

The logo for SPICe (The Information Centre) is located in the top left corner. It consists of the word "SPICe" in a large, white, sans-serif font, with "The Information Centre" in a smaller, white, sans-serif font directly below it. The background of the logo is a dark purple rounded rectangle with a decorative pattern of white and light purple lines and arrows pointing towards the right.

SPICe

The Information Centre

SPICe Briefing

Criminal Justice and Licensing (Scotland) Bill: Stage 3

4 June 2010

10/35

Frazer McCallum

Stage 3 proceedings on the Criminal Justice and Licensing (Scotland) Bill are expected to take place towards the end of this month.

This briefing considers some key recommendations made by the Justice Committee in its Stage 1 Report, the Scottish Government's response to those recommendations and a number of key stage 2 amendments.



The Scottish Parliament
Pàrlamaid na h-Alba

CONTENTS

EXECUTIVE SUMMARY	3
INTRODUCTION	5
SENTENCING	6
PURPOSES AND PRINCIPLES OF SENTENCING	6
SCOTTISH SENTENCING COUNCIL	7
COMMUNITY PAYBACK ORDERS	8
SHORT CUSTODIAL SENTENCES	9
EFFECT OF INTOXICATION ON SENTENCING	9
SENTENCING FOR CARRYING KNIVES	10
SERIOUS ORGANISED CRIME	12
DEFINITIONS OF SERIOUS ORGANISED CRIME AND SERIOUS OFFENCE	12
FAILURE TO REPORT SERIOUS ORGANISED CRIME	13
POSSESSION OF KNIVES, ETC – PUBLIC PLACES	14
STALKING AND BREACH OF THE PEACE	15
BACKGROUND	15
STALKING	15
BREACH OF THE PEACE	16
PROSTITUTION	18
BACKGROUND	18
PENALTIES FOR LIVING ON THE EARNINGS OF PROSTITUTION	19
PROPOSED NEW OFFENCES	20
DOUBLE JEOPARDY	22
AGE OF CRIMINAL RESPONSIBILITY	23
BACKGROUND	23
PROPOSALS FOR CHANGE	23
DISCLOSURE OF INFORMATION ON OFFENDING BEHAVIOUR	25
REPRESENTATIONS OF VICTIMS AT PAROLE BOARD HEARINGS	26
FINGERPRINT AND DNA DATA	27
UNSUCCESSFUL PROSECUTIONS	27
ALTERNATIVES TO PROSECUTION	29
CHILDREN’S HEARINGS SYSTEM	30
DISCLOSURE OF EVIDENCE	31
BACKGROUND	31
LEVEL OF DETAIL IN THE BILL	32
DEFENCE STATEMENTS	33
LICENSING	34
METAL DEALERS	34
MARKET OPERATORS	35
LAP DANCING AND OTHER ADULT ENTERTAINMENT	35
ALCOHOL	37
SOURCES	37
RELATED BRIEFINGS	40

EXECUTIVE SUMMARY

The Criminal Justice and Licensing (Scotland) Bill (as introduced by the Scottish Government on 5 March 2009) contained provisions relating to a wide range of distinct policy proposals, including ones dealing with sentencing, criminal offences, criminal procedure, disclosure of evidence, licensing under the Civic Government (Scotland) Act 1982 and alcohol licensing.

The Parliament's Justice Committee was designated as lead committee for parliamentary consideration of the Bill, which completed stage 1 with a plenary debate on 26 November 2009. A number of stage 2 amendments sought to add provisions to the Bill dealing with topics which were not addressed in the Bill as introduced (e.g. prostitution, stalking, sentencing for people convicted of carrying knives and lap dancing). In light of this, the Justice Committee sought further evidence as part of its stage 2 consideration of the Bill.

Stage 2 was completed on 11 May 2010. Stage 3 proceedings are expected to take place towards the end of June 2010.

Key areas of debate during scrutiny of the Bill at stages 1 and 2 included:

- proposals for a sentencing council – the Bill as introduced sought to create a Scottish Sentencing Council tasked with preparing sentencing guidelines for the criminal courts. Amendments agreed during stage 2 altered the proposed composition of the Council and provided that any guidelines will only take effect following endorsement by the High Court
- use of short custodial sentences – the Bill as introduced included provisions seeking to discourage the use of short custodial sentences (defined as those of six months or less). The Justice Committee was divided on the extent to which the use of such sentences is appropriate. A stage 2 amendment, seeking to delete the relevant provisions of the Bill, was agreed by majority (with the convener using his casting vote)
- sentencing for carrying knives – a stage 2 amendment, agreed by a majority of the Justice Committee (with the convener using his casting vote), added a new provision to the Bill seeking to establish a custodial sentence of at least six months as the norm for any adult convicted of carrying a knife in a public place
- serious organised crime – the Bill as introduced sought to create various new offences relating to serious organised crime. The Justice Committee's stage 1 report expressed support for the underlying intention of the provisions but raised concerns about some of the specifics (e.g. the scope of an offence dealing with the failure to report serious organised crime). The Scottish Government sought to provide reassurance and indicated that certain matters would be considered further prior to the stage 3 debate
- stalking and breach of the peace – stage 2 amendments sought to create a specific offence of stalking and a wider offence of threatening, alarming or distressing behaviour. It was intended that the second offence (proposed by the Scottish Government) could be used to prosecute both stalking and other activities which might be difficult to successfully prosecute as a result of recent court decisions clarifying the scope of the existing common law offence of breach of the peace. The amendment creating the specific stalking offence

was agreed, with the Government indicating that it would work with the relevant MSP to ensure that the final version of the offence is robust and workable. Following debate, the Government decided not to move its amendment (setting out the wider offence) but noted that it would bring forward an alternative amendment at stage 3

- prostitution – a number of stage 2 amendments proposed new offences relating to prostitution and paid-for sexual activities. Following the consideration of additional evidence sought during stage 2, some members of the Justice Committee highlighted the need for more detailed consideration of the issues before seeking to legislate. Although some of the proposals found support amongst members of the committee, relevant amendments were either rejected or not moved
- age of criminal responsibility – the Bill as introduced sought to amend current legal provisions so as to prevent any child under the age of 12 being prosecuted in the criminal courts. It did not seek to alter the legal presumption that no child under the age of eight years can be guilty of any offence. The result of this would be that a child aged between eight and 12 could still be held to have the mental capacity to commit a crime but could, where some form of compulsory intervention is considered necessary, only be dealt with through the children’s hearings system. Some members of the Justice Committee were attracted to the possibility of going further and increasing to 12 the age below which a child is deemed to lack the mental capacity to commit a crime. One member lodged a stage 2 amendment to achieve this result. However, the amendment was rejected by the committee (with the relevant provision of the Bill being agreed without amendment)
- retention of fingerprint and DNA data – the Bill as introduced included provisions to extend existing police powers in relation to the retention of such data where there has been an unsuccessful prosecution, or where a child is dealt with through the children’s hearings system in relation to certain sexual and violent offences. Various stage 2 amendments lodged by members of the Justice Committee, seeking to alter these provisions, were rejected by the committee. However, amendments lodged by another committee member, seeking to extend retention powers where an alleged offender accepts certain alternatives to prosecution (e.g. a fiscal fine), were agreed
- disclosure of evidence in criminal cases – the Bill as introduced set out a statutory framework for the disclosure of evidence, by the prosecution to the accused, in criminal cases. The Justice Committee’s stage 1 report indicated that it supported the general policy of clarifying the rules on disclosure but raised some concerns (e.g. in relation to the complex nature of the provisions). The Scottish Government sought to reassure the committee in relation to the detail of the provisions and noted that a scheme for disclosure in other parts of the UK has statutory provisions of a similar length to those proposed in the Bill
- licensing of lap dancing and other adult entertainment venues – a stage 2 amendment sought to add new provisions to the Bill giving local authorities the power to apply a specific licensing regime to lap dancing and other adult entertainment venues. It would expressly allow a local authority to provide that no licences should be granted for venues in a particular locality. In response to the amendment, the Scottish Government offered to work with the relevant MSP to produce an alternative stage 3 amendment. On this basis, the stage 2 amendment was withdrawn

INTRODUCTION

The Scottish Government introduced the [Criminal Justice and Licensing \(Scotland\) Bill](#) in the Parliament in March 2009. It contained provisions relating to a wide range of distinct policy proposals, including ones on:

- sentencing (e.g. the creation of a Scottish Sentencing Council, the introduction of community payback orders and a presumption against short custodial sentences)
- criminal offences (e.g. relating to serious organised crime and extreme pornography)
- criminal procedure (e.g. preventing the prosecution of children under the age of 12 in the criminal courts and extending existing police powers in relation to the retention of fingerprint and DNA data)
- disclosure of evidence (establishing a statutory framework for the disclosure of evidence, by the prosecution to the accused, in criminal cases)
- licensing under the Civic Government (Scotland) Act 1982 (e.g. licensing of taxis and private hire cars)
- alcohol licensing (e.g. amendments intended to improve the operation of the Licensing (Scotland) Act 2005)

The Parliament's Justice Committee was designated as lead committee for parliamentary consideration of the Bill. Its [Stage 1 Report](#) was published in November 2009. The Bill completed stage 1 (consideration of general principles) with the [stage 1 debate](#) on 26 November 2009. The Scottish Government provided a [written response to the Stage 1 Report](#) in January 2010.

Stage 2 (detailed consideration of the Bill) was carried out by the Justice Committee. A number of stage 2 amendments sought to add provisions to the Bill dealing with topics which were not addressed in the Bill as introduced. In light of this, the Justice Committee sought further written evidence (relevant [stage 2 written submissions](#) are published on its website)¹ and held an [additional oral evidence session](#) (on 23 March 2010)² to obtain information on:

- proposed new offences relating to prostitution
- proposed new offences relating to stalking and other threatening, alarming or distressing behaviour
- the possibility of introducing mandatory custodial sentences for people convicted of carrying knives
- a proposal to allow local authorities to apply a specific licensing regime to adult entertainment venues³

Stage 2 was completed on 11 May 2010 and was followed by publication of the [Bill \(as amended at stage 2\)](#). Stage 3 (final consideration) is expected to take place towards the end of this month.

Other SPICe briefings, providing information on the Bill as introduced, are also available on the Parliament's website:

¹ See Scottish Parliament Justice Committee 2010a.

² See Scottish Parliament Justice Committee 2010b.

³ The oral evidence session on 23 March 2010 did not deal with this topic.

- [Criminal Justice and Licensing \(Scotland\) Bill: Fingerprint and DNA Data](#)
- [Criminal Justice and Licensing \(Scotland\) Bill: Short Custodial Sentences](#)
- [Criminal Justice and Licensing \(Scotland\) Bill: Community Penalties in Scotland](#)
- [Criminal Justice and Licensing \(Scotland\) Bill: Scottish Sentencing Council](#)
- [Criminal Justice and Licensing \(Scotland\) Bill: Disclosure of Evidence](#)

Key dates in the Parliament's consideration of the Bill are set out in the following table.

Table 1: Summary of Parliamentary Consideration

Bill introduced	5 March 2009
Stage 1: Justice Committee evidence sessions	12, 19 and 26 May; 2, 9, 16 and 23 June; 1 September 2009
Stage 1: Finance Committee	10 March, 21 April and 19 May 2009
Stage 1: Subordinate Legislation Committee	5 and 26 May 2009
Stage 1: Justice Committee report published	12 November 2009
Stage 1: Plenary Debate	26 November 2009
Stage 2: Justice Committee (including additional evidence session)	2, 16 and 23 March; 13, 20, and 27 April; 4 and 11 May 2010

The rest of this briefing looks at some of the main issues raised during both stage 1 and stage 2 consideration of the Bill. It does not seek to outline all of the issues debated or changes made.

SENTENCING

Purposes and Principles of Sentencing

Sections 1 and 2 of the Bill as introduced set out provisions on the purposes and principles of sentencing. The policy memorandum published along with the Bill stated that they were:

“intended to ensure that the public has a much clearer understanding of what sentencing is actually for and is clear on the key factors that every sentencer must have regard to when making decisions in individual cases”. (para 9)

However, the Justice Committee's Stage 1 Report (2009) questioned the benefit of the provisions:

“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 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

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.” (paras 34–35)

In its written response to the Stage 1 Report the Scottish Government (2010a) said that:

“Public perception of justice and the sentencing process remains poor and if we are to improve confidence in the criminal justice system and promote consistency and transparency, we consider it necessary to set out clearly in statute the function and rationale of sentencing.” (p 3)

Relevant stage 2 amendments included two lodged by Robert Brown MSP to remove both sections. He stated, in arguing for his amendments, that:

“The committee was prepared to consider some leeway on the issue because stating what sentencing is for is viewed as a preliminary to the creation of the proposed sentencing council. However, after reflection, I have come to the view that that is not a valid proposition, and that the sentencing council can stand on its own without sections 1 and 2”. (Scottish Parliament Justice Committee 2010c, col 2689)

Following debate, the Justice Committee (by majority) agreed both amendments, thus removing sections 1 and 2 from the Bill.

Scottish Sentencing Council

Sections 3 to 13 and schedule 1 of the Bill as introduced sought to create a Scottish Sentencing Council, comprising both judicial and non-judicial members, which would prepare and publish sentencing guidelines for the criminal courts. A court, in sentencing an offender, would be required to have regard to any relevant sentencing guidelines. The policy memorandum published along with the Bill stated that the provisions were intended to:

“help ensure greater consistency, fairness and transparency in sentencing and thereby increase public confidence in the integrity of the Scottish criminal justice system”. (para 12)

The Justice Committee’s Stage 1 Report (2009) noted that committee members “recognise that there could be merit in a Sentencing Council” (para 107). However, it went on to say that a majority of members would like to see changes to the provisions on guidelines produced by the Sentencing Council, so that they would take effect only after formal endorsement by the High Court. The Stage 1 Report also raised a number of issues in relation to the proposed membership of the Sentencing Council and noted that concerns had been raised as to whether the costs involved were justified.

During stage 2, the Justice Committee agreed Government amendments providing that any sentencing guidelines will only take effect after endorsement by the High Court. The Justice Secretary noted that:

“During stage 1 it became clear that there were substantial concerns about the influence of sentencing guidelines on judicial discretion and how the Scottish sentencing council would function alongside the High Court. In light of that, and in line with the committee’s recommendations, we have re-examined the status of the sentencing council and lodged amendments that will recast it as an advisory body that will prepare sentencing guidelines for endorsement by the High Court.” (Scottish Parliament Justice Committee 2010c, col 2705)

Other stage 2 amendments in this area included some seeking to alter the proposed membership of the Sentencing Council. The Justice Committee agreed a number of such amendments (lodged by the Government and Bill Butler MSP), including ones effectively changing the balance of judicial members (e.g. High Courts judges, sheriffs and justices of the peace) to non-judicial members (both legal and lay) from 5:7 to 6:6. During the debate on the amendments, the Justice Secretary had argued that:

“It is essential to have balanced representation on the council if it is to improve public confidence in our system. For that reason, we cannot support amendments that seek to create a judicial majority on the council, particularly given our amendments that make the council an advisory body.” (Scottish Parliament Justice Committee 2010c, col 2710)

Although the amendments agreed at stage 2 did not go as far as creating a judicial majority on the Sentencing Council, which some members of the Justice Committee had wanted, amendments agreed by majority did go further than the Government had argued for in shifting the balance towards judicial members.

Community Payback Orders

Section 14 of the Bill as introduced sought to create a new community sentence. The new disposal, referred to as a community payback order (CPO), would replace a range of existing community sentences – probation, community service and supervised attendance orders. It would also reproduce elements of community reparation orders (previously piloted in a number of areas). It was intended that CPOs would allow the courts to impose a range of existing community sentence options in a package tailored for the particular offender. The disposal could include a requirement to carry out unpaid work (up to 300 hours) as well as other requirements aimed at addressing problematic areas of an offender’s life.

The Justice Committee’s Stage 1 Report (2009) noted that:

“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.

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.” (paras 158-159)

The Scottish Government’s (2010a) written response to the Stage 1 Report said that:

“We share the Committee’s conclusion that the new sentence must be adequately resourced. That is why along with our partners, we will be monitoring the level of take-up of the CPO closely. As for the additional funding, we have set out our budget for 2010/11: we have announced extra resources and have said it will be baselined thereafter.” (p 8)

Amendments agreed at stage 2 included a number of Government amendments expanding the range of requirements which a court will be able to impose as part of a CPO, to include:

- a compensation requirement – an obligation to pay compensation
- a conduct requirement – an obligation to do or refrain from doing specified things (e.g. not to go to certain places at certain times)

Short Custodial Sentences

Section 17 of the Bill as introduced sought to discourage the use of short custodial sentences – defined in the Bill as those of six months or less – in cases where other appropriate sentencing options are available. The Scottish Government intended that such a provision should encourage a move away from the use of short periods of imprisonment to greater use of community sentences. The policy memorandum published along with the Bill said that:

“We want to make it clear that sentencers should not impose a custodial sentence of 6 months or less, unless the particular circumstances of the case lead them to believe that no other option would be appropriate.” (para 69)

The Justice Committee’s Stage 1 Report (2009) indicated that:

“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.” (para 193)

It went on to note:

“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.” (para 195)

Both Robert Brown MSP and Richard Baker MSP lodged stage 2 amendments. Robert Brown made it clear that he supported the policy intention underlying section 17 of the Bill, but sought to change the presumption to one against custodial sentences of less than three months. This was, in part, intended to reduce any risk that the criminal justice system would not be able to cope with a larger increase in community sentences.

The amendment lodged by Richard Baker sought to delete section 17 of the Bill. He noted his confidence that “our judiciary already seeks to use imprisonment as a last resort” and described section 17 as an “ill-judged proposal” (Scottish Parliament Justice Committee 2010d, col 2852).

Following debate, Richard Baker’s amendment deleting section 17 of the Bill as introduced was agreed by majority (with the convener using his casting vote). Robert Brown’s amendment was rejected.

Effect of Intoxication on Sentencing

In relation to section 24 of the Bill as introduced, the policy memorandum published along with the Bill noted that it would:

“enshrine in statute that the commission of an offence while voluntarily under the influence of alcohol should not be considered as a mitigating factor by the courts when sentencing an offender”. (para 104)

The Justice Committee’s Stage 1 Report (2009) stated that:

“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.” (para 224)

Following debate, a stage 2 amendment lodged by Robert Brown MSP seeking to remove section 24 was agreed by a majority of the Justice Committee.

Sentencing for Carrying Knives

Section 49 of the Criminal Law (Consolidation) (Scotland) Act 1995 prohibits the carrying of knives (and other articles which have a blade or are sharply pointed) in public places without good reason or lawful authority.⁴ The maximum sentence which may be imposed for carrying such items was increased by the Police, Public Order and Criminal Justice (Scotland) Act 2006:⁵

- where a person is convicted under summary procedure the maximum custodial sentence was increased from six months to 12 months
- where a person is convicted under solemn procedure the maximum custodial sentence was increased from two years to four years

However, there is no requirement that a custodial sentence (or any other minimum sentence) is imposed by a court where a person is convicted under the above provisions.

A stage 2 amendment lodged by Richard Baker MSP aimed to establish a custodial sentence of at least six months as the norm for any adult convicted under the above provisions. An alternative amendment, lodged by Bill Aitken MSP, proposed a sentence of at least two years as the norm. As noted above, this was one of the new issues in relation to which the Justice Committee sought further evidence during stage 2.

The Scottish Government (2010b) statistical bulletin [Criminal Proceedings in Scottish Courts, 2008-09](#) indicates that 3,529 people were convicted of handling an offensive weapon (where this was the main offence) during 2008/09.⁶ In relation to those 3,529 people:

- 93% were male and 7% were female
- 33% were aged under 21, 37% were aged 21 to 30 and 30% were aged over 30
- 13% were convicted in the sheriff solemn courts and 86% in the sheriff summary courts
- 30% received a custodial sentence,⁷ 35% received a community sentence (mostly probation and community service orders), 24% were fined and 11% received some other form of sentence (mostly admonished)

In relation to the 30% who received a custodial sentence:

- 22% received a sentence of up to three months
- 37% received a sentence between three months and six months

⁴ The prohibition on carrying knives does not apply to folding pocket knives where the cutting edge of the blade does not exceed three inches/7.62 centimetres.

⁵ The relevant provisions of the Police, Public Order and Criminal Justice (S) Act 2006 came into force on 1 September 2006.

⁶ For the purposes of the statistical bulletin, the category of “handling an offensive weapon” covers offences relating to the carrying of knives in public places, as well as other offences placing restrictions on knives and offensive weapons.

⁷ A custodial sentence was imposed in relation to 82% of offenders convicted in the sheriff solemn courts and 22% of offenders convicted in the sheriff summary courts.

- 41% received a sentence of more than six months

Figures set out in the above statistical bulletin point to some increase in recent years in the likelihood of the courts imposing a custodial sentence for handling an offensive weapon:

Table 2: Percentage of persons with a charge proved receiving a custodial sentence – handling an offensive weapon

Year	1999/00	2000/01	2001/02	2002/03	2003/04
Percentage	25%	27%	24%	26%	22%
Year	2004/05	2005/06	2006/07	2007/08	2008/09
Percentage	22%	26%	30%	29%	30%

Source: Criminal Proceedings in Scottish Courts, 2008-09 (table 9)

Recent figures also disclose a substantial recent increase in the average length of custodial sentences imposed for handling an offensive weapon:

Table 3: Average length of custodial sentence – handling an offensive weapon

Year	1999/00	2000/01	2001/02	2002/03	2003/04
Days	107	120	119	112	116
Year	2004/05	2005/06	2006/07	2007/08	2008/09
Days	111	118	161	218	263

Source: Criminal Proceedings in Scottish Courts, 2008-09 (table 10c)

During the committee meeting considering the amendments, Richard Baker stated that:

“Given the persistently high levels of knife crime, we believe that the sentencing regime for knife carrying must change. That is why I propose a mandatory minimum custodial sentence of six months for knife carrying, except in exceptional circumstances.”

“We believe that the crucial thing is to introduce the principle of a minimum custodial sentence so that those who are convicted of carrying knives can expect to go to jail.” (Scottish Parliament Justice Committee 2010d, cols 2868 and 2870)

Bill Aitken noted that views were divided on whether the approach provided for in the amendments was appropriate, but argued that:

“a sentence of two years would act as a sufficient deterrent and would lead to a dramatic reduction in knife carrying and consequently to a dramatic reduction in homicides and assaults to severe injury. That is what we should be seeking to achieve.” (Scottish Parliament Justice Committee 2010d, col 2871)

Committee members arguing against the amendments included Robert Brown MSP:

“It is through effective policing that the deterrent effect is brought to bear, rather than through sentences (...). The proposal for a so-called mandatory prison sentence for carrying a knife is a distraction from the real issue.

It is often the case that a person who is found in possession of a knife will face a prison sentence. People who carry knives should know that they face the real potential of such a sentence. However, we know that many offenders are men of full age, and a man of 25 or 30 who might have previous convictions for violence and undoubtedly knows the score is in a manifestly different position from an immature youth of 16 (...) who is caught up on the margins of a gang and thinks that carrying a knife makes him a hard man. Sheriffs know the difference and sentence accordingly.” (Scottish Parliament Justice Committee 2010d, col 2872)

And also Stewart Maxwell MSP:

“Effective policing, early intervention and the fear of getting caught stop people carrying out the offences that we all condemn; the fear of receiving one prison sentence as opposed to another prison sentence has no effect whatsoever, as it is not in the minds of any of the people, young or old, who walk out of their house carrying a knife. The amendments will do nothing apart from cause money to be spent that could better be spent on ensuring that the justice system tackles the problem properly.” (Scottish Parliament Justice Committee 2010d, col 2874)

Following debate, Richard Baker’s amendment was agreed by a majority of the Justice Committee (with the convener using his casting vote). Thus, the Bill as amended at stage 2 (section 24B) provides that a custodial sentence of at least six months should, where the offender was aged 16 or over at the time of the offence, be imposed “unless the court is of the opinion that there are exceptional circumstances relating to the offence or the offender which justify not doing so”.

The wording quoted in the previous paragraph is almost identical to that used in subsection (2) of section 51A of the Firearms Act 1968. That section provides for minimum custodial sentences in relation to certain firearms offences and was added to the 1968 Act by the Criminal Justice Act 2003.

SERIOUS ORGANISED CRIME

Sections 25 to 28 of the Bill as introduced sought to create offences relating to involvement in, direction of and failure to report serious organised crime. They also provided that other offences may be aggravated by connection with serious organised crime. The policy memorandum published along with the Bill stated that:

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

The Justice Committee’s Stage 1 Report (2009) indicated that committee members strongly supported “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” but were “less certain (...) that the Bill gets the detail right” (para 272).

Definitions of Serious Organised Crime and Serious Offence

The Stage 1 Report (2009) stated that members of the Justice Committee had:

“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 (...). 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.” (para 274)

It also noted 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.” (para 237)

A stage 2 amendment lodged by Robert Brown MSP sought to narrow the potential scope of the offences by providing that serious organised crime must involve crime that “would reasonably be regarded as being both serious and organised”. However, the Government resisted the proposed change, with the Justice Secretary arguing that activities that “are apparently minor or trivial in themselves often form part of a more insidious picture” (Scottish Parliament Justice Committee 2010d, col 2883). He went on to say that:

“We accept that there is a valid concern that the provisions should not be used to punish offending that is genuinely minor and which is not, relatively speaking, organised. However, the best way in which to deal with that concern while retaining the flexibility that is required to tackle the diversity and innovation that are inherent in serious organised crime is to rely on the discretion of the police and the prosecution authorities to report and prosecute such offending appropriately.” (col 2883)

Following debate, Robert Brown did not move his amendment.

Failure to Report Serious Organised Crime

The Justice Committee’s Stage 1 Report (2009) indicated that:

“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.

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 ‘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.” (paras 275-276)

Stage 2 amendments lodged by Robert Brown MSP and Bill Aitken MSP sought to focus the proposed offence on what might be considered more culpable individuals, thus addressing some of the concerns highlighted above. During the debate on those amendments, the Minister for Community Safety told members that:

“we recognise the committee’s concerns and we wish to make it clear that we are not intending to capture people who have innocently had their suspicions raised and have not made any personal benefit from choosing not to report such activity. (...)

Furthermore, the Solicitor General for Scotland has made it clear that prosecutorial guidance will be issued to ensure that the offence is targeted at and used proportionately against those in a position of authority or who have used their expertise in relation to the

supply of goods and services and who have benefited from their connection with serious organised crime. An additional safeguard is that any such prosecution under this offence will proceed only with Crown counsel's consent. I hope that those safeguards, which have been carefully conceived and set out, provide the committee with some assurance." (Scottish Parliament Justice Committee 2010e, col 2904)

The Scottish Government's assurances did not wholly convince some members of the Justice Committee. For example, Robert Brown argued that:

"The defence, if you like, that the Government will arrange for prosecutorial guidance from the Crown Office and that prosecution will be undertaken only with the permission and agreement of Crown counsel admits that a problem exists, because such matters should not be the subject of prosecutorial guidance – we should get the legislation right." (Scottish Parliament Justice Committee 2010e, cols 2905-2906)

However, in light of the above assurances and an indication that the Government would consider the matter further prior to the stage 3 debate, neither Robert Brown nor Bill Aitken pressed their amendments.

POSSESSION OF KNIVES, ETC – PUBLIC PLACES

As noted above, an amendment lodged by Richard Baker MSP, seeking to establish a custodial sentence of at least six months as the norm for any adult convicted of carrying a knife in a public place, was agreed during stage 2 (by a majority of the Justice Committee). Other stage 2 amendments relating to both that offence, and a similar offence relating to the carrying of offensive weapons,⁸ sought (amongst other things) to amend the scope of those offences by expanding the definition of a "public place".

In outlining the purpose and effect of a Government amendment, the Minister for Community Safety told committee members that:

"Amendment 109 will correct a problem that exists in the provisions of the Criminal Law (Consolidation) (Scotland) Act 1995 that deal with the possession of knives and offensive weapons in public places. We have become aware of cases in which people have escaped prosecution for carrying weapons in the common parts of shared dwellings, such as the stair of a tenement block, because the courts have not found the location to be a 'public place'. (...)

Amendment 109 deals with these problems by defining a public place as any place other than domestic premises, school premises or prisons.⁹ The common areas of communal buildings are expressly included in the definition of a public place. Effectively, this turns the existing definition on its head – instead of saying what is a public place, it provides that everywhere is a public place, subject to a number of limited exceptions." (Scottish Parliament Justice Committee 2010e, cols 2908-2909)

The Government amendment was agreed by the Justice Committee. An amendment lodged by Johann Lamont MSP, focussing on the possession of knives and offensive weapons on workplace premises, was not moved. This followed assurances from the Minister for Community Safety that the Government amendment would effectively encompass the changes which she was seeking through her amendment.

⁸ See sections 47 and 49 of the Criminal Law (Consolidation) (Scotland) Act 1995.

⁹ Separate offences already deal with school premises and prisons – see sections 49A and 49C of the Criminal Law (Consolidation) (Scotland) Act 1995.

STALKING AND BREACH OF THE PEACE

Background

This was one of the new issues in relation to which the Justice Committee sought further evidence (both written and oral) during stage 2.

A stage 2 amendment lodged by Rhoda Grant MSP sought to create a specific offence of stalking. A Scottish Government amendment sought to create a wider offence of threatening, alarming or distressing behaviour. The Government amendment was intended to create an offence which could be used to prosecute both stalking and other activities which might be difficult to successfully prosecute as a result of recent court decisions clarifying the scope of the existing common law offence of breach of the peace.

Although it is not the only offence which might be relevant, breach of the peace has been one of the main offences which could be used to prosecute some of the threatening behaviour involved in activities such as stalking and domestic abuse. However, the Government felt that cases emphasising a “public element” within the definition of that offence could limit its application in such areas:

“The proposed offence will cover a wide range of behaviours constituting stalking, including the sending of threatening or harassing emails, text messages or phone calls, or persistent following, pursuing or spying upon a person. The offence is not however limited in scope to stalking related activity and will ensure that prosecutors can take action in other areas, such as incidents of domestic abuse that take place in isolated locations or where a public element is not present.” (Scottish Government 2010c)

A number of witnesses have suggested that both offences are needed. For example, during the additional committee evidence session on 23 March 2010, Assistant Chief Constable Livingstone said that:

“We think that we need a specific offence. People understand what it says, and it criminalises insidious, threatening behaviour. We strongly support the proposal for a specific offence of stalking. You also asked about the requirement for a more general offence of threatening behaviour. A statutory breach of the peace would be valuable in giving wider coverage, as some recent case law has narrowed the common-law definition.

Therefore, the ACPOS¹⁰ position is that we strongly support having both a specific stalking offence and a statutory breach of the peace, with reference to the other amendment.” (Scottish Parliament Justice Committee 2010b, col 2805)

Following debate on the two amendments, the Justice Committee agreed Rhoda Grant’s amendment – see section 31B of the Bill as amended at stage 2. The Government took the decision not to move its amendment at this stage.

The amendments lodged by Rhoda Grant and the Government are further considered below (under the headings of stalking and breach of the peace respectively).

Stalking

In support of her successful amendment seeking to create a specific offence of stalking, Rhoda Grant noted that:

¹⁰ The Association of Chief Police Officers in Scotland.

“The term ‘stalking’ is used generally to describe repeated and unwelcome conduct that a person finds alarming or threatening. Due to the wide range of such behaviour, it is difficult to define stalking. Some of the behaviour may be perfectly innocent, such as making a telephone call or standing in the street, but becomes threatening and alarming due to the context of the relationship between the stalker and the victim. Therefore, stalking is a context-dependent crime the unacceptability of which depends on the context in which it occurs. Previously, such crimes were prosecuted as breaches of the peace. However, following the ruling in the case of *Harris v HM Advocate* in 2009, that approach may no longer be possible. That ruling said that there must be some public element to the behaviour if it is to constitute a breach of the peace.” (Scottish Parliament Justice Committee 2010d, col 2834)

She went on to argue that, even where breach of the peace could be used, it is not an appropriate mechanism for dealing with stalking:

“Action Scotland Against Stalking has made it clear that the approach that was taken in the Protection from Harassment Act 1997 in England and Wales, which does not name the crime of stalking, has kept stalking hidden in the same way as breach of the peace has done in Scotland. (...) By calling that behaviour stalking, we recognise it and mark it as unacceptable.” (Scottish Parliament Justice Committee 2010d, col 2835)

At a subsequent meeting of the Justice Committee, the Minister for Community Safety said:

“Following extensive discussion at last week’s meeting, there was agreement to consider further the various amendments relating to the proposed new stalking offence that Rhoda Grant lodged, and our offence of threatening, alarming or distressing behaviour. The committee earlier agreed to Rhoda Grant’s amendment 402, and we will now work with Rhoda Grant and the committee with a view to preparing further amendments that will ensure that the final version of the stalking offence is robust and workable.” (Scottish Parliament Justice Committee 2010e, col 2943)

Breach of the Peace

A number of recent court decisions have sought to clarify the scope of the common law offence of breach of the peace. In particular, important guidance is provided by the case of [Harris v HM Advocate](#) (2009), which was considered by a bench of five appeal court judges. It confirmed that a breach of the peace is committed only where both parts of the following test are satisfied:

- there must be conduct which is severe enough to cause alarm to ordinary people (further described as conduct which does present as genuinely alarming and disturbing, in its context, to any reasonable person); and
- that conduct must threaten serious disturbance to the community (further described as conduct which creates a reasonable apprehension of disturbance to the public peace)

In relation to the second part of the test, the court indicated that it requires that the conduct complained of has “at least a public element” (para 22). In rejecting the proposition that, for example, an utterance made privately to another individual which was, objectively speaking, disturbing or alarming would be sufficient to constitute a breach of the peace, the court said that this:

“would, if sound, mean that the making of a statement privately, say by a journalist to a politician, that he intended to publish true but embarrassing details about that politician’s past conduct would, assuming the content to be such that his exposure would cause genuine alarm to the politician, constitute the criminal offence of a breach of the peace.

The Convention¹¹ implications of such a result are too obvious to need elaboration. In our view, absent a public element, that offence is not committed.” (para 24)

The court went on to state that:

“It is unnecessary for the purposes of this opinion to seek to give definitive guidance as to what public element would be sufficient. Disturbance or potential disturbance of even a small group of individuals in a private house (...) may suffice. The conduct need not be directly observable by the third parties (...) but, if in private, there must be a realistic risk of it being discovered”. (para 25)

As noted above, a stage 2 amendment lodged by the Government sought to create a new statutory offence of threatening, alarming or distressing behaviour. During the additional committee evidence session in March, police witnesses described this offence as a statutory form of breach of the peace, albeit with the scope of the offence widened so that it does not require a public element. For example:

“This is the first time that I have ever seen breach of the peace codified, and it is a codification of my understanding of breach of the peace, subject to the restatement of the public place element in the Harris judgment.” (Scottish Parliament Justice Committee 2010b, col 2810)

This characterisation of the proposed statutory offence may, however, understate its significance. The decision in *Harris v HM Advocate* did not simply confirm the need for some public element if conduct is to amount to a breach of the peace, it emphasised that the conduct must threaten disturbance to the community. In not having this requirement, the proposed statutory offence might represent a more significant extension of the current law than is suggested by a description of it as a statutory form of breach of the peace. Certainly, a number of responses to the Justice Committee’s call for further evidence during stage 2 highlighted concerns about the scope of the offence. For example, a joint response from a number of academics argued that:

“In relation to (...) ‘Threatening, alarming or distressing behaviour’, much of the conduct that it covers is already (and rightly) criminal. Insofar as it goes well beyond existing law it goes too far. (...) the law has been extended so far that it loses touch with the real mischief (harassment, including domestic harassment) at which it is properly aimed. (...) if there is evidence that the current legal provisions are inadequate to deal with the mischief, more carefully considered proposals (based on decent research) are needed.” (Scottish Parliament Justice Committee 2010f, p 2)

It may be noted that the above response does not exclude the possibility that a new offence is required. In relation to areas where the current criminal law may be inadequate, evidence presented to the Justice Committee has highlighted some cases of domestic abuse (e.g. those which are not covered by either breach of the peace or assault). For example, during the additional committee evidence session, Detective Chief Inspector McPike stated that:

“Certainly, I know from investigating domestic abuse-related crimes that it is possible, for example, to have two people living in a dwelling-house where there is no chance of any other person overhearing the conduct or behaviour that goes on in the dwelling-house or between the two people and one individual is being subjected to pretty appalling verbal abuse, but that set of circumstances is not a crime in Scots law because, as the recent High Court decision in the *Harris v Her Majesty’s Advocate* case reinforced, there is a

¹¹ The European Convention on Human Rights.

need for a public element to the crime of breach of the peace – it was not a new decision, but it reinforced the point.” (Scottish Parliament Justice Committee 2010b, col 2806)

As noted earlier, the Scottish Government amendment seeking to create a statutory offence of threatening, alarming or distressing behaviour was not moved at stage 2. However, the Minister for Community Safety has indicated that the Government intends to bring forward an alternative amendment at stage 3 to address issues arising from the decision in *Harris v HM Advocate*:

“I will not move Government amendment 378 at this time. Instead, we will refine the text as necessary and engage with interested members to ensure that we can lodge an amendment at stage 3 that will address the uncertainty created by *Her Majesty’s Advocate v Harris* and which will, I believe, have broad parliamentary support.” (Scottish Parliament Justice Committee 2010e, col 2943)

Another stage 2 amendment, lodged by Robert Brown MSP, sought to overcome any prosecution difficulties caused by the decision in *Harris v HM Advocate* through amending the existing offence of breach of the peace. It was also, following debate, not moved.

PROSTITUTION

Background

The possibility of new offences relating to prostitution was another of the issues in relation to which the Justice Committee sought further evidence during stage 2.

As the law currently stands, it is possible for a consenting adult aged 18 or over to have sex with another consenting adult in return for payment without any offence being committed by either person. However, a range of offences apply to street prostitution, the involvement of young people in prostitution, the running of brothels and those who seek to live off the earnings of a prostitute. For example:

- Civic Government (Scotland) Act 1982 – section 46 makes it an offence for a prostitute to loiter or solicit in a public place (or other relevant place) for the purposes of prostitution
- Criminal Law (Consolidation) (Scotland) Act 1995¹²
 - section 7(1) includes offences aimed at people who seek to procure women to work as prostitutes
 - section 11 includes offences relating to living on the earnings of prostitutes and brothel-keeping
 - section 13(9) provides that it is an offence to live on the earnings of another from male prostitution
- Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005
 - section 9 makes it an offence to pay for the sexual services of a child under the age of 18 (an offence aimed at a person buying sex or other sexual services)
 - sections 10 to 12 include offences aimed at those who encourage, control or arrange the provision of sexual services by children under the age of 18

¹² The Sexual Offences (Scotland) Act 2009 includes a number of provisions amending sections 7 and 13 of the Criminal Law (Consolidation) (Scotland) Act 1995 (eg repealing most of section 13 to leave it focussed solely on people who knowingly live on the earnings of another from male prostitution). The relevant provisions of the 2009 Act (section 61 plus schedules 5 and 6) are not in force at the time of writing and do not, in any case, seek to repeal the offences highlighted in this briefing.

- Prostitution (Public Places) (Scotland) Act 2007 – section 1 makes it an offence for a person to loiter or solicit in a public place (or other relevant place) for the purposes of obtaining the services of a person engaged in prostitution (an offence aimed at a person seeking to buy sex)

In August 2003, the previous Scottish Executive established an Expert Group on Prostitution in Scotland. The expert group's first report was published the following year – [Being Outside: Constructing a Response to Street Prostitution](#) (2004). Although this report indicated that it would go on to look at other issues, including indoor prostitution and trafficking, the expert group was never reconvened and did not, therefore, produce a report on such issues.

Penalties for Living on the Earnings of Prostitution

A Scottish Government stage 2 amendment sought to change the penalties for various offences, set out in sections 11 and 13 of the Criminal Law (Consolidation) (Scotland) Act 1995, relating to living on the earnings of prostitution and brothel-keeping.

It provided for a substantial increase in the maximum penalty for a number of offences. For example, a custodial sentence of up to seven years could be imposed for some, including those provided for in:

- section 11(1)(a) – male living on the earnings of prostitution
- section 11(4) – female exercising control over a prostitute for the purposes of gain
- section 11(5)(a) – keeping, managing or acting or assisting in the management of a brothel
- section 13(9) – living on the earnings of another from male prostitution

In relation to the gender specific nature of some offences, it has been noted that:

“The distinctions between those offences which can be committed by men, and those by women, as well as the distinction between male and female prostitution are historical accidents and have no foundation in principle.” (Clive et al 2003, p 133/136 of print/online version)

The above offences could be used to prosecute people involved in prostitution at different levels (e.g. a person working at the reception of a brothel or the owner of a number of brothels). They may also be used in relation to instances where there is evidence of the accused being involved in trafficking, or other exploitative conduct, and in cases where there is not. It would appear that the Government was, in lodging its amendment, concerned to ensure that adequate penalties can be imposed in cases where significant money is being made from exploitation.¹³

It may be noted that a harm reduction approach to policing prostitution has led to examples where the police have allowed prostitution, including brothels, to carry on without seeking to enforce the criminal law to its full extent. For example, Assistant Chief Constable Iain Livingstone noted in evidence to the Justice Committee that:

“There are indeed licensed saunas in Edinburgh, which is to do with the City of Edinburgh Council's partnership approach. There is a history of such an approach in the east, including an emphasis on harm reduction. Rightly or wrongly, it is an historical fact. We recently visited all licensed premises – and there are a number of gay saunas in Edinburgh – with a view to engaging with people working in those establishments. They

¹³ See comments made by the Community Justice Minister at the Justice Committee meeting on 20 April 2010 (Scottish Parliament Justice Committee 2010e, cols 2918).

were not enforcement visits, but welfare visits.” (Scottish Parliament Justice Committee 2010b, col 2786)

He did, however, emphasise that the police did not ignore criminal activity:

Our main concern with regard to indoor prostitution is the organised crime that lies behind it. (...) In recent years, and certainly in the past five years, there has been, from my experience of working in the Leith area of Edinburgh, a move away from the traditional profile of street-based prostitution towards off-street prostitution and – probably uniquely in Edinburgh, through the approach of the City of Edinburgh Council and others – towards the use of off-street licensed premises.

We do not tolerate off-street prostitution as such, because there are significant issues in relation to knowledge gaps in our information and intelligence. Our general assessment is that there is likely to be organised crime behind off-street prostitution, and that a lot of the women who work in off-street premises may well be there under some form of duress. We seek to identify those premises and to find out more about what is going on, but toleration is not a national police policy. (Scottish Parliament Justice Committee 2010b, col 2776)

The Government amendment, to increase the maximum penalty for various offences relating to living on the earnings of prostitution and brothel-keeping, was agreed by the Justice Committee.

Proposed New Offences

A number of stage 2 amendments proposed new offences relating to prostitution and paid-for sexual activities:

- an amendment lodged by Trish Godman MSP sought to create three new offences of engaging in, advertising and facilitating paid-for sexual activities. The first of these offences focused on the customer rather than the provider of the sexual activity. The other two could be used to prosecute prostitutes (e.g. where prostitutes advertise their own services) as well as others involved in prostitution. One of the consequences of the first offence would appear to be that there would no longer be any circumstances where prostitution could take place without an offence being committed by the customer
- amendments lodged by Margo MacDonald MSP sought to create offences of: causing alarm, etc by engaging in a paid-for sexual activity (both the customer and provider of the sexual activity could be prosecuted); and profiting from coerced paid-for sexual activities
- an amendment lodged by Nigel Don MSP sought to create an offence of paying for the sexual services of a prostitute who has been subjected to some form of exploitative conduct. It provided for a strict liability offence in that the prosecution would not have to show that the offender knew, or should have suspected, that the prostitute had been exploited. The proposed offence would be the same as one provided for, in relation to England and Wales, by section 14 of the Policing and Crime Act 2009

Much of the debate in this area focussed on the offences set out in Trish Godman's amendment, which were generally seen as offering the most significant change to the current legal position. Her amendment was supported by Glasgow City Council, with Ann Hamilton (head of equalities and women's services within Glasgow Community and Safety Service) stating in evidence to the Justice Committee:

“we want something that challenges the acceptability of prostitution. At the moment, buying sex is viewed as something that men do, to which there is an entitlement, and which causes no harm. It is an individual transaction. We want there to be a clear message that that is not the case, and that buying sex has an impact: it supports organised crime and brings harm to women and their families. The proposed change

sends out a clear message about the kind of Scotland that we want.” (Scottish Parliament Justice Committee 2010b, col 2785)

In support of her own amendment, Trish Godman argued that:

“We need to send a strong message that buying sex is not harmless or acceptable. It should be regarded in Scotland as an abuse and an exploitation that will not be tolerated. I argue that we owe it to all women who are victimised by prostitution to do what we can now.” (Scottish Parliament Justice Committee 2010e, col 2920-2921)

The other amendments were, at least in part, lodged to ensure that a range of possibilities were considered. Margo MacDonald argued that it was not appropriate to significantly change the law on prostitution by way of amendment to a bill which did not, as introduced, deal with the topic. She indicated that she had lodged her amendments:

“simply because I thought that balance was required in the committee’s scrutiny and not because I thought that my proposals should be inserted into the Bill”. (Scottish Parliament Justice Committee 2010e, col 2921)

Nigel Don also stated that he did not think this was an appropriate legislative vehicle for significant changes to the law in this area and explained that he had lodged his amendment to see if there was overwhelming support for a strict liability offence similar to the one provided for by the Policing and Crime Act 2009 in relation to England and Wales. He indicated that, on the basis that such support had not been forthcoming he would not move his amendment.

Although Trish Godman’s amendment did receive support, both from within the Justice Committee and externally, the committee heard different opinions on the best way forward and conflicting evidence about the need for additional legal powers. When asked whether the police need more powers to deal effectively with prostitution, Assistant Chief Constable Livingstone replied:

“We probably do not. Instead, we need more information, intelligence and awareness of where prostitution takes place, the nature of that prostitution, who is involved in it, whether the women are vulnerable and so on. Ann Hamilton is right to say that there must be robust enforcement against organised and unlicensed off-street premises, although I add that enforcement can take place only against things that we know about. We are concerned about the possibility of driving prostitution further off-street into areas where it is harder to identify vulnerable women and enforcement opportunities. As ever, we need to strike the optimum balance, but I am not sitting before the committee this morning seeking additional powers.” (Scottish Parliament Justice Committee 2010b, col 2779)

He also emphasised the complexities involved in dealing with prostitution:

“when we think about what should be done about prostitution, we should bear in mind its profile: it is not a single entity and does not manifest itself in any single way. It can be very complex and multilayered with regard to whether it occurs on-street or off-street and in the different approaches that are taken across the country. From a policing perspective, I find it quite difficult to speak on a national basis because there is certainly a lot of robust debate in the police service about how the issue should be taken forward.” (Scottish Parliament Justice Committee 2010b, cols 2779-2780)

On the basis of the evidence received, some members of the Justice Committee highlighted the need for more detailed consideration of the issues before legislation is considered. The need for further work was, for example, suggested by Robert Brown MSP and Bill Aitken MSP who said respectively:

“We could benefit from a rather more detailed study, either by recalling the task force or by seeking a royal commission-type study. Before I could be satisfied of the need to go in the proposed direction, I would need there to be much greater agreement and underlying justification than we have had in the limited context of today’s stage 2 debate.”

“I am also of the view that the matter should be subject to wider and further inquiry, but I do not think that stage 2 of what is largely a legal bill is the appropriate time to agree to any of the amendments, bearing in mind the lack of consultation and the lack of an opportunity to take fuller evidence.” (Scottish Parliament Justice Committee 2010e, cols 2925 and 2928)

A majority of the Justice Committee rejected Trish Godman’s amendment. Margo MacDonald’s amendments were either rejected or not moved. Nigel Don’s amendment was not moved.

DOUBLE JEOPARDY

In December 2009 the Scottish Law Commission published a [Report on Double Jeopardy](#) (including a draft bill) The current common law rule against double jeopardy generally prevents someone being tried twice for the same offence. The Commission considered whether there should continue to be such a rule, the justification for any exceptions which currently exist and the case for any further exceptions.

Recommendations in the report included ones relating to: (a) the continued existence of a general rule against double jeopardy (reformed and restated in statute); and (b) the possibility of retrying an acquitted person where the acquittal is tainted by an offence against the administration of justice (eg intimidation of witnesses involved in the original trial) or where that person subsequently admits committing the offence. The Commission also considered, but made no recommendation on, whether there should be a general exception to the rule against double jeopardy on the basis of new evidence supporting the prosecution case.

Stage 2 amendments included a number lodged by Bill Aitken MSP seeking to take forward the work of the Commission on this topic (including a new evidence exception). However, the relevant amendments were withdrawn or not moved, with Bill Aitken stating that:

“The amendments have been overtaken by events. Since they were lodged, the Government has intimated its intention to legislate separately after a consultation process. On the basis of a brief assurance from the Minister that that is still the Government’s intention, I will seek to withdraw or not move my amendments, with the committee’s approval.” (Scottish Parliament Justice Committee 2010e, col 2944)

Relevant assurances were provided by the Minister for Community Safety. The relevant Scottish Government (2010d) [consultation](#) is set to end on 14 June 2010. In a [letter](#) to the Scottish Law Commission, the Justice Secretary indicated that:

“In relation to double jeopardy, I published a consultation paper on Monday 22 March. This consultation is not upon the Report on Double Jeopardy in its entirety. I fully accept the general thrust of the recommendations on codifying the rule and in relation to post-acquittal confessions and tainted or corrupted trials.

Instead, the consultation paper focuses upon the establishment of a new evidence exception, where the Commission was of course undecided either way. My personal view is that if new evidence emerges which shows the original ruling was fundamentally flawed, it should be possible to have a second trial. I also believe that this reform should be made retrospective. (...)

The public consultation will run until 14 June and it is my intention to legislate on this issue at the earliest practicable opportunity thereafter.” (Scottish Government 2010e)

AGE OF CRIMINAL RESPONSIBILITY

Background

The Scottish Law Commission [Report on Age of Criminal Responsibility](#) (2002) identified two different rules in Scots law concerning the age of criminal responsibility. The first of these relates to the age below which a child is deemed to lack the mental capacity to commit a crime. The second is concerned with the age at which an accused is (normally) subject to the adult system of prosecution and punishment. In relation to the issue of capacity, section 41 of the Criminal Procedure (Scotland) Act 1995 provides that:

“It shall be conclusively presumed that no child under the age of eight years can be guilty of any offence.”

In relation to the second meaning, the Commission report highlighted section 42(1) of the 1995 Act, which states that:

“No child under the age of 16 years shall be prosecuted for any offence except on the instructions of the Lord Advocate, or at his instance; and no court other than the High Court and the sheriff court shall have jurisdiction over a child under the age of 16 for an offence.”

The current situation in Scotland is that children between the ages of eight and 16 can be prosecuted in the criminal courts but, in practice, the vast majority of alleged child offenders under the age of 16 are dealt with through the children’s hearings system.

Proposals for Change

Section 38 of the Bill as introduced sought to amend the current provisions of the 1995 Act to prevent any child under the age of 12 being prosecuted in the criminal courts. It did not seek to alter the legal presumption that no child under the age of eight years can be guilty of any offence. The result of this would be that a child aged between eight and 12 could still be held to have the mental capacity to commit a crime but could, where some form of compulsory intervention is considered necessary, only be dealt with through the children’s hearings system.

The Justice Committee’s Stage 1 Report (2009) noted that:

“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 [Scotland’s Commissioner for Children and Young People], 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.” (para 342)

In its written response to the Stage 1 Report the Scottish Government (2010a) said:

“We believe section 38 moves Scots law towards the expectations of the UN Committee on the Rights of the Child (UNCRC). The UNCRC requires State Parties to set a minimum age below which children shall be presumed not to have the capacity to infringe the penal law and that age should be at least 12. (...)

The Scottish Law Commission recommended abolishing any rule on the age at which children can be found guilty of an offence. This recommendation was not implemented as, if it were, it would mean that children under the age of eight could be charged with any offence as adult offenders, albeit they would be immune from prosecution. Given that it is widely appreciated that children under age eight do not have the mental capacity (*mens rea*) to commit criminal acts, the approach above has not been adopted. Instead, new grounds of referral are being included in the Children’s Hearings Bill to cover all situations where a child is in need of compulsory measures of supervision through the hearing, including behaviour that might be considered criminal if committed by an adult.”¹⁴ (p 23-24)

Relevant stage 2 amendments included one lodged by Robert Brown MSP seeking to increase the age below which a child is deemed to lack the mental capacity to commit a crime from eight to 12. In support of his amendment, he argued that:

“It might be said that the difference between raising the age of criminal responsibility and raising the minimum age at which a child can be prosecuted is technical. It is true that, either way, a small number of children will be affected. Few prosecutions take place of young people who are aged between 12 and 14; the graph of prosecutions for offences shows a sharp rise only from the age of 15.

In the background is the welfare-based children’s hearings system, which focuses on meeting a child’s needs and which all parties broadly support. One stimulus for reform was the criticism from the United Nations Committee on the Rights of the Child in its concluding observations on the three most recent United Kingdom state party reports. Section 38 [of the Bill] as it stands does not meet Scotland’s obligation under the UN Convention on the Rights of the Child. Children who are aged between eight and 11 will continue to be referred to a children’s panel on offence grounds, and in practice, if not in theory, the result will be to all intents and purposes a criminal record. Such information can be routinely disclosed through Disclosure Scotland checks, regardless of the gravity of the offending. There is persuasive evidence that criminalising children in that way is damaging. (...)

In general, the reform in the Bill is worth while, but it is arguable that it is the minimum that is appropriate and that we should do the task properly by raising the age of criminal responsibility. Nobody suggests that that means a reign of terror by lawless children. It is appropriate for the system to have powers to tackle, detain if necessary and deal with children who cause trouble. Most such children can be dealt with on other welfare grounds, but the Children’s Hearings (Scotland) Bill should provide for a non-criminal offence ground for referring children to a hearing, to protect the public and in children’s interests.” (Scottish Parliament Justice Committee 2010g, cols 2954-2955)

The case put forward by Robert Brown received a sympathetic response from some members of the Justice Committee and others attending the committee meeting. For example, Angela Constance MSP said that:

“It will come as no surprise to anybody on the committee that I have considerable sympathy for Robert Brown’s amendment (...).

¹⁴ A Children’s Hearings (Scotland) Bill was introduced in the Scottish Parliament on 23 February 2010.

In the Government's defence, I accept that what the Bill proposes is a prudent step forward, although instinctively I would rather that it were a bigger step forward. I wonder whether we should have considered the issue as part of the Children's Hearings (Scotland) Bill. The Criminal Justice and Licensing (Scotland) Bill is a huge bill, and I would have preferred a far more dedicated focus on children who are in need and who offend. Perhaps, following the committee's scrutiny of the issue, the Children's Hearings (Scotland) Bill will be able to take things further." (Scottish Parliament Justice Committee 2010g, cols 2959-2960)

Richard Baker MSP said:

"I also have sympathy for amendment 379, in the name of Robert Brown. When the Bill was introduced, it might have been better for it to have included a proposal on the age of criminal responsibility, so that that could be properly debated. However, the committee did not discuss such a proposal, although it was referred to in the debate on the age of prosecution. (...)

Given where we are, we should not support a change in the age of criminal responsibility now, but we should change the age of prosecution to 12. That is the crucial issue now and the right way forward. I accept that there should be further consideration of the age of criminal responsibility. I do not believe that Parliament should wait too long to engage in such consideration, which should lead to change, but I am inclined to believe that that requires new, detailed proposals and fuller debate." (Scottish Parliament Justice Committee 2010g, col 2958)

However, Robert Brown's amendment was defeated when the committee voted on it (his being the only vote in favour of the change), with section 38 of the Bill being agreed without amendment.

Some statements made by members of the Justice Committee, during the debate on Robert Brown's amendment, may be taken as suggesting that the age of criminal responsibility might be revisited in the context of the Children's Hearings (Scotland) Bill. That bill (as introduced) does not seek to legislate on the age below which a child is deemed to lack the mental capacity to commit a crime. This fact would be taken into account when considering whether any amendment seeking to change the age of criminal responsibility was within the scope of that bill – a proposed amendment is only admissible if it is relevant to the bill in question. Any possible issues with the admissibility of such an amendment would not necessarily prevent amendment of the Children's Hearings (Scotland) Bill to, for example, provide that hearings can only consider non-offence welfare grounds when dealing with children under the age of 12, whilst leaving existing provisions on the age below which a child is deemed to lack the mental capacity to commit a crime unchanged.

Disclosure of Information on Offending Behaviour

As noted above, Robert Brown highlighted that the proposals in the Bill as introduced, under which children aged between eight and 12 could still be referred to a children's panel on offence grounds, would mean that offence information would still be retained in relation to such children. He was concerned that this would lead to them having a criminal history which could be disclosed – thus damaging future employment opportunities.

The Scottish Government's (2010a) response to the Stage 1 Report stated that:

"Children between the ages of eight and 12 who commit serious offences will continue to have information retained on the Criminal History System and may have forensic samples (including DNA) retained (under provisions in section 59 of the

Bill).¹⁵ These measures ensure that communities will continue to be protected despite a change in practice. In certain circumstances it is appropriate to retain conviction information in order to protect the public from harm. There is a balance to be struck between the rights of children and the rights of communities to be protected.” (p 24)

During the debate on Robert Brown’s amendment to increase the age below which a child is deemed to lack the mental capacity to commit a crime, the Minister for Community Safety indicated that:

“I am aware of the issue around the retention and disclosure of information about children and young people who are referred to a hearing on offence grounds. In the interests of public safety, we believe that there is still a strong case for recording certain information. However, we recognise that the information that is made available under disclosure checks needs to be proportionate, and we are, therefore, seeking to include provisions in the Children’s Hearings (Scotland) Bill that will ensure that information about children and young people who are referred to a hearing on offence grounds is retained and disclosed only where necessary.” (Scottish Parliament Justice Committee 2010g, col 2963)

Further information was provided during stage 1 consideration of the Children’s Hearings (Scotland) Bill, when the Minister for Children and Early Years was asked to respond to concerns about the future employment prospects of children who accept offence grounds. He advised that:

“Where offence grounds for referral are accepted or established, we believe that serious offences should continue to appear on disclosure certificates in the interest of public safety. However, we are keen to end the situation whereby, in some circumstances, offences are disclosed over a long period and in a manner that is disproportionate to the offence. We want to try to ensure that we strike the correct balance between the rehabilitation of individuals who conducted offending behaviour as children and the public safety of children and vulnerable adults, but we recognise the issues that the committee has raised and we intend to address them at stage 2.” (Scottish Parliament Education, Lifelong Learning and Culture Committee 2010, col 3537)

REPRESENTATIONS OF VICTIMS AT PAROLE BOARD HEARINGS

Section 16 of the Criminal Justice (Scotland) Act 2003 provides the victim of a wide range of offences with a right to receive information concerning the release of an offender given a custodial sentence of 18 months or more.¹⁶ Section 17 of the 2003 Act goes on to give such a victim the right to make written representations to the Scottish Ministers before any decision is taken to release the offender from custody on licence.

A stage 2 amendment lodged by Margaret Curran MSP sought to give a victim, who is covered by the above provisions, the additional right to make oral representations at a meeting of the Parole Board for Scotland when it is considering the possibility of releasing the offender from custody on licence.

During consideration of the amendment, a number of Justice Committee members raised concerns about the possibility of practical difficulties in implementing the proposal and unintended consequences (eg whether it might change the nature of parole hearings to one where both offender and victim, plus their representatives, are generally present).

¹⁵ The retention of fingerprint and DNA data is considered later in this briefing.

¹⁶ Relevant offences are set out in the Victim Notification (Prescribed Offences) (Scotland) Order 2004 (as amended).

The Minister for Community Safety indicated that the Scottish Government was sympathetic to the proposal and, whilst it would not support the amendment, intended to bring forward its own proposals after consulting relevant organisations:

“Giving victims the choice whether or not to be heard at a Parole Board hearing is an important development in enhancing victims’ participation in the criminal justice system. However, a number of practicalities need to be addressed, to cover the workability factor to which the convener alluded. There are almost 500 oral or tribunal hearings a year at which the offender is present and a further almost 1,200 casework meetings a year at which the offender is not present. An effective system would need to be put in place to ensure that victims could be present at appropriate hearings. As I have said, there is a very large number of such hearings. (...)

That said, we concur with the thrust of the amendment and undertake that the Scottish Government will put together proposals that will enable victims to be heard at appropriate Parole Board hearings.

(...) we will be unable to complete the work in time for the passage of the Bill, but the Scottish Government will bring proposals to the Parliament as soon as possible. Allowing oral representations at a Parole Board hearing might not require primary legislation but might be possible to deliver through amendments to the Parole Board rules, so it might be effected quite quickly once the practicalities are addressed.”
(Scottish Parliament Justice Committee 2010g, cols 2978-2979)

Following debate, Margaret Curran’s amendment was rejected by a majority of the Justice Committee.

FINGERPRINT AND DNA DATA

The Bill as introduced included provisions to extend existing police powers in relation to the retention of certain types of forensic information – including fingerprint and DNA data. In putting forward its proposals, the Scottish Government said that it wanted to ensure that the rules in this area maintain a proper balance between: (a) the benefits to law enforcement of retaining forensic information; and (b) the civil liberty implications of retaining such information (particularly DNA data) obtained from people who are not convicted of an offence.

Unsuccessful Prosecutions

The law currently provides that, where there is a criminal conviction, any fingerprint or DNA data obtained from an offender can be retained indefinitely. However, all fingerprint data taken from a suspect must be deleted from databases and destroyed if the suspect is not subsequently convicted in a criminal court. This was, until quite recently, also the position in relation to DNA data taken from a suspect who is not subsequently convicted.

The rules on the retention of DNA data (but not fingerprint data) were modified by the Police, Public Order and Criminal Justice (Scotland) Act 2006. Since the changes came into force, in January 2007, DNA data obtained from a suspect who is prosecuted in the criminal courts for any of a wide range of sexual or violent offences may be retained for a period after the conclusion of criminal proceedings, even if the suspect is not convicted.¹⁷ Where there is no

¹⁷ An amendment to the Bill, lodged by the Scottish Government and agreed to by the Justice Committee during stage 2, provides for some changes to the list of sexual and violent offences covered by the extended retention provisions. For example, as noted in an earlier SPICe briefing (McCallum 2009a, p 7), the violent offences in relation to which those provisions currently apply do not include offences prohibiting the carrying of knives and offensive weapons in public. The amendment adds such offences to those covered by the extended retention provisions.

conviction but the extended retention powers do apply, DNA data must still be deleted from databases and destroyed at some point. This must be done: (a) within three years of the date on which the criminal proceedings were concluded; or (b) by any later date set by a sheriff following an application by a chief constable to extend the retention period.¹⁸

The Bill, as introduced, sought to apply the current extended DNA retention powers to fingerprint data. This proposal was supported by the Justice Committee in its Stage 1 Report (2009).

A number of stage 2 amendments lodged by James Kelly MSP sought to go further, automatically allowing the retention of both fingerprint and DNA data for a period of six years where a suspect has been prosecuted in the criminal courts but not convicted. The police would still be able to apply to a sheriff for the extension of this period. He proposed that these retention powers should apply in relation to prosecutions for any offence (ie that they should not be restricted to certain sexual or violent offences).

In arguing against James Kelly's amendments, the Minister for Community Safety said that the proposals:

“would mean that someone who was prosecuted for but acquitted of a minor breach of the peace would have their DNA and fingerprints retained for six years – the same period for which someone who was prosecuted for but not convicted of rape or murder would have their DNA and fingerprints retained. Given that lack of discrimination between minor and serious offences, Mr Kelly is asking us to introduce an approach that would be at greater risk of ECHR challenge.” (Scottish Parliament Justice Committee 2010g, col 2995)¹⁹

The Minister went on to state that:

“of course if you retain more DNA you are going to get more hits and solve more crimes. However, the question is not solely about evidence, but about proportionality and finding a balance between what is acceptable to the police in terms of providing evidence to investigate crime, to the courts in terms of compatibility with the ECHR and to the people of Scotland in terms of protecting their civil liberties.” (Scottish Parliament Justice Committee 2010g, col 2996)

In support of his amendments, James Kelly noted that he was seeking a retention period of six years, not unlimited retention. Cathie Craigie MSP argued that:

“James Kelly's amendments take account of the decisions that were reached as a result of the ECHR. (...) if the committee does not accept them, it would be ignoring the very real and dangerous criminals who are out there and who could be caught if we retained their DNA. I fully support James Kelly's amendments, and I think that the argument that they do not comply with the ECHR is exaggerated scaremongering.” (Scottish Parliament Justice Committee 2010g, col 3002)

Following debate, a majority of Justice Committee members rejected James Kelly's amendments.

¹⁸ A sheriff can extend the retention period by a maximum of two years following such an application. However, subsequent applications seeking further extensions are permitted.

¹⁹ Issues of compliance with the European Convention on Human Rights (ECHR) are considered in the SPICe briefing Criminal Justice and Licensing (Scotland) Bill: Fingerprint and DNA Data (McCallum 2009a).

Alternatives to Prosecution

Prior to the Bill's introduction, the Scottish Government sought views on proposals to change the rules for retaining/destroying fingerprint and DNA data where a case is concluded by an alleged offender accepting a prosecution offer of a direct measure (eg a fiscal fine) as an alternative to prosecution in the criminal courts. At present, fingerprint and DNA data must be destroyed in such circumstances. The Bill, as introduced, did not contain any provisions on this issue, with the Government indicating that it wanted to work with the Parliament in considering the matter further.

In its Stage 1 Report (2009), the Justice Committee noted a degree of uncertainty about whether the provisions in the Bill should be extended to allow the retention of forensic data taken from people who are dealt with by way of alternatives to prosecution. It did, however, indicate that it would "look forward to a stage 2 amendment that would allow for the retention of data in such circumstances" (para 372). In its written response to the Stage 1 Report, the Scottish Government (2010a) stated that:

"When we published our retention proposals for DNA and fingerprints in February 2009, we undertook to consider further the issue of retention in relation to fiscal disposals and police Fixed Penalty Notices (FPNs) issued under the Antisocial Behaviour (Scotland) Act 2004. Since then Stewart Maxwell has made public his intention to lodge a stage 2 amendment that would allow for the retention of data in relation to police FPNs. We understand that he also intends to lodge a similar amendment to ensure that DNA and fingerprints can also be retained in relation to disposals issued by Procurators Fiscal." (p 26)

Stage 2 amendments lodged by Stewart Maxwell MSP did, indeed, seek to allow the retention of fingerprint and DNA data in cases dealt with by way of various alternatives to prosecution:

- cases where a person accepts a prosecution offer of certain alternatives to prosecution (e.g. a fiscal fine)
- cases where a person pays a fixed penalty notice issued by the police under the Antisocial Behaviour etc (Scotland) Act 2004

In general, his amendments sought a two year retention period in such cases. However, if a prosecution offer is concerned with one of the relevant sexual or violent offences in relation to which the extended retention powers for unsuccessful prosecutions apply, the retention period would be three years with the possibility of extension (on a two year rolling basis) on application to a sheriff.

In support of his amendments, Stewart Maxwell said:

"I remind colleagues that we examined this issue at stage 1 in our evidence and report. It was clear that the quite correct move to the greater use of non-court disposals has meant that DNA and so on that would have been retained is not being retained because of that administrative change. I believe that the amendments will plug a loophole in the current law." (Scottish Parliament Justice Committee 2010g, col 3009)

Some Justice Committee members sought reassurance that the approach put forward in the amendments was a proportionate response given the nature of the offences involved. For example, Bill Aitken MSP noted that:

"I recognise that there is an anomaly and he is right to bring it to the committee's attention, but I am not yet entirely convinced that the amendments are proportionate. The committee has some unfinished business involving summary justice reforms and the

way in which the Procurator Fiscal Service is dealing with them. Although some concerns have arisen, no case has been brought to my attention in which a conditional offer, fiscal fine or fixed penalty has been made in respect of a sexual or serious violent offence. If that had happened, there would have been considerable concern on the part of all members.

I would have thought that a case in which there is an argument for DNA retention should be a matter for prosecution so that the court can apply a realistic disposal.” (Scottish Parliament Justice Committee 2010g, col 3010)

However, following debate, all members of the committee supported the amendments – see sections 58A and 58B of the Bill as amended at stage 2.

Children’s Hearings System

Section 59 of the Bill as introduced provided for extended police retention powers, in relation to both fingerprint and DNA data, obtained from children who are dealt with through the children’s hearings system. At present such data should be deleted as soon as possible following a decision not to prosecute a child in the criminal courts. Thus, a decision to deal with a child through the children’s hearings system should lead to deletion. The Bill sought to change this, allowing the police to retain such data where a child is referred to a children’s hearing and either: (a) accepts that he/she committed a “relevant offence” as prescribed by Scottish Ministers; or (b) is held by a sheriff to have committed a “relevant offence”. The proposals did not allow for the indefinite retention of data – the Bill provided for a three year retention period with the possibility of extension (on a two year rolling basis) on application by the police to a sheriff.

The Bill as introduced proposed that the Scottish Ministers should have the power to provide, by way of statutory instrument, that some or all of the relevant sexual and violent offences set out in section 19A(6) of the Criminal Procedure (Scotland) Act 1995 are also “relevant offences” for the purposes of the new retention provisions. The policy memorandum published along with the Bill indicated that the “list of applicable violent and sexual offences would be developed in consultation with interested parties” (para 302).

The Justice Committee’s Stage 1 Report (2009) noted that the committee was:

“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.” (para 373)

The Scottish Government’s (2010a) response to the Stage 1 Report stated that:

“The list of relevant sexual and violent offences will be specified in an order subject to affirmative procedure. At present, the Bill provides that the order can only specify sexual and violent offences which are contained in section 19A(6) of the Criminal Procedure (Scotland) Act 1995. The forensic data working group, on which the SCCYP [Scotland’s Commissioner for Children and Young People] is represented, has made good progress with developing a list of relevant sexual and violent offences that will trigger retention. Although agreement has been reached on most of the offences to be included, the inclusion of a small number of offences is still under discussion.” (p 26-27)

Relevant stage 2 amendments included ones lodged by:

- James Kelly MSP – seeking to allow for the indefinite retention of fingerprint and DNA data taken from children who are dealt with through the children’s hearings system after committing a relevant offence
- Robert Brown MSP – seeking to provide that fingerprint and DNA data taken from children who are dealt with through the children’s hearings system may only be retained where the police have applied to a sheriff for its retention and the sheriff is satisfied that retention is justified on the basis that the child continues to pose a risk to public safety

Both proposals for amending the Bill were rejected by the Justice Committee (by majority votes).

DISCLOSURE OF EVIDENCE

Background

In 2006 the then Scottish Executive asked Lord Coulsfield (a retired High Court judge) to review the law and practice of disclosure of evidence in criminal proceedings. This followed a series of court decisions giving rise to some uncertainty about the requirements of the prosecution’s duty of disclosure. Lord Coulsfield’s [report](#) (2007) recommended establishing a statutory framework for disclosure by the prosecution, replacing the existing common law system.

Part 6 of the Bill as introduced set out a statutory framework for the disclosure of evidence, by the prosecution to the accused (including the accused person’s defence lawyer), in criminal cases. The relevant provisions were based, with some changes, on the recommendations in Lord Coulsfield’s report.

The prosecution’s duty of disclosure, under the provisions of the Bill as introduced, included a general duty to disclose all “material information” to the accused. Information would be material if: (a) it would materially weaken or undermine the prosecution case; (b) it would materially strengthen the accused person’s case; or (c) it is likely to form part of the prosecution case.

The Bill as introduced also included:

- a procedure under which the prosecution would apply to the court for a “non-disclosure order” in relation to any item of material information if the prosecution believed that its disclosure would be likely to do any of the following: (a) cause serious injury or death to any person; (b) obstruct or prevent the prevention, detection, investigation or prosecution of crime; or (c) cause serious prejudice to the public interest
- provisions allowing the prosecution to apply for an “exclusion order” (preventing the accused or defence lawyer from attending the court hearing dealing with a related application for a non-disclosure order), or a “non-notification order” plus exclusion order (preventing the accused or defence lawyer from receiving any notice of the fact that the prosecution has applied for exclusion and non-disclosure orders in relation to the relevant piece of information)

It provided for appeals and reviews in relation to non-disclosure, exclusion and non-notification orders. It also included provisions allowing courts to appoint special counsel,²⁰ to represent the interests of accused persons, where a court is dealing with applications, appeals or reviews relating to any such orders.

²⁰ The Bill as amended at stage 2 makes it clear that only solicitors or advocates could be appointed as special counsel.

It also provided that further guidance on how the disclosure regime should operate in practice would be set out in a code of practice issued by the Lord Advocate.

Level of Detail in the Bill

The Justice Committee's Stage 1 Report (2009) included the following conclusions:

"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.

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 in the proposed code of practice (or in guidance)." (paras 430-431)

The Scottish Government's (2010a) response to the Stage 1 Report indicated that:

"On the question of complexity of the provisions, we accept the concerns made and we will seek to amend the Bill at stage 2 to simplify the provisions. While we want provisions that provide certainty and clarity for practitioners, it is not our intention to increase burden or create an inflexible system. So we have looked again at the provisions and we will lodge amendments at stage 2 which, if approved, will not only simplify the provisions on schedules of information in solemn cases but will also remove the detail on the precise form in which the information is provided. We accept the concerns expressed that such administrative detail would be best left for the Code of Practice or in guidance for prosecutors and the police.

Having said this, as the Solicitor General explained in his evidence to the Committee, disclosure is a complex matter. While we can attempt to simplify how it is presented, the underlying complexity will remain. We are continuing to look at the remaining provisions and, if we are able to identify provisions which could be included in the Code of Practice, in secondary legislation or in guidance rather than on the face of the Bill, we will bring forward any appropriate amendments at stage 2." (p 32)

During stage 2 consideration of the Bill, the Justice Secretary emphasised the importance of establishing a legal framework for disclosure of evidence that is clear, coherent and effective. He sought to assure members of the Justice Committee that appropriate matters would be set out in secondary legislation or a code of practice, but argued that the level of detail being proposed in the Bill itself was reasonable given the complexity of the topic. He indicated that the Government had "reviewed the provisions in Part 6 to remove as much complexity as possible from the Bill", whilst accepting that it had "not been able to go as far as members of the committee might have liked" (Scottish Parliament Justice Committee 2010h, col 3068). He also noted that a scheme for disclosure of evidence in other parts of the UK has statutory provisions of a similar length to those proposed in the Bill.

A range of Government amendments were agreed at stage 2, some of which sought to reduce the complexity of this part of the Bill, although the Justice Secretary conceded that the overall impact of its stage 2 amendments was to make the provisions on disclosure longer. He explained:

"That is because, although some of our amendments will simplify the provisions, there are also areas that were not covered when the Bill was introduced but which we consider we need to seek to add in. Those include provisions on disclosure post conclusion of

first-instance proceedings, on appeals and on ensuring that there is a means of representing reserved interests in decisions about the non-disclosure of information on public interest grounds.” (Scottish Parliament Justice Committee 2010h, col 3069)

Defence Statements

An assessment by the prosecution as to whether or not information is material may be influenced by having some knowledge of the nature of the accused person’s intended line of defence. In light of this, the Bill as introduced included provision for the accused to provide the prosecution with a “defence statement” setting out certain details of the planned defence. The provisions required the accused to provide such a statement in solemn proceedings (ie mandatory) and allowed the accused to provide one in summary proceedings (ie discretionary). Following receipt of a defence statement, the prosecution would review any information which may be relevant to the case to see if anything else should be disclosed.

The Justice Committee’s Stage 1 Report (2009) noted that “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” (para 434). The committee went on to say in its report that:

“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.” (para 442)

In relation to the latter point, the committee’s report included evidence from the Sheriffs’ Association that:

“the timing requirements envisaged [for defence statements] 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”. (para 437)

In its response to the Stage 1 Report, the Scottish Government (2010a) argued that:

“The nature and scale of solemn cases are such that the prosecutor’s task in assessing what information requires to be disclosed would be extremely difficult without knowing some information about the accused’s line of defence. Not having mandatory defence statements would risk essential information not being disclosed inadvertently and through no fault of the prosecutor or the accused.” (p 33)

Although some members of the Justice Committee still had concerns about the provisions in the Bill on defence statements, stage 2 amendments lodged by Bill Aitken, which would have removed the relevant sections of the Bill, were not moved.

MENTAL DISORDER AND UNFITNESS FOR TRIAL

Part 7 of the Bill as introduced sought to implement recommendations in the Scottish Law Commission’s [Report on Insanity and Diminished Responsibility](#) (2004) to modernise the criminal law in relation to mentally disordered offenders. It included provisions:

- creating a new statutory defence to replace the common law defence of insanity
- setting out a statutory version of the plea of diminished responsibility in place of the current common law plea (acts to reduce a charge of murder to one of culpable homicide)

- replacing the existing common law rule on insanity as a plea in bar of trial with a new statutory plea of unfitness based on the mental or physical condition of the accused

The Justice Committee's Stage 1 Report (2009) noted that committee members broadly supported the provisions in this part of the Bill, but were not yet convinced that the new statutory defence should be unavailable to "people who know their conduct is wrong, but are driven by their mental illness to do it anyway" (para 471). The Scottish Government's (2010a) written response to the Stage 1 Report supported the stance taken in the Bill by reference to the thinking of the Scottish Law Commission on the issue. The Commission's (2004) report included the following discussion in relation to whether the statutory defence should include a volitional element (ie one focusing on whether the accused was capable of controlling his/her actions and exercising choice):

"In the Discussion Paper we were inclined to adopt the position that the test for the defence should not contain a volitional element but we did not reach a concluded view on this point. We presented the issue in the form of a question whether the definition of the defence should contain any reference to volitional incapacities or disabilities. Consultees were divided on this question. However most agreed that the wider cognitive criterion of appreciation would cover any relevant volitional failing. About half of the consultees who responded on this issue accepted that there was no need for any volitional element. Two consultees gave clear support for it. It was of some significance that none of the consultees could provide any example where a person might fail the test for the defence on the appreciation criterion but satisfy it purely on a volitional one. It is also worth noting that the mental health experts whom we met were virtually unanimous in rejecting a category of mental disorder which was purely volitional in nature and which had no impact on cognitive functions." (para 2.54)

The Commission's report did not recommend the inclusion of a volitional element in the defence. However, in light of the mixed views received by the Justice Committee, Angela Constance MSP lodged a stage 2 amendment seeking further assurance from the Scottish Government that those who should have access to the new statutory defence would, indeed, have it. Following discussion she withdrew her amendment, stating that:

"I think that I am satisfied with the Cabinet Secretary's answer, particularly his clear statement that, if it is the view that the 'appreciation criterion is to be understood in a wide sense as we argue that it should, then there is no need for any volitional element'. To reserve my position, I will study the Cabinet Secretary's response in detail. However, at this stage, and with the committee's permission, I will withdraw amendment 24." (Scottish Parliament Justice Committee 2010h, col 3103)

Only minor changes were made to provisions in Part 7 of the Bill during stage 2.

LICENSING

Metal Dealers

Section 123 of the Bill as introduced sought to replace the current mandatory licensing scheme for metal dealers with an optional scheme – allowing local licensing authorities to determine whether licences should be required in their areas. Following concerns expressed by some of those providing evidence during stage 1, the Justice Committee asked the Scottish Government to provide further justification for the proposed change.

In its written response to the Stage 1 Report, the Scottish Government (2010a) indicated that:

“Metal dealers were originally licensed due to the concern that their businesses could become involved in criminal activities. It would be fair to state that this concern tends to increase in line with the market price for metal (recently before the economic downturn there had been a significant rise in prices paid). We believe this justifies the need for a licensing system. The flexibility provided by an optional licensing regime has the advantage that as the position of the metal markets changes, it may be appropriate for Local Authorities to remove the burden of a mandatory licensing system on business if they consider it appropriate. We would only expect such action to be taken after a local authority had consulted with the relevant bodies in their area, in particular the Police.” (p 38)

However, some Justice Committee members still had concerns. Robert Brown MSP argued that:

“The law of unintended consequences applies. It is all very well for one council to decide that it does not need a metal dealers licensing regime, but that has implications for surrounding councils, particularly as council areas are fairly small. For example, Glasgow City Council is surrounded by several other authorities. One can readily see that people who want to operate at the dubious end of the market might move to a surrounding local authority’s area if it took a slightly more lax view than Glasgow did. Section 123 has considerable dangers, so I will press amendment 385.” (Scottish Parliament Justice Committee 2010j, col 3114)

Following debate, the committee (by majority) agreed an amendment lodged by Robert Brown deleting section 123 of the Bill.

Market Operators

Section 40 of the Civic Government (Scotland) Act 1982 generally requires people wishing to hold a private market to obtain a market operators licence. However, it exempts from this requirement any “functions held by charitable, religious, youth, recreational, community, political or similar organisations”. Section 125 of the Bill as introduced sought to remove this exemption.

The Justice Committee’s Stage 1 Report (2009) stated that:

“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.” (para 526)

In response to the Stage 1 Report, the Scottish Government indicated that it would lodge suitable stage 2 amendments to continue the exemption for charities. Relevant Government amendments were, indeed, lodged at stage 2. However, a majority of Justice Committee members preferred alternative amendments lodged by Cathie Craigie MSP deleting the whole of section 125 from the Bill (thereby also reversing some additional changes which the Government had sought to make to the provisions on market operators’ licences).

Lap Dancing and other Adult Entertainment

Although the Bill as introduced did not contain specific provisions on the licensing of lap dancing (and other adult entertainment), the Justice Committee received evidence during stage 1 consideration arguing that the Bill provided a valuable opportunity to reassess the licensing of lap dancing venues. In light of the evidence received, the Justice Committee’s Stage 1 Report (2009) said:

“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.” (para 528)

The Scottish Government’s (2010a) response to the Stage 1 Report indicated that its:

“position remains as it was at the start of transition to the new licensing regime of the Licensing (Scotland) Act 2005. It is possible for Licensing Boards to justify through the licensing objectives a policy of only allowing this [i.e. lap dancing clubs] on a limited number of licensed premises to provide adult entertainment or even to justify a ban on such entertainment on licensed premises.

Such a policy could be set out in a Board’s licensing policy statement (which has to be consulted on with certain parties). Such a policy could continue to be applied as long as the justification for the policy remained. Boards can also set out what conditions such licensed premises must meet should they wish to provide such entertainment.” (p 40)

However, Sandra White MSP lodged a stage 2 amendment seeking to give local authorities the power to apply a specific licensing regime to lap dancing and other adult entertainment venues. The proposed licensing regime would expressly state that a local authority could provide that no licences should be granted for venues in a particular locality.

This was the final issue in relation to which the Justice Committee sought further evidence during stage 2 proceedings. A number of submissions argued that lap dancing is a form of commercial sexual exploitation of women and expressed support for the licensing regime proposed by Sandra White. However, some submissions expressed concerns, including: (a) whether the proposals would (unintentionally) affect theatrical companies producing performances with an element of nudity; and (b) whether it is appropriate to have venues covered by more than one licensing regime (alcohol and adult entertainment).

In support of her amendment, Sandra White argued that

“Lap dancing clubs objectify women. ‘Safer Lives: Changed Lives’, which was published by the Scottish Government and the Convention of Scottish Local Authorities, recognises activities that are undertaken as part of commercial sexual exploitation, including table dancing and lap dancing, as forms of violence against women that have been shown to be ‘harmful for the individual women involved and have a negative impact on the position of all women through the objectification of women’s bodies’. (...)

I believe that amendment 516 will be beneficial to women and will tackle the perception that men have of them. It will also enable local authorities to make a legitimate choice about whether they wish this type of entertainment – I would place inverted commas around that word – to be allowed to operate in their areas.” (Scottish Parliament Justice Committee 2010i, col 3121)

In response to the amendment, the Justice Secretary stated that:

“We understand and support Sandra White’s wish for communities to be able to refuse to host venues that provide such entertainment, but we have significant concerns about amendment 516. Although we support the policy intention behind the amendment, in giving local authorities that discretion, (...) there are drafting difficulties with the amendment in its current form, which will require to be addressed.

I therefore ask Sandra White to withdraw amendment 516, with an offer from us to assist and support a stage 3 amendment that clarifies exactly when an adult entertainment licence is required and the premises for which it is required.” (Scottish Parliament Justice Committee 2010i, cols 3123-3124)

Sandra White accepted the Justice Secretary’s offer and, with the agreement of the committee, withdrew her amendment.

Alcohol

The Bill as introduced included provisions relating to off-sales purchases of alcohol by people under the age of 21 (section 129) and a social responsibility levy on licensed premises (section 140). However, the Justice Committee’s Stage 1 Report (2009) noted that:

“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.” (Scottish Parliament Justice Committee 2009, para 557)

In November 2009, the Scottish Government introduced the [Alcohol etc \(Scotland\) Bill](#) containing a range of measures relating to the sale of alcohol, including provisions concerning the purchase of alcohol by people under the age of 21 and a social responsibility levy on licensed premises. Further information on this bill is set out in a separate [SPICe briefing](#) (Robson 2010).

Scottish Government amendments removing sections 129 and 140 from the Bill were agreed at stage 2.

SOURCES

Alcohol etc (Scotland) Bill [as introduced] Session 3 (2009). SP Bill 34. Edinburgh: Scottish Parliament. Available at: <http://www.scottish.parliament.uk/s3/bills/34-AlcoholEtc/b34s3-introd.pdf>

Children’s Hearings (Scotland) Bill [as introduced] Session 3 (2010). SP Bill 41. Edinburgh: Scottish Parliament. Available at: <http://www.scottish.parliament.uk/s3/bills/41-ChildrensHearing/b41s3-introd.pdf>

Clive, E et al. (2003) *A Draft Criminal Code for Scotland*. Edinburgh: Scottish Law Commission. Available at: http://www.scotlawcom.gov.uk/downloads/cp_criminal_code.pdf

Coulsfield, Lord. (2007) *Review of the Law and Practice of Disclosure in Criminal Proceedings in Scotland*. Edinburgh: Scottish Government. Available at: <http://www.scotland.gov.uk/Publications/2007/09/11092728/0>

Criminal Justice and Licensing (Scotland) Bill [as introduced] Session 3 (2009). SP Bill 24. Edinburgh: Scottish Parliament. Available at: <http://www.scottish.parliament.uk/s3/bills/24-CrimJustLc/b24s3-introd.pdf>

Criminal Justice and Licensing (Scotland) Bill: Policy Memorandum Session 3 (2009). SP Bill 24-PM. Edinburgh: Scottish Parliament. Available at: <http://www.scottish.parliament.uk/s3/bills/24-CrimJustLc/b24s3-introd-pm.pdf>

Criminal Justice and Licensing (Scotland) Bill [as amended at stage 2] Session 3 (2010). SP Bill 24A. Edinburgh: Scottish Parliament. Available at: <http://www.scottish.parliament.uk/s3/bills/24-CrimJustLc/b24as3-amend.pdf>

Expert Group on Prostitution in Scotland. (2004) *Being Outside: Constructing a Response to Street Prostitution*. Edinburgh: Scottish Executive. Available at: <http://www.scotland.gov.uk/Publications/2004/12/20410/48751>

Harris v HM Advocate. (2009) Appeal Court, High Court of Justiciary. Available at: <http://www.scotcourts.gov.uk/opinions/2009HCJAC80.html>

McCallum, F. (2009a) *Criminal Justice and Licensing (Scotland) Bill: Fingerprint and DNA Data*. SPICe Briefing 09/30. Available at: <http://www.scottish.parliament.uk/business/research/briefings-09/SB09-30.pdf> [Accessed 3 June 2010]

McCallum, F. (2009b) *Criminal Justice and Licensing (Scotland) Bill: Short Custodial Sentences*. SPICe Briefing 09/31. Available at: <http://wwwscottish.parliament.uk/business/research/briefings-09/SB09-31.pdf> [Accessed 3 June 2010]

McCallum, F. (2009c) *Criminal Justice and Licensing (Scotland) Bill: Disclosure of Evidence*. SPICe Briefing 09/38. Available at: <http://www.scottish.parliament.uk/business/research/briefings-09/SB09-38.pdf> [Accessed 3 June 2010]

Robson, K. (2010) *Alcohol etc (Scotland) Bill*. SPICe Briefing 10/13. Available at: <http://www.scottish.parliament.uk/business/research/briefings-10/SB10-13.pdf> [Accessed 3 June 2010]

Ross, G. (2009a) *Criminal Justice and Licensing (Scotland) Bill: Community Penalties in Scotland*. SPICe Briefing 09/32. Available at: <http://www.scottish.parliament.uk/business/research/briefings-09/SB09-32.pdf> [Accessed 3 June 2010]

Ross, G. (2009b) *Criminal Justice and Licensing (Scotland) Bill: Scottish Sentencing Council*. SPICe Briefing 09/35. Available at: <http://www.scottish.parliament.uk/business/research/briefings-09/SB09-35.pdf> [Accessed 3 June 2010]

Scottish Government. (2010a) *Criminal Justice and Licensing (Scotland) Bill – Scottish Government Response to the Stage 1 Report*. Available at: <http://www.scottish.parliament.uk/s3/committees/justice/inquiries/CriminalJusticeandLicensing/Correspondence/20100203SGresponsetoStage1report.pdf> [Accessed 3 June 2010]

Scottish Government. (2010b) *Criminal Proceedings in Scottish Courts, 2008-09*. Statistical Bulletin – Crime and Justice Series. Edinburgh: Scottish Government. Available at: <http://www.scotland.gov.uk/Publications/2010/03/03114034/0>

Scottish Government. (2010c) *Move to Strengthen Law on Stalking*. News release 21 February 2010. Edinburgh: Scottish Government. Available at: <http://www.scotland.gov.uk/News/Releases/2010/02/19173653> [Accessed 3 June 2010]

Scottish Government. (2010d) *Double Jeopardy: Consultation Paper*. Edinburgh: Scottish Government. Available at: <http://www.scotland.gov.uk/Publications/2010/03/22113128/0>

Scottish Government. (2010e) Letter to the Scottish Law Commission dated 31 March 2010. Available at: http://www.scotlawcom.gov.uk/downloads/minresp/minresp_rep218.pdf [Accessed 3 June 2010]

Scottish Law Commission. (2002) *Report on Age of Criminal Responsibility*. Scot Law Com No 185. Edinburgh: The Stationery Office. Available at: <http://www.scotlawcom.gov.uk/downloads/rep185.pdf>

Scottish Law Commission. (2004) *Report on Insanity and Diminished Responsibility*. Scot Law Com No 195. Edinburgh: The Stationery Office. Available at: <http://www.scotlawcom.gov.uk/downloads/rep195.pdf>

Scottish Law Commission. (2009) *Report on Double Jeopardy*. Scot Law Com No 218. Edinburgh: The Stationery Office. Available at:
<http://www.scotlawcom.gov.uk/downloads/reps/rep218.pdf>

Scottish Parliament. (2009) *Official Report 26 November 2009 (Session 3) – Criminal Justice and Licensing (Scotland) Bill: Stage 1*. Cols 21574-21609 and 21661-21694. Edinburgh: Scottish Parliament. Available at:
<http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-09/sor1126-02.htm#Col21574>

Scottish Parliament Education, Lifelong Learning and Culture Committee. (2010) *Official Report 13th meeting 2010, Session 3, 5 May 2010*. Cols 3511-3546. Edinburgh: Scottish Parliament. Available at: <http://www.scottish.parliament.uk/s3/committees/ellc/or-10/ed10-1302.htm#Col3511>

Scottish Parliament Justice Committee. (2009) *18th Report, 2009 (Session 3): Stage 1 Report on the Criminal Justice and Licensing (Scotland) Bill*. SPP 334. Edinburgh: Scottish Parliament. Available at: <http://www.scottish.parliament.uk/s3/committees/justice/reports-09/jur09-18-01.htm>

Scottish Parliament Justice Committee. (2010a) *Criminal Justice and Licensing (Scotland) Bill: Written Submissions Received at Stage 2*. Available at:
<http://www.scottish.parliament.uk/s3/committees/justice/inquiries/criminaljusticeandlicensing/Stage2submissions.htm> [Accessed 3 June 2010]

Scottish Parliament Justice Committee. (2010b) *Official Report 11th meeting 2010, Session 3, 23 March 2010*. Cols 2775-2832. Edinburgh: Scottish Parliament. Available at:
<http://www.scottish.parliament.uk/s3/committees/justice/or-10/ju10-1102.htm#Col2775>

Scottish Parliament Justice Committee. (2010c) *Official Report 8th meeting 2010, Session 3, 2 March 2010*. Cols 2686-2720. Edinburgh: Scottish Parliament. Available at:
<http://www.scottish.parliament.uk/s3/committees/justice/or-10/ju10-0802.htm#Col2686>

Scottish Parliament Justice Committee. (2010d) *Official Report 12th meeting 2010, Session 3, 13 April 2010*. Cols 2834-2890. Edinburgh: Scottish Parliament. Available at:
<http://www.scottish.parliament.uk/s3/committees/justice/or-10/ju10-1202.htm#Col2834>

Scottish Parliament Justice Committee. (2010e) *Official Report 13th meeting 2010, Session 3, 20 April 2010*. Cols 2898-2945. Edinburgh: Scottish Parliament. Available at:
<http://www.scottish.parliament.uk/s3/committees/justice/or-10/ju10-1302.htm#Col2898>

Scottish Parliament Justice Committee. (2010f) *Criminal Justice and Licensing (Scotland) Bill – written submission from Professor R A Duff, Professor L Farmer, Professor S E Marshall, Professor V Tadros and Dr M Renzo*. Available at:
<http://www.scottish.parliament.uk/s3/committees/justice/inquiries/criminaljusticeandlicensing/CJL.S2.47%20Professor%20RA%20Duff.pdf> [Accessed 3 June 2010]

Scottish Parliament Justice Committee. (2010g) *Official Report 14th meeting 2010, Session 3, 27 April 2010*. Cols 2954-3044. Edinburgh: Scottish Parliament. Available at:
<http://www.scottish.parliament.uk/s3/committees/justice/or-10/ju10-1402.htm#Col2954>

Scottish Parliament Justice Committee. (2010h) *Official Report 15th meeting 2010, Session 3, 4 May 2010*. Cols 3051-3104. Edinburgh: Scottish Parliament. Available at:
<http://www.scottish.parliament.uk/s3/committees/justice/or-10/ju10-1502.htm#Col3051>

Scottish Parliament Justice Committee. (2010i) *Official Report 16th meeting 2010, Session 3, 11 May 2010*. Cols 3112-3149. Edinburgh: Scottish Parliament. Available at:
<http://www.scottish.parliament.uk/s3/committees/justice/or-10/ju10-1602.htm#Col3112>

RELATED BRIEFINGS

[SB 09-30 Criminal Justice and Licensing \(Scotland\) Bill: Fingerprint and DNA Data \(251KB pdf\)](#)

[SB 09-31 Criminal Justice and Licensing \(Scotland\) Bill: Short Custodial Sentences \(257KB pdf\)](#)

[SB 09-32 Criminal Justice and Licensing \(Scotland\) Bill: Community Penalties in Scotland \(251KB pdf\)](#)

[SB 09-35 Criminal Justice and Licensing \(Scotland\) Bill: Scottish Sentencing Council \(255KB pdf\)](#)

[SB 09-38 Criminal Justice and Licensing \(Scotland\) Bill: Disclosure of Evidence \(289KB pdf\)](#)

Scottish Parliament Information Centre (SPICe) Briefings are compiled for the benefit of the Members of the Parliament and their personal staff. Authors are available to discuss the contents of these papers with MSPs and their staff who should contact Frazer McCallum on extension 85189 or email frazer.mccallum@scottish.parliament.uk. Members of the public or external organisations may comment on this briefing by emailing us at spice@scottish.parliament.uk. However, researchers are unable to enter into personal discussion in relation to SPICe Briefing Papers. If you have any general questions about the work of the Parliament you can email the Parliament's Public Information Service at sp.info@scottish.parliament.uk.

Every effort is made to ensure that the information contained in SPICe briefings is correct at the time of publication. Readers should be aware however that briefings are not necessarily updated or otherwise amended to reflect subsequent changes.

www.scottish.parliament.uk