

The Scottish Parliament
Pàrlamaid na h-Alba

Justice Committee

18th Report, 2009 (Session 3)

Stage 1 Report on the Criminal Justice and Licensing (Scotland) Bill

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Justice Committee

Remit and membership

Remit:

To consider and report on (a) the administration of criminal and civil justice, community safety, and other matters falling within the responsibility of the Cabinet Secretary for Justice and (b) the functions of the Lord Advocate, other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.

Membership:

Bill Aitken (Convener)
Robert Brown
Bill Butler (Deputy Convener)
Angela Constance
Cathie Craigie
Nigel Don
James Kelly (Member from 05/11/2009)
Paul Martin (Member from 13/06/2007 until 04/11/2009)
Stewart Maxwell

Committee clerking team:

Andrew Mylne
Anne Peat
Andrew Proudfoot
Christine Lambourne



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Justice Committee

18th Report, 2009 (Session 3)

Stage 1 Report on the Criminal Justice and Licensing (Scotland) Bill

The Committee reports to the Parliament as follows—

INTRODUCTION

1. The Criminal Justice and Licensing (Scotland) Bill was introduced in the Parliament on 5 March 2009 by Kenny MacAskill, Cabinet Secretary for Justice. The Parliament designated the Justice Committee as the lead committee to consider and report on the general principles of the Bill.
2. The Subordinate Legislation Committee (SLC) considered the delegated powers proposed in the Bill and reported to the Parliament on 4 June 2009.¹ The SLC report refers to 14 provisions in relation to which it raised concerns with the Scottish Government. The outcome was that it accepted in eight of those instances the Scottish Government's response – which, in five cases, included a commitment to bring forward amendments at Stage 2 to address the Committee's concerns. In relation to two of the provisions identified by the SLC, the Scottish Government is committed to lodging Stage 2 amendments to remove entirely the sections in which they arise (sections 129 and 140). The remaining four provisions are drawn to the attention of the Justice Committee and the Parliament as raising more substantial issues, or issues that the Subordinate Legislation Committee does not consider to have been satisfactorily resolved. These outstanding issues are considered in this report in the context of those sections to which they relate. The report of the Subordinate Legislation Committee is contained in Annexe A to this report.
3. The Finance Committee considered the Bill's Financial Memorandum and reported to the Justice Committee on 21 May 2009.² The Committee afforded this

¹ Scottish Parliament Subordinate Legislation Committee. *Report on the Criminal Justice and Licensing (Scotland) Bill at Stage 1*. Available at: <http://www.scottish.parliament.uk/s3/committees/subleg/reports-09/sur09-CriminalJusticeLicensing.htm>

² Scottish Parliament Finance Committee. *Report on the Financial Memorandum of the Criminal Justice and Licensing (Scotland) Bill*. Available at: <http://www.scottish.parliament.uk/s3/committees/finance/reports-09/fir09-CriminalJusticeLicensingBill.htm>.

Bill “level three” scrutiny, that is, it considered written and oral evidence from affected organisations³ and from the Scottish Government before finalising its report.⁴ The Finance Committee’s recommendations and observations are considered in this report in the context of those sections to which they relate. The report of the Finance Committee is contained in Annexe B.

4. Standing Orders require the lead committee to consider and report on the Bill’s Financial Memorandum, taking into account any views submitted to it by the Finance Committee, and to consider and report on the Policy Memorandum. The Committee has no general comments to make on these documents at this stage, although there are some specific points (for example, on the figures relating to anticipated take-up of community payback orders) that are addressed at relevant points later in this report.

BACKGROUND AND CONSULTATION

5. In his statement to the Parliament on 3 September 2008 on the Scottish Government’s programme, the First Minister announced the Scottish Government’s intention to introduce the Bill as follows—

“The criminal justice and licensing bill will ensure that prison remains the correct disposal for serious and violent offenders and will ensure that they are dealt with firmly and effectively in prison. Building on the recommendations of the Scottish Prisons Commission, it will reform the community punishments that are available to the courts and reform criminal law and criminal court procedures. Consolidated by the creation of a sentencing council, the bill will ensure that there is public confidence in sentencing decisions.

“As members know, we are consulting on a wide range of measures to challenge Scotland’s relationship with alcohol. The consultation, which ends later this month, outlines proposals in several key areas: to prohibit off-sales to under-21s; to set a minimum price for alcoholic drink; and to introduce a social responsibility fee. We will reflect on the results of the consultation and use the bill to effect those proposals which require primary legislation.”⁵

6. Following this announcement, the Government published *Revitalising Justice – Proposals to Modernise and Improve the Criminal Justice System*⁶ which summarised the proposals to be included in the Bill as “measures to improve criminal law; take forward sensible sentencing reforms; modernise criminal procedures; develop licensing laws; and assist victims and witnesses.” A total of 66 measures were listed, of which ten were described as “major reforms”. For

³ Community Justice Authorities, local authorities, the Crown Office and Procurator Fiscal Service, the Scottish Police Services Agency, the Scottish Prison Service, and the Scottish Legal Aid Board.

⁴ An explanation of the three “levels” of Finance Committee scrutiny of Financial Memorandums is provided at: <http://www.scottish.parliament.uk/s3/committees/finance/financialMemo.htm>

⁵ Scottish Parliament. *Official Report*, 3 September 2008, Cols 10305-6: Available at: <http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-08/sor0903-02.htm#Col10301>.

⁶ Scottish Government. *Revitalising Justice – Proposals to Modernise and Improve the Criminal Justice System*. Available at <http://www.scotland.gov.uk/Publications/2008/09/24132838/0>

each one, the document outlined the main proposal and indicated where consultation was already underway or about to commence.

7. By the time the Bill itself was finalised, further measures had been added, beyond those outlined in *Revitalising Justice*. The Bill, as introduced, consists of 148 sections and five schedules, grouped into 11 parts, the main ones covering sentencing, criminal law, criminal procedure, evidence, criminal justice, disclosure, mental disorder and unfitness for trial, licensing under the Civic Government (Scotland) Act 1982 and alcohol licensing.

8. In all, the Bill implements more than eighty distinct policy proposals. Some of these – most notably the establishment of a Scottish Sentencing Council and the creation of a statutory presumption against short-term prison sentences – are Scottish National Party manifesto commitments. Others originate from the work of independent bodies or take forward reforms initiated by the previous administration. The opportunity has also been taken to make a number of technical changes such as repealing spent enactments or correcting errors in existing statutes.

9. The principal non-governmental sources for the proposals implemented in the Bill are:

- Professor James Fraser's review of police powers in relation to forensic data taken from adults prosecuted for sexual or violent offences but not convicted, and from children who have committed similar offences;
- Lord Coulsfield's review of the law and practice of disclosure in criminal proceedings;
- the report of the Scottish Prisons Commission, chaired by Henry McLeish;
- various reports by the Sentencing Commission for Scotland;
- reports by the Scottish Law Commission, including on a Crown right of appeal in criminal cases, on the age of criminal responsibility and on insanity and diminished responsibility;
- a joint Scottish Executive and Home Office consultation on the possession of extreme pornographic material.

EVIDENCE RECEIVED BY THE COMMITTEE

10. With such a wide-ranging Bill it has been impossible, in the time available to the Committee, to take evidence and consider in detail each and every proposal. It has also become clear from the written and oral evidence that there is a much more limited number of proposals that raise particularly complex issues or have generated significant controversy, and to which the Committee has therefore devoted most attention.

11. The Committee issued its call for written evidence on the Bill in March 2009 and has since received more than 90 submissions.⁷

12. The Committee took oral evidence over eight meetings in May, June and August. The principal individuals and organisations who attended were—

- the Lord President of the Court of Session and Lord Justice General (Lord Hamilton) and the Lord Justice Clerk (Lord Gill)
- the Sheriffs' Association
- the Scottish Justices Association
- the Royal Society of Edinburgh
- Henry McLeish (chair of the Scottish Prisons Commission)
- representatives of three Community Justice Authorities (Fife and Forth Valley, North Strathclyde, Lanarkshire)
- the Association of Directors of Social Work
- Howard League for Penal Reform
- the Scottish Consortium on Crime and Criminal Justice
- the Association of Chief Police Officers in Scotland
- the Scottish Crime and Drug Enforcement Agency
- Victim Support Scotland
- the office of Scotland's Commissioner for Children and Young People
- Children 1st
- Children in Scotland
- the Law Society of Scotland
- the Faculty of Advocates
- Professor Jim Fraser (Centre for Forensic Science, University of Strathclyde)
- Scottish Police Services Authority
- Lord Coulsfield (author of the independent review of the law and practice of disclosure in criminal proceedings in Scotland)

⁷ The written submissions are published on the Committee's webpage. Available at: <http://www.scottish.parliament.uk/s3/committees/justice/index.htm>

- the Centre for Sentencing Research (University of Strathclyde)
- James Chalmers, School of Law, University of Edinburgh
- Dr Sarah Armstrong, Faculty of Law, University of Glasgow
- the Scottish Prison Service
- the Convention of Scottish Local Authorities
- the Lord Advocate (Elish Angiolini QC) and Solicitor General for Scotland (Frank Mulholland)
- the Scottish Licensed Trade Association
- Noctis (which represents night clubs and other late-night venues)
- the Scottish Late Night Operators Association
- the Scottish Beer and Pub Association
- City of Edinburgh and City of Glasgow Licensing Boards
- Fife Council
- the Cabinet Secretary for Justice (Kenny MacAskill).⁸

13. As always, the tight timescale for the Committee's Stage 1 scrutiny resulted in a relatively short deadline, particularly given the breadth of this Bill, for those interested to give their views. The Committee is very grateful to those who were able to contribute to the process.

14. The Committee would also like to thank the staff at Alloa Town Hall and the members of the public who attended the Committee's meeting there on 19 May 2009, as well as the witnesses who gave evidence on that occasion. This meeting enabled the Committee, amongst other things, to gain a local perspective on some of the changes proposed in the Bill. The Committee is also grateful for the assistance provided by its two advisers, Professor Peter Duff of Aberdeen University (on the criminal procedure aspects of the Bill) and Robert Millar, principal solicitor at City of Edinburgh Council (on the licensing provisions).

PART 1 – SENTENCING

15. Part 1 of the Bill covers issues relating to sentencing including the purposes and principles of sentencing, the creation of a Scottish Sentencing Council, community payback orders, and a presumption against short periods of imprisonment.

⁸ Full details of oral witnesses are set out in Annexe C (extracts from the minutes of the Justice Committee) and Annexe D (index of oral witnesses).

Sections 1 and 2: Purposes and principles of sentencing

Background

16. The Sentencing Commission for Scotland (the Commission) recommended that, as a useful step to promoting consistency in sentencing, the purposes of sentencing should be enshrined in statute. In its report, the Commission stated that the purposes of sentencing “commonly accepted by most jurisdictions are punishment or retribution, protection of the public or incapacitation, deterrence and rehabilitation or reform. To these are sometimes added denunciation, reparation, crime reduction and economy of resources”.⁹

17. Section 1 sets out the purposes of sentencing as: the punishment of offenders, the reduction of crime (including its reduction by deterrence), the reform and rehabilitation of offenders, the protection of the public, and the making of reparation by offenders to persons affected by their offences.

18. Section 1(3) lists other matters to which a court must have regard in sentencing an offender, namely the seriousness of the offence, any information before the court about the effect of the offence on any person (other than the offender), the range of sentences available to the court in dealing with the offence, the desirability of ensuring consistency in sentencing in respect of the same type of offence, and any other information before the court about the circumstances and attitude of the offender.

19. By setting down the purposes of sentencing, Scottish Ministers intend—

“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.”¹⁰

Evidence received

20. Victim Support Scotland agreed with the Bill’s proposals in this regard and said—

“We believe that the introduction of a statutory definition of the aim of sentencing will help create more consistency in sentences ... More consistency will subsequently make the criminal justice process more transparent, enabling parties to foresee and understand why a particular verdict is given.”¹¹

21. The Law Society of Scotland was broadly supportive of the purposes and principles as set out in the Bill, but suggested that—

⁹ The Scottish Sentencing Commission for Scotland. *The Scope to Improve Consistency in Sentencing*, paragraph 9.5. Available at: <http://www.scottishsentencingcommission.gov.uk/docs/consistency/Consistency%20Report%20-%20Final.pdf>

¹⁰ Criminal Justice and Licensing (Scotland) Bill. Policy Memorandum, paragraph 9. Available at <http://www.scottish.parliament.uk/s3/bills/24-CrimJustLc/b24s3-introd-pm.pdf>

¹¹ Victim Support Scotland. Written submission to the Justice Committee.

“the purpose as outlined at section 1(1)(b) should be the deterrence of crime as opposed to the reduction of crime (including its reduction by deterrence). The Society also believes that one of the main principles of sentencing is to serve the interests of justice and that should be reflected in the Bill.”¹²

22. Both the Faculty of Advocates and the Judges of the High Court of Justiciary flagged up a concern about section 2(2), according to which a court need not comply with the purposes and principles of sentencing where they are inconsistent with sentencing guidelines. As Lord Hamilton put it—

“If the principles are to be recognised as being applicable in the criminal justice system, they should also be applicable to the sentencing council. It should not be free to deal with the matter without regard to those principles.”¹³

23. The High Court judges, the Sheriffs’ Association and the Scottish Centre for Criminal Justice Research all questioned why (under subsection (5)(a) of section 1), the purpose and principles of sentencing (subsections (2) and (3)) do not apply to offenders under the age of 18. The judges recognised that it would be necessary to take account of a child’s age, but suggested that “the considerations referred to in subsections (2) and (3) appear to be equally apt for the sentencing of any person who has attained the age of criminal responsibility”.¹⁴

24. The Sheriffs’ Association accepted that the principles set out in section 1(3) are not intended to be exclusive or exhaustive, but suggested denunciation (the expression of “society’s abhorrence of a particular crime”) as an additional purpose of sentencing and the nature or character of the offence (in addition to its seriousness) and local circumstances as additional matters to be taken into account. It also questioned section 1(3)(d), which provides that a court must have regard to “the desirability of ensuring consistency in sentencing in respect of the same type of offence”—

“Consistency in sentencing is not stated in the Bill as a purpose of sentencing. This provision assumes a purpose that is not stated. Under the proposal, if the court considers that consistency is not desirable, it may be ignored. How is a court to ascertain what the consistent sentence is if there is no guideline published? ... This provision should be removed as containing no principle that can be applied in practice.”¹⁵

25. Overall, the Association’s view was summarised by Sheriff Nigel Morrison QC—

“The purpose of setting out the principles in the Bill was not simply to set them out. As the policy memorandum indicates, the purpose was to achieve

¹² The Law Society of Scotland. Written submission to the Justice Committee.

¹³ Scottish Parliament Justice Committee. *Official Report*, 12 May 2009, Col 1771.

¹⁴ Judges of the High Court of Justiciary, Sheriffs’ Association and Scottish Centre for Criminal Justice Research. Written submissions to the Justice Committee.

¹⁵ Sheriffs’ Association. Written submission to the Justice Committee.

consistency, transparency and confidence. However, we do not think that that purpose has been achieved.”¹⁶

26. In its written submission, the Royal Society of Scotland (RSE) said that the purposes of sentencing are already well known and there is no need for them to be embodied in statute. In the RSE’s view, the extent to which any of the purposes listed in the Bill would apply depends on the nature and circumstances of the case and hence on the judgement of the sentencer, and that listing the purposes in statute “serves no practical purpose”.¹⁷

27. In later oral evidence, Lord Cullen for the RSE was asked whether there was anything that should be added to the list, were it to remain in the Bill. He replied—

“The trouble is that that would be like adding one unnecessary thing to a lot of other unnecessary things. However, I can think of a few additions. For example, we mention in our submission the absence of any reference to the significance of a guilty plea, which is a potent factor.”¹⁸

28. Professor Neil Hutton (Centre for Sentencing Research, University of Strathclyde) drew attention to the English sentencing guidelines which included “overarching principles of seriousness” and advocated a similar approach for Scotland, consistent with the recommendations of the Scottish Prisons Commission. This would involve the level of penalty being set by reference to the seriousness of the offence, both in terms of the culpability of the offender and the harm caused to the victim, while the precise amount and form of penalty would be decided by the judge according to the facts and circumstances of the offence and the offender. In this way, fairness would take priority over other purposes of sentencing—

“Arguably, fairness is one thing that a systematic approach to sentencing can deliver and fairness is valued by the public. It is not so easy to make this claim about other purposes.”¹⁹

29. The Scottish Consortium on Crime and Criminal Justice (SCCCJ) welcomed a statutory statement of the purposes of sentencing, but believed it could go further. In particular, it could include reference to the larger purpose of making society more just and safer for its citizens, thus providing some basis for choosing between the stated purposes and principles when they conflict—

“The difficulty with the way in which the bill is drafted is that it simply lists a range of purposes that sentences might serve. The list is familiar, covering exactly what is found in similar legislation or in the relevant textbooks in various jurisdictions. It provides no coherent rationale that a sentencer might employ when thinking about which principles should apply or have priority in

¹⁶ Scottish Parliament Justice Committee. *Official Report, 12 May 2009*, Col 1774.

¹⁷ Royal Society of Edinburgh. Written submission to the Justice Committee.

¹⁸ Scottish Parliament Justice Committee. *Official Report, 12 May 2009*, Col 1797.

¹⁹ Professor Neil Hutton. Written submission to the Justice Committee.

particular circumstances, or how to choose between different purposes of punishment or sanctioning that might conflict in certain ways.”²⁰

30. Professor Fergus McNeill of the SCCCJ rejected the idea that reducing reoffending could be regarded as an overarching principle—

“It is a laudable objective for the system to pursue, but if adhering to the principle allowed disproportionate sentences – perhaps even incapacitating sentences of a duration that was not merited by the gravity of the crime – to be applied, that would be contrary to the interests of justice. ... A better approach than putting the reduction of reoffending first is to try to approximate to fairness and justice in the first instance, before thinking about the specific outcomes that we might pursue through a properly proportionate penalty.”²¹

31. The SCCCJ also suggested that the first purpose listed in section 1(1), “the punishment of offenders”, could be omitted on the grounds that punishment would serve no purpose if it did not secure any of the other purposes listed. Instead, it advocated a principle of “parsimony”, namely “that any sentence should be the least oppressive and intrusive consistent with the other aims of sentencing”.²²

32. This approach was strongly supported by the Scottish Centre for Crime and Justice Research, which also wanted the Bill to—

“make it explicit that each of the stated purposes of sentencing should serve a larger purpose, i.e. the production of a more just and safer society for all of its citizens.”²³

33. The Cabinet Secretary was not convinced that any overarching purpose was needed—

“We think that sections 1 and 2 are clear and easy to understand. They set out the purposes and principles of sentencing, and we think it essential to do that. Sentencing does not have just a single purpose – that of punishment – and the lack of hierarchy in section 1 is quite deliberate. In trying to get the balance right, fairness is important, and setting out purposes and principles will contribute to achieving that.”²⁴

Committee conclusions

34. The Committee believes that the purposes or principles of sentencing, as established by common law, are already well understood by the courts. The common law has the advantage that it can more easily evolve and develop in response to changes in social attitudes; fixing this common-law understanding in statute carries a risk of unintended consequences, and may also lose some of the nuances of case-law jurisprudence. What is

²⁰ Scottish Parliament Justice Committee. *Official Report, 19 May 2009*, Col 1866.

²¹ Scottish Parliament Justice Committee. *Official Report, 19 May 2009*, Col 1867.

²² Scottish Consortium on Crime and Criminal Justice. Written submission to the Justice Committee.

²³ Scottish Centre for Crime and Justice Research. Written submission to the Justice Committee.

²⁴ Scottish Parliament Justice Committee. *Official Report, 23 June 2009*, Col 2159.

more, it is generally understood to be a principle of legislative drafting to make provision only where it is necessary to do so – and, indeed, this has often been articulated by Ministers (both of the current and previous administrations) as a reason to resist backbench amendments.

35. Considering section 1 in isolation, therefore, we are not convinced that a sufficiently good case has been made for its inclusion. However, we recognise the Scottish Government’s view that an opening section setting out in broad terms what sentencing is for may be a useful preliminary to the creation of a Scottish Sentencing Council. Accordingly, we invite the Scottish Government both to justify the necessity for setting out the purposes and principles of sentencing in the Bill and to provide assurance that the provisions in sections 1 and 2 do not inadvertently change the law. Without adequate justification and assurance, we are liable to conclude that retaining these sections in the Bill may be problematic.

36. We acknowledge that all the purposes listed in subsection (1), and the “other matters” to which the courts must have regard listed in subsections (3) and (4), have a part to play in sentencing decisions. We believe it is important that, if these are to be listed in statute, they are regarded as non-exhaustive and unranked lists, with the order not implying any general priority of earlier items over later ones. We also note that, while the section title refers both to “purposes” and “principles”, only purposes are actually listed. In our view, principles of fairness, justice and proportionality are at least as important as the purposes already included, and we therefore invite the Scottish Government to consider including these principles within the section (or removing reference to “principles” from the section title).

37. The Committee is also uncertain as to why subsections (2) and (3) of section 1 are disapplied in relation to persons under the age of 18. Our presumption would be that the matters listed in subsection (3) are still relevant in that context, albeit in a context where the offender’s age is also a significant factor. We are also unclear what status subsection (1) is meant to have in relation to a young offender – it is not disapplied, but the court is under no obligation to have regard to it in sentencing that offender. We would invite the Scottish Government either to provide a better justification for its drafting approach here, or to bring forward amendments to clarify the application of section 1 to under-18 offenders.

38. The Committee has also found difficulty with the relationship between the purposes of sentencing in section 1 and the sentencing guidelines to be issued by the Scottish Sentencing Council (SSC). Specifically, the SSC does not appear to be required to reflect the purposes in preparing guidelines, but the courts are obliged to give precedence to the guidelines should they and the purposes of sentencing come into conflict (section 2(2)). We do not see the logic of creating a statutory Sentencing Council and, at the same time, setting out the purposes of sentencing in statutory form if that Council is not itself made subject to those purposes in carrying out its work. That way, there should be no question of the council issuing guidelines that are inconsistent with the purposes of sentencing. We recognise that the Scottish Sentencing Council is likely, in practice, to follow the purposes in

any event, and there may also be reasons for not having this as a statutory obligation on the Council. Nevertheless, we believe the Scottish Government needs to do more to explain its thinking on these matters, so that the Committee can either satisfy itself that the relationship is an appropriate one, or consider how it might be amended at Stage 2.

Sections 3-13 and schedule 1: The Scottish Sentencing Council

Background

39. At present, sentencing mainly operates on a case-by-case basis in the criminal courts, supplemented by the power of the Appeal Court to issue guideline judgements under the Criminal Procedure (Scotland) Act 1995, a power that has so far been little used.

40. The Sentencing Commission for Scotland, set up by the previous administration in 2003, was tasked with considering what scope there was for improving consistency in sentencing, and reported on this topic in 2006.²⁵ The report recommended that the Appeal Court should consider making greater use of its power to issue guideline judgements and that a sentencing advisory body, to be known as the Advisory Panel on Sentencing in Scotland (APSS), should be set up. with members from each level of the judiciary, the law enforcement agencies, the prosecuting authorities, the legal profession, offender management services and organisations working with victims and the wider community. The APSS would be responsible for drafting guidelines for consideration by the Appeal Court on general topics related to sentencing, on new sentencing disposals introduced by legislation and on particular categories of crimes and offences. The Appeal Court would then approve the draft guidelines, refer them back to the APSS for further consideration, or decline to approve them.²⁶

41. The Scottish Prisons Commission, in its report *Scotland's Choice*, published in July 2008, supported the establishment of a body to develop clear sentencing guidelines applicable nationwide to aid consistency and improve the effectiveness of sentencing.²⁷

42. The Scottish Government agreed that there was a need for a statutory body to produce sentencing guidelines and in September 2008 its proposals for a Scottish Sentencing Council were published for consultation. Over 40 responses were received and, although the majority were in favour of the proposals, some concerns were raised about the proposed relationship between the Sentencing Council and the Appeal Court. In particular, the High Court Judges said that the proposed relationship between the Sentencing Council and the Appeal Court was unsatisfactory, unworkable and unacceptable. In the Judges' view the proposals would have significant impact on the independence of the judiciary and would fundamentally alter the position of the Appeal Court in its role of controlling the development and application of sentencing policy.²⁸

²⁵ Sentencing Commission for Scotland. *The Scope to Improve Consistency in Sentencing*.

²⁶ Sentencing Commission for Scotland, paragraphs 9.16 – 9.17; recommendations 12, 13, 14, 15.

²⁷ <http://www.scotland.gov.uk/Publications/2008/06/30162955/0>

²⁸ [Scottish Government 2009, response 034](#)

The proposals

43. Section 3 of the Bill establishes a Scottish Sentencing Council (the Council). Its functions, under section 4, are to prepare and publish sentencing guidelines and, in doing so, promote consistency in sentencing practice, assist the development of policy in relation to sentencing, and promote greater awareness and understanding of sentencing policy and practice.

44. Section 5 provides that sentencing guidelines may relate to the principles and purposes of sentencing, sentencing levels, the particular types of sentence that are appropriate for particular types of offence or offender and the circumstances in which the guidelines may be departed from. Guidelines must include an assessment of the relevant costs and benefits and an assessment of the likely effect on the number of persons detained in prisons or other institutions, the number of persons serving sentences in the community, and the criminal justice system generally.

45. The Scottish Government's overall policy objective in creating the Council is—

“to help ensure greater consistency, fairness and transparency in sentencing and thereby increase public confidence in the integrity of the Scottish criminal justice system.”²⁹

46. Before publishing any sentencing guidelines, the Council is required to publish a draft and consult the Scottish Ministers, the Lord Advocate and such other persons as the Council considers appropriate. When finalising a guideline, the Council must have regard to any comments made on the draft.

47. Courts must have regard to any final guideline which is applicable to a case before them. If the court decides not to apply any relevant guideline, it must state its reasons for not doing so.

48. The Council will comprise twelve members: the Lord Justice Clerk, as chairing member, four other judicial members (one other High Court judge, two sheriffs or sheriffs principal and one JP or stipendiary magistrate), four legal members (one prosecutor, one constable, one advocate and one solicitor) and three lay members (one of whom must have knowledge of the issues faced by victims).

49. The Lord Justice General, after consulting the Scottish Ministers, will be responsible for appointing the judicial and legal members. The Scottish Ministers, after consulting the Lord Justice Clerk, will be responsible for appointing the lay members.

Evidence received – general comments

50. Most witnesses from whom the Committee took evidence were supportive of the aims behind the proposals for the Council – to contribute to greater consistency, fairness and transparency in sentencing and thereby increase public confidence. Many witnesses also recognised that a sentencing council could

²⁹ Policy Memorandum, paragraph 12.

contribute to a greater knowledge base, the development of public policy and better research into public attitudes to sentencing.

51. In support of the proposals, Professor Neil Hutton commented —

“The Council provides an institutional space for judges to work with others to develop sentencing policy. Crime and punishment have become such sensitive political issues that many jurisdictions have found it helpful to develop an institution which provides an opportunity to develop a more rational, evidence-based approach to policy-making which can be pursued away from the media glare of the world of electoral politics. Guidelines will provide a clear and transparent structure within which judges can exercise their discretion at the level of the individual case. This will help the public to understand sentencing decisions and, over time, lead to enhanced public confidence in the courts.”³⁰

52. Victim Support Scotland also expressed support and said—

“It is about the need to build public confidence in our sentencing processes, so that there is demonstrably a greater understanding of consistency in sentencing. That is required in the 21st century. The sentencing guidelines will be an important tool for judges and other sentencers. The proposal is a win-win for communities, victims and the criminal justice system.”³¹

53. The Scottish Police Federation (SPF) said it supported the establishment of the Council and its aim of ensuring greater consistency in sentencing. It considered however that the requirement on the Council to include in any guidelines “an assessment of the likely effect of the guidelines on the number of persons detained in prisons or other institutions” was incompatible with the principle of the punishment fitting the crime.³²

54. The Scottish Centre for Crime and Justice Research said that the Council had the potential to make sentencing practice more consistent and just, although that would depend on its powers and how it was organised.³³

55. The Scottish Consortium on Crime and Criminal Justice (SCCCJ) was unable to reach a consensus view on the merits of the Council as proposed, saying “the case for and likely effects of a Sentencing Council are far from clear”.³⁴ It drew attention to some of the arguments it had considered: that retaining judicial control over sentencing provides a necessary independence from political intervention; that prison populations have risen in most US states which have developed sentencing guidelines; that guidelines can reduce judicial discretion and can carry the risk of unjust sentences being imposed in individual cases; but that on the other hand it is legitimate for governments to set a sentencing policy to make the most effective use of scarce criminal justice resources and that the current system

³⁰ Professor Neil Hutton. Written submission to the Justice Committee.

³¹ Scottish Parliament Justice Committee. *Official Report*, 26 May 2009, Col 1932.

³² Scottish Police Federation. Written submission to the Justice Committee.

³³ Scottish Centre for Crime and Justice Research. Written submission to the Justice Committee.

³⁴ Scottish Consortium on Crime and Criminal Justice. Written submission to the Justice Committee.

of individualised sentencing does not make provision for consistency in sentencing.³⁵

56. Professor Spencer, representing the SCCCJ, said—

“the proposal for a sentencing council is a case of using a sledgehammer to crack a nut. I am not sure that I completely favour a sentencing council, because we have to get the number of people in prison down, and judges have to fit in to that framework.”³⁶

57. Other witnesses, most particularly sentencers, did not feel they could support the Sentencing Council as proposed in the Bill.

58. Lord Gill, the Lord Justice Clerk, agreed that there was a role for a sentencing council in Scotland but not the role as envisaged in the Bill. He said—

“We need hard research to establish the effects of sentencing. The courts have before them a wider range of disposals than they have had at any stage in history. We need to know how to measure the success of those disposals and, if a criterion exists for their success or failure, to know what is happening out there in the field. Useful research could be done on that.”³⁷

59. For those who did not feel able to support the creation of a Sentencing Council as envisaged in the Bill, four main areas of concern were expressed in evidence: firstly, that the proposals were founded on an unproven claim of inconsistency in sentencing; secondly, that the Sentencing Council as proposed would undermine the independence of the judiciary by taking decision-making away from the Appeal Court; thirdly, about the composition of the Council and in particular its lack of a judicial majority; and, fourthly, about cost in a time of budget pressures.

Inconsistency in sentencing

60. One of the main policy objectives behind the proposal to create a Sentencing Council is to improve consistency in sentencing. The question of what evidence exists of a lack of consistency was one that arose repeatedly throughout the evidence taking.

61. In his foreword to the Sentencing Commission’s report, Lord McFadyen (the Commission chairman) had concluded—

“While there is little research evidence measuring the extent to which there is inconsistency in sentencing in the courts in Scotland, there is a public perception that such inconsistency exists, and the Commission has concluded that that perception is in some measure well founded.”³⁸

62. The Lord Advocate endorsed this view, saying that—

³⁵ Scottish Consortium on Crime and Criminal Justice. Written submission to the Justice Committee.

³⁶ Scottish Parliament Justice Committee. *Official Report*, 19 May 2009, Col 1870.

³⁷ Scottish Parliament Justice Committee, *Official Report*, 12 May 2009, Col 1769.

³⁸ Sentencing Commission for Scotland. *The Scope to Improve Consistency in Sentencing*.

“it can be difficult to assess whether there is inconsistency in the sentencing process because of the absence of data and, indeed, of a system that is open to examination. I have been a practitioner in the courts over the years and I can tell you that there is anecdotal evidence across the board that some sentences surprise practitioners and that in certain circumstances it is difficult to predict what the sentence will be ... On days when a particular judge is known to be on duty, there might be a queue of enthusiastic guilty pleas, but on other days the court can be a veritable desert as far as guilty pleas are concerned.”³⁹

63. Henry McLeish, the Chair of the Scottish Prisons Commission, said that there was sufficient evidence from various sources to suggest that there are inconsistencies in sentencing throughout Scotland. He cited publicly recorded cases that generate public debate, court decisions and anecdotal evidence.⁴⁰

64. Community Justice Authorities (CJAs) also felt that there was inconsistency in sentencing. Tony McNulty of Lanarkshire CJA referred to court statistics and said—

“in some courts 22 per cent of the sentences that are imposed are custodial, whereas in other courts custodial sentences account for 11 per cent of sentences. There seems to be no rhyme or reason for such variations in sentencing.”⁴¹

65. However Dr Cyrus Tata of the Centre for Sentencing Research at the University of Strathclyde cautioned against drawing such inferences directly from “bald statistics”, since they did not take account of possible differences in the cases that come before different courts. As he put it, the statistics “do not control for input. If you do not control for input, you are unable to control for output.” Nevertheless, Dr Tata cited a range of studies which had been carried out which together provided some limited evidence of inconsistency, together with evidence of consistency: “The overall picture is rather like a bell curve, with a lot of consistency and some variation.”⁴²

66. Professor Fergus McNeill of the Scottish Consortium on Crime and Criminal Justice agreed that it was impossible to establish conclusively whether there was inconsistency through research. However, he believed there was “variance in sentencing that seems to be beyond what is defensible”. He based this view on statistical evidence, research studies and anecdotal evidence, including the fact that—

“At intermediate diets, some people will plead guilty instantly if the judge whom they are going to appear before is deemed to be a relatively lenient sentencer. If a harsher or more punitive sentencer is on the bench, the person will not plead guilty in the hope that, when they return to court later,

³⁹ Scottish Parliament, Justice Committee. *Official Report*, 9 June 2009, Col 2058.

⁴⁰ Scottish Parliament Justice Committee. *Official Report*, 19 May 2009, Cols 1816-7.

⁴¹ Scottish Parliament Justice Committee. *Official Report*, 19 May 2009, Col 1841.

⁴² Scottish Parliament Justice Committee. *Official Report*, 2 June 2009, Cols 2010-12.

they will face a different judge. Judges know that this happens. It is called judge shopping and ... it goes on to a significant degree in our system.”⁴³

67. Victim Support Scotland said that in its view, there was little evidence of inconsistency, but even less evidence of consistency and added—

“People have the right to understand why a particular sentence was given in a particular case. That is what sentencing guidelines can do for us.”⁴⁴

68. For Professor Neil Hutton of the Centre for Sentencing Research at the University of Strathclyde, demanding evidence of inconsistency got things the wrong way round—

“The onus is on the judiciary to tell us what they mean by consistency, and to explain that in a transparent way to the public. They do not have a language – that is a criticism not of judges but of the structure in which they work – that enables them to talk about consistency. That is why we need guidelines, and the sentencing council.”⁴⁵

69. The judiciary, however, was not convinced. Lord Hamilton said that he was not aware of, and no one had brought to his attention, any empirical evidence to suggest that there is inconsistency of sentencing in Scotland. He offered access to court records to allow an empirical exercise to be carried out, saying that—

“we should want to know that there is truly an inconsistency in sentencing before undertaking the very expensive exercise of setting up a body of the kind envisaged in the Bill, with operating funds that have been identified of more than £1 million a year.”⁴⁶

70. This view was supported by Ian Duguid QC, of the Faculty of Advocates, who said that he had not seen “an inconsistency in sentencing to the point at which another body would be required to set guidelines.”⁴⁷

71. Bill McVicar from the Law Society of Scotland questioned whether consistency in sentencing is, in fact, desirable—

“We are concerned to understand what is meant by consistency in sentencing. Two apparently similar cases may attract different sentences for reasons that are particular to those cases; that is the difficulty in applying strict guidelines. The question is whether we want uniform sentences or consistent sentences – and what is meant by consistent sentences. It seems to me that such matters are not properly dealt with in the Bill.”⁴⁸

72. The Lord Justice Clerk felt that a definition of consistency was essential if sentencing was to be a stated aim of the legislation—

⁴³ Scottish Parliament Justice Committee. *Official Report*, 19 May 2009, Col 1883.

⁴⁴ Scottish Parliament Justice Committee. *Official Report*, 26 May 2009, Col 1933.

⁴⁵ Scottish Parliament Justice Committee. *Official Report*, 2 June 2009, Col 2010.

⁴⁶ Scottish Parliament Justice Committee. *Official Report*, 12 May 2009, Cols 1761, 1764.

⁴⁷ Scottish Parliament Justice Committee. *Official Report*, 2 June 2009, Col 1976.

⁴⁸ Scottish Parliament Justice Committee. *Official Report*, 2 June 2009, Col 1977.

“The consultation paper started off by talking about inconsistency and then spoke about a perception of inconsistency, which is rather a different thing. It is not quite clear yet what the legislation seeks to achieve. There is no definition of consistency in the draft, and it seems to me that those who would form a sentencing council would find some difficulty in knowing exactly what they were trying to do unless the legislation gave them a clear definition by which to judge their own views and decisions.”⁴⁹

73. The Cabinet Secretary for Justice explained the rationale for the provisions in the Bill as follows—

“We have founded our approach on the conclusions of the Sentencing Commission for Scotland, which was an august body that contained senior figures, including senior members of the judiciary. We are building on their comments. ... Factors other than inconsistency are involved. However, we think that there is disquiet among the public about inconsistency in sentencing, which must be tackled, whether it is based on anecdotal evidence or reality.”⁵⁰

The powers of the Council and the independence of the judiciary

74. While most witnesses were generally supportive of sentencing guidelines, there was significant disagreement on whether a new Sentencing Council was needed and whether its role should be more than advisory.

75. In their written submission, the High Court judges observed that the Council will prepare guidelines “which will have direct legal effect thus restricting the sentencing discretion and power not only of all courts, including the High Court sitting as a court of appeal (section 7(1)(a)), but also of that court when carrying out its other function of issuing guideline judgments (section 7(1)(b)).” The Council will also have the power to prescribe when its guidelines may (and presumably may not) be departed from (section 5(3)(d)).

76. In the judges’ view, the Bill’s proposals—

“strike directly at the independence of the judiciary (and in particular of the High Court) as the arm of Government essentially responsible for the setting of sentencing policy. The proposals (as framed) are fundamentally unacceptable both on domestic constitutional grounds and because mandatory directions to the court by a non-judicial body undermine the judicial independence required of courts by Article 6 of the European Convention on Fundamental Rights and Freedoms.”⁵¹

77. In his oral evidence, Lord Hamilton expanded on these objections—

“One has to recognise the radical difference between the proposals now made and the proposals that were made by the Sentencing Commission for Scotland, chaired by Lord Macfadyen. The commission recognised the

⁴⁹ Scottish Parliament Justice Committee. *Official Report*, 12 May 2009, Col 1762.

⁵⁰ Scottish Parliament Justice Committee. *Official Report*, 23 June 2009, Col 2161.

⁵¹ Judges of the High Court of Justiciary. Written submission to the Justice Committee, paragraph 10.

importance of the High Court of Justiciary, as the senior criminal court in Scotland, being the ultimate body responsible for laying down sentencing guidelines. It saw the advantage in there being an advisory body with a research facility for undertaking exercises and putting matters before the appeal court for endorsement or otherwise. However, I think a situation in which an outside body that is not itself elected and which comprises, as the present proposals indicate, a majority of non-judicial office-holders impinges on the independence of the judiciary, if that body is to lay down what are, in effect, prescriptive guidelines.”⁵²

78. While Lord Hamilton accepted that any guidelines published by the Sentencing Council would not be binding, the requirement on the court to “have regard to” them would be “constraining to a significant extent, as I think it is intended to be”. This would not be welcome in the context of guidelines laid down by a sentencing council as opposed to the Appeal Court.⁵³

79. The Royal Society of Edinburgh (RSE) pointed out that, while the Policy Memorandum cited the Sentencing Commission as the origins of the proposals in the Bill, it did not mention that the Commission had only been in favour of an advisory body and against a sentencing guidelines council; nor did the Memorandum explain why the Scottish Government had taken a different view. In the Society’s view—

“the purpose of the Sentencing Council is open to grave objection on constitutional grounds. Sentencing policy is, and should remain, a matter for the Parliament on the one hand and the Appeal Court on the other, following, we may say, a public hearing. It is fundamentally wrong that sentencing policy should be determined by a Sentencing Council, for which it appears that the executive have disproportionate influence on the procedure for appointment of members.”⁵⁴

80. However Professor Neil Hutton did not accept that a Sentencing Council undermined judicial independence—

“Judicial independence means that a judge makes a decision in an individual case. It is entirely appropriate for a body such as a sentencing council to develop a broader sentencing policy or to decide what sentencing should be for particular types of cases. I do not think that interferes with judicial independence at all.”

81. Indeed, he suggested, well-crafted guidelines, by “giving judges something to argue about” would bolster judicial independence—

“If they decide to depart from the guidelines in a particular case, they can set out the range of penalties for the crime and then give a clear reason in public for their decision. Unlike the present situation, such a move blends

⁵² Scottish Parliament Justice Committee. *Official Report*, 12 May 2009, Col 1761.

⁵³ Scottish Parliament Justice Committee. *Official Report*, 12 May 2009, Col 1766.

⁵⁴ Royal Society of Edinburgh. Written submission to the Justice Committee.

consistency and individualised sentencing in a way that is transparent to the public.”

82. Nor, in his view, did judicial independence require the sentencing council to have only an advisory role—

“If we have a sentencing council whose task is to devise guidelines, it is appropriate that it should have final authority. That preserves judicial independence at a sufficient level, as it allows the appeal court to make decisions in individual cases.”⁵⁵

83. Dr Cyrus Tata agreed that “in principle, a sentencing council can ... be a way of buttressing the judicial independence rather than detracting from it”, but it depended on the detail. He had some concerns that the council as proposed in the Bill “appears to report mainly to the Scottish Ministers and, to some extent, the Lord Advocate. I would want it to be more distanced from the Executive and perhaps a little more accountable to the Parliament.”⁵⁶

84. John Scott, representing the SCCCJ and the Howard League for Penal Reform, was concerned that the Council might be exposed to undue political pressure, or pressure from the media. He was not wholly opposed to such a body, suggesting that it could play a useful role if it was an advisory body rather than one that issues guidelines.⁵⁷

85. However, David McKenna of Victim Support Scotland was opposed to a Sentencing Council that was purely advisory—

“I am not sure whether that arrangement would be as effective in demonstrating sentencing consistency to the public as the approach that is set out in the Bill. An advisory group might just disappear into the background and never be heard from again.”⁵⁸

86. Henry McLeish downplayed the significance of a sentencing council, suggesting that the arguments on both sides were in danger of becoming polarised. He saw no threat to the independence of the judiciary, described the establishment of a sentencing council as “a modest measure that should not get too many people too excited” and said that he had no strong views on how it operated. His only concern was—

“that the sentencing council should not appear as an ultra-quasi-legal body that looks like it is imposing its individual judgments on the work of the courts.”⁵⁹

87. James Chalmers (Edinburgh University) said that, as the Bill makes clear that the final decision on sentencing is still left to judges, he did not see how

⁵⁵ Scottish Parliament Justice Committee. *Official Report*, 2 June 2009, Cols 2008, 2012, 2017.

⁵⁶ Scottish Parliament Justice Committee. *Official Report*, 2 June 2009, Col 2008.

⁵⁷ Scottish Parliament Justice Committee. *Official Report*, 19 May 2009, Col 1874.

⁵⁸ Scottish Parliament Justice Committee. *Official Report*, 26 May 2009, Col 1934.

⁵⁹ Scottish Parliament Justice Committee. *Official Report*, 19 May 2009, Cols 1820-1.

independence would be undermined.⁶⁰ Similarly, the Lord Advocate said it was “quite clear that it will not be the council’s role to provide prescriptive mandatory guidelines or to interfere with judges’ independence in individual cases.”⁶¹

88. The Cabinet Secretary for Justice explained why he felt there was no substance to fears that the Sentencing Council would undermine the independence of the judiciary. He pointed to the fact that the Parliament had only recently enshrined the independence of the judiciary in statute and that there was no intention to go against this—

“We have made it as clear as we can do that we will not interfere with the ultimate responsibility of each sheriff or judge to make the decision that they think is appropriate to the specific offence of the individual offender who appears before them. ... I just cannot see the basis on which the sentencing council could be viewed as unconstitutional. It will not interfere with the independence of the judiciary and it is clearly *intra vires*.”⁶²

89. He also argued that—

“the sentencing guidelines must be more than advisory. The judiciary will have the opportunity to say that the guidelines do not fit in the particular circumstances of an individual offender or individual offence. ... However, in the main, the guidelines will apply.”⁶³

90. On a related point, a number of witnesses expressed concerns about section 5(3)(d) of the Bill, which allows the Sentencing Council to specify the circumstances in which sentencing guidelines may be departed from. The Sheriffs’ Association described this as “an unwarranted restriction on sentencing in individual circumstances” and suggested it ran counter to section 7(2) of the Bill, which allows a court not to follow guidelines (so long as it states its reasons for doing so).⁶⁴ Lord Cullen, speaking for the RSE, agreed that section 5(3)(d) enabled the Sentencing Council to restrict the scope of the court to depart from its guidelines, noting that the court in turn could not force the Council to review guidelines: “We are dealing with a constitutional point – whether the court remains in charge of its original and proper constitutional responsibility to determine sentences”.⁶⁵

91. The Sheriffs’ Association also expressed concerns about section 5(5), which requires the sentencing guidelines to include “an assessment of the costs and benefits to which the implementation of the guidelines would be likely to give rise, and an assessment of the likely effect of the guidelines on the number of persons detained in prisons or other institutions, the number of persons serving sentences in the community and the criminal justice system generally”. According to Sheriff

⁶⁰ Scottish Parliament Justice Committee. *Official Report*, 2 June 2009, Col 2009.

⁶¹ Scottish Parliament Justice Committee. *Official Report*, 9 June 2009, Col 2057.

⁶² Scottish Parliament Justice Committee. *Official Report*, 23 June 2009, Cols 2162-3.

⁶³ Scottish Parliament Justice Committee. *Official Report*, 23 June 2009, Col 2167.

⁶⁴ Sheriffs’ Association. Written submission to the Justice Committee, para 2.15; Scottish Parliament Justice Committee. *Official Report*, 12 May 2009, Col 1782.

⁶⁵ Scottish Parliament Justice Committee. *Official Report*, 12 May 2009, Cols 1801-2.

Fletcher, it would be inappropriate for sentencers to take such matters into account—

“We think that the person who is being sentenced is entitled to be sentenced by someone whose attention is not directed at whether there is a place available for them”.⁶⁶

Sentencing Council – membership

92. A closely related issue was about the composition of the Council and, in particular, the fact that it is to have only a minority of judicial members. The High Court judges, the Sheriffs’ Association, the Scottish Justices Association, the Faculty of Advocates and the Royal Society of Edinburgh all argued that the Council should have a judicial majority – particularly if it was to have more than a purely advisory role.

93. Lord Hamilton set out the changes in membership he would like to see—

“It would be inappropriate merely to have the Lord Justice Clerk as the chairman and one other judge – in effect, a first-instance criminal judge – as the only senators on the council. I would be minded to double that to four senators. I would leave the number of sheriffs and justices the same, but I would remove the constable, because I do not recognise the function of the constable in that regard. I would reduce the provision in paragraph 1(5)(b) in schedule 1 from “two other persons” to “one other person” which would mean council membership of 12, with judicial office-holders being seven of the 12.”⁶⁷

94. The Sheriffs’ Association said that it would be difficult for sheriffs, or the public, to have confidence in a body that did not have a judicial majority.⁶⁸ The RSE said it could not support a Council with only a minority of people having experience of sentencing. John Scott said he would “lean towards having a majority of judges on the sentencing council, if it were going to be more than just advisory”.⁶⁹

95. Professor Fergus McNeill was less concerned about an overall judicial majority than with the balance among the judicial members, arguing that the focus should be on including more sheriffs rather than senior judges.⁷⁰

96. There were also some specific concerns about the drafting of the provisions for judicial members of the Council. The Sheriffs’ Association was concerned that the drafting could allow there to be two sheriffs principal and no sheriffs, given that sheriffs principal have no active role in sentencing. Similarly, the Scottish Justices Association questioned the provision requiring one Council member to be either a justice of the peace or a stipendiary magistrate. Pointing out that there were hundreds of JPs doing a great deal of criminal work across Scotland and only a handful of stipendiary magistrates, all based in Glasgow, the Association said it

⁶⁶ Scottish Parliament Justice Committee. *Official Report*, 12 May 2009, Col 1785.

⁶⁷ Scottish Parliament Justice Committee. *Official Report*, 12 May 2009, Col 1767.

⁶⁸ Sheriffs’ Association. Written submission to the Justice Committee.

⁶⁹ Scottish Parliament Justice Committee. *Official Report*, 19 May 2009, Col 1879.

⁷⁰ Scottish Parliament Justice Committee. *Official Report*, 19 May 2009, Col 1879.

would be “extremely concerned if we did not have a say or a place on the sentencing council”.⁷¹

97. There were also arguments about the legal and lay membership of the Council. The Scottish Justices Association questioned the need for the police or the legal professional bodies to be represented and suggested that, if they were to be represented, so too should the Scottish Prison Service and perhaps COSLA.⁷² The Joint Faiths Advisory Board on Criminal Justice said that it would be preferable to draw membership of the Council from a wider range of professions involved in the justice system, and suggested additional lay members from the Scottish Prison Service, criminal justice social work teams and community justice authorities.⁷³ Action for Children Scotland suggested that the membership should include a representative from an agency working directly in the rehabilitation of offenders.⁷⁴

98. However Mike Ewart, Chief Executive of SPS did not agree that his organisation should be represented on the Council, for two reasons—

“First, we are required to discharge the lawful warrant that is the outcome of a sentence. Secondly, unlike some other organisations that take part in such discussions, we are part of Government and could be seen to be directed by ministers. I do not think that such a position would be helpful for us or for the sentencing council.”⁷⁵

99. The Community Justice Authorities said they were relaxed about the proposed membership of the Council so long as lay people and victims were represented.⁷⁶ But Professor McDonald of the Royal Society of Edinburgh disagreed—

“There is very little point to involving non-experts in making expert decisions. If the problem is public perception, and we then involve members of the public without improving public perception, perhaps we need to educate our masters, if such they are to be.”⁷⁷

100. The Cabinet Secretary for Justice explained the rationale for the composition that was proposed in the Bill—

“The council will be judicially led. We accept that that is important. We are open to persuasion, but our view is that it is important that the council also has representatives of broader society ... it is important that we take into account others who have an interest, such as the police, the prosecution service or Victim Support Scotland.”⁷⁸

⁷¹ Scottish Parliament Justice Committee. *Official Report*, 12 May 2009, Cols 1786-7.

⁷² Scottish Justices Association. Written submission to the Justice Committee.

⁷³ Joint Faiths Advisory Board on Criminal Justice. Written submission to the Justice Committee.

⁷⁴ Action for Children Scotland. Written submission to the Justice Committee.

⁷⁵ Scottish Parliament Justice Committee. *Official Report*, 9 June 2009, Col 2044.

⁷⁶ Scottish Parliament Justice Committee. *Official Report*, 19 May 2009, Col 1842-3.

⁷⁷ Scottish Parliament Justice Committee. *Official Report*, 12 May 2009, Col 1805.

⁷⁸ Scottish Parliament Justice Committee. *Official Report*, 23 June 2009, Col 2164.

Sentencing Council – cost and resourcing

101. The Bill's Financial Memorandum states that establishing the Scottish Sentencing Council is one of the proposals in the Bill that carries a significant financial impact and estimates the annual budget at between £1 million and £1.1 million, plus one-off set-up costs of £0.45 million. These costs are to be met entirely by the Scottish Government as part of its funding of the Scottish Court Service.

102. The Judges of the High Court of Justiciary questioned whether this cost could be justified—

“We are profoundly concerned that, at the present time of financial stringency, when the justice system has other very pressing demands for funding – not least of judicial training and of the provision of judicial manpower – the Government is promoting and the Parliament is contemplating such expenditure on such a Council.”⁷⁹

103. Similar doubts were expressed by the Faculty of Advocates and by the Scottish Consortium on Crime and Criminal Justice (SCCCJ), who suggested that, “given the pressures on the criminal justice budget, the sum required for the establishment of a Sentencing Council could be spent more effectively in other ways.”⁸⁰

104. Asked to expand on this in oral evidence, Professor Fergus McNeill pointed out that the estimated £1 million annual running cost of the Council could buy 25 prison places for a year, or nearly 1,000 community penalties. However, his personal view was that—

“investing £1 million in producing a coherent and rational approach to sentencing would be an excellent use of taxpayers' money—as long as a coherent and rational approach was indeed the outcome.”⁸¹

105. In its report, the Finance Committee notes that the Scottish Court Service agreed that cost estimates for the Scottish Sentencing Council were “in the right ballpark” but that it could not be expected to meet the costs of running the Council without receiving additional funding from the Government. The Finance Committee's report also draws attention to the £97,000 costs associated with the post of the Sentencing Council's chief executive, and to ongoing discussions about the extent to which support services for the Council could be provided by the body that will shortly replace the Scottish Court Service.

Committee conclusions

106. The Committee recognises that some degree of inconsistency in sentencing is probably inevitable in any system that respects the independence both of the judiciary as a whole and of individual sentencers. We also accept that there is a perception, both among people working in the justice system and among the wider public as well, of at least a degree of

⁷⁹ Judges of the High Court of Justiciary. Written submission to the Justice Committee.

⁸⁰ Scottish Consortium on Crime and Criminal Justice. Written submission to the Justice Committee.

⁸¹ Scottish Parliament Justice Committee. *Official Report*, 19 May 2009, Col 1881.

inconsistency in the sentences given out by different judges or in different locations for similar offences. We have not been convinced that there is clear objective evidence – as opposed to anecdotal and circumstantial evidence – to substantiate this perception, no doubt partly because of the inherent difficulties involved in comparing individual sentencing decisions on a like-for-like basis.

107. We regard any actual – or indeed perceived – inconsistency as a problem, in that it runs counter to the principle of fairness that must be central to any justice system. We therefore support the aim of minimising inconsistency in sentencing. However, that aim cannot be an over-riding one, and must clearly be balanced against other considerations – including cost, and the potential for compromising other principles of justice. A majority of the Committee is not yet convinced that a Scottish Sentencing Council, as proposed in the Bill, can be justified in terms of its capacity to reduce inconsistency beyond what might be achieved using existing mechanisms (such as the existing power of the Appeal Court to issue guideline judgments). On the other hand, we are also conscious that there are other aims for the Council, including the consideration of wider sentencing issues, and the promotion of relevant research. We accept that there may be a case for the setting of guidelines for sentencers, but recognise that there are issues as to how such guidelines are approved and promulgated. Overall, taking account of the other aims that it may serve, which we support, we recognise that there could be merit in a Sentencing Council.

108. A Sentencing Council will inevitably have some influence on judicial discretion (indeed, there would be little point in having it if it did not), and there is a tension between that and the principle of separation of powers.

109. There was no consensus view in the Committee on how that tension is best addressed. A majority of members would prefer a structure in which sentencing guidelines developed by any Sentencing Council would take effect only after formal endorsement by the Appeal Court. These members argue that such endorsement would no doubt be forthcoming in the large majority of cases, but such a structure would also enable there to be a constructive dialogue in cases where the Court questioned some aspect of the guidelines proposed. These members also believe that having any guidelines issued with the authority of the Court itself is the best means of resolving the constitutional concerns about the role of the Sentencing Council that some witnesses have raised.

110. An alternative view within the Committee is that, to the extent that any adjustment to the provisions of the Bill is needed to address those concerns, it would be preferable to adjust the composition of the Council to provide a judicial majority. On this view, any structure that leaves the courts with the final say on sentencing guidelines would not represent a sufficient advance over the present arrangements.

111. In that context we regard the safeguard in the Bill – that any court can decide not to follow a sentencing guideline so long as it states its reason for

doing so – as essential, and the minimum necessary to preserve judicial independence. We will keep an open mind during Stage 2 as to whether further such safeguards are necessary, particularly whether the Council’s composition should be adjusted to ensure there is a judicial majority.

112. On other aspects of the Council’s composition, we can be more definite. We do not believe that a constable should be included among the “legal members” (although it will of course be important for the police to have a proper input in other ways to the Council’s deliberations). We also think there is at least a question whether a prosecutor should be included. We do not support any of the various suggestions made to us for additional members (such as a representative of the Scottish Prisons Service, or of local authorities). We do, however, have sympathy with concerns made in evidence that the Bill would allow – at least in principle – the appointment of two sheriff principals but no sheriff, or two stipendiary magistrates but no JP – thus unbalancing the judicial composition of the Council. This may be unlikely in practice, but we suggest that some redrafting would address these concerns – perhaps by amalgamating what are currently separate requirements into a single requirement for three judicial members holding (any of) the offices of sheriff, sheriff principal, JP or stipendiary magistrate, of whom at least one must be a sheriff and at least one a JP.

113. We note the concerns of some witnesses as to the costs of establishing a Sentencing Council, and ask the Scottish Government to consider further whether this cost is still a priority for the use of scarce Justice Department resources at a time of financial stringency.

Section 14: Community payback orders

Background and proposals

114. The Scottish Government’s 2007 report *Reforming and Revitalising: Review of Community Penalties*⁸² recommended a single community sentence to replace the existing probation orders, community service orders, supervised attendance orders and community reparation orders.

115. The Scottish Prisons Commission recommended that prison “should be reserved for those people whose offences are so serious that no other form of punishment will do and for those who pose a threat of serious harm to the public.” Accordingly, “to move beyond our reliance on imprisonment as a means of punishing offenders”, the Commission recommended that “paying back in the community should become the default position in dealing with less serious offenders”. The Commission wanted there to be a single community sentence, with judges provided with a wide range of “payback” options through which offenders could make good to the victim and/or the community whether by unpaid work, engaging in rehabilitative work that benefited both victims and communities by reducing re-offending, or some combination of these and other approaches.⁸³

⁸² Scottish Government. (2007) *Reforming and Revitalising: Review of Community Penalties* Available at: <http://www.scotland.gov.uk/Publications/2007/11/20142739/0>

⁸³ Scottish Prisons Commission. (2008) *Scotland’s Choice* Executive Summary, paragraphs 1, 2 and 11.

116. Taking forward these recommendations, section 14 of the Bill inserts 37 new sections into the Criminal Procedure (Scotland) Act 1995 in order to provide the statutory basis for community payback orders (CPOs). These orders (CPOs) are intended to be easy to understand in contrast to “the unnecessarily complex range of sentencing options currently available which are not readily understood by the public.” However, CPOs will not replace two existing orders – Drug Treatment and Testing Orders (DTTOs) and Restriction of Liberty Orders (RLOs), which the Policy Memorandum anticipates will continue to be used for around 10% of community disposals.⁸⁴

117. A CPO is defined (by inserted section 227A(2)) as an order imposing one or more of the following requirements on the offender: a supervision requirement, an unpaid work and activity requirement, a programme requirement (a course or planned set of activities designed to address the behavioural needs of the offender), a residence requirement, a mental health treatment requirement, a drug treatment and testing requirement, and an alcohol treatment requirement.

General response of witnesses

118. Many witnesses were broadly supportive of the proposed new CPOs.⁸⁵ For example, the Scottish Consortium on Crime and Criminal Justice welcomed them as implementing recommendations of the Scottish Prisons Commission that put the emphasis on “flexibility, reparation and ‘problem solving’ sentencing”, and as an effective approach to reducing imprisonment.⁸⁶ But many witnesses argued that for these proposals to be effective, they would need to be properly resourced. Many also emphasised the importance of ensuring that the nature of the community payback work needed to be properly explained to the public.

119. The Wise Group said that it supported the new CPOs and advocated a more holistic approach to addressing offenders’ needs and reducing reoffending. In its experience, programmes to support offenders are better provided in the community than in prisons.⁸⁷

Terminology

120. Some witnesses were critical of some of the terminology used in relation to the new orders. The Faculty of Advocates said that it would be “particularly inappropriate” to describe those requiring mental health treatment or alcohol treatment as undertaking community payback, suggesting that a more general title such as “community involvement orders” would be preferable.⁸⁸

121. The Scottish Children’s Reporter Administration pointed out that the term “supervision requirement”, used in section 14 for one of the requirements of a CPO, is also the name given to an order made by a children’s hearing under section 70 of the Children (Scotland) Act 1995—

⁸⁴ Policy Memorandum, paragraphs 43, 49.

⁸⁵ Aberdeenshire Council, Dumfries and Galloway Council, Ayrshire Criminal Justice Social Work Partnership, Scottish Justices Association, Turning Point Scotland, Action for Children Scotland, Victim Support Scotland, The Sheriffs’ Association. Written submissions to the Justice Committee.

⁸⁶ Scottish Consortium on Crime and Criminal Justice. Written submission to the Justice Committee.

⁸⁷ The Wise Group. Written submission to the Justice Committee.

⁸⁸ Faculty of Advocates. Written submission to the Justice Committee.

“As it is possible that both types of supervision requirement might apply to an individual child or young person, SCRA suggests that another name is found for the order created under section 14 to avoid confusion.”⁸⁹

Consequences of non-compliance

122. For Yvonne Robertson of the Association of Directors of Social Work (ADSW), a particular advantage was that—

“The new order will also provide an opportunity for the imposition of electronic monitoring, if someone is taken back to court for breach. ... If an offender is in breach currently, the court either allows the order to continue or considers sending them to prison. The imposition of electronic monitoring, with the support that the community payback order will provide, may be sufficient to help some offenders to move away from non-compliance towards compliance.”⁹⁰

123. Victim Support Scotland also supported the CPO provisions, but wanted greater clarity from the outset about the consequences of non-compliance. It therefore suggested that—

“an alternative (suspended) sentence should be set out by the court alongside the community payback order, which would announce what sentence would be given if the offender breaches the payback order”.⁹¹

124. Challenged on how compliance with CPOs would be managed, the Cabinet Secretary pointed to local monitoring mechanisms that were in place, the introduction of progress courts and the option of electronic monitoring. He also argued that it was—

“not simply about keeping people on a tight leash and berating them; sometimes it is about encouraging them, and saying how well they have done. We are giving sheriffs the flexibility to encourage people who are doing well to overcome their addictions, to become less of a nuisance in their communities and to contribute as net taxpayers who function manageably in our communities, rather than their being a drain on taxpayers.”⁹²

Drug treatment and testing orders

125. Drug Treatment and Testing Orders (DTTOs) are generally used as a high tariff disposal for drug-misusing offenders who might otherwise receive a custodial sentence. They have two objectives: to reduce the amount of acquisitive crime to fund drug misuse, and to reduce the level of drug misuse itself. A DTTO includes a requirement for regular reviews by the court to enable sentencers to monitor progress and a requirement that the offender consent to regular, random drug tests during the period of the order.

126. Although the Bill does not replace DTTOs, it includes a drug treatment requirement as one of the options available to the courts when imposing a CPO.

⁸⁹ Scottish Children’s Reporter Administration. Written submission to the Justice Committee.

⁹⁰ Scottish Parliament Justice Committee. *Official Report*, 19 May 2009, Col 1850.

⁹¹ Victim Support Scotland. Written submission to the Justice Committee.

⁹² Scottish Parliament Justice Committee. *Official Report*, 23 June 2009, Cols 2191-2.

127. Cosla saw a potential difficulty with this, suggesting there was “potential for confusion” between DTTOs and CPOs that included a drug treatment requirement. A similar point was made by the Community Justice Authorities.⁹³

Resourcing

128. The Financial Memorandum estimates that CPOs, together with the presumption against short periods of imprisonment or detention and reports about supervised persons, will cost £10.67 million per year (the mid-point figure between the costs associated with a 10% or 20% increase in community sentencing) plus one-off costs of £50,000. The majority of these additional costs will fall to be dealt with under the existing ring-fenced funding arrangements for local authority criminal justice social work services.⁹⁴

129. The Financial Memorandum explains that, as it is difficult to predict sentencing practice, it is difficult to forecast what the take-up of the new CPO will be, when compared to existing sentences and against the backdrop of the new presumption against the use of prison sentences of six months or less. For indicative cost purposes therefore, the memorandum uses two assumptions – an increase of 10% and an increase of 20% in community sentences or community payback orders. In oral evidence, Wilma Dickson of the Criminal Justice Directorate explained that although around 12,000 sentences of less than six months were imposed each year, this translated into only around 6,000 individuals entering prison each year. A 10% increase in community sentences, representing 1,931 CPOs, was therefore equivalent to 31% of the current number of short-term prison receptions, while a 20% increase in community sentences was equivalent to 62% of those receptions.⁹⁵

130. Councillor McGuigan of COSLA argued that, in order to make the new CPOs effective, there needed to be—

“a willingness to redistribute resources between the set of agencies – not just the Scottish Prison Service, but local authorities and the national health service ... I simply do not think that the bill will work if the necessary resources are not in place. Local authority budgets are not as abundant as you might believe, and we are making considerable efficiency savings – cuts, if you like – in many services. ... The provisions for community payback orders, which involve reviews, putting in place responsible officers and meeting other responsibilities, will cost the local authority a fair amount, which I cannot quantify at the moment.”⁹⁶

131. Henry McLeish said that, in its report, the Prisons Commission had—

“made it clear that no one should be under the impression that the proposed changes could be made without considerable input of new resources – the statement was as bald as that. There must be new

⁹³ Convention of Scottish Local Authorities, Community Justice Authorities. Written submissions to the Justice Committee; Scottish Parliament Justice Committee. *Official Report*, 19 May 2009, Col 1848.

⁹⁴ Financial Memorandum, paragraphs 675, 991.

⁹⁵ Scottish Parliament Justice Committee. *Official Report*, 23 June 2009, Cols 2193-4.

⁹⁶ Scottish Parliament Justice Committee. *Official Report*, 9 June 2009, Cols 2050, 2053.

resources. If we are successful in the long term, there could conceivably be a transfer of resources from prisons to the community, but that cannot happen in the short term.”⁹⁷

132. Mike Ewart, Chief Executive of the Scottish Prison Service, agreed that greater use of community penalties would not necessarily result, at least in the short term, in a significant reduction in prison populations or expenditure—

“During the period in which effective community disposals and interventions are built up and crucial confidence in them is developed, so that we collectively feel that that is the appropriate route, we will still have to maintain the required resource for keeping more or less the current population running through the prison system. There will not be a major shift of population until that confidence is established.”⁹⁸

133. Victim Support Scotland presented a different perspective, arguing that there were “plenty of resources” in the system; the challenge was to find new ways of thinking about them. It wanted to see more use made of compensation orders to victims or, where no individual victim is discernible, to pay for improvements to the communities that suffered from the offending behaviour.⁹⁹

134. Many witnesses drew particular attention to the resource implications for criminal justice social work. For example, the view of Aberdeenshire Council was that—

“Whilst both elements of the new community payback orders have positive elements, their introduction is likely to have a significant impact on criminal justice social work resources; in particular, the need to identify, and supervise, additional work placements. There will also be an increase in the number of reports that will be required by Progress Courts.”¹⁰⁰

135. The Association of Directors of Social Work (ADSW), while supporting CPOs “as an alternative to expensive and ineffective short sentences of imprisonment”, said it was necessary to acknowledge “that this will place increased demands on a range of specialist and mainstream services including local authority social work, housing and education services; health; Jobcentre Plus and others.”¹⁰¹

136. In evidence to the Finance Committee, Community Justice Authorities—

“expressed concern about the assumption in the Financial Memorandum that current funding for probation, social enquiry reports (SERs), community service orders and supervised attendance orders is adequate. They indicated that six of the eight authorities have this year asked for approval to move money from non-core funding to core funding, citing this as evidence that existing core funding is not sufficient for purpose and told the Committee, ‘we

⁹⁷ Scottish Parliament Justice Committee. *Official Report, 19 May 2009*, Col 1825.

⁹⁸ Scottish Parliament Justice Committee. *Official Report, 9 June 2009*, Col 2041.

⁹⁹ Scottish Parliament Justice Committee. *Official Report, 26 May 2009*, Col 1942.

¹⁰⁰ Aberdeenshire Council. Written submission to the Justice Committee.

¹⁰¹ Association of Directors of Social Work. Written submission to the Justice Committee.

are concerned that, if we have a large increase in the number of CPOs, we may have to vire further moneys from non-core to core funding’.”¹⁰²

137. The Finance Committee also heard concerns that Scottish Government funding for local authority core criminal justice functions had not kept pace with inflation, and that the funding formula was sometimes based on out-of-date activity levels and did not take account of the additional costs of service delivery in rural areas. Perth and Kinross Council made specific reference to the unit cost used for probation orders, saying that it is unrealistic and does not take account of people who require ever-higher levels of support and supervision if they are to escape the cycle of reoffending. The Community Justice Authorities suggested that the Financial Memorandum might underestimate the number of additional social enquiry reports (SERs) that would be required; in response, the Scottish Government confirmed that costings for additional SERs had not been included and that this would need to be kept under careful review.

138. In its report, the Finance Committee notes that funding for full implementation of the Bill has not been confirmed. It also notes that it has not received any evidence “to allow it to understand whether the estimated uptake of CPOs, of between 10 and 20 per cent, is accurate or whether this figure is likely to increase year-on-year, along with the cost implications” and drew attention to “the apparent disconnect” between the creation of a statutory presumption against short-term custodial sentences and the assumptions in the Financial Memorandum concerning the expected uptake of CPOs.¹⁰³

139. The Cabinet Secretary said that the Scottish Government had already invested an additional £2 million in community service – “£1 million to get orders under way and completed more quickly, and a further £1 million in recognition of underlying workload pressures”. He said this represented a 15% increase between 2008-09 and 2009-10.

140. Mr MacAskill agreed that resources were required, for local authorities, for courts in respect of progress hearings and for the additional electronic monitoring capacity in order to deliver the approach envisaged by the Bill, and he announced that he would make a further £5.5 million available over the next two years – £1.5 million this year and £4 million the next.¹⁰⁴ Wilma Dickson, for the Scottish Government, added that all of the £1.5 million going out this year would be distributed to local authorities on the normal distribution formula so that they could begin to clear current backlogs, and it was hoped that by the end of the second year, some funds could be redirected into CPOs.¹⁰⁵

Availability of programmes and timescales for commencement and completion

141. For Raymund McQuillan of ADSW, one of the big advantages of the new CPO was that—

¹⁰² Scottish Parliament Finance Committee. *Report on Financial Memorandum on the Criminal Justice and Licensing (Scotland) Bill*, paragraph 36.

¹⁰³ Scottish Parliament Finance Committee. *Report on Financial Memorandum on the Criminal Justice and Licensing (Scotland) Bill*, paragraph 59.

¹⁰⁴ Scottish Parliament Justice Committee. *Official Report*, 23 June 2009, Col 2158.

¹⁰⁵ Scottish Parliament Justice Committee. *Official Report*, 23 June 2009, Col 2190.

“It provides for a substantial tightening of timescales, which sends an important message from the courts to the public and to offenders about the commencement of new orders. We support the view that orders should be started and should finish quickly. The current arrangements provide for the work to commence within three weeks; under the new arrangements, that period would be reduced to one week. Current legislation allows one year for completion of a community service order; the new guidelines suggest that orders should be completed within three to six months.”¹⁰⁶

142. The Cabinet Secretary confirmed in evidence that the target was “that unpaid work should start within seven days”.¹⁰⁷

143. Victim Support Scotland wanted to tighten the legislation to make such a timescale enforceable. In its view, a CPO should not be made unless the relevant treatment or activity “is available at the time of sentencing. This will ensure that the offender will start the disposal straight away, instead of for instance waiting several months to begin a particular treatment, which gives a signal to the victim that nothing has happened.”¹⁰⁸

144. But for Professor Neil Hutton, this was not the most important consideration relating to timing—

“If punishment is to be effective, the important issue is probably not immediacy after the decision to punish but immediacy after the commission of the offence, which is a different story altogether. How long do people have to wait before they come to court? That is a resource issue.”¹⁰⁹

145. For Turning Point Scotland, the availability of programmes was crucial—

“When a Community Payback Order is made, and an offender is subject to its requirement, it is clear that the appropriate services must be in place if the goals of the Order are to be achieved. When they are not, or when the offender is forced into the wrong services, it is far more likely that they will be unable to address their issues, or even comply with the requirements. In this case they would be seen as having failed to meet the requirements under the order, when in reality the system has failed them”.¹¹⁰

146. However, when Councillor Harry McGuigan of COSLA was asked about current availability of existing community programmes, he said—

“I doubt very much whether there are sufficient programmes available for community sentences, especially if we move towards an increased demand or call on services that are to be delivered locally. The quality of such programmes is another matter, too. We need to question whether current

¹⁰⁶ Scottish Parliament Justice Committee. *Official Report*, 19 May 2009, Col 1850.

¹⁰⁷ Scottish Parliament Justice Committee. *Official Report*, 23 June 2009, Col 2185.

¹⁰⁸ Victim Support Scotland. Written submission to the Justice Committee.

¹⁰⁹ Scottish Parliament Justice Committee. *Official Report*, 2 June 2009, Col 2023.

¹¹⁰ Turning Point Scotland. Written submission to the Justice Committee.

resources are sufficient to enable quality, effectiveness and credibility in community sentences.”¹¹¹

Progress reviews

147. An important element of the new regime is the option for courts to require periodic “progress reviews” of CPOs, which the offender must attend. On conclusion of a progress review, the court may vary, revoke or discharge the CPO (inserted section 227W).

148. The Association of Directors of Social Work supported the introduction of progress reviews, but said they should be “targeted rather than universally applied to all offenders”.¹¹² The Community Justice Authorities and COSLA also welcomed the provision, but suggested that in order to ensure consistency in the operation of the reviews, further guidance on the purpose and practice for reviews should be issued, following consultation with stakeholders.¹¹³

149. The Scottish Centre for Crime and Justice Research was critical of the fact that, under the Bill, progress reviews would be optional rather than mandatory, and would be conducted by the mainstream criminal courts rather than by specialised “progress courts”—

“In our view this represents a missed opportunity. The Prisons Commission, based on clear evidence, highlighted that because the business of desisting from crime (and complying with both community supervision and the law in general) is complex and challenging for offenders, the management of that process might be better remitted to a court in which specially trained judges and court social workers could better support it. In our view, removing that function from already busy generic criminal courts and placing it within a more specialised progress court made considerable sense and merits re-examination.”¹¹⁴

150. But the decision to make progress reviews optional was greeted “with some relief” by the Sheriffs’ Association, who said that “for them to be mandatory would be unduly burdensome to the system financially and take up already precious court time.”¹¹⁵

Other suggestions in relation to community payback orders

151. The Scottish Centre for Crime and Justice Research said that for the new CPO to be effective, changes to the Bill would be required to take account of existing research on effectiveness—

“As a disposal, its effectiveness will be improved by acting on the research evidence about how to increase both public support for community penalties and behavioural change in offenders. The two key factors are clarity (as to what a community punishment is) and speed (with which the order is made and fulfilled). This evidence suggests careful consideration and some re-

¹¹¹ Scottish Parliament Justice Committee. *Official Report*, 9 June 2009, Col 2048.

¹¹² ADSW. Written submission to the Justice Committee.

¹¹³ Community Justice Authorities and COSLA. Written submissions to the Justice Committee.

¹¹⁴ Scottish Centre for Crime and Justice Research. Written submission to the Justice Committee.

¹¹⁵ Sheriffs’ Association. Written submission to the Justice Committee.

drafting is required of provisions on conditions (to prevent ‘condition loading’), progress reviews, the role of Responsible Officers, and continuing to have separate community orders (like RLOs and DTTOs).¹¹⁶

152. Victim Support suggested that the existing requirement to explain in ordinary language the purpose of the CPO requirements, and the consequences of non-compliance, to the offender should also be extended to the victim (unless he or she did not wish to receive this information).¹¹⁷

153. On a similar theme, Sacro suggested that individual victims or communities affected by offenders’ behaviour should be given a direct input into the nature of community payback activity undertaken (“reparative tasks”). Without such a facility, the Bill would—

“miss an important opportunity to gain widespread support for a refocussing of the objectives of our criminal justice system to give increased attention to repairing the harm caused by offending together with reducing the likelihood of re-offending”.¹¹⁸

154. The Joint Faiths Advisory Board on Criminal Justice said that it would like to see restorative justice included as part of the community sentencing, with a focus not just on the offender but on the victim and the community.¹¹⁹

Mental health treatment requirement

155. The Scottish Association for Mental Health (SAMH) noted that instead of imposing a sentence of imprisonment, a court may instead impose a CPO which could include a “mental health treatment requirement”. They said—

“SAMH has long argued that people who have mental health problems should receive treatment rather than being imprisoned, and we hope that this Bill might present a mechanism for this. However, we are unsure about how this system would work in practice and specifically seek clarification about the role of judges.”

156. SAMH sought clarity on who would make the decision to seek the view of a medical practitioner, how this regime would relate to the existing Mental Health Tribunal and asked whether there was a risk of a parallel system being set up. It also questioned whether the new regime would be subject to the same principles as underpin the Mental Health (Care and Treatment) Act 2003, without which there could be “an unfair disparity which would cause SAMH great concern”.¹²⁰

157. The Mental Welfare Commission for Scotland (MWC) said that it had significant concerns about the provision for a “mental health treatment requirement” in a CPO (under inserted section 227R), and that it was not clear what status an individual subject to such a requirement would have in the context of hospital or outpatient treatment. The MWC highlighted some specific concerns,

¹¹⁶ Scottish Centre for Crime and Justice Research. Written submission to the Justice Committee.

¹¹⁷ Victim Support Scotland. Written submission to the Justice Committee.

¹¹⁸ SACRO. Written submission to the Justice Committee.

¹¹⁹ Joint Faiths Advisory Board on Criminal Justice. Written submission to the Justice Committee.

¹²⁰ SAMH. Written submission to the Justice Committee.

including that there does not appear to be any requirement for a report from a Mental Health Officer or a social work report to assist with decisions; that there does not appear to be any consideration of the individual's ability to consent to treatment; and that the individual would have no automatic recourse to independent or statutory review or to the safeguards that are available to people who are otherwise subject to compulsion in respect of mental disorder.¹²¹

Committee conclusions

158. The Committee broadly supports the creation of community payback orders (CPOs) on the grounds that they should simplify and strengthen the current range of community sentences, allowing more focus on offenders' needs.

159. However, we are also convinced that CPOs will not deliver the benefits envisaged for them unless they are adequately resourced – and we find it difficult or impossible to be sure at this stage whether sufficient funds have been or will be made available.

160. We are conscious that the level of take-up of CPOs will be closely linked to the views of sentencers on their effectiveness and the impact of any new statutory presumption against short-term custodial sentences, and that the Scottish Government itself cannot forecast with any confidence how many CPOs are likely to be made. What does seem clear is that there is very little prospect of any significant savings being made, in the short to medium term, in the largely fixed costs of running Scotland's prisons even if the Bill succeeds in its aim of diverting a substantial number of offenders from custodial to community disposals. Therefore, even though community sentences are generally cheaper than imprisonment, there will be a need for additional resources to make this approach work. (We also recognise, however, that if nothing is done to address rising prison populations, it will at some point become necessary to increase prison capacity, and that this will also have significant resource implications.)

161. We strongly believe that, if CPOs are to gain credibility with the public, and with the victims of crime in particular, they must begin (and be seen to begin) very shortly after sentence is declared – either on the day of sentence or (where this is not practicable, as we accept will sometimes be the case) as soon as possible thereafter. This is on the same principle that judgment should be given as soon as possible after an offence is committed – namely that justice delayed is justice denied.

162. The Cabinet Secretary has already announced some additional resources for existing community sentences, but until we know what the level of take-up will be, it is difficult or impossible to say whether current budgets will be sufficient. It is clear that many witnesses are concerned about this issue, and equally clear that an increased take up of CPOs of 10% or 20% (as postulated by the Scottish Government in the Financial Memorandum) will require additional resources. We welcome the additional resources already committed, but note that they require to be used both to

¹²¹ Mental Welfare Commission for Scotland. Written submission to the Justice Committee.

eliminate barriers to the speedy commencement of the orders, and to address issues of quality. There may also be issues about the adequacy of the unit cost calculation used in this context. Further, it is evident that the programme, residence, mental health treatment, drug treatment or alcohol treatment requirements that may be applied to the new orders will require additional resourcing. The Committee asks the Scottish Government to provide further assurance as to how such costs are to be met. Thereafter we need a commitment by Ministers to keep the level of take-up under review, and to bring forward additional funding as required.

163. In this connection, we are conscious that, while the main impact will be felt by criminal justice social work services, there will be resource implications for other areas. For example, there will be additional costs for the Scottish Court Service as a consequence of the progress reviews, and for voluntary sector bodies involved in the delivery of the new CPOs. Appropriate consideration must be given to these wider resource implications.

164. We do not agree with those witnesses who argued that progress courts should have been established as specialist courts, as the Prisons Commission recommended. We believe this should be a matter for individual sheriffs principal to consider in the light of local circumstances. We also believe the Bill gets it right in making progress reviews optional, so that the resources involved in them can be targeted to where they are most needed.

165. The Committee also recommends that the Scottish Government reconsider some of the terminology used in the Bill, specifically whether an alternative name might be considered to avoid confusion over the term "supervision requirement". We also invite the Scottish Government to consider making the rehabilitative element in community payback orders clearer.

Section 16: Short periods of detention

Background and evidence received

166. Section 16 repeals section 169 of the Criminal Procedure (Scotland) Act 1995 which permits summary courts to detain an offender at a court or police station until 8 pm instead of imposing imprisonment. As the provisions have not been used for a number of years they are considered no longer to be of any practical use.

167. This section also extends the current minimum period of imprisonment that can be imposed by a summary court from five to 15 days and repeals the provision whereby the summary courts can sentence an offender to be detained in a certified police cell or similar place for up to four days. According to the Explanatory Notes, this provision is redundant as there are no certified police cells in Scotland and have not been for some time. However, the Scottish Police Federation said that certified police cells are still used in the Orkney, Shetland and

Western Isles and are essential, when, for example, severe weather conditions prevent transfer to mainland Scotland.¹²²

Committee conclusions

168. **There is clearly uncertainty from the evidence about whether there are, in fact, any police cells in remote parts of Scotland that are certified for use for short-term detention. The Committee invites the Scottish Government to provide clarification on this point, and also to explain more fully how the process of certification operates. We would also suggest that further consideration be given to whether, even if no police cells are currently certified, this is a sufficient basis to repeal the provision that enables them to be so certified. We can envisage circumstances in which the facility to detain people in such cells, as an alternative to a long journey to the nearest prison, could continue to be useful.**

Section 17: Presumption against short periods of imprisonment or detention

Background

169. Section 17 amends the Criminal Procedure (Scotland) Act 1995 to create a presumption against prison sentences of six months or less, so that they may be imposed only where the court considers that no other method of dealing with the offender is appropriate. Where such a short sentence is imposed, the court must state its reasons for that opinion, and enter them in the record of proceedings.

Evidence received

170. Many witnesses expressed support for this proposal on the grounds that short-term prison sentences are generally regarded as expensive and ineffective, both in terms of protecting communities and in terms of rehabilitating offenders and reducing crime.¹²³

171. In its written submission, Scottish Women's Aid said that a presumption against short custodial sentences "may have a positive impact on certain offenders with chaotic lifestyles for whom prison is a 'revolving door'", but that perpetrators of domestic abuse do not fall into that category. The presumption could therefore "have a negative impact on women, children and young people experiencing domestic abuse".¹²⁴

172. Clydebank Women's Aid Collective agreed, saying that a presumption against sentences of six months or less would be "gendered in its impact. For women facing sentencing themselves it is likely to be positive. However, women affected by crimes committed against them by men may be affected detrimentally."¹²⁵

¹²² Criminal Justice and Licensing (Scotland) Bill. Explanatory Notes, paragraph 86. Available at: <http://www.scottish.parliament.uk/s3/bills/24-CrimJustLc/b24s3-introd-en.pdf> Scottish Police Federation. Written submissions to the Justice Committee.

¹²³ Association of Directors of Social Work, Ayrshire Criminal Justice Social Work Partnership, Association of Scottish Neighbourhood Watches, Joint Faiths Advisory Board on Criminal Justice, SAMH, Action for Children Scotland. Written submissions to the Justice Committee.

¹²⁴ Scottish Women's Aid. Written submission to the Justice Committee.

¹²⁵ Clydebank Women's Aid Collective. Written submission to the Justice Committee.

173. Professor Alec Spencer of the Scottish Consortium on Crime and Criminal Justice said: “The use of short-term and very short-term sentences is complete eye-wash. It has no effect at all on reducing crime.”¹²⁶ Indeed, he cited international research suggesting that where prison was used on its own, crime actually increases slightly.

174. Professor Spencer said that 81 per cent of prison sentences are for six months or less, and two-thirds of those are for three months or less; and that people sentenced to six months or less subsequently spend, on average, only around 23 days in prison. This did not allow time for prison staff to obtain the relevant information about the prisoner, assess them and arrange for appropriate interventions. As a result, he said, short sentences are a cause of frustration to prison staff, who have to spend a lot of time and effort accommodating people, but without the opportunity to help them address their offending behaviour.¹²⁷

175. His colleague Professor Fergus McNeill added—

“three things help people to stop offending: getting older and becoming more mature; developing social ties that mean something to them; and changing their view of what they are about as a person. Short periods in prison do not help with any of those three things.”¹²⁸

176. Dr Sarah Armstrong (University of Glasgow) referred to the Scottish Prisons Commission’s finding that many people in prison are repeatedly serving short sentences, in effect completing a life term by instalments but without access to the programmes and services available to those who are given a life sentence. She drew attention to research suggesting that short prison terms are not only ineffective but can be counter-productive, since people are more likely to engage in worse offending after they have been imprisoned than before.¹²⁹

177. Rona Sweeney, for the Scottish Prison Service, confirmed that for prisoners sentenced to a short period of custody, there was very little that could be done beyond meeting health care needs: “During those very short sentences we focus on undoing the harm that imprisonment has caused, because we know that many of the protective factors that support someone in not reoffending are damaged by imprisonment”.¹³⁰

178. Representatives of Community Justice Authorities said that while there were occasions when short prison sentences was justified they were being used “far too frequently” and sometimes only because sentencers felt they had no alternative disposals available.¹³¹

179. In its report, the Scottish Prisons Commission recommended a legislative presumption against custodial sentences of six months except where the judge is satisfied that a custodial sentence should be imposed having regard to one or

¹²⁶ Scottish Parliament. *Official Report*, 19 May 2009, Col 1891.

¹²⁷ Scottish Parliament Justice Committee. *Official Report*, 19 May 2009, Cols 1889.

¹²⁸ Scottish Parliament Justice Committee. *Official Report*, 19 May 2009, Col 1893.

¹²⁹ Scottish Parliament Justice Committee. *Official Report*, 2 June 2009, Col 2018.

¹³⁰ Scottish Parliament Justice Committee. *Official Report*, 9 June 2009, Col 2034.

¹³¹ Scottish Parliament Justice Committee. *Official Report*, 19 May 2009, Cols 1861-2.

more of the following: violent and sexual offences that raise significant concerns about serious harm; offences that constitute a breach of bail conditions; offenders already subject to a community sentence and/or with a significant history of failing to comply with community or conditional sentences; offenders subject to a release licence; offenders who do not consent to rehabilitative elements in a community sentence; and other sentences of imprisonment then being served by the offender.¹³²

180. Henry McLeish said that the Bill aimed to strike the same balance that the Scottish Prisons Commission had done. The Commission had considered the option of a statutory ban on custodial sentences of less than six months but—

“to preserve the independence of the judiciary and to take a commonsense approach, we rejected that option. Of the people who go to prison for less than six months, a small group have committed what I would regard as serious offences, one of which is domestic violence.”¹³³

181. Some witnesses questioned the basis upon which the six month dividing line had been selected. Cyrus Tata of the Centre for Sentencing Research (University of Strathclyde) said it was “not harmonious with the new summary powers for sentences of up to 12 months”, but that a more appropriate way to make the distinction would rely on the nature of the offence—

“If the argument behind the bill is that we should not imprison non-violent, non-dangerous offenders who might simply be feckless, we should focus on those types of cases. We should specify those cases, rather than a limit of six months, because the group of prisoners on sentences of six months or under will include—this will give the tabloids a field day—people who are convicted of dangerous and violent offences.”¹³⁴

182. Similarly, the Scottish Police Federation described the six month cut-off as “arbitrary”, pointing out that there are many habitual offenders who have no desire to comply with any court disposal and hence that short periods of imprisonment may well be necessary for even minor offences.¹³⁵

183. The experience of the High Court judges was that—

“under existing arrangements courts resort to short custodial sentences only where there is no realistic alternative ... we doubt whether the proposed legislative changes will in practical terms achieve much.”¹³⁶

184. The Sheriffs’ Association went further, saying that arguments about the ineffectiveness of short prison sentences misunderstood their point. A custodial sentence was unavoidable, whereas community disposals “without the option of custody for breach, would be rendered voluntary”. Noting that a 30-day sentence was to be an option for breach of a level 1 CPO, the Association concluded—

¹³² Scottish Prisons Commission. (2008) *Scotland's Choice*, paragraph 3.36.

¹³³ Scottish Parliament Justice Committee. *Official Report*, 19 May 2009, Col 1826.

¹³⁴ Scottish Parliament Justice Committee. *Official Report*, 2 June 2009, Col 2019.

¹³⁵ Scottish Police Federation. Written submission to the Justice Committee.

¹³⁶ Judges of the High Court of Justiciary. Written submission to the Justice Committee.

“As a means of dealing with breaches of court orders, as a sharp reminder to some offenders of the consequences of breaking the law for repeated offending when all else has been tried, or to give the public some measure of relief from their activities, short prison sentences have a purpose.”¹³⁷

185. Mike Ewart of the Scottish Prison Service disagreed. In terms of giving relief to the community, his view was that a short-term sentence could do more harm than good in terms of recidivism and hence community safety. In terms of being the only alternative for offenders who have repeatedly breached community service orders or reoffended, he said that—

“if a community disposal was appropriate four or five times for a particular offender in particular circumstances, that disposal might still be appropriate if the only factor that has changed is the irritation of the criminal justice system with that character’s reappearance.”¹³⁸

186. Henry McLeish said that the Scottish Prisons Commission had considered the argument about community respite but rejected it—

“What people want in communities throughout Scotland is a long-term future in which the crime figures go down and people are less afraid of crime and can have a sense of security. The respite approach is no more than a short-term consideration.”¹³⁹

187. Dr Cyrus Tata also questioned the argument that custodial sentences are sometimes appropriate where a court has lost patience with an offender who has repeatedly breached the conditions attached to community sentences. Recent research challenged the assumption that such breaches were wilful, suggesting instead that many of those subject to such sentences had significant learning difficulties and simply failed to understand the conditions.¹⁴⁰

188. The Scottish Justices Association noted that, whereas the Scottish Prisons Commission had listed six circumstances in which a short sentence could be justified, no such list was included in the Bill, and it suggested that these should at least be set out in sentencing guidelines.¹⁴¹ Sheriff Fletcher, speaking for the Sheriffs’ Association, suggested that, with a statutory requirement to state reasons for imposing a short sentence, “the unintended result might be to slow down the court system while the judge makes up the short statement that he has to make”.¹⁴²

189. Professor Neil Hutton (Centre for Sentencing Research, University of Strathclyde) suggested that judges already recognise the need to impose custodial sentences only when non-custodial options are inappropriate. In his view, making

¹³⁷ Sheriffs’ Association. Written submission to the Justice Committee. A level 1 unpaid work or other activity requirement involves up to 100 hours of work or activity (new section 227I).

¹³⁸ Scottish Parliament Justice Committee. *Official Report, 9 June 2009*, Col 2035.

¹³⁹ Scottish Parliament Justice Committee. *Official Report, 19 May 2009*, Col 1838.

¹⁴⁰ Scottish Parliament Justice Committee. *Official Report, 2 June 2009*, Col 2019.

¹⁴¹ Scottish Justices Association. Written submission to the Justice Committee.

¹⁴² Scottish Parliament Justice Committee. *Official Report, 12 May 2009*, Col 1788.

it more difficult to impose prison sentences of six months or less could create a temptation for judges to impose sentences of seven months or more—

“This will produce the unintended consequence of a rise in the overall prison population. ... A more appropriate way of reducing the use of short sentences would be to ask the Scottish Sentencing Council to develop a comprehensive inaugural set of guidelines which paid particular attention to defining the custody threshold in a way which reduced the overall use of short sentences of imprisonment.”¹⁴³

190. The Scottish Consortium on Crime and Criminal Justice said that the only sure way to achieve a reduction in short sentences would be to cap the number of places available for sentences of less than six months, so that, when the cap is reached, those given short sentences would be placed on a waiting list and their sentences suspended until a place becomes available.¹⁴⁴

191. The Cabinet Secretary for Justice said that Scottish Ministers would fully support any sheriff who feels it appropriate to use a short term prison sentence as a last resort. However, the problem of prison overcrowding had to be tackled, and he also wanted to “end the free-bed-and-board culture” in which “far too many people go to prison and sit there twiddling their thumbs” at taxpayers’ expense and to the frustration of the communities who have suffered from their behaviour. Through the Bill, he wanted to see people convicted of less serious offences given community payback orders in order to “free up our prisons to deal with the people who have to be there because they are a danger to our communities”.¹⁴⁵

192. Asked for clarification of the term “less serious offenders” and the types of crimes such offenders would have committed, the Cabinet Secretary said that ultimately that would be left to the Sentencing Council given the variable nature of common-law offences in Scotland and the need for flexibility.¹⁴⁶

Committee conclusions

193. The Committee agrees that there is a need to strike a proper balance between the imposition of short custodial sentences and effective community disposals. Additionally, the Committee agrees that there is a need to develop a range of community sentences in which the public can have confidence and which present the best chance of long-term rehabilitation of offenders. However, members were unable to agree on whether it was either necessary or desirable to create a statutory presumption against custodial sentences of six months or less in order to achieve that balance.

194. All Committee members recognise that the priority is to imprison offenders who (as the Prisons Commission said) commit offences so serious that no other form of punishment will do or who pose a threat of serious harm to the public. Committee members also recognise that those

¹⁴³ Professor Neil Hutton. Written submission to the Justice Committee.

¹⁴⁴ Scottish Consortium on Crime and Criminal Justice. Written submission to the Justice Committee.

¹⁴⁵ Scottish Parliament Justice Committee. *Official Report*, 23 June 2009, Cols 2176-7.

¹⁴⁶ Scottish Parliament Justice Committee. *Official Report*, 23 June 2009, Cols 2179-81.

who have persistently failed to respond to non-custodial disposals may also have to be imprisoned. We acknowledge that this is, to a significant extent at least, what sentencers already aim to do, and that they do not lightly send people to prison if this is unlikely to benefit either them or those affected by their offending behaviour. We accept that short prison sentences do not normally achieve much by way of rehabilitation, that while they provide respite for victims and communities, this is only for a limited period, and that high re-offending rates tend to demonstrate that they have limited effect as a deterrent. Finally, we all recognise that the Bill, although undoubtedly intended to shift sentencing behaviour, leaves the final decision in any individual case to the court, thus allowing a short-term prison sentence still to be given where the court is convinced that that is the best option in the circumstances.

195. Where Committee members do not agree is on how far short-term custodial sentences should continue to be regarded as an appropriate disposal (other than in exceptional circumstances), and on whether they are currently being overused, or inappropriately used.

196. Some members point to the weight of evidence, particularly from academics, suggesting that short sentences involve only “warehousing” of offenders and provide no real opportunity to engage them in programmes to tackle their offending behaviour or address their other problems – and indeed that imprisonment itself may make those problems worse. These members also cite Scotland’s high incarceration rate, and the re-offending statistics, in support of the view that current sentencing policy is not working.

197. However, other members question that evidence, pointing out in particular that, since the people the courts imprison are likely to be the more persistent or serious offenders, it is hardly surprising that their re-offending rates are higher than those given community disposals. These members also cite examples referred to by witnesses, where a short prison sentence has had a salutary effect in persuading an offender to change his or her behaviour, even where previous community disposals had failed to do so. They also question the assumption that short-term sentences are currently given out where better alternatives exist, and hence doubt that a statutory presumption will make any real difference.

198. At least one member of the Committee questions whether, in the context of a provision aimed at discouraging sentencers from imposing short custodial sentences, a six-month threshold is the right one to use. On this view, reducing this to (say) three months, at least initially, would focus the provision on those cases where there is the least chance of rehabilitation in prison and which are least likely to involve serious or violent offences.

199. Overall, the Committee did not agree with the proposal in the Bill to create a statutory presumption against short-term custodial sentences.¹⁴⁷

Section 18: Amendment of the Custodial Sentences and Weapons (Scotland) Act 2007

Background and proposals

200. Part 2 of the Custodial Sentences and Weapons (Scotland) Act 2007, which makes provision for the imprisonment and release of prisoners, has not yet been commenced. Section 18 of the Bill amends some of the statutory provisions in the 2007 Act relating to the release of prisoners from custody.

201. The 2007 Act makes provision for two different categories of sentence for an offence: a custody and community sentence (a sentence of imprisonment for a term of 15 days or more) and a custody-only sentence (a sentence of imprisonment for a term of less than 15 days). Where a custody and community sentence is imposed, the court must make an order specifying the custody part of the sentence. If the court intends to specify a custody part of more than one-half of the total sentence, it must state publicly its reasons for doing so.

202. The Scottish Government has expressed support for the offender management principles contained in the 2007 Act but believes that, “as enacted, the process would not work and would place an intolerable burden on the Scottish Prison Service and the Local Authorities that would undermine the core intentions of the legislation”¹⁴⁸.

203. Section 18 repeals the custody-only provisions of the 2007 Act and replaces them with new measures to be known as the short-term custody and community sentence. The current custody and community sentence provisions, as set out in the 2007 Act, are retained.

204. The Bill provides for an order-making power, subject to affirmative resolution, to designate the length of sentence that will distinguish short-term custody and community sentences from (other) custody and community sentences. The Explanatory Notes and Policy Memorandum make reference, by way of example, to a threshold set at one year, while the Financial Memorandum considers the cost implications both of that and a two-year threshold.¹⁴⁹ Short-term custody and community prisoners will be released on licence at the halfway point of their sentence, and the licence conditions must include the standard conditions in every case and supervision requirements in specified cases (prisoners released on compassionate grounds, those with extended sentences, sex offenders serving six months or more, and child offenders). Local authorities and the Scottish

¹⁴⁷ This conclusion was reached by a division on the question whether to agree with the principle of a statutory presumption against short-term custodial sentences. The Committee divided Yes 4 (Robert Brown, Angela Constance, Nigel Don, Stewart Maxwell), No 4 (Bill Aitken, Bill Butler, Cathie Craigie, Paul Martin); the question was disagreed to on the Convener’s casting vote.

¹⁴⁸ Scottish Government. (2008) *Protecting Scotland’s Communities: Fair Fast and Flexible Justice*. Available at: <http://www.scotland.gov.uk/Publications/2008/12/16132605/0>.

¹⁴⁹ Explanatory Notes, paragraph 90, Policy Memorandum, paragraph 75, Financial Memorandum, paragraph 785.

Government are required to establish joint arrangements for assessing the risks involved in the release of short-term custody and community prisoners on licence.

Evidence received

205. Mike Ewart, Chief Executive of the Scottish Prison Service, said that the 2007 Act, as enacted, would have increased the number of prisoners serving longer sentences, and he was concerned about “the inevitable impact ... on an already overcrowded prison system”. In relation to the changes now proposed, Rona Sweeney, of the SPS, added that until the SPS knew what the threshold was to be and what the risk assessments would involve, it could not assess the likely impact on resources.¹⁵⁰

206. The Association of Directors of Social Work (ADSW) said that “introducing the new custody and community licenses and extending formal supervision to all prisoners sentenced to more than 12 months will have massive implications for local authority criminal justice social work services”.¹⁵¹

207. The Sheriffs’ Association were critical of this provision, in particular the new provisions for early release on “curfew licence”—

“It hardly makes public sentencing decisions of the courts clear to the public, or enhances its confidence in the system, if the public has no idea what the time served will be and if the actual time served bears no resemblance to [the] sentence imposed in public by the court. It involves an unseen, unaccountable exercise of executive discretion in contrast to public sentencing in open court.”¹⁵²

208. The Scottish Centre for Crime and Justice Research said it had “great reservations” about implementing the 2007 Act at all, and could only consider supporting it if the threshold was set at two years – as the Scottish Prisons Commission had recommended. It noted that (according to the Financial Memorandum) the annual estimated cost of implementing the 2007 Act, as amended by the Bill, was around £45 million with a one-year threshold, but only £32 million with a two-year threshold.¹⁵³ The Centre’s concern was not simply “the enormous costs of implementation” but also the minimal returns expected, as it was aware of no research which would justify blanket pre-release risk assessment. To limit the “potentially disastrous consequences” for criminal justice services, the SCCJR urged the Parliament to drop the provisions entirely or at least raise the threshold to two years, or to implement them only after “there has been an observable trend in reduced use of prison for short sentence prisoners.”¹⁵⁴

209. According to Professor Fergus McNeill of the Scottish Consortium on Crime and Criminal Justice—

“The 2007 Act is a dreadful piece of legislation, which will have very negative consequences for the operation of the prison service and criminal justice

¹⁵⁰ Scottish Parliament Justice Committee. *Official Report, 9 June 2009*, Col 2042.

¹⁵¹ ADSW. Written submission to the Justice Committee.

¹⁵² Sheriffs’ Association. Written submission to the Justice Committee.

¹⁵³ Financial Memorandum, paragraph 785.

¹⁵⁴ SCCJR. Written submission to the Justice Committee.

social work. The money that it will cost to implement it would be far better spent on making community payback work ... and not on a peculiarly muddled and ill-considered set of release reforms.”¹⁵⁵

210. John Scott, speaking for the Consortium and for the Howard League on Penal Reform, said the provisions would make Scotland less safe because of the “waste of professional resources” that would be involved.¹⁵⁶

211. In its written submission, ACPOS said that “the good work achieved to date in relation to the deterrence of knife crime would be lost if knife crime is not separated from this legislation”. Invited to clarify this, ACPOS said it was not seeking to argue that knife crime should be treated differently from other crimes, but was trying to highlight a possible unintended consequence of the proposal for automatic early release of short-term custody and community prisoners. This, it suggested, could be seen as inconsistent with recent initiatives to combat knife crime, which included sending a message that people caught carrying a knife could expect a custodial sentence.¹⁵⁷

212. The Scottish Police Federation said that the provision for automatic early release of short-term custody and community prisoners “will not be readily understood or accepted”, since it did not take into account “the conduct and contrition of the offender whilst imprisoned”. The Federation wanted it to be a standard condition of any licence that the offender provide a home address at which he or she may be contacted by the police, and that the police should have the power to search the premises without a warrant.¹⁵⁸

213. The Cabinet Secretary emphasised that he was building on the Custodial Sentences and Weapons (Scotland) Act 2007 and the recommendations of the Scottish Prisons Commission, thus replacing a system of “arbitrary unconditional automatic early release” with a system in which the sentence is explained publicly in court and where release, when it happens, is based on conditions. He went on—

“Letting people out early is not necessarily a bad thing if they show remorse and have been dealt with, but there is something wrong with a system in which people get out after the same period of time whether they show no remorse for what they have done or whether they have recanted and reformed and will be an exemplary citizen.”¹⁵⁹

214. Philip Lamont of the Scottish Government explained that the cost of implementing the 2007 Act as amended by the Bill (estimated in the Financial Memorandum as £51.45 million) will be lower than implementing it unamended (estimated as £45.75 million if the “prescribed period” is set at one year, and £32.73 million if set at two years). These costs, according to Mr Lamont, would

¹⁵⁵ Scottish Parliament Justice Committee. *Official Report*, 19 May 2009, Cols 1896-1897.

¹⁵⁶ Scottish Parliament Justice Committee. *Official Report*, 19 May 2009, Col 1897.

¹⁵⁷ Association of Chief Police Officers in Scotland. Written submission and supplementary written submission to the Justice Committee.

¹⁵⁸ Scottish Police Federation. Written submission to the Justice Committee.

¹⁵⁹ Scottish Parliament Justice Committee. *Official Report*, 23 June 2009, Col 2179.

“require financial commitment at a future stage”, but since that would be covered by a future spending review, it would be “premature to pre-empt that outcome”.¹⁶⁰

215. The Subordinate Legislation Committee (SLC) questioned the scope of the power being given to Scottish Ministers in section 18(2) to prescribe the threshold that distinguishes short-term custody and community sentences from custody and community sentences – in particular, why the delegated power required to be drawn so widely as to enable any period at all to be substituted for the period of 15 days in the existing legislation.¹⁶¹ In its response to the SLC, the Scottish Government said that it would consider this power again and whether the scope could be narrowed by setting minimum or maximum limits.

Committee conclusions

216. The Committee has found this a particularly difficult provision to assess, because of the complex interface between the current law, the regime that would be introduced by commencing relevant provisions of the 2007 Act as it was enacted, and the version of that Act that would result from the amendments made by the Bill. We are grateful to Scottish Government officials and to SPICe for providing the Committee with additional briefing on this section at a late stage in our Stage 1 consideration.

217. We understand the general intention of the 2007 Act to move away from a system of automatic and unconditional early release to a system that allows appropriate conditions to be imposed. However, we also recognise the serious concerns that have been raised about the complexity and cost involved in implementing that Act unamended, given the number of prisoners who would be subject to supervision and assessment requirements. We therefore agree that the Bill represents some improvement on the current law, as it will result in more prisoners being subject to statutory supervision on release and fewer to automatic unconditional early release, while avoiding the more onerous requirements of the 2007 Act. We understand that the intention is to set the threshold at sentences of one or two years’ duration, and we note the significant difference in the resource implications according to which of these is chosen. We also note the Subordinate Legislation Committee’s concerns about the unlimited nature of the power delegated by this provision, and welcome the Scottish Government’s commitment (in response to that Committee) to consider whether appropriate parameters might be specified in the Bill.

Section 24: Voluntary intoxication by alcohol – effect in sentencing

Background and evidence received

218. Under section 24, courts must not consider the fact that an offender is voluntarily intoxicated by alcohol at the time of the offence as a mitigating factor in

¹⁶⁰ Scottish Government. Supplementary written submission to the Justice Committee, 29 September 2009.

¹⁶¹ Subordinate Legislation Committee. *Report on the Criminal Justice and Licensing (Scotland) Bill*, paragraphs 23-31. The SLC raised exactly similar concerns about paragraphs 10(3) and (4) of schedule 2, which make equivalent provision in relation to periods of detention for offenders aged under 21 – see paragraphs 32-35 of its Report.

sentencing. The Scottish Government considers that there “is a very strong link between alcohol and offending” but that intoxication can often be presented by the defence as “an excuse or reason for offending behaviour.”¹⁶²

219. The provision was supported by Victim Support Scotland and the Joint Faiths Advisory Board on Criminal Justice.¹⁶³ ACPOS also backed the provision, but suggested that it should be widened “to include all intoxicants, whether legitimate, prescribed or otherwise” – a suggestion backed by the Law Society of Scotland.¹⁶⁴

220. However, both the Faculty of Advocates and the Sheriffs’ Association considered section 24 unnecessary, since it was already understood in common law that intoxication is not a mitigating factor. The Faculty also suggested that the provision as drafted could lead to “unforeseen consequences”, since it was not clear whether it applied to an alcoholic who could not control their consumption and so could be regarded as involuntarily intoxicated (and for whom a defence of diminished responsibility might be available under common law).¹⁶⁵ The Sheriffs’ Association was concerned that the provision was inflexible, and would not allow intoxication to be a mitigating factor even where someone had, for example, had their drink “spiked with stronger liquor” before committing a breach of the peace. The Association suggested that the test should not just be whether someone had consumed alcohol voluntarily, but also whether they had done so “knowingly”.¹⁶⁶

221. The Lord President questioned whether the “sentencer would be allowed to take into account background circumstances such as a personal tragedy”, for example, bereavement. He conceded that it might be possible to allow mitigation by reference to the tragedy itself rather than directly by reference to the intoxication, but felt the provision “gives rise to an ambiguity that ought to be addressed”.¹⁶⁷

222. Responding to these points, the Lord Advocate acknowledged that most judges would not currently accept voluntary intoxication as a mitigating factor but said that solicitors continued to advance the argument, particularly in domestic abuse cases. She believed that—

“An important message would be sent out if we codified what is already known in our common law, which is that alcoholic intoxication is not a mitigating factor and that defendants who have imbibed alcohol will not have their sentences reduced because of that.”

223. She defended the decision to include only alcohol in the scope of the provision, on the basis that it featured far more frequently than drugs in cases that prosecutors dealt with, and was much more liable to be associated with violence.

¹⁶² Scottish Government. (2008) *Sentencing Guidelines and a Scottish Sentencing Council – Consultation and Proposals*. Available at:

<http://www.scotland.gov.uk/Resource/Doc/236809/0064977.pdf>

¹⁶³ Victim Support Scotland and the Joint Faiths Advisory Board on Criminal Justice. Written submissions to the Justice Committee.

¹⁶⁴ Association of Chief Police Officers in Scotland, Law Society of Scotland. Written submissions to the Justice Committee.

¹⁶⁵ Faculty of Advocates. Written submission to the Justice Committee.

¹⁶⁶ Sheriffs’ Association. Written submission to the Justice Committee.

¹⁶⁷ Scottish Parliament Justice Committee. *Official Report*, 12 May 2009, Col 1771.

She also argued that the provision would not prevent the underlying cause of intoxication (such as bereavement or alcoholism) being treated as a mitigating factor even if the intoxication itself could not be.¹⁶⁸

Committee conclusions

224. **The Committee fully supports the principle that voluntary intoxication by alcohol should not be regarded as a mitigating factor in sentencing, but most members are less convinced of the case for codifying this principle in statute. The evidence suggests the principle is already well understood by sentencers, and there may be a risk that a statutory provision will confuse the legal position instead of clarifying it. This is partly because of uncertainty about the meaning of “voluntary” intoxication, and about the distinction between the intoxication itself and any underlying circumstances which might properly be regarded as mitigating. It could also be inferred from the fact that the provision mentions only alcohol in the context of what is not to be regarded as a mitigating factor, that the position in respect of other forms of intoxication must be intended to be different. It would be unfortunate if one of the consequences of this well-intentioned provision was to make it easier to advance an argument for mitigation in the context of voluntary intoxication by drugs. We would therefore be grateful for further explanation from the Scottish Government about the rationale for this provision and its response to these concerns.**

PART 2 – CRIMINAL LAW

Sections 25-28: Serious organised crime

Policy objectives

225. In the Policy Memorandum, the Scottish Government explains that the provisions creating a series of new offences derive from recommendations by the Serious Organised Crime Taskforce. The objective is—

“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.”¹⁶⁹

226. The Bill proposes the creation of three new offences—

- involvement in serious organised crime (section 25);
- directing serious organised crime (section 27); and
- failure to report serious organised crime (section 28).

227. There is also to be a statutory aggravation (section 26) “where an offence can be proved to have been connected with serious organised crime.”¹⁷⁰

¹⁶⁸ Scottish Parliament Justice Committee. *Official Report*, 9 June 2009, Col 2060.

¹⁶⁹ Policy Memorandum, paragraph 107.

¹⁷⁰ Policy Memorandum, paragraph 115.

228. A number of witnesses raised concerns about the interaction or overlap with the existing common law, the definitions and other aspects of these offences.

Interaction with the common law

229. The Judges of the High Court of Justiciary observed in their written submission that “a person who agrees to become involved in serious organised crime under our existing law commits the offence of conspiracy to commit a crime.”¹⁷¹ They sought further explanation of what section 25 would achieve which is not already provided for by the existing common law.

230. The SCCJR also questioned this apparent overlap with the common law—

“It is not clear whether these new sections really add anything to existing offences such as conspiracy or incitement, or simply constitute a rather muddy overlap and ‘legislative creep’.”¹⁷²

231. Responding to the point about overlap, the Solicitor General accepted that the new statutory provision would duplicate the common law to some extent – as was already the case with, for example, vandalism and malicious mischief – but argued that specific statutory provision could provide a useful framework for prosecutors and investigators seeking to address serious organised crime.¹⁷³

232. However, the main argument advanced in support of the new provisions was that they would make it easier to secure a conviction than the existing law of conspiracy. According to Gordon Meldrum, Director General of the SCDEA—

“The current criminal law does not completely fail us – we can use the charge of conspiracy – but it is difficult to prove that such individuals have been involved in a specific offence, whereas the provisions in the Bill will create the specific offences of being involved in and directing serious organised crime.”

233. Similarly, the Lord Advocate accepted that “with creativity” the common law could be used to prosecute most of the behaviour aimed at by the new provisions, but section 25 in particular takes matters “a stage back” compared with the existing law on conspiracy—

“We are talking about the stage of preparation and the stage of perpetration. In many cases, we have evidence that does not quite show that the person was at the actual conspiracy stage; rather, it relates to their becoming involved in a conspiracy.”¹⁷⁴

234. The Cabinet Secretary backed this up by saying—

“The Crown has made the point that proving conspiracy can be difficult. It is therefore appropriate that we have an additional statutory basis that allows us, while keeping the appropriate balance in the scales of justice, to ensure that it is not as difficult to convict someone of involvement in serious

¹⁷¹ Judges of the High Court of Justiciary. Written submission to the Justice Committee.

¹⁷² Scottish Centre for Crime and Justice Research. Written submission to the Justice Committee.

¹⁷³ Scottish Parliament Justice Committee. *Official Report*, 9 June 2009, Col 2064.

¹⁷⁴ Scottish Parliament Justice Committee. *Official Report*, 9 June 2009, Col 2062.

organised crime as it is to convict them of conspiracy, and to send a message that society will take serious organised crime extremely seriously.”¹⁷⁵

235. Later in the same evidence session, he added that—

“The job of our Government is to ensure that the appropriate legislative framework is put in place to allow the police and the prosecution service to do their job. They have told us that they do not believe that the current law of conspiracy is appropriate.”¹⁷⁶

Definition of serious organised crime

236. Section 25 of the Bill defines “serious organised crime” as—

“crime involving two or more persons acting together for the principal purpose of committing or conspiring to commit a serious offence or a series of serious offences”

and then defines “serious offence” as

“an indictable offence—

(a) committed with the intention of securing a material benefit for any person, or

(b) which is an act of serious violence committed with the intention of securing such a benefit in the future.”¹⁷⁷

237. The Committee notes that the definition of “serious offence” covers all indictable offences aimed at securing a material benefit (for instance any common law theft or fraud) rather than being restricted to offences involving serious violence, drugs trafficking and firearms, for example. The Committee also notes that the definition of “organised” as involving two or more people conspiring together would cover much ordinary criminal activity.

238. The Scottish Crime and Drug Enforcement Agency (SCDEA), the body responsible for tackling serious organised crime in Scotland, welcomed the new offences but expressed a number of concerns about the definitions and the difficulties of securing evidence in order to prove the offences.¹⁷⁸ The Agency said that it would be preferable if the term “serious offence” could be applied to any crime capable of being indicted which would enable instances of minor crime, motivated by serious organised crime, to be dealt with more effectively.”¹⁷⁹

239. The Scottish Centre for Crime and Justice Research (SCCJR) was one of a number of witnesses concerned about the potential breadth of the definition of serious organised crime. It observed that the definition “sets a very low threshold

¹⁷⁵ Scottish Parliament Justice Committee. *Official Report, 23 June 2009*, Cols 2195-6.

¹⁷⁶ Scottish Parliament Justice Committee. *Official Report, 23 June 2009*, Col 2200.

¹⁷⁷ Criminal Justice and Licensing (Scotland) Bill, section 25(2).

¹⁷⁸ Scottish Crime and Drug Enforcement Agency. Written submission to the Justice Committee.

¹⁷⁹ Scottish Crime and Drug Enforcement Agency. Written submission to the Justice Committee.

for what might constitute serious organised crime” and that “much of what would be captured by the definition given here is ‘crime that is comparatively organised’ not serious organised crime.”¹⁸⁰

240. The SCCJR also noted that there is no standard UK definition of organised crime, although there are various informal working definitions in use. It argued, therefore, that—

“Whilst such definitions may be appropriate in the context of policing, it is not appropriate for a statutory definition. Given the lack of a standard definition it seems inadvisable to frame legislation that introduces one that is so over-inclusive.”¹⁸¹

241. In their written submission, the Judges of the High Court of Justiciary said that these provisions risked including a wider range of offenders than is appropriate—

“If this is correct, we doubt that it is a principled approach in the criminal law simply to leave it to the discretion of the prosecuting authorities when to invoke provisions which are themselves unduly wide in their scope.”¹⁸²

242. Ian Duguid QC, representing the Faculty of Advocates, also questioned the scope of the definition—

“If the Bill is trying to pursue persons who have a remote connection with serious organised crime, that is a perfectly laudable objective. That aspect of the provisions is well founded; the issue is whether enough care has been taken in the drafting and whether the Bill will create more difficulties than it is trying to solve. Who is envisaged to be ‘involved in serious organised crime’? Is it every person across the board?”¹⁸³

243. Using an extreme example to illustrate the same point, the Sheriffs’ Association pointed out that “if two people agree to steal a meat pie from a shop to give it to a starving beggar, they commit the offence of being involved in serious organised crime.”¹⁸⁴

244. However, in oral evidence, the Lord Advocate refuted the suggestion that such a crime would be prosecuted on indictment—

“Of course, if two people conspire to steal a meat pie, I can – theoretically – indict them for that. Currently, that is under the common law. However, I would not do so, because if I did, I would receive criticism – and not delicate criticism – from the judiciary and others. I would be seen as having lost all common sense.”¹⁸⁵

¹⁸⁰ Scottish Centre for Crime and Justice Research. Written submission to the Justice Committee.

¹⁸¹ Scottish Centre for Crime and Justice Research. Written submission to the Justice Committee.

¹⁸² Judges of the High Court of Justiciary. Written submission to the Justice Committee.

¹⁸³ Scottish Parliament Justice Committee. *Official Report*, 2 June 2009, Col 1982.

¹⁸⁴ Sheriffs’ Association. Written submission to the Justice Committee.

¹⁸⁵ Scottish Parliament Justice Committee. *Official Report*, 9 June 2009, Col 2064.

245. The Cabinet Secretary for Justice re-emphasised the point—

“The Crown will not libel such matters on a whim or fancy. Indeed, if any such matter were so libelled, I would expect our judiciary to treat the charge with the contempt that it deserved by dismissing it fairly summarily.”¹⁸⁶

246. The Lord Advocate explained to the Committee why she considered that a wide definition of serious organised crime was appropriate—

“With the jurisprudence of the European Convention on Human Rights, particularly Article 7, there is a drive towards greater certainty about what constitutes a crime ... The benefit of having a wider definition is that it gives us the capacity to indict immediately, without having to wait for legislation, when an innovative new business is created that should clearly be struck at in the context of serious organised crime, as opposed to the simple commission of fraud. Even emergency legislation can miss that opportunity.”¹⁸⁷

247. Chief Constable Stephen House, representing ACPOS, also argued against tightening the definition—

“If we tighten the definition too much we will miss issues and new crimes. Criminals might even exploit the definition to ensure that activity does not fall within the definition of ‘serious organised crime’ and therefore cannot attract the powers that we are talking about. Definitions have been exploited in that way in the past.”¹⁸⁸

248. The Cabinet Secretary said he was willing to consider narrowing down the scope of the provision to concentrate more clearly on serious organised crime, but pointed out that “the fail-safe of judicial interpretation” should ensure that the provisions are not used inappropriately.¹⁸⁹

Serious violence

249. In addition to these concerns that the definitions are too widely drawn, there was also a suggestion that including the term “serious violence” in the definition of serious offence risked being too restrictive. According to the Scottish Crime and Drugs Enforcement Agency (SCDEA)—

“It is unclear what would constitute an act of serious violence ... those involved in organised crime may achieve their objectives through fear and intimidation without necessarily resorting to serious violence, albeit it is acknowledged that violence may well occur. The use of the term appears to be unnecessarily restrictive and should be widened to include any behaviour which is used to further the activity of organised crime.”¹⁹⁰

250. Expanding on the point in oral evidence, Gordon Meldrum argued—

¹⁸⁶ Scottish Parliament Justice Committee. *Official Report*, 23 June 2009, Col 2197.

¹⁸⁷ Scottish Parliament Justice Committee. *Official Report*, 9 June 2009, Col 2065.

¹⁸⁸ Scottish Parliament Justice Committee. *Official Report*, 26 May 2009, Col 1906.

¹⁸⁹ Scottish Parliament Justice Committee. *Official Report*, 23 June 2009, Col 2197.

¹⁹⁰ Scottish Crime and Drug Enforcement Agency. Written submission to the Justice Committee.

“In witness statements or through intelligence, we pick up on the fact that serious and organised crime groups operate through a culture of fear, intimidation and threats. On occasions, there might not be a physical act of violence but there will be threats, intimidation and all sorts of other non-violent abuse. That is how those groups manipulate people from all walks of life in order to get their own way.”¹⁹¹

251. In response, the Lord Advocate explained that—

“Threats and intimidation are indictable offences; the outcome depends on the situation in which they take place. I could indict a threat or extortion in the High Court—indeed, we have done so.”¹⁹²

Offences aggravated by connection with serious organised crime

252. In the Policy Memorandum, the Scottish Government sets out its view 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.”¹⁹³

253. Accordingly, under the Bill, where a criminal offence has been committed with the underlying purpose or motivation of committing or conspiring to commit serious organised crime, this could be treated as an aggravating factor and the court would have the discretion to adjust the sentence accordingly.¹⁹⁴

254. The Sheriffs’ Association, however, questioned this reasoning—

“It is not always appreciated that courts can take aggravating circumstances into account in sentencing without there having to be a statutory aggravation as in [section] 26. There may be a desire for statutory aggravations for statistical purposes, but they are not necessary.”¹⁹⁵

255. Nevertheless, the Lord Advocate said that she believed the new provisions would be “very useful”—

“I hope that, in addition to dealing with the crime itself, the courts will clearly show and reflect the seriousness with which engagement in serious organised crime, intimidation, the exploitation of human beings for human trafficking or sexual purposes, or engagement in drug trafficking are treated in Scotland by reference to the aggravation and by having the particular offences available.”¹⁹⁶

256. The Scottish Centre for Crime and Justice Research (SCCJR) accepted that this may be an appropriate aggravation to recognise in law but considered that the

¹⁹¹ Scottish Parliament Justice Committee. *Official Report*, 26 May 2009, Col 1907.

¹⁹² Scottish Parliament Justice Committee. *Official Report*, 9 June 2009, Col 2067.

¹⁹³ Policy Memorandum, paragraph 115.

¹⁹⁴ Policy Memorandum, paragraph 115.

¹⁹⁵ Sheriffs’ Association. Written submission to the Justice Committee.

¹⁹⁶ Scottish Parliament Justice Committee. *Official Report*, 9 June 2009, Col 2063.

broad definition of serious organised crime meant that the aggravation could be “too easily applied or proved”. It also questioned why, under section 26(4), the normal requirement for corroborating evidence is disapplied, so that evidence from a single source is sufficient to prove aggravation by a connection with serious organised crime—

“Given the potential severity of the penalty it is not clear why this requirement is being relaxed, or that the relaxation is justified.”¹⁹⁷

Failure to report serious organised crime

257. The Policy Memorandum explains the rationale for section 28 of the Bill as follows—

“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.”¹⁹⁸

258. This offence will carry a maximum penalty of 5 years imprisonment, an unlimited fine or both for conviction on indictment and 12 months imprisonment, a fine not exceeding the statutory maximum or both for summary conviction.¹⁹⁹

259. In oral evidence, Gordon Meldrum, Director of the SCDEA, explained that the provision was designed to catch individuals whom he described as consultants and facilitators—

“They oil the wheels of organised crime but do not necessarily get close to the front-end criminality – they might be involved in the banking profession, the legal profession, the accounting profession, the haulage industry and so on. ... Often, they have a knowledge of the business of serious organised crime, if not necessarily the daily transaction of the criminality. The fact that they fail to report that knowledge often inhibits us. Having an offence around failure to report knowledge of serious and organised crime would be helpful with regard to those people.”²⁰⁰

260. The Solicitor General gave the example of an estate agent who factors a number of flats for a client and then notices they are paying huge monthly amounts for electricity: “That would tip off anyone with any semblance of common sense ... that the flats were being used as cannabis farms”. Such a person might be tempted not to report their suspicions because of the large fees they are getting – and while this would not be covered by existing money-laundering legislation, the Bill would, he argued, provide a useful tool to address the situation.²⁰¹

¹⁹⁷ Scottish Centre for Crime and Justice Research. Written submission to the Justice Committee.

¹⁹⁸ Policy Memorandum, paragraph 117.

¹⁹⁹ Policy Memorandum, paragraph 119.

²⁰⁰ Scottish Parliament Justice Committee. *Official Report*, 26 May 2009, Col 1908.

²⁰¹ Scottish Parliament Justice Committee, *Official Report*, 9 June 2009, Col 2070.

261. But the Sheriffs' Association expressed concern about the terms of the offence—

“Having regard to the wide definition, the offence of failure to report serious organised crime under [section] 28 is a frightening prospect. It is of some concern that a person may unwittingly fall foul of this provision.”²⁰²

262. The Judges of the High Court of Justiciary also expressed “considerable concerns as to how these provisions will work”, referring specifically to—

- the level of suspicion needed to render criminal any failure to disclose such a suspicion;
- the implications for this offence of the width of the definitions of “serious organised crime” and “serious offence” in section 25; and
- the breadth and lack of definition of some of the concepts used in defining this offence, such as “material benefit” in subsection (2) and “reasonable excuse” in subsection (4).²⁰³

263. Sir Gerald Gordon expressed similar reservations—

“As it stands it could require children to report their parents just because the latter pay their school fees. The whole idea of making it an offence not to report a crime has its problems, but this section (which does not define ‘material benefit’) goes too far. It could perhaps be cured, and could certainly be improved, by some limitation on ‘material benefit’. If it is indeed intended only to apply to a direct share in the proceeds of the crime, such an amendment might help to avoid the apparent creation of a society which encourages denunciation. As it stands it has totalitarian overtones.”²⁰⁴

264. On a similar theme, the Law Society of Scotland raised the issue of compatibility with the European Convention on Human Rights. It drew to the Committee’s attention a German case where the European court held that there had been a breach of Article 8 (respect for privacy and family life)—

“In this case, which involved the unlawful search of a lawyer’s office in Germany to find documents revealing the identity of a supposed associate of the lawyer, the court held that the search was a violation of Article 8 and commented that the notion of “private life” should not be taken to exclude activities of a professional or business nature. The Society questions whether the provisions of section 28 comply with Article 8.”²⁰⁵

265. In oral evidence, Alan McCreadie of the Law Society concluded—

²⁰² Sheriffs' Association. Written submission to the Justice Committee.

²⁰³ Judges of the High Court of Justiciary. Written submission to the Justice Committee.

²⁰⁴ Sir Gerald Gordon. Written submission to the Justice Committee.

²⁰⁵ The Law Society of Scotland. Written submission to the Justice Committee.

“Perhaps section 28 is too widely drafted and has unintended consequences. It must be properly considered who the provision is intended to capture.”²⁰⁶

266. Other witnesses raised more specific concerns. Her Majesty’s Revenue and Customs (HMRC) argued that, since the offence was defined in terms of failing to report knowledge or suspicion to “a constable” it would be appropriate for this to cover relevant officers of HMRC—

“We think it should, as the obvious route for reporting tax-related offending in particular would be to HMRC directly. It would seem to us to be wrong in such cases for a person to be criminalised for reporting to HMRC instead of the police.”²⁰⁷

267. The SCDEA expressed concern that professional legal advisers employed by an organised crime group could escape prosecution under the provisions of section 28, since “by virtue of the defence afforded under subsections (4) and/or (5) a legal adviser could continuously evade prosecution.”²⁰⁸

268. However, according to the Lord Advocate, the protection provided for legal privilege “should not be used as a cover by solicitors or other professionals who would facilitate crime”. For her, the new offence was important—

“because a lot of organised crime can take place only with the acquiescence of certain professionals, be they estate agents, solicitors or others, who allow activity to take place through what are ostensibly legal and legitimate activities. We must ensure that we tackle that route. ... I am not concerned that the provision is too widely drawn, but if that is seen to be the case, we can consider whether amendments might provide reassurance.”²⁰⁹

269. Chief Constable Stephen House, ACPOS, argued that the new offence was necessary—

“simply because we have to get at serious and organised crime in any way that we can. The people who choose to become involved in it make a conscious choice. Therefore, they are ready for it and are getting into a defensible position. ... In section 28, we are saying that, if such people have suspicions or knowledge, they need to step forward and, if they do not, they commit an offence.”²¹⁰

270. In a joint supplementary submission, SCDEA and ACPOS gave several examples of how the new provisions could make a difference to the prosecution of serious organised crime, including the following—

“During a recent investigation it became apparent that a number of persons were identified as having knowledge of the business of a serious organised crime group. There was however insufficient evidence to charge them with

²⁰⁶ Scottish Parliament Justice Committee. *Official Report, 2 June 2009*, Col 1985.

²⁰⁷ Her Majesty’s Revenue and Customs. Written submission to the Justice Committee.

²⁰⁸ Scottish Crime and Drug Enforcement Agency. Written submission to the Justice Committee.

²⁰⁹ Scottish Parliament Justice Committee. *Official Report, 9 June 2009*, Col 2066.

²¹⁰ Scottish Parliament Justice Committee. *Official Report, 26 May 2009*, Col 1910.

offences in connection with the primary activity of the group. Had the provisions of section 28 been available then they most certainly would have been charged under those provisions. As it was, whilst a number were charged with other offences, some of those involved could not be charged and therefore evaded prosecution.”²¹¹

271. The Cabinet Secretary for Justice acknowledged that the offence of failure to report serious organised crime was targeted widely, but said it was “about allowing discretion and judgment to be used by the police, the SCDEA, HMRC and, ultimately, the Crown and the courts”, and was “a backstop, to an extent”. He went on—

“It is not so much the person whom we might ask, ‘Where did you think the money was coming from?’ whom we are targeting; we are targeting the people whom we know to be working as the scribes or authors of inventive schemes to take money that has been bled from our community to make themselves ever richer.”²¹²

Committee conclusions

272. We strongly support the underlying intention of these sections of the Bill to provide additional tools for the police and the courts to tackle those involved in serious organised crime. We are less certain, however, that the Bill gets the detail right.

273. While there was contradictory evidence and most members are not entirely clear on what sections 25 and 27 add to the existing common law on conspiracy and incitement, and while we have some concern that the key terms of “involvement” and “direction” are insufficiently clear, on balance we support the creation of these new offences. We also support the new aggravation provided for in section 26, although we are not wholly convinced of the case for removing the normal requirement for corroborating evidence. We would therefore welcome a clearer justification for this element of the provision from Ministers.

274. We have considered carefully the evidence we have received about the definitions underpinning these new offences, namely the definitions of “serious organised crime” and “serious offence”. The main concern is that they are too widely drawn, and in this context we note that there is some dispute about whether offences need to be widely drawn in statute to ensure that the courts can apply them as intended. The Lord Advocate advanced this view, suggesting that ECHR case-law has made it increasingly difficult for the courts to “expand” on a narrowly-drawn statutory definition in deciding what constitutes an offence. However, the Committee’s criminal justice adviser (Professor Peter Duff) has suggested that the European Court of Human Rights extends a considerable “margin of appreciation” to domestic courts, and that if the serious organised crime offences were more tightly defined, the Court “would grant the Scottish courts considerable leeway in interpreting the legislation creatively to extend to all the types of

²¹¹ ACPOS. Supplementary written submission to the Justice Committee.

²¹² Scottish Parliament Justice Committee. *Official Report*, 23 June 2009, Col 2199.

mischievous it was intended to cover". Accordingly, we invite the Scottish Government to re-examine the extent to which it may be possible to tighten the definitions in the light of the evidence we have received.

275. Of the provisions on serious organised crime, the one that has given us most difficulty is the section 28 offence of failure to report serious organised crime. It would clearly aid the fight against serious organised crime if people who come into contact with it, even quite innocently or inadvertently, were more prepared to report their suspicions to the police – but it is much less clear that a criminal sanction for not doing so is a fair or indeed effective way of encouraging this. People may be reluctant to report suspicions to the police for quite understandable reasons.

276. We also think more allowance should be made for the nature of a person's role if they are to be held liable for not reporting suspicions arising from information gained in the course of their business or employment. For example, if unusually large amounts of cash are banked by a small business and this prompts suspicion among bank staff, it is one thing to hold liable for not reporting this a senior manager or trained professional, but another to hold liable a junior cashier. Similar concerns may arise about information gained through a "close personal relationships" from which a "material benefit" is derived, as this could apply to the teenage child of a gangster who has begun to understand where the family income comes from.

277. While we do not agree with Sir Gerald Gordon that section 28 has "totalitarian overtones", we do agree with his view that the provision could certainly be improved. For the time being, we invite the Scottish Government either to provide a better justification for this provision, or to bring forward amendments that will address the concerns raised.

Section 34: Extreme pornography

278. Section 34 of the Bill inserts into the Civic Government (Scotland) Act 1982 new provisions to criminalise the possession of obscene pornographic images which explicitly and realistically depict various "extreme acts".

279. The policy objective is to "help ensure the public are protected from exposure to extreme pornography that depicts horrific images of violence".²¹³ The maximum penalty for the new offence will be three years imprisonment or a fine or both.²¹⁴

280. The Policy Memorandum explains that it is already illegal to publish, sell or distribute the obscene material that would be covered by this new offence. Section 34(1) increases the maximum penalty for these activities from three to five years "to emphasise the seriousness attached to distribution of this type of material".²¹⁵

²¹³ Policy Memorandum, paragraph 153.

²¹⁴ Criminal Justice and Licensing (Scotland) Bill, section 34(2) inserting section 51A(8)(b)

²¹⁵ Policy Memorandum, paragraph 158.

281. The new offence is similar to that in section 63 of the Criminal Justice and Immigration Act 2008, which applies in the rest of the UK. The proposed Scottish offence goes further, however, as—

“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).”²¹⁶

282. Provisions to establish a category of excluded images and defences to a charge of possession of an extreme pornographic image are also included within section 34.

283. Most of those who commented on this section supported the creation of an offence of possessing extreme pornography, although some argued that there is no evidence that pornography increases sexual offending and opposed these provisions as an unjustifiable intrusion into the private lives of citizens.²¹⁷

Definition of extreme pornography

284. A number of concerns were expressed about the definition of the new offence, either arguing that it is too wide or that it should be extended in various directions.

285. In his written submission, James Chalmers of Edinburgh University School of Law noted that the provisions in the Bill go significantly beyond the definition canvassed in a consultation exercise carried out by the Scottish Executive and Home Office in 2005 and subsequently implemented for the rest of the UK in the Criminal Justice and Immigration Act 2008.²¹⁸ He noted that the Policy Memorandum says only that this definition was “insufficiently broad” without giving any further explanation—

“The Policy Memorandum observes that the English legislation does not cover rape *per se*, but this is hardly an accident of drafting: there was a clear desire to limit the legislation to extremely serious cases.”²¹⁹

286. Mr Chalmers argued that the Scottish Government had “at no stage explained its rationale for criminalising such possession. It can hardly be the simple fact that the activity depicted is criminal: murder is regularly depicted on terrestrial television without objection.”²²⁰

287. On the other hand, several respondents expressly supported the use of the wider definition in the Bill.²²¹

288. Ian Duguid QC, representing the Faculty of Advocates, expressed strong support for an offence of possessing extreme adult pornography—

²¹⁶ Policy Memorandum, paragraph 165.

²¹⁷ Allan Balsillie; Consenting Adult Action Network. Written submissions to the Justice Committee.

²¹⁸ James Chalmers. Written submission to the Justice Committee.

²¹⁹ James Chalmers. Written submission to the Justice Committee.

²²⁰ James Chalmers. Written submission to the Justice Committee.

²²¹ Engender; Zero Tolerance; Glasgow City Council. Written submissions to the Justice Committee.

“It is only proper that the law deal with such images, including computer-generated images. The difficulty that I can envisage concerns policing the internet, but I have no difficulty with the full weight of the law being applied when a fruitful investigation is undertaken that reveals images of that type. If the law requires to be amended as is proposed so that it reflects the public’s attitude, that is perfectly reasonable as far as I am concerned.”²²²

289. In its written submission, the Crown Office explained how it would approach enforcement of the new offence—

“Although the offence is broad in its terms and allows for a wide latitude of discretion in determining what amounts to a prohibited image, careful consideration will be given, if it is enacted, to the development of clear guidance for police and prosecutors to ensure that it is enforced consistently and fairly.”²²³

290. In oral evidence, the Lord Advocate was asked whether the new offence was drawn widely enough. She commented—

“We already have the Civic Government (Scotland) Act 1982, which includes the wider definition of, or the fundamental platform of, obscenity. ... The difficulty in respect of pornography is that we come up against the ECHR rights of freedom of expression and the article 8 rights to privacy in the context of sexual activity. It is important to derive some certainty in that area in order to show a balance – to show not only that what is being done in engaging article 8 is proportionate, but that it has a degree of certainty in that area of criminality.”²²⁴

Definition of obscene

291. Several respondents questioned whether the word obscene should form part of the definition. For example, the Women’s Support Project argued that—

“the inclusion of ‘obscene’ in the criteria for extreme pornography dilutes the focus of the new proposals, retains a ‘moral’ judgement and suggests that the intention behind the proposals is to prevent depravity or corruption. The WSP believes that the Scottish Government should not rely on the 1982 Act for a definition of obscenity but develop a definition based on an understanding of the broad cultural harm to which pornography contributes.”²²⁵

292. Other respondents also argued for a definition focused on “cultural harm”.²²⁶ Professor Clare McGlynn and Dr Erika Rackley, Durham Law School, offered a justification for this approach—

²²² Scottish Parliament Justice Committee. *Official Report, 2 June 2009*, Cols 1985-6.

²²³ Crown Office and Procurator Fiscal Service. Written submission to the Justice Committee.

²²⁴ Scottish Parliament Justice Committee. *Official Report, 9 June 2009*, Cols 2080-1.

²²⁵ Women’s Support Project. Written submission to the Justice Committee.

²²⁶ Engender; Women’s Support Project; Professor Clare McGlynn and Dr Erika Rackley; Violence Against Women Strategy Multi-Agency Working Group. Written submissions to the Justice Committee.

“Legislative action against extreme pornography is justified because of the ‘cultural harm’ of such material, by which we mean that the existence and use of extreme pornography contributes to a society which fails to take sexual violence against women seriously.”

293. Professor McGlynn and Dr Rackley urged the Committee to reconsider the use of the language and concept of “obscenity”, partly because “the definition of ‘obscene’ is vague and opaque” and leads to “a great level of discretion and lack of clarity”. In addition, the term—

“has been used to cover the depiction of activities which are not in themselves unlawful, yet may be viewed by some as morally wrong or disgusting (such as images of coprophilia). The criminal law should not be used to proscribe the depiction or viewing of acts which are not unlawful in themselves to carry out.”

294. However, they also argued that the use of the term “obscene” alone was preferable to the “exceptionally vague and undefined reference in the English provisions to material which is ‘grossly offensive, disgusting or otherwise of an obscene character’ [section 63(6) of the Criminal Justice and Immigration Act 2008]”.²²⁷

295. For ACPOS, the problem was that while “pornographic” and “extreme” were defined in the Bill, “obscene” was not, and it suggested it could be defined as “abhorrent to morality or virtue; specifically designed and intended to incite lust or depravity”.²²⁸

296. The Committee notes the evidence presented regarding the inclusion of the term “obscene” as part of the definition of extreme pornography. The Committee understands that the Civic Government (Scotland) Act 1982 already includes reference to obscene material but notes that the word obscene is not defined in that Act.

Definition of extreme image

297. The Bill defines an image as extreme “if it depicts, in an explicit and realistic way any of the following—

- (a) an act which takes or threatens a person’s life,
- (b) an act which results, or is likely to result, in a person’s severe injury,
- (c) rape or other non-consensual penetrative sexual activity,
- (d) sexual activity involving (directly or indirectly) a human corpse,
- (e) an act, which involves sexual activity between a person and an animal (or the carcase of an animal).²²⁹

²²⁷ Professor Clare McGlynn and Dr Erika Rackley. Written submission to the Justice Committee.

²²⁸ ACPOS. Supplementary written submission to the Justice Committee.

²²⁹ Criminal Justice and Licensing (Scotland) Bill, section 34(2).

298. Some respondents, including the Zero Tolerance Charitable Trust and the Violence Against Women Strategy Multi-Agency Working Group, suggested that the definition of an extreme image set out at (b) above should be changed from an act which is “likely” to result in severe injury to “threatens” to cause this result. They argued that this would increase the scope to cover acts of rape which could be said to threaten severe injury, but are not likely actually to result in severe injury.²³⁰

299. The SCDEA suggested there might be “practical difficulties” with the definition of an extreme image—

“The use of the terminology ‘depicts, in an explicit and realistic way’ would seem to include all images where such acts are depicted but are subsequently shown to have been staged or acted out. For example, a realistic depiction of a rape or sexual murder, which is undoubtedly pornographic but where the ‘victim’ is shown to have suffered no harm and to have been a willing participant in actions depicted, would appear to be included in the definition.”²³¹

300. Subsequently, in a joint submission with SCDEA, ACPOS suggested that a better approach to defining extreme image could be to replace the list of specified acts with a more general definition that would capture “all images of illegal acts committed with a sexual motivation (subject to the exclusions currently outlined within the Bill)”²³².

Computer-generated images

301. Several respondents suggested that non-photographic representations of extreme acts should be covered, in particular computer generated images of the sort found in virtual reality games.²³³ Rape Crisis Scotland explained the basis for its concern about this issue—

“We believe that it is a missed opportunity to not include non-photographic representations of extreme acts in the Bill. This means that the provision in the Bill will not cover depictions of extreme pornography on virtual worlds such as Second Life or games online or other digital platforms, where the pornography is violent, extreme and interactive, but where the images are not photographic. Similarly, we would like to emphasis that there is still a need to enact similar legislation in relation to child pornography, as proposed by the Scottish Executive in early 2007.”²³⁴

302. Tom Roberts, representing Children 1st, commented on the effect such images may have on children—

²³⁰ Zero Tolerance Charitable Trust; Violence Against Women Strategy Multi-Agency Working Group. Written submissions to the Justice Committee.

²³¹ Scottish Crime and Drug Enforcement Agency. Written submission to the Justice Committee.

²³² ACPOS. Supplementary written submission to the Justice Committee.

²³³ Violence Against Women Strategy Multi-Agency Working Group; Rape Crisis Scotland; Zero Tolerance; Scottish Centre for Crime and Justice Research. Written submissions to the Justice Committee.

²³⁴ Rape Crisis Scotland. Written submission to the Justice Committee.

“Given that computer-generated images can be used to groom children by suggesting to them that something that happens on their computer must be acceptable, the distribution of such images can cause harm or distress to children and can be just as bad as the other type of material that circulates on the internet. We need to ensure that our laws can deal with that appropriately.”²³⁵

303. ACPOS considered this issue in a supplementary written submission—

“The use of the phrase ‘in an explicit and realistic way’ is worthy of debate when considering the definition of ‘extreme’ in respect of cartoon images, etc. It may be argued that cartoon (or other) images with gross distortions are not ‘realistic’. However these may well portray extreme pornographic images which are clearly understood.”²³⁶

304. ACPOS suggested that it may be more appropriate to address the action rather than the realistic portrayal of the image, for example by referring to any image that “depicts in an explicit manner a representation of an event of a sexual and pornographic nature”.²³⁷

305. But for James Chalmers, it was “clear” that section 34 already covers computer generated images—

“The only limiting factor is that an image must be ‘realistic’ to fall within the scope of the provisions. The Bill is not limited to particular *types* of image. In this respect, it is rather wider than the offence of possessing indecent photographs of children, which is restricted to ‘photographs or pseudo-photographs’, including photographs comprised in films. A ‘pseudo-photograph’ is ‘an image, whether produced by computer-graphics or otherwise howsoever, which appears to be a photograph’ [Civic Government (Scotland) Act 1982, sections 52 and 52A].”²³⁸

Incest

306. A number of organisations argued in favour of extending the definition of “extreme pornography” to cover incest.²³⁹ Rape Crisis Scotland argued that the provisions in the Bill would not necessarily cover pornography which glorifies incest, unless it is clear that the woman depicted is not old enough to consent—

“We believe serious consideration must be given to extending the definition of extreme to include depictions of incest (which is in itself an illegal activity) to ensure these types of materials are covered by the legislation.”²⁴⁰

²³⁵ Scottish Parliament Justice Committee. *Official Report, 26 May 2009*, Col 1959.

²³⁶ ACPOS. Supplementary written submission to the Justice Committee.

²³⁷ ACPOS. Supplementary written submission to the Justice Committee.

²³⁸ James Chalmers. Supplementary written submission to the Justice Committee.

²³⁹ Violence Against Women Strategy Multi-Agency Working Group; Rape Crisis Scotland; Zero Tolerance Charitable Trust. Written submissions to the Justice Committee.

²⁴⁰ Rape Crisis Scotland. Written submission to the Justice Committee.

Possession

307. Various questions about the definition of “possession” were raised by respondents to the Committee’s call for evidence.

308. The SCCJR argued that for reasons of clarity, it would be better if the provisions were to clearly define the meaning of possession—

“Since, as is acknowledged in the Policy Memorandum, this is aimed at material produced and distributed in electronic form, it is important to be specific about what amounts to possession in these circumstances. Viewing an image online means that it is downloaded and (usually) stored on the hard drive of the computer of the viewer. Does possession extend to all images cached on the computer hard-drive?”²⁴¹

309. The National Gender-based Violence Programme Team, part of the Healthcare, Strategy and Policy Directorate, Scottish Government, submitted that there was a need to clarify whether possession would cover repeated viewings of extreme pornography, whether or not the material was actually downloaded.²⁴²

310. According to Professor McGlynn and Dr Rackley—

“The concept of possession is key to this offence. It is not defined in the Bill (nor in the English provisions). This is a serious omission. We suggest the legislation include a definition of possession to clarify exactly what will be covered.”²⁴³

311. However, ACPOS and the SCDEA said they were “content that existing legislation and case law would provide sufficient definition around the term ‘possession’.”²⁴⁴

Excluded images and defences

312. Under the proposed section 51B of the 1982 Act, images that would otherwise qualify as extreme pornography are excluded from the scope of the offence (under proposed section 51A) if they are from a “classified work” – which is defined as a video work which has been classified by a “designated authority” such as the British Board of Film Classification (BBFC). In addition, section 51C provides a series of defences to a charge of possession of an extreme pornographic image, including a defence for those who directly participated in the act depicted.

313. The Consenting Adult Action Network, which opposes making possession of extreme pornography a criminal offence, questioned whether the provision for “excluded images” was appropriate—

“If the material in question causes demonstrable harm, then it is totally utterly irresponsible on the part of government to insert the BBFC exemption – and

²⁴¹ Scottish Centre for Crime and Justice Research. Written submission to the Justice Committee.

²⁴² National Gender-based Violence Programme Team, Scottish Government. Written submission to the Justice Committee.

²⁴³ Professor Clare McGlynn and Dr Erika Rackley. Written submission to the Justice Committee.

²⁴⁴ ACPOS. Supplementary written submission to the Justice Committee.

suggests a bowing to commercial (film) pressure in preference to a genuine desire to protect members of society. Further, would not most BBFC material fail the 'realistic' or 'pornographic' test once it is known that the material is from a film? There is no reason for this section to be in there."²⁴⁵

314. The Judges of the High Court of Justiciary also questioned the provisions regarding excluded images and the defence of direct participation—

"We question the policy of allowing a designated body to exclude from the scope of the criminal law an image which meets the definition of extreme pornographic image. Why should such a body, in the context of criminal law, decide that such material, the possession of which would otherwise be criminal, is acceptable as a part of or as being in its entirety a work of art?

"We are also at a loss to understand the defence in proposed section 51C of the 1982 Act protecting the persons who directly participated in the act depicted. If the depiction is unacceptable as amounting to extreme pornography, we do not see why the participant who retains the material for private use should have the defences available in subsection (4) of section 51C when other possessors, for good policy reasons, do not."²⁴⁶

Committee conclusions

315. The Committee shares the Scottish Government's aim to protect the public from extreme pornography, but has noted a range of concerns raised in evidence about the parameters of the new offence proposed. There are various points on which we would seek further clarification from the Scottish Government. The first is why the definition of "extreme image" includes a much broader reference to depictions of rape than was suggested in consultation and is provided for in the equivalent England and Wales legislation. Secondly, we would be grateful for further explanation about why that definition refers to "realistic" depictions of sexual acts, and how that relates to cartoons or other images that have been distorted or have a fantasy element. Thirdly, we would seek clarification on the rationale for using the term "obscene" as part of the definition of extreme pornography, when that term is itself undefined in the Bill, and whether any consideration was given to alternative definitions in terms of the cultural harm that pornography can cause. Finally, we would be grateful for clarification of what is meant by "possession" of extreme pornography, and whether, in the absence of any definition in the Bill, what understanding of that term would be relied on by the courts (particularly where images come into someone's possession through electronic transmission).

316. The Committee accepts the rationale for excluding from the offence of possessing extreme pornography images that form all or part of a classified work, such as a film granted a certificate by the British Board of Film Classification. However, we are uncertain about some of the practical implications, for example whether it offers protection from prosecution to

²⁴⁵ Consenting Adult Action Network. Written submission to the Justice Committee.

²⁴⁶ Judges of the High Court of Justiciary. Written submission to the Justice Committee.

the film-maker who is in possession of a film that the BBFC has not yet been able to consider for certification.

317. We are satisfied with the defences that are provided in inserted section 51C. In particular, while we note the concerns raised in evidence, we agree that the Bill is right to distinguish between the possession of an image by those who participated in the sexual activity depicted and the onward transmission of that image to third parties.

Section 35: People Trafficking

Background

318. Section 22 of the Criminal Justice (Scotland) Act 2003 makes it an offence to engage in trafficking for the purposes of prostitution. UK-wide provisions making it an offence to engage in trafficking for purposes of exploitation (including slavery, forced labour and organ harvesting) are contained in sections 4 and 5 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. Amendments to the 2004 Act to clarify the application of those offences were made by the UK Borders Act 2007, but these amendments only apply in England, Wales and Northern Ireland.

319. Section 35 of the Bill is intended to clarify Scots law and ensure consistency across the UK. Accordingly, it amends section 22 of the 2003 Act to make clear that the existing offence of trafficking for the purposes of prostitution applies whether the trafficking is into, within or out of the UK, and whether it is directed from inside the UK or from outside the UK, and it specifies in which sheriff court districts an offender may be proceeded against. The section also makes similar changes to the 2004 Act to ensure consistency across the UK.

Evidence received

320. ACPOS was supportive of the proposed changes but sought clarification that any new offences created would apply to those who traffic from within the UK and would not be limited to those who orchestrate trafficking from outwith the UK. It also suggested that the definition of facilitation should include related activity such as the procurement of travel documents, transport and offers of work and accommodation. Finally, ACPOS argued that “it is vital that further consideration should be given to extending the legislation to include labour exploitation, sexual exploitation and domestic servitude rather than being exclusive to prostitution”.²⁴⁷

321. Care for Scotland also welcomed the proposals but said it missed an opportunity and that “until the root causes of sex trafficking and other forms of sexual exploitation through prostitution are sufficiently addressed, attempts to diminish the phenomenon will be limited.” It warned that, unless Scottish legislation in this area kept pace with that in the rest of the UK, the numbers of people trafficked into Scotland for the purpose of sexual exploitation would continue to grow.²⁴⁸

²⁴⁷ ACPOS. Written submission to the Justice Committee.

²⁴⁸ Care for Scotland. Written submission to the Justice Committee.

Committee conclusions

322. The Committee has no difficulties with this provision as far as it goes, but it would be useful to get a clearer indication of what else the Scottish Government is doing to tackle trafficking issues, particularly in view of the absence so far of convictions for sexual exploitation under the 2003 Act (notwithstanding suggestions that Glasgow has the highest number of trafficked persons outside London).²⁴⁹ We are sympathetic to the concerns expressed by ACPOS that the legislation should be sufficiently broad to cover all forms of trafficking. We are particularly concerned that the problem may be exacerbated during the Commonwealth Games in 2014. We would therefore welcome assurances from the Cabinet Secretary that the changes made by the Bill will contribute meaningfully to addressing this problem.

PART 3 – CRIMINAL PROCEDURE

Section 38: Prosecution of children

Background

323. Section 38 of the Bill amends the Criminal Procedure (Scotland) Act 1995 so as to prohibit the prosecution of children under the age of 12 years in the criminal courts. As a result, whatever the offence committed, a child under the age of 12 will in future only be able to be dealt with by the children's hearing system.²⁵⁰

324. The UN Committee on the Rights of the Child carried out a periodic examination of the UK in September 2008 to see how well it was protecting children's human rights. It made more than 100 concluding observations (recommendations) about where the UK must do more to put the UN Convention on the Rights of the Child (UNCRC) fully into practice. Among its recommendations on youth justice, the UN Committee said that the age of criminal responsibility (currently eight in Scotland) must be made higher.²⁵¹

325. Article 40(3)(a) of the UNCRC requires States to establish "a minimum age below which children shall be presumed not to have the capacity to infringe the penal law".²⁵² The UN Committee considers it not to be internationally acceptable for a minimum age of criminal responsibility to be set below the age of 12 years.²⁵³

326. In December 2008, the Scottish Government published a consultation on its response to the UN Committee's concluding observations. This included specific

²⁴⁹ See written answer of 31 August 2009 by Kenny MacAskill to S3W-26275. Available at: <http://www.scottish.parliament.uk/Apps2/Business/PQA/Default.aspx>

²⁵⁰ Policy Memorandum, paragraph 191.

²⁵¹ Scottish Government. (2008) *UN Convention on the rights of the child: UK Concluding Observations 2008*, paragraph 108. Available at: <http://www.scotland.gov.uk/Publications/2009/01/27155153/0>

²⁵² United Nations. (1989) *Convention on the Rights of the Child*. Available at: <http://www2.ohchr.org/english/law/crc.htm#art40>

²⁵³ United Nations Committee on the Rights of the Child. (2007) *General Comment No.10 (2007) Children's rights in juvenile justice*. Available at: http://www2.ohchr.org/english/bodies/crc/docs/GC10_en.doc

reference to the age of criminal responsibility and invited responses on this issue.²⁵⁴

327. In October 2000, the Scottish Law Commission (“the SLC”) was asked by the Scottish Ministers to look at the rules on the age of criminal responsibility, including the rule (contained in section 41 of the 1995 Act) which presumes that a child under the age of eight cannot be guilty of any offence. In its report, published in January 2002, the SLC made the following principal recommendations—

“1. Any rule (whether at common law or statutory) on the age at which children cannot be found guilty of an offence should be abolished.

“2. The existing statutory provisions which place restrictions on the prosecution of children under 16 should be retained subject to an amendment to the effect that a child under the age of 12 cannot be prosecuted.

“3. It should be competent to refer a child to a children’s hearing under section 52(2)(i) of the Children (Scotland) Act 1995 notwithstanding that because of his age the child cannot be prosecuted for the offence.

“4. None of the provisions in the Act shall apply in respect of the conduct of a child committed prior to the date on which the Act comes into force or to any prosecution commenced prior to that date.”²⁵⁵

328. The Policy Memorandum claims that the Bill implements the main recommendations of the SLC report by introducing a prohibition on the prosecution of children under 12 in the criminal courts. However, “the SLC’s recommendation to abolish the existing conclusive presumption in relation to under 8s is not taken forward”; nor is the current age-limit increased.²⁵⁶

329. The result is that, under the Bill, children aged between eight and 11 will continue to be treated as capable of committing criminal offences but will not be capable of being prosecuted in the criminal courts. Instead, they will, where appropriate, be referred to a Children’s Hearing. The prosecution of children aged between 12 and 15 will remain a decision entirely for the Lord Advocate.

Evidence received

330. The Committee received several written submissions which expressed support for the proposal to raise the minimum age at which children may be prosecuted.²⁵⁷

²⁵⁴ Scottish Government. (2008) *Improving the Lives of Children in Scotland - are we there yet?* Available at: <http://www.scotland.gov.uk/Publications/2008/12/18090842/0>

²⁵⁵ Scottish Law Commission. (2002) *Report on Age of Criminal Responsibility*. Available at: <http://www.scotlawcom.gov.uk/downloads/rep185.pdf>

²⁵⁶ Policy Memorandum, paragraph 192.

²⁵⁷ Action for Children Scotland; Children in Scotland; COSLA; ADSW. Written submissions to the Justice Committee.

331. Children 1st welcomed the proposed increase to 12 but commented that this was “the bare minimum and still leaves Scotland with a low age in comparison to many other European states.”²⁵⁸

332. Dr Jonathan Sher of Children in Scotland argued that 16, not 12, should be both the age of criminal responsibility and the age of criminal prosecution—

“That would dovetail with other things that already exist. The children’s hearings system, by and large, operates until the age of 16. Polmont young offenders institution starts to take offenders at the age of 16. Looked-after and accommodated children continue to be so until they age out at 16. Even if 16 is somewhat arbitrary, it is at least consistent with other laws relating to age and the perception of responsibility.”²⁵⁹

333. The Scottish Centre for Crime and Justice Research (SCCJR) generally welcomed the changes proposed, but noted that they fell short of the Scottish Law Commission’s recommendations—

“The Bill proposes that 8 years would be retained as the age below which children are incapable of committing crime; 12 would be introduced as the age below which children can no longer be prosecuted and 16 would remain as the (usual) age of automatic referral to the adult system. The only difference, then, is the inability to prosecute those children aged eight, nine, ten and eleven.”²⁶⁰

334. James Chalmers described as a “surprising omission” the decision not to implement the Scottish Law Commission recommendation to abolish the rule that no child under the age of eight can commit a criminal offence—

“This is because there might be circumstances in which a child under that age had committed a crime, ought therefore to be referred to a children’s hearing, and could not be referred on any other ground (as in *Merrin v S* 1987 SLT 193). The Commission noted that virtually all consultees who had responded to the proposals in their Discussion Paper on this point agreed with this proposal (*Report*, para 3.24).”

335. Mr Chalmers concluded that “in the absence of good reason to the contrary – this recommendation should be implemented in the Bill.”²⁶¹

336. The Scottish Children’s Reporter Administration (SCRA) expressed its support for the Scottish Government’s proposals on the grounds that the children’s hearings system is able to ensure that children get the most appropriate form of intervention and support, while addressing concerning behaviour. However, the SCRA cautioned that—

²⁵⁸ Children 1st. Written submission to the Justice Committee.

²⁵⁹ Scottish Parliament Justice Committee. *Official Report*, 26 May 2009, Col 1945.

²⁶⁰ Scottish Centre for Crime and Justice Research. Written submission to the Justice Committee.

²⁶¹ James Chalmers. Written submission to the Justice Committee.

“if the [children’s hearings] system is to deal with the small number of very serious offences committed by 8-12 year olds it must be properly resourced and interventions must be focused and effectively delivered.”²⁶²

337. The office of Scotland’s Commissioner for Children and Young People (SCCYP) was also generally supportive, but with reservations—

“We believe that the Bill in its current form would continue to allow for children between 8 and 11 years of age to face ‘criminal’ consequences despite the new minimum age for prosecution set at 12. With section 41 [of the 1995 Act] retained in its present form, disposals of the welfare-based Children’s Hearing relating to this age group count as a conviction for the purposes of the Rehabilitation of Offenders Act 1974.”²⁶³

338. Maire McCormack, for the SCCYP, explained further—

“If a child accepts an offence ground or that is established, there are serious implications under section 3 of the Rehabilitation of Offenders Act 1974. Our office has evidence that there are implications later in life for children who accept such grounds, because the information is still carried when they are looking for employment or want to go to college. The fact that they accepted a ground as a young child can come back to haunt them.”²⁶⁴

339. A child dealt with by the welfare-based Children’s Hearing System could therefore still “have a criminal record if they and their relevant adult accept an offence ground or an offence ground is established by a Sheriff”. As a result, “questions would therefore remain as to whether the age of criminal responsibility has actually been raised – it could be argued that in terms of the criminal consequences for children who commit offences this remains at the unacceptably low level that is at present.”²⁶⁵

340. SCCYP suggested that section 41 of the 1995 Act should be repealed and “a new non-offence ground should be introduced to allow for children under 12 to be referred to the Children’s Hearing so that their behaviour and their needs can be addressed without the prospect of ‘criminal’ consequences.”²⁶⁶

341. The Law Society of Scotland also proposed the creation of a new non-offence ground for referral to a Children’s Hearing, suggesting it could be—

“along the lines of ‘the child has behaved in such a way as to cause (or risk causing) harm to himself/herself or another person or damage to property’ ... The benefits of this proposal would be that the child would not carry the taint

²⁶² Scottish Children’s Reporter Administration. Written submission to the Justice Committee.

²⁶³ Scotland’s Commissioner for Children and Young People. Written submission to the Justice Committee.

²⁶⁴ Scottish Parliament Justice Committee. *Official Report*, 26 May 2009, Col 1944.

²⁶⁵ Scotland’s Commissioner for Children and Young People. Written submission to the Justice Committee.

²⁶⁶ Scotland’s Commissioner for Children and Young People. Written submission to the Justice Committee.

of criminality for the rest of his or her life and that he or she would receive early intervention.”²⁶⁷

Committee conclusions

342. **The Committee recognises that there are various ways of addressing concerns about the fact that Scots law allows children as young as eight to be regarded as criminally liable and prosecuted through the courts, when a minimum age of 12 is recommended by the UN Committee. However, we remain unclear why the Scottish Government has opted for raising the minimum age at which a child may be prosecuted, rather than also abolishing the rule of law on the age at which children cannot be guilty of an offence (as the Scottish Law Commission recommended). An alternative, suggested by SCCYP, would have been to raise that age from eight to 12, and then to provide for a new “non-offence” ground to enable children below 12 to be referred to a Children’s Hearing in cases where other grounds for referral do not apply. We find it difficult to assess whether the approach adopted in the Bill is the best available option without a fuller explanation of the Scottish Government’s reasoning. While we recognise that the difference between the various approaches may be mostly theoretical, it would be useful to know how far the Scottish Government’s choice of approach was based on practical considerations, such as whether it would permit retention of children’s forensic data, or how offences committed by children would be recorded (and what implications this might have for their future prospects).**

343. **We recognise that children under 12 can sometimes do terrible things, and if there is to be a statutory ban on criminal prosecution in all such cases, it would be useful to have an assurance from the Cabinet Secretary that there is a sufficient range of disposals available within the children’s hearings system.**

344. **We note that the Bill does not change the existing situation in which the option of referring children to a Children’s Hearing on the ground that they have committed an offence is unavailable for a child under the age of eight. We note that the Scottish Government intends to bring forward a Children’s Hearings Bill in the near future and we trust that this issue will be properly and fully considered in that context.**

345. **On the question of whether 12 is the appropriate age threshold (either for being deemed capable of committing a crime, or for being liable to prosecution), we have no settled view. We recognise that any age is, to some extent, arbitrary, but there may be merit in having some consistency with age-limits in other relevant statutory contexts. We are conscious, in particular, that the new Sexual Offences (Scotland) Act sets an age threshold of 13 for the definition of various sexual offences against young children, and we suggest that the Scottish Government could do more to explain why the same age was not adopted in the current context.**

²⁶⁷ Law Society of Scotland. Written submission to the Justice Committee.

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

Background

346. Sections 58-60 of the Bill extend the powers of the police to keep forensic (primarily, DNA and fingerprint) data in a way that is consistent with the European Convention on Human Rights.

347. The Policy Memorandum explains that where a person has been convicted in court of any offence, there is currently a power to retain his or her forensic data indefinitely. In addition, since January 2007, where a person has been proceeded against but not convicted in court of certain sexual or violent crimes, the person's DNA can be retained for a period of three years, with discretion for the chief constable to apply to a sheriff for extensions of up to two years at a time. The Bill extends this latter arrangement to the retention of fingerprints and to certain cases within the children's hearings system.

348. In the recent case of *S and Marper v. the United Kingdom*, the European Court of Human Rights held that the DNA retention policy in England and Wales, which allows indefinite retention of DNA and fingerprint data taken from a suspect, regardless of whether the suspect was convicted or even charged, was incompatible with Article 8 of ECHR (respect for privacy and family life). In so doing, the court contrasted this with the present arrangements in Scotland, on which it commented favourably.

349. In 2007, the Scottish Government asked Professor James Fraser, the Director of the Centre for Forensic Science at Strathclyde University and Chair of the European Academy of Forensic Science, 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, the Scottish Government published the Fraser report together with a consultation on the issues it raised. This work formed the basis of the provisions that have been included in the Bill.²⁶⁸

350. Section 58 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 would not have to be destroyed for at least three years, and the relevant chief constable would have discretion to apply to a sheriff for extensions of up to two 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.

351. Section 59 would authorise the retention of forensic data taken from children who are dealt with by the children's hearing system for committing relevant violent or sexual offences, again for a period of three years with the possibility of subsequent extensions of up to two years if authorised by a sheriff. The list of relevant offences is to be prescribed by statutory instrument made under the affirmative procedure.

²⁶⁸ Policy Memorandum, paragraph 296. The Scottish Government consultation (including the Fraser report) is available at <http://www.scotland.gov.uk/Publications/2008/09/22154244/0>.

352. In addition, section 60 specifies that retained forensic data may only be used for the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution; or for the identification of a deceased person or a person from whom the data originated. This is to provide clarity and better comply with the ECHR.

Evidence received – general responses

353. Responses to the proposals contained in the Bill were few and generally favourable, although some specific issues were raised.

354. The Nuffield Council on Bioethics supported the proposal to bring the law on the retention of fingerprints and other forensic data into line with existing law on DNA retention.²⁶⁹

355. GeneWatch argued that samples should be destroyed once DNA profiles have been obtained and loaded onto the DNA database because it is only the profile that is necessary for the purposes of future identification. GeneWatch also urged the Committee to consider putting the weeding rules for records relating to old and minor offences on a statutory basis, “with a view to improving public trust in the system of oversight for police records and linked forensic data”.²⁷⁰

356. Professor Fraser, in oral evidence to the Committee, said that he was satisfied that the proposals in the Bill achieved an appropriate balance between law enforcement and the rights of individuals—

“The main issue relates to the retention of samples from unconvicted people. Proportionality is a tricky issue, because there are not many data to allow detailed analysis. However, when I considered the three-year period, the available data showed that a considerable number of people reoffended during the period. That was a fairly short period, and the study related to serious offences, so the retention struck me as reasonable and balanced.”²⁷¹

Alternatives to prosecution

357. ACPOS was concerned that the Bill failed to address what ACPOS saw as an oversight in the current law, which allows samples to be retained only where “criminal proceedings ... were instituted” but no conviction was obtained. Since no criminal proceedings are instituted in cases where offenders are offered alternatives to prosecution (such as fiscal fines or fixed penalty notices), it is currently not possible for forensic data taken from such offenders to be retained.²⁷²

358. Asked to comment on this, Professor Fraser said—

“The issue of direct disposals came up, and was referred to in my report, but I did not feel that I had the data to make any real sense of that. It strikes me that the purpose of such disposals is the speedy administration of justice. That purpose had not previously taken DNA into account, and I felt that the

²⁶⁹ Nuffield Council on Bioethics. Written submission to the Justice Committee.

²⁷⁰ Genewatch UK. Written submission to the Justice Committee.

²⁷¹ Scottish Parliament Justice Committee. *Official Report*, 2 June 2009, Col 1995.

²⁷² ACPOS. Written submission to the Justice Committee.

issue merited more research and more consideration, so I did not express a view.”²⁷³

359. Tom Nelson, Scottish Police Services Authority, supported Professor Fraser’s view and added—

“An opportunity may have been missed; we need to be careful, and more work is needed. If more cases take the road of alternatives to prosecution, I will be concerned about losing opportunities to get people’s DNA profile and check it against the DNA database. A lot more work needs to be done in this area.”²⁷⁴

360. When asked about the same issue, the Cabinet Secretary for Justice said that the Scottish Government was considering whether there was a case for an amendment at Stage 2 to address this issue.²⁷⁵

Retention of samples etc. from children

361. The Nuffield Council on Bioethics recommended that, when considering requests for the removal of children’s DNA profiles and the destruction of their samples, “there should be a presumption in favour of the removal of all records, fingerprints and DNA profiles, and the destruction of samples”.²⁷⁶ Children 1st also argued in favour of a strong presumption against the retention of samples from children.²⁷⁷

362. The Law Society of Scotland submitted that it was not appropriate as a matter of principle to retain DNA and fingerprints from children who are dealt with by Children’s Hearings as opposed to the criminal courts.²⁷⁸

363. The Information Commissioner’s Office said that, while its preferred position was for no change to the current position, it recognised that—

“an element of retention would provide a balance between the public interest in retaining relevant material of those who have committed violent or sexual crimes and the recognition that offences committed by children may not be replicated in adulthood. The proposal contained within section 59 of the Bill reflects that balance.”²⁷⁹

364. Professor Fraser explained the basis for his conclusion on this issue—

“My recommendation was that a sample should be retained if the child accepted that he had committed, or was found by a sheriff to have committed, an offence in the narrow category of serious sexual and violent offences. Because the numbers involved are small, and because the offences are serious and involve some sort of judicial proceedings—that is,

²⁷³ Scottish Parliament Justice Committee. *Official Report, 2 June 2009*, Cols 1995-6.

²⁷⁴ Scottish Parliament Justice Committee. *Official Report, 2 June 2009*, Col 1996.

²⁷⁵ Scottish Parliament Justice Committee. *Official Report, 23 June 2009*, Cols 2201-2.

²⁷⁶ Nuffield Council on Bioethics. Written submission to the Justice Committee.

²⁷⁷ Children 1st. Written submission to the Justice Committee.

²⁷⁸ Law Society of Scotland. Written submission to the Justice Committee.

²⁷⁹ Information Commissioner’s Office. Written submission to the Justice Committee.

some process whereby the child is represented—I feel that the recommendation strikes a good balance between looking after the welfare of the very small number of children involved and public protection.”²⁸⁰

365. The Scottish Children’s Reporter Administration accepted that it may be necessary to retain DNA and other forensic evidence from a child but considered that there should be a judicial process, separate from the children’s hearings system, to determine whether there is a clear and justifiable reason for doing so.²⁸¹

366. Similarly, the office of Scotland’s Commissioner for Children and Young People (SCCYP) argued that the automatic retention of the DNA profile of children dealt with by a Children’s Hearing for a qualifying offence was “disproportionate” and that a sheriff should only approve retention subject to the following five conditions—

“(1) the child has been referred on an offence ground; (2) the offence is one of a list of ‘trigger offences’ to be specified in the Bill; these should be serious violent and sexual offences; (3) the child and their relevant adult have accepted the ground, or it has been established by a sheriff; (4) the police or another relevant agency has made an application to the sheriff for an order to retain the child’s DNA for a period of up to three years; and (5) the sheriff makes a decision based on the risk that the child poses to public safety.”²⁸²

List of specified offences

367. Maire MacCormack, representing SCCYP, expressed concern that the Bill itself did not specify those offences that would trigger retention of children’s samples—

“The Bill talks about ‘sexual and violent offences’, but that is a broad spectrum and it does not define what those offences are. I know that a working group will be set up to look into that, but we need to consider the definitions.”²⁸³

368. The Law Society of Scotland also expressed concern that the list of prescribed offences is to be made by statutory instrument, albeit under affirmative procedure, “rather than placed on the face of the Bill”.²⁸⁴

369. The SCRA submitted that if a list of relevant offences is to be produced, it should be developed by an expert working group “representing all interests, including those of children and young people themselves”.²⁸⁵

370. Questioned on this point, the Cabinet Secretary said that the Scottish Government would consult the forensic data working group and would ensure that

²⁸⁰ Scottish Parliament Justice Committee. *Official Report*, 2 June 2009, Col 1998.

²⁸¹ Scottish Children’s Reporter Administration. Written submission to the Justice Committee.

²⁸² Scotland’s Commissioner for Children and Young People. Written submission to the Justice Committee.

²⁸³ Scottish Parliament Justice Committee. *Official Report*, 26 May 2009, Col 1956.

²⁸⁴ Law Society of Scotland. Written submission to the Justice Committee.

²⁸⁵ Scottish Children’s Reporter Administration. Written submission to the Justice Committee.

“appropriate people from a variety of backgrounds” were involved in drawing up the list of relevant offences.²⁸⁶

Committee conclusions

371. The Committee agrees with the Scottish Government that it is sensible to enable fingerprint data and other forensic data to be subject to the same ECHR-compatible retention regime as DNA data.

372. We are less certain about whether the current provisions in the Bill should be extended to cover forensic data taken from people who are then offered alternatives to prosecution. We certainly would not support any change that would result in the police being required or expected routinely to take samples in situations where, at present, fixed penalties or fiscal fines can be imposed with minimal time and bureaucracy. However, we also recognise the logic of saying that, where a sample has already been taken from an individual in connection with an offence, the decision to offer an alternative to prosecution rather than institute criminal proceedings should not be sufficient to determine whether the forensic data can subsequently be retained. We would therefore look forward to a Stage 2 amendment that would allow for the retention of data in such circumstances. However, in considering the terms of any such amendment, particularly the duration of retention provided for, we would wish to ensure that an appropriate balance was struck between considerations of consistency and proportionality.

373. In relation to the retention of forensic data taken from children referred to a Children’s Hearing, we are sympathetic to the broad outline of what is proposed, but uncomfortable with the fact that the Bill leaves unspecified the sexual or violent offences that would enable the retention of data in such cases. We take the view that retention of DNA and other data from children would be required only in a small proportion of cases, probably involving serious violent or sexual crimes. We note both the evident difficulties the Scottish Government has in defining the list of relevant offences satisfactorily and concerns that the children’s hearing system is not equipped to determine such questions. It would be helpful if the Scottish Government would provide us with its view of the suggestion by SCCYP that retention should only be on application to a sheriff.

374. The Committee is conscious that the retention of DNA and other evidence, particularly from children and from persons not convicted of significant crimes, can raise issues under Article 8 of ECHR and requires a proportional approach. We note both the suggestion by the Nuffield Council on Bioethics that there should be a presumption in favour of the removal of all records, fingerprints and DNA profiles, and the argument by Genewatch that DNA samples should be destroyed once DNA profiles have been obtained, and would seek the comments of the Scottish Government on these matters.

375. We would therefore expect the Scottish Government to report in the Stage 1 debate on its position on these matters and on progress with the

²⁸⁶ Scottish Parliament Justice Committee. *Official Report, 23 June 2009*, Col 2202.

forensic data working group and, ideally, commit to providing us with a draft list of proposed relevant offences before Stage 2.

PART 4 – EVIDENCE

Section 62: Witness statements: use during trial

Background and evidence received

376. Under section 62, courts would be able to allow witnesses to refer to prior statements while giving evidence. This is related to section 40, which allows the prosecutor to give the witness a copy of his or her written statement in advance of giving evidence in court. The Policy Memorandum explains that it is intended “to ensure fairness for witnesses in giving evidence in criminal cases” and that it had been generally supported by those who contributed to Lord Coulsfield’s review of the law and practice of disclosure.²⁸⁷

377. The provision was supported by the Solicitor General for Scotland who said it would reduce the length of trials by reducing time spent on questioning witnesses, and would improve the criminal justice process by enabling witnesses to point out any inaccuracies in their statements. He also argued that many trials can become “a memory test for witnesses”, pointing out that witnesses are often questioned in court on statements they may have made many years earlier—

“If they cannot remember precisely what they said or if they say something slightly different, they will be accused of being inconsistent. It seems unfair that the only person in a prosecution who cannot see the statement before the trial is the witness who gave the statement in the first place.”²⁸⁸

378. The Solicitor General also explained that police officers are already allowed to refer to their notebooks, which may contain their own statements, while giving evidence, and that this provided a precedent for allowing witnesses also to refer to their statements during trials. Similar arrangements were also made in other jurisdictions, including England and Wales.

379. However, the Judges of the High Court of Justiciary said that section 62 gave “real cause for concern”. They explained that prior statements given by civilians (as opposed to police officers or expert witnesses) are written down by the investigating police officer and may not accurately reflect what the witness actually said; partly for this reason, the Scottish courts have normally accorded them much less weight than oral evidence given from the witness box.

380. In the judges’ view, there was “a real danger that the new provision will encourage a greater reliance to be placed on the contents of police statements, as opposed to a witness’ recollection of what happened and that this may complicate and lengthen trials.”²⁸⁹ They also suggested the provision was unnecessary—

“In our opinion, the limited circumstances in which the common law and the provisions of section 260 of the [1995] Act enable the Court to allow

²⁸⁷ Policy Memorandum, paragraphs 200-1.

²⁸⁸ Scottish Parliament Justice Committee. *Official Report*, 9 June 2009, Cols 2070-1.

²⁸⁹ Judges of the High Court of Justiciary. Written submission to the Justice Committee.

reference to prior statements are more than sufficient to ensure that a witness can be questioned as to the contents of a prior police statement should the interests of justice require that to happen.”²⁹⁰

381. The Sheriffs’ Association noted that there are at present four situations in which prior statements of witnesses other than the accused may be used during a trial—

“One is where the evidence of the witness is inconsistent with a prior statement (s. 263(4) of the 1995 Act). The purpose is at least to challenge the credibility and reliability of the witness and also in the hope that the witness might accept the truth of the prior statement. Any part of the prior statement becomes evidence only in so far as the witness accepts it to be the truth. The second is where the witness adopts a prior statement in a document of which the witness was the originator as his or her evidence in court (s. 260). The third is where a witness cannot remember everything, accepts that he or she made a prior statement to someone and accepts that if he or she said what he or she is alleged to have said, it must be the truth. In that case the person to whom the statement was made may give evidence of it and it becomes part of the evidence of the witness: *Jamieson v. HM Advocate*, 1994 J.C. 251; 1994 S.C.C.R. 610. The fourth is where the statement was recorded by the witness at the time of the incident to which it relates and is used to refresh the memory of the witness.”²⁹¹

382. According to the Association, section 62 “will lead to a number of appeals to define its parameters”. Its view was that, if the present common law position is to be changed, then this should be in accordance with Lord Coulsfield’s recommendation – namely, that witnesses should only be supplied with prior statements taken by the police that they read and signed at or close to the time when the statement was taken.²⁹²

383. The Law Society of Scotland was also opposed to the proposals, largely because of concerns about the accuracy of prior statements and because “material discrepancies between statements given to the police and evidence given in court at a later date can call into question the credibility and reliability of a witness”.²⁹³ As Bill McVicar of the Society put it in oral evidence—

“The problem is that the statement will not be the words of the witness. Having asked witnesses countless times about the statements that they have given to the police and whether what is contained in those statements is right, I can say that, unless almost every witness in the universe is telling lies about it, the police tend not to write down exactly what the witness has said.”²⁹⁴

384. Ian Duguid, representing the Faculty of Advocates, expressed complete opposition to the provisions. He explained that although a statement recorded by

²⁹⁰ Judges of the High Court of Justiciary. Written submission to the Justice Committee.

²⁹¹ Sheriffs’ Association. Written submission to the Justice Committee.

²⁹² Sheriffs’ Association. Written submission to the Justice Committee.

²⁹³ Law Society of Scotland. Written submission to the Justice Committee.

²⁹⁴ Scottish Parliament Justice Committee. *Official Report*, 2 June 2009, Col 1991.

a police officer is admissible in court, a statement taken by a legally qualified solicitor from a witness for the defence is called a precognition, which is inadmissible in accordance with the practice of the courts—

“The difficulty immediately arises that the prosecution is placed at an extreme advantage over the defence. The question arises whether the provision will ever be sustained as a matter of fairness to the accused. If prosecution witnesses can have a statement in front of them and read it out, and defence witnesses have no such facility, is that a recognition that defence witnesses are in a different position to prosecution witnesses? Of course it is not.”²⁹⁵

Committee conclusions

385. The Committee was unable to reach consensus on the merits of this provision. On the one hand, we can understand why it seems anomalous that a witness, almost alone among those taking part in a trial, does not have access to the statement he or she made at the time the offence was investigated (which may have been months or even years previously). On the other hand, we understand the concerns expressed in evidence about the accuracy of these statements, and the risk of exacerbating a difference of treatment between prosecution and defence witness statements. We would therefore appreciate clarification from the Scottish Government on its justification for this provision, particularly in view of the strong reservations expressed in evidence from the legal profession and the judiciary.

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

Background

386. Under section 264 of the Criminal Procedure (Scotland) Act 1995, the spouse of an accused person is always a competent witness, but is only a compellable witness for the prosecution or for a co-accused where (by virtue of the common law) he or she was a victim of the offence charged. As a result, a married parent can, for example, decline to give evidence against a spouse accused of abusing their child. Civil partners are given similar protection against compellability by section 130 of the Civil Partnership Act 2004.

387. Section 63 of the Bill replaces these existing provisions with a new section in the 1995 Act specifying that the spouse or civil partner of an accused is both a competent and a compellable witness in all circumstances. The Policy Memorandum states that the current law has caused difficulty, particularly where the crime is against a child and there is important and material evidence that could have been obtained from a spouse. It says that, in some cases, accused persons have married partners in order to ensure they cannot give evidence against them.²⁹⁶

Evidence received

388. ACPOS was supportive of the change, saying that many offences where spouses or civil partners are competent witnesses occur in the family home where

²⁹⁵ Scottish Parliament Justice Committee. *Official Report*, 2 June 2009, Col 1990.

²⁹⁶ Policy Memorandum, paragraph 318.

their evidence could be crucial for a conviction. This provision, in ACPOS's view, will ensure that children are better protected by the criminal justice system.²⁹⁷

389. Victim Support Scotland supported the principle, particularly in cases of serious and organised crime, but suggested that the value of using evidence from a spouse or partner should be subject to a test of proportionality and risk assessment in order to "protect the integrity of the family".²⁹⁸ South Lanarkshire Council was also supportive in principle but sought assurances that sufficient safeguards would be put in place to protect individuals who may be subject to abuse or threat by a spouse or partner.²⁹⁹

390. North Lanarkshire Council went further, arguing that compelling people to give evidence against their spouses or partners could place them at greater risk. Pointing out that the vast majority of currently "non-compelled" witnesses are women experiencing domestic abuse, the Council said that if a woman in those circumstances is compelled to give evidence and refuses, she could be held in contempt of court and be classed as an offender herself. In the Council's view, this would present her with a "Hobson's choice" that had no place in a modern justice system.³⁰⁰

391. The Law Society of Scotland also opposed the provision, primarily because it ignored the "long-established purpose behind the rule on compellability ... which attaches to the status of marriage and the risk of perjury by the spouse". Experience suggested that people were only rarely prepared to give evidence against their spouses or partners even when compelled to do so by law. The Society suggested that a fairer approach would be to bring the law in Scotland in line with that in England and Wales, where the spouse or civil partner of an accused is a compellable witness for the prosecution only where the offence is one of personal violence against the spouse or civil partner or a child under the age of 16, a sexual offence against such a child, or related offences of attempt, conspiracy etc. in relation to those offences.³⁰¹

Committee conclusions

392. The Committee understands the underlying rationale for this provision, but acknowledges the concerns raised in evidence that removing entirely the current limits on compellability, and hence making persons who refuse to give evidence against their spouses or partners liable to a charge of contempt of court, risks putting them in an invidious position in certain circumstances. We therefore invite the Scottish Government to explain further its approach in the light of the evidence received.

Section 66: Witness anonymity orders

Background and evidence

393. The purpose of section 66 is to replicate the regime established in England and Wales by the Criminal Evidence (Witness Anonymity) Act 2008, which

²⁹⁷ ACPOS. Written submission to the Justice Committee.

²⁹⁸ Victim Support Scotland. Written submission to the Justice Committee.

²⁹⁹ South Lanarkshire Council. Written submission to the Justice Committee.

³⁰⁰ North Lanarkshire Council. Written submission to the Justice Committee.

³⁰¹ Law Society of Scotland. Written submission to the Justice Committee.

enables the courts to grant “witness anonymity orders” in appropriate cases. The Bill for this Act was introduced by the UK Government on an emergency basis in response to the decision of the House of Lords to quash the conviction in the case of *R v Davis* [2008] UKHL 36, on the basis of its concerns over the use of anonymous witnesses.³⁰²

394. In their written submission, the Judges of the High Court of Justiciary agreed that it was appropriate to provide a statutory basis for the powers of Scottish courts to permit witnesses to give evidence anonymously—

“It would be unsatisfactory to leave the matter to be governed by the common law in Scotland when the House of Lords has held that no such common law power exists in England and Wales. Although not directly applicable in Scotland, the decision in *Davis* may be thought to have introduced a measure of uncertainty about the position here.”³⁰³

395. According to the Crown Office, protective measures such as those referred to in section 66(4) of the Bill had been used before in Scotland; nevertheless, following the House of Lords decision, “the current position is that no guarantee can be given to witnesses that there are steps which can be taken to protect their identity.”³⁰⁴

396. Questions were also raised about the drafting of this section of the Bill. The Judges of the High Court of Justiciary queried one of the tests for a witness anonymity order set out in inserted section 271Q, namely that “the witness would not testify if the proposed order were not made” (Condition D)—

“Taken literally, this condition might be thought to be almost impossible to satisfy since any witness is obliged to testify when validly cited and called upon so to do. The point might be met by making it clear that the condition is to the effect that the witness would not willingly testify if the proposed order were not made.”³⁰⁵

397. The SCDEA also had concerns about the drafting of condition D—

“It would appear however, from the way in which this condition is framed, that it may present a barrier to those willing witnesses who may be denied anonymity only because they are willing to testify.”³⁰⁶

Committee conclusion

398. The Committee accepts the rationale for this provision, but would invite the Scottish Government to reflect on the drafting in the light of the points raised by witnesses.

³⁰² Policy Memorandum, paragraph 331.

³⁰³ Judges of the High Court of Justiciary. Written submission to the Justice Committee.

³⁰⁴ COPFS. Written submission to the Justice Committee.

³⁰⁵ Judges of the High Court of Justiciary. Written submission to the Justice Committee.

³⁰⁶ Scottish Crime and Drug Enforcement Agency. Written submission to the Justice Committee.

PART 5 – CRIMINAL JUSTICE

Section 68: Upper age limit for jurors

Background and evidence

399. Section 68 raises the upper age limit for sitting on a jury in criminal cases in Scotland from 65 to 70, bringing the position in Scotland in line with the rest of the UK. The aim is to enlarge the pool of potential jurors by around 200,000 and ensure that, as the demographic profile of Scotland changes, juries are drawn from a wider age range.³⁰⁷

400. Although the Judges of the High Court of Justiciary supported this move, they pointed out that the upper age limit for jurors in civil trials would remain unchanged at 65—

“While we appreciate that the scope of the Bill does not extend to civil as opposed to criminal procedure, we would observe that it may be thought to be anomalous to have different age limits for jurors in criminal and civil cases.”³⁰⁸

401. The Law Society of Scotland also raised no objection to the proposal, while stressing the importance of considering the age balance of jury composition.³⁰⁹

Committee conclusion

402. We endorse this provision, so far as it goes, but note that it will create an inconsistency in terms of the upper age limit for jurors in criminal and civil trials. While we recognise that this cannot be addressed through the present Bill, we recommend that the Scottish Government address this through separate legislation at the earliest practical opportunity.

Section 70: Data matching for detection of fraud etc.

Background

403. The National Fraud Initiative is a data matching exercise conducted for the purpose of assisting in the prevention and detection of fraud. It already operates on a non-statutory basis in Scotland and has identified around £37 million of fraud and error in Scotland and led to over 75 prosecutions. The Serious Crime Act 2007 provided a statutory basis for the National Fraud Initiative in England, Wales and Northern Ireland, and the purpose of section 70 is to make similar provision for Scotland. This involves giving Audit Scotland the power to conduct data matching exercises on its own accord, or to arrange for such exercises to be conducted on its behalf.³¹⁰

404. Data matching involves the use of computerised techniques to compare information about individuals held by different public bodies, and on different

³⁰⁷ Policy Memorandum, paragraph 358.

³⁰⁸ Judges of the High Court of Justiciary. Written submission to the Justice Committee.

³⁰⁹ Law Society of Scotland. Written submission to the Justice Committee.

³¹⁰ Policy Memorandum, paragraphs 362-3.

financial systems, to identify circumstances (matches) that might suggest the existence of fraud or error.³¹¹

405. An Audit Scotland report on the National Fraud Initiative was considered by the Audit (now Public Audit) Committee in May 2008. The Committee agreed to note the report and to write to the Cabinet Secretary for Justice to request that legislation providing explicit data matching powers for Audit Scotland be brought forward at the earliest opportunity.³¹²

Evidence received

406. In evidence to the Committee, Audit Scotland explained that data matching exercises have been carried out by the Audit Commission in England for some years using auditors' powers to obtain information from audited bodies and others for the purposes of their audit—

“Without similar explicit powers in Scotland, Audit Scotland would have to continue to rely on its existing powers to obtain the relevant information. These powers are not consistent across the different parts of the public sector and do not allow for cross border matching. ... In the absence of similar clear legislation in Scotland it will undoubtedly be the case that fraud and error will be less likely to be detected in the public sector in Scotland than elsewhere in the United Kingdom and cross border cases will not be detected at all.”³¹³

407. The proposals were also supported by the Information Commissioner's Office (ICO)—

“We welcome the clarification of practice in Scotland and note the attention paid to protection of privacy within this section of the Bill which is particularly important given the breadth of information which may be sought by Audit Scotland in fulfilment of this function. We also welcome the requirement that Audit Scotland produce a data matching code of practice and that the ICO must be consulted prior to its publication and subsequent amendments.”³¹⁴

Section 82: Compensation for miscarriages of justice

Background

408. Section 133 of the Criminal Justice Act 1988 provides for a scheme of compensation for miscarriages of justice which, in Scotland, is operated by the Scottish Ministers. There is also a non-statutory *ex gratia* scheme dating from 1986, and the main purpose of section 82 of the Bill is to put that on a statutory footing by making provision for it within the existing statutory scheme. Accordingly, Scottish Ministers are given the power, by order, to provide for the circumstances in which compensation may be paid for a miscarriage of justice (or

³¹¹ Audit Scotland. National Fraud Initiative. Available at: <http://www.audit-scotland.gov.uk/work/nfi.php>

³¹² Scottish Parliament Public Audit Committee. Minute of Proceedings, 28 May 2008. Available at: <http://www.scottish.parliament.uk/s3/committees/audit/mop-08/aumop08-0528.htm>

³¹³ Audit Scotland. Supplementary written submission to the Justice Committee.

³¹⁴ Information Commissioner's Office. Written submission to the Justice Committee.

for wrongful detention, or a decision by the prosecutor not to take or to discontinue proceedings).

Subordinate Legislation Committee report

409. The Subordinate Legislation Committee (SLC), in its report on the Bill, questioned why the *ex gratia* scheme was to be provided for in subordinate legislation, when the existing scheme was provided for directly in the 1988 Act. It also questioned the scope of the delegated power, which in its view went beyond what was required to achieve the Scottish Government's stated purpose for the provision. The Scottish Government told the SLC that it wished to have flexibility in relation to how it gave statutory effect to the *ex gratia* scheme, but the SLC concluded that "no adequate justification has been given by the Scottish Government for the power to extend the scheme beyond that currently operating"³¹⁵.

Committee conclusion

410. The Committee notes and endorses the concerns expressed by the Subordinate Legislation Committee about the scope of the delegated power proposed. We therefore invite the Scottish Government either to justify that scope by reference to any changes of substance it might wish to make to the existing *ex gratia* scheme in the course of putting it on a statutory basis, or to limit the scope of the delegated power to what is required to replicate the existing scheme without substantial change.

PART 6 – DISCLOSURE

411. Part 6 of the Bill establishes a statutory framework for disclosure of evidence in criminal proceedings in Scotland.

Background

412. In November 2006, the then Justice Minister, Cathy Jamieson MSP, appointed Lord Coulsfield to review the law and practice of disclosure of evidence in the Scottish criminal justice system. This was prompted by a number of decisions of the Judicial Committee of the Privy Council and of the High Court which redefined and expanded the duty of disclosure, the most important being *McLeod v HMA (No. 2)* [1998] JC 67, *Holland v HMA* [2005] SC(PC) 3 and *Sinclair v HMA* [2005] SC(PC) 28.³¹⁶

413. Lord Coulsfield's final report was published in September 2007. Having consulted on Lord Coulsfield's recommendations, the Scottish Government

³¹⁵ Subordinate Legislation Committee. *Report on the Criminal Justice and Licensing (Scotland) Bill*, paragraphs 51-58.

³¹⁶ The Rt Hon Lord Coulsfield. (2007) *Review of the Law and Practice of Disclosure in Criminal proceedings in Scotland*. Available at: <http://www.scotland.gov.uk/Publications/2007/09/11092728/0>. Further background is set out in the letter from the Cabinet Secretary of 22 October 2009.

published a statement of its intended next steps, including a commitment to bring forward legislation and to develop a statutory Code of Practice.³¹⁷

414. According to the Policy Memorandum the purpose of this Part of the Bill is to “provide certainty in statute as regards how the disclosure of evidence regime should operate”, in place of the existing common law system. In particular, the new regime provides—

- “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 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.”³¹⁸

Fairness, certainty and clarity

415. The Law Society of Scotland was largely positive about the disclosure provisions—

“The Society’s position is that a full and fair system of disclosure to the accused is an essential element of a fair trial and without such a system there can be no guarantee of an accused person receiving a fair trial.”³¹⁹

416. For the Solicitor General for Scotland, the key benefit of the Part 6 provisions was to provide certainty to those involved—

³¹⁷ Scottish Government. (2008) *A Statutory Basis for Disclosure in Criminal Proceedings in Scotland Analysis of responses to Consultation and Next Steps*. Available at: <http://www.scotland.gov.uk/Resource/Doc/221066/0059469.pdf>

³¹⁸ Policy Memorandum, paragraphs 467, 474.

³¹⁹ Law Society of Scotland. Written submission to the Justice Committee.

“The Bill gives us a comprehensive set of rules so that the police and the prosecutor know that if they comply with those rules, they will comply with their disclosure obligations, which will ensure a fair trial in accordance with article 6 of the European convention on human rights.”³²⁰

417. The Crown Office, similarly, described the Bill as providing “for the first time, a clear procedural and legal framework for disclosure within which the police, the Crown and the accused can operate with certainty.” This would be complemented by a code of practice which would—

“set out publicly the procedures to be adopted by investigators and prosecutors which might be thought to be less appropriate for primary legislation such as the conduct of lines of enquiry during an investigation, the detailed responsibilities of key roles in the investigation and prosecution and the consequences for completion of reports and witness statements”.³²¹

418. The Committee was advised that work had already started in preparing a draft code of practice, and that a copy will be provided as soon as it is available.³²²

419. However, others were doubtful about the level of detail included in the primary legislation. The Judges of the High Court of Justiciary described the style and structure of the drafting of Part 6 as “often unnecessarily complicated and ‘user unfriendly’”, while the Sheriffs’ Association warned of “detailed, complicated and time-consuming rules about disclosure that will further delay trials”.³²³

420. Lord Coulsfield had similar doubts. For him, the key was “to state the fundamental duty of the prosecution clearly and in a simple and memorable form at the start of the relevant part of the statute”. Instead, he believed that “the provisions of the Bill are much too elaborate and diffuse and tend to confuse rather than clarify the statement of the fundamental duty.”³²⁴ He would prefer to see sections 85 to 90 replaced by one or possibly two fairly short and simple sections.³²⁵

421. The Solicitor General, however, argued that the Bill already contained a clear statement of principle in section 89(3) which requires the prosecutor to review all relevant information and disclose it to the accused where—

“(a) the information would materially weaken or undermine the prosecution case,

(b) the information would materially strengthen the accused’s case, or

(c) the information is likely to form part of the prosecution case.”

422. According to the Solicitor General—

³²⁰ Scottish Parliament Justice Committee. *Official Report*, 9 June 2009, Col 2073.

³²¹ COPFS. Written submission to the Justice Committee.

³²² COPFS. Written submission to the Justice Committee.

³²³ Judges of the High Court of Justiciary; Sheriffs’ Association. Written submissions to the Justice Committee.

³²⁴ Lord Coulsfield. Written submission to the Justice Committee.

³²⁵ Scottish Parliament Justice Committee. *Official Report*, 2 June 2009, Col 2002.

“That is a statement of principle—it is our disclosure obligation. It takes into account the most up-to-date and authoritative jurisprudence on the matter from the Privy Council, and it is enshrined in the Bill.”³²⁶

Sections 86 to 88: Solemn cases: schedules of information

423. Sections 86 to 88 of the Bill create a duty on the police (and other agencies or organisations who investigate crimes and submit reports to the prosecutor) in solemn cases 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 need to distinguish between information that is “sensitive”, “highly sensitive” and “non-sensitive”, although only “sensitive” is defined in the Bill. If the prosecutor disagrees with the categorisation of any piece of information, he or she will be able to direct that the schedules are amended and re-submitted.³²⁷

424. Although Lord Coulsfield had recommended a practice, similar to that employed in England, of listing the material to be disclosed in various categories set out in schedules, he was sceptical about how this had been effected in the Bill—

“The Bill makes the provision of schedules, both by the police to the prosecutor and by the prosecutor to the accused, a statutory requirement. That was not my intention and it is, I think, a serious error. The use of schedules is only a method of carrying out the duty of disclosure. It is an inconvenient and cumbersome method. One should not exclude the possibility that, with experience, better methods may be devised. If any prescription is required, it should be done by a code of practice or by regulation: it is easy to amend a code of practice but much harder to amend a statute. There may even be cases in which it is inconvenient or harmful to use schedules even where adequate disclosure could be made in a different form. In England, the statute does not include any requirement for schedules.”³²⁸

425. The Judges of the High Court of Justiciary agreed, saying it was not appropriate or necessary to include in the Bill detailed provision about schedules of information, which would be better dealt with administratively—

“To attempt to address such practical, administrative arrangements by means of detailed provision in primary legislation risks creating an undesirable lack of flexibility and the possibility of raising objections and questions of a highly technical nature.”³²⁹

426. These points were acknowledged by the Scottish Law Officers. The Lord Advocate said “I certainly agree with the desire to make things as straightforward and simple as possible”, while the Solicitor General accepted that the schedules of

³²⁶ Scottish Parliament Justice Committee. *Official Report*, 9 June 2009, Col 2073.

³²⁷ Policy Memorandum, paragraph 482.

³²⁸ Lord Coulsfield. Written submission to the Justice Committee. See also Scottish Parliament Justice Committee. *Official Report*, 2 June 2009, Col 2001.

³²⁹ Judges of the High Court of Justiciary. Written submission to the Justice Committee.

evidence “could reasonably be taken out of the Bill and put into subordinate legislation or a code of practice”.³³⁰ However, he added—

“I am a great advocate of simplicity, but as I said, disclosure is a complex matter. When you look at the number of relevant provisions and sections in comparison with our disclosure manual from which we operate, they are not overly long or detailed and they give us a comprehensive set of rules or provisions. We know that if we comply with them, we will ensure a fair trial and comply with our disclosure obligations.”³³¹

427. Chief Constable House, on behalf of the the Association of Chief Police Officers in Scotland, said that his main concern in relation to these provisions was the level of police resources that would be required. He cited his experience of the English and Welsh system where “disclosure was a massive drain on police resources” and “it was a monster, to be frank, and one from which England and Wales have stepped back significantly.”³³²

428. The Cabinet Secretary agreed to consider whether elements of the provisions could be dealt with in rules of court or in the code of practice, but expressed caution on the grounds that “the duty to disclose is a critical duty and if we were to remove too many provisions we would deprive [the] Parliament of its role in scrutinising the proposals”.³³³

429. A separate point raised by the Sheriffs’ Association concerned the need for a distinction between “sensitive” and “highly sensitive” information in section 86. The Sheriffs foresaw delays “created by information having to be categorised, the information having to be described, and with inevitable arguments between the prosecutor and the investigating authorities over the correct categorisation”.³³⁴

Committee conclusions

430. We support the general policy of clarifying the rules of disclosure, and accept that these provisions are motivated by good intentions. However, we agree with Lord Coulsfield that the way in which his recommendations have been given effect in the Bill is too complex and detailed, and risks losing sight of the underlying principle. We would prefer to see the basic duty of disclosure elevated to greater prominence.

431. The Committee invites the Scottish Government to review, in the light of Lord Coulsfield’s comments, where the line has been drawn between what is set out in the Bill (including provision about schedules of information in solemn cases) and what is to be included the proposed code of practice (or in guidance). We welcome the Crown Office’s commitment to provide a copy of the draft code, and look forward to being given sight of it in advance of Stage 2.

³³⁰ Scottish Parliament Justice Committee. *Official Report, 9 June 2009*, Cols 2072-3.

³³¹ Scottish Parliament Justice Committee. *Official Report, 9 June 2009*, Col 2073.

³³² Scottish Parliament Justice Committee. *Official Report, 26 May 2009*, Cols 1920-21.

³³³ Letter from Cabinet Secretary for Justice, 22 October 2009.

³³⁴ Sheriffs’ Association. Written submission to the Justice Committee.

432. We also note the evidence by the Sheriffs' Association questioning the need for a distinction between "sensitive" and "highly sensitive" information, particularly when the latter is not separately defined. It would be helpful if the Scottish Government could provide a fuller justification for why this distinction is considered necessary and how it is to be applied.

Sections 94-95: Defence statements

Background and evidence received

433. Under sections 94 and 95 of the Bill, the accused (or the accused person's defence team) must (in solemn cases) or may (in summary cases) provide the prosecution with a "defence statement" setting out certain details of the planned defence. It is intended that this will assist the prosecution in determining what evidence must be disclosed to the accused.

434. However, there was significant scepticism amongst practitioners about how well the defence statement regime would work and whether it would add very much to the present position.³³⁵

435. Lord Coulsfield, in his report, said that the experience of English practitioners was that "in the majority of cases, defence statements are late, unspecific and unhelpful", and that it would be difficult to make the system work better through more rigorous enforcement without "either causing delay or prejudicing a legitimate defence or both". In his view, in Scotland the well-established rules for notification of special defences and the relatively new mechanisms for holding pre-trial hearings fulfilled most of the functions expected of defence statements. He was therefore not convinced that a general requirement for defence statements "would give any significant, additional benefit to justify the additional work and cost which would be generated".³³⁶ He maintained this view in evidence to the Committee, saying that—

"Requiring the preparation of defence statements would have a cost in time and expense, and they could cause confusion and delay and add to complexity in the conduct of trials."³³⁷

436. For the Law Society of Scotland, a key concern was about the requirement on the accused to lodge a defence statement at least fourteen days before the first diet and at least fourteen days before the preliminary hearing, given the requirements about what such a statement should include—

"14 days before a preliminary hearing or first diet in the sheriff court, we do not always know the facts that the prosecution will seek to establish. It is difficult to know how the defence will be able to deal with a requirement to set out 'matters of fact on which the accused takes issue with the prosecution'. Furthermore—others have said this and I agree—the danger is that, if the

³³⁵ Judges of the High Court of Justiciary; Law Society of Scotland. Written submissions to the Justice Committee.

³³⁶ The Rt Hon Lord Coulsfield. (2007) *Review of the Law and Practice of Disclosure in Criminal proceedings in Scotland*. Available at:

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

³³⁷ Scottish Parliament Justice Committee. *Official Report*, 2 June 2009, Col 2003.

accused has to set things out in the detail that seems to be envisaged, their right to silence will be undermined.”³³⁸

437. The Sheriffs’ Association were also concerned about the proposal to make defence statements compulsory in solemn procedure, rather than voluntary as Lord Coulsfield had envisaged. They argued that the timing requirements envisaged could lead to the accused being required to lodge a defence to an indictment before the prosecution has provided any information about the prosecution case, and that this “will no doubt be regarded as repugnant to our legal system” and, as well as being unnecessary, was “contrary to the principles of our law, the right to silence and article 6 of the European Convention of Human Rights”.³³⁹

438. Ian Duguid, for the Faculty of Advocates, was also sceptical, saying that defence statements “are a concept that is particular to the law of England and Wales and are required there because they do not have the procedures that we have”. In particular, the Bonomy reforms of 2004 had already put in place a range of procedures, such as a requirement for advance intimation of special defences—

“We have gone some way towards addressing the issues that defence statements were designed to address in England ... so I am curious as to whether a defence statement will do anything over and above what we have, other than increase expenditure.”³⁴⁰

439. However, the Lord Advocate argued that recent statutory amendments and changes in practice in England and Wales – details of which were later provided in a supplementary submission by the Crown Office³⁴¹ – meant that the experience with defence statements was now quite different from that encountered by Lord Coulsfield. Referring to the thousands of documents that can be involved in High Court cases, she argued—

“To understand what might be relevant or of interest to the defence, it is of considerable help—in establishing the rights of the accused to a fair trial under article 6 of the ECHR—to be able to anticipate in what the defence might be interested. It is not just about assisting the prosecution; it is also about assisting the accused. It’s not about prosecution by ambush or surprise – we now disclose all relevant information – but nor should it be about defence by ambush or surprise.”³⁴²

440. The Solicitor General referred to cases he had been involved in where he believed a defence statement would have assisted the prosecution to effectively discharge its duty of disclosure. He argued strongly in favour of making defence statements mandatory—

“A trial is a test of the prosecution evidence and the defence case, if the defence wants to put forward a case. One would want to identify issues in

³³⁸ Scottish Parliament Justice Committee. *Official Report, 2 June 2009*, Col 1989.

³³⁹ Sheriffs’ Association. Written submission to the Justice Committee.

³⁴⁰ Scottish Parliament Justice Committee. *Official Report, 2 June 2009*, Cols 1987-8.

³⁴¹ COPFS. Supplementary written submission to the Justice Committee.

³⁴² Scottish Parliament Justice Committee. *Official Report, 9 June 2009*, Cols 2074-5.

advance of the trial because that, in my view, makes for a much better trial. It means that it will not be simply a case of taking a scattergun approach to the evidence: there will be focus to assist the court and the jury, and there will be no excessive delays or long trials. A defence statement is a good thing: it should be mandatory rather than discretionary in order to achieve the purposes that I have articulated.”³⁴³

441. For John Logue of the Crown Office and Procurator Fiscal Service, the Bill’s provisions reflected an important point of principle, namely—

“that it is difficult to conceive of a reason why the defence would, at the stage of being ready to go to trial, be unable to advise anyone of what its case is. After all, as a result of the recent changes, the defence now has fair notice of the entirety of the Crown case to the extent that is required under the law, and the accused is the only person in the process who is able to say at that stage what the defence case potentially is.”³⁴⁴

Committee conclusions

442. This is another provision on which the Committee has not been able to reach an agreed and settled view. We understand the rationale presented by the Scottish Government, but we also recognise the concerns expressed by some witnesses. However, the Committee is not currently persuaded that there is merit in the proposal to make defence statements compulsory in solemn cases, as it appears that the timing of their production may risk jeopardising important principles of justice. Some further explanation of the Scottish Government’s thinking would therefore be appreciated, including on its reasons for departing from Lord Coulsfield’s recommendations on this issue.

Sections 102-106: Applications to court: orders restricting disclosure

Background

443. Under sections 102-106 the prosecutor may apply to the court for orders to withhold certain information from the accused on the grounds that the information is sensitive. This is sometimes referred to as “public interest immunity”. The three categories of order proposed – “non-disclosure orders”, “non-notification orders” and “exclusion orders” – are intended to give effect to recommendations made by Lord Coulsfield in his report.

444. A non-disclosure order allows the prosecutor to withhold from the accused an item or items of information specified in the order which would otherwise require to be disclosed. An exclusion order prohibits the accused from attending or making representations in proceedings relating to the application for a non-disclosure order, while a non-notification order prohibits 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.³⁴⁵ An exclusion order may be made with or without a non-notification

³⁴³ Scottish Parliament Justice Committee. *Official Report, 9 June 2009*, Col 2076.

³⁴⁴ Scottish Parliament Justice Committee. *Official Report, 9 June 2009*, Col 2077.

³⁴⁵ Policy Memorandum, paragraph 489.

order also being made, but if a non-notification order is made, an exclusion order must also be made.

Evidence received

445. Ian Duguid, for the Faculty of Advocates, recognised that there would be situations when information would have to be withheld in the public interest, and that a framework had to be provided for this situation. He questioned, however, whether the proposals were balanced, and whether there were enough safeguards for the withholding of information.³⁴⁶

446. Speaking for the Law Society of Scotland, Bill McVicar suggested that the provisions “might – unfortunately – complicate the system more than is necessary”, and that they adopted an English system that “would not fit terribly well with our procedures”.³⁴⁷

447. The Sheriffs’ Association expressed strong reservations about the provisions in the Bill—

“In a democratic society such provisions are likely to be regarded as disturbing. We anticipate time taken up with challenges under the European Convention of Human Rights.”³⁴⁸

448. The Association also questioned why one of the tests for granting a non-notification or exclusion order was lower than that required for a non-disclosure order—

“It is simply whether “it is not in the public interest that the nature of the information be disclosed”, instead of “likely to cause serious prejudice to the public interest”. We are not clear why the test is lower for non-notification and exclusion orders.”³⁴⁹

449. Lord Coulsfield argued in favour of setting out the detail in subordinate legislation—

“In my view, issues to do with orders, such as the procedure for making them, the terms of orders and what kind of orders can be made, should all properly be found in subordinate legislation, because one hopes that, with experience, it will be possible to simplify and improve the procedure, so it should be easy to change.”³⁵⁰

Committee conclusions

450. The Committee accepts the case made by the Scottish Government, following Lord Coulsfield, for having a statutory process to allow non-disclosure of information in certain circumstances. However, we also recognise the inherent difficulties in achieving this objective while continuing to secure adequate protection for the rights of the accused. We

³⁴⁶ Scottish Parliament Justice Committee. *Official Report, 2 June 2009*, Col 1989.

³⁴⁷ Scottish Parliament Justice Committee. *Official Report, 2 June 2009*, Cols 1988-9.

³⁴⁸ Sheriffs’ Association. Written submission to the Justice Committee.

³⁴⁹ Sheriffs’ Association. Written submission to the Justice Committee.

³⁵⁰ Scottish Parliament Justice Committee. *Official Report, 2 June 2009*, Col 2002.

are also concerned about the amount of detail set out in these sections of the Bill, and agree with witnesses that some of this provision would be better dealt with in subordinate legislation (subject to appropriate Parliamentary control) to allow them to be refined and developed over time.

Section 107: Special counsel

Background and evidence received

451. Section 107 allows the court, when considering an application for a non-notification, exclusion or non-disclosure order, or a review or appeal in relation to such an order, to appoint “special counsel” if the court considers it necessary to ensure that the accused receives a fair trial.

452. Commenting on this, the Sheriffs’ Association said—

“We think that such an appointment may be inevitable for an application for a non-notification order, an exclusion order or a non-disclosure order where either of the first two has been granted. The task of special counsel will be difficult because he or she will not be familiar with the details of the defence case and because the accused is not to be made aware of the contents of these applications.”³⁵¹

453. In their written submission, the Judges of the High Court of Justiciary noted that nothing is said in the Bill about the funding of special counsel.³⁵²

454. Bill McVicar, representing the Law Society of Scotland, questioned whether the proposed special counsel system – which he described as being about “hiding information from the defence” – was compatible with human rights.³⁵³

455. When asked about compatibility with ECHR, Lord Coulsfield drew to the attention of the Committee a House of Lords appeal case concerned with control orders under terrorism legislation, under which there is a procedure for the use of special counsel to consider information that is thought not to be suitable for public disclosure. He explained that a decision in that case was still awaited. He commented—

“If we are asking ourselves whether the proposed system would be compatible with ECHR, the response must be that the system as it has been operating in England has so far survived all the challenges that have been made to it, but one cannot say whether it will continue to do so.”³⁵⁴

456. The Lord Advocate acknowledged that the issue of special procedures and non-notification had been looked at by the House of Lords recently. She commented—

“I am satisfied that, so far as is possible, the Bill sets a framework that will be compatible with the ECHR as we understand it in the United Kingdom, and

³⁵¹ Sheriffs’ Association. Written submission to the Justice Committee.

³⁵² Judges of the High Court of Justiciary. Written submission to the Justice Committee.

³⁵³ Scottish Parliament Justice Committee. *Official Report*, 2 June 2009, Col 1989.

³⁵⁴ Scottish Parliament Justice Committee. *Official Report*, 2 June 2009, Col 2004.

that much will depend on the facts of individual cases. It will ultimately be for judges to determine whether the provisions, as they operate in practice, can allow fair trials in that respect. That judicial role will be important.”³⁵⁵

457. On 10 June in *Secretary of State for the Home Department v AF and others* [2009] UKHL 28 on the use of secret evidence in control order hearings, nine Law Lords (including two Scottish judges, Lords Hope of Craighead and Rodger of Earlsferry) unanimously agreed that the procedure that resulted in the making of the control orders in relation to the three individuals concerned did not amount to a fair trial, and accordingly allowed their appeal.³⁵⁶ The Law Lords did not accept the argument that “special counsel” can second-guess the impact of non-disclosed material on the defence’s conduct of the trial in such a way as to allow the court to retain confidence that the accused can have a fair trial.

458. However, the Cabinet Secretary said that the House of Lords judgment “does not apply to the procedures that we operate in Scotland” because of the checks and balances that are built into the non-disclosure provisions.³⁵⁷ He added that—

“The fundamental differences between the circumstances of the AF case and the provisions of the Bill are that, in control order cases, the non-disclosed information is the incriminatory evidence used by the court in deciding whether to grant the order whereas, in our proposed scheme, it is only the exculpatory evidence which is not disclosed (and, even then, only where rigorous tests are met) and, therefore, the court has to entirely disregard information which is the subject of a non-disclosure order in reaching its verdict. As such, Special Counsel within the scheme proposed in Scotland for non-disclosure orders in criminal proceedings do provide an additional safeguard in ensuring that the accused’s rights are protected.”³⁵⁸

Committee conclusions

459. The Committee is satisfied that the provision for special counsel in this Bill do not fall foul of the human rights objections raised by the House of Lords in relation to control orders, and are appropriate in the context of a non-disclosure regime. However, we would be grateful for clarification about how special counsel would be paid for, and in particular whether any changes to legal aid regulations will be required.

Section 115: Acts of Adjournal

Background

460. Under this section, the High Court is empowered to make “such rules as it considers necessary or expedient for the purposes of, in consequence of, or for giving full effect to” Part 6 of the Bill. Any such rules would be in the form of “Acts of Adjournal” – a form of subordinate legislation made directly by the High Court and not subject to any Parliamentary procedure or control.

³⁵⁵ Scottish Parliament Justice Committee. *Official Report*, 9 June 2009, Col 2078.

³⁵⁶ Secretary of State for the Home Department (Respondent) v AF (Appellant) (FC) and another (Appellant) and one other action [2009] UKHL 28. Available at: <http://www.publications.parliament.uk/pa/ld200809/ldjudgmt/jd090610/af-1.htm>

³⁵⁷ Scottish Parliament Justice Committee. *Official Report*, 1 September 2009, Col 2245.

³⁵⁸ Letter from Cabinet Secretary for Justice, 22 October 2009.

Subordinate Legislation Committee report

461. The Subordinate Legislation Committee (SLC), in its report on the Bill, questioned the width of the delegated power involved and even whether a new power was necessary in addition to the existing power of the High Court to make Acts of Adjournal under section 305 of the Criminal Procedure (Scotland) Act 1995. It concluded that “insufficient justification” had been given for a power in these terms, or for the decision not to limit its scope to “matters of criminal practice or procedure or other matters within the remit of the High Court”.³⁵⁹

Committee conclusion

462. The Committee notes the concerns of the Subordinate Legislation Committee, and invites the Scottish Government to provide a fuller justification of the scope of the proposed power, and indeed why it is considered necessary in addition to existing powers to make Acts of Adjournal.

PART 7 – MENTAL DISORDER AND UNFITNESS FOR TRIAL

Background

463. Part 7 of the Bill implements the recommendations made by the Scottish Law Commission in its 2004 *Report on Insanity and Diminished Responsibility*.³⁶⁰

464. The principal recommendation of the Commission’s report was that the common law test for insanity as a defence should be abolished in favour of a statutory special defence, provable on the balance of probabilities, that the accused lacks criminal responsibility by reason of mental disorder (defined to exclude psychopathic personality disorder). It also recommended a statutory basis for the plea of diminished responsibility, available only in cases of murder, which should, if successful, reduce any conviction to one of culpable homicide; and that the common law plea of insanity in bar of trial should be replaced by a statutory plea on the basis of “unfitness for trial”.

Evidence received

465. The Mental Welfare Commission for Scotland welcomed the introduction of the new statutory defence to replace the common law defence of insanity and the removal of outdated and inappropriate terminology. However, it questioned the exclusion of psychopathic personality disorder from the defence of mental disorder, pointing out that the Mental Health (Care and Treatment) (Scotland) Act 2003 defines “mental disorder” to include all forms of personality disorder.

466. The Commission also questioned the lack of reference to individuals with a learning disability or cognitive impairment, pointing out that their ability to understand and give informed consent to participation in community programmes may be limited and hence that they may be “set up to fail”.³⁶¹

³⁵⁹ Subordinate Legislation Committee, *Report on the Criminal Justice and Licensing Bill*, paragraphs 63-69.

³⁶⁰ Scottish Law Commission. (2004) *Report on Insanity and Diminished Responsibility*. Available at: <http://www.scotlawcom.gov.uk/downloads/rep195.pdf>

³⁶¹ Mental Welfare Commission for Scotland. Written submission to the Justice Committee.

467. A further issue was that the proposed defence depends on whether the offender was able to “appreciate the nature or wrongfulness of the conduct”. For the Commission—

“a mental disorder may not just impair an individual’s ability to appreciate the wrongfulness of the conduct but may also impair their ability to control their behaviour even though they may appreciate that their actions are wrong.”

468. Very similar concerns were raised by the Law Society of Scotland and the Scottish Association for Mental Health (SAMH). SAMH also suggested that “abnormally aggressive or seriously irresponsible conduct” needed to be further defined, but other witnesses did not think that further definitions would necessarily help.³⁶²

469. The Law Society of Scotland, in explaining its concern about the terms of the “mental disorder” defence, suggested that it might not be available to “a person who kills his or her children while suffering from a depressive illness [and who] may be able to appreciate what he/she is doing and understand that it is wrong in the eyes of the law, but nonetheless be driven to commit the crime by his or her illness.” However, James Chalmers, from the University of Edinburgh, thought the Society had misunderstood the position and was wrongly assuming that the Bill relied on “the much criticised English position” according to which “no defence of insanity is available to a person who knows their actions to be *legally* wrong, but – due to mental disorder – does not appreciate that they are *morally* wrong”. Scots law, he said, already recognised a defence of insanity based on circumstances similar to those outlined by the Law Society, and the defence provided under the new section 51A would not change that, since it “encompasses a failure to appreciate either legal or moral wrongfulness”. He added that the Law Society’s arguments for a defence of “volitional insanity” had already been fully considered by the Scottish Law Commission in its report and rejected “for cogent reasons which have not been challenged”.³⁶³

470. However, where Mr Chalmers did see a problem was with subsection (4) of the new section 51A(4) which allows only the accused to advance the special defence of mental disorder. He gave various examples of situations in which there could be a dispute about whether an offender had a mental disorder or suffered instead from diminished responsibility and where, without the ability of the Crown also to advance the special defence, the court could find itself unable to reach the appropriate verdict.³⁶⁴

Committee conclusions

471. The Committee broadly supports this provision insofar as it implements the Scottish Law Commission’s recommendations. However, we are not yet confident that the proposed special defence of mental disorder has been appropriately defined, given the concerns raised in evidence and the differences of interpretation between Mr Chalmers and other witnesses

³⁶² Law Society of Scotland, SAMH. Written submissions to the Justice Committee. Scottish Parliament Justice Committee. *Official Report*, 2 June 2009, Cols 1993-4.

³⁶³ Law Society of Scotland. Written submission to the Justice Committee. James Chalmers. Supplementary written submission to the Justice Committee.

³⁶⁴ James Chalmers. Written submission to the Justice Committee.

about whether the special defence would be available to people who know their conduct is wrong, but are driven by their mental illness to do it anyway. We therefore invite the Scottish Government to consider carefully and respond to the points raised. We support the suggestion by James Chalmers that it should be open to the Crown as well as the accused to advance the special defence. We also invite the Scottish Government to comment on the issues raised by the Mental Welfare Commission relating to people with learning disability or cognitive impairment.

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

Introduction

472. Part 8 of the Bill—

“makes various changes to the general licensing provisions of the Civic Government (Scotland) Act 1982 and to its specific provisions on metal dealers, market operators, public entertainment, late hours catering, and taxis and private hire cars.”³⁶⁵

473. These changes are based on recommendations made by a Task Group set up to review the licensing provisions contained in the 1982 Act.³⁶⁶ The Task Group’s remit was to—

“re-examine the principles and mechanisms of licensing as they are set out in the 1982 Act and, having done so, review the existing provisions and any proposals for change submitted to the Executive.”

474. When the Task Group’s report was published in 2004, the then Scottish Executive stated that it was not in a position to bring forward the necessary legislative changes prior to the 2007 Scottish Parliament elections.³⁶⁷

475. According to the Policy Memorandum, the amendments to the 1982 Act taken forward in the Bill are “largely technical”, although they include some more substantive changes. Overall—

“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.”³⁶⁸

The 1982 Act and the Task Group recommendations

Evidence received

476. Aberdeenshire Council said that, rather than further amendments to the 1982 Act, it would prefer to see an overhaul of the Act as a whole.³⁶⁹ Midlothian Council,

³⁶⁵ Explanatory Notes, paragraph 551.

³⁶⁶ Scottish Government. (2004) *A Report by the Task Group Set Up to Review the Licensing Provisions Contained in the Civic Government (Scotland) Act 1982*. Available at: <http://www.scotland.gov.uk/Resource/Doc/30859/0026954.pdf> [Accessed 28 July 2009]

³⁶⁷ Scottish Government. (2005) *Executive response to report on licensing*. Available at <http://www.scotland.gov.uk/News/Releases/2005/08/02134157> [Accessed 29 July 2009]

³⁶⁸ Policy Memorandum, paragraph 512.

³⁶⁹ Aberdeenshire Council. Written submission to the Justice Committee.

while generally welcoming the provisions, noted that no explanation had been given for why some of the recommendations made in the Task Group's report had not been taken forward in the Bill.³⁷⁰

477. The Scottish Taxi Federation went further, suggesting that only "a few" of the Task Group's recommendations were implemented by the Bill, and that "if the efforts of the Task Group are not to be lost and the 1982 Act properly updated, then much more needs to be included".³⁷¹

478. However, responding to these claims, the Cabinet Secretary said that all but two of the Task Group's recommendations that required legislation were being implemented by the Bill, and that the aim was to improve an Act that had served Scotland well, rather than making change for its own sake.³⁷²

Committee conclusion

479. The Committee accepts the Cabinet Secretary's explanation, and recognises that the Task Group recommendations provide a sound general basis for the provisions in this Part of the Bill.

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

Background and evidence received

480. The 1982 Act allows for the automatic and unconditional grant or renewal of a licence where the licensing authority has failed to reach a final decision on an application within a specified period.

481. Section 121 of the Bill removes the term "unconditionally" and instead allows for mandatory and standard conditions to be applied to any such licence issued by a licensing authority. Mandatory conditions will be determined by Scottish Ministers while standard conditions will be determined by licensing authorities.

482. The proposal was generally welcomed. North Ayrshire Council called it "a good proposal"³⁷³ and Aberdeenshire Council said—

"While normally all licences are processed and issued within 28 days, there are occasions where problems arise that make it difficult to issue a licence within the permitted six months. To be able to issue a licence by default with the same standard conditions that all other licences issued under the Act have makes the licence enforceable where there are problems. This provision is long overdue."³⁷⁴

483. In order to have effect, a licensing authority will be required to publish any standard conditions determined by them. The Law Society of Scotland suggested that a transitional period should be set to allow local authorities "time to draft, consider, publish and determine standard conditions for all licence types."³⁷⁵ The

³⁷⁰ Midlothian Council. Written submission to the Justice Committee.

³⁷¹ Scottish Taxi Federation. Written submission to the Justice Committee.

³⁷² Scottish Parliament Justice Committee. *Official Report, 1 September 2009*, Col 2225.

³⁷³ North Ayrshire Council. Written submission to the Justice Committee.

³⁷⁴ Aberdeenshire Council. Written submission to the Justice Committee.

³⁷⁵ The Law Society of Scotland. Written submission to the Justice Committee.

Cabinet Secretary for Justice said that he recognised the need for a transitional period and that it would be considered carefully as part of implementation.³⁷⁶

484. The Faculty of Advocates welcomed the intention to remove the term “unconditionally” from the 1982 Act, but described the introduction of mandatory licensing conditions as “a radical departure from the current approach which is to leave the attachment of specific conditions to licensing authorities.”³⁷⁷ In the Faculty’s view, mandatory conditions would not allow licensing authorities to take into account local circumstances and it said that no explanation had been given for this change.

485. Mr MacAskill, when questioned by the Committee on the potential inflexibility of mandatory conditions, said—

“We accept that the setting of mandatory conditions has the potential to limit local flexibility. Whenever they exercise the power, ministers will need to be aware of that. We are seeking an appropriate balance between matters that require to be dealt with uniformly and those that require to be dealt with on a much more localised basis.”³⁷⁸

486. George Burgess, for the Scottish Government, explained that the inclusion in the Bill of a power to set mandatory conditions for licences was seen as the easiest way of addressing the Task Group recommendation that all licence holders should be required to display or carry their licences. Given the variety of licences covered by the 1982 Act, he said it was considered preferable to create a power rather than “write directly into the 1982 Act a different type of condition for each type of licence”; but he added: “We do not have a long list up our sleeve of other mandatory conditions that we are looking to insert by way of the power.”³⁷⁹

Committee conclusion

487. The Committee is satisfied with the Scottish Government’s justification for seeking a power to set mandatory conditions, and accepts its explanation about the conditions it envisages determining.

Section 123: Licensing of metal dealers

Background and evidence received

488. The 1982 Act provides for a mandatory licensing scheme for all metal dealers. Section 123 of the Bill replaces this with an optional scheme by which it will be “open to local licensing authorities to determine whether or not licences are required in their areas.”³⁸⁰

489. Again, the Committee received evidence³⁸¹ requesting transitional provisions in order to afford licensing authorities time to decide whether or not to retain a

³⁷⁶ Scottish Parliament Justice Committee. *Official Report*, 1 September 2009, Col 2226.

³⁷⁷ The Faculty of Advocates. Written submission to the Justice Committee.

³⁷⁸ Scottish Parliament Justice Committee. *Official Report*, 1 September 2009, Col 2226.

³⁷⁹ Scottish Parliament Justice Committee. *Official Report*, 1 September 2009, Col 2227.

³⁸⁰ Policy Memorandum, paragraph 516.

³⁸¹ Glasgow City Council and the Law Society of Scotland. Written submissions to the Justice Committee.

licensing requirement for metal dealers. Some witnesses questioned the need to relax the regime. Dumfries and Galloway Council said it was an “odd time”³⁸² to introduce an optional scheme when the “theft of metal is regularly reported in the press.” Aberdeenshire Council shared this view, saying that—

“The price of metal is currently very high and many communities are experiencing random theft of metal. This activity should remain mandatory.”³⁸³

490. However, the Association of Chief Police Officers in Scotland (ACPOS) was content for the decision on whether or not to licence metal dealers to rest with local authorities, saying that—

“The theft of metal has been an issue in the past. Our local experience is that it has been curtailed to a large extent, probably due to the economic downturn.”³⁸⁴

Committee conclusions

491. The Committee notes the concerns raised by some witnesses about theft of metals and the implication that a mandatory system of licensing may have a role to play in tackling this problem. We recognise that tackling criminality is only one factor to be taken into account in deciding on an appropriate licensing regime, but we are also uncertain about the Scottish Government’s rationale for proposing moving to an optional system of licensing in this area. We therefore invite the Cabinet Secretary to provide a fuller justification of this aspect of its policy intention.

Section 124: Licensing of taxis and private hire cars

Background

492. The Task Group made over 20 recommendations in its report on the licensing of taxis and private hire cars, noting that—

“of all the licensing activities contained in the 1982 Act, this was the one that had over the years attracted the most criticism, particularly from the trade who had been pressing for a review for some time. In view of this, and given the number of people involved in the trade, it was not surprising that this was the activity which attracted most responses from our consultation.”³⁸⁵

493. According to the Policy Memorandum, the purpose of section 124 of the Bill is to—

³⁸² Dumfries and Galloway Council. Written submission to the Justice Committee.

³⁸³ Aberdeenshire Council. Written submission to the Justice Committee.

³⁸⁴ Scottish Parliament Justice Committee. *Official Report*, 16 June 2009, Col 2114.

³⁸⁵ Scottish Government. (2004) *A Report by the Task Group Set Up to Review the Licensing Provisions Contained in the Civic Government (Scotland) Act 1982*. Available at: <http://www.scotland.gov.uk/Resource/Doc/30859/0026954.pdf> [Accessed 28 July 2009]

“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.”³⁸⁶

Applications for taxi and private car licences

494. The 1982 Act requires applicants for taxi or private hire car licences to have held a driving licence for any continuous period of 12 months. Under the new proposals, all applicants for taxi and private hire licenses must have held a driving licence for 12 months immediately prior to the application.

495. The Policy Memorandum states that this new provision “clarifies the original intention of the policy and was widely supported during the consultation on the Task Group review.”³⁸⁷

496. Aberdeenshire Council strongly supported this proposed change in the interests of public safety, while North Ayrshire Council stated that it “clarifies a grey area of law”.³⁸⁸ Dumfries and Galloway Council generally supported the change but suggested that some discretion be granted to local authorities to allow an applicant’s individual circumstances to be taken into account – a view supported by the Law Society of Scotland, which gave the example of someone disqualified from driving on a “totting up” basis (i.e. where the disqualification is triggered by the most recent of a series of driving offences committed over a period of time). The Bill would prevent that person applying for a taxi licence until a year after the end of the disqualification period, something that both the Society and Glasgow City Council suggested would amount to a double penalty for the individual.³⁸⁹

497. Responding to these concerns, the Cabinet Secretary said that the purpose of section 124(2) “is to ensure that an applicant has a proven record of unblemished recent driving experience to the benefit of public safety and confidence”. He wanted to see “a uniform approach throughout all areas”, and on this basis did not support giving discretion to licensing authorities.

Fixing scales for taxi fares

498. Section 17 of the 1982 Act specifies how licensing authorities should fix the scales for taxi fares. The Bill updates these provisions to include a requirement to review and then fix scales within an 18-month period.

499. Glasgow City Council and the Law Society of Scotland both suggested that the 18-month deadline could prove difficult to meet, given the time sometimes required for consultation. The Scottish Taxi Federation believed that such reviews should be completed annually and suggested a method to make this possible—

“If a cost formula were agreed between trade representatives and the local authority, such a review would simply be a case of checking the figures

³⁸⁶ Policy Memorandum, paragraph 517.

³⁸⁷ Policy Memorandum, paragraph 522.

³⁸⁸ Aberdeenshire Council, North Ayrshire Council. Written submissions to the Justice Committee.

³⁸⁹ Dumfries and Galloway Council, Law Society of Scotland, Glasgow City Council. Written submissions to the Justice Committee.

against the previous figures and calculating any percentage increase which may apply.”³⁹⁰

500. According to the Federation, section 17 will be ineffective as there are no sanctions for local authorities should a review of fares be late. They suggested the section be amended to include a right of appeal by taxi operators against an authority’s failure to carry out a fares review within the prescribed timescale.

501. The Cabinet Secretary did not see why the 18-month timescale should be a problem, since most local authorities interpreted the existing legislation on a similar basis. He also did not think it was necessary for the Bill to provide sanctions against a licensing authority that fails to review fares within the set period. His experience was that “the taxi trade is not shy in coming forward if it thinks there are matters that are prejudicial to its financial wellbeing”, so there is “an inbuilt mechanism for local authority accountability”. Nevertheless, he was willing to consider a statutory sanction if it was thought necessary.³⁹¹

Appeals in respect of taxi fares

502. Taxi operators can currently appeal against a licensing authority’s review of taxi scales. Section 124 of the Bill will amend the 1982 Act to widen this right of appeal to include representatives of taxi operators.

503. While the Scottish Taxi Federation supported this amendment,³⁹² Glasgow City Council considered that the right to appeal decisions should only be extended to those who responded to the original consultation.³⁹³

504. However, the Scottish Government said it was appropriate to give all representative bodies a right of appeal, since these groups already require to be consulted by licensing authorities when they review taxi scales and then notified of the outcome.³⁹⁴

Publication and coming into effect of taxi fares

505. Section 124(5) requires licensing authorities, once they have fixed taxi fare scales, to publicise the scales in a newspaper circulating in the relevant area. The Law Society of Scotland and Glasgow City Council both commented on this provision, pointing out that newspaper advertisements are expensive and that it would be more consistent with the “modern approach” of the Licensing (Scotland) Act 2005 which allows advertising via a website.³⁹⁵ John Loudon from the Law Society of Scotland also pointed out that people can find information on a website at any time, whereas they will only see a newspaper advertisement if they happen to read the relevant edition.³⁹⁶

³⁹⁰ The Scottish Taxi Federation. Written submission to the Justice Committee.

³⁹¹ Scottish Parliament Justice Committee. *Official Report*, 1 September 2009, Col 2228.

³⁹² The Scottish Taxi Federation. Written submission to the Justice Committee.

³⁹³ Glasgow City Council. Written submission to the Justice Committee.

³⁹⁴ Scottish Government. Supplementary written submission to the Justice Committee.

³⁹⁵ Glasgow City Council and the Law Society of Scotland. Written submissions to the Justice Committee.

³⁹⁶ Scottish Parliament Justice Committee. *Official Report*, 16 June 2009, Col 2101.

506. The Cabinet Secretary said the aim was simply to follow existing practice, which appeared to have worked well, with no specific concerns about cost having been raised. He noted the point about the use of websites, but said that making a change in this context “would have potential implications for other parts of the 1982 Act.”³⁹⁷

Other issues

507. The Committee also received evidence suggesting further provisions in relation to the licensing of taxis and private hire cars. For example, the Scottish Taxi Federation suggested that local authorities’ power to limit the number of taxi licences should be extended to cover private hire licences.³⁹⁸

508. While not considering this an issue to be considered in the context of the Bill, the Cabinet Secretary for Justice added—

“we do anticipate that we may need to look more widely at the existing powers once we have a clearer understanding of where the current consultation on vehicle accessibility is proceeding.”³⁹⁹

509. Both the City of Edinburgh Council and West Lothian Council also proposed additional restrictions for non-UK residents who applied for taxi and private hire car driver licences. According to the City of Edinburgh Council—

“Taxis and private hire cars often carry children and vulnerable adults, mostly without incident. However, licensing authorities and the police wish to ensure that all drivers are subject to rigorous background and criminal checks. These checks cannot be carried out effectively on persons who reside outwith the United Kingdom.”⁴⁰⁰

510. The Scottish Government said that it had received no evidence of such concerns from either licensing authorities or the police.⁴⁰¹

Committee conclusions

511. The Committee supports the proposal to require all applicants for taxi licences to have held a driving licence for the year immediately prior to their applications. We agree with the Cabinet Secretary that discretion for licensing authorities would not be appropriate in this context.

512. We also agree with the Cabinet Secretary that provision for sanctions against authorities that fail to review fares within the set period is unnecessary, given existing mechanisms to enable authorities to be held accountable.

513. While we would not wish to undermine the distinction between taxis that are entitled to ply for trade and private hire cars that are not, we accept

³⁹⁷ Scottish Government. Supplementary written submission to the Justice Committee.

³⁹⁸ The Scottish Taxi Federation. Written submission to the Justice Committee.

³⁹⁹ Scottish Government. Supplementary written submission to the Justice Committee.

⁴⁰⁰ The City of Edinburgh Council Regulatory Committee. Written submission to the Justice Committee.

⁴⁰¹ Scottish Government. Supplementary written submission to the Justice Committee.

that there may be a case for allowing local authorities to limit the number of private hire cars operating in their areas, just as they can limit the number of taxis. However, we agree that this is not a matter for the current Bill, not least because of the shortage of evidence we have taken on this issue and the fact that the Task Group did not address the point in its report.

514. Finally, we are surprised that the Scottish Government is unaware of concerns about the ability of licensing authorities to carry out appropriate checks on non-UK residents applying for a taxi or private hire car driver's licence. Members of the Committee have, individually, heard such concerns expressed, and we would encourage the Scottish Government to adopt a more active approach to establishing whether this anecdotal impression is borne out by the evidence.

Sections 125 and 126: Licensing of market operators and licensing of public entertainment

Background

515. Section 125 of the Bill removes the exemption from holding a market operators' licence currently given to non-commercial organisations. The new provisions will bring charitable, youth, religious, community, political and other organisations within the scope of the new provisions and "licensing authorities [will] have discretion as to whether to charge reduced or no fees to such organisations."⁴⁰² Licensing authorities will be able to regulate car boot sale organisers as well as other types of market operators.

516. Section 126 of the Bill removes the existing exemption in section 41 of the 1982 Act from the need to hold a public entertainment licence if an event is free to enter. This will allow licensing authorities to control large-scale free events but will give them discretion whether to require licences for certain events such as school fetes or gala days.⁴⁰³

Evidence received

517. East Lothian Council supported the removal of both statutory exemptions, as it believed that events held outwith the licensing framework could "easily be to the detriment of the public with regard to safety and lack of measures for public protection."⁴⁰⁴

518. Aberdeenshire Council took a similar view, saying the removal of the exemption was "long overdue"—

"Many large scale events regularly get round licensing requirements by being 'free'. This often means that essential health and safety checks are not carried out and the applicants do not have the proper measures in place to ensure the safety of the events. Likewise, the ability to be able to exclude small events is welcomed."⁴⁰⁵

⁴⁰² Explanatory Notes, paragraph 563.

⁴⁰³ Explanatory Notes, paragraph 565.

⁴⁰⁴ East Lothian Council. Written submission to the Justice Committee.

⁴⁰⁵ Aberdeenshire Council. Written submission to the Justice Committee.

519. Dumfries and Galloway Council was concerned that sections 125 and 126, by removing the statutory exemptions for non-commercial organisations, will take up local authorities' "valuable time and resources" and "will impact on local community groups". They argued that authorities would have to publicise the new arrangements and process additional applications, and that (given their obligation to secure cost recovery) it would unfairly increase fees for other applicants if they exercised their discretion to waive or reduce the fees for non-commercial organisations.⁴⁰⁶

520. Other written submissions⁴⁰⁷ questioned whether the potential costs of obtaining a market operators' licence or a public entertainment licence would be prohibitive for not-for-profit organisations. Midlothian Council said that volunteers who organise events such as gala days and fetes need to be supported rather than potentially have obstacles placed in their path.⁴⁰⁸ Both the Law Society of Scotland and ACPOS questioned whether there was sufficient evidence of a current problem to justify this change in the law – "what is the mischief that we are trying to resolve?"⁴⁰⁹

521. Frank Jensen, speaking for Fife Council, pointed out that local authorities currently only had discretion either to license all market operators in their area, or none. He suggested that—

"It would be highly desirable if there were explicit provision that gave local authorities discretion to determine which categories of market in their area they wished to license, control or regulate ... through assessment of perceived risk, numbers and so on. Such explicit provision would allow local authorities to decide whether to license small-scale markets, or car-boot sales by church groups, and so on."⁴¹⁰

522. Alan McCreddie, Deputy Director Law Reform of the Law Society of Scotland, questioned the statements in the Policy Memorandum and the Explanatory Notes that local authorities already have discretion either to charge reduced or no fees to non-commercial organisations or exempt them from licensing requirements.⁴¹¹ He did not see how such discretion was provided for by the Bill, and therefore concluded that the reference must be to authorities' existing discretion under section 9 of the 1982 Act (according to which the licensing of market operators and public entertainment applies only where an authority has so resolved). He described it as a "curious situation" in which authorities, by invoking section 9, would be able to "circumvent" the intention of these sections of the Bill.⁴¹²

523. In oral evidence, the Cabinet Secretary insisted that the removal of exemptions would not prevent local authorities from creating their own exemptions

⁴⁰⁶ Dumfries and Galloway Council. Written submission to the Justice Committee.

⁴⁰⁷ Glasgow City Council, South Lanarkshire Council and the Law Society of Scotland. Written submissions to the Justice Committee.

⁴⁰⁸ Midlothian Council. Written submission to the Justice Committee.

⁴⁰⁹ Scottish Parliament Justice Committee. *Official Report*, 16 June 2009, Cols 2103, 2114.

⁴¹⁰ Scottish Parliament Justice Committee. *Official Report*, 16 June 2009, Col 2141.

⁴¹¹ Scottish Parliament Justice Committee. *Official Report*, 16 June 2009, Col 2104.

⁴¹² The Law Society of Scotland. Supplementary written submission to the Justice Committee.

for some or all of the organisations presently entitled to exemptions. He said it was appropriate that these decisions should be made by locally-accountable politicians rather than centrally, by Scottish Ministers.⁴¹³ In a supplementary submission, the Cabinet Secretary further explained the basis for his view, asserting that—

“If section 125 is approved and a licensing authority did subsequently decide to licence non-commercial market operator activities, the 1982 Act affords licensing authorities full flexibility in deciding whether to charge reduced or no fees to non-commercial organisations. For example, a licensing authority could decide to license non-commercial market operators but charge no fees to applicants.”⁴¹⁴

Licensing of lap dancing clubs

524. The Committee understands that local authorities regulate lap dancing clubs primarily through the alcohol licensing system (although such clubs could also be regulated under section 41 of the 1982 Act which requires a “public entertainment licence” in order to operate legally). Both the Trafficking Awareness Raising Alliance and Glasgow City Council said that the Bill “provides a valuable opportunity to reassess the current licensing of lap dancing venues”.⁴¹⁵ The Alliance added that it would “strongly welcome” any move to re-categorise such clubs as sex shops for licensing purposes, in order to “give local authorities greater powers to apply conditions and restrictions on such clubs.”⁴¹⁶

525. However, the Cabinet Secretary said that the Licensing (Scotland) Act 2005 “enables local authorities to take what action is required in this area”, although he did not give details of the existing powers in question.⁴¹⁷

Committee conclusions

526. The Committee shares concerns raised in evidence that the potential costs for non-commercial groups to obtain a market operator’s or public entertainment licence might prove prohibitive. We recognise that the Bill gives local authorities discretion over whether to charge for such licenses, but we can also understand concerns that where the power to charge exists, it may in practice be used.

527. The Committee also recognises the public safety concerns surrounding large-scale events that are free to enter, and hence currently do not require a public entertainment licence. We believe that it is important that community and charitable groups are able to hold small-scale events easily while also ensuring that licensing authorities have the power to control these large-scale events. The Committee therefore invites the Scottish Government to consider the alternative of basing the requirement for a public entertainment licence on the scale of the event (recognising that this will require authorities that choose to impose a licensing regime also to exercise

⁴¹³ Scottish Parliament Justice Committee. *Official Report, 1 September 2009*, Cols 2228-9.

⁴¹⁴ Scottish Government. Supplementary written submission to the Justice Committee.

⁴¹⁵ Glasgow City Council. Written submission to the Justice Committee.

⁴¹⁶ Trafficking Awareness Raising Alliance. Written submission to the Justice Committee.

⁴¹⁷ Scottish Government. Supplementary written submission to the Justice Committee.

discretion in relation to the size of events that would then require to be licensed).

528. In relation to lap-dancing clubs, the Committee is strongly in favour of local authorities having sufficient powers under licensing legislation to be able to control the numbers of such venues in their area – including to the extent of setting zero as the appropriate number of such venues. We would be grateful for an assessment by the Scottish Government of whether it considers those powers to be sufficient for this purpose. Subject to that, we are not convinced that re-categorising these venues for licensing purposes would necessarily be beneficial.

Section 127: Licensing of late night catering

Background

529. The 1982 Act provides that premises providing meals and refreshments between 11 pm and 5 am are to be licensed if licensing authorities so decide.

530. Section 127 of the Bill replaces “meals and refreshments” with “food”, bringing late-night grocers and 24-hour stores within the scope of the provisions, although licensing authorities will still have the power to determine which types of premises require a licence. This change implements a recommendation of the Task Group, which believed that—

“the potential for large numbers of people leaving pubs, night clubs etc. late at night to cause a disturbance ... exists regardless of whether the food or drink being sold has been cooked or pre-prepared in any way”.⁴¹⁸

Evidence received

531. South Lanarkshire and East Lothian Councils supported this provision on the grounds that it removes current uncertainty about whether certain types of premises, such as those selling kebabs, require to be licensed.⁴¹⁹

532. ACPOS fully supported the provision as a useful tool in licensing premises which can be a source of disorder late at night, although it also pointed out that there could be “fairly significant” resource implications for the police.⁴²⁰

533. However, the Law Society of Scotland said that—

“Section 42 of the 1982 Act was enacted in order to regulate the sale of meals or refreshments from take-away establishments located in the main in city centres and in residential areas with potential for disturbance. The Society would therefore question why late night grocers, 24-hour stores and motorway service stations etc. should be brought within the scope of these provisions and questions whether the regulation and cost is proportionate to the perceived benefit.”⁴²¹

⁴¹⁸ Task Group report, paragraph 10.2; Policy Memorandum, paragraph 526.

⁴¹⁹ South Lanarkshire Council, East Lothian Council. Written submissions to the Justice Committee.

⁴²⁰ ACPOS. Written submission to the Justice Committee.

⁴²¹ The Law Society of Scotland. Written submission to the Justice Committee.

534. In his response to the Committee, the Cabinet Secretary for Justice reiterated that section 127 of the Bill takes forward a Task Group recommendation and believed that it was appropriate to give licensing authorities the discretion to licence such premises “as they are best placed to decide what subset of food and drink retailers need to be licensed.”⁴²²

Committee conclusion

535. The Committee considers that there is a case for broadening the definition for late night catering but supports local authorities retaining discretion in determining which types of premises require a licence.

Section 128: Applications for licences

536. Section 128 of the Bill makes various changes to Schedules 1 and 2 to the 1982 Act, including some of the time-limits that apply to applications for and the issuing of licences.

537. South Lanarkshire Council pointed out that some of these changes would have both advantages and disadvantages – for example, extending from 21 to 28 days the period within which people may object to licence applications “will cause delay for people wishing to obtain a licence although it may make it easier for partner organisations to submit timeous reports”⁴²³ However, Dumfries and Galloway argued that increasing the length of the objection period is unnecessary as most applications are unopposed and there is already provision allowing authorities to consider objections outwith the time-limit.⁴²⁴

538. The Cabinet Secretary for Justice accepted that the existing time period of 21 days for objections is “usually sufficient”. However, he pointed out that the police, for example, often have much less than 21 days to object once they have received notice of the application, and that lengthening the objection period would “ease such problems considerably.”⁴²⁵

Statement of reasons time limit

539. Under Schedule 1 (paragraph 17) to the 1982 Act, a person applying for a licence has 28 days from the date of the decision to request a written statement of reasons from the licensing authority. Section 128 of the Bill reduces the time which an applicant has to request a statement of reasons from 28 to 21 days.

540. Dumfries and Galloway Council supported this change as being—

“of advantage to the authority especially in relation to issuing of a licence where an objection has been lodged. It is presently unfortunate that the period during which a statement of reasons can be requested equates with the period for lodging an appeal.”⁴²⁶

⁴²² Scottish Government. Supplementary written submission to the Justice Committee.

⁴²³ South Lanarkshire Council. Written submission to the Justice Committee.

⁴²⁴ Dumfries and Galloway Council. Written submission to the Justice Committee.

⁴²⁵ Scottish Government. Supplementary written submission to the Justice Committee.

⁴²⁶ Dumfries and Galloway Council. Written submission to the Justice Committee.

Renewal applications after the expiry of a licence

541. Section 128 will allow licensing authorities, “on good cause being shown”⁴²⁷, to treat renewal applications received up to 28 days after the expiry of the previous licence as having been made on time, rather than treating them as new applications. While this amendment was welcomed by the Faculty of Advocates,⁴²⁸ the Committee received a number of critical comments.

542. Dumfries and Galloway Council pointed out that, since a decision on any such late application would require the exercise of discretion, it would have to be taken by councillors rather than delegated to staff; but that the timescales demanded an “almost immediate response” if the advantage of the provision was not to be lost.⁴²⁹

543. Midlothian Council regarded the proposal as “a backward step” that was likely to lead to confusion and make enforcement more difficult.⁴³⁰ Glasgow City Council also cautioned against the change, saying it was “very concerning from a regulatory perspective” as, presumably in an attempt to protect licence-holders from the consequences of forgetting to renew, it risked undermining the importance of expiry dates. It also questioned what was meant by “good cause shown” and whether a hearing would be required to decide.⁴³¹

544. The Law Society of Scotland expressed similar concerns.⁴³² John Loudon, convener of the Society’s licensing law sub-committee, said he could—

“see the logic and the fairness of having a bit of leeway. However, what happens if, for example, an offence occurs or someone applies for an extra taxi during the 28-day period?”⁴³³

545. In a supplementary submission, the Society suggested that a shorter period of leeway, perhaps seven days, would be better than the 28 days proposed, although it also felt that the leeway provision was unnecessary. In its view, if the provision is to remain, a licensing authority should convene a hearing to determine whether there had been cause shown for a late renewal.⁴³⁴

546. According to the Cabinet Secretary—

“If the licensing authority allows a late renewal application, trading will be legal, in the same way that it will be when the renewal application is made on time. If there has been no renewal application, or if the licensing authority does not recognise good cause for a late application, offences concerning trading without a licence will apply as normal. ... Section 128 allows the

⁴²⁷ Criminal Justice and Licensing (Scotland) Bill, section 128.

⁴²⁸ The Faculty of Advocates. Written submission to the Justice Committee.

⁴²⁹ Dumfries and Galloway Council. Written submission to the Justice Committee.

⁴³⁰ Midlothian Council. Written submission to the Justice Committee.

⁴³¹ Glasgow City Council. Written submission to the Justice Committee.

⁴³² The Law Society of Scotland. Written submission to the Justice Committee.

⁴³³ Scottish Parliament Justice Committee. *Official Report*, 16 June 2009, Col 2106.

⁴³⁴ The Law Society of Scotland. Supplementary written submission to the Justice Committee.

licensing authority to recognise honest mistakes and to allow a licence holder to continue to trade, even if the renewal application is made late.”⁴³⁵

Applicants’ personal information

547. The 1982 Act requires people applying for licences to provide their address. Section 128 of the Bill will additionally require them to provide their date and place of birth.

548. South Lanarkshire Council welcomed the new provision and said that it is a practice which they have already adopted. Punch Taverns had no objection to this information being provided to licensing boards, the police and other statutory bodies but said that “this information must not be available in the public domain.”⁴³⁶

549. The Cabinet Secretary for Justice said that, while applicants for licences would continue to be required publicly to display notices containing certain information, this did not include the additional information being required by the Bill (i.e. date and place of birth). He would expect local authorities only to use this additional information to assist the relevant authorities and not to publish it.⁴³⁷

Committee conclusion

550. The Committee recognises that these amendments are based on the Task Group’s recommendations and considers them as sensible proposals.

PART 9 – ALCOHOL LICENSING

Introduction

551. The provisions in this Part of the Bill make changes to the Licensing (Scotland) Act 2005 in order 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.”⁴³⁸

552. The 2005 Act came fully into force on 1 September 2009, replacing the Licensing (Scotland) Act 1976 in its entirety. There was a transitional period, beginning in February 2008, aimed at giving existing licence holders and licensing boards sufficient time and information to enable them to adapt to the new system, with Ministers putting in place by subordinate legislation (using powers under the 2005 Act) some of the legislative changes proposed in the Bill.

553. Despite this, there were widespread reports in the immediate run-up to the 1 September date about problems relating to the new regime, with many councils reported to be late in issuing many of the new personal licences applied for. In June, the Law Society of Scotland outlined the extent of the problems being encountered by licencees and trade bodies, and suggested an extension to the

⁴³⁵ Scottish Parliament Justice Committee. *Official Report, 1 September 2009*, Col 2234.

⁴³⁶ Punch Taverns. Written submission to the Justice Committee.

⁴³⁷ Scottish Government. Supplementary written submission to the Justice Committee.

⁴³⁸ Policy Memorandum, paragraph 539.

1 September deadline for processing applications to enable those who had put in applications in good time to continue trading lawfully beyond the deadline.⁴³⁹

554. Responding to these and similar concerns, the Cabinet Secretary made further use of the “transitional provisions” power in the 2005 Act to allow a personal licence to be deemed to be in effect in relation to a premises manager from 1 September 2009 provided an application for personal licence for that manager had been made by 31 August. Licensing boards must process all such personal licences by 1 November 2009.⁴⁴⁰

Sections 129 and 140

Background

555. Section 129 of the Bill is intended—

“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 Licensing Boards with a power to impose licensing conditions restricting off-sales of alcohol to people under the age of 21.”⁴⁴¹

556. Section 140 enables Scottish Ministers to impose a “social responsibility levy” for alcohol retailers and certain licence holders “to help offset the costs of dealing with the adverse impact of these businesses or their customers”.⁴⁴²

557. On 24 March 2009, following the introduction of the Bill but before the Committee had started its oral evidence-taking, Bruce Crawford, the Minister for Parliamentary Business, advised the Committee that the Scottish Government intended to introduce a new health bill to take forward a range of alcohol measures including minimum pricing, restrictions on the sale of alcohol to persons under 21 and a social responsibility levy. As a consequence, the Scottish Government would be lodging amendments to remove sections 129 and 140 of the Bill at Stage 2. In light of this announcement, the Justice Committee decided not to consider further these sections of the Bill.⁴⁴³

Committee conclusion

558. The Committee welcomes the Scottish Government’s commitment to remove these sections of the Bill at Stage 2.

Wider issues relating to the 2005 Act

559. As the Committee’s consideration of the Bill overlapped with the period immediately preceding full commencement of the 2005 Act, it was perhaps not surprising that some of those who commented on the Bill also offered comments on the commencement process as well.

⁴³⁹ Scottish Parliament Justice Committee. *Official Report, 16 June 2009*, Cols 2112-3.

⁴⁴⁰ The Licensing (Scotland) Act 2005 (Transitional Provisions) Order 2009 (SSI 2009/277), considered by the Justice Committee on 8 September 2009.

⁴⁴¹ Policy Memorandum, paragraph 538.

⁴⁴² Policy Memorandum, paragraph 555.

⁴⁴³ Letter from Bruce Crawford.

Licence fees

560. The submission from the Scottish Licensed Trade Association (SLTA) concentrated on the fees set by licensing authorities to cover the costs of the new licensing system introduced by the 2005 Act. The SLTA said it was “absolutely absurd” that the major supermarkets – which accounted for 73% of off-sales alcohol purchases – would pay fees that were equivalent to “only 7.5% of the total running costs for the transitional period”. In the SLTA’s view, the supermarkets should “make a far greater contribution to the running of the new licensing regime”. It also argued that the fees set by licensing boards “will lead to inconsistency and confusion throughout the country” and the new system was “a money making exercise for Local Councils who we are sure will find some way of justifying the fees set.” The SLTA was particularly concerned that the fee structure proposed unfairly burdened the on-trade and that small, independent pubs were being targeted disproportionately.⁴⁴⁴

561. John Loudon from the Law Society of Scotland was asked how an appropriate balance should be struck between reflecting in the fee structure the volumes of sales between different outlets, while at the same time equating fees to the administrative costs of processing applications (on the principle of full cost recovery). He acknowledged that—

“With the judgment of Solomon. It is very difficult to strike the balance. You will never get it right, because whatever you plump for, there will always be people who are caught fairly – or unfairly. ... I appreciate what the SLTA is saying. I am glad that I am not the one who has to make the decision on the fees, because it is not easy.”⁴⁴⁵

562. The Cabinet Secretary for Justice, while stating that the Parliament had already agreed that the licensing regime must be self-financing, wrote—

“Fees are set by the local authorities within capped bands and those bands ensure a small corner shop pays less than a large supermarket. This is unlike the current arrangements where everybody pays the same. It is easy to say the costs should be loaded onto the biggest retailers but we believe the system has to be fair to everyone, including the council tax payer. The fees are charged for the cost of processing the application (a position that will be reinforced by the forthcoming EU Services Directive). Any Board which collects an excess is expected to reduce the coming year's annual fee.”

563. The Cabinet Secretary added that the Accounts Commission had been asked to consider these issues and that the Scottish Government will consider its recommendations.⁴⁴⁶

564. The Committee acknowledges that concerns raised on the structure of alcohol licence fees, as defined in the 2005 Act, are outwith the scope of the current Bill. However, the Committee is of the view that there are some inequalities in the present system, including the difference in fees paid by

⁴⁴⁴ Scottish Licensed Trade Association. Written submission to the Justice Committee.

⁴⁴⁵ Scottish Parliament Justice Committee. *Official Report*, 16 June 2009, Col 2111.

⁴⁴⁶ Scottish Government. Supplementary written submission to the Justice Committee.

different sized outlets, on-sales and off-sales premises and discrepancies across licensing boards. The Committee therefore welcomes the Scottish Government's decision to ask the Accounts Commission to consider these issues and would encourage the Commission to look in particular at the cost implications for smaller outlets in rural areas. The Committee looks forward to receiving the Scottish Government's response to the Commission's recommendations in due course.

Appeals procedure

565. The Committee received a number of representations about the appeal procedures introduced by the 2005 Act, which replaced a system of appeal by summary application with a system of application by way of stated case. The City of Edinburgh Licensing Board considered the new system “cumbersome” and suggested that “thought should be given to reverting to the arrangements for summary appeals under the Licensing (Scotland) Act 1976.”⁴⁴⁷ Fife Licensing Board described the stated case appeals process as “time consuming” as they “deal in facts and while in liquor licensing cases there are indeed findings in fact by the Board, a considerable amount of what they do is founded on possibilities and probabilities.”⁴⁴⁸

566. John Loudon from the Law Society of Scotland said that there were widespread concerns in the profession about the stated case appeals procedure—

“We have the rare situation that almost every lawyer – if not every lawyer – whom I have met agrees that the new appeal procedures are cumbersome, expensive and not working in practice. That is what the private sector, the public sector and sheriffs have said.”⁴⁴⁹

567. Mairi Millar, Senior Solicitor and Assistant Clerk to the City of Glasgow Licensing Board, agreed, saying that—

“the stated case procedure does not work for licensing appeals and a straightforward return to the summary application is welcomed by all.”⁴⁵⁰

568. In his evidence, the Cabinet Secretary advised that the concerns had been recognised and that the appropriate amendments would be lodged at Stage 2.

569. The Committee welcomes the Cabinet Secretary's commitment to lodge amendments at Stage 2 to reinstate the summary appeals procedure.

Provisional premises licenses and site-only application procedure

570. A further area of criticism of the 2005 Act focused on the procedures under section 45 for obtaining a new provisional premises licence, and the lack of a “site-only application” process like that under section 26(2) of the Licensing (Scotland) Act 1976. Under the 1976 Act, according to the Law Society of Scotland, “an applicant could make an application to the board having obtained only planning permission”, whereas under the 2005 Act, “applicants require to incur the expense

⁴⁴⁷ The City of Edinburgh Licensing Board. Written submission to the Justice Committee.

⁴⁴⁸ Fife Licensing Board. Written submission to the Justice Committee.

⁴⁴⁹ Scottish Parliament Justice Committee. *Official Report*, 16 June 2009, Col 2096.

⁴⁵⁰ Scottish Parliament Justice Committee. *Official Report*, 16 June 2009, Col 2156.

of an operating plan, a layout plan and all statutory consents before the Board can consider the application for premises licence.” Giving oral evidence for the Society, John Loudon acknowledged that “the mischief under the 1976 Act was that the board had no control over the detail once someone got to the affirmation stage”, but that there was nevertheless “a desperate need” for a similar procedure under the 2005 Act. He gave the example of a major hotel project that was not going ahead because of the cost involved in preparing the detailed plans required for an application, saying “that represents the loss of a major inward investment to Scotland, which is crackers”.⁴⁵¹

571. Mr Loudon also highlighted the two-year period within which a provisional premises licence under the 2005 Act was valid:

“A project of any size will take longer than two years. If the project is not completed within two years and the board does not grant an extension, the developer might have spent heaven knows what and still have no licence. Developers are simply not going to do that. Bankers or financiers will not lend someone the money to do that.”⁴⁵²

572. In his view, increasing the period to five years would be sensible, especially for bigger projects.

573. The Scottish Beer and Pub Association (SBPA) was also critical of the changes made to site-only applications in the 2005 Act, describing the new process as “time consuming, complex and very expensive”. The SBPA acknowledged that once the provisional premises licence is granted, the applicant has the ability to make subsequent changes to the premises “but that is process akin to a new licence application and may easily take another three to six months in addition to the time already spent in applying for planning and licensing.” The Association also said that the two year maximum length of the provisional licence was “completely unrealistic for any major development.” The Scottish Late Night Operators Association echoed these concerns, arguing that the costs of the 2005 Act application process were deterring much-needed investment and development.⁴⁵³

574. The Committee shares the concerns raised in evidence about the procedures for obtaining a provisional premises licence under section 45 of the 2005 Act, and believes that there is a case for modifying these procedures within the current Bill. We therefore invite the Scottish Government to consider bringing forward suitable amendments at Stage 2. These amendments might re-introduce something similar to the site-only application procedure under the 1976 Act while also extending the current two-year time limit for provisional licences.

⁴⁵¹ Scottish Parliament Justice Committee. *Official Report, 16 June 2009*, Cols 2097-8.

⁴⁵² Scottish Parliament Justice Committee. *Official Report, 16 June 2009*, Col 2110.

⁴⁵³ Scottish Parliament Justice Committee. *Official Report, 16 June 2009*, Col 2131-2.

Licence transfers

575. The Law Society of Scotland highlighted a potential difficulty with the 2005 Act regarding transferring licences to court-appointed administrators. The Law Society wrote—

“In terms of the 1976 Act [Licensing (Scotland) Act 1976], there was no requirement for the licence to be transferred. The position now is that the administrator would be required to become the premises licence holder in his own right as opposed to as an agent of the insolvent company (and apply within 28 days of their appointment) and may be reluctant to do so.”⁴⁵⁴

576. Asked to comment on this, the Cabinet Secretary said he was unaware of the details, but was prepared to consider it further.

577. The Committee welcomes the Cabinet Secretary’s willingness to address this potential difficulty and trusts that an appropriate solution can be found.

Section 130: Premises licence applications: notification requirements

Background and evidence received

578. Under the 2005 Act a licensing board, when notifying a required list of interested parties, must provide a copy of the application along with the notification. Section 130 of the Bill amends this requirement so that licensing boards must provide copies only to the appropriate chief constable, and may provide copies to “any other person”. According to the Policy Memorandum, this “does not prevent the application being available for public inspection but reduces the cost and burden of notification.”⁴⁵⁵

579. This change was generally welcomed.⁴⁵⁶ However, the City of Glasgow Licensing Board⁴⁵⁷ considered that it should also be a requirement to provide a copy of the application to the relevant fire authority, while the City of Edinburgh Licensing Board⁴⁵⁸ suggested extending the requirement to include Licensing Standard Officers.

580. Fife Licensing Board suggested making it clear that the requirement to provide a “copy” of the application was understood to include electronic transfer of the information contained in an application forms an not necessarily the form itself.⁴⁵⁹ North Ayrshire Council pointed out that it may be difficult for some persons who have received a notice of an application to view the application if they live some distance from a council office.⁴⁶⁰

⁴⁵⁴ The Law Society of Scotland. Supplementary written submission to the Justice Committee.

⁴⁵⁵ Policy Memorandum, paragraph 541.

⁴⁵⁶ Aberdeenshire Council, South Lanarkshire Council, North Ayrshire Council, City of Edinburgh Licensing Board and the Law Society of Scotland. Written submissions to the Justice Committee.

⁴⁵⁷ City of Glasgow Licensing Board. Written submission to the Justice Committee.

⁴⁵⁸ City of Edinburgh Licensing Board. Written submission to the Justice Committee.

⁴⁵⁹ Fife Licensing Board. Written submission to the Justice Committee.

⁴⁶⁰ North Ayrshire Council. Written submission to the Justice Committee.

581. Doubts were also expressed about the value of providing copies of applications to “any other person”, suggesting this could lead to uncertainty over what is being proposed and therefore generate a large number of objections. The City of Edinburgh Licensing Board suggested that any notice of an application sent to interested parties should include a broad outline of the application, while the City of Glasgow Licensing Board asked whether a standard form of notification would be developed.

582. During oral evidence, Mairi Millar of the City of Glasgow Licensing Board, said—

“A balance must be struck. Given the length of such documents, it would be overburdensome for boards to have to provide copies of the application form, the operating plan and the layout plan for neighbourhood notification and various other consultations. ... My experience throughout the transition period for the 2005 Act coming fully into force is that people who have received letters of notification have had no idea as to what was proposed, because of the lack of information that I have described. In all honesty, I think that even providing them with a copy of the application form, operating plan and layout plan would take them no further. I find it difficult to understand what is proposed in applications, because the generic operating plan has little or no information about what will happen on the premises.”⁴⁶¹

Committee conclusions

583. The Committee believes that a balance must be struck between the cost and burdens of notification and providing appropriate information. The Committee therefore recommends that the minimum notification required should consist of a summary of what is being proposed along with information on how to view the application in full.

Section 131: Premises licence applications: modification of layout plans

Background and evidence received

584. Section 131 enables a licensing board to propose a modification to the layout plan provided with an application for a premises licence if that modification would enable it to accept an application that would otherwise be refused.

585. While this was welcomed by some local authorities⁴⁶², the City of Glasgow Licensing Board and the Law Society of Scotland both highlighted potential difficulties in practice and suggested that the proposal be clarified. The City of Glasgow Licensing Board noted that a modified application would not be able to be granted “there and then”⁴⁶³ as any such amended plan would require further consultation with other interested parties such as building control officers and the fire authority.

586. The Law Society also commented on the potential for the licensing board to refuse “applications accompanied by layout plans which had received the

⁴⁶¹ Scottish Parliament Justice Committee. *Official Report, 16 June 2009*, Cols 2144-2145.

⁴⁶² North Lanarkshire Council, North Ayrshire Council and the City of Edinburgh Licensing Board.

Written submissions to the Justice Committee.

⁴⁶³ City of Glasgow Licensing Board. Written submission to the Justice Committee.

appropriate statutory consents.”⁴⁶⁴ Alan McCreadie of the Law Society of Scotland expanded—

“For want of a better phrase, we would end up with a catch-22 situation. Once the technical consents have been given, if the board is not happy with something, which is then fixed—if the applicant is happy to do so—the premises might then no longer meet the technical consents.”⁴⁶⁵

587. The Scottish Beer and Pub Association (SBPA) and Punch Taverns were both opposed to the provision. The SPBA stated—

“We do not believe this is proportionate and we are concerned the clause could lead if passed to Licensing Boards effectively having the power to ‘micro manage’ the actual operation of a licensed premises, with significant likely cost and other implications such as planning, listed building consent and building warrant requirements.”⁴⁶⁶

588. SBPA Chief Executive Patrick Browne expanded on the point in oral evidence—

“We have no issue with an applicant and a board mutually agreeing that a course of action is appropriate for an application, with a consequent change to a layout plan. ... Our concern is that if boards are given the power to make changes, they might try in some cases to do so without agreement and leave it for the applicant to seek a remedy.”⁴⁶⁷

589. Paul Smith, Vice-Chairman of the Scottish Late Night Operators Association, added—

“I am worried that licensing boards, which sometimes have only five or 10 minutes to decide on an application, could suggest a change that might seem right to them but which would destroy a building's layout and design. I am greatly concerned that if an applicant were presented with a fait accompli – we should remember that the decision whether to grant the licence on the day might be critical for the applicant to secure options on buildings or funding – they might be forced to accept it.”⁴⁶⁸

590. But Mairi Millar from the City of Glasgow Licensing Board said she was not aware of her Board ever intervening on “cosmetic” grounds—

“Any attempts to modify the layout or operating plan have been the result of concerns raised by building control officers or licensing standards officers”.⁴⁶⁹

⁴⁶⁴ The Law Society of Scotland. Written submission to the Justice Committee.

⁴⁶⁵ Scottish Parliament Justice Committee. *Official Report*, 16 June 2009, Cols 2107-2108.

⁴⁶⁶ The Scottish Beer and Pub Association. Written submission to the Justice Committee.

⁴⁶⁷ Scottish Parliament Justice Committee. *Official Report*, 16 June 2009, Col 2133.

⁴⁶⁸ Scottish Parliament Justice Committee. *Official Report*, 16 June 2009, Col 2134.

⁴⁶⁹ Scottish Parliament Justice Committee. *Official Report*, 16 June 2009, Col 2142.

591. Councillor Thomas from the City of Edinburgh Licensing Board agreed, saying that her board “would change plans only if officials reckoned that we needed to do so.”⁴⁷⁰

592. According to the Cabinet Secretary—

“The provision was included following a request from licensing boards, which saw it as being helpful, rather than something that would stifle businesses – it should enable applications to be progressed, rather than rejected.”⁴⁷¹

593. However, he said that he was more than happy to discuss the issue again with the trade.

Committee conclusions

594. While acknowledging the concerns raised in evidence about giving licensing boards the power to suggest modifications to layout plans, the Committee is not convinced that this would be a problem in practice. The Committee nevertheless welcomes the Cabinet Secretary’s commitment to discuss the matter further with the licensed trade.

Section 132: Premises licence applications: antisocial behaviour reports

Background

595. The 2005 Act requires chief constables to provide an antisocial behaviour report to the licensing board within 21 days for every application. The report is required to describe “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.”⁴⁷²

596. Section 132 of the Bill amends the 2005 Act to require that chief constables only have to provide such a report if requested by the licensing board, although they may also choose to provide one. According to the Policy Memorandum, it had become clear, when considering the implementation of the 2005 Act, that the existing procedure was “unnecessarily onerous and bureaucratic.”⁴⁷³ Scottish Ministers used secondary legislation to introduce a similar provision for the duration of the transitional period prior to the implementation of the 2005 Act.

Evidence received

597. This proposal has been welcomed by some respondents, such as the SBPA and Punch Taverns. North Lanarkshire Council also supported the proposal—

“Allowing the Chief Constable if he sees fit to produce such reports or the Board at any time prior to determining applications to request such reports

⁴⁷⁰ Scottish Parliament Justice Committee. *Official Report, 16 June 2009*, Col 2143.

⁴⁷¹ Scottish Parliament Justice Committee. *Official Report, 1 September 2009*, Col 2234.

⁴⁷² Policy Memorandum, paragraph 543.

⁴⁷³ Policy Memorandum, paragraph 544.

from the Chief Constable will avoid any unnecessary work being undertaken regarding the preparation of such reports.”⁴⁷⁴

598. ACPOS, although welcoming the provision, was concerned about the usefulness of the reports because incidents of antisocial behaviour cannot always be directly attributed to individual premises. Assistant Chief Constable Barker explained—

“The provisions that were put in place during transition have been helpful. The amount of work that would be involved in producing an antisocial behaviour report for every premises is considerable. ... Where there are clusters of licensed premises in a town or city centre, it would be difficult in a general report to attribute antisocial behaviour to particular premises, but we can say that a group of premises has caused concern.”⁴⁷⁵

599. The Committee received evidence questioning whether there was any merit in retaining this provision. For example, the City of Glasgow Licensing Board stated that, in relation to antisocial behaviour reports, “their content adds no value to a Board’s consideration of an application.”⁴⁷⁶

600. Similarly, Mairi Millar of the City of Glasgow Licensing Board, was concerned that antisocial behaviour reports offered “no tie-in with the applicant premises”. She added—

“I would be reluctant to advise a board that it could refuse an application based on an antisocial behaviour report, because that report will display no evidence of culpability on the part of the applicant.”⁴⁷⁷

601. That view was supported by Fife Council, whose Legal Team Leader Frank Jensen said—

“So far, the antisocial behaviour reports that our board has viewed have been of very limited value, essentially because of that point about culpability. The reports do not contain a great deal of information that can be used, although they might paint a picture of the area. The information in antisocial behaviour reports might be used more beneficially in larger areas such as town centres, where the details could be reported to licensing forums, which can make general recommendations to the licensing board on terminal hours and other issues. However, that option is available already.”⁴⁷⁸

602. North Ayrshire Council said that antisocial behaviour reports, as presently prepared, contain fundamental flaws and that much more information requires to be given to the Board.⁴⁷⁹ This was echoed by the City of Edinburgh Licensing

⁴⁷⁴ North Lanarkshire Council. Written submission to the Justice Committee.

⁴⁷⁵ Scottish Parliament Justice Committee. *Official Report*, 16 June 2009, Cols 2117-2118.

⁴⁷⁶ City of Glasgow Licensing Board. Written submission to the Justice Committee.

⁴⁷⁷ Scottish Parliament Justice Committee. *Official Report*, 16 June 2009, Col 2146.

⁴⁷⁸ Scottish Parliament Justice Committee. *Official Report*, 16 June 2009, Col 2147.

⁴⁷⁹ North Ayrshire Council. Written submission to the Justice Committee.

Board who emphasised “the need for consideration of the type of report that would be of most value.”⁴⁸⁰

603. The Cabinet Secretary for Justice said that Scottish Ministers supported the view taken by police and that the Bill seeks to—

“strike the appropriate balance between the needs and wants of our communities, the requirements of our police and the amount of information that can be dealt with by the board that is charged with the ultimate responsibility of deciding whether to grant the application.”

604. The Cabinet Secretary added that as licensing standards officers are now in place, a variety of checks and balances exist.⁴⁸¹

Committee conclusions

605. The Committee was unable to reach consensus on the merits of this provision. Some members of the Committee considered the current measures within the 2005 Act requiring chief constables to provide an antisocial behaviour report to licensing boards for all applications still to be appropriate. Other members felt that such reports should only be provided by chief constables if requested to do so by the licensing board or if they choose to provide one, so as to target resources more effectively. The Committee specifically notes that, now that all premises licences are subject to the requirements of the 2005 Act, antisocial behaviour reports are required only in respect of applications for new licences. We also note that the provisions in the 2005 Act allowing a premises licence to be reviewed provide an opportunity for a licensing board to consider any evidence on antisocial behaviour associated with a particular licensed premises, or indeed to request an antisocial behaviour report itself.

606. While we note the evidence suggesting that antisocial behaviour reports are often not specific enough to aid a licensing board’s consideration of an individual application, we do not consider this to demonstrate a problem with the legislation, and is something that should be addressed by better communication between boards and the police on the information required.

Section 133: Sale of alcohol to trade

Background and evidence received

607. Section 133 of the Bill amends section 63 of the 2005 Act, so that it is no longer an offence for licensed premises to sell to the trade. The Policy Memorandum describes it as—

“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

⁴⁸⁰ City of Edinburgh Licensing Board. Written submission to the Justice Committee.

⁴⁸¹ Scottish Parliament Justice Committee. *Official Report, 1 September 2009*, Col 2236.

restaurant from a supermarket instead of the wholesaler, the restaurant owner would under the 2005 Act be committing an offence.”⁴⁸²

608. North Lanarkshire Council⁴⁸³ was supportive of the change as providing clarity to section 63 of the 2005 Act. The Law Society of Scotland⁴⁸⁴ also welcomed the provision.

Committee conclusion

609. The Committee welcomes this as a sensible amendment to the 2005 Act.

Section 134: Occasional licences

Background

610. Section 134 of the Bill reduces the length of time, from 21 days to not less than 24 hours, that a licensing board is required to wait for comments from the chief constable and the licensing standards officer. The Policy Memorandum explains—

“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.”⁴⁸⁵

611. The licensing board must be satisfied that the application requires to be dealt with quickly while the provision also restricts the approval of such applications to “any member of the Board, any committee established by the Board and the clerk of the Board.”⁴⁸⁶

Evidence received

612. This proposal was generally welcomed. The SPBA, Punch Taverns, City of Edinburgh Licensing Board and the Law Society of Scotland all supported the provision but suggested that the procedure should also include applications for extended hours. John Loudon from the Law Society of Scotland explained—

“Under the 1976 Act, occasional extensions, as they are known, are common. It is very rare for there to be a problem with an occasional extension: you put in your application and it is processed and granted. Some boards turn such applications round within two or three days, although others take a couple of weeks. ... Relatively few issues have arisen. I therefore cannot see any good reason for not replicating that system in the 2005 Act. That would be in the interests of the public, business and councils. We could be creating a time problem when none exists at present.”⁴⁸⁷

⁴⁸² Policy Memorandum, paragraph 545.

⁴⁸³ North Lanarkshire Council. Written submission to the Justice Committee.

⁴⁸⁴ The Law Society of Scotland. Written submission to the Justice Committee.

⁴⁸⁵ Policy Memorandum, paragraph 546.

⁴⁸⁶ Explanatory Notes, paragraph 581.

⁴⁸⁷ Scottish Parliament Justice Committee. *Official Report*, 16 June 2009, Col 2109.

613. North Ayrshire Council, North Lanarkshire Council and South Lanarkshire Council also welcomed the change but questioned why the power was not also delegated to members of staff employed to assist the Clerk. North Lanarkshire Council said that not extending the power to such staff “could, on occasion, cause unnecessary delay.”⁴⁸⁸

614. The City of Glasgow Licensing Board feared that the reduction in the reporting period could be abused by applicants who were “seeking to have the reduced reporting period in less than exceptional circumstances”⁴⁸⁹ and suggested that the provisions need to be tightened to avoid such abuse. It also considered it unsatisfactory that any concerns from the chief constable or licensing standards officer might not be highlighted to the board before the application is granted. Dumfries and Galloway Council, meanwhile, was concerned about the “vastly detailed procedure”⁴⁹⁰ for occasional licences within the 2005 Act, and suggested that the Licensing (Scotland) Act 1976 contained a much simpler and more effective procedure. Mairi Millar, Senior Solicitor and Assistant Clerk to the City of Glasgow Licensing Board agreed.⁴⁹¹

615. The Cabinet Secretary said that in light of the concerns expressed he would be happy to look again at this provision.⁴⁹² Responding further in writing, the Cabinet Secretary pointed out that the 2005 Act for the first time gives the local community affected an opportunity to comment and believed that any “simplification of the procedure as suggested would remove that community involvement.”⁴⁹³

Committee conclusions

616. While the Committee acknowledges the need for fast-tracking of some occasional licence applications, in light of points raised by witnesses it has some concerns that the procedure might be open to abuse. The Committee therefore seeks assurances from the Scottish Government that the procedure will minimise the scope for such abuse and notes the Cabinet Secretary’s willingness to look again at the provision.

617. The Committee also recommends that the power to approve such applications should be capable of being delegated to licensing authority officials.

Section 135: Extended hours applications: variation of conditions

Background and evidence received

618. Section 135 enables licensing boards to apply additional conditions to extended hours licences for the period that the extended hours apply or for the whole period of the licence. The Policy Memorandum provides a practical example—

⁴⁸⁸ North Lanarkshire Council. Written submission to the Justice Committee.

⁴⁸⁹ City of Glasgow Licensing Board. Written submission to the Justice Committee.

⁴⁹⁰ Dumfries and Galloway Council. Written submission to the Justice Committee.

⁴⁹¹ Mairi Millar. Supplementary written submission to the Justice Committee.

⁴⁹² Scottish Parliament Justice Committee. *Official Report, 1 September 2009*, Col 2238.

⁴⁹³ Scottish Government. Supplementary written submission to the Justice Committee.

“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).”⁴⁹⁴

619. This provision was broadly welcomed.⁴⁹⁵ For example Dumfries and Galloway Council said it—

“will allow the Board to address concerns arising from the use of the additional hours without reviewing the premises licence and is therefore a positive step.”⁴⁹⁶

620. North Lanarkshire Council⁴⁹⁷ also welcomed the provision but said it was unclear whether a licence holder would be given a hearing into whether the variations proposed are necessary for the purposes of the licensing objective. Aberdeenshire Council was concerned that there could be room for legal argument about exactly what additional conditions licensing boards had power to impose.⁴⁹⁸

621. According to the Cabinet Secretary for Justice, it is a matter for a licensing board to decide whether to hold a hearing. When questioned on what powers licensing boards had to impose such additional conditions, Mr MacAskill stated that “the position on enforcement is no different from any other licence”.⁴⁹⁹ Philip Lamont added that the Scottish Government would re-examine the provisions in the light of the comments by Aberdeenshire Council to ensure the powers assigned are clear.⁵⁰⁰

Committee conclusions

622. While generally content with the provision, the Committee notes that extended hours applications might increase the potential for irresponsible drinking. The Committee therefore seeks clarification from the Scottish Government as to how it envisages licensing boards ensuring they take health and public order concerns into account when considering such applications.

Section 136: Personal licences

Background and evidence received

623. Section 136 of the Bill amends the 2005 Act to allow a licensing board to refuse an application for a personal licence on the grounds that the applicant

⁴⁹⁴ Policy Memorandum, paragraph 547.

⁴⁹⁵ Dumfries and Galloway Council, the Law Society of Scotland and the City of Edinburgh Licensing Board. Written submissions to the Justice Committee.

⁴⁹⁶ Dumfries and Galloway Council. Written submission to the Justice Committee.

⁴⁹⁷ North Lanarkshire Council. Written submission to the Justice Committee.

⁴⁹⁸ Aberdeenshire Council. Written submission to the Justice Committee.

⁴⁹⁹ Scottish Government. Supplementary written submission to the Justice Committee.

⁵⁰⁰ Scottish Government. Supplementary written submission to the Justice Committee, 29 September 2009.

already holds one, or that a previous licence held by the applicant expired or was surrendered during the past three years. The section also makes it a criminal offence, subject to a fine of up to £1,000, to pass off as valid or fail to surrender a void personal licence. The purpose is—

“to close a possible loophole where a licence holder who had an endorsement under section 85(1) of the 2005 Act could avoid the suspension or revocation provisions of section 86 of the 2005 Act by voluntarily surrendering their personal licence before the Licensing Board had had an opportunity to consider what action it might take under section 86 of the 2005 Act, and then apply for another personal licence which would be “clean”.”⁵⁰¹

624. Both the City of Edinburgh Council Licensing Board and Dumfries and Galloway Council welcomed the provision.⁵⁰² However, the Scottish Beer and Pub Association considered it unlikely that a person would apply for a second personal licence to avoid sanctions, given the vigilance of licensing boards and the existence of a National Personal Licence Database.⁵⁰³ Similarly, Punch Taverns said that the 2005 Act is still in its infancy, no problems concerning second personal licences have so far arisen and there are “sufficient safeguards to prevent the issues which appear to cause the Government concern.”⁵⁰⁴

625. The City of Glasgow Licensing Board, although supportive of the change, said it was unclear how licensing boards would know whether an applicant already holds, or previously held, a personal licence issued by a different licensing board, since the National Personal Licence Database was not used by all boards, and was not always updated quickly.⁵⁰⁵ In oral evidence, Mairi Millar, Assistant Clerk of the Board, added that “the Bill will cure many of the problems that we have identified with personal licences” and that the database would be “useful in the future”, once the Bill had taken effect. At present, she said, there is no point in checking the database because boards have no right to refuse an application for a personal licence on the ground that the applicant already holds or previously held one.⁵⁰⁶

626. The Law Society of Scotland also supported the change, and suggested that all licensing boards should be required to update the national database.⁵⁰⁷

627. The Society also questioned the requirement in the Bill that an application must be signed by the applicant, arguing that the applicant’s agent should also be able to sign the application. However, Frank Jensen of Fife Council suggested that the provision could be interpreted so as to allow an agent to sign, since “the person making the application” need not be the person who would benefit from it. He believed that the correct interpretation would be influenced by the EU Services Directive, which is intended to remove certain barriers to trade. Mairi Millar also

⁵⁰¹ Explanatory Notes, paragraph 585.

⁵⁰² City of Edinburgh Council Licensing Board and Dumfries and Galloway Council. Written submissions to the Justice Committee.

⁵⁰³ The Scottish Beer and Pub Association. Written submission to the Justice Committee.

⁵⁰⁴ Punch Taverns. Written submission to the Justice Committee.

⁵⁰⁵ City of Glasgow Licensing Board. Written submission to the Justice Committee.

⁵⁰⁶ Scottish Parliament Justice Committee. *Official Report*, 16 June 2009, Col 2155.

⁵⁰⁷ The Law Society of Scotland. Written submission to the Justice Committee.

referred to the Directive, suggesting that it would require licensing boards to accept online and hence unsigned applications, although this might not apply directly to personal licences.⁵⁰⁸

628. Section 73 of the 2005 Act requires chief constables to be notified of all personal licence applications and allows them to recommend to the board that a particular application be refused by reference to the applicant's relevant previous offences. ACPOS suggested that chief constables should, in addition, be able to make formal representations to boards that would be relevant to the board's consideration of an application even though they did not merit a recommendation to refuse it.

629. Aberdeenshire Council noted that section 136 includes provision apparently aimed at tackling a "possible black market in personal licences", but suggested this would be more effective if personal licences issued by a particular licensing board were only valid in that board's area, rather than throughout Scotland.⁵⁰⁹

630. The Cabinet Secretary confirmed that the Scottish Government was in the process of ensuring that all provisions within both the Bill and the 2005 Act meet the requirements of the EU Services Directive, but he acknowledged that there were some technical difficulties with the National Personal Licence Database which were being "tackled".⁵¹⁰ He confirmed that all local authorities had signed up to participate in the Database but that if this participation was not realised, he would consider making it mandatory.

Committee conclusions

631. The Committee supports these provisions for tightening the rules on applications for personal licences. We recognise the importance of the national database to make the provision effective, and accept the Cabinet Secretary's assurances about the practical measures being taken in this connection. We also support ACPOS's suggestion that chief constables should have wider powers to make representations to licensing boards in relation to personal licence applications, and would invite the Scottish Government to give this serious consideration.

Section 137: Emergency closure orders

Background and evidence received

632. The 2005 Act allows "a senior police officer" (defined as a constable of or above the rank of superintendent) to make an "emergency closure order" requiring licensed premises to close for up to 24 hours in the interests of public safety, and then to extend or terminate the order. Section 137 of the Bill changes this to a constable of or above the rank of inspector so as to "accord better with the practicalities of day to day policing".⁵¹¹

⁵⁰⁸ Scottish Parliament Justice Committee. *Official Report, 16 June 2009*, Col 2152.

⁵⁰⁹ Aberdeenshire Council. Written submission to the Justice Committee.

⁵¹⁰ Scottish Government. Supplementary written submission to the Justice Committee.

⁵¹¹ Policy Memorandum, paragraph 549.

633. The SBPA and Punch Taverns both welcomed this clarification⁵¹², North Lanarkshire Council described the provisions as “helpful”⁵¹³ and the Law Society of Scotland considered it a “sensible proposal.”⁵¹⁴ However, while accepting that the amendment may assist the police on an operational level, Dumfries and Galloway Council believed that “keeping it at a higher rank would underline the importance of what is being sought or imposed.”⁵¹⁵

Committee conclusion

634. The Committee welcomes the changes made by this section of the Bill.

Section 138: False statements in applications: offences

Background and evidence received

635. Section 138 of the Bill makes it an offence, punishable by a fine of up to £1,000, knowingly to make a false statement in an application under the 2005 Act. The Explanatory Notes suggest this might be used to deter people from applying for a second personal licence as a precaution against the original such licence being suspended or revoked for improper conduct.⁵¹⁶

636. In its written submission North Lanarkshire Council considered the creation of the offence “an incentive for applications to be completed honestly and accurately.”⁵¹⁷ The provision was also welcomed by the City of Edinburgh Licensing Board and the City of Glasgow Licensing Board, although the Glasgow Board sought clarification on how the offence would be established if the application was submitted electronically without a signature.⁵¹⁸ Further clarification of the provision was also sought by the SPBA and Punch Taverns who sought an assurance that “honest oversights or mistakes would not be caught by this provision”.⁵¹⁹

637. On the point about electronic applications, the Cabinet Secretary said that the Scottish Government was “in the process of ensuring” that the 2005 Act and the Bill fully complied with the EU Services Directive. On the point about oversights or mistakes, the Cabinet Secretary said that—

“A defence is afforded in that the person must knowingly make a false statement before an offence is committed.”⁵²⁰

Committee conclusion

638. The Committee accepts the policy rationale for the changes proposed.

⁵¹² The Scottish Beer and Pub Association and Punch Taverns. Written submissions to the Justice Committee.

⁵¹³ North Lanarkshire Council. Written submission to the Justice Committee.

⁵¹⁴ The Law Society of Scotland. Written submission to the Justice Committee.

⁵¹⁵ Dumfries and Galloway Council. Written submission to the Justice Committee.

⁵¹⁶ Explanatory Notes, paragraph 587.

⁵¹⁷ North Lanarkshire Council. Written submission to the Justice Committee.

⁵¹⁸ City of Glasgow Licensing Board. Written submission to the Justice Committee.

⁵¹⁹ The Scottish Beer and Pub Association and Punch Taverns. Written submissions to the Justice Committee.

⁵²⁰ Scottish Government. Supplementary written submission to the Justice Committee.

Section 139 and schedule 4: Further modifications of 2005 Act

Background and evidence received

639. The 2005 Act allows any person to make an objection to a premises licence. However, the chief constable is limited to making an objection on the grounds of crime prevention if there is reason to believe that the applicant is involved in serious organised crime. Schedule 4 to the Bill (introduced by section 139) makes various changes to the 2005 Act to widen the grounds on which a chief constable can raise objections in relation to a premises or personal licence. The Policy Memorandum states that—

“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.”⁵²¹

640. The proposed changes were welcomed by the City of Edinburgh Licensing Board and also North Lanarkshire Council, which said—

“There was always a feeling that the Board’s powers were unnecessarily restricted in this area with the legislation as it was originally drafted. ... The proposed new power of the Chief Constable to report conduct inconsistent with the licensing objectives will, of course, be welcomed by the police and it is a positive measure since it allows for the ongoing monitoring of the operation of premises and personal licences and is a clear indicator to those involved in the licensed trade that if the police in their monitoring of matters have concerns regarding anything inconsistent with any licensing objectives there is provision for them to refer the matter, as they see fit to the Licensing Board.”⁵²²

641. Aberdeenshire Council, Dumfries and Galloway Council and the City of Glasgow Licensing Board each suggested minor amendments, sought clarification or highlighted possible drafting errors within schedule 4. All three, however, generally welcomed the changes.

642. Both Punch Taverns and the SBPA, however, described the provisions as “very wide ranging” and questioned whether they were necessary, given that the police would already be fully consulted on licence applications, and would have carried out criminal records checks. They went on—

“We would suggest that allowing the police to comment on applications solely on the basis of the objective of ‘preventing crime and disorder’ is entirely appropriate, adequate and proportionate. Extending this to all of the other licensing objectives risks the police acquiring the status of the catch all objector of last resort. We do not believe this would be appropriate nor reasonable and it could lead to the police commenting on matters which are more appropriately dealt with by other agencies with more relevant, or indeed the only, expertise. We would suggest that this could only weaken the status

⁵²¹ Policy Memorandum, paragraph 549.

⁵²² North Lanarkshire Council. Written submission to the Justice Committee.

of the police in the process and indeed the credibility of their objections on legitimate criminal matters.”⁵²³

643. In response, the Cabinet Secretary argued that the police had the same right to comment on all licensing objectives as members of the public, and that it would be for “the Licensing Board to weigh the information before reaching a decision”.⁵²⁴

Committee conclusions

644. The Committee accepts the case made by the Scottish Government for this provision. We are not persuaded by the objections raised, and accept the Cabinet Secretary’s argument that chief constables should have greater powers to object to applications for a premises or personal licence.

ADDITIONAL ISSUE: NON-INVASIVE POST-MORTEM

Background and evidence received

645. The Scottish Council of Jewish Communities (SCoJeC) made a written submission to the Committee urging the Parliament to take the opportunity presented by the Criminal Justice and Licensing (Scotland) Bill to provide that “a post-mortem carried out by non-invasive methods such as Magnetic Resonance Imaging (MRI) is acceptable for all purposes for which a surgical post-mortem is generally accepted”. As this topic is not currently addressed in the Bill, SCoJeC asked that consideration be given to an amendment to add this new subject-matter within the overall scope of the Bill.

646. The submission explained that *Halachah* (Jewish Law) regards the human body (including all body parts and tissue) is sacrosanct, and requires that it should always be treated with dignity. Although fully accepting that there may be occasions when it may be necessary for a post-mortem examination to take place, SCoJeC pointed out that, since MRI scanning was made available in Manchester in 1997, the number of surgical post mortems carried out in the Jewish community there has fallen from around 100 to fewer than ten per annum. However, SCoJeC had been told that MRI is not currently recognised as a form of post-mortem examination in Scotland.

647. SCoJeC also explained that the Coroners and Justice Bill, currently before the UK Parliament, included a provision that would permit a coroner to specify the kind of post-mortem examination that should be made, the Explanatory Notes for which made specific mention of MRI.⁵²⁵

648. In response, the Lord Advocate made clear that she had no objection in principle to the introduction of non-invasive post mortems in Scotland but that “it would depend on the nature of the death”. John Logue, Head of Policy at the Crown Office, said that following representations from the Jewish community the matter was being considered closely. However, he cautioned that there might be relatively limited scope for using MRI in Scotland, given the difference between the

⁵²³ Punch Taverns and the Scottish Beer and Pub Association. Written submissions to the Justice Committee.

⁵²⁴ Scottish Government. Supplementary written submission to the Justice Committee.

⁵²⁵ Scottish Council of Jewish Communities. Written submission to the Justice Committee.

role of procurators fiscal in investigating deaths in Scotland and the role of coroners in England. He also suggested that it was unclear whether legislation was necessary to enable MRI to be used in post-mortem examinations in Scotland.⁵²⁶

Committee conclusions

649. **The Committee acknowledges the importance of this issue to the Jewish community and potentially other faith groups in Scotland. However, we are unclear whether an amendment of the sort sought by the Scottish Council of Jewish Communities is necessary to enable MRI to be used where appropriate. It must also be doubtful whether such an amendment would be within the scope of the current Bill, given that the issue of post-mortem examination is not directly a matter of criminal justice.**

650. **Nevertheless, since the matter has been raised with us, it would be helpful if the Scottish Government or the Crown Office could give us a more definitive view on whether it supports SCoJeC's case for a change to the system of post-mortems in Scotland, whether legislative change would be required and, if so, when that legislation might be forthcoming.**

651. **We would certainly wish to ensure that a full range of techniques for the conduct of post-mortems is available in Scotland, so that non-invasive methods can be considered in appropriate circumstances. We accept that many relatives will understandably prefer such non-invasive methods where possible, but accept that this must always be a decision for the procurator fiscal, acting in the public interest.**

CONCLUSION

652. **As will be evident from this report, the Justice Committee has scrutinised in considerable depth the many complex issues raised by this Bill. Some of the more significant provisions are controversial, and it was predictable that we would not be able to agree on those. Many raise difficult issues in terms of legal principle, effectiveness and cost, and we have found it challenging to reach a clear view based on the often strong and diverse evidence we have received.**

Recommendation

653. **Notwithstanding the differences of view on specific provisions set out earlier in this Report, the Committee agrees to recommend to the Parliament that the general principles of the Bill be agreed to.**

⁵²⁶ Scottish Parliament Justice Committee. *Official Report, 9 June 2009*, Cols 2078-80.

ANNEXE A: SUBORDINATE LEGISLATION COMMITTEE REPORT

Subordinate Legislation Committee Report on the Criminal Justice and Licensing (Scotland) Bill

The Committee reports to the Parliament as follows—

Introduction

1. At its meetings on 5 May¹, and 26 May² 2009 the Subordinate Legislation Committee considered the delegated powers provisions in the Criminal Justice and Licensing (Scotland) Bill at Stage 1. The Committee submits this report to the Justice Committee as the lead committee for the Bill under Rule 9.6.2 of Standing Orders.
2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill.³
3. The Committee's correspondence with the Scottish Government is reproduced in the Appendix.

Delegated Powers Provisions

4. The Committee considered each of the delegated powers provisions in the Bill.
5. The Committee determined that it did not need to draw the attention of the Parliament to the delegated powers in the following sections: 5, 12(2)(a), 13(2), 14 (inserted sections 227A(8), 227B(2), 227E(6), 227J(3), 227O(1), 227Z(2), 227ZD(6), 227ZG, 227ZH(4) and (5) and 227ZJ(2)), 19 (inserted section 9B(5)), 30(3) (inserted section 1A(3)(c)), 31(4) (inserted subsection (4B)(c), 57(3) (inserted section 113A(4)(c)), 59 (inserted section 18B(6)), 66(1) (inserted section 271U(3)), 72(7) (inserted section 40A(4)), 79(2) and (3) (inserted sections 113BA(1) and 120ZB(2A)), 81(1), 86(9)(b), 114(1) and (3)(c), 126(2)(e) (inserted paragraph (h)), 148(1) and schedule 1 paragraph 2(3) and schedule 1 paragraph 4.

Section 14 (Community payback orders) (inserting section 227I(6) of the Criminal Procedure (Scotland) Act 1995 – power to vary the minimum and maximum hours of unpaid work or other activity requirement)

6. New sections 227I to 227O of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) concern the “unpaid work or other activity requirement” which may be imposed on an offender in a community payback order. Section 227I(1) defines “unpaid work or other activity requirement” as a requirement that the offender must, for a specified number of hours, undertake unpaid work or another activity. Section 227I(3) sets minimum and maximum hours which may be

¹ [Official Report 5 May](#)

² [Official Report 26 May](#)

³ [Delegated Powers Memorandum](#) (‘DPM’)

specified in an unpaid work or other activity requirement; namely at least 20 hours, and not more than 300 hours.

7. The effect of the power at section 227I(6) is that the Scottish Ministers may vary by order the minimum and maximum numbers of hours of unpaid work or other activity which may be specified in the requirement. They may also vary the number of hours at which a requirement is considered to be level 1 or level 2. (Level 1 being a requirement to work for 100 hours or less, level 2 more than 100 hours.)

8. The Committee asked why this power could not be expressed as a power to vary within defined maximum and minimum limits. The response indicates that the Government will bring forward Stage 2 amendments to provide limits to the extent to which the minimum and maximum hours stated can be varied, and to provide limits to the extent to which the "100" figure can be varied. The Committee welcomes this undertaking in relation to the extent of this delegated power. The Government does not indicate in its response the likely range of the limits that will be in such amendments. However, given that finite limits shall be put in the Bill, the actual limits themselves may be considered a policy matter for the lead committee and Parliament.

9. While the Committee is of the view that generally modifications amending the text of the Act should be subject to affirmative resolution procedure, this is not an absolute rule and in this case the power is to be quite strictly defined, so far as it only allows changing the minimum and maximum number of hours in the requirement, and the "100" figure which distinguishes a level 1 requirement from level 2.

10. Accordingly, the Committee is content with the exercise of the power being subject to negative procedure.

11. The Committee welcomes the confirmation provided by the Government in its response that it shall bring forward amendments at Stage 2, to provide limits to the extent to which the minimum and maximum number of hours stated in section 227I(3) can be varied, and to provide limits to the extent to which the "100" figure in section 227I(4) and (5) can be varied.

Section 14 (Community payback orders) (New section 227K(3) – power to vary the limits of the balance of activity within the unpaid work or other activity requirement)

12. Section 227K deals with the split of hours between unpaid work and other activity in relation to an unpaid work and other activity requirement. It will be for the responsible officer (an officer of the relevant local authority) to specify the allocation of activity between unpaid work activity and other activity. This is subject to subsection (2) - the number of hours allocated to undertaking an activity other than unpaid work must not exceed whichever is the lower of, 30% of the total number of hours specified in the requirement, and 30 hours. This means that the number of hours allocated to non-work activity cannot exceed 30 hours.

Subsection 227K(3) permits the Scottish Ministers to amend subsection (2) by regulations subject to negative procedure.

13. The Committee asked for further explanation as to why the power is required to amend subsection (2) in any respect instead of a power to specify different figures in subsection (2)(a) or (b) and given that this is a “Henry VIII power” how negative procedure can be justified.

14. The response confirms that the Government proposes to bring forward amendments at Stage 2 to address the issues raised in the Committee’s questions. The reply also confirms that the amendments will apply affirmative resolution procedure to these powers.

15. The Committee welcomes the Government’s confirmation that it shall bring forward amendments at Stage 2 to vary the powers as drafted in section 14 (so far as inserting new section 227K(3) of the 1995 Act). The Committee understands this to mean that instead of the power permitting the amendment of subsection (2) in any respect, it shall be a power to specify different figures in subsection (2)(a) or (b). The Committee notes that the response also confirms that the amendments at Stage 2 shall provide for the application of affirmative resolution procedure, rather than negative procedure.

Section 14 (Community payback orders) (Inserting section 227ZB(12) – power to vary the maximum number of months in which a restricted movement requirement can have effect

16. Section 227ZB(9) restricts the maximum period for which a restricted movement requirement can have effect. The period must not exceed whichever is the lesser of—

(a) the period for which the supervision requirement has effect, and

(b) the period of 12 months. So the maximum period for which a restricted movement requirement can have effect is 12 months. A supervision requirement may be between 6 months, and not more than 3 years.

17. The power at section 227ZB(12) permits the Scottish Ministers to substitute the number of months specified in subsection (9)(b) with another number of months. This allows Ministers to vary (up or down) the maximum number of months in which a restricted movement requirement can have effect.

18. A related provision is section 227ZD(4)(b), which provides that a restricted movement requirement “has effect for such period of not more than 12 months as is specified.” The Scottish Ministers’ have power at section 227ZD(6) to modify section 227D(4)(b).

19. The Committee asked for confirmation whether the intention is that there is a single overall maximum period of 12 months for which a restricted movement requirement may last (subject to the ability to modify that period). If that is the case, the Scottish Government was asked why the maximum is specified in two

places, with a separate power to change each figure, rather than providing the maximum in one place only – albeit that cross-reference to the maximum may be appropriate elsewhere. The Committee considered that the provision of two separate powers gives rise to the risk that they may not be used to maintain parity.

20. This power has significant consequences, in that it will affect the duration of the period in which an offender can be subject to restrictions on his or her movement under a restricted movement requirement. The response confirms that it is intended there is a single overall maximum period of 12 months for which a restricted movement requirement may last.

21. The response confirms that the Government accepts the Committee's concerns and will address the issue raised by the Committee's question, by amendment at Stage 2.

22. The Committee welcomes the Government's confirmation in relation to the delegated powers specified in section 14 of the Bill (inserting new section 227ZB(12) of the 1995 Act) that it shall bring forward amendments at Stage 2 to address the issue raised by the Committee's question. This would provide for a single overall maximum period of 12 months for a restricted movement requirement (subject to the ability to modify that period by affirmative regulations).

Section 18(2)(a)(iii) of the Bill (so far as amending section 4(1) of the Custodial Sentences and Weapons (S) Act 2007– power to prescribe by order the “prescribed period” for the purposes of certain sentences under Part 2 of that Act

23. Section 18(2) introduces various revised definitions of sentences for the purposes of Part 2 of the Custodial Sentences and Weapons (Scotland) Act 2007. The Committee understands that Part 2 of the 2007 Act has still to be commenced. The 2007 Act's existing regime for offender release depends on whether an individual is serving a “custody-only” sentence (less than 15 days), or a “custody and community sentence” (15 days or more).

24. The amendments in section 18(2) remove the 15 day period which is specified in the 2007 Act for the purposes of defining custody-only and custody and community sentences. The 15 days is replaced with a “prescribed period”, defined as “such period as the Scottish Ministers may by order specify”.

25. The amendments in section 18 also replace the “custody-only sentence” with a “short-term custody and community sentence”. A revised section 5 of the 2007 Act is inserted at section 18(3) of the Bill. It replaces the unconditional release of custody-only prisoners on completion of their prison term. Under that revised provision, short-term custody and community prisoners will generally be released on a short-term community licence on completion of one-half of their sentence.

26. The amendment at section 18(2)(a)(iii) empowers the Scottish Ministers to specify the prescribed period for the purposes of defining, and distinguishing between, short-term custody and community sentences, and custody and community sentences. Previously the relevant time period (15 days) had been

specified on the face of the Custodial Sentences and Weapons (Scotland) Act 2007. This time period has significant consequences, as different release regimes flow from a prisoner being categorised as serving a short-term custody and community sentence; or a custody and community sentence.

27. The Committee understands that the distinction between the two types of sentence can impact on the length of time an offender spends in prison. In the case of a short-term custody and community sentence a prisoner is released, subject to licence conditions, on serving one half of his sentence. In the case of a custody and community sentence, release on serving one half of a prison sentence is not automatic – it depends on a number of other requirements being met.

28. The Committee asked questions on the scope of this power, particularly why the delegated power requires to be drawn as wide as to enable any period at all to be substituted for the period of 15 days in the existing legislation. The Committee accepts the further explanation offered by the Government on this apparently significant power. Any future decision on a change to this period involves matters of sentencing policy, and therefore the Committee considers that the responses on this power should be drawn to the attention of the Justice Committee.

29. The Committee considers that it is appropriate this power is subject to affirmative procedure. The power may have significant effects, and it will textually amend the Act.

30. The response also confirms that the Government is considering if the scope of this power could be narrowed by setting a limit beyond which the demarcation line could not be moved. Further consideration will be given to what that demarcation point might be. The Committee agreed to re-visit the provisions after the Bill has been amended at Stage 2.

31. The Committee reports to the lead committee, in relation to the delegated power in section 18(2)(a)(iii) of the Bill—

- **that the Government has indicated in its response that it will reconsider whether the power requires to be taken to prescribe *any* new period of custody, instead of 15 days, for the purposes of that section, and will consider whether the scope of this power could be narrowed by setting minimum or maximum limits;**
- **otherwise, the Committee draws its questions and the Government responses on the scope of, and reasons for, this delegated power to the lead committee in connection with its consideration of the Bill;**
- **the Committee is content that this power shall be subject to affirmative resolution procedure.**

Paragraphs 10(3) and (4) of Schedule 2 (amending section 55 of the 2007 Act) – Power to prescribe the length of periods of detention for those under 21 years of age for the purpose of determining if they are serving “short-

term custody and community sentences” or “custody and community sentences”

32. The Delegated Powers Memorandum explains that a person under 21 cannot be sentenced to imprisonment, but will instead be sentenced to a period of detention. The provisions in Part 2 (confinement and release of prisoners) operate by reference to the term of imprisonment that a person is sentenced to, so do not apply to people under 21. Section 55 of the 2007 Act sets out how Part 2 is to apply to people under 21. The reason for taking this power is to allow the Scottish Ministers to take account of changes in the length of a period of imprisonment that determines when a sentence of imprisonment is a custody and community sentence, and when it is a short-term custody and community sentence.

33. The questions raised here were similar to those raised in relation to section 18(2)(a)(iii) of the Bill, above.

34. The Government provided a similar response as for section 18(2)(a)(iii) of the Bill.

35. **Therefore, the Committee reports to the lead committee—**

- **that the Government has indicated in its response that it will reconsider whether the power requires to be taken to prescribe *any* new period of custody, instead of 15 days, for the purposes of that section, and will consider whether the scope of this power could be narrowed by setting minimum or maximum limits;**
- **otherwise, the Committee draws its questions and the Government responses on the scope of, and reasons for, this delegated power to the lead committee in connection with its consideration of the Bill;**
- **the Committee is content that this power shall be subject to affirmative resolution procedure.**

Section 70(3) (inserted section 26G(1))-power to amend list of persons mentioned in section 26C(2) of the Public Finance and Accountability (Scotland) Act 2000 by adding or removing a public body and to modify the application of new Part 2A of that Act to a public body so added

36. Section 70(3) of the Bill inserts a substantial new Part (Part 2A, encompassing inserted sections 26A to G) into the Public Finance and Accountability (Scotland) Act 2000 ('the 2000 Act') in relation to data matching. This covers such matters as the power to carry out data matching exercises; voluntary disclosure of data to Audit Scotland; power to require disclosure of data; disclosure of results of data matching; publication of reports on data matching, and provisions for a data matching code of practice.

37. It was accepted that there may, from time to time be a need to adjust the list set out in section 26C(2), whether to add a public body to it, or to remove a person from it, and the Committee recognises that it would be considered desirable to be able to do so by means of subordinate legislation.

38. The Committee noted the list to be of some importance, in respect that persons (or public bodies) named on it may be required by Audit Scotland to disclose data to them for the purposes of a data matching exercise. That being so, the Committee raised the issue of whether it would be appropriate that the exercise of a power to add a public body to the list, or to remove persons from it, should be subject to more rigorous parliamentary scrutiny than that afforded by negative procedure. The Committee questioned whether a higher level of scrutiny might be required where the power is used to modify the application of Part 2A to the body specified. The power to modify is not restricted to administrative matters. On one view, the power could be used to amend the purposes for which the data matching is to be conducted set out in section 26A(3).

39. In addition, very limited justification had been provided within the DPM in respect of the related power, under section 26G(2) for such an order to include incidental etc. provision as the Scottish Ministers may think fit. It was stated that this is required to give flexibility 'so that appropriate arrangements can be made for particular bodies'. The provision itself is quite a wide one and the Committee asked why an unlimited power to modify Part 2A in respect of new bodies added to the list was necessary. It sought clarification of the reason for there being provision for an order under inserted section 26G(1) being able to include such incidental etc. provision as the Scottish Ministers think fit and how that ancillary power might be used. The Committee also sought clarification as to the choice of procedure, and in particular why negative procedure had been preferred to affirmative.

40. The response seeks to justify the use of negative procedure on the grounds of the narrowness of the power. It has been provided in order to allow for additional public bodies to be added in future. The response goes on to emphasise that it can apply to a limited range of bodies. It can apply only to those whose functions are of a public nature, or include such functions, but which are not such as to be automatically covered by virtue of having their accounts added by the Auditor General. Accordingly, in view of that narrowness, the Government considered that negative procedure was appropriate.

41. The Committee sought clarification as to why it was considered that there was a need for an unlimited power to modify Part 2A of the Act (which deals with 'data matching'). The question also noted and sought comment on the apparent ability of the provision to modify the purposes for which data matching may be conducted.

42. The response indicates that this is required for reasons of flexibility and also so that appropriate arrangements can be made for particular bodies. The response goes on to acknowledge the power which exists, to modify Part 2A, so that data cannot be used for certain data matching circumstances.

43. It was also noted that the limited range of bodies in respect of which the power could be used are stated as being those which are effectively at the fringes of the public sector. These are bodies with functions of a public nature, or including such functions, but which are not automatically covered by virtue of having their accounts audited by the Auditor General. For such bodies the full data matching provisions might not be appropriate.

44. However, in the absence of a power to be able to modify the application of Part 2 in regard to a body which has been added to it, and which has only limited public functions, such a body might be unwilling to come within the scope of section 26C. Reliance might therefore require to be made on data being provided under section 26B, under which disclosure is only on a voluntary basis.

45. It was noted that there may be circumstances where it would be preferable by means of section 26G, to add a body to the list of those required to disclose data to Audit Scotland. It was also acknowledged that it may be appropriate to have the flexibility to be able to modify Part 2A in relation to such bodies, given that the full data matching functions might not be appropriate.

46. The Committee also asked why it is thought necessary for provision for an order under inserted section 26G(1) being able to include such incidental etc. provisions as the Scottish Ministers think fit. And, with further reference to that matter, the Committee sought further explanation as how and in what circumstances the ancillary power under section 26G(2) might require to be used.

47. The Government responded that provision has been made for reasons of flexibility. Adding a body to the list of those under section 26C which are required to disclose data involves a disapplication of the 'normal' restrictions on disclosure of data. The power to make incidental or consequential provision could therefore be useful to remove any apparent inconsistencies in other legislation or instruments.

48. The Committee concluded that the further information provided by the Government was of assistance in terms of setting out why powers in this particular form have been taken and how they might be used. In relation to procedure, having regard to the narrowness of the power and in terms of the limited range of bodies which might be affected, the Committee agreed that negative procedure should provide an appropriate level of scrutiny. Similarly, the Committee is satisfied with the further justification provided in relation to the power for an order to include incidental provision etc.

49. It was considered that some reassurance could therefore be taken from the response in relation to why the provision is in the terms set out, and in regard to how the Government would envisage this power being used. The power to modify could, on the face of it, be used in order to expand the purposes for which data matching could be conducted in relation to new bodies, as well as limiting those purposes as the Government suggests. However, this might represent an unusual use of the power given that it would go beyond the primary scheme set out in the Bill itself. As such it would at least attract comment and negative procedure would allow Parliament the remedy of annulment.

50. Having obtained further explanation and justification from the Government, the Committee finds the proposed power under section 70(3), in regard to inserted section 26G(1) of the Public Finance and Accountability (Scotland) Act 2000, to be acceptable in principle, and also that it is subject to negative resolution procedure.

Section 82(1)(a) – Amendment to section 133 of the Criminal Justice Act 1988 - Power to specify further circumstances in respect of which compensation may be paid for a miscarriage of justice or for wrongful detention prior to the acquittal or a decision to take no proceedings or discontinue proceedings

51. Section 82(1)(a) inserts a new subsection (1A) into section 133 of the Criminal Justice Act 1988 ('the 1988 Act'). Section 133 currently provides for a statutory scheme of compensation for miscarriages of justice. In addition to the statutory scheme an *ex gratia* scheme covering other types of cases has operated for a number of years. The *ex gratia* scheme operates under the prerogative and has not been subject to statutory or parliamentary control. The intention of this provision is to put the *ex gratia* scheme on a statutory footing and to combine it with the statutory scheme under section 133.

52. The Policy Memorandum states that no changes are proposed to the scope of the *ex gratia* scheme other than to place it on a statutory footing and to combine it with the scheme under section 133. However, no details of the *ex gratia* scheme are given in the DPM or in the Explanatory Note.

53. In order to take a view, the Committee asked for an explanation as to the scope of the current scheme and an explanation as to whether the powers sought extend beyond what is necessary to replicate the current non-statutory arrangements. Given that the scope of the existing statutory scheme was set out in primary legislation the Committee also asked the Scottish Government to explain why it was considered necessary to use delegated powers for the extended scheme.

54. Details of the *ex gratia* scheme are given in the first two paragraphs of the Scottish Government's response. Although the DPM states (para. 89) that the intention is to put the *ex gratia* scheme on a statutory footing, the third paragraph of the response acknowledges that the power is not limited to this.

55. The response states that the provisions of the existing statutory scheme are required to meet international obligations. The inference is that these obligations cannot be changed and that flexibility (with respect to the provisions of the existing statutory scheme) is not required. However, in placing the *ex gratia* scheme on a statutory basis, the Scottish Ministers wish to retain flexibility in terms of what any new provisions may provide (in so far as they go beyond the international obligations as reflected in the provisions of the existing statutory scheme). The response points out that an order making power will allow for flexibility while at the same time introducing an element of parliamentary control which is currently absent.

56. The committee is content with the principle of putting the *ex gratia* scheme on a statutory basis. This allows for Parliamentary accountability. However, the Scottish Government acknowledged in its response that the power goes beyond what is required to put the *ex gratia* scheme on a statutory basis. The Committee considers that the power is too wide. The Scottish Government claim that flexibility is required, but the Committee considers that there has been no adequate

justification of the breadth of the power and of the need for the power to go beyond what is required to put the ex gratia scheme on a statutory basis.

57. As the question of whether there should be wider compensation schemes of this kind is essentially a policy matter the Committee simply draws this issue to the attention of the lead committee and of the Parliament.

58. The Committee draws to the attention of the lead committee and of the Parliament that the proposed power goes beyond what is strictly necessary to achieve the objective stated in the Scottish Government's Delegated Powers Memorandum, namely to put the ex gratia scheme on a statutory basis, and that, in the opinion of the Committee, no adequate justification has been given by the Scottish Government for the power to extend the scheme beyond that currently operating.

Section 82(1)(d) - New section 133(4B) Criminal Justice Act 1988 - Guidance to assessors

59. Section 133(4) of the Criminal Justice Act 1988 ('the 1988 Act') provides that where the Scottish Ministers determine that there is a right to compensation for a miscarriage of justice, the amount of the compensation shall be assessed by an assessor appointed by the Scottish Ministers. Section 134(4A) specifies certain matters which an assessor is required to have regard to in assessing the amount of compensation payable. The new section 133(4B) requires an assessor to have particular regard to any guidance issued by the Scottish Ministers.

60. The committee asked whether the guidance to be issued under this new subsection should be laid before Parliament, and whether such provision is or is not appropriate given Parliament's interest in ensuring the independence of assessors and the proper use of public funds.

61. The Government responded that it does not consider that a statutory requirement to lay guidance before the Parliament is necessary, but gave a commitment that any such guidance will be laid before Parliament.

62. The Committee welcomes the commitment from the Scottish Government that any guidance issued under this power will be laid before the Parliament. The Committee finds the proposed power acceptable in principle and that it is subject to no parliamentary procedure.

Section 115 – Power to establish rules of court in relation to Part 6

63. Part 6 of the Bill creates a statutory regime for disclosure in criminal proceedings. Section 115 enables the High Court to make rules as it considers necessary or expedient for the purposes of, in consequence of, or for giving full effect to Part 6 of the Bill by Act of Adjournal. Para. 99 of the DPM explains that rules of court will be required in relation to how certain provisions are given effect to and to provide forms for applications and other court documents required under Part 6.

64. The Committee was concerned that the power was potentially too wide in scope, having regard to the manner in which the power is expressed. It was not clear that the power was restricted to making rules of court or regulating practice and procedure in relation to criminal proceedings in which part 6 is engaged.

65. The Committee asked the Scottish Government why the power was an open one and was not restricted to regulating practice and procedure in relation to criminal proceedings or otherwise clearly restricted to matters for which the courts are responsible.

66. The response acknowledged that the provision does not 'mirror' section 305 of the Criminal Procedure (Scotland) Act 1995, as stated in the DPM. Having regard to the terms of section 305(1)(a) and (b) the committee was surprised that it was considered necessary and appropriate to create a new power. The Scottish Government had considered whether or not section 305 was sufficient for their purposes but had taken the view that it was not. No explanation was given for the Scottish Government taking this view. It was unclear to the committee why section 305 is not sufficient or why there was a need to create a new power.

67. As presently expressed, the Committee remains concerned that the power in section 115 could permit matters addressed by Act of Adjournal to stray beyond the realms of criminal procedure into areas of substantive law. Had the words 'in relation to criminal procedure' appeared at the end of section 115, the committee would have been content with the power as expressed.

68. The Committee takes the view that the Scottish Government has not justified the width of the power, particularly given that it is intended that rules are to be made by the High Court without any form of parliamentary procedure or control and that there is no restriction on the exercise of the power by reference to criminal procedure.

69. The Committee draws the breadth and scope of the proposed power to the attention of the lead committee and of the Parliament. The Committee considers that insufficient justification has been given by the Scottish Government for the need for a power in these terms, or why the scope of the proposed power should not be limited to matters of criminal practice or procedure or other matters within the remit of the High Court given that this is a power which is not subject to parliamentary procedure.

Section 121(3) – Power to set mandatory conditions to licences granted under the Civic Government (Scotland) Act 1982

70. This provision enables the Scottish Ministers to set mandatory conditions which are applicable to licences granted under the Civic Government (Scotland) Act 1982. Local authorities are the licensing authorities under the 1982 Act in relation to a number of activities listed in that Act. These include taxis, second hand dealers, knife dealers, metal dealers, street traders, markets, public entertainment, window cleaners and sex shops.

71. The Committee noted that it is the Government's intention that the power to prescribe mandatory conditions in respect of licences under the Civic Government

(Scotland) Act 1982 should be subject to affirmative procedure in line with the approach taken to alcohol licensing under the Licensing (Scotland) Act 2005, but that new section 3A(3) provides for such orders to be subject to annulment. The committee therefore sought clarification on this matter.

72. The Government confirmed that this was an error and that they will bring forward an amendment to remedy this at Stage 2.

73. The Committee welcomes the Government's undertaking to bring forward an amendment at Stage 2 which will require the power setting mandatory conditions in respect of licences under the Civic Government (Scotland) Act 1982 to be subject to affirmative procedure.

Section 129(4) – new section 27A Licensing (Scotland) Act 2005 -Power to prescribe those areas in respect of which licensing boards may vary all or a particular group of premises licences' conditions of operation

74. Section 129(4) introduces a new section 27A(1) into the Licensing (Scotland) Act 2005 which confers on the Scottish Ministers the power to prescribe by regulations the matters in respect of which licensing boards may vary all or a particular group of premises licences' conditions of operation.

75. There was no justification provided in the DPM as to why it is considered appropriate to use subordinate legislation to enable licensing boards to vary certain licence conditions. The Scottish Government was asked to explain why this cannot be achieved through primary legislation alone.

76. The Government informed the committee that it intends to bring forward a separate Bill to take forward alternative measures on alcohol. The Government will therefore seek to remove section 129 at Stage 2. The Committee is content for present purposes to note the intention to remove this power and to return to the Bill after Stage 2.

77. The Committee draws the attention of the lead committee to the Government's confirmation that it intends to remove section 129 at Stage 2.

Section 140(1) – Power to make provision for the imposition on relevant licence-holders of a social responsibility levy

78. Section 140 provides a power for the Scottish Ministers to make regulations imposing and setting out the detail of a social responsibility levy. Under the levy charges are to be imposed on the persons mentioned in subsection (2) for the purposes set out in subsection (3). The Explanatory Notes state that (para 592) "money raised by the charge will be for the local authorities to use in contributing towards the cost of dealing with the adverse effects of the operation of those businesses, for example extra policing or street cleaning or furthering the licensing objectives [under the 2005 Act]." Subsection (4) sets out in more detail what the regulations may include.

79. The Scottish Government was asked why it is not considered appropriate for the general principles of the proposal to be set out in primary legislation leaving only administrative detail for subordinate legislation.

80. Again, the Government confirmed that it will remove section 140 at Stage 2. While the Committee's concerns with the proposed approach remain unanswered, the Committee is content to note the intention to remove this power and to return to the Bill after Stage 2.

81. The Committee draws the attention of the lead committee to the Government's confirmation that it intends to remove section 140 at Stage 2.

Section 146(1) – Power to make supplemental, incidental or consequential provision appropriate for the purposes of, or in connection with the Bill

Section 147 – Power to make transitory, transitional and saving provision necessary or expedient for the purposes of, or in connection with, the coming into force of any provisions in the Bill

82. Section 146(1) confers on the Scottish Ministers a power to make by order such supplemental, incidental, or consequential provision as they consider appropriate for the purposes of, or in connection with, giving full effect to any provision of the Bill. Section 146(2) provides that the power extends to the modification of any enactment.

83. Section 147(1) confers on Scottish Ministers a power to make by order such transitory, transitional and saving provision as they consider necessary or expedient in connection with, the coming into force of any provisions in the Bill. Section 147(2) provides that the power extends to the modification of any enactment.

84. In each case section 143(4) provides that an order under either section which makes textual amendments to an Act is subject to affirmative procedure. Otherwise the power is subject to negative procedure.

85. In this Bill the normal group of ancillary powers has been split in two. Section 146 contains the ancillary powers which may make additional provision which could augment the provisions in the Bill or the subordinate legislation made under the Bill permanently. Section 147 deals with the ancillary powers which are intended to make temporary provision of a transitional or transitory nature or which save the existing law as required.

86. The committee accepts the Government's argument that ancillary powers are necessary in a substantial Bill like this. Given the breadth and complexity of the measures in this Bill, it is to be anticipated that not every fine detail of what is required to integrate these new provisions fully with the existing law may have been identified. The Committee agrees that it would not be sensible to require further primary legislation in order to deliver minor additional measures which are subsequently found to be necessary in order for the Bill to work properly or to have full effect.

87. However, the Committee also considers that the availability of ancillary powers should not be taken for granted. Their scope and the manner in which they can be used should still be tested on the merits of each case, as should the Parliamentary procedure to which they should be subject. Care should be taken to ensure that they are appropriate for the individual Bill concerned according to its scope, complexity and the sensitivity of the subject matter.

88. Having accepted that ancillary powers are necessary here, the Committee noted that the Government seeks the ability to use them to modify enactments. It is proposed that only textual amendments will be subject to affirmative procedure. As this Bill concerns provisions relating to criminal justice which frequently affect the liberty of persons and have the potential to impact significantly on the individual. In this context the Government was asked to explain why it is not thought appropriate to provide that any modification of the statute book in this context should not be subject to affirmative procedure.

89. In relation to section 146 the Committee welcomes the Government's undertaking to bring forward an amendment so that the exercise of ancillary powers under section 146 that make consequential, incidental or supplementary provision will be subject to affirmative procedure in any case where enactments are modified whether by textual amendment or otherwise.

90. In relation to section 147, the Government explained that it has reviewed its position and considers that given that these ancillary powers are temporary in nature, where they make modifications which do not textually amend acts then they will remain subject to negative procedure.

91. These kinds of powers are by their nature intended to have only temporary effect. However, measures in the area of criminal justice can have significant effects on individuals and their rights and liberty. Transitional provisions which deal with the application of the new measures to cases in progress when provisions are commenced could have a significant impact on accused persons.

92. There may be occasions when temporary provision is made as a textual amendment but it may be more likely to be made by modification which "sits" in separate subordinate legislation – and which would not attract affirmative procedure.

93. The Committee accepts that providing a subjective test in section 147 of "significance" or other similar description would introduce unwanted uncertainty and therefore accepts the Government's proposal but on the understanding that the Committee would expect the Government to bring forward measures in a form that attracts affirmative procedure where the measures impact on individuals' rights or liberty.

94. The Committee welcomes the Government's undertaking to amend section 146 so as to provide that any modification of enactments is subject to affirmative procedure.

95. The Committee accepts section 147 and that only textual amendments will be subject to affirmative procedure but on the understanding that the

Committee would expect the Government to bring forward measures in a form that attracts affirmative procedure where the measures impact on individuals' rights or liberty.

Appendix

Response from Scottish Government

Criminal Justice and Licensing (Scotland) Bill at Stage 1

Section 14 (Community payback orders) so far as inserting section 227I(6) of the Criminal Procedure (Scotland) Act 1995 – power to vary the minimum and maximum hours of unpaid work or other activity requirement

The Committee asks the Scottish Government to provide further explanation of the following—

- why the scope of the power requires to be drawn to permit any variation of either the minimum and maximum hours stated in section 227I(3), and the “100” figure in section 227I(4) and (5), rather than a power to vary within defined maximum and minimum limits

SG response

We accept the Committee’s observations and will bring forward amendments at Stage 2 to provide limits to the extent to which the minimum and maximum hours stated in section 227I(3) can be varied and to provide limits to the extent to which the “100” figure in section 227I(4) and (5) can be varied.

- given that this is a Henry VIII power and such a power where justifiable would usually be exercisable by affirmative procedure –particularly where concerned with levels of maximum penalty – why it is justifiable that negative resolution procedure should apply here?

SG response

We consider that the variation of the number of hours within the defined minimum and maximum number of hours is a matter of detail which is unlikely to require a debate. However, the negative procedure instrument would still afford the Parliament the opportunity to debate variations if they had objections.

Section 14, so far as inserting section 227K(3) of the Criminal Procedure (S) Act 1995 – power to vary the limits of the balance of activity within the unpaid work or other activity requirement

The Committee asks the Scottish Government to provide further explanation of the following—

- why the power is required to amend subsection (2) in any respect instead of a power to specify different figures in subsection (2)(a) or (b); and

SG response

We accept the Committee's observations and will bring forward amendments at Stage 2 to provide that these powers, as to be amended, will be exercisable by affirmative resolution procedure.

- given that this is a Henry VIII power enabling amendment of primary legislation which affects a type of sentencing why negative procedure is considered appropriate rather than affirmative procedure.

SG response

Variation of the existing balance between the unpaid work and other activity requirement components of the order is a matter of detail and it was not considered that a debate in the Parliament would be required. However, the use of negative procedure still affords the Parliament the opportunity to debate any variation that they were opposed to.

Section 14, so far as inserting section 227ZB(12) of that 1995 Act – power to vary the maximum number of months in which a restricted movement order can have effect

The Committee asks for confirmation whether the intention is that there is a single overall maximum period of 12 months for which a restricted movement requirement may last (subject to the ability to modify that period). If that is the case, the Scottish Government is asked why the maximum is specified in two places with a separate power to change each figure rather than providing the maximum in one place only – albeit that cross-reference to the maximum may be appropriate elsewhere. Does the provision of two separate powers not give rise to the theoretical risk that they may not be used to maintain parity?

SG response

We accept the Committee's observations and will bring forward an amendment at Stage 2 so that the maximum is provided for in one place only.

Section 18(2)(a)(iii) – power to prescribe by order the “prescribed period” for the purposes of certain sentences under Part 2 of the Custodial Sentences and Weapons (Scotland) Act 2007

The Committee asks for an explanation, in relation to the width of the delegated power in section 18(2)(a)(iii) of the Bill—

- why the power is required to be taken to prescribe any new period whatever, instead of 15 days, and why the parameters of any new period could not be drawn within a minimum and maximum set out in primary legislation?

Schedule 2, paragraphs 10(3) and (4) – power to prescribe the length of periods of detention for those under 21 years of age for the purpose of determining if they are serving “short-term custody and community sentences” or “custody and community sentences”

The Committee asks for an explanation, in relation to the width of the delegated power in paragraphs 10(3) and (4) of Schedule 2—

- why the power is required to be taken to prescribe any new period whatever, instead of 15 days, and why the parameters of any new period could not be drawn within a minimum and maximum set out in primary legislation?

SG response

The intention behind these powers is to set the length of sentence where the custody and community sentence provisions apply. It may prove, on the basis of future data (and in the light of the benefits of the investment in the prisons estate and the community payback strategy), that custody and community sentences are more effective for sentences of a longer period than the 15 days currently prescribed for. The power allows the demarcation line to be set on the basis of evidence but without the need for new primary legislation to allow the Scottish Ministers to respond effectively and promptly to changing circumstances in sentence management. The powers will also allow the Scottish Ministers to make changes, if required, to respond effectively to trends.

The affirmative resolution will require a full Parliamentary debate before the period, which would be evidence-based, could be prescribed. On that basis, we accept that this power could be narrowed without losing the desired effect by setting a limit beyond which the demarcation line could not be moved. Further consideration will be given to what that demarcation point might be. This maintains the desired degree of flexibility whilst we hope answering the Committee’s concern about the breadth of the power.

Section 18(2)(a)(iii) – power to prescribe by order the “prescribed period” for the purposes of certain sentences under Part 2 of the Custodial Sentences and Weapons (Scotland) Act 2007

The Committee asks for an explanation, in relation to the width of the delegated power in section 18(2)(a)(iii) of the Bill—

- could the Government explain the “potentially significant” effects of the use of this power in relation to the sentencing of offenders, given that the period could be prescribed at less than 15 days, or substantially more than 15 days – as the DPM suggests?

Schedule 2, paragraphs 10(3) and (4) – power to prescribe the length of periods of detention for those under 21 years of age for the purpose of determining if they are serving “short-term custody and community sentences” or “custody and community sentences”

The Committee asks for an explanation, in relation to the width of the delegated power in paragraphs 10(3) and (4) of Schedule 2—

- could the Government explain the “potentially significant” effects of the use of this power in relation to the sentencing of offenders, given that the period could be prescribed at less than 15 days, or substantially more than 15 days – up to a year as the DPM suggests.

SG response

The powers would have no effect in relation to the sentence handed down to offenders. It is not about introducing a new sentencing option but rather is about managing offenders from the beginning of their sentence through to the end. It will provide a workable and proportionate sentence management regime that will reflect the risk and needs of all offenders and focus on reducing reoffending. The new measures will see all offenders subject to some form of restriction for the full length of the sentence whether it is being served in custody or in the community on licence.

In practice this will mean that offenders who receive a sentence of below the demarcation line will be released on licence at the halfway point of their sentence but will be restricted and supported in the community for the second part of the sentence. For offenders who receive a sentence above the demarcation line, their suitability for release at the end of the custody part of the sentence will be informed by the joint risk assessment and on release he or she will be subject to statutory supervision by a criminal justice social worker. The level of supervision and intervention will vary from offender to offender and will be informed, as above, by the nature of the offence and the offender’s response to work begun in custody.

Section 70(3), so far as inserting section 26G(1) of the Public Finance and Accountability (Scotland) Act 2000 – power to amend list of persons mentioned in that Act

The Committee seeks clarification from the Scottish Government as to (a) the choice of procedure in relation to this power, and in particular why negative procedure has been preferred to affirmative, having regard to the terms of this power, including the consequences of being on the list, (b) the need for an unlimited power to modify Part 2A in respect of new bodies added to the list (including it would appear the ability to modify the purposes for which data matching may be conducted); and (c) why it is thought necessary for provision for an order under inserted section 26G(1) being able to include (in terms of 26G(2)) such incidental, consequential, supplementary or transitional provision as the Scottish Ministers think fit, and in particular to provide further explanation as to

how and in what circumstances it is envisaged that the ancillary power under section 26G(2) might require to be used.

SG response

As noted in the Delegated Powers Memorandum, the list of bodies in section 26C is fairly comprehensive, and would automatically include any new public bodies whose accounts are audited by the Auditor General. The power is a narrow one to allow for additional public bodies to be added in future. It can apply to a limited range of bodies, ie those whose functions are functions of a public nature, or include such functions, but which are not automatically covered by virtue of having their accounts audited by the Auditor General. In light of that narrowness, negative procedure is considered appropriate. We note that the related powers for England, Wales and Northern Ireland inserted by the Serious Crime Act 2007 are subject to draft affirmative procedure. However those powers are wider, and include power to add further purposes for which data matching can be used.

The power to modify the application of Part 2A in relation to bodies that are added, and to make incidental, consequential &c provision gives flexibility and is considered necessary so that appropriate arrangements can be made for particular bodies. As the Committee has identified, this would include power to modify Part 2A so that data cannot be used for certain data matching circumstances. As noted above, the limited range of bodies in respect of which the power could be used are effectively those at the fringes of the public sector, for which the full data matching provisions may not be appropriate. Without this power a body which has only limited public functions may not be willing to come within the scope of section 26C, requiring reliance instead on the voluntary provision of data under section 26B. While section 26C disapplies restrictions on disclosure of data, the power to make incidental or consequential provision could be useful to remove any apparent inconsistencies in other legislation or instruments.

Section 82(1)(a) – Amendment to section 133 of the Criminal Justice Act 1988 - Power to specify further circumstances in respect of which compensation may be paid for a miscarriage of justice

The Committee asks the Scottish Government the following questions—

- The DPM simply states that the purpose of the power is to enable a statutory basis for the existing ex gratia payment scheme to be established. The Committee requests an explanation as to the scope of the current scheme and an explanation as to whether the powers sought extend beyond what is necessary to replicate the current non-statutory arrangements.

The Scottish Government has not explained why it seeks to use delegated powers to provide a statutory basis for the extended scheme. Given that the scope of the existing statutory scheme is set out in primary legislation the Government is asked to explain why it considers it necessary to use delegated powers for the extended scheme.

SG response

The circumstances in which an individual may be eligible for compensation under the ex gratia scheme were set out in a statement by the then Secretary of State (Malcolm Rifkind) in a Written Answer to a Parliamentary Question in January 1986 (Hansard, 23 January 1986, cols 237-8). This statement is similar in its content to the one made by the then Home Secretary in November 1985 (Hansard, 29 November 1985, cols 689-90).

The Secretary of State stated that he was-

"prepared to pay compensation to people who ... have spent a period in custody following a wrongful conviction or charge, where I am satisfied that this has resulted from serious default on the part of a member of a police force or of some other public authority; and there may be exceptional circumstances that justify compensation in cases outside these categories. I will not, however, be prepared to pay compensation simply because at the trial or on appeal the prosecution was unable to sustain the burden of proof beyond reasonable doubt in relation to the specific charge that was brought."

As set out in the Explanatory Notes, this power will be used to replace the ex gratia scheme by placing it on a statutory footing with the existing statutory scheme. It is intended to correspond to the existing ex gratia criteria. Strictly, the power is not limited to placing the ex gratia scheme on a statutory basis, and no need has been identified to do so – Ministers may in future wish to recognise further circumstances in which compensation should be available, and without some flexibility in the power the only way to do so would be through the creation of another ex gratia scheme.

We anticipate that in preparing an order under this power, detailed consideration will have to be given to the terms used in the 1986 Written Answer, eg what constitutes a “public authority” and “exceptional circumstances”, rather than simply repeating the terms of the written answer verbatim. That might better be done in secondary legislation. A distinction can also be drawn between the provisions of the existing statutory scheme, which are required to meet international obligations, and those of the ex gratia scheme which, to the extent that they go beyond the statutory scheme, are not required by international obligations and which could currently be modified or revoked by Ministers at will. Placing the ex gratia scheme on a statutory basis by way of an order making power retains some of this flexibility, but introduces an element of Parliamentary control that is currently absent.

Section 82(1)(d) - New section 133(4B) Criminal Justice Act 1988 - Guidance to assessors

The Committee asks the Scottish Government whether it has considered whether the guidance to be issued under this sub-section should be laid before Parliament, and to comment on whether such provision is or is not in its view appropriate given Parliament’s interest in ensuring the independence of assessors and the proper use of public funds.

SG response

We do not consider that a statutory requirement to lay guidance before the Parliament is necessary. As set out in the Explanatory Notes, it is necessary to have a statutory basis for this guidance as the assessor is discharging a quasi-judicial role. Doing so provides greater transparency. We are however content to give a commitment that any guidance that is issued under this power will be laid before the Parliament.

Section 115 – Power to establish rules of court in relation to Part 6

Given that the Scottish Government refers to section 305 of the Criminal Procedure (Scotland) Act 1995 as the model for the power to be conferred on the High Court, why the power is an open power to make rules as may be considered necessary or expedient and not restricted to making rules of court or otherwise provision to regulate practice and procedure in relation to criminal proceedings?

SG response

We have reflected on our comment that section 115 “mirrors similar provision” in section 305 of the 1995 Act. It does not actually “mirror” that provision, and on reflection we consider that this is potentially misleading.

In preparing the draft Bill, we considered whether section 305 was sufficient for our purposes and considered that it was appropriate to create a new power. We required to consider what powers would be necessary given that this is the first time the Disclosure scheme has been put into statute and concluded that we needed flexibility to enable the High Court to do everything we thought it would be likely to require to do in ensuring the statutory scheme worked efficiently. In any event we consider that section 115 is not an entirely open power in that it is limited by the wording of section 115 to only those aspects required in consequence of or giving full effect to, only Part 6 itself, which deals only with the Disclosure of information in criminal matters.

Section 121(3) – Power to set mandatory conditions to licences granted under the Civic Government (Scotland) Act 1982

The DPM states that it is the Government’s intention that the power to prescribe mandatory conditions in respect of licenses under the Civic Government (Scotland) Act 1982 should be subject to affirmative procedure in line with the approach taken to alcohol licensing under the Licensing (Scotland) Act 2005. However, the Committee notes that new section 3A(3) provides for such orders to be subject to annulment. Can the Government clarify its intention and if the power is not to be subject to affirmative procedure to explain why it takes that view?

SG response

We can confirm that it is our intention that the affirmative procedure should apply and we will bring forward an amendment at Stage 2.

Section 129(4) – new section 27A Licensing (Scotland) Act 2005 - Power to prescribe those areas in respect of which licensing boards may vary all or a particular group of premises licences' conditions of operation

- No justification is provided in the DPM as to why it is considered appropriate to use subordinate legislation to enable licensing boards to vary certain licence conditions. If consistency of application is the policy objective can the Scottish Government explain why this cannot be achieved through primary legislation alone?

The DPM explains that the present policy intention is to enable the restriction of the sale of alcohol at off-sales premises to persons under 21. If such a restricted policy objective is in view why is a broad discretionary power required? No justification for the breadth of the power is provided in the DPM. Can the Scottish Government provide such justification to the Committee?

Section 140(1) – Power to make provision for the imposition on relevant licence-holders of a social responsibility levy

Given that the power in section 140 is a significant revenue raising measure, why is it not considered appropriate for the general principles of the proposal (including how the levy is to be calculated and by whom it is proposed to be administered) to be set out in primary legislation leaving only administrative detail for subordinate legislation?

SG response

In a letter to the Justice Committee and Health Committee on 24 March 2009, we advised of our intention to introduce a new health bill to take forward provisions on a range of measures, including those currently set out in sections 129 and 140 of the Bill. As a consequence, we intend to seek to remove these sections from the Bill at Stage 2.

Sections 146(2) and 147(2) – ancillary provision

The Committee asks the Scottish Government for the following additional information—

- To give its reasons for considering negative procedure as a sufficient level of parliamentary control in respect of modifications of the statute book using these powers where there is no textual amendment, particularly in the context of the subject matter of the Bill which impacts on individual rights and liberty.

SG response

We can appreciate the Committee's concern that the Bill deals with the rights and liberty of individuals. We have considered again the question of the appropriate level of parliamentary scrutiny in relation to orders under sections 146 and 147 which would modify the effect of – but not textually amend or repeal – enactments.

Given the subject matter of this Bill we acknowledge that the effect of a modification could be just as significant as the effect of a textual amendment. We think that there is a case for adjusting the level of scrutiny in relation to section 146 and we will bring forward amendments at Stage 2 to increase the level of parliamentary scrutiny in any case where an enactment is modified.

In our view, however, the position is different in relation to section 147. In that case, the modification is made in the context of a move from the old law to the new. The modification is temporary in nature and it is very focused and tightly drawn. The power is exercisable only for transitory, transitional or saving purposes and it is clearly linked to the coming into force of a particular provision of the Bill. We consider that, for these reasons, the current level of parliamentary scrutiny is appropriate.

ANNEXE B: FINANCE COMMITTEE REPORT

Finance Committee Report on the Financial Memorandum of the Criminal Justice and Licensing (Scotland) Bill

The Committee reports to the Justice Committee as follows—

INTRODUCTION

1. The Criminal Justice and Licensing (Scotland) Bill (“the Bill”) was introduced in the Scottish Parliament on 5 March 2009. The Justice Committee has been designated as the lead committee on the Bill at Stage 1.

2. Under Standing Orders Rule 9.6, the lead committee at Stage 1 is required, among other things, to consider and report on the Bill’s Financial Memorandum. In doing so, it is required to consider any views submitted to it by the Finance Committee (“the Committee”).

3. At its meeting on 10 March 2009, the Committee agreed to adopt level three scrutiny in relation to the Bill.¹ At its meeting on 21 April, the Committee took evidence from the following organisations—

- Panel 1: Criminal Justice Authorities (CJAs), North Lanarkshire Council and Perth and Kinross Council;
- Panel 2: Crown Office and Procurator Fiscal Service (COPFS), Scottish Court Service (SCS), Scottish Police Services Authority (SPSA) and Scottish Prison Service (SPS); and
- Panel 3: Scottish Government Bill Team.

All of the organisations represented on the first two panels also provided written evidence.

4. In addition, the Committee also received written evidence from—

- Dumfries and Galloway Council
- East Ayrshire Council;
- Orkney Islands Council; and
- Scottish Legal Aid Board.

5. All written evidence received is published in the electronic version of this report.² The *Official Report* of the oral evidence session on 21 April can be found on the Parliament’s website.³

¹ Information on the Committee’s three-level system of scrutiny for Financial Memoranda is available at: <http://www.scottish.parliament.uk/s3/committees/finance/financialMemo.htm>

² Scottish Parliament Finance Committee Report on the Financial Memorandum of the Criminal Justice and Licensing (Scotland) Bill available at: <http://www.scottish.parliament.uk/s3/committees/finance/reports-09/fir09-CriminalJusticeLicensingBill.htm>

³ Scottish Parliament Finance Committee, *Official Report*, 21 April 2009 available at:

THE BILL

6. The Bill provides for various changes under the general headings of criminal justice and licensing. The Bill contains around 85 distinct topics and is split into the following 10 main parts—

- Part 1 – Sentencing: creates a Scottish Sentencing Council and places on statute for the first time the purposes and principles of sentencing; introduces a Community Payback Order to replace the existing range of community penalties; and establishes a presumption against short periods of imprisonment;
- Part 2 – Criminal law: creates new serious organised crime offences and a new offence of possessing communication devices within prison; and creates new offences in relation to extreme pornography;
- Part 3 – Criminal procedure: raises the age of criminal responsibility of children from eight to 12 years old; implements Scottish Law Commission proposals on Crown right of appeals; and changes the system of retention and use of forensic samples, e.g. allowing fingerprints to be kept on the same basis as DNA;
- Part 4 – Evidence: confirms in statute that courts are able to allow witnesses to give evidence anonymously and via TV link (under certain circumstances); and allows all persons to be compelled to give evidence, ending the restriction that exempted spouses or civil partners could not be compelled;
- Part 5 – Criminal justice: increases the maximum age that someone is able to sit on criminal juries from 65 to 70; permits the police to close down premises associated with human exploitation; and permits public bodies to share information for the purpose of detecting fraud;
- Part 6 – Disclosure: provides in statute a regime for the disclosure of evidence in criminal cases;
- Part 7 – Mental disorder and unfitness for trial: modernises the law in the area of mental disorders in criminal proceedings;
- Part 8 – Licensing under Civic Government (Scotland) Act 1982: makes various changes to the Civic Government (Scotland) Act 1982 to improve the licensing of a number of businesses including metal dealers, entertainment operators and taxi and private hire firms;
- Part 9 – Alcohol licensing: places a duty on Licensing Boards to consider the detrimental impact of off-sales to under-21s, with a view to considering whether to apply a condition to some or all of the licences in their Board area requiring those purchasing off-sales alcohol to be aged 21 or over; and

- Part 10 – Miscellaneous: gives Scottish Ministers an enabling power to introduce a ‘Social Responsibility Levy’ to ensure that alcohol retailers and licensed premises whose activities can impact negatively on the wider community contribute towards the cost of this impact.

SUMMARY OF COSTS AND SAVINGS AS OUTLINED IN THE FINANCIAL MEMORANDUM

7. The Financial Memorandum estimates the total annual financial cost of implementing the Bill at £58.405 million, with a total non-recurring start-up cost of £2.633 million. In arriving at these figures, the Financial Memorandum identifies five topics in the Bill that carry a “significant financial impact” – defined as those estimated as costing over £0.4 million per year. These topics are dealt with in Chapter 1 of the Financial Memorandum and are as follows—

- creation of a Scottish Sentencing Council (costing £1.1 million per year, plus one-off costs of £0.45 million);
- introduction of Community Payback Orders, presumption against short periods of imprisonment or detention, and reports about supervised persons (costing £10.67 million per year, plus one-off costs of £50,000);
- new serious organised crime offences (costing £3.654 million per year, plus one-off costs of £5,000);
- placing on statute a regime for the disclosure of evidence in criminal cases (costing £4.105 million per year, plus one-off costs of £1.816 million); and
- provisions regarding the sale of alcohol to persons under the age of 21 (costing £38 million per year). (The Scottish Government has subsequently announced that it will seek to remove this proposal from the Bill at Stage 2⁴.)

8. The Financial Memorandum estimates that other provisions in the Bill will also have cost implications, although each carrying a lesser financial impact than £0.4 million per year. These topics are described in Chapters 2 to 10 of the Financial Memorandum.

9. The Financial Memorandum contains substantial cost information, and explanation of policy background and assumptions underpinning the cost estimates. A brief summary of the cost implications is included in this report.

Provisions with significant financial impact

Scottish Sentencing Council

10. Based on the running costs incurred by bodies of a likely similar size, and the assumption that administrative functions will be provided by the Scottish Court Service (SCS), the Financial Memorandum estimates that an annual budget of

⁴ Scottish Parliament Finance Committee, *Official Report*, 21 April 2009, col. 1074. See also correspondence received from the Minister for Parliamentary Business, dated 26 March 2009.

£1.1 million will be required. These costs include fees and expenses for Council members; cover for judicial absence (Council membership will include a practising judge, two sheriffs and one justice of the peace); support office costs including staff salaries; and research, publications and website costs. One-off set up costs of £450,000 are also anticipated.

11. These costs will be met entirely by the Scottish Government as an element of its funding of the SCS. The Financial Memorandum states that no costs will fall on local authorities or other bodies, individuals or businesses.

Community Payback Orders etc.

12. The new Community Payback Orders will replace the existing court disposals of probation orders, community service orders, supervised attendance orders and community reparation orders. The Financial Memorandum estimates the likely cost of these Orders as £10.67 million per year, based on assumptions about the rate of change in sentencer behaviour away from imposing short prison sentences. This figure is given as the mid-point between an additional cost per year of £8.237 million (where there is a 10% increase in usage of Orders compared with existing sentences) and £13.103 million (where there is a 20% increase in usage of Orders). It is also anticipated that there will be one-off costs of £50,000 relating to IT development.

13. These additional costs will be incurred by local authorities (although the cost will be reimbursed by the Scottish Government through its ring-fenced funding arrangements for criminal justice social work); the Scottish Court Service; and the electronic monitoring contractor (although the additional cost will be covered by a revised commercial contract to be met by the Scottish Government).

Serious organised crime offences

14. The Financial Memorandum estimates that the new serious organised crime offences will incur total eventual additional costs of £3.654 million per year. These costs will fall upon the Scottish Court Service, the Crown Office and Procurators Fiscal Service (COPFS) and the Scottish Prison Service. These costs will, therefore, ultimately be met by the Scottish Government. The Financial Memorandum states that the Government does not anticipate any costs falling on local authorities or other bodies, individuals or businesses.

Disclosure

15. According to the Financial Memorandum, additional costs are expected to fall on the Scottish Government as follows—

- Scottish Police Service – additional operational and training costs as a result of the principles and changes to practices and procedures that will require to be adopted as a result of the legislation. The recurring costs are estimated at £2.2 million per year, with non-recurring costs estimated at £1.3 million;
- Scottish Police Services Authority – additional staff costs relating to training, administration and defence access to SPSA sites are estimated at £205,000 per year, with £143,000 in non-recurring costs;

- Scottish Crime and Drug Enforcement Agency – 10 additional Criminal Disclosure Officers. The cost is estimated £495,000 per year. However, the cost could vary from £340,000 – £650,000 per year, depending on whether police officers or field officers undertake these roles;
- Crown Office and Procurator Fiscal Service – costs relating to IT development, staff training, time taken to complete a schedule and the review of disclosure following receipt of defence statements are expected to be £485,000 per year, with non-recurring costs of £273,000;
- Scottish Court Service – additional court hearings are estimated to cost £164,000 per year and one-off IT development costs of £100,000;
- Scottish Legal Aid Board – the introduction of mandatory defence statements is estimated to cost £556,000 per year.

16. The Financial Memorandum states that the Government does not anticipate any costs to fall on local authorities or other bodies, individuals or businesses.

Sale of alcohol to persons under the age of 21

17. The Government has indicated to the Committee that it will seek to remove this proposal from the Bill at Stage 2.⁵

18. The maximum estimated costs contained in the Financial Memorandum assume that every Licensing Board introduces a ban on the off-sale of alcohol to 18-20 year olds across their entire Board area. It is anticipated that no costs will fall on the Scottish Government, but it is likely that there will be financial implications for local authorities and for other bodies, individuals and businesses.

19. The Financial Memorandum states that additional costs are expected to fall on local authorities in respect of the cost to Licensing Boards of considering the detrimental effect of alcohol sales to under-21s; and the cost of Licensing Standards Officers (LSOs) to ensure compliance with any conditions laid down by Boards. The Financial Memorandum states that these costs are likely to be marginal and suggests that the cost of running the licensing system, including costs of LSOs, is generally recovered by Licensing Boards from fee income. No further details on possible costs or specific estimations are provided.

20. The Financial Memorandum suggests that individuals aged between 18 and 21 who are restricted in buying off-sales may be affected to the extent of reducing their total alcohol intake, or alternatively spending up to three times more on alcohol purchases. The average cost of a unit of alcohol in on-sales purchases is £1.28, compared with 40p in off-sales.

21. The financial impact on business will depend on the extent to which Boards choose to establish such conditions and the extent to which purchasers switch to on-sales. The Financial Memorandum estimates that these provisions will result in a financial impact of £38 million per year, which represents a loss of 63% of

⁵ Scottish Parliament Finance Committee, *Official Report*, 21 April 2009, col. 1074. See also correspondence received from the Cabinet Secretary for Justice, dated 26 March 2009.

alcohol purchases made by 18-20 year olds. This figure includes £15 million in lost annual sales revenue to business and £23 million in lost VAT and alcohol duty per year to the UK Government.

Provisions with a lesser financial impact

22. The Financial Memorandum refers to the following provisions in the Bill as not having a significant financial impact—

- Extended supervision sentences for certain sexual offences: the estimated annual cost of £16,000 will be met by local authorities, which would be reimbursed by the Scottish Government through the criminal justice social work services funding;
- Offences aggravated by prejudice: annual recurring costs falling on the Scottish Court Service are estimated at £24,000, plus one-off costs of £5,000 for IT development;
- Articles banned in prison: the cost to the Scottish Prison Service is estimated at £215,000 per year;
- New offence of possession of extreme pornography: the estimated annual cost of £27,000 is expected to impact on the Scottish Crime and Drug Enforcement Agency, Scottish Legal Aid Board, Scottish Court Service and Scottish Prison Service;
- Witness statements and their use during trial: estimated annual cost to the Crown Office and Procurator Fiscal Service and Scottish Court Service of £218,000;
- Remand and committal of children and young people: eventual recurring costs of £65,000 are expected to fall on local authorities;
- Crown appeals: an estimated annual cost of £377,000 across the Scottish Court Service, Crown Office and Procurator Fiscal Service and Scottish Legal Aid Board;
- Retention and use of DNA and fingerprint samples: an estimated eventual annual recurring cost to the Scottish Police Services Authority of £25,000, plus one-off system change costs of £25,000;
- Limiting grounds for appeal on referrals from the Scottish Criminal Cases Review Commission: annual costs to the SCCRC are estimated at £30,000;
- Enabling evidence to be provided by television link: estimated annual cost to the Scottish Court Service of £47,000, plus one-off set up costs of £132,000 to equip courts;
- Amendments to Part V of the Police Act 1997: annual costs to Disclosure Scotland are estimated at £120,000, plus non-recurring costs of £150,000; and

- Taxi and private hire car licenses: annual cost to local authorities' licensing authorities is estimated at £8,000; and the cost to individual taxi firms is anticipated as being less than £1.00 per year.

Savings

23. The Financial Memorandum states that the Government anticipates overall cost savings in relation to the provisions on early removal of certain short-term prisoners from the UK; bail review applications; and jury service. These savings are estimated at £40,000; £6,000; £250,000 per year, respectively.

SUMMARY OF EVIDENCE

Community Payback Orders and presumption against short prison sentences

24. Evidence highlighted the potential impact that the twin proposals to introduce Community Payback Orders (CPOs) and a presumption against short term prison sentences will have on criminal justice social work. There was also some discussion about the potential impact of the proposals on the prison population, and in relation to whether the assumptions about social enquiry reports (SERs) are correctly identified in the Financial Memorandum. This evidence is summarised below.

25. While, on the whole, witnesses accepted that the assumptions in the Financial Memorandum were appropriate, some concerns were raised. Some evidence illustrated the difficulty in predicting sentencing behaviour and the extent to which the courts would use CPOs instead of short term prison sentences. Other evidence criticised the amount of core funding available for criminal justice social work and suggested that additional funding would be required in order to meet the management needs of offenders who would currently receive short custodial sentences.

Uptake of Community Payback Orders (CPOs)

26. Government officials confirmed that, in relation to the implementation of the Bill, the costings in the Financial Memorandum have been made on the assumption that all proposals will come into force in April 2010. Officials stated, however, that "at this stage, we have not set an implementation timetable for the whole Bill."⁶ Officials referred to the spending constraints in the context of the current economic climate which affected prioritisation across Government and were unable to comment in any further detail about the resources that might be available to the Justice Department in order to implement the measures in the Bill.⁷

27. Specifically, in relation to the proposals introducing CPOs and a presumption against short-term prison sentences, Government officials explained that the Financial Memorandum makes two assumptions—

⁶ Scottish Parliament Finance Committee, *Official Report*, 21 April 2009, col. 1091.

⁷ Scottish Parliament Finance Committee, *Official Report*, 21 April 2009, cols. 1091-2.

“that the number of CPOs will essentially derive from a reduction in the number of short sentences, and that our best estimate of the extent of that shift in the initial years is between 10 and 20 per cent.”⁸

28. The figures contained in the Financial Memorandum (and as confirmed in supplementary evidence) reflect an increase in the number of orders imposed by the courts of between 1939 (10% increase) and 3878 (20% increase), based on 2007-08 court figures.⁹ Officials stated that, in the context of the number of prison receptions, these assumptions reflect a reasonable range of increases.

29. East Ayrshire Council stated that, in estimating a 10 to 20 per cent increase in the use of CPOs over the course of the years 2010-11 and 2011-2012, the Financial Memorandum accurately reflects the margins of uncertainty about costs and timescales.¹⁰

30. Perth and Kinross Council stated that, based on the additional demand that might be expected, the costings in the Financial Memorandum “are not inaccurate.”¹¹ However, it recognised that the additional impact of 170 offenders currently serving sentences of six months or less receiving CPOs would be a significant additional cost.¹² In supplementary evidence, the Council added that—

“although the prospective sum seemed realistic in relation to the number of additional staff who may be required on the ground to deliver the enhanced services, I do not think that sufficient allowance has been made for management, accommodation, clerical support and transport costs. These costs are equally important, have not always been accounted for in the past and impact directly on our ability to deliver fast and effective services”¹³¹⁴

31. In written evidence, the Community Justice Authorities (CJAs)¹⁵ referred to the estimated increase of up to 20 per cent in the use of CPOs and stated that “there is no evidence to suggest whether this will meet margins of uncertainty.”¹⁶ However, in oral evidence to the Committee the CJAs stated that—

“What the Government has done in the [Financial] Memorandum is probably the best that it could do. It has made some reasonable assumptions. However, if the bill is passed, it will be necessary to monitor closely the first year or 18 months of implementation, because I am not sure

⁸ Scottish Parliament Finance Committee, *Official Report*, 21 April 2009, col. 1077.

⁹ Criminal Justice and Licensing (Scotland) Bill, Financial Memorandum, paragraph 679; and supplementary written evidence from the Scottish Government.

¹⁰ Written evidence from East Ayrshire Council.

¹¹ Scottish Parliament Finance Committee, *Official Report*, 21 April 2009, col. 1052.

¹² Written evidence from Perth and Kinross Council. See also Scottish Parliament Finance Committee, *Official Report*, 21 April 2009, col. 1053.

¹³ See also Scottish Parliament Finance Committee, *Official Report*, 21 April 2009, cols. 1050 and 1059.

¹⁴ Supplementary written evidence from Perth and Kinross Council.

¹⁵ There are eight CJAs: Fife & Forth Valley CJA; North Strathclyde CJA; Northern CJA; South West Scotland CJA; Glasgow CJA; Lothian & Borders CJA; Tayside CJA; and Lanarkshire CJA.

¹⁶ Written evidence from Community Justice Authorities.

that anyone really understands yet how some of the measures will affect others. At this stage, it is difficult to predict that.”¹⁷

32. With regard to the projected increase by courts in their use of CPOs, the CJAs accepted that although “it is a bit of a leap in the dark and it is difficult to come up with a figure... 20 per cent would not be an unreasonable figure for the sheriff courts.”¹⁸ It was suggested, however, in relation to justice of the peace courts that the 20 per cent figure might represent an underestimation of how JPs will use the power.

33. Although Government officials accepted that it is difficult to predict with any certainty changes in sentencer behaviour, they stated that “past experience suggests that sentencers are cautious in making changes to their sentencing behaviour” and considered that sentencing shift would be gradual.¹⁹ Officials confirmed that if there is a larger than expected shift in sentencing behaviour then the costings in the Financial Memorandum would be exceeded²⁰; and took the point made by the CJAs²¹ about the need to monitor the usage of CPOs.²²

34. When questioned on whether the cost estimates should be based on diverting 100% of short-term sentences to CPOs, officials referred to the Scottish Prison Commission’s recommendation that there would have to be exceptions to any presumption against imposing a prison sentence. Such exceptional cases might involve sex offenders, violent offenders and multiple repeat offenders. Officials stated that they have examined this and concluded that around 50% of offenders likely to receive short sentences would not be subject to the presumption against imposing imprisonment.²³

Impact on criminal justice social work and related costs

35. The Committee also heard evidence from the CJAs and Perth and Kinross Council about current core funding for criminal justice social work and, specifically, whether current levels could effectively meet a potential increase in demand for services.

36. The CJAs expressed concern about the assumption in the Financial Memorandum that current funding for probation, social enquiry reports (SERs), community service orders and supervised attendance orders is adequate. They indicated that six of the eight authorities have this year asked for approval to move money from non-core funding to core funding, citing this as evidence that existing core funding is not sufficient for purpose and told the Committee, “we are concerned that, if we have a large increase in the number of CPOs, we may have to vire further moneys from non-core to core funding.”²⁴

¹⁷ Scottish Parliament Finance Committee, *Official Report*, 21 April 2009, col. 1060.

¹⁸ Scottish Parliament Finance Committee, *Official Report*, 21 April 2009, col. 1058.

¹⁹ Supplementary written evidence from the Scottish Government. See also, regarding JP Courts, Scottish Parliament Finance Committee, *Official Report*, 21 April 2009, cols. 1082 and 1093.

²⁰ Scottish Parliament Finance Committee, *Official Report*, 21 April 2009, col. 1078.

²¹ Scottish Parliament Finance Committee, *Official Report*, 21 April 2009, col. 1060.

²² Scottish Parliament Finance Committee, *Official Report*, 21 April 2009, col. 1076.

²³ Scottish Parliament Finance Committee, *Official Report*, 21 April 2009, col. 1085.

²⁴ Scottish Parliament Finance Committee, *Official Report*, 21 April 2009, col. 1051.

37. Perth and Kinross Council also expressed concern that Government funding for local authority core criminal justice functions has not kept pace with inflation and criticised the funding formula as “sometimes based on activity levels that are four, five or six years out of date and do not reflect current or immediately projected activity levels.”²⁵ It also stated that costs of delivering services in rural areas can be considerably higher.

38. The Council also reflected on the specific needs and associated costs of providing an increased number of community disposals, most of which, as Government officials confirmed, “will be attributable to down-tariffing from short sentences.”²⁶ It highlighted “the complex needs of those in the churn of short-term adult imprisonment” most of whom “require well-constructed care and supervision arrangements”.²⁷ In supplementary evidence, the Council referred to the unit cost of probation orders and stated that—

“The unit cost allowed for delivery of such services is unrealistic now and will become more-so as we endeavour to supervise people in the churn of short terms prison sentences who require ever higher levels of support and supervision if they are to escape the cycle of re-offending.”²⁸

39. In view of the complex needs of such offenders, the Council further suggested that, in some cases, the number of requirements attached to individual CPOs might need to be increased.²⁹ The Financial Memorandum states that, in Scotland, the average number of additional conditions imposed per probation order is estimated at 1.2 and that, because no significant increase by courts in the use of the available requirements is anticipated, proposes no increase in the core funding currently provided for this purpose.³⁰

40. Government officials confirmed the assumption in the Financial Memorandum that no additional requirements will be imposed per CPO.³¹ On the wider point about current levels of funding for criminal justice social work, the Government stated in supplementary evidence that “whether the existing baseline is sufficient is, we believe, a separate issue and outwith the scope of the [Financial] Memorandum.”³² East Ayrshire and Perth and Kinross Councils suggested that any potential shortfall in funding for criminal justice social work could be met, to some extent, by transferring savings from the prisons service.³³

Impact on prison population and related costs

41. In relation to the specific proposals for CPOs and a presumption against short custodial sentences, the Scottish Prison Service considered that there could be some long-term benefits. It suggested that these could materialise in two ways—

²⁵ Scottish Parliament Finance Committee, *Official Report*, 21 April 2009, col. 1050.

²⁶ Scottish Parliament Finance Committee, *Official Report*, 21 April 2009, col. 1075.

²⁷ Scottish Parliament Finance Committee, *Official Report*, 21 April 2009, col. 1050.

²⁸ Supplementary written evidence from Perth and Kinross Council.

²⁹ Scottish Parliament Finance Committee, *Official Report*, 21 April 2009, col. 1059.

³⁰ Financial Memorandum, paragraph 689.

³¹ Scottish Parliament Finance Committee, *Official Report*, 21 April 2009, col. 1081.

³² Supplementary written evidence from the Scottish Government.

³³ Written evidence from East Ayrshire and Perth and Kinross Councils.

“If the measures contained in the bill have an impact on the average prison population such that... they reduce the average prison population to a point at which structural changes could be made, which would allow us to save significant amounts in relation to the prison estate or people, cash savings would materialise. We are not at that point yet, however – it is a long way off.

“The second area where there would be benefits, and where those benefits would be much closer, lies in reducing the churn in the prison population... There would be benefits there, not in cash savings but in a better use of resources and a better sentence management regime.”³⁴

42. The CJAs suggested that the Financial Memorandum provides an incomplete picture because it does not capture any potential savings from the intended reduction in short term prison sentences.³⁵ The SPS stated, however, that a 50 per cent reduction in the number of short term prison sentences “would probably result, in the longer term, in some 300 prisoner places no longer being required.”³⁶ However, a reduction of 500 prison places would be required before the prison service would be operating at design capacity, and SPS stated that a significant reduction on top of that would be required before it would be possible to close an establishment or a substantial part of one.³⁷ On this basis, the SPS suggested that, until an establishment opens or closes, the changes in costs will be marginal. The unit cost of imprisonment per prisoner per year is, therefore, simply indicative and not an illustration of savings that can be realised immediately.

43. East Ayrshire Council stated that there is uncertainty about the impact that the Bill will have on short term prison sentences to reduce the prison population. In written evidence, it stated that its “experience over the past few years is that there has been a considerable increase in the use of community sentences/ requests for reports, without making any significant impact on the levels of custodial sentencing.”³⁸

44. Government officials agreed with the evidence from SPS and confirmed that, while a reduction in short sentences would reduce churn and free up prison officer time, this would not save a huge number of prison places.³⁹ Officials suggested that, on average prisoners serving short sentences spend about three weeks in a prison cell and on this basis a 10 per cent reduction in the number of sentences of six months or less would only free up around 50 prison places.⁴⁰

Social Enquiry Reports (SERs)

45. In evidence, the CJAs suggested that the Financial Memorandum may underestimate the number of additional social enquiry reports (SERs) that might be requested by the courts as a result of the Bill. They suggested that—

³⁴ Scottish Parliament Finance Committee, *Official Report*, 21 April 2009, cols. 1065-6.

³⁵ Written evidence from Community Justice Authorities.

³⁶ Scottish Parliament Finance Committee, *Official Report*, 21 April 2009, cols. 1066-7.

³⁷ Scottish Parliament Finance Committee, *Official Report*, 21 April 2009, col. 1071.

³⁸ Written evidence from East Ayrshire Council.

³⁹ Scottish Parliament Finance Committee, *Official Report*, 21 April 2009, cols. 1076-7.

⁴⁰ Scottish Parliament Finance Committee, *Official Report*, 21 April 2009, col. 1077.

“Given the presumption against short sentences, we are a bit concerned that sheriffs might ask for social enquiry reports in most cases. They might do that to have the full information about the community options that are available in order to make up their minds that none of those options is suitable, which would mean moving on to a short term prison sentence. If that were to happen, many additional social enquiry reports that have not been costed in the financial memorandum might be required.”⁴¹

46. Government officials confirmed that costings for additional social enquiry reports have not been built into the Financial Memorandum, and acknowledged that the Government will need to keep that under careful review.⁴²

Scottish Sentencing Council

47. The SCS considered that the cost estimate for the establishment of the Scottish Sentencing Council shown in the Financial Memorandum is “in the right ball park”.⁴³ It stated, however, that due, for example, to the costs involved with integrating the district courts into its operations, it could not be expected to meet the costs associated with running the Council without additional funding from the Government.

48. The SCS also agreed with the statement in the Financial Memorandum that it had not been confirmed whether or not it would actually provide the administrative functions for the Council. It suggested that it will be for the new statutory body which will replace the SCS, under the Judiciary and Courts (Scotland) Act 2008, to discuss this with the Scottish Government in due course.

49. The Financial Memorandum states that the Government “will provide funding to the SCS in recognition of its support function.”⁴⁴ Government officials confirmed that the costs in the Financial Memorandum are illustrative, “based on the assumption that the Scottish Sentencing Council will be grafted on to the new, reformed Scottish Court Service”, but “do not say that the SCS will definitely provide the functions concerned.”⁴⁵

50. Officials also referred to the costs associated with the post of the Council’s Chief Executive (the Financial Memorandum shows this as £97,055 per year). Officials confirmed that the cost as set out in the Financial Memorandum indicates the total cost to the Government rather than the total salary to the post-holder, but that, ultimately, it will be for the Council to decide at which level it pitches its chief executive post.⁴⁶ With regard to location, officials suggested that the bulk of the Council’s staff could be based in most places in Scotland and need not necessarily result in expensive accommodation and running costs. However, they suggested

⁴¹ Scottish Parliament Finance Committee, *Official Report*, 21 April 2009, cols. 1051-2.

⁴² Scottish Parliament Finance Committee, *Official Report*, 21 April 2009, col. 1076.

⁴³ Scottish Parliament Finance Committee, *Official Report*, 21 April 2009, col. 1067.

⁴⁴ Financial Memorandum, paragraph 664.

⁴⁵ Scottish Parliament Finance Committee, *Official Report*, 21 April 2009, cols. 1078-9.

⁴⁶ Scottish Parliament Finance Committee, *Official Report*, 21 April 2009, col. 1086.

that Council meetings would most likely need to take place in Edinburgh or Glasgow.⁴⁷

Remand and committal of children and young people

51. In written evidence, East Ayrshire Council referred to the proposals regarding the remand and committal of children and young people (section 47 of the Bill). The Council stated that it “remains unclear about the financial implications surrounding the additional burden that might fall on local authorities through increased demands for alternative remand accommodation most likely in the form of secure accommodation.”⁴⁸ Perth and Kinross Council also stated that, although it makes minimal use of secure accommodation, where there is no available facility for a young offender to go to a secure unit the burden of finding an alternative way of supervising the person will fall on local authorities.⁴⁹

52. Government officials stated that, under section 47, there will be a transfer of responsibility from the Scottish Prison Service to local authorities and that, as identified in the Financial Memorandum, there will be a cost to local authorities. Officials confirmed that, as a result, the provisions “will increase the demand for local authority secure accommodation” and at the same time, would produce a saving to the Scottish Prison Service (although see paragraph 42 on the realisation of savings in the prison service).⁵⁰

Licensing provisions

53. Officials confirmed that it is the Government’s intention to seek to remove two alcohol licensing measures from the Bill at Stage 2: section 129 (sale of alcohol to persons under the age of 21 etc.); and section 140 (licensed premises: social responsibility levy).⁵¹ As a result of the Government’s proposal to remove these provisions, the Committee has not considered the related financial assumptions in any detail.

54. From the evidence received, local authorities appeared to be largely content with the other licensing provisions in the Bill. In written evidence, North Lanarkshire Council suggested that the impact of the proposals in Part 8 of the Bill “is likely to be minimal in cost terms and would, in any event, be recovered through license application fees.”⁵²

55. Additional costs were anticipated, however, in relation to the administration process for licensing of taxi and private hire cars⁵³, and in relation to the associated consultation costs of making new licensing resolutions for premises selling food or drink, large-scale public entertainments and non-commercial market operators.⁵⁴ Also, Orkney Islands Council referred to the difficulty experienced by

⁴⁷ Scottish Parliament Finance Committee, *Official Report*, 21 April 2009, cols. 1086-7.

⁴⁸ Written evidence from East Ayrshire Council.

⁴⁹ Scottish Parliament Finance Committee, *Official Report*, 21 April 2009, col. 1061.

⁵⁰ Scottish Parliament Finance Committee, *Official Report*, 21 April 2009, cols. 1089-90.

⁵¹ Scottish Parliament Finance Committee, *Official Report*, 21 April 2009, col. 1074.

⁵² Written evidence from North Lanarkshire Council.

⁵³ Scottish Parliament Finance Committee, *Official Report*, 21 April 2009, col. 1056.

⁵⁴ Written evidence from Dumfries and Galloway Council.

small, rural locations in absorbing the costs of the provisions, due to the existence of fewer traders resulting in smaller fee incomes.⁵⁵

56. Government officials stated that with the removal of sections 129 and 140, “the licensing provisions that remain in the Bill are of a much smaller order in terms of finances”.⁵⁶ Officials confirmed that the Government’s intention is for the remaining provisions to be self-financing out of fees and suggested that “quite a few will lead to a more efficient licensing system and potential savings for the licensing boards and police in operating it”.⁵⁷

CONCLUSIONS

57. The Committee acknowledges the detailed level of information contained in the Financial Memorandum to the Bill. On the basis of evidence received, however, the Committee wishes to draw the lead committee’s attention to a number of specific matters relating to the financial assumptions.

58. With regard to the Bill as a whole, the Committee notes that funding for full implementation has not been confirmed and suggests that the lead committee seeks further detail from the Cabinet Secretary on the proposed timetable for implementation and the source of funding for the measures.

Community Payback Orders and presumption against short prison sentences

59. The Committee recognises the difficulty in estimating the rate of change in sentencing behaviour from imposing short term custodial sentences to imposing Community Payback Orders (CPOs). The Committee has not, however, received any evidence to allow it to understand whether the estimated update of CPOs, of between 10 and 20 per cent, is accurate or whether this figure is likely to increase year-on-year, along with the cost implications. As far as the Committee understands, the legislation provides for a statutory presumption against short-term custodial sentences. The Committee draws the apparent disconnect between this and the assumptions in the Financial Memorandum to the attention of the lead committee.

60. Nonetheless, the Committee notes the potential financial impact on local authorities’ criminal justice social work services of dealing with the complex needs of offenders who would otherwise receive custodial sentences, particularly in the event that the volume of CPOs is above the estimates in the Financial Memorandum. The Committee, therefore, recognises the vital importance of monitoring the uptake of CPOs and the number of social enquiry reports requested by the courts and the associated financial impact on criminal justice social work services.

61. In relation to the potential impact of the proposals on the prison population, the Committee notes that the Financial Memorandum does not include any assumptions about potential savings resulting from these proposals. The Committee acknowledges that any savings will depend on the rate of change in

⁵⁵ Supplementary written evidence from Orkney Islands Council.

⁵⁶ Scottish Parliament Finance Committee, *Official Report*, 21 April 2009, col. 1083.

⁵⁷ Scottish Parliament Finance Committee, *Official Report*, 21 April 2009, col. 1084.

sentencing behaviour, and accepts that a significant decrease in the prison population would have to take place before any sizeable cost savings would be likely to occur. If any savings were to occur, however, the Committee notes the concern of the Community Justice Authorities that Scottish Government should consider transferring additional funding to reflect the shifting demand.

62. The Committee recommends that the lead committee should consider these issues and, in particular, the methodology underpinning the assumptions about the expected take-up of CPOs, in greater depth in evidence with the Cabinet Secretary.

Scottish Sentencing Council

63. The lead committee may wish to seek further clarification from the Cabinet Secretary on the costs associated with the Scottish Sentencing Council, and the scope to minimise these as far as possible through, for example, the co-location of offices.

Remand and committal of children and young people

64. The Committee recognises that, as a result of the proposals regarding the remand and committal of children and young people, there will be an additional cost impact for local authorities, while there will be a saving for the Scottish Prison Service. The lead committee may wish to pursue with the Cabinet Secretary whether the SPS saving will be passed on to local authorities to ensure that sufficient resources are available for the provisions to be enacted successfully.

Licensing provisions

65. Subject to the Government's commitment to remove sections 129 and 140 from the Bill, the Committee does not wish to raise any significant concerns with regard to the financial implications of the licensing provisions. The lead committee may, however, wish to pursue with a wider representation of local authorities the issues raised in evidence to the Finance Committee.

ANNEXE C: EXTRACTS FROM THE MINUTES

5th Meeting, 2009 (Session 3), Tuesday 10 February 2009

Decision on taking business in private: The Committee agreed to consider its work programme and an approach paper for the anticipated Criminal Justice and Licensing (Scotland) Bill in private at future meetings.

8th Meeting, 2009 (Session 3), Tuesday 10 March 2009

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee considered its approach to the scrutiny of the Bill at Stage 1 and agreed to continue consideration at its next meeting. In addition, the Committee agreed its preferred candidates for appointment as advisers in connection with its consideration of the Bill at Stage 1.

9th Meeting, 2009 (Session 3), Tuesday 17 March 2009

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee agreed its approach to the scrutiny of the Bill at Stage 1.

11th Meeting, 2009 (Session 3), Tuesday 31 March 2009

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee agreed a revised approach to the scrutiny of the Bill at Stage 1.

13th Meeting, 2009 (Session 3), Tuesday 5 May 2009

Decision on taking business in private: The Committee agreed to take item 7 and any future consideration of written and oral evidence received on the Criminal Justice and Licensing (Scotland) Bill at Stage 1 in private.

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee agreed to accept into evidence written submissions received in response to the call for evidence.

14th Meeting, 2009 (Session 3), Tuesday 12 May 2009

Criminal Justice and Licensing (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

The Right Hon Lord Hamilton, Lord President and Lord Justice General,
The Right Hon Lord Gill, Lord Justice Clerk, and Carolyn Breeds, Deputy
Legal Secretary to the Lord President;
Sheriff Michael Fletcher and Sheriff Nigel Morrison QC, Sheriffs'
Association;
Johan Findlay, Chairman, and Robin White, Committee Member, Scottish
Justices Association;
The Right Hon Lord Cullen and Professor Jan McDonald, the Royal Society
of Edinburgh.

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee agreed to accept into evidence further written submissions received in response to the call for evidence.

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee considered the main themes arising from the evidence session.

15th Meeting, 2009 (Session 3), Tuesday 19 May 2009

Criminal Justice and Licensing (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

The Right Hon Henry McLeish, Chair, Scottish Prisons Commission;
Councillor Margaret Kennedy, Convener, and Anne Pinkman, Chief Officer,
Fife and Forth Valley Community Justice Authority;
Jim Hunter, Chief Officer, North Strathclyde Community Justice Authority;
Tony McNulty, Chief Officer, Lanarkshire Community Justice Authority;
Raymund McQuillan, Vice Convener, Criminal Justice Standing Committee,
and Yvonne Robson, Professional Development Manager, Association of
Directors of Social Work;
Contributors from the public gallery in an open session;
Professor Fergus McNeill, Professor of Criminology and Social Work,
University of Glasgow, John Scott, Chairman of the Howard League for
Penal Reform in Scotland, and Professor Alec Spencer, Honorary
Professor, University of Stirling, Scottish Consortium on Crime and
Criminal Justice.

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee agreed to accept into evidence a further written submission received in response to the call for evidence.

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee agreed to defer consideration of the main themes arising from the evidence session to its next meeting.

16th Meeting, 2009 (Session 3), Tuesday 26 May 2009

Criminal Justice and Licensing (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Chief Constable Stephen House, Strathclyde Police, and Chief Constable
David Strang, Lothian and Borders Police, Association of Chief Police
Officers in Scotland;
Gordon Meldrum, Director General, Scottish Crime and Drug Enforcement
Agency;
David McKenna, Chief Executive, Susan Gallagher, Director of
Development, and Jim Andrews, Director of Operations, Victim Support
Scotland;
Maire McCormack, Head of Policy, and Nico Juetten, Parliamentary Officer,
Scotland's Commissioner for Children and Young People;
Tom Roberts, Head of Public Affairs, CHILDREN 1st;
Dr Jonathan Sher, Director of Research, Policy and Programmes, Children
in Scotland.

The Committee agreed to take evidence from the Scottish Prison Service at a future meeting.

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee considered the main themes arising from the evidence session.

17th Meeting, 2009 (Session 3), Tuesday 2 June 2009

Criminal Justice and Licensing (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Alan McCreadie, Deputy Director Law Reform, and Bill McVicar, Convener of the Criminal Law Committee, Law Society of Scotland;
Ian Duguid QC, Chairman of the Criminal Bar Association, Faculty of Advocates;
Professor James Fraser, Director of the Centre for Forensic Science, University of Strathclyde;
Tom Nelson, Director of Forensic Services, Scottish Police Services Authority;
The Rt Hon Lord Coulsfield, author, Independent review of the law and practice of disclosure in criminal proceedings in Scotland;
Professor Neil Hutton, and Dr Cyrus Tata, Centre for Sentencing Research, University of Strathclyde;
James Chalmers, Senior Lecturer, School of Law, University of Edinburgh;
Dr Sarah Armstrong, Senior Research Fellow, Faculty of Law, Business and Social Sciences, University of Glasgow.

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee agreed not to accept into evidence a further written submission received after the deadline for responses to the call for evidence.

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee agreed to defer consideration of the main themes arising from the evidence session to a future meeting.

19th Meeting, 2009 (Session 3), Tuesday 9 June 2009

Criminal Justice and Licensing (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Mike Ewart, Chief Executive, and Rona Sweeney, Director of Prisons, Scottish Prison Service;
Councillor Harry McGuigan, Community Well-being and Safety Spokesperson, and Mike Callaghan, Policy Manager, COSLA;
The Rt Hon Elish Angiolini QC, Lord Advocate, and Frank Mulholland QC, Solicitor General;
John Logue, Head of Policy Division, Crown Office and Procurator Fiscal Service.

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee agreed to defer consideration of the main themes arising from the evidence session to a future meeting.

20th Meeting, 2009 (Session 3), Tuesday 16 June 2009

Decision on taking business in private: The Committee agreed that consideration of an issues paper and draft report on the Criminal Justice and Licensing (Scotland) Bill would be taken in private at future meetings.

Criminal Justice and Licensing (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Alan McCreddie, Deputy Director Law Reform, and John Loudon, Convener of the Licensing Law Sub-Committee, Law Society of Scotland;
Assistant Chief Constable Andrew Barker, Fife Constabulary, and Inspector Gordon Hunter, Lothian and Borders Police, Association of Chief Police Officers in Scotland;
Paul Waterson, Chief Executive, and Colin Wilkinson, Secretary, Scottish Licensed Trade Association;
Paul D. Smith, Executive Director, Noctis;
Paul Smith, Vice-Chairman, Scottish Late Night Operators Association;
Patrick Browne, Chief Executive, Scottish Beer and Pub Association;
Councillor Marjorie Thomas, Chair, City of Edinburgh Licensing Board;
Mairi Millar, Senior Solicitor and Assistant Clerk, City of Glasgow Licensing Board;
Frank Jensen, Legal Team Leader, Fife Council;
Sylvia Murray, Policy Manager, COSLA.

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee considered the main themes arising from the evidence session.

21st Meeting, 2009 (Session 3), Tuesday 23 June 2009

Criminal Justice and Licensing (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Kenny MacAskill MSP, Cabinet Secretary for Justice; George Burgess, Criminal Law and Licensing Division, Wilma Dickson, Community Justice Services Division, Rachel Rayner, Scottish Government Legal Directorate, Rachael Weir, Criminal Procedure Division, and Denise McKay, Scottish Government Legal Directorate, Scottish Government.

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee considered the main themes arising from the evidence sessions, in order to inform the drafting of its report. The Committee agreed to delegate to the Convener authority to issue any requests for follow-up information.

22nd Meeting, 2009 (Session 3), Tuesday 1 September 2009

Criminal Justice and Licensing (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Kenny MacAskill MSP, Cabinet Secretary for Justice, George Burgess, Criminal Law and Licensing Division, Tony Rednall, Criminal Law and Licensing Division, and Denise McKay, Scottish Government Legal Directorate, Scottish Government.

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee agreed not to accept into evidence further written submissions received after the deadline for responses to the call for evidence.

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee considered the main themes arising from the evidence session in order to inform the drafting of its Stage 1 report.

23rd Meeting, 2009 (Session 3), Tuesday 8 September 2009

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee considered a draft Stage 1 report and agreed to continue consideration at its next meeting.

24th Meeting, 2009 (Session 3), Tuesday 15 September 2009

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee further considered its draft Stage 1 report, and agreed to continue consideration at its next meeting.

25th Meeting, 2009 (Session 3), Tuesday 22 September 2009

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee further considered its draft Stage 1 report, and agreed to continue consideration at its next meeting. The Committee also agreed that the Convener would write to the Parliamentary Bureau seeking an extension to the previously agreed Stage 1 deadline.

26th Meeting, 2009 (Session 3), Tuesday 29 September 2009

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee further considered its draft Stage 1 report and agreed to continue consideration at its next meeting.

27th Meeting, 2009 (Session 3), Tuesday 6 October 2009

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee further considered its draft Stage 1 report and agreed to continue consideration at its next meeting.

28th Meeting, 2009 (Session 3), Tuesday 27 October 2009

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee further considered a draft Stage 1 report and agreed to continue consideration later in the meeting.

Criminal Justice and Licensing (Scotland) Bill: The Committee continued its consideration of a draft Stage 1 report. Various changes were agreed to, one by division. The Committee agreed to continue consideration at its next meeting.

Record of division in private: In relation to section 17 of the Bill, the Convener proposed inserting a new paragraph expressing the Committee's disagreement to a statutory presumption against short custodial sentences. The Committee divided: For 4 (Bill Aitken, Bill Butler, Cathie Craigie, Paul Martin); Against 4 (Robert Brown, Angela Constance, Nigel Don, Stewart Maxwell); Abstentions 0; amendment agreed to on Convener's casting vote.

29th Meeting, 2009 (Session 3), Tuesday 3 November 2009

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee further considered a draft Stage 1 report and agreed to continue consideration later in the meeting.

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee continued its consideration of a draft Stage 1 report and agreed to consider a final draft at its next meeting.

30th Meeting, 2009 (Session 3), Tuesday 10 November 2009

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee considered and agreed its Stage 1 report. In so doing, various changes were agreed to.

ANNEXE D: INDEX OF ORAL EVIDENCE

14th Meeting, 2009 (Session 3), Tuesday 12 May 2009

The Right Hon Lord Hamilton, Lord President and Lord Justice General, The Right Hon Lord Gill, Lord Justice Clerk, and Carolyn Breeds, Deputy Legal Secretary to the Lord President;
Sheriff Michael Fletcher and Sheriff Nigel Morrison QC, Sheriffs' Association;
Johan Findlay, Chairman, and Robin White, Committee Member, Scottish Justices Association;
The Right Hon Lord Cullen and Professor Jan McDonald, the Royal Society of Edinburgh.

15th Meeting, 2009 (Session 3), Tuesday 19 May 2009

The Right Hon Henry McLeish, Chair, Scottish Prisons Commission;
Councillor Margaret Kennedy, Convener, and Anne Pinkman, Chief Officer, Fife and Forth Valley Community Justice Authority;
Jim Hunter, Chief Officer, North Strathclyde Community Justice Authority;
Tony McNulty, Chief Officer, Lanarkshire Community Justice Authority;
Raymund McQuillan, Vice Convener, Criminal Justice Standing Committee, and Yvonne Robson, Professional Development Manager, Association of Directors of Social Work;
Contributors from the public gallery in an open session;
Professor Fergus McNeill, Professor of Criminology and Social Work, University of Glasgow, John Scott, Chairman of the Howard League for Penal Reform in Scotland, and Professor Alec Spencer, Honorary Professor, University of Stirling, Scottish Consortium on Crime and Criminal Justice.

16th Meeting, 2009 (Session 3), Tuesday 26 May 2009

Chief Constable Stephen House, Strathclyde Police, and Chief Constable David Strang, Lothian and Borders Police, Association of Chief Police Officers in Scotland;
Gordon Meldrum, Director General, Scottish Crime and Drug Enforcement Agency;
David McKenna, Chief Executive, Susan Gallagher, Director of Development, and Jim Andrews, Director of Operations, Victim Support Scotland;
Maire McCormack, Head of Policy, and Nico Juetten, Parliamentary Officer, Scotland's Commissioner for Children and Young People;
Tom Roberts, Head of Public Affairs, CHILDREN 1st;
Dr Jonathan Sher, Director of Research, Policy and Programmes, Children in Scotland.

17th Meeting, 2009 (Session 3), Tuesday 2 June 2009

Alan McCreadie, Deputy Director Law Reform, and Bill McVicar, Convener of the Criminal Law Committee, Law Society of Scotland;
Ian Duguid QC, Chairman of the Criminal Bar Association, Faculty of Advocates;

Professor James Fraser, Director of the Centre for Forensic Science, University of Strathclyde;
Tom Nelson, Director of Forensic Services, Scottish Police Services Authority;
The Rt Hon Lord Coulsfield, author, Independent review of the law and practice of disclosure in criminal proceedings in Scotland;
Professor Neil Hutton, and Dr Cyrus Tata, Centre for Sentencing Research, University of Strathclyde;
James Chalmers, Senior Lecturer, School of Law, University of Edinburgh;
Dr Sarah Armstrong, Senior Research Fellow, Faculty of Law, Business and Social Sciences, University of Glasgow.

19th Meeting, 2009 (Session 3), Tuesday 9 June 2009

Mike Ewart, Chief Executive, and Rona Sweeney, Director of Prisons, Scottish Prison Service;
Councillor Harry McGuigan, Community Well-being and Safety Spokesperson, and Mike Callaghan, Policy Manager, COSLA;
The Rt Hon Elish Angiolini QC, Lord Advocate, and Frank Mulholland QC, Solicitor General;
John Logue, Head of Policy Division, Crown Office and Procurator Fiscal Service.

20th Meeting, 2009 (Session 3), Tuesday 16 June 2009

Alan McCreadie, Deputy Director Law Reform, and John Loudon, Convener of the Licensing Law Sub-Committee, Law Society of Scotland;
Assistant Chief Constable Andrew Barker, Fife Constabulary, and Inspector Gordon Hunter, Lothian and Borders Police, Association of Chief Police Officers in Scotland;
Paul Waterson, Chief Executive, and Colin Wilkinson, Secretary, Scottish Licensed Trade Association;
Paul D. Smith, Executive Director, Noctis;
Paul Smith, Vice-Chairman, Scottish Late Night Operators Association;
Patrick Browne, Chief Executive, Scottish Beer and Pub Association;
Councillor Marjorie Thomas, Chair, City of Edinburgh Licensing Board;
Mairi Millar, Senior Solicitor and Assistant Clerk, City of Glasgow Licensing Board;
Frank Jensen, Legal Team Leader, Fife Council;
Sylvia Murray, Policy Manager, COSLA.

21st Meeting, 2009 (Session 3), Tuesday 23 June 2009

Kenny MacAskill MSP, Cabinet Secretary for Justice; George Burgess, Criminal Law and Licensing Division, Wilma Dickson, Community Justice Services Division, Rachel Rayner, Scottish Government Legal Directorate, Rachael Weir, Criminal Procedure Division, and Denise McKay, Scottish Government Legal Directorate, Scottish Government.

22nd Meeting, 2009 (Session 3), Tuesday 1 September 2009

Kenny MacAskill MSP, Cabinet Secretary for Justice, George Burgess, Criminal Law and Licensing Division, Tony Redhall, Criminal Law and Licensing Division,

and Denise McKay, Scottish Government Legal Directorate, Scottish Government.

Oral evidence is published separately on the Committee's webpage at:

<http://www.scottish.parliament.uk/s3/committees/justice/inquiries/criminaljusticeandlicensing/index.htm>

ANNEXE E: INDEX OF WRITTEN EVIDENCE

Evidence received in alphabetical order

[Aberdeenshire Council \(a\) \(19KB pdf\)](#)
[Aberdeenshire Council \(b\) \(28KB pdf\)](#)
[Action for Children Scotland \(38KB pdf\)](#)
[Association of Chief Police Officers in Scotland \(48KB pdf\)](#)
[Association of Directors of Social Work \(21KB pdf\)](#)
[Association of Scottish Neighbourhood Watches \(41KB pdf\)](#)
[Audit Scotland \(25KB pdf\)](#)
[Ayrshire Criminal Justice Social Work Partnership \(15KB pdf\)](#)
[Allan Balsillie \(34KB pdf\)](#)
[William Beck \(26KB pdf\)](#)
[Aileen Campbell MSP \(14KB pdf\)](#)
[CARE for Scotland \(35KB pdf\)](#)
[Central Scotland Rape Crisis and Sexual Abuse Centre \(13KB pdf\)](#)
[James Chalmers, Senior Lecturer in Law, University of Edinburgh \(20KB pdf\)](#)
[Children 1st \(48KB pdf\)](#)
[Children in Scotland \(15KB pdf\)](#)
[Church of Scotland \(13KB pdf\)](#)
[Clydebank Women's Aid Collective \(16KB pdf\)](#)
[Community Justice Authorities \(35KB pdf\)](#)
[Consenting Adults Action Network \(32KB pdf\)](#)
[Convention of Scottish Local Authorities \(26KB pdf\)](#)
[Lord Coulsfield \(17KB pdf\)](#)
[Crown Office and Procurator Fiscal Service \(19KB pdf\)](#)
[Margaret Curran MSP \(14KB pdf\)](#)
[Dumfries and Galloway Council \(a\) Social Work Services \(19KB pdf\)](#)
[Dumfries and Galloway Council \(b\) Court and Licensing Service \(44KB pdf\)](#)
[East Lothian Council \(15KB pdf\)](#)
[East Renfrewshire Community Health and Care Partnership \(14KB pdf\)](#)
[City of Edinburgh Council Regulatory Committee \(20KB pdf\)](#)
[City of Edinburgh Licensing Board \(15KB pdf\)](#)
[Engender \(25KB pdf\)](#)
[Equality and Human Rights Commission \(34KB pdf\)](#)
[Equality Network \(19KB pdf\)](#)
[Faculty of Advocates \(a\) \(20KB pdf\)](#)
[Faculty of Advocates \(b\) \(18KB pdf\)](#)
[Fife Council \(11KB pdf\)](#)
[Fife Licensing Board \(16KB pdf\)](#)
[GeneWatch UK \(25KB pdf\)](#)
[Glasgow City Council \(37KB pdf\)](#)
[Glasgow Community and Safety Services \(27KB pdf\)](#)
[City of Glasgow Licensing Board \(26KB pdf\)](#)
[Sir Gerald Gordon \(12KB pdf\)](#)
[Her Majesty's Revenue and Customs \(14 KB pdf\)](#)
[Human Genetics Commission \(22KB pdf\)](#)
[Professor Neil Hutton \(32KB pdf\)](#)
[Information Commissioners Office \(16KB pdf\)](#)

[Joint Faiths Advisory Board on Criminal Justice \(16KB pdf\)](#)
[Judges of the High Court of Justiciary \(84KB pdf\)](#)
[Law Society of Scotland \(a\) \(48KB pdf\)](#)
[Law Society of Scotland \(b\) \(29KB pdf\)](#)
[Professor Clare McGlynn and Dr Erika Rackley, Durham Law School, Durham University \(158KB pdf\)](#)
[Helen McGregor \(10KB pdf\)](#)
[Mental Welfare Commission for Scotland \(31KB pdf\)](#)
[Midlothian Council \(12KB pdf\)](#)
[John Muir \(14KB pdf\)](#)
[National Gender-based Violence Programme Team \(21KB pdf\)](#)
[NOCTIS \(42KB pdf\)](#)
[North Ayrshire Council \(24KB pdf\)](#)
[North Lanarkshire Council \(48KB pdf\)](#)
[Nuffield Council on Bioethics \(26KB pdf\)](#)
[Orkney Islands Council \(13KB pdf\)](#)
[Punch Taverns \(21KB pdf\)](#)
[Rape Crisis Scotland \(30KB pdf\)](#)
[Renfrewshire Council \(25KB pdf\)](#)
[Anna Ritchie \(12KB pdf\)](#)
[The Royal Society of Edinburgh \(49KB pdf\)](#)
[Sacro \(20KB pdf\)](#)
[SAMH \(31 KB pdf\)](#)
[Scotland's Commissioner for Children and Young People \(63KB pdf\)](#)
[Scottish Beer and Pub Association \(33KB pdf\)](#)
[Scottish Borders Council \(21KB pdf\)](#)
[Scottish Centre for Crime and Justice Research \(93KB pdf\)](#)
[Scottish Childrens Reporter Administration \(47KB pdf\)](#)
[Scottish Consortium on Crime and Criminal Justice \(43KB pdf\)](#)
[Scottish Council of Jewish Communities \(30KB pdf\)](#)
[Scottish Crime and Drug Enforcement Agency \(59KB pdf\)](#)
[Scottish Grocers Federation \(12KB pdf\)](#)
[Scottish Justices Association \(34KB pdf\)](#)
[Scottish Licensed Trade Association \(32KB pdf\)](#)
[Scottish Police Federation \(35KB pdf\)](#)
[Scottish Prison Service \(14KB pdf\)](#)
[Scottish Taxi Federation \(33KB pdf\)](#)
[Scottish Womens Aid \(57KB pdf\)](#)
[Sheriffs' Association \(133KB pdf\)](#)
[SM Dykes Manchester \(12KB pdf\)](#)
[Mike Smith \(11KB pdf\)](#)
[South Ayrshire Multi-Agency Partnership to tackle Violence Against Women & Children \(37KB pdf\)](#)
[South Lanarkshire Council \(37KB pdf\)](#)
[Cyrus Tata, Centre for Sentencing Research, Department of Law, Strathclyde University \(61KB pdf\)](#)
[Trafficking Awareness Raising Alliance \(38KB pdf\)](#)
[Turning Point Scotland \(25KB pdf\)](#)
[Victim Support Scotland \(26KB pdf\)](#)
[Violence Against Women Strategy Multi-Agency Working Group \(28KB pdf\)](#)

[Lesley Walker \(12KB pdf\)](#)
[West Lothian Council \(20KB pdf\)](#)
[The Wise Group \(51KB pdf\)](#)
[Women's Support Project \(36KB pdf\)](#)
[Zero Tolerance Charitable Trust \(29KB pdf\)](#)

Supplementary evidence received (in alphabetical order)

[Association of Chief Police Officers in Scotland \(48KB pdf\)](#)
[James Chalmers, Senior Lecturer in Law, University of Edinburgh \(18KB pdf\)](#)
[Crown Office and Procurator Fiscal Service \(27KB pdf\)](#)
[City of Glasgow Licensing Board \(16KB pdf\)](#)
[Law Society of Scotland \(19KB pdf\)](#)
[Lord President \(11KB pdf\)](#)
Scottish Government:
[Cabinet Secretary for Justice - 7 September 2009 \(75KB pdf\)](#)
[Cabinet Secretary for Justice - 22 September 2009 \(40KB pdf\)](#)
[Officials - 14 September 2009 \(12KB pdf\)](#)
[Officials - 29 September 2009 \(14KB pdf\)](#)
[Victim Support Scotland \(31KB pdf\)](#)

Written submissions are published separately (in the order received) on the Committee's webpage at:

<http://www.scottish.parliament.uk/s3/committees/justice/inquiries/criminaljusticeandlicensing/index.htm>

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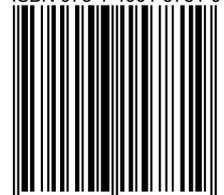
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