The Committee will meet at 1.45pm in the Chamber.

1. **Items in private**: The Committee will consider whether to discuss items 2 and 7 in private, and whether to discuss lines of questioning for witnesses on the Prison Estates Review in private at future meetings.

2. **Prison Estates Review**: The Committee will discuss lines of questioning for witnesses.

3. **Prison Estates Review**: The Committee will consider whether to appoint an adviser.

4. **Subordinate Legislation**: The Committee will consider the following statutory instruments—

   The Adults with Incapacity (Supervision of Welfare Guardians etc by Local Authorities) (Scotland) Regulations 2002 (SSI 2002/95)

   The Adults with Incapacity (Reports in Relation to Guardianship and Intervention Orders) (Scotland) Regulations 2002 (SSI 2002/96)

   The Adults with Incapacity (Recall of Guardians’ Powers) (Scotland) Regulations 2002 (SSI 2002/97)
5. **Petitions:** The Committee will consider the following petitions —

PE29 by Alex and Margaret Dekker,

PE55, PE299 and PE331 by Ms Tricia Donegan, and

PE111 by Mr Frank Harvey.

6. **Prison Estates Review:** The Committee will take oral evidence on the Prison Estates Review from—

Roger Houchin, former Governor of HM Prison Barlinnie, and

Bill Rattray, former Governor of HM Prison Peterhead.

7. **Regulation of the legal profession inquiry:** The Committee will consider a revised future options paper for the inquiry.

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Alison Taylor
Acting Clerk to the Committee, Tel 85195

**The following papers are attached for this meeting:**

**Agenda item 3:**
Note by the Clerk

**Agenda item 4:**
Note by the Clerk (SSI’s attached) (TO FOLLOW)
Note by the Clerk (SSI attached) (TO FOLLOW)

**Agenda item 5:**
Note by SPICe and the Clerk (petitions PE29, PE55, PE299, PE331, PE111 attached)
Correspondence from petitioner

**Agenda item 6:**
Note by the Clerk (private paper) (TO FOLLOW)
Briefing paper/research note by SPICe (TO FOLLOW)
Written report for HM Prison Peterhead visit (private paper)
Correspondence from Alec Salmond MP and the Minister for Justice regarding HM Prison Peterhead
Correspondence regarding the Prison Estates Review (private paper)
Report by Professor W L Marshall on HM Prison Peterhead
Agenda item 7:
Note by the Clerk (private paper) (TO FOLLOW)  J1/02/11/11
Faculty of Advocates revised Disciplinary Rules  J1/02/11/12
Supplementary evidence by Professor Alan Paterson:
Regulatory regimes in parts of the Antipodes and in Ontario, Canada  J1/02/11/13
Office of the Legal Services Commissioner  J1/02/11/14
Edited communications from Steve Mark, Legal Services Commissioner, New South Wales  J1/02/11/15

Papers not circulated:

Committee members may wish to note that copies of the Scottish Executive report on responses to the consultation on Procedures for a Victim’s Statements Scheme are available from the Committee Clerks at Room 3.11, Committee Chambers.

Agenda item 4:
Committee members may wish to consult the Adults with Incapacity (Scotland) Act 2000. Copies of the Act may be obtained via the Scottish Parliament website at (http://www.scottish.parliament.uk/parl_bus/bill-final.htm#5) or from Scottish Parliament Document Supply.

Agenda item 7:
Committee members may wish to note that the ‘Review of Regulation of the Legal Profession in Victoria’ report is now available via the Department of Justice in Victoria, Australia at (www.justice.vic.gov.au) or from the Committee Clerks at Room 3.11, Committee Chambers.

Papers for information circulated for the 11th meeting, 2002

Scottish Executive report on Youth Crime by the Feasibility Group (Committee members only, copies available from the Scottish Executive website at (http://www.scotland.gov.uk/publications/recent.aspx)  J1/02/11/16
Minutes of 10th meeting, 2002  J1/02/10/M
JUSTICE 1 COMMITTEE

Appointment of adviser on the Prison Estates Review

Note by the Clerk

1. The Executive published its consultation on the future of the Scottish Prison Estate on 21 March. The Committee has agreed to examine the review, and will take oral evidence from a number of witnesses over the next month.

2. The Financial Review of the Scottish Prison Service Estates Review, prepared by PricewaterhouseCoopers, was also published on 21 March. This document outlines the options considered in the Prison Estates Review and the approach taken in establishing the cost of each option. It is suggested that the Committee might find it helpful to have an expert adviser to assist in analysing this information. The role of the adviser could include:

- briefing the Committee on the financial review of the options considered in the Prison Estates Review;
- summarising the issues relating to the financial aspects of the review arising from oral evidence;
- advising the Committee on suggested lines of questioning on the financial aspects of the review;
- drawing out key issues relating to the financial aspects of the review for the Committee’s report on the review.

3. The Committee is asked to agree to the appointment of an adviser to assist in consideration of the financial aspects of the Prison Estates Review.
JUSTICE 1 COMMITTEE

The Adults with Incapacity (Supervision of Welfare Guardians’ etc by Local Authorities) (Scotland) Regulations 2002 (SSI 2002/95)

The Adults with Incapacity (Reports in Relation to Guardianship and Intervention Orders) (Scotland) Regulations 2002 (SSI 2002/96)

The Adults with Incapacity (Recall of Guardians’ Powers (Scotland) Regulations 2002 (SSI 2002/97)

The Adults with Incapacity (Non-compliance with Decisions of Welfare Guardians (Scotland) Regulations 2002 (SSI 2002/98)

Note by the Clerk

Background
1. These four instruments relate to Parts 1 and 6 of the Adults with Incapacity (Scotland) Act 2000 (‘the Act’) and deal specifically with the functions of local authorities and provisions relating to welfare guardianship for those adults covered by the Act. The instruments and Scottish Executive Notes are attached.

2. The Scottish Executive has recently published Codes of Practice for the Act which can be obtained from the Scottish Executive web-site at (http://www.scotland.gov.uk/justice/incapacity/codes.asp) and which contain extensive guidance on the practicalities of these instruments and on the Act generally.

The instruments
3. SSI 2002/95 makes provision for the supervision of welfare guardians by local authorities. It also provides for supervision by local authorities of a person authorised under an intervention order with welfare powers where ordered by a sheriff under section 10 of the Act. The regulations detail local authority duties regarding supervisory visits to welfare guardians and information to be supplied to the local authority. Where a guardian has been appointed for at least a year, the local authority can visit them to check whether they are promoting and safeguarding the adult's interests, at intervals of not more than 3 months. A sheriff using powers under section 10 of the Act can specify the frequency of visits.

4. The Committee considered and noted a similar instrument, The Adults with Incapacity (Supervision of Welfare Attorneys by Local Authorities) (Scotland) Regulations 2001 (SSI. 2001/77) at it meeting on 27 March 2001.

5. SSI 2002/96 prescribes the reports required to accompany an application for a guardianship or intervention order under Part 6 of the Act. Schedules 1 to 10 set out the format that reports from medical practitioners, mental health officers, chief social work officers and persons as defined in section 57(3)(b)(i) and (ii) of the Act should take (please note section 57 of the Act will be commenced on 1 April 2002).
6. SSI 2002/97 prescribes the forms required for the Mental Welfare Commission (MWC) or the local authority to recall the powers of a welfare guardian either on application to them or at their own request. It is worth noting that a local authority cannot recall a welfare guardian’s powers where the guardian is the chief social work officer. Regulation 3 stipulates that if the grounds for recall are due to the adult becoming capable, then application for recall must be accompanied by a medical report. Schedules 1 to 9 detail the layout of the forms.

7. SSI 2002/98 makes provision for applications for an order, or warrant, to enforce the decision of a welfare guardian and prescribes the period within which the named person can object to the application. The associated Codes of Practice makes clear at paragraphs 6.125 – 6.127 ‘Enforcing a guardian’s welfare decision’, that before granting such a warrant or order, a sheriff would have to be satisfied that it would benefit the adult and was the only way to achieve this benefit. The sheriff should also have regard to whether it was appropriate to the third party and they were able to comply. It is expected that this power should seldom be used.

Financial Implications
8. Implementation of the Act by local authorities will cost approximately £1 million annually. This additional expenditure has been budgeted for.

Subordinate Legislation Committee scrutiny
9. The Subordinate Legislation Committee considered SSI 2002/96, SSI 2002/97 and SSI 2002/98 at its meeting on 12 March 2002 and determined that the attention of the Parliament need not be drawn to these instruments (Subordinate Legislation Committee, 15th Report, 2002).

10. The Subordinate Legislation Committee considered SSI 2002/95 at its meeting on 19 March 2002 and determined that the attention of the Parliament should be drawn to it (Subordinate Legislation Committee, 16th Report, 2002).

11. The comments of the Subordinate Legislation Committee and answer from the Scottish Executive are attached below. The Subordinate Legislation Committee was content with the reply received:

The Committee noted that regulation 4 revokes Regulations made under powers other than the powers under which this instrument is made. As it is not obvious that section 86(2) of the Adults with Incapacity (Scotland) Act 2002 provides sufficient power for this purpose, the Committee asked the Executive to explain why the enabling powers relevant to the Regulations referred to in regulation 4 were not also cited as enabling powers.

The Executive, in a full and courteous reply, explained that the Regulations revoked in regulation 4 of the instrument make provision for the supervision of guardians appointed under the Mental Health (Scotland) Act 1984 (c.36) ("the 1984 Act"), and the duties of those guardians.

Paragraph 2 of schedule 4 to the Adults with Incapacity (Scotland) Act 2000 ("the 2000 Act"), provides that any person holding office as guardian of an adult under the 1984 Act shall become guardian of that adult under the 2000 Act when that paragraph comes into force (on 1st April 2002).
The instrument replaces the provisions of the regulations being revoked with provisions relating to all 2000 Act guardians, including former 1984 Act guardians. The Executive considers that this revocation is necessary as a consequence of the above instrument and so is enabled by the power, at section 86(2) of the 2000 Act, to "make such incidental, supplemental, consequential or transitional provision or savings as appear to the Scottish Ministers to be appropriate."\(^1\)

**Procedure**

12. Under Rule 10.4, these instruments are subject to negative procedure which means that they come into force and remain in force unless the Parliament passes a resolution, not later than 40 days after the instruments are laid, calling for its annulment. Any MSP may lodge a motion seeking to annul such an instrument and, if such a motion is lodged, there must be a debate on the instrument at a meeting of the Committee.

13. The instruments were laid on 7 March 2002 and are subject to annulment under the Parliament’s standing orders until 30 April 2002.

14. In terms of procedure, unless a motion for annulment is lodged, no further action is required by the Committee.

\(^1\) Subordinate Legislation Committee, 16th Report 2002
JUSTICE 1 COMMITTEE

The Restriction of Liberty Order (Scotland) Amendment Regulations 2002
(SSI 2002/119)

Note by the Clerk

Background
1. These regulations amend the Restriction of Liberty Order (Scotland) Regulations 1998 ("the 1998 Regulations") which regulate aspects of the monitoring, by electronic and radio devices, of the compliance of offenders with requirements of restriction of liberty orders.

2. From the 1 May 2002, Restriction of Liberty Orders (RLOs) will be available throughout Scotland, following a positive outcome from the pilot projects in Aberdeen, Peterhead and Ayr.

3. The regulations specifically prescribe the courts, or classes of courts able to make RLOs. This instrument also regulates the means by which compliance with the orders is monitored.

4. The Subordinate Legislation Committee (SLC) considered the Restriction of Liberty Order (Scotland) Amendment Regulations 2002 for the first time at its meeting on 19 March 2002 and agreed to request a response from the Executive on a number of points. The SLC considered the instrument again on 26 March and agreed that the Parliament’s attention be drawn to the Regulations for minor technical errors (extract from the Subordinate Legislation Committee, 18th Report 2002 attached).

Procedure

5. Under Rule 10.4, this instrument is subject to negative procedure which means that it comes into force and remains in force unless the Parliament passes a resolution, not later than 40 days after the instrument is laid, calling for its annulment. Any MSP may lodge a motion seeking to annul such an instrument and, if such a motion is lodged, there must be a debate on the instrument at a meeting of the Committee.

6. The instrument was laid on 11 March 2002 and is subject to annulment under the Parliament’s standing orders until 4 May 2002.

7. In terms of procedure, unless a motion for annulment is lodged, no further action is required by the Committee.
Briefing on Dangerous Driving and the Law

Petitions

Note by SPICe and the Clerks

1. This paper outlines current road traffic legislation and provides a summary of the research carried out by the Department of Transport, Local Government and the Regions (DTLR) which is contained in the report, ‘Dangerous Driving and the Law’. It then provides a brief analysis of certain recommendations from the research which may be used to address some of the concerns outlined in the petitions received by the Committee on this subject.

Current Legislation

2. There are three offences which relate to the substance of the petitions received by the Committee and which were also the focus of the research carried out by the DTLR:

- Causing death by dangerous driving;
- Dangerous driving; and
- Careless and inconsiderate driving.

3. According to current legislation, a driver is guilty of dangerous driving if:

- The way he or she drives falls far below what would be expected of a competent and careful driver; and
- It would be obvious to a competent and careful driver that driving in that way would be dangerous.

4. Whereas dangerous is explicitly defined in the Road Traffic Act (RTA) 1991, careless is not. There are two forms of the careless and inconsiderate driving offence:

- Driving without due care and attention;
- Driving without reasonable consideration for other road users.

5. So far as the first is concerned, the evidence must show that the defendant’s driving fell below the required standard, in that he was not displaying the proper care and attention of a reasonable, competent and prudent driver. For the second, in England and Wales, the evidence must show that other road users were inconvenienced by the inconsiderate driving of the defendant. However, in Scotland, it does not appear to be

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1 Road Safety Research Report No. 26; DTLR January 2002.
established whether the prosecution is required to prove that actual inconvenience was caused to other road users or whether such inconvenience was merely liable to occur\(^2\). Although these two different forms of the offence require different types of evidence, they are often referred to under the general heading of *careless driving*.

<table>
<thead>
<tr>
<th>Table 1: Penalties for offences</th>
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<tr>
<td>Offence</td>
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<tr>
<td>Imprisonment</td>
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<td>-------------------</td>
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<tr>
<td>Causing death by dangerous driving*</td>
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<tr>
<td>Dangerous driving*</td>
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<tr>
<td>Causing death by careless driving when under the influence of drink or drugs</td>
</tr>
<tr>
<td>Careless and inconsiderate driving</td>
</tr>
</tbody>
</table>

(* Where a court disqualifies a person on conviction for one of these offences, it must order an extended re-test – about twice as long as the ordinary driving test. The courts also have discretion to order a re-test for any other offence which carries penalty points; an extended test where disqualification is obligatory, and an ordinary test where disqualification is not obligatory.)

**Summary of the Research**

6. The research carried out by DTLR suggests that if it is reasonable to assume that driving a car demands a duty of care on the part of the driver, then *careless driving* is clearly a failure to exercise the required degree of care. It might be assumed that dangerous driving is a quite different type of behaviour. Not a failure to exercise care but a planned behaviour and one where the driver intentionally drives in a certain way without regard to the safety of other road users, whilst also being aware of the danger that driving in such a way poses. Although this appears to provide a quite clear distinction between the two offences, it is evident from the research that, in practice, the distinction is not clear. In many ways they are not regarded as distinct offences, but as an arbitrary distinction between the most ‘serious’ bad driving and the rest, with a significant grey area covering offences which could be interpreted one way or another.

7. The North Report (Department of Transport 1988) described how an effect of road traffic law is to place an onus or duty on the driver to exercise care, to look for signs, to keep an eye on the speedometer, and to look carefully when emerging at junctions. Offences, the Report notes, that will often be ones of omission not commission. The earlier offences of reckless driving and causing death by reckless driving were problematic to English and Welsh courts primarily because it was held to be necessary to prove the state of mind of the driver. This requirement to show *mens rea*, generally held to be central to the concept of criminal liability involves a subjective enquiry into the actual state of mind of the accused at the time of the offence. The rejection of this principle is, perhaps, an indication of the separation of motoring offences from the rest of criminal law.

8. The changes in legislation brought about by the 1991 Road Traffic Act were intended to focus attention on the standard of driving rather than the mental state of the driver. Taken at face value, this seems to imply that a manoeuvre which poses a danger to other road users should attract equal punishment regardless of whether the driver carried out that manoeuvre deliberately (in order to make speedier progress, for example) and was aware of the risk, or by mistake. The research suggests that this seems to be at odds with most people’s sense of justice. The research shows that it is “certainly not the way in which the law is being interpreted by the agencies involved in prosecution.”

Section 2A(3) of the 1991 Road Traffic Act states:

“...regard shall be had not only to the circumstances of which he could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused”.

9. Consideration is given, when deciding the appropriate charge and debates in court, as to whether the driver was aware of the risks he or she was taking. For example, if a defendant was driving the wrong way up a one way road, which is potentially dangerous, it is natural to ask whether he or she was aware that they were entering a one way road. If in fact a driver *intentionally* drove up a one way road it seems likely that the verdict would be that he or she was guilty of *dangerous driving*. The difference here as the research points out, is one of intention. How much the intentions of the defendant should direct the charge is a key issue. In examining intentions there is a need to be clear about whether it is intention to harm, intention to violate or intention to take risks, which is in question.

10. In modern law, if A injures B, the legal consequences will depend on A’s state of mind at the time. If it was A’s intention to injure B, they may be liable to criminal prosecution and punishment. There is an argument which suggests that recklessness here equates with intention. If this were accepted, then this would give the same weight to an intention to take risk as an intention to harm. If there was no intention to injure they will not be

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criminally liable, but B may succeed in a civil action against A if they can show that A was negligent. If this were accepted as the basis for defining bad driving offences, it would follow that ‘reckless’ driving would be a criminal offence requiring proof of the state of mind of the driver, and ‘careless’ driving would not be a criminal offence but would be a matter of civil liability. Clearly, this is not the case. Arguments can also be found for the inclusion of various degrees of negligence in criminal liability.

11. One explanation for the differences between the meaning of expressions like ‘inadvertently’ and ‘negligently’ says that the former describes only the state of mind in which someone acted, whereas the latter also refers to the fact that he failed to comply with a standard of conduct with which any reasonable person could and would have complied. To define the degree of negligence which might be liable to criminal prosecution is a difficult task, and to describe it in such a way as to be universally interpreted in the same way even more so.

12. Attempts to grasp the underlying legal principles are confused further by the semantics used in describing both the actions and the consequences of bad driving. The DTLR research points out that it is common practice to refer to ‘accidents’ even when there is no doubt that the collision was caused entirely by the bad driving of another driver. Furthermore, the term ‘careless’ is generally used to refer to minor omissions with no serious consequences, whereas careless driving may result in a death. It is a common complaint from those who lobby for changes in the law that ‘carelessness’ is not an appropriate description for a failure to drive in a responsible and safe manner. The problem here is that ‘careless’ can refer to any failure in care, from minor instances to those where taking care is of critical importance. “Whilst it clearly encompasses a failure to fulfil a duty of care, everyday use of the term has trivialised it.”

13. Another key issue, which was discussed in the North Report and which still causes debate, is the extent to which the consequences of driving in a certain way should be taken into account. There are conflicting schools of thought on this. What is clear, is that two similar pieces of driving can result in a collision in one instance and have no consequences in another. Similarly, whether a fatality results from a collision depends upon a number of circumstances, some of which are unrelated to the blameworthiness of the driver.

14. The principle that the gravity of a crime is a function not only of the offender’s intention to cause harm, but of the actual harmfulness of the conduct is applied in many cases in the sentencing policy of courts, but less so in the classification of offences. It is apparent that actual harmfulness is relevant in motoring offences, however, in the existence of two dangerous driving offences, the only difference between them being the consequences. The differing penalties available for these two offences (see Table 1) further reinforce an underlying belief that the consequences

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5 Criminal Responsibility, Jacobs, FG 1971.
alone make the offence of *causing death by dangerous driving* a more serious one. This difference may be regarded as reflecting the view of society on the sanctity of human life.

15. One of the key questions addressed by the DTLR research is whether there ought to be an offence of *causing death by careless driving* to ‘fill the gap’. The research emphasises that it is important to be clear what legal and moral principles would be behind a decision to create such an offence. The absence of this offence currently implies a view that the sort of behaviour which falls into the category of *careless driving* is not of sufficient culpability that society would wish to hold the driver responsible for the consequences as well as of the behaviour itself. It is true that, as in instances of *careless driving*, whether or not an act of *dangerous driving* results in a fatality is, at least partly, a matter of chance. The difference between the two categories of offence, (which lies behind the argument to create a separate offence of *causing death by dangerous driving* but not one of *causing death by careless driving*), must be that the behaviour categorised as ‘dangerous’ carries sufficient culpability that it exposes the motorist to the additional risk of being held responsible for the consequences of his or her actions as well as the action itself.

16. The research suggests that the disquiet expressed at some of the decisions taken in court is fuelled by uncertainty as to whether the consequences of bad driving should be a factor in determining both the charge and the sentence. It could be argued, for example, that as the consequences of overtaking on a blind bend may be a fatal accident in one instance, but nothing in another, the consequences should be irrelevant. The decision to undertake such a dangerous manoeuvre is what should be punished, and the fact that no car was coming in the other direction is sheer luck which in no way detracts from the nature of the offence. However, a recent decision in the Court of Appeal stated:"

“It is often a matter of chance whether death or serious injury results from even a serious breach. Generally, where death is the consequence of a criminal act it is regarded as an aggravating feature of the offence. The penalty should reflect the public disquiet at the unnecessary loss of life.”

17. It is clear from the above that there are a number of issues which are relevant in the determination of offences.

**Sheriff Court v High Court**

18. The majority of driving offences in Scotland, including that of *causing death by dangerous driving* are dealt with in the sheriff court. (Only one of the cases observed during the DTLR research was remitted to the High Court). It has been argued, by victims and by various campaigning groups, that all serious cases ought to be indicted in the High Court. The sheriff court can impose a maximum penalty of 3 years. As the maximum penalty for *causing death by dangerous driving* is 10 years, it seems strange that cases are normally tried in a court which could not impose the maximum
penalty. A sheriff does have the power to remit solemn cases to the High Court, if he considers that his sentencing powers are inadequate. However, concern has been expressed by campaigners that the current system of initiating solemn cases in the sheriff court implies that their sentencing powers are adequate for the majority of cases. There is also concern that courts do not use the maximum penalties available to them. The research found that penalties are, on average, substantially below the maximum. It could be argued that a clearer message regarding the seriousness of these offences would be sent to both defendant and society if all causing death by dangerous driving cases were tried in the High Court.

**Recommendations**

19. The following recommendations from the research have been highlighted as they address most of the issues which have been raised by the petitions received by the Committee.

19.1 In any offence where consequences form part of the charge, then serious injury should be taken into account as well as death. The current offence of causing death by dangerous driving should therefore be extended to include severe injuries. This would recognise the suffering and impact that severe and permanent injuries have both on victims and their families.

19.2 A consultation exercise should be carried out to assess how the introduction of an intermediate offence, to sit between the current offences of dangerous driving and careless driving, would be received by the agencies responsible for implementing road traffic legislation and other concerned groups. This offence might be called 'Negligent Driving' and would be defined such that it includes gross carelessness or a serious failure to take sufficient care whilst driving. Behaviour which involves violation or aggression would still be classed as dangerous driving. This new offence would define a duty of care which, if breached, would render the driver liable to more severe penalties than the relatively minor offence of careless driving. If such an offence was introduced, there should also be an offence of causing death/serious injury by negligent driving. The penalty for such offences, which would probably be an 'either way' offence (i.e. could be tried in either the sheriff or High court), would fall between the penalties for dangerous driving and careless driving and would include imprisonment, disqualification and community service.

19.3 The research did not find sufficient argument to recommend the introduction of an offence of causing death by careless driving. It was sufficiently popular, however, amongst respondents that it should also be included in any consultation exercise. If it is decided to introduce such an offence, the range of penalties, and whether they would differ from those available for careless driving, should be carefully considered. It may be necessary to make clear that the purpose of the new offence would be to recognise the fact that a death has been
caused but there should be a clear statement that penalties must be in proportion to culpability.

19.4 There should be a requirement that statistics are kept on the outcome of cases involving fatalities and serious injuries where these do not form part of the charge.

19.5 There is a significant amount of re-offending, suggesting that current penalties are not acting as a sufficient deterrent. As the worst offenders often disregard a disqualification, alternative penalties should be considered. Increased use of vehicle forfeiture and community service could be part of the solution.

19.6 There should be a requirement that convictions for the bad driving offences are kept by the DVLA, if not on the ‘live’ driver record at least in an archive, in order that future monitoring of re-offending can be carried out.

Background to petitions
20. In total the Committee (and the former Justice and Home Affairs Committee) has considered 5 petitions about road traffic offences resulting in a fatality. The Committees agreed to defer consideration of these petitions until the publication by the Department of the Environment, Transport and the Regions of a report into the application of road traffic legislation by the police, prosecutors and courts.

21. Three of the petitions were concerned about drivers being charged with the seemingly lesser offence of careless driving rather than causing death by dangerous driving. The former Justice and Home Affairs Committee considered PE29 and PE55 on 2 May 2000. Justice 1 Committee considered the PE 331 on 27 February 2001:

PE29 – Alex and Margaret Dekker calling for action to be taken in relation to the Crown Office’s decisions and considerations in prosecuting road traffic deaths.

PE55 - Tricia Donegan calling for the Scottish Parliament to conduct an investigation to establish why the full powers of the law are not enforced in all cases which involve death by dangerous driving.

PE 331 – Tricia Donegan calling for the Scottish Parliament to investigate why drivers who have made deliberate decisions when driving which cause risk to the lives of others are classed as careless drivers when prosecuted, even in the event of a fatality.

22. Given the information set out above which highlights the difficulties involved in determining which charge should be brought, the Committee may wish note the recommendation that a consultation exercise be carried out to assess the introduction of an intermediate offence.
23. The Committee considered another petition on 27 February 2001 concerning a case where a driver had knowingly broken the law by driving without insurance, a current MOT and whilst holding only a provisional licence, and had caused the death of another driver:

PE 299 – Tricia Donegan calling for the Scottish Parliament to investigate whether the additional driving offences of failure to possess the correct licence, MOT or insurance documentation should be taken into consideration at court hearings concerning a fatality caused by dangerous driving.

24. There are no specific recommendations in the research which deal with this type of case. However, for the lesser offences, the recommendation which suggests the increased use of vehicle forfeiture and community service may be appropriate.

25. On 7 June 2000, the former Justice and Home Affairs Committee considered a petition that concerned road accidents which may be caused by the police while responding to emergency calls:

PE 111 - Mr Frank Harvey calling for the Scottish Parliament to order a public inquiry into road accidents involving police responding to 999 calls.

26. The police are required to observe road traffic laws with the exception of speed limits from which they, (and the other emergency services) are exempt (Section 87 of the Road Traffic Regulation Act 1984) if observance would hinder the purpose for which the vehicle was being used. Given that the police are subject to the same laws as everyone else, the recommendation at paragraph 19.2 of this note seems as if it could address these circumstances.

27. The Committee has received a submission from Scotland’s Campaign Against Irresponsible Drivers (SCID) (paper number J1/02/11/5) relating to the TRL report. SCID indicated its support for several recommendations in the TRL report, and also suggested:

- there is a need to clarify the definitions of “dangerous” and “careless” driving and so make them less open to interpretation by the police, Procurators Fiscal, sheriffs and juries;
- there is a need for a “hard hitting” education programme informing drivers of the road traffic law and the penalties which can be applied for bad driving offences;
- the victim or victim’s family (in road death cases) should be given the opportunity of making a verbal statement in court at the conclusion of a case but before sentencing.

Procedure
28. The Standing Orders of the Scottish Parliament make clear that, where the Public Petitions Committee refers a petition to another Committee, it is for
that Committee then to take “such action as they consider appropriate” (Rule 15.6.2(a)).

Options
29. The Report from the Department of Transport, Local Government and the Regions is an important piece of research recommending further action to address its findings. There are a number of options which the Committee may wish to pursue.

30. The Committee may wish to write to the Minister for Justice to ask whether he has discussed the recommendations contained within the report with the UK Government and, if so, to report back to the Committee on the outcome of these discussions. The Committee may also wish to include the following points in a letter to the Minister:

- The Committee may wish to indicate its support for a consultation exercise to be carried out to assess how the introduction of an intermediate offence, to sit between the current offences of dangerous driving and careless driving, would be received by the agencies responsible for implementing road traffic legislation and other concerned groups;
- The Committee may wish to consider whether it supports the recommendation that the current offence of causing death by dangerous driving should be extended to include severe injuries. If the Committee supports this recommendation, it may wish to recommend that the Minister make representations to the UK Government that this recommendation should be implemented;
- In its representations to the Committee, SCID outlined its concerns that the TRL report had limited input by Scottish agencies. The Committee may wish to ascertain whether the Minister is content that the situation in Scotland has been adequately investigated or whether there is a need for specific research to be carried out in Scotland (as advocated by SCID);
- The Committee may wish to consider the recommendation that there should be a requirement for convictions for bad driving offences to be kept by the DVLA to assist in monitoring re-offending. If the Committee supports such a recommendation, it may wish to outline its views on the matter to the Minister for Justice.

31. The Committee may also wish to write to the Lord Advocate to ask for a response to the recommendations in the report. In particular:

- The Committee may wish to consider whether it supports the suggestion that all causing death by dangerous cases should be tried in the High Court. The Committee may then consider whether to recommend to the Lord Advocate that this should be implemented;
- SCID supports the recommendation in the TRL report that statistics are kept on the outcome of cases involving fatalities and serious injuries where these do not form part of the charge. The Committee may wish to recommend to the Lord Advocate that the Crown Office should keep such statistics.
32. Alternatively, the Committee may wish to ask the **Minister for Justice and Lord Advocate** to appear before the **Committee** to discuss the recommendations contained within the report and the issues raised by the petitions.

33. SCID has suggested that the Scottish Parliament should set up an **inquiry** into the application of road traffic law in Scotland. The Committee may wish to consider this suggestion. It should be noted, however, that the Committee is currently concluding its inquiries into the Regulation of the Legal Profession and Legal Aid, and plans to carry out an inquiry into Alternatives to Custody. In addition, it is expected that the Title Conditions Bill will be introduced in May and will be referred to this Committee. There will therefore not be sufficient time to carry out an additional inquiry before the Scottish Parliament elections in 2003. If the Committee wishes to pursue any of the issues raised in this paper any further, it could choose to **appoint a reporter** to carry out the work and report back to the Committee. It should be noted, however, that road traffic law is a reserved matter. The Committee can look into reserved matters if it wishes, but may wish to consider whether the impact of such an inquiry would be limited.

34. Alternatively, the Committee may wish to **note the recommendations of the TRL report** and close its consideration of these petitions.
Petitions on Road Traffic Deaths

Response on behalf of SCID to Transport Research Laboratory’s Study

Dangerous Driving and the law
(Evaluation of the working of the Road Traffic Act)

11th April 2002
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Appendix 1 – Petitions to the Scottish Parliament

Appendix 2 – Relevant extracts from Road Traffic Act
Introduction

“People in Scotland have high hopes for their Parliament, and in developing our proposals we have been keen to ensure that these hopes will be met. In particular our recommendations envisage an open, accessible Parliament where power is shared with the people; where people are encouraged to participate in the policy making process which affects our lives; an accountable, visible Parliament; and a Parliament which promotes equal opportunities for all.”


The Transport Research Laboratory’s (TRL) study was commissioned in May 1998 by the now Department of Transport Local Government and the Regions following concerns that the amended Road Traffic Act 1991 was not working as Parliament intended. Presently and in past years there have been numerous debates in the House of Commons and the House of Lords articulating these concerns.

Devolution has provided the Scottish people with the means to voice specific concerns regarding the application of the Road Traffic Act in Scotland and the Scottish Parliament has been given the power in the Committee structure to address these issues. Petitions on road death issues have been submitted to the Public Petitions Committee (see Appendix 1) and have been forwarded to the Justice Committee for their consideration. The Justice Committee suspended further deliberations of the petitions until the publication of the TRL study which was evaluating, nationally, the working the 1991 Road Traffic Act.

Throughout the 2½ year period of the TRL’s research project SCID has raised concerns with MSPs and MPs. We are extremely grateful to the MSPs and Scottish MPs who have shown an interest, the assistance they have given and for their continuing support.

SCID’s concerns included the facts that, the working of the Road Traffic Act could not be evaluated as a national study, as:

a) The UK Road Traffic Act is applied and administered in two different Criminal Justice Systems. Scots Law has evolved quite separately from that in England & Wales.

b) Legal precedents are not shared.

c) The lack of participation in the TRL study by the Scottish agencies. A major part of the research was to evaluate the considerations and decisions made in prosecuting road traffic deaths i.e. “whether a lesser charge was being brought where a higher charge, Causing death by dangerous driving was more appropriate”, one of the main issues expressed in PE 29.

Since the petitions on road deaths have been lodged with the Scottish Parliament the petitioners of PE29 and the petitioner of PE 55, PE 299 and PE 331 have become involved with Scotland’s Campaign against Irresponsible Drivers (SCID) PE 281. This therefore is a collective submission on behalf of SCID which includes comments and proposals intended to aid the Justice Committee in their considerations of road deaths issues before them.

SCID asks the Justice Committee in revisiting the petitions, to have a joined up approach in considering the issues arising from road deaths or serious injury on Scottish roads. This submission makes brief reference to issues arising from the publications:

- Dangerous Driving and the Law, TRL report (DTLR Feb 2002),
- Investigation into Road Deaths in Scotland Internal review carried out by the Quality and Practice Review Unit (QPRU) at the Crown Office (June 2001)
- Strategy for Victims - Victims’ Statement Scheme (Scottish Executive Consultation Paper Nov 2001)
- Road Traffic Penalties (DTLR Consultation Paper Dec 2000)
About SCID

SCID was formed in 1985 by Wendy Moss following the road death of her only son. SCID’s knowledge and experience of road traffic law and how it works in practice has been gained by helping and advising hundreds of Scottish families whose loved one has been killed or seriously injured as a result of a road crash and by attending court cases.

From consultation with other victim support organisations, the trauma experienced by these victim families are akin to those of victim families who have been bereaved by murder.

SCID Objectives:

• To provide practical and emotional support for those who have been injured or bereaved as a result of road crashes.
• To seek to restructure the Law as it applies to Criminal Traffic Offences which have caused Death or Injury.
• To deter irresponsible drivers by the imposition of more relevant sanctions.
• To encourage drivers through education, to adopt safer standards.

SCID is a member of RoadPeace and The Victims’ Forum recently launched by Victim Support Scotland. It would be fair to say that in the past 16 years SCID has sat through more Section 1, Causing death by Dangerous Driving and Section 3 Careless driving cases than many of our representatives in the criminal justice system.

SCID has submitted written evidence to the Justice Committees following their call for evidence into;
Crown Office and Procurator Fiscal Service. (July 2001)
Freedom of Information Legislation (November 2001)
Summary

1. SCID has always campaigned for death and serious injury to be uppermost in a charge. The fact that any person is killed or seriously injured through no fault of their own and is deemed of “no consequence” defies logic.

   **No other criminal charge ignores consequences.**

   This disregard of the law for the sanctity of life is the most difficult for families, friends and communities to understand. While SCID welcomes the TRL report recommendation that an additional charge be introduced to bridge the gap between dangerous and careless, it does not go far enough. SCID supports the view expressed by 55% of respondents in the TRL study that a new charge of Causing death by careless driving should be introduced. Such a charge would require a wider range of penalties available to the court to take into account driving of minor to gross carelessness. SCID welcomes the view expressed in the TRL report that that further consideration of this new charge should be included in a further consultation exercise.

2. While Road Traffic Law is a reserved matter, the application of the law is devolved to Scotland. Part of the TRL remit was to investigate whether a lesser charge e.g. Careless driving was being brought where the higher charge of Causing Death by Dangerous Driving would be more appropriate, particularly as the “downgrading” of charges is of particular concern to SCID. Almost 6,000 fatal accident files from England & Wales were examined by the TRL, **NO files were examined from Scotland**. SCID sees this as a major flaw in the study as the criminal justice system has evolved quite separately north and south of the border.

3. The imminent Freedom of Information Bill recognises the public right of access to information they want to see. The new tracking system *Integration of Scottish Criminal Information Systems* (ISCJIS) now provides the opportunity to flag cases where presently death or serious injury does not form part of the charge. The collection of these statistics was also a recommendation in the TRL report. SCID has long advocated that the collection of these statistics is vital to inform Parliament and other interested agencies to assist in their decision and policy making strategies.

4. PE 281 called for all Causing death by dangerous driving to be heard in the High Court. This charge is commonly heard in Scotland in the Sheriff court. SCID supports the views expressed in the TRL report, which states; “A clearer message regarding the seriousness of these offences would be sent to both defendant and society if all Causing death by dangerous Driving cases was tried in the High Court” and “As the maximum penalty for Causing death by dangerous driving is 10 years, it seems strange that the cases are normally tried in a court which could not impose the maximum penalty.”

5. There is a need to clarify the definitions of “dangerous” and “careless” driving and so make them less open to interpretation by police, Procurators fiscal, sheriffs and juries, than is presently the case. One consideration is the adoption of a nationally agreed Charging Standards. This view in part has already been recognised by QPRU *Investigation of Road Deaths in Scotland* recommendation 19 “That the section on Road Traffic Offences in the Handbook of guidance for those investigating cases should be expanded to provide more comprehensive guidelines on the legal requirements of proving contraventions of section 1 or section 3 of the RTA 1988.” For the purpose of the TRL research study, categories of “bad” driving were identified. It would not be impossible to expand on these categories thus identifying, specifically, driving which is “dangerous” and driving which is “careless” and incorporate them into legislation. The *Road Traffic Penalties*, (DTLR consultation document December 2000) has already set
out new proposals for a possible two-tier penalty regime for speeding. If this is accepted it should be expanded upon to give clearer guidelines as to when speed becomes excessive i.e. dangerous.

6. From the experience gained by SCID in attending court cases, there is a real need for Sheriffs to be very clear and careful in interpreting Road Traffic Law and in explaining to jurors the definition of driving which is dangerous or careless e.g. a sheriff directed a jury by saying “dangerous is just what you think it is.”

7. SCID supports the recommendations in the summary of QPRU’s findings of the Investigation of Road Deaths in Scotland. SCID was disappointed that no plan was published by which these recommendations would be actioned. We would ask the Justice committee to inquire what progress has been made especially in the following areas;
   a) Procurators fiscal and police forces to actively manage the investigation of road deaths.
   b) Where there is the possibility of criminal proceedings, Procurators fiscal ensure that all road deaths be reported by full precognition including a contravention of Section 3 of the RTA 1988.
   c) Those prosecuting road deaths visit the locus, with the Reporting Officer, prior to the trial.
   d) Procurators Fiscal to take a direct role in the decision-making process in relation to the instruction of expert witnesses.

8. SCID raised concerns with MSPs and MPs regarding the input to the TRL study by Scottish agencies. These concerns were well founded as the TRL study states that;
   a) “It was not possible to obtain the views of Scottish prosecutors on incorrect charging”
   b) 5,943 fatal accident files were analysed from England & Wales. “It was not possible to obtain similar information for Scottish fatal accident files within this research.” The Scottish police have given assurances that had this information been requested there would have been no difficulty in supplying it.
   c) “It was not possible to obtain the views from a sample of sheriffs, but a brief statement was provided by the Sheriffs’ Association stating that their members find no difficulty in convicting and sentencing drivers under the current legislation.”
   d) The views of 5 Procurators fiscal were obtained on the basis that their views would not be attributed.

As this study ran for 2½ years SCID finds it incomprehensible that the required degree of co-operation was not given by Scottish agencies. SCID asks the Justice Committee to appoint a reporter to investigate and report on the decisions and considerations in prosecuting road deaths as requested in PE29.

9. In view of the level of participation by the Scottish Criminal Justice agencies together with the number of cases attended by SCID, there is a clear need for specific research to be carried out in Scotland in;
   a) The relationship between the choice of court and the sentencing patterns as they apply to section 1, 2, 3 and 3a of the Road Traffic Act.
   b) Consistency in sentencing practices (within and between judges/sheriffs) for cases as they apply to section 1, 2, 3 and 3a of the Road Traffic Act.
10. It is imperative to a fair trial/successful prosecution that a thorough and resource intensive crash investigation be carried out. To that end;
   a) SCID would ask the Scottish Parliament to seek the help of ACPOS to explore ongoing training of crash investigation officers to a higher qualification than the present City & Guilds certificate
   b) SCID would ask the Scottish Parliament to seek the help of ACPOS to explore ongoing training for crash investigation officers to keep them up to date with new advances in crash investigation.

11. SCID supports the TRL recommendation that there should be a requirement for convictions of bad driving offences to be kept by the DVLA, if not on the ‘live’ record at least in an archive to assist in monitoring re-offending.

12. The current use of a driving disqualification as a sanction should be reassessed particularly;
   a) The present situation where the period of disqualification runs concurrently with any custodial sentence handed down.
   b) The option available to the courts of vehicle forfeiture, for drivers who continue to drive whilst disqualified.
   c) Victims or victim families should be consulted on the ‘early’ return of a driving licence to drivers who make application to the court before the full period of disqualification has been completed. Such a consideration would be in keeping with the objectives outlined in the Scottish Executives *Strategy for Victims*.

13. As a fine is levied on the ability to pay, proper proof of offender’s earnings should be made available to the court before a fine is handed down e.g. production of P60 / salary / payslip.

14. To enable the Government to achieve the road safety targets by the year 2010, but more importantly, to reduce the pain and suffering of victims and victim families who continue to be bereaved by irresponsible drivers, a hard hitting education programme informing drivers of the road traffic law and the penalties that can be applied for bad driving offences. However, education is not all, for the law to work these penalties have to be enforced. Irresponsible drivers will continue to take risks because the law is not being applied by the courts. Ineffective sentences trivialise tragedy and condone unacceptable standards of driving.

15. A victim or victim families (in road death cases) should be given the opportunity of making a verbal statement in court at the conclusion of a case but before sentencing. This would balance the defence agents’ mitigation plea. As with the mitigation plea the judge/sheriff may or may not take into account either statement in sentencing. Sentencing is always at the discretion of the judge/sheriff. Sensitive information could be made available to the judge/sheriff by a written medical report. There is a clear need for victims to have a clear legal status within the criminal justice system. Victims, witnesses and defendants have distinct needs and rights and should be considered separately.
1. Application and Administration of UK Road Traffic Act (RTA)

The definitions in the Road Traffic Act which states the criteria for Section 1 *Causing death by dangerous driving* and Section 3 *Careless driving* apply nationally. (Relevant extracts of the RTA Appendix 2)

In theory the definition of “dangerous driving” is a sound one but in practice it has many difficulties. Serious injuries can form no part of any ‘bad’ driving charge. Also the loosely applied definition of “careless driving” as a moment’s inattention (North Report), driving without due care and attention or Driving Without Reasonable Consideration for Other Road Users, on the face of it seems straightforward to careful and competent drivers. In practice a Careless driving charge can cover multiple violations and still be deemed simply “careless”. Death or serious injuries forms no part of this charge.

**SCID has always campaigned for death or serious injury to be uppermost in a charge.**

The UK Road Traffic Act is applied and administered by different criminal justice systems. While both systems are guided by case law, legal precedents are not shared.

The Transport Research Laboratory’s study has shown that for Section 3 *Careless driving* there are different criteria being applied in England & Wales than that used in Scotland, giving rise to two forms of the offence. The TRL study states “These two different forms of the offence (Careless driving) require quite different types of evidence; they are often referred to under the general heading of *Careless driving.*”

It is useful at this stage to compare the application and administration of the UK Road Traffic Act following road deaths in England & Wales with those in Scotland (Table 1) bearing in mind the TRL report has found both systems to be wanting in applying and administering the Road Traffic Act.

<table>
<thead>
<tr>
<th>England &amp; Wales</th>
<th>Scotland</th>
</tr>
</thead>
<tbody>
<tr>
<td>Coroner’s Inquest is held in vast majority of cases.</td>
<td>FAI’s not mandatory</td>
</tr>
<tr>
<td>Police manual - Investigation of Fatal Accidents</td>
<td>Not adopted in Scotland</td>
</tr>
<tr>
<td>Decisions taken on sufficient evidence for offence is based on guidelines in the Driving Offences Charging Standard (CPS, 1996)</td>
<td>Not adopted in Scotland</td>
</tr>
<tr>
<td>Prosecution in Crown Court for section 1 and section 3a of RTA (where 10 year max custodial sentence available to the court)</td>
<td>Prosecution routinely in Sheriff Court for Section 1 of RTA (where 3 year max custodial sentence available to the court) Sheriff can remit to High Court for further sentencing – very rare occurrence.</td>
</tr>
<tr>
<td>Offence of causing death by aggravated vehicle taking</td>
<td>Not adopted in Scotland</td>
</tr>
<tr>
<td>Death may now be taken into account in sentencing ‘Careless driving’ (R v Simmonds 1999)</td>
<td>Not tested in Scots Law</td>
</tr>
<tr>
<td>Sentencing Guidelines</td>
<td>Not adopted in Scotland</td>
</tr>
<tr>
<td>Private Prosecution an option.</td>
<td>Not applicable in Scotland following road deaths</td>
</tr>
</tbody>
</table>
The Lord Advocate has stated that prosecution following contravention of Section 3a of the RTA Causing Death by Careless Driving under the influence of drink/drugs, is more likely to be heard in the High Court, while; *Driving Offences Charging Standards England & Wales* (agreed by Police & CPS) Para 10 Relationship between section 1 & Section 3a of RTA 1988 states:

“Offences under section 1 and Section 3a carrying the same maximum penalty, so the choice of charge will not inhibit the courts sentencing powers.

The courts have made it clear that for sentencing purposes the two offences are to be regarded on an equal basis”;


2. Sentencing Patterns in England & Wales and Scotland

The TRL report *Issues arising in Prosecution* states – “As the maximum penalty for causing death by dangerous driving is 10 years, it seems strange that the cases (in Scotland) are normally tried in a court which could not impose the maximum penalty.” “Only one case observed during the 2½ research study was referred to the High Court for sentencing”.

SCID has knowledge of this case and can say the driver received a 4 year custodial sentence.

**Crown Court - Custodial Sentences > 5years in England & Wales**

(Extracted from Road Traffic Penalties Home Office Consultation Paper Dec 2000)

<table>
<thead>
<tr>
<th>Length of sentences (yrs)</th>
<th>5.5</th>
<th>6</th>
<th>6.5</th>
<th>7</th>
<th>7.5</th>
<th>8</th>
<th>Over 8</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1996</td>
<td>1</td>
<td>13</td>
<td>0</td>
<td>4</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>20</td>
</tr>
<tr>
<td>1997</td>
<td>2</td>
<td>10</td>
<td>3</td>
<td>5</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>20</td>
</tr>
<tr>
<td>1998</td>
<td>2</td>
<td>12</td>
<td>0</td>
<td>9</td>
<td>1</td>
<td>2</td>
<td>0</td>
<td>26</td>
</tr>
</tbody>
</table>

**Sheriff Court - Custodial Sentences in Scotland**

(Statistics not published. Figures available on application from Scottish Executive Justice Department – Criminal Justice Division). It has not been possible to obtain more detailed figures.

<table>
<thead>
<tr>
<th>Length of sentence</th>
<th>Up to 1 year</th>
<th>1 – 2 years</th>
<th>2 – 4 years</th>
<th>Over 4 years</th>
</tr>
</thead>
<tbody>
<tr>
<td>1996</td>
<td>3</td>
<td>4</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>1997</td>
<td>3</td>
<td>7</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>1998</td>
<td>3</td>
<td>3</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>1999</td>
<td>7</td>
<td>&lt;</td>
<td>4</td>
<td>&gt; 0</td>
</tr>
</tbody>
</table>

It must be remembered that offenders nationally:

- Will generally serve half or less than half of any custodial sentence handed down.
- A driving disqualification runs concurrently with a custodial sentence
- A fine is levied on the ability to pay - as declared to the court.
- Those drivers who have been disqualified for a period of four years or more can apply to the court to have a driving licence returned after a minimum time of half the period of disqualification. i.e. 4 year disqualification by the court can be reduced to 2 years.
3. Scottish Criminal Justice Agencies Participation in the TRL study.

The TRL study included tracking a variety of court cases in Scotland, interviews with road traffic police and a postal survey which was distributed to a sample of Scottish police. The researchers state “It was not possible to obtain views from a sample of sheriffs, but a brief statement was provided from the Council of Sheriffs’ Association, stating that their members find no difficulty in convicting or sentencing drivers under the current legislation. It should also be noted that 5 Procurators fiscal participated on the basis that their views would not be attributed. Two sheriffs were interviewed. The remarks were noted as personal observations and did not represent the views of the Sheriffs’ Association. In the TRL study no participation was sought from High Court judges as virtually all Causing Death by Dangerous Driving cases are heard in the Sheriff Court.

Sarah Boyack when Transport Minister, stated that there has been a disappointing lack of participation by Scottish agencies in the TRL study.

**Methodology and Participation**

<table>
<thead>
<tr>
<th></th>
<th>England &amp; Wales</th>
<th>Scotland</th>
</tr>
</thead>
<tbody>
<tr>
<td>Analysis of Fatal Accident Files</td>
<td>5,943</td>
<td>None</td>
</tr>
<tr>
<td>Analysis of Re-offending</td>
<td>42,879</td>
<td>None</td>
</tr>
<tr>
<td>Police Force participation</td>
<td>8</td>
<td>2</td>
</tr>
<tr>
<td>Decision to Prosecute</td>
<td>Police, CPS, Magistrates and judges responded</td>
<td>Police responded</td>
</tr>
<tr>
<td>Incorrect charging</td>
<td>34 CPS Prosecutors, 11 Magistrates, 10 Crown Court Judges</td>
<td>“Not possible to obtain the views of Scottish Prosecutors on the issue of incorrect charging.”</td>
</tr>
<tr>
<td>Interviews</td>
<td>10 Magistrates, 8 Justice clerks, 4 Crown Court judges, 2 Coroners, 4 Barristers, 6 CPS</td>
<td>5 Procurators Fiscal – views would not be attributed, 2 Sheriffs - personal observation, Crown Office - (no further information given)</td>
</tr>
<tr>
<td></td>
<td>Total of 79 police officers participated - no break down of figures given.</td>
<td></td>
</tr>
</tbody>
</table>

The views of the Crown Office and Procurator Fiscal representatives were that there had not been a problem with the earlier offence of ‘Reckless’ driving. However the research points out that these views were not generally shared. It is worth noting that the view expressed by the Crown Office in 1988 was also that there was no difficulty in applying the Road Traffic Act.
4. The Role of the Scottish Executive in the TRL study

The Scottish Executive joined the project Steering Group on 9th September 1999. Further meetings were held in December 1999, April 2000 and November 2000 (after study completed).

It is worth noting that the main function of the steering group was to monitor the progress of the project, to ensure that the research team followed its remit and to consider whether additional research was needed. We would draw your attention again to the part of the remit of the TRL which states “this exploration will seek to identify whether ‘lesser’ charges of for example, careless driving are being brought where a charge of dangerous driving might be more appropriate.” As the TRL study did not analyse fatal accident files in Scotland and it was not possible to obtain the views of prosecutors on incorrect charging or the individual views of sheriffs in interpreting and sentencing serious road traffic offences, it is alarming that this part of the remit in Scotland is unfulfilled.

5. Police Road Crash Investigations in Scotland

There is evidence in the TRL report from police officers to support SCID’s view that there is a disparity between resources given to murder investigations and road traffic fatalities. SCID has always maintained all homicide investigations should be treated as equal.

Presently crash investigation officers (CIOs) with a 6 week City & Guild certificate are deemed to be the “experts” in crash investigation. It is essential to the prosecution of a case to have highly qualified and trained accident investigators who have status equal to the crash investigation experts frequently being called by defence agents.

It is imperative that Procurators fiscal liaise with the CIOs and understand the mechanics of crash investigation. Recently in Kirkcaldy Sheriff Court one young fiscal who was prosecuting a careless driving case, in which a youth had died, stated to the court “maths was never my strong point.” The accused’s lawyer had an expert crash investigation officer advising him in court - there was no contest.

SCID supports the recommendation in the QPRU Investigation of Road Deaths in Scotland that “The Standing Committee on Expert Evidence explore with ACPOs the standards of road traffic investigation courses attended by police officers to ensure that the qualification obtained establish a sufficient standard of expertise.” SCID would add that as ‘road crash investigation’ is a progressing science it is necessary to have a programme of on going training for officers involved in crash investigations and for procurators fiscal so that they can prosecute robustly in court.

6. Downgrading /Plea bargaining of Charges

The evidence from the QPRU findings into the Investigations of Road Deaths in Scotland, the ongoing inquiry by Justice 2 Committee into the Crown Office and Procurator Fiscal Service together with the Management Review published by the Crown Office (March 2002) identifies areas which require major improvement in the Service. However the failings of the Service and how it is affecting prosecutions cannot be quantified and is of no comfort to victim families who look to the justice system to recognise their loss and in the public interest to punish and deter bad driving offences.
With regard to multiple charges following a road traffic death, the Lord Advocate stated to the Justice & Home Affairs Committee on 31st August 1999, that each charge would be prosecuted individually. However, the Crown Agent at the Justice 2 Committee meeting on 24th April 2001 confirmed what the petitioners together with SCID already know to be true “if plea negotiation were banned, or if problems were to develop with that system, our resources and those of the district and sheriff courts and of the High Court would need to be increased substantially.”

It has been the experience of SCID, that in prosecutions following road deaths, charge/multiple charges are being dropped and lesser charges are being brought where a higher charge is appropriate.

SCID echoes the view expressed by senior English police officers in the TRL study that this practice (downgrading/plea bargaining) may or is already leading to a reluctance by the police to investigate and report bad driving offences.

7. Sheriffs and Juries

It has been widely accepted that juries available for selection do not represent a cross section of society. The TRL research points out that “many of the jurors in particularly difficult cases were unemployed, some because they were unemployable and of limited education.” The problem being that only jurors who can spare the time will sit on juries. There is therefore a need for Sheriffs to be very clear and careful in explaining to jurors the criteria required for driving which is considered ‘dangerous’ or ‘careless’.

The problem is exacerbated by the fact that every driver, including members of the jury and sheriffs consider themselves to be careful and competent drivers. Without proper guidance a jury will use their own standard of driving as the criterion to assess the accused’s culpability. i.e. to find the accused guilty of Dangerous driving, it would have to be shown that the standard of driving was a standard which fell far below that of the jury and of the Sheriff who is directing them.

While sentencing is always a matter for the sheriff it has to be said that this predisposition may be a factor in the lenient approach shown by a large number of sheriffs in sentencing drivers who have been found guilty of Causing Death by Dangerous Driving.

8. Right to a fair Trial

The right to a fair trial is inherent in basic human rights. Of the two sheriffs interviewed in Scotland for the TRL study both thought that cases were sometimes lost by inadequate Procurators Fiscal. One noted that “younger, more inexperienced Procurators Fiscal were at trials a lot more and were controlled by the ‘armchair’ fiscals, therefore had less discretion”.

At the meeting of the Justice 2 Committee on 13th March 2002, Derek Batchelor QC in his evidence stated “Advocates are specialist court practitioners.” “The expertise of the advocate lies in the fact that, day in, day out he presents cases before superior courts.” While these comments were relating to prosecutors it is becoming the norm for drivers accused of serious driving offences to be represented by very experienced QCs in sheriff courts e.g. Gordon Jackson QC defence agent in Linlithgow Sheriff Court in February 2002. Thus alleged offenders have the benefits of a High Court defence and the additional ‘benefits’ of cases
frequently being prosecuted by inexperienced procurator fiscal deputes in sheriff courts. In these circumstances Justice is not seen to be done nor has the public interest (or safety) been served. In these circumstances victim families feel victimised for a second time.

9. Education and Offending

SCID supports wholeheartedly all Government initiatives to educate road users to adopt safer practices especially as an earlier TRL study uncovered that 95% of ‘accidents’ were due to driver error. The Government spends resources of time and money to make our road safer. This includes a commitment by the year 2010 to reduce by 50% the number of people killed or seriously injured, 40% reduction on the number of children killed or seriously injured and a 10% reduction in the number of slight casualties.

From the TRL study there is evidence that a number of offenders convicted of dangerous driving in 1996 went on to commit subsequent offence/s in 1997. Indeed many of the court cases SCID has attended offenders have had one or more than one previous driving offences. Many drivers who re-offend do so during their period of disqualification. These drivers show contempt for the law and compromise public safety yet are dealt with very leniently by the courts.

The full extent of re-offending is unknown as a number of these crimes are only detected as a result of police activity and deployment. eg driving whilst disqualified. Scottish Executive figures over the past decade show that each year on average 17% of drivers who have been disqualified, continue to drive, inevitably with no insurance. In cases of death or serious injury this causes additional untold problems and misery for victims and victim families.

The recent adoption of the Driver Improvement Scheme (DIS) as an alternative to prosecution for careless driving offences is given a cautious welcome. There were over 3,000 careless driving offences prosecuted in Scottish courts in the year 2000, the option of DIS could free up court resources and time. SCID accepts that for first time minor careless driving offences the DIS would probably be of more benefit to most careless drivers than a fine and penalty points. However, as a matter of public safety, there should be a requirement that a record is kept of the offence to inform the courts in those cases where a driver re-offends.

SCID would be very concerned if it was the intention that DIS was seen to be an alternative to prosecution for those cases where a fatality or serious injury were the consequence of careless driving. The present sentencing powers of the court for careless driving offences are very limited. Indeed in court cases attended by SCID, sheriffs have stated that their “hands were tied” in sentencing.

SCID has always maintained to hold a driving licence was a privilege not a right and supports the view expressed in the TRL report that all road users have ‘a duty of care’.

When there is a violation of that duty, there are laws in place to deal with violators to;

• punish and deter bad driving offences and
• protect all road users

SCID would recommend a hard hitting education programme, educating and informing drivers of the Road Traffic Law and the penalties available to the court for serious driving offences. However, education is not all, for the law to work these penalties have to be enforced. Irresponsible drivers will continue to take risks because the law is not being applied by the courts.
10. Victims’ Voice

The Scottish Executive recently launched its *Strategy for Victims*. Objective 3 is; “*Is to encourage greater participation in the criminal justice system.*” One of the proposed routes is “*By ensuring that victims have the opportunity to articulate their concerns, it is hoped that they will be enabled to feel they have regained some control over their situation.*”

The present Scottish Executive consultation paper *A Victims’ Statement Scheme* proposes that this can be achieved by giving a victim the option of making a personal written statement. SCID envisages that this option may cause further victimisation as the statement will become part of the case papers and therefore will be treated as a witness statement. As such it will be available to defence agents and can be challenged in the courts by the defence. It is only too predictable that some defence agents will take this opportunity to undermine the credibility of the victim. Information given in good faith could be used against their interests.

SCID proposes that a victim or victim families (in road death cases) should be given the opportunity of making a verbal statement in court at the conclusion of a case but before sentencing. (Sensitive information could be made available to the judge/sheriff by a written medical report.) This would balance the defence agents’ plea in mitigation. As with the mitigation plea the judge/sheriff may or may not take into account either statement in sentencing. Sentencing is always a matter for the judge/sheriff.

The role of the victim in the criminal justice system has to be re-thought. The Scottish Executive’s commitment to recognise the needs of victims of crime provides a unique opportunity to do so. Victims, witnesses and defendants have distinct needs and rights each of which should be considered separately. One way would be to give victims clear legal status within the criminal justice system.

11. Conclusion

In addition to fulfilling the criteria required for bad driving, for a fair trial or a successful prosecution SCID looks to;

- The implementation of all 80 recommendations in the QPRU’s review *Investigation of Road Deaths in Scotland*.
- The Scottish Parliament setting up its own inquiry into the application of the Road Traffic Law in Scotland following the lack of participation in the TRL study by the Scottish criminal justice agencies
- Nationally agreed Charging Standards and Sentencing guidelines.
- All Causing Death by Dangerous Driving offences to be heard in the High Court to highlight the gravity of the offence.
- The Scottish Parliament to make representation to the Parliament at Westminster to support the view that death or serious injury be uppermost in driving offences.
- The use of specialist fiscals to prosecute road death or serious injury cases.
- Crash investigation expert attendant in court to aid fiscals prosecuting road death or serious injury cases.
- Clear guidelines for Sheriffs in interpreting Road Traffic Law, particularly that the key elements of cases to be summarised in the clearest terms to direct a jury.
- Recognition throughout the criminal justice system that victims have distinct needs and rights.
Appendix 1

The petitions forwarded to the Justice Committee for their consideration were;

**PE29**  **Petition submitted on 16th November 1999 by Alex & Margaret Dekker.**
The petition called for the Scottish Parliament to:
- Register their disquiet about the reduction in prosecutions for “Causing death by Dangerous driving”
- Affirm the sentiments in the petition and condemn the actions of the Crown Office in this case. (The charge of careless driving brought. No seats and no seatbelts worn charge dropped)
- Investigate and report the Crown Office’s decisions and considerations in prosecuting road traffic deaths, including how they interpret the law.
- Monitor the Scottish situation in dealing with road deaths
- Devise and enforce a system which shall ensure the accountability and the independence of the Crown Office in a manner that incompetence and cover ups are not able to be hidden by the mantle of independence.

This petition was supported by 3,500 signatories
The Dekker Family made a submission to the Justice & Home Affairs Committee on 30th March 2000 *Road Deaths and the Criminal Justice System.*

**Petitions submitted by Tricia Donegan calling for the Scottish Parliament;**

**PE 55**  **Submitted 18th January 2000**
To conduct an investigation to establish why the full powers of the law are not enforced in all cases which involve death by dangerous driving.

**PE 299**  **Submitted 4th December 2000**
To investigate whether additional driving offences of failure to possess the correct licence, MOT or insurance documentation should be taken into consideration at court hearings concerning a fatality caused by dangerous driving.

**PE 331**  **Submitted 23rd January 2001**
To investigate why drivers who have made deliberate decisions when driving which cause risk to the lives of others are classed as ‘careless’ when prosecuted even in the event of a fatality.

**PE281**  **Submitted on 24th October 2000 by Isobel Brydie (co-chairman of the Scotland’s Campaign against Irresponsible Drivers (SCID))**
Calling for action to ensure that all prosecutions following contravention of Section 1 of the Road Traffic Act 1988, Causing death by dangerous driving be heard in the High Court.

This petition was supported by more than 5,200 signatories
Appendix 2

Relevant Extracts from Road Traffic Act

Section 1 - Causing Death by Dangerous Driving
“A person who causes the death of another person by driving a mechanically propelled vehicle dangerously\(^1\) on a road or other public place is guilty of an offence”

Maximum sentences - 10 year prison sentence and/or unlimited fine, obligatory 2 year’s disqualification and re-test, obligatory 3-11 points.

Section 2 - Dangerous Driving
“A person who drives a mechanically propelled vehicle dangerously on a road or other public place is guilty of an offence”

Maximum sentences - 2 year prison sentence and/or statutory maximum fine, obligatory 12 months disqualification and re-test, obligatory 3 - 11 points.

Section 3 - Careless or Inconsiderate Driving\(^2\)
(without due care and attention)
“A person who drives a mechanically propelled vehicle on a road or other public place without due care and attention or without reasonable consideration for other persons using the road is guilty of an offence”

Maximum sentences - Level 4 fine (£2500), discretionary disqualification, obligatory 3-9 points.

Section 3a - Causing Death by Careless Driving Under the influence of Drink/Drugs
Maximum sentences - 10 year’s prison sentence and/or unlimited fine, obligatory 2 year’s disqualification and re-test, obligatory 3-11 points.

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1 Road Traffic Act 1991 definition of “Dangerously”,
A person drives dangerously if:
• the way he drives falls far below what would be expected of a competent driver, and
• it would be obvious to a competent and careful driver that driving in that way would be dangerous.
• it is obvious to a competent and careful driver that driving the vehicle in its current state would be dangerous.

2 Road Traffic Act’s definition of “Careless” was adopted from the North Report as:
A moment’s inattention
In March this year the Scottish Prison Service (“SPS”) published its report on the long awaited review of the Scottish prison estate (“the Estates Review”). The review contains proposals to close two existing prisons and to build three new prisons to be designed, constructed and operated by the private sector. This Research Briefing summarises the findings of the Estates Review and associated documents and describes the historical background to the Review. It also draws on the work of other bodies where this is relevant to the Estates Review and to provide alternative perspectives in relation to the arguments advanced in the Estates Review.
INTRODUCTION

BACKGROUND TO THE SCOTTISH PRISON SERVICE ESTATES REVIEW

Work of the Scottish Prison Service & the Scottish Executive

Work of the HM Inspectorate of Prisons for Scotland

Work of the Scottish Parliament’s Justice Committees

THE ESTATES REVIEW

Requirement for prisoner places

“Slopping out” and related issues

Current overcrowding issues

Options for the provision of 2,200 prisoner places
  - New houseblocks
  - Refurbished accommodation
  - New prisons

New prisons: the costing model and the options presented
  - Option 1 - Public sector (“Option 1”)
  - Option 2 - Public Private Partnership (PPP) – Private Build, Public Operate (“Option 2”)
  - Option 3 – Public Private Partnership (PPP) – Private Build, Private Operate (“Option 3”)

A comparison of the costs and anticipated timescale of the Options

Reasons for cost differences between options
  - Construction costs
  - Running Costs
  - The remaining shortfall

The Kilmarnock case study
  - Problems with operating to contract
  - Regime performance indicators not agreed
  - Purposeful work
  - Programmes to address offending
  - Staff approach and staff turnover
  - Staff facilities and terms and conditions
  - Staffing levels
  - Operational costs

Future of HMP Barlinnie, HMP Low Moss, HMP Peterhead
  - HMP Barlinnie
  - HMP Low Moss
  - HMP Peterhead

CONCLUSIONS

providing research and information services to the Scottish Parliament
INTRODUCTION

The report on the Estates Review is a long awaited and eagerly anticipated document for all those with an interest in the future of Scottish prisons and the SPS.

This briefing paper considers:

- The background to the Estates Review, including the work of other relevant bodies;
- A summary and analysis of main the issues associated with, and the solutions suggested by, the Estates Review, including:
  - The recommendation that 3 new private sector prisons should be created; and
  - The impact on the existing prison estate, in particular the proposed closure of HMP Peterhead, a prison internationally recognised for the excellence of its sex offender programmes.

BACKGROUND TO THE SCOTTISH PRISON SERVICE ESTATES REVIEW

Work of the Scottish Prison Service & the Scottish Executive

The Scottish Prison Service (“the SPS”) is an agency of the Scottish Executive and is answerable for its performance to Scottish Ministers. Its primary role is to keep in secure custody those sent to it by the courts, whether on remand or following sentence. It must accept any prisoner sent to it by the courts.

The Scottish Prison Service is currently responsible for 17 establishments (16 in Scotland and HMP Zeist in the Netherlands, which held the defendants in the Lockerbie trial). The prison population currently averages about 6,200 prisoners.

The largest prison in Scotland is HMP Barlinnie, in Glasgow, where over 1,000 prisoners are currently held and the smallest prison is HMP Inverness holding just over 100 prisoners.

The last review of the efficiency and effectiveness of the prison estate by the SPS began in 1999. The “Living Within Our Means” Review (“the 1999 Review”) resulted in the closure of three prisons (HMPs Dungavel, Penninghame and Longriggend), the merger of two (HMPs Friarton and Perth) and the mothballing and amalgamation of other units.
The 1999 Review revealed the need for a more fundamental assessment of the prison estate. As the issues involved expenditure of significance for the whole Scottish Executive budget, the Scottish Ministers decided that they would take the final decisions in the light of SPS work known as the “Estates Review”. This work began in December 1999, with the final reports published in April 2002. At the same time the Scottish Executive published its Consultation Paper on the recommendations of the Estates Review (“the Consultation Paper”). The deadline for submission of responses to the Consultation Paper is 12 June 2002. The private sector firm of PricewaterhouseCoopers (“PwC”) verified the Estates Review costs. Their document (“the PwC Report”), summarising their methodology and findings, was published at the same time as the main report.

Work of the HM Inspectorate of Prisons for Scotland

It is the statutory duty of the Chief Inspector of Prisons for Scotland to inspect or arrange for the inspection of prisons in Scotland and to report to Scottish Ministers on the results of such inspections.¹

Each of Scotland’s 17 penal establishments currently receives a full formal inspection, on a cyclical basis, every 3 ½ to 4 years. Reports are not subject to negotiation prior to publication with the prison Governors or the Scottish Prison Service. In due course, a ministerial response is normally published along with the report.

The Chief Inspector has no executive powers but can draw Ministers’ attention to any aspect of the administration and operation of a penal establishment which he considers calls for comment.

Full inspection reports are followed up in subsequent years by intermediate inspections and these are provided to the prison Governor and to the Chief Executive of the Scottish Prison Service.²

Work of the Scottish Parliament’s Justice Committees

At the first meeting of the Justice & Home Affairs Committee (“the JHA”) (subsequently reconstituted as the Justice 1 and Justice 2 Committees in January 2001) in June 1999, Scottish prisons were identified as a potential topic of interest for the Committee³. As a starting point, it was agreed that the

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¹ Prisons (Scotland) Act 1989, s 7 (as amended by the Scotland Act 1998). The latest report is the Report for 2000-01 (SE/2001/227) (‘the 2000-01 Report’). Previous reports have the following citations: Cm. 4824 (SE/1999/21); Cm. 4428 (SE/1999/21); Cm. 4032; Cm. 3726; Cm. 3314; Cm. 2938; Cm. 2648; Cm. 2348; Cm. 2072; Cm. 1658; Cm. 1380; Cm. 725; Cm. 541; Cm. 260; Cmnd. 9909; Cmnd. 9636; Cmnd. 9401; Cmnd. 9035; Cmnd. 8619.
Committee should consider the 1998-1999 Annual Report of HM Chief Inspector of Prisons for Scotland and publish a report of the Committee’s findings.4

The JHA Committee’s interest proceeded by way of a site visit to two Scottish prisons.5 The announcement of a Scottish Executive reduction in the budget of the SPS and a new strategy for young offenders6 convinced the Committee that its work in this area should continue. Furthermore, it considered that the scope of its original inquiry should be widened, to consider the future of Scottish prisons, taking evidence from a variety of witnesses.

Despite a heavy legislative timetable, the work of the Committee subsequently spanned the 1999-2000 parliamentary session. When the Committee split into two separate committees in January 2001, the Justice 1 Committee assumed responsibility for this area of work. No formal report has yet been published by the Committee but it has maintained its interest and developed a degree of expertise in this area.

THE ESTATES REVIEW

The purpose of the Estates Review was to identify the likely pressures on the SPS estate over the long term (i.e. 10+ years) and to generate a series of options for meeting these.

Requirement for prisoner places

At present the design capacity of the prison estate is 6,300 places, 500 of which are out of use at any given time due to refurbishment programmes and contingency places for emergencies. In April 2001 the Scottish Executive Justice Division Statistics Unit7 projected that the future prison population would be 7,200 prisoners by 2010-11. In September 2001 (towards the end of the work of the Estates Review) a revised projection was released of 7,700 prisoners by 2010-11.8 The Estates Review, however, was based on the earlier 7,200 projection.9

The Estates Review concluded that to hold an average of 7,200 prisoners in appropriate accommodation and allowing for a seasonal peak in numbers, the

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4 Minutes of the Meeting of the Justice & Home Affairs Committee, 31 August 1999 (JH/99/2/M).
5 Meeting of the Justice & Home Affairs Committee, 6 October 1999, col 216: ‘Pauline McNeil: Christine and I went to Low Moss. It was the most useful thing I have done in the Committee since joining it. It was the Convener’s suggestion that we should look into prisons, and I now firmly hold the view that we should continue to do so.’
6 Minutes of the Meeting of the Justice & Home Affairs Committee, 3 November 1999 (JH/99/8/M).
7 The projections of future prison population are made on the basis of numbers entering custody over the past 10-28 years and the sentencing trends observed over that period. The stated reason for this is that it is the sentencing behaviour of courts which most immediately determines the prison population (The Estates Review, para 45).
8 The Estates Review, para 42.
9 For the reasoning behind this decision see ibid, paras 42-45.
SPS will require 3,300 new prisoner places by the end of the ten-year planning cycle.\textsuperscript{10}

The Estates Review suggests that 2,400 places are required now to replace unfit and other temporary accommodation. The figure of 2,400 places includes around 1,900 places to end the practice of “slopping out” and 500 places to replace the sub-standard accommodation at HMP Low Moss (see further discussion below in respect of both of these). In addition to the 2,400 places, 900 places are required to increase the overall capacity of the prison estate to hold the projected increase in prison numbers.\textsuperscript{11}

The Estates Review also recognises: 1) overcrowding in prisons as being a current problem and 2) the need to create places that will allow refurbishment and maintenance work to be carried out without compromising the security or operational stability in the SPS.\textsuperscript{12}

The Estates Review recognised that currently planned new houseblocks and refurbishments in relation to existing prisons would provide 1,100 prisoner places. However, approximately 2,200 places would still be required.\textsuperscript{13}

\textit{“Slopping out” and related issues}

There are approximately 1,900 prisoner places in Scotland that, during lock up periods, i.e. mainly during the night, do not have access to toilet facilities other than chamber pots, buckets, or porta potties which have to be “slopped out” by prisoners supervised by prison staff.\textsuperscript{14}

The major shortfall in accommodation with appropriate night sanitation facilities mainly affects sentenced adult males (who comprise 67.8% of the prison population) and male remands (15.9% of the prison population) which together account for approximately 84% of the prison population.\textsuperscript{15}

The Estates Reviews comments as follows:

\textit{‘..going through the practice of slopping out, means that the SPS is having to expend valuable time and resources on meeting basic needs rather than moving forward with a proper correctional agenda. It means that far too much time is wasted on tasks that are mundane and unpleasant for staff and prisoners alike’}\textsuperscript{16}.

\textsuperscript{10} The Estates Review, para 30.
\textsuperscript{11} Ibid.
\textsuperscript{12} The Estates Review, para 31.
\textsuperscript{13} The Estates Review, p i.
\textsuperscript{14} The Consultation Paper, p 1.
\textsuperscript{15} The Estates Review, para 35.
\textsuperscript{16} The Estates Review, para 26.
The SPS has been challenged in the courts on the grounds that slopping out allegedly breaches the European Convention of Human Rights (ECHR). The ECHR has been part of Scots law since 1 July 1999 and legal action for an alleged breach can now be taken in the Scottish courts and is directly enforceable. The ECHR does not explicitly prohibit slopping out but an action has been brought under Article 3 of the ECHR, which prohibits inhumane and degrading treatment.\textsuperscript{17}

SPS upgrading of prison cells to end “slopping out” is usually linked to upgrading to meet two other operational and health issues, namely the provision of a hot and cold water supply and an electric power supply in the cell.\textsuperscript{18}

The concept of an “Ideal Estate” was described in the 1999 “Living within our Means” exercise and adopted as an underlying principle for the Estates Review. One of the key features of an Ideal Estate was that there should be 100% access to night sanitation.\textsuperscript{19} The Scottish Executive in the Consultation Paper has reiterated its intention to end the practice of “slopping out” in prisons as quickly as possible.\textsuperscript{20}

\textbf{Current overcrowding issues}

Overcrowding is recognised as a current problem in Scottish prisons. It particularly affects local prisons, which admit prisoners direct from court.\textsuperscript{21}

The following local prisons were overcrowded on the last Friday of July 2001\textsuperscript{22}:

<table>
<thead>
<tr>
<th>Establishment</th>
<th>% overcrowding on 27 July 2001</th>
</tr>
</thead>
<tbody>
<tr>
<td>HMP Barlinnie</td>
<td>131%</td>
</tr>
<tr>
<td>HMP Aberdeen</td>
<td>124%</td>
</tr>
<tr>
<td>HMP Greenock</td>
<td>136%</td>
</tr>
<tr>
<td>HMP Edinburgh</td>
<td>123%</td>
</tr>
<tr>
<td>HMP Inverness</td>
<td>125%</td>
</tr>
</tbody>
</table>

\textsuperscript{17} The Estates Review, para 28.
\textsuperscript{18} Ibid, para 29.
\textsuperscript{19} Ibid, para 24.
\textsuperscript{20} The Consultation Paper, p 3.
\textsuperscript{21} The Estates Review, para 40.
\textsuperscript{22} Ibid. For more on overcrowding in Scottish prisons see SPICe Research Briefing \textit{Conditions in Scottish Prisons} published contemporaneously with this Research Briefing.
Options for the provision of 2,200 prisoner places

The Estates Review considered 3 options for the provision of new places:

New houseblocks

One way of providing the necessary prison places would be to add houseblock accommodation to existing prisons. This has been a popular way to meet demand in the past\(^{23}\) and the SPS has already contracted to build additional houseblocks at HMP Edinburgh (target: 226 places ready by summer 2003) and one at HMYOI Polmont (target: 213 places ready by spring 2003)\(^{24}\).

However, the Estates Review identified the following problems with this approach:

- In some prisons there is no room to add further accommodation.\(^{25}\)
- As increasing the size of a prison also increases the demand on the support facilities, e.g. the kitchens, there is a limit to the extra places that can be provided without having to add to other core prison areas.\(^{26}\)
- Existing houseblocks already occupy the best land within existing sites, other areas within secure perimeters are generally less suitable.\(^{27}\)
- It causes disruption to the day to day working of the prison and management of contractors and machinery also present considerable added strain on prison security.\(^{28}\)

The Estates Review concluded that the establishments that are suitable for new houseblocks are the ones where houseblocks are already planned\(^{29}\).

Refurbished accommodation

In this regard the Estates Review comments as follows:

‘Experience has taught the SPS that refurbishment of largely Victorian buildings is fraught with difficulties’\(^{30}\)

\(^{23}\) *The Estates Review*, para 47.
\(^{24}\) *The Estates Review*, para 46.
\(^{25}\) *The Estates Review*, para 47.
\(^{26}\) *The Estates Review*, para 48.
\(^{27}\) Ibid.
\(^{28}\) *The Estates Review*, para 49.
\(^{29}\) *The Estates Review*, p.i.

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They concluded that provision of prisoner places by refurbishment is rarely suitable due to the constraints of refurbishing older buildings, e.g. each requires individualised design and planning due to their often unique character.\textsuperscript{31} Also, even where possible it is usually time consuming and expensive and the finished product is not the optimum design, compared to a custom designed building incorporating the most up to date technology\textsuperscript{32}. The Estates Review noted that the only place where refurbishment was being actively contemplated at present is at Perth where there are specific problems with the demolition and rebuild of the one remaining hall.\textsuperscript{33}

**New prisons**

The Estates Review concluded that the way to achieve effectively adequate numbers of prisoner places is by building new prisons.\textsuperscript{34} It noted that although historically a prison in the region of 350-500 prisoner places was thought best in terms of operational stability; increased use of technology and improved design means the current view is that the optimum size is now considered to be 700 places.\textsuperscript{35}

Hence, the Estates Review concludes that \textbf{3 new prisons} would be required to provide the required \textbf{2,200 additional prisoner places}\textsuperscript{36}.

**New prisons: the costing model and the options presented**

The principal accounting method the PwC Report uses to present the financial costs for each option is estimated Net Present Values (“NPV”):\textsuperscript{37}

- NPV is an accepted accounting technique used in appraisal of investment decisions over a period of time.
- It assumes money has a time value, i.e. money now is worth more than in the future. So, for instance, it is better to take possession of a car now and pay £10,000 for it in a year’s time than to pay £10,000 now.

\textsuperscript{30} \textit{The Estates Review}, para 53.
\textsuperscript{31} \textit{The Estates Review}, para 54. See generally this paragraph for further examples of problems with renovation of Victorian prison buildings.
\textsuperscript{32} \textit{The Estates Review}, p ii and para 55.
\textsuperscript{33} \textit{Ibid}, para 55.
\textsuperscript{34} \textit{Ibid}, para 57.
\textsuperscript{35} \textit{Ibid}, paras 57 and 60.
\textsupersoft{36} \textit{Ibid}, p ii.
\textsupersoft{37} The PwC Report also used a second indicator: Cash Value Real (“CVR”). This is the total cash expenditure of the option over 25 years, expressed in terms of March 2001 prices (\textit{The Estates Review}, para 69).

\textit{providing research and information services to the Scottish Parliament}
• Calculation of a project proposal using NPV method is achieved by multiplying forecast cash-flows over the life of a project by a given discount factor (set by the Treasury) thus converting future cash-flows into today’s values.

• NPV represents the cash flow discounted at rate of 6% per annum (the current Treasury rate).\(^{38}\)

By converting competing lifetime costs into today’s values it is possible to make direct comparisons between various options being considered at the start of a project\(^{39}\).

In the Estates Review 3 options were evaluated by PwC for their viability and relative cost to other options:

**Option 1 - Public sector ("Option 1")**

In this model the public sector determines the design of the prison, controls the building phase by contracting the work out to a private sector builder and then takes over the operation of the prison\(^{40}\).

The Estates Review identified the following problems with use of this model:

• The SPS does not have the required resources to deliver more than 1 prison at the time.\(^{41}\)

• There is no formally agreed operational design, as the SPS has not planned to build a whole prison for 30 years. It would need “enormous” extra resources to create such a model.\(^{42}\)

• Like most other public sector bodies, SPS’s track record of delivery of new building projects to time and original cost is not good.\(^{43}\)

**Option 2 - Public Private Partnership (PPP) – Private Build, Public Operate ("Option 2")**

\(^{39}\) *Ibid.*.  
\(^{40}\) *Ibid.* para 64.  
\(^{41}\) *Ibid.* p iii.  
\(^{42}\) *Ibid.* para 73.  
\(^{43}\) *Ibid.* para 76.
In this model the private sector delivers the building to the required specification and provides facilities management, e.g. cleaning services, but the core operational work is carried out by the public sector. This option has been used in other sectors, principally health and education.\textsuperscript{44} However, no model of this kind has been adopted in the prisons sector world-wide.\textsuperscript{45}

The main problem that the Estates Review identified with this model is that the integrity of the physical fabric of the prison is inextricably linked to security and good order. Accordingly a fault which in the sectors of e.g. health or education would be minor, could have serious consequences in a prison. The private sector would need to absorb a high level of risk and it would be difficult to do this and still achieve value for money.\textsuperscript{46}

To take the example used in the Consultation Paper, if the central heating system failed and prisoners rioted and caused damage to the prison the private sector facilities company would need to take liability not only for failure to provide heating but also for any resultant damage caused by prisoners.\textsuperscript{47}

**Option 3 – Public Private Partnership (PPP) – Private Build, Private Operate (“Option 3”)**

Under this option the public sector has a partnership arrangement with a private sector consortium where the latter designs, builds, finances and operates a prison in accordance with the terms of a contract\textsuperscript{48}. There are 10 prisons operating in this way in the United Kingdom. One of these is HMP Kilmarnock in Scotland, which opened in March 1999. This prison was designed, constructed, financed and is managed by Premier Prison Services Limited.\textsuperscript{49}

In relation to this type of model the Estates Review and the Scottish Executive in their Consultation Paper made the following observations:

- The private sector has shown it can manage effectively the design and building of new prisons. It is currently the only source of expertise in designing and building whole prisons since the public sector has not done so for many years.\textsuperscript{50}

\textsuperscript{44} Ibid.
\textsuperscript{45} The Consultation Paper, para 50.
\textsuperscript{46} The Consultation Paper, para 50.
\textsuperscript{47} Ibid.
\textsuperscript{48} Ibid.
\textsuperscript{49} Ibid, para 87.
\textsuperscript{50} Ibid, para 61.
• If prisons under this model fail to open on time the private sector provider fails to earn income and can also incur financial penalties.\(^{51}\)

• The detailed level of scrutiny mostly on a daily basis of privately managed prisons exceeds that of public sector prisons.\(^{52}\)

• The risks and responsibilities for delivering a service to specified output standards are transferred almost in their entirety to the private operator.\(^{53}\)

**A comparison of the costs and anticipated timescale of the Options**\(^{54}\)

The following table, taken from the Estates Review and the Consultation Paper,\(^{55}\) shows the comparative costs and timescales in relation to each of the 3 options if three new prisons were built:

<table>
<thead>
<tr>
<th>Option</th>
<th>Costs £m NPV (for completion of 3 new prisons)</th>
<th>Timescale (for completion of 3 new prisons)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public sector</td>
<td>1,300</td>
<td>11 years</td>
</tr>
<tr>
<td>Private build, public operate</td>
<td>1,000-1,300</td>
<td>12 years</td>
</tr>
<tr>
<td>Private build, private operate</td>
<td>600</td>
<td>5-6 years</td>
</tr>
</tbody>
</table>

When comparing the timescales above the following should be borne in mind:

‘Options 1 and 2…provide for a prudent gap between the development of the first two prisons and the third as the SPS have operational concerns

\(^{51}\) Ibid.
\(^{52}\) Ibid.
\(^{53}\) The Estates Review, p iii.
\(^{54}\) Adapted from tables in The Estates Review, paras 89-90 and 110 (also The Consultation Paper, paras 49, 55, 62-63, 92).
\(^{55}\) The Estates Review, paras 90 and 110; The Consultation Paper, para 92.

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providing research and information services to the Scottish Parliament
about their capacity and the risks of attempting themselves to open three new establishments virtually simultaneously.\textsuperscript{56} The Consultation Paper

The following table, adapted from that appearing in the Estates Review and the Consultation Paper,\textsuperscript{57} shows the comparative costs in relation to the three options of building 1 new prison:

<table>
<thead>
<tr>
<th>OPTION</th>
<th>Comparison Cost 1 New Prison (NPV £ m)</th>
<th>Comparison Cost per prisoner place (NPV £k)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public Sector Build and Operate</td>
<td>429.1</td>
<td>24.5</td>
</tr>
<tr>
<td>Private Build and Public Operate</td>
<td>337.7 to 429.1</td>
<td>19.3 to 24.5</td>
</tr>
<tr>
<td>Private Build and Operate</td>
<td>206.2</td>
<td>11.8</td>
</tr>
</tbody>
</table>

\textit{Reasons for cost differences between options}

‘It is not unreasonable for the taxpayer to ask why the public sector option is twice that of the private sector route…There are many reasons for this cost difference. In order to identify the key areas, the SPS has taken the verified PwC data and by applying knowledge and experience of the public and private prison sectors has tried to identify where the main cost differences exist.’\textsuperscript{58} The Estates Review

\textbf{Construction costs}

‘SPS experience has identified that a history of delay during the pre-planning, design, build and commissioning (including agreeing staffing levels) stages has contributed to the construction project costs being uncompetitive. In addition, a tendency to over-specify the requirements and make changes to the building’s specification

\textsuperscript{56} The Consultation Paper, para 93.
\textsuperscript{57} The Estates Review, para 89 and The Consultation Paper, para 63.
\textsuperscript{58} The Estates Review, para 93.
after the design is finalised has led to higher costs in the public sector construction projects.\textsuperscript{59}

Scottish Executive’s Consultation Paper

Running Costs

‘SPS has, in common with most of the public sector, operated national wage rates and current pay rates are the sum total of many years of settlements which bore little relation to local labour market realities. The private prison operators have regional pay systems and tailor their terms and conditions to the local labour markets in which they operate…Some of their terms and conditions are less generous than the public sector. But companies in the sector are reputable and cannot afford terms and conditions that do not attract and retain competent staff.’\textsuperscript{60}

Scottish Executive’s Consultation Paper

The remaining shortfall

The following table appears in the Estates Review and provides a breakdown of the costs of Option 1 (Public Sector Build and Operate)\textsuperscript{61}:

<table>
<thead>
<tr>
<th>COST CATEGORY</th>
<th>NPV £ m</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Initial Construction Costs</td>
<td>104</td>
<td>24</td>
</tr>
<tr>
<td>Running Costs</td>
<td>260</td>
<td>60</td>
</tr>
<tr>
<td>Other Facility Costs</td>
<td>24</td>
<td>6</td>
</tr>
<tr>
<td>Cost of Project Risks</td>
<td>42</td>
<td>10</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>430</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>

The narrative in the subsequent paragraphs of the Estates Review provides an explanation of why there are differences in the construction costs and the running costs (of which a summary is provided above).\textsuperscript{62} However, there is no substantive explanation of the reasons for the difference between the costs for Option 1 and the costs for Option 3 in relation to the categories of “Other Facility Costs” and “Cost of Project Risks”.

\textsuperscript{59} The Consultation Paper, para 72.
\textsuperscript{60} The Consultation Paper, para 74.
\textsuperscript{61} The Estates Review, para 94.
\textsuperscript{62} The Estates Review, paras 93-108.
The Estates Review then goes on to explain that PwC was asked to calculate, on a hypothetical basis, the impact on Option 1 of:

- a 20% improvement in running costs\(^{63}\)
- private sector efficiencies during the initial construction phase.\(^{64}\)

It should be noted that it is not entirely clear why the SPS opted for these particular levels of hypothetical improvements or why they are limited to certain types of costs. For convenience the results are shown in the revised table below:

<table>
<thead>
<tr>
<th>COST (NPV £'m for 1 Prison)</th>
<th>Option 1 (after hypothetical improvements)</th>
<th>Option 3</th>
<th>Percentage Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>TOTAL</td>
<td>338</td>
<td>206</td>
<td>64%</td>
</tr>
</tbody>
</table>

These hypothetical improvements to Option 1 result in a saving, in NPV terms, of £92m. This still leaves the public sector option £132m (i.e. £338m minus £206m) more expensive than the private build private operate option. Even after the hypothetical improvements, the public sector option is 64% more expensive than the private sector option, as shown in the final table below. No quantitative explanation is provided for this remaining difference.

\(^{63}\) Ibid, para 106.
\(^{64}\) Ibid, para 99.
The Kilmarnock case study

Throughout the Estates Review and the Consultation Paper HMP Kilmarnock is presented as an unqualified success demonstrating a sound policy basis for the creation of three further private prisons to meet the required number of prisoner places.

‘Arguments have been led by opponents of the concept that privately managed prisons are not tackling the issue of recidivism as well as the public sector. There is no evidence for this. Output in terms of whether prisoners will re-offend again once they have served their prison terms is difficult to relate to any single factor and therefore one of the outputs of a prison system (other than punishment and incapacitation through incarceration) is difficult to gauge. A number of intermediate outputs have therefore been adopted...to measure whether prisons are doing well or badly. Most of these have to do with custody and order including purposeful work, rehabilitation, good medical services etc. In this respect, the SPS Board is clear that it has better hard data on what is happening at Kilmarnock (measured by 50 detailed performance outputs) than it does for the prisons it manages itself.’

The Scottish Executive’s Consultation Paper

‘Some comparable data is available from the prison survey. Each year the SPS hands out questionnaires to every prisoner in every prison over a short period and the results are collated. Comparing Kilmarnock prison with its nearest comparators in size and prisoner mix, Edinburgh and Perth, the survey shows overall no discernible difference in prisoners’ experience.’

The Scottish Executive’s Consultation Paper

Given the largely uncritical presentation of Kilmarnock Prison in the Estates Review and Consultation Paper, the following extracts from HM Chief Inspector of Prisons for Scotland’s Report for 2000-01 in relation to the prison (‘the Inspector’s 2000-01 Report’), offer a less positive view of the contractual and operational aspects of the prison.

However, it should be borne in mind that it is not necessarily the case that the private prisons of the future will encounter the same problems as Kilmarnock.

Problems with operating to contract

65 The Consultation Paper, para 85.
66 The Consultation Paper, para 86.
‘..priority was being given to delivering the contract, as specified. Additional work, which might be necessary and appropriate and would contribute to more effective delivery of the contract, could not be undertaken if this meant that some other elements specified in the contract would not be delivered. Similarly, if there was a shift in existing demand, or if new demands arose, these could not be addressed without either changes to the contract being negotiated or additional resources being provided.

…this highlights a dichotomy when operating to a detailed contract specification. At the time of our previous inspection, operating to an agreed specification had been thought to provide clarity of purpose. On this occasion, however, it seemed that the contract was more of a mixed blessing with management also describing it as being “restrictive and inflexible at times”. ⁶⁷

**Regime performance indicators not agreed**

‘We were surprised to find that although the prison had been operational for two years, the necessary regime performance measures have still not been agreed. This prevented full, objective, assessments of performance in regime delivery. ⁶⁸

**Purposeful work**

‘..while worksheds were full, a large number of prisoners were not engaged in purposeful activity, the regime timetable was not being followed and a number of prisoners were asleep in their beds. ⁶⁹

**Programmes to address offending**

‘While we were pleased to note developments in process to identify needs, we remain concerned that insufficient resources were in place for the timeous delivery of programmes to address offending. In this critical area, the accredited offending behaviour programmes being delivered in a number of other Scottish prisons…are now setting standards for others to achieve. ⁷⁰

**Staff approach and staff turnover**

…prisoners repeatedly told us that they were treated with more respect [at Kilmarnock] than they had been at any other prison in Scotland. Additionally we were most impressed with the flexibility shown by staff. However, it was disappointing to note that the staff turnover rate at

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Kilmarnock – 32% last year...was significantly higher than in any other Scottish prison (e.g. Barlinnie – 9%...) More experienced staff were also expected to leave shortly on promotion for a new Premier Prison Service in England.\footnote{Ibid.}

Staff facilities and terms and conditions

‘Following our criticisms last year, slightly better facilities for staff had been provided. Unfortunately most staff said they rarely had time to use them – though some said the level of job security provided by the Company [i.e. the private sector prison provider] offset this unsatisfactory situation. We still think staff deserve better and were pleased to note that a review of staff terms and conditions was shortly to be undertaken.’\footnote{Ibid.}

Staffing levels

‘Staffing levels in the houseblocks continued to be a concern. It was often the case that single officers were supervising large numbers of prisoners, due to the competing pressures of demands for escorts and other out of wing activities...With the current staffing levels, it did not, in our opinion, feel a particularly safe environment for either prisoners or staff.’\footnote{Ibid.}

Operational costs

‘So far as competition is concerned, it would certainly appear that Kilmarnock, with its considerably lower staffing levels, is cheaper to run than most public sector prisons, though by how much depends on the way the figures are presented.’\footnote{Ibid., p 20.}

Future of HMP Barlinnie, HMP Low Moss, HMP Peterhead

HMP Barlinnie

HMP Barlinnie is Scotland’s biggest prison with a capacity of 1,019 prisoners but a population which often exceeds this level.\footnote{The Consultation Paper, para 100.} The Estates Review and the Consultation Paper concluded that the accommodation is generally poor, often lacking proper night sanitation, but there is already investment to resolve the issue.\footnote{The Consultation Paper, paras 99 and 100; The Estates Review, paras 129-131.} Further, the prison is in an excellent location; near the busiest courts in Scotland, close to the population centre, the motorway, and public transport so that visits are easy.\footnote{The Consultation Paper, para 99; The Estates Review, para 129.} The SPS and the Executive propose that HMP Barlinnie

\footnote{\textit{providing research and information services to the Scottish Parliament}}
should be retained at a capacity of around 530 prisoners and that investment should be made in a new houseblock.\textsuperscript{78} The SPS in the Estates Review cautioned that the timing of the much needed investment would depend on a number of factors, including the availability of resources.\textsuperscript{79}

**HMP Low Moss**

This prison has wooden huts as dormitories and operated as a barrage balloon station during World War II. The Estates Review and the Consultation Paper concluded that this accommodation was unacceptable, that the prison should accordingly close as soon as alternative accommodation is available and the site should be considered for a new prison development.\textsuperscript{80}

**HMP Peterhead**

This prison holds convicted long-term sex offenders and offers a range of programmes designed to challenge offending behaviour in order to reduce the risk of re-offending on return to the community. A report on the prison’s work published in July 2000 by Professor Bill Marshall, an internationally recognised expert in the field of sex offending, made the observation that Peterhead is one of the top 3 prisons of its type in the world.\textsuperscript{81}

However, the Estates Review and the Consultation Paper concluded that the buildings themselves are sub-standard and have reached the end of their useful life.\textsuperscript{82}

The Estates Review and the Consultation Paper proposed that HMP Peterhead should close and its work be transferred to prison(s) elsewhere in Central Scotland.\textsuperscript{83}

The proposed closure of HMP Peterhead is one of the most controversial recommendations to emerge from the Estates Review. The proposal has attracted a wide range of comments from a number of sources. The following are examples:

**Staff attitudes and prospects**

‘Staff were angry at what they perceived as betrayal by the SPS Board. They pointed out that they had already incorporated changes in attendance patterns, reduced staff absence and improved the throughput of prisoner programmes. In addition, they had reduced the annual cost per prisoner place by some £14,000 and there were plans for even further reduction.'

\textsuperscript{78} *The Consultation Paper*, p 32; *The Estates Review*, p 35.
\textsuperscript{79} *The Estates Review*, p 35.
\textsuperscript{80} *The Consultation Paper*, p 33; *The Estates Review*, p 37.
\textsuperscript{81} Meeting of the Justice 1 Committee, 13 November 2001, O.R. col 2749.
\textsuperscript{82} *The Consultation Paper*, para 107; *The Estates Review*, para 154.
\textsuperscript{83} *The Consultation Paper*, p 36; *The Estates Review*, p 41.
They put forward cogent arguments that they had earned future investment in the fabric of the prison and should be given preference over other establishments that had not delivered the business as efficiently and cost effectively. They were also justifiably proud that Peterhead had become an internationally recognised centre of excellence for the management of sex offenders through the STOP [i.e. the sex offender] programme.\(^{84}\)

HM Inspector of Prisons for Scotland, 2000-01 Report

‘SPS advise that this [the three years prior to closure of Peterhead] would allow time for detailed transfer plans to be drawn up, possibly including options such as detached duty for staff and plans for the voluntary exit of any suitable surplus of staff who would not wish to transfer…There is no reason why the staff delivering this [sex offender] programme at Peterhead would not be involved in delivering it at another site.\(^{85}\)

The Consultation Paper

Re-offending

‘Stuart Campbell:….. Since the [STOP] programme commenced in 1993, it has had a total of 244 participants. One hundred and sixty-two of those prisoners have been liberated, 69 are still in custody, 173 prisoners completed the programme and 71 failed to finish it. Six have been reconvicted of a sexual offence and four have been recalled because of a breach of licence conditions.\(^{86}\)

Stuart Campbell (Programmes Manager at Peterhead) giving evidence to the Justice 1 Committee

The benefits of total segregation

‘I feel there is clearly a need to segregate certain types of offenders given the attitude of prisoners and the constant threat of violence towards sex offenders. For the first time in my career, I have seen sex offenders in a local prison acting as normal, mainstream prisoners.\(^{87}\)

Ian Gunn (Governor at Peterhead)

‘Stuart Campbell: Peterhead is a totally unusual facility. It is the only facility in Scotland that has a total culture in which offenders can move about freely.
The Convener [Justice 1 Committee]: Would that total culture not exist in the facility if it was attached to another prison?

Stuart Campbell: No. 88

HM Chief Inspector for Prisons, 2000-01 Report

‘The arguments for a dedicated sex offender prison with a very specific overall culture (also described as ‘homogeneous’, ‘total’ or ‘monoculture’) is not universally accepted. It is not possible to be definitive. All that is clear from the extensive literature on sexual offending interventions is that treatment gains are maximised when sexual offenders are held together for the duration of their treatment. There are numerous positive evaluations from jurisdictions with approaches to treating sexual offenders in the larger prison context. What is crucial is that these prisoners feel secure within the environment where the programme is being delivered. 89

Time required to re-create new sex offender facility

‘If the decision was taken to close HMP Peterhead, this could not take place under any scenario within a minimum of three years. This time will be utilised to continue building up expertise and training of staff throughout the SPS...It will also enable a careful scheduling of sex offending programmes so that disruption will be kept to a minimum for the transfer of prisoners and staff 91

The Estates Review

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88 Ibid, O.R., cols 2757.
90 The Consultation Paper, para 120.
91 The Estates Review, para 162.
‘We must bear in mind that the programme at Peterhead did not happen overnight. It has taken seven years to build to where we are now’

Stuart Campbell (Programmes Manager at Peterhead)

‘to recreate the status that the [sex offender] programme has now reached would take four or five years if it was scattered elsewhere’

The Convener of Justice 1 quoting Clive Fairweather (job title)

**Family visits**

‘Approximately 11% of current Peterhead prisoners are from the North East, with 4% from Highland and 85% from the rest of Scotland (with a very small number from England). Some prisoners do not receive visits from family because of the nature of their offences. However, maintenance of family links is still a major problem for this offender group given the distance and awkwardness of the journey for those families who do visit. Further, of the prisoners who do not receive visits, distance is cited by 24% as the principal reason’

The Estates Review/The Consultation Paper

‘As a large percentage of prisoners have offended against family members...the figure is 45 per cent – they would probably not have that family contact. There is a system in the SPS that allows prisoners to move from one prison to another to receive visits. They can also save up their visits, which means that a prisoner from Dumfries or Inverness can spend a month at the prison in those places’

Ian Gunn (Governor at Peterhead)

‘..in a recent survey, 12 per cent of prisoners at Peterhead said that they were unhappy with visiting arrangements; the rest were quite satisfied with the current system’

Stuart Campbell (Programmes Manager at Peterhead)

**Community attitudes**

‘I have lived in Peterhead for the past 14 years. Over the years, the prison’s staff have built up a very good relationship with the Peterhead public, who know exactly what our work is about’

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93 Ibid, O.R., col 2751.
94 The Estates Review, para 153; The Consultation Paper, para 108.
96 Ibid, O.R., col 2758.
Stuart Campbell (Programmes Manager at Peterhead)

‘It is human nature that people do not want a sex offenders institution near them, yet Peterhead has somehow broken the blacklisting…and has succeeded all round with sex offenders, its staff, programmes and most important, with the community and recidivism. It seems to me perhaps we should not dismantle that.’ 97

The Convener of Justice 1

At one stage it was proposed that a group of carefully selected inmates, under the supervision of an officer would be engaged in limited community work as part of their pre-release preparation. 98 The following quotation sums up the Peterhead community’s response:

‘The community was canvassed with a 98% response rate all of whom indicated approval of the project. However, a Head Office Directive shut down the project before it was implemented’ 99

Professor Bill Marshall

CONCLUSIONS

The Estates Review has had a long gestation period and has produced several controversial recommendations.

To deal with current problems and future demand for prisoner places, it proposes the creation of 3 new private sector prisons. Furthermore, it makes recommendations impacting on the existing estate, including, most notably, the recommendation that the HMP Peterhead should be closed and its work transferred elsewhere.

Now that the findings of the Estates Review are known the interest surrounding it is unlikely to die down.

If you have any comments or questions about this briefing, please contact Sarah Dewar on extension 85392 or Sarah.Dewar@scottish.parliament.uk.

SPICe Briefings are compiled for the benefit of Members of the Scottish Parliament and their personal staff. Authors are available to discuss the contents of these papers with Members and their staff but cannot advise members of the general public.

97 Ibid, O.R., col 2759.
Regulation of the legal profession inquiry

Supplementary evidence from Professor Alan Paterson on regulatory regimes in parts of the Antipodes and in Ontario, Canada

1. The regulatory regimes in New Zealand, each Canadian province and each Australian States are slightly different. Thus there is no single Antipodean or Canadian method of regulating the legal professions. However, it would be fair to say that of the three main jurisdictions being discussed, Australia is the one in which competition policy has led the State and Federal governments to be more interventionist than their Canadian or New Zealand counterparts.

There are 3 main models of regulation of the legal profession in Australia, Canada and New Zealand:

a. Professions investigate complaints: no ombudsman but there may be lay observer. (This is a position in New Zealand and parts of Canada, including Ontario but it is about to change in New Zealand when the current legal profession bill goes through, and in Ontario when their Complaints Review Commissioner is appointed.)

b. Ombudsman and professional bodies both involved in regulation.

c. Independent regulator with professional bodies simply as a trade union.

2. The second is the predominant model, but there is a considerable range within b., depending on how the 2 roles are divided. Most Australian ombudsmen have more powers than the Scottish Legal Services Ombudsman. In New South Wales and Victoria, there is an ombudsman who, together with professional bodies, regulates the profession. There are also disciplinary tribunals. This combination is very similar to us, but its working is significantly different in two respects. First, because complaints in Australia are divided into conduct cases and disputes. The former can be misconduct or unsatisfactory conduct, both of which are generally more fully defined than in Scotland. The latter are sufficiently broadly defined as to be equivalent to inadequate professional services, but in practice they are mainly fee disputes which are handled by mediation or arbitration by the ombudsman or the registrar of the
professional discipline tribunal.¹

3. In Scotland, inadequate professional service and misconduct overlap, but there is disagreement about the extent. Indeed, it would be fair to say that one of the problems with the complaints system in Scotland is that misconduct and inadequate professional service are too loosely defined to ensure consistency of decision within the Law Society. Thus despite the Code of Conduct and the Practice Rules, the outcome of every case turns on the Client Relations Committees / Council’s discretionary decision in the light of their perception of the facts and circumstances in each individual case.

4. In NSW and Victoria there is a co-regulation regime between the ombudsman and the professional bodies. In Victoria, there is a twin gateway for complaints, the public can either take their complaint to the ombudsman or to the professional bodies. In practice conduct complaints are divided between the ombudsman and the professional bodies depending on which of them the complainer goes to first. However, disputes – which are usually about fees, are all dealt with by the professional bodies rather than the ombudsman.

5. The ombudsman in Victoria has the power to do spot checks of files in professional bodies’ offices and look at any individual file. The ombudsman can also review any case even while it is still with the professional body and without being asked by a complainer. The ombudsman can review a case on the merits and not simply on the process (as is the case with the Scottish ombudsman). The ombudsman can send it back to the professional body to re-investigate the case or re-investigate the case herself. If the ombudsman forms the view that it is misconduct, she can send it to the professional tribunal or reprimand the solicitor. The Scottish ombudsman can prosecute cases before the Tribunal but this has never been done to date.

¹The Law Society of Scotland, by contrast, decline to handle fee disputes unless they come in the guise of IPS complaints, opting instead to direct people to the auditor of court. The Law Society does have powers on excessive fees, but seldom uses them. In Scotland, we use conciliation over IPS disputes, but this is not the same as mediation which involves a third party. We know little about how conciliation works in Scotland in this context. Mediation in Australia, however, takes a lot of resources, and the Victorian review recommends that this be reduced.
6. In New South Wales, the ombudsman (the Legal Services Commissioner) is in a slightly different position. He is the sole gateway for all complaints, including fee disputes and conduct. He then allocates the complaints between his office and the professional bodies based on a protocol drawn up by him in discussion with the professional bodies. In practice, the LSC passes the great majority of conduct complaints to the professional bodies, but can keep an eye on any case or say how the case is to be dealt with by the professional body. On the other hand, he handles all disputes. This is therefore a form of co-regulation and not a completely independent regulatory set up as there is in some other Australian States (e.g. Western Australia).

7. The outcome of these 2 systems, is as follows. The Victoria system does not work, because splitting the gateway confuses the public, leads to duplication of effort and exacerbates the poor personal relations between the ombudsman and the professional bodies. Confirmation of the deficiencies of the system are contained in the recent official review of legal professional regulation in Victoria which recommended a single gateway system through an ombudsman, as in NSW.

8. In New South Wales, however the system appears to work very well. The LSC has a clearer position as the sole gateway and also good relations with the profession. He seen as a co-regulator with them, rather than an independent regulator. Perhaps because the New South Wales ombudsman (LSC) is a lawyer (unlike his Victorian counterpart), there appear to be fewer misunderstandings or a greater degree of trust between him and the professional bodies than exists in Victoria. Curiously, the LSC has even greater powers than the Victorian Ombudsman in that his remit covers the regulation of education standards, admissions, certification of practitioners, the equivalent of the Guarantee Fund and the Master Policy. A further reason for the LSC’s success is that he sees his function as an educator rather than a regulator. First to educate the complainer as to what his office can and cannot do for him or her, what it is reasonable to expect from a complaints system as opposed to a court based system of redress, then to educate the profession as to the lessons to be learned from complaints, particularly service complaints, for enhancing client care. The LSC is strongly of the view that confining the professional bodies to a trade union role would reduce their interest in

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2 See sheet attached
9. The position in Ontario is quite different. Prior to the recent amendments, discipline complaints against lawyers in Ontario were handled by professional staff members of the Law Society who placed complaints before a small committee chaired by a bencher (equivalent to a Law Society Council member). This committee would instruct a prosecution to be heard by a Discipline Committee. Where the initial committee took the decision that there was no case to answer, the complainer could appeal to a committee of four lay benchers.

10. The Discipline Committee consisted of three benchers (one of whom was a lay bencher) who made a finding on the question of alleged professional misconduct or conduct unbecoming a barrister or solicitor. They also made a recommendation as to the penalty appropriate in the circumstances. The hearing was conducted in an adversarial manner and a duty counsel scheme operated to ensure that the lawyer complained against was represented if he/she so wished. (A transcript was kept of the hearing). The recommendation as to penalty was submitted not to an independent Discipline Tribunal but to a 44 bencher strong Discipline Convocation (equivalent to the Council of the Law Society, but with lay members), which heard submissions from Law Society counsel and from counsel for the member, and then deliberated in private on motions proposed with respect to penalty. Where Convocation did not accept the recommendation of the hearing panel, reasons would be given for the decision. As in the case of the Committee proceedings were adversarial and a duty counsel scheme operated to ensure representation for the lawyer complained against.

11. Unlike the Scottish situation unless a decision was made to the contrary, any hearing was open to the public, including the complainant and the media and anyone else interested in attending. In fact, virtually all of the hearings are and have been open. Even if, in exceptional circumstances, a hearing was closed, the member complained against would be entitled to be present throughout the hearing (evidence and submissions). Discipline Convocations were also open to the public. Only the deliberations of the benchers in committee or in Discipline Convocation were in camera.

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12. This system created a host of problems. It meant that parts of cases were often deliberated twice, once by the Committee and once by Convocation. It often created delays between the Committee recommendation and the actual imposition of the penalty. It also created an administrative nightmare for the staff of the discipline department, who were required to present their cases to 44 benchers according to elaborate procedures involving mountains of paper.

13. The recent Ontario reforms (see the new Law Society Act set out on the website for the Law Society of Upper Canada, i.e. Ontario, at www.lsuc.on.ca) introduce a number of changes:

I. provision is made for three kinds of proceedings
   a. complaints of professional misconduct or conduct unbecoming
   b. complaints of incapacity
   c. complaints of incompetence

II. Complaints are heard by a panel of three benchers (one of whom must be a layperson) who have authority to make findings AND to determine the appropriate penalty or outcome.

III. Either the Law Society or the member has a right of appeal to a seven bencher Appeal Panel (with at least one lay bencher).

Hearings of the panel or the appeal panel are open except in very unusual circumstances. In addition, there is a right of judicial review on appropriate grounds.

14. Another significant reform is the creation of the Complaints Resolution Commissioner (CRC) who, in addition to acting like an Ombudsman in reviewing the handling of complaints will also be able to resolve minor complaints in a way which was impossible under the old system. These complaints will include those relating to competence which could not be handled under the previous system. The office has not yet been established, but the intention is that the establishment of the Complaints Review Commissioner will provide additional accountability
within the discipline system and avoid any implication that the Law Society’s discipline process in fact protects lawyers from complainants.

15. Finally, the reforms give the Society a wide range of available sanctions in addition to the traditional penalties of reprimand, suspension and disbarment. Penalties available on a finding of misconduct include sanctions ranging from fines to mandatory addiction treatment. A professional competence order can include requirements such as implementation of new practice management systems, participation in legal education programs and restricting practice areas. An incapacity order can include requirements such as obtaining medical or addiction treatment and practising under supervision. The Solicitors (Scotland) Act 1980 contains no equivalent powers for the Law Society.
The purpose of these guidelines

Under sections 134 and 135 of the Legal Profession Act 1987, all complaints against legal practitioners and licensed conveyancers in New South Wales must be made to the Office of the Legal Services Commissioner (OLSC).

The OLSC must assess each complaint to determine whether

- it is a valid complaint within the terms of sections 137, 138 and 141;
- it should be dealt with as a consumer dispute or conduct investigation; and
- it should be retained by the OLSC or referred to a Council or the Department of Fair Trading.

These Guidelines set out the general principles to be applied by the OLSC when assessing complaints.

When applying these principles the OLSC has regard to the Commissioner’s statutory function of providing assistance and advice to complainants and potential complainants in making and pursuing complaints (including assisting complainants to clarify their complaints and to put their complaints in writing).

Statutory framework

The flow chart at Attachment 1 sets out the statutory framework in which new complaints are assessed.

Assessment of new complaints

Statutory criteria

For a complaint to be accepted under the Act it must

- be in writing (section 137(a));
- identify the complainant (section 137(b));
• identify the legal practitioner against whom the complaint is made (section 137(b));
• give particulars of the conduct of the legal practitioner that is the subject of the complaint (section 137(c));
• not be vexatious, misconceived, frivolous or lacking in substance (section 141(b)); and
• be made within three years after the conduct is alleged to have occurred (section 138(1)).

**Particulars**

The OLSC does not expect complainants to provide “particulars” in a narrow, legalistic sense. It is sufficient that a complaint contains adequate details of the alleged conduct and the dates on which it occurred to allow the legal practitioner to respond.

Where a complaint does not contain adequate particulars than the OLSC may write to the complainants requesting further information and, where appropriate, documents. These requests will specify the information and documents to be provided, and set a time limit within which the complainant must reply.

Where appropriate, the OLSC may require the complainant to verify the complaint, or any further particulars, by statutory declaration. The request for such verification must specify a reasonable time for compliance.

If a complainant fails to provide the particulars or verification within the specified time then the Commissioner may, pursuant to section 141(a), dismiss the complaint without referring it to the appropriate Council.

**Complaints which are vexatious, misconceived, frivolous or lacking in substance**

Under section 141(b) of the Act, the Commissioner may dismiss a complaint without referring it to the appropriate Council on the basis that the complaint is vexatious, misconceived, frivolous or lacking in substance.

The Commissioner exercises his discretion under section 141(b) in accordance with the following principles:

• the object of the section is to stop complaints which ought not to be investigated because they are either hopeless or not bona fide;
• the defect must be apparent on the face of the complaint;
• for the purpose of exercising the discretion, the facts alleged in the complaint should be taken as proven;
• the discretion should only be exercised in plain and obvious cases - while there is any hope for the success of the allegations raised in a complaint the matter should be allowed to proceed.

**Out of time complaints**

Under section 138(2) of the Act the Commissioner has a discretion to accept out of time complaints if satisfied that

• it is just and fair to accept the complaint having regard to the delay and the reason for it; or
• the complaint concerns an allegation of professional misconduct and that it is necessary in the public interest to investigate the complaint.

Before exercising this discretion the Commissioner will, in all but exceptional cases, invite submissions from the complainant and the practitioner on the out of time issue.

**Classification criteria**

**Introduction**

Under Part 10 of the Act, a complaint may be dealt with as

• a consumer dispute under Division 4 of Part 10;
• a conduct investigation under Division 5 of Part 10; or
• both a consumer dispute and a conduct investigation.

When classifying a complaint as a consumer dispute, conduct investigation or both, the OLSC will apply the following.

**Consumer disputes**

Under section 143, for the purposes of Division 4 a consumer dispute is a dispute between a person and a legal practitioner in which the person seeks redress or a remedy by making a complaint under Part 10. A person may make a complaint in connection with a consumer dispute even though the dispute may not involve an issue of professional misconduct or unsatisfactory professional conduct.

In general terms, a complaint will be dealt with as a consumer dispute having regard to the following factors.

• The extent to which the complaint involves any issues of professional misconduct or unsatisfactory professional conduct, and the seriousness of those issues.
• The nature of the redress or remedy sought by the complainant.
• The extent to which a resolution of the dispute is achievable given the nature and history of the dispute and of the relationship between the complainant and practitioner.

Conduct investigations

Under sections 147A and 148, the OLSC and Councils may investigate a complaint to determine whether there is a reasonable likelihood of the Legal Services Division of the Administrative Decisions Tribunal finding the practitioner guilty of unsatisfactory professional conduct or professional misconduct.

For the purposes of the Act,

• professional misconduct includes:
  ⇒ unsatisfactory professional conduct, where the conduct is such that it involves a substantial or consistent failure to reach reasonable standards of competence and diligence;
  ⇒ conduct (whether consisting of an act or omission) occurring otherwise than in connection with the practice of law which, if established, would justify a finding that a legal practitioner is not of good fame and character or is not a fit and proper person to remain on the roll of legal practitioners;
  ⇒ conduct that is declared to be professional misconduct by any provision of this Act;
  ⇒ conduct which would reasonably be regarded as disgraceful or dishonourable by the practitioner’s professional brethren of good repute and competency.

• unsatisfactory professional conduct includes conduct (whether consisting of an act or omission) occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner.

In general terms, a complaint will be dealt with as a conduct investigation having regard to the following factors.

• The complaint must raise issues of professional misconduct or unsatisfactory professional conduct.
• The seriousness of those issues.

Both
The Act acknowledges that there will be complaints which may be dealt with as both a consumer dispute and a conduct investigation.

As a general rule the OLSC will classify each complaint according to the category which it most satisfies.

**Changing classifications**

There will be cases where a complaint is initially classified as a consumer dispute but conduct issues arise in the course of the resolution process. Similarly, there will be cases where a complaint is initially assessed as raising conduct issues which, after some investigation, is more appropriately dealt with as a consumer dispute.

In these cases the OLSC will reconsider the complaint and, if appropriate, amend its classification accordingly.

**Allocation criteria**

The Commissioner may

- deal with a complaint within his Office; or
- refer a complaint under section 142 to the appropriate Council for investigation or mediation, or both.

When allocating a complaint the Commissioner will have regard to the following factors.

1. The relative resources, expertise and workload of the OLSC and the Councils.

2. The fact that a complainant has no right to seek a review of a decision by the LSC to dismiss or a complaint or to deal with it under section 155(3).

3. The OLSC will, as a general rule, refer conduct complaints to the relevant Council for investigation.

4. The OLSC will, as a general rule, only investigate a complaint where
   - the complaint raises an issue of public interest or statutory interpretation, or an issue which is otherwise novel, that is more properly dealt with by a public authority;
- the Council (to which the investigation would otherwise be referred) has a conflict in relation to the complaint - such as complaints which involve a member, former member or employee of a Council;
- the complaint is initiated by the Commissioner or arises from a review of a Council determination; or
- the interests of efficiency and proper handling of a complaint would best be served by the OLSC conducting the investigation - including situations where the conduct issue arises in the course of assessing the complaint or dealing with it as a consumer dispute.

5. The OLSC will not, as a general rule, investigate complaints initiated by a Council under section 135.

6. The OLSC will, as a general rule, retain consumer disputes. Consumer disputes which involve two practitioners (with the exception of lien disputes) will usually be referred to the appropriate Council.
Justice 1 Committee

Regulation of the legal profession inquiry

Supplementary evidence from Professor Alan Paterson on edited communications from Steve Mark, Legal Services Commissioner, New South Wales

Of course any introduction of an independent regulator into the arena is a move away from self-regulation. That's what the public and the politicians want. However, I believe that co-regulation is the most appropriate model (as distinct from removing the professional association altogether) as it keeps the profession involved and creates the best of both worlds.

The Commissioner’s Office receives ALL complaints at first instance (about licensed conveyancers, solicitors or barristers) and assesses them as to whether they are within jurisdiction, whether they are likely to be conduct complaints or consumer disputes which require attempt at resolution. This is generally done by my Assistant Commissioner (Legal) and Assistant Commissioner (Complaints). While they don't physically do it together, they liaise over difficult or borderline cases, and sometimes bring contentious issues to me. This would take between 1/2 hour - 2 hours per day depending on the number and complexity of complaints received, but on average about one hour. This obviates the need for the Professional Associations to "sift" or assess the complaints they receive, other than to determine who of their staff to refer it to. On occasion the Professional Association considers that the complaint is out of jurisdiction, out of time or otherwise should be dismissed by me without the need for investigation. While this is fairly rare, I listen to their reasoning and sometimes agree at which time I can dismiss the complaint as frivolous, vexatious or lacking in substance without an investigation. There is very little, if any duplication. More an occasional difference of opinion. This causes no problems for us or the Professional Associations. In a sense, this is the very reason that we have a single gateway – to reduce duplication which would undoubtedly occur if complaints could go to either organisation (as in Victoria). I enclose a copy of the protocol\textsuperscript{1} we have developed for determining which complaints I refer to the Professional Associations.

If the Law Society or the Bar does the investigation, I can review their decision. This is a review, and part of our monitoring role, not duplication. We look at their investigation, and decide if they have investigated all the issues raised in the complaint, interviewed all the appropriate witnesses etc. in other words, we assess whether a proper investigation has taken place. If not, we direct the

\textsuperscript{1} See attached sheet
professional body to do what it has omitted. We then turn to the decision that was made and determine whether we believe it appropriate. I can direct a reinvestigation, or reinvestigate myself, but this would only occur due to a failure by the Professional Association to do what they should have. No duplication. I can also decide that the practitioner should be referred to the Tribunal and either direct the Professional Association to do so, or prosecute myself. Again, no duplication.

Does this mean that there is a problem because there is no review against my initial decision as to whether a “complaint” is really a complaint or within jurisdiction? This is similar to the old “who guards the guardians” question. It comes up here occasionally. There is no perfect answer to this question, and it usually simply dissipates when no one can come up with a reasonable suggestion without creating an endless system of review bodies. The simple answer is that any decision that I make is an administrative decision which can be reviewed through the operation of administrative law. In addition, anyone can complain about me, my office or the decisions we make to the Attorney General, the Minister that I “report” to. He, of course would not/could not overturn any specific decision I make, but if I were to become deranged and make insupportable decisions I would simply be removed. Occasionally the idea emerges from various sources that I should be “accountable” to a committee (of Parliament or of the profession). This is fine, but it would be totally unacceptable for any such body to be able to interfere with or overturn my decision. That is why I am an Independent Statutory Authority.

Sydney, February, 2001
Thank you for your letter of 12 December.

As you indicate, Tony Cameron has now confirmed that he did not attend the meeting on 26 January between Henry McLeish, Alec Salmond and myself. As I said in the course of the SNP debate on 12 December no one is accusing Tony Cameron of showing bad faith in the evidence he gave to the Committee. Such an accusation would be very serious and I rebut it completely. It was simply a mix-up about dates of and attendance at meetings and I hope we can now let the matter rest.

You ask that I expand on the points to which Tony Cameron refers from the record of the meeting. I have to say that although obviously a verbatim note was not taken, the quote from the record of the meeting sums up the issue fairly well. Throughout this process, we have said that the Estates Review will be looking at options that provide the best value for money to the taxpayer, which is of course an evaluation of both cost and quality.

In the case of Peterhead, therefore, it means the options will be considered, not only in terms of the costs (although these cannot be ignored) but also in terms of their ability to secure the delivery of programmes (particularly STOP 2000) for all sex offenders in the long term. I would hope that the Committee would agree with such an approach.

JIM WALLACE
I felt reassured by the manner in which the then First Minister dealt with the issue and the fact that he readily agreed to the point being stressed in my press release from the meeting a copy of which I have already sent to the Committee.

Finally let me raise two other related matters

I was encouraged that at the same meeting the Justice Minister said that, on the critical question of the importance of the 'total culture' of the prison environment in running successful programmes for sex offenders, he would seek the advice of HMCI, Mr. Fairweather. I would hope that this commitment still applies within Mr. Fairweather’s remaining tenure in post.

I also understand that the Justice Minister has now indicated that the qualitative aspects of delivery of programmes are included in the Estates Review itself and not only in the consultation exercise. I would think that is also to be welcomed, although it has never previously been made clear to me in any meeting that I have had with Mr. Cameron on the issue.

I hope these remarks are of use to the Committee and I would be pleased to discuss them further at any stage.

Yours sincerely

ALEX SALMOND MP
13 January 2002

Christine Grahame MSP
Convener, Justice 1 Committee
The Scottish Parliament
EDINBURGH

Dear Christine

HM PRISON PETERHEAD

Thank you for your letter of 12 December.

I note that Mr. Cameron now accepts that he was not present at the meeting on 26 January 2001. I find it difficult to understand how he could have confused a meeting in Edinburgh with the then First Minister with a visit to Peterhead Prison involving the Justice Minister.

The importance of the matter is this. Throughout this long delayed exercise I had found it difficult, as the constituency MSP for Peterhead, to pin down Mr. Cameron on the criteria to be employed in the Estates Review i.e. whether it was a pure bricks and mortar exercise or whether the QUALITY of provision was to be taken into account and at what stage.

I was very satisfied with the meeting on 26 January precisely because the then First Minister twice went out of his way to emphasise that these qualitative aspects would be recognised in the consultation exercises. I know that Committee members will understand that at any meeting with Ministers the way in which a point is made can be of considerable importance.
Proposal for the Provision of Treatment Services to Sexual Offenders
In the Scottish Prison Service
by
W. L. Marshall, Ph.D., FRSC
This proposal is submitted at the request of Mr. Alec Spencer, Director, Rehabilitation and Care, Scottish Prison Service (SPS). I have been involved in the development and growth of the Sexual Offenders’ Program at Peterhead Prison since 1991 and I have, I hope, gained over that time a reasonable understanding of the issues relevant to planning a comprehensive approach to treating sexual offenders within SPS. No doubt there are relevant issues I do not understand or fully appreciate, so with that reservation I offer the following proposal.

PROGRAM NEEDS

For convenience I will describe all incarcerated sexual offenders serving sentences of 4 years or more as “long-termers” while those with 4 years or less I will describe as “short-termers.” Although not a perfect match with actuarial estimates of risk, the long-termers are for the most part, be considered as constituting moderate to high risk, and having matching treatment needs. Thus they will need to be housed in a maximum security prison and provided with extensive treatment opportunities.

Short-termers, on the other hand, can be considered to be in the low to moderate risk range with matching treatment needs. They present a more difficult management problem as some will need maximum and some medium security, while others can do well in minimum security conditions. In fact, of course, both short-termers and long-termers should, with treatment, be able to cascade down to lower security as part of their graduated release program (see comments on this issue later in this proposal). The reader will note that I am using security level descriptors as these are used in Correctional Service of Canada; that is, maximum security prisons have very secure peripheries and internal security, medium security prisons are similar peripherally but with greater freedom of movement internally, while minimum security prisons have no peripheries and very relaxed internal environments.

Correctional Service of Canada also have “soft” medium security prisons where there is little restriction on internal movement; that is, intensively they are a match for minimum security. SPS should consider developing a soft medium, if one does not already exist, to accommodate both the nonproblematic short-termers and the long-termers who are cascading down the system on their graduated release program.

In this proposal I will concern myself only with what I believe are the optimal conditions for providing treatment, and I will leave to others decisions about security needs. However, I should note that what I will describe is in most respects what is done in Correctional Service of Canada prisons without compromising security.

One final note before detailing my proposal. SPS has been one of the leaders in the world, in my view, in attempting to house sexual offenders in a “sexual offenders only” prison. This is very clearly the best circumstance in which to provide treatment for sexual offenders so I will assume, in all the comments and suggestions that follow, that SPS is devoted to continuing this excellent management system.

ASSESSMENT

All sexual offenders should be requested to complete a comprehensive assessment battery. However this battery of tests and interviews should only target those issues that can be addressed in treatment as well providing background information on offence history and life history (e.g., childhood, adult relationships, employment). Psychologists are the best suited professionals to conduct these assessments.

The targets in this assessment should include: denial of the offence(s), minimization of various features of the offence(s), cognitive distortions, recognition of victim harm and the expression of victim empathy, coping styles and skills, intimacy and loneliness, self-esteem, substance use and abuse, anger problems, awareness of risk factors, and an actuarial estimate of future risk. These are the factors addressed in treatment. The reports of these assessments should be communicated to treatment providers so that they can pay special attention to treatment to the specific needs of each offender. These assessments should be repeated after treatment to determine if the goals of treatment have been reached.

The final treatment report, which should integrate the post-treatment changes with the therapists’ evaluation of progress, should be provided to Parole Board members and passed on to both probation/parole supervisors and community treatment providers.

1
Deterrence program

Some sexual offenders remain adamant that they did not commit the offence(s) for which they are incarcerated. In most cases their claims appear absurd in face of the evidence but their denial may preclude them entering the standard programs. Their risk for future offending, then, will go unmodified unless some program is developed to accommodate them. The treatment staff at Peterhead Prison, namely John Hamilton and Dale Galley, took the description of our Detriens Program and developed one suited to Scottish offenders. They did an excellent job and once again it is better than our program so I am adapting ours accordingly. This should run 3 or 2 x 2.5 hour sessions per week.

Maintenance program

Sometimes called a "booster program", this program is for sexual offenders who have completed the standard programs but who either need some additional work on relapse prevention plans or who have remained in prison for over a year since completing treatment. This program should have 1 x 2.5 hour session every second week.

Preparation program

Sexual offenders serving very long sentences (i.e., 10 years or more) should enter a preparatory program aimed at reducing the negative impact of the delay in entering treatment. Without some involvement in treatment such offenders typically become discouraged and resentful, and in those months they too embrace hostile attitudes toward authority, the prison service, and treatment. To avoid these negative effects, a program needs to be designed to encourage the interests of these offenders in treatment and to dispel any negative views they may have. Such a program can also begin the process of overcoming denial and maximization, and begin to challenge their distorted perceptions, attitudes, and beliefs. It can also introduce them to the model of treatment and what they can expect to gain from it. This program should run bi-weekly sessions of 2.5 hours.

Transition to community

Where possible all the long-term offenders should return to the community (if indeed, it is deemed they are suitable for release) while there is still time on their sentence to allow control over their actions and movements. The conditions of their parole, and indeed the decision to grant parole, should be informed by post-treatment evaluation reports, among other considerations. All these offenders should be released through a graduated release program. Initially they should be granted escorted temporary passes (escorts to be either prison officers or approved citizens) until they have demonstrated their ability to function appropriately. Then a series of escorted short-term passes should be granted until again they demonstrate good functioning at which time the length of the escorted passes could be extended. As a final step before full parole, these long-term offenders should be placed in an appropriately supervised halfway house; that is, a secure house in the community, staffed by approved people, that accommodates only sexual offenders. Part of the conditions of release to a halfway house should be to enter a community treatment program. Once they have been deemed to be able to function independently, they should be granted full parole with initially strict supervision and continued involvement in treatment.

These essential features of an effective transition back to the community of moderate to high risk sexual offenders, make clear the very strong need for a seamless system for the process of release (i.e., the prison management, parole supervision, and community treatment). In Canada this has been achieved by integrating the services of prisons and parole supervision, and by Correctional Service of Canada staffing and funding halfway houses and funding community treatment services. I strongly recommend that SPS and the Scottish Government work toward a similar system.

Also the process of information transmission needs to be seamless. Victim statements (both about the details of the offence and about the impact upon the victim of the offence) must be passed from the procurators fiscal to the treatment providers in both the prison or community. These details are essential to effective treatment so that any tendency to resist passing them to treatment providers will jeopardize attempts at reducing the risk these offenders present to innocent members of society. That should clearly be the goal of all parties involved in the system. The argument against doing this, that I have heard, is that victim statements were taken in confidence and cannot therefore be released. Perhaps telling the victims the purposes of passing along this information would prompt them to give permission. Alternatively a synopsis of the salient features of their reports could be made and passed along. Other countries have done this so there only needs to be goodwill on the part of all parties for it to happen in Scotland. As I have
REFERENCES


already mentioned, post-treatment reports provided by prison staff should also be passed to decision makers, and to community supervisions and treatment providers.

Short-term

It may not be possible to house all of these short-term sexual offenders in the same prison but at least one central-belt prison should be devoted to as many of these offenders as possible. Since these offenders have short sentences, and most may not have enough time to complete a full Core program, the development of a Rolling (or Open-ended) program is essential. We developed such a program in 1991 and it has run successfully since then producing marked reductions in recidivism post-release. It has been adapted by the English Prison Service and we (i.e., myself and Volanda Fernández), together with Ruth Mann of the English Prison Head Office, have produced a detailed manual (see attached) and an associated training program. Some, but few, graduates of this program need further community treatment, but for most of them, low intensity community supervision appears to sufficient.

Juvenile sexual offenders

SPS has a prison housing young offenders and this is where a program for juvenile sexual offenders could be developed. Juvenile non sexual offenders are even more likely than adult non sexual offenders to harass sexual offenders and thereby interfere with treatment. Perhaps the present young offender institution could arrange some system to separate sexual offenders from the rest and offer appropriate treatment. I have no knowledge of the present provision of services for these young offenders in SPS but there are plenty of other excellent models available (see, for example, Becker & Kaplan 1992, Gray & Pithers, 1993; Worthing 1998) that could readily be adapted if necessary. Again the problem of longer versus shorter sentences arises. Probably the best solution would be a Rolling program meeting 3 x 2.5 hour sessions per week.

CONCLUSIONS

Provide of an adequate assessment protocol, a comprehensive range of programs for long-term sexual offenders, rolling programs for short-term offenders and for adolescent offenders, an adequate system of information transmission, and a seamless system of managing the transition back to the community of sexual offenders, are all essential to the goal of reducing the risk these men present to innocent people.

I hope the present proposal provides sufficient details of the ways in which these requirements can best be met in the Scottish Prison Service.

W.L. Marshall, Ph.D. and FRSC
Professor Emeritus of Psychology
and Psychiatry
Director, Rockwood Psychological Services
FACULTY OF ADVOCATES

2 April 2002

Ms. Jenny Goldsmith,
Assistant Clerk, Justice 1 Committee
The Scottish Parliament,
Room 3.7 Committee Chambers,
Edinburgh, EH99 1SP

Dear Ms. Goldsmith,

Disciplinary Procedure

For your information I enclose a copy of the Faculty of Advocates revised Disciplinary Rules. These were approved at a recent Faculty Meeting.

Yours sincerely,

[Signature]

Rev. Colin M. Campbell, Q.C.

Dictated by the Dean and signed in his absence
PART I

DISCIPLINARY PROCEDURE

Application of rules

1. (1) These rules shall apply -

   (a) where any complaint is made in writing to the Dean, or

   (b) where the Dean of his own accord initiates disciplinary proceedings,

   in respect of the conduct of a member of Faculty (hereafter in these rules referred to as "the member").

(2) The initiation of disciplinary proceedings by the Dean under paragraph (1)(b) above shall, for the purposes of these rules, be treated as if it were a complaint made to him under paragraph (1)(a) above; and these rules shall, with any necessary modifications, apply to such initiation as they apply to such complaint.

(3) Where the Dean is at any time of the opinion that a complaint is vexatious, unreasonable or unjustified, or that no further action is appropriate, he shall refer the complaint to the Complaints Committee, which may, if in agreement with the Dean, dismiss the complaint.

(4) At his discretion, the Dean may direct that the Vice-Dean or another Faculty Officer be responsible for handling a complaint in his place and exercise all relevant powers.
Interim suspension from membership

2. (1) The Dean may, if he thinks fit, suspend the member ad interim from membership of Faculty pending the determination and disposal of the complaint.

(2) As soon as may be practicable the Dean shall invite the member to make written or oral representations on the matter of his suspension and shall thereafter review the position.

(3) In the event of the Dean determining that a member should be suspended in terms of rule 2(1) above, he shall, on the application of the member, further review the position at intervals of not less than six months, and report to the member the result of any such review.

(4) The member may appeal the matter of his suspension to the Disciplinary Tribunal within a reasonable time of any review under paragraph (2) or (3) above.

Intimation of complaint

3. (1) The Dean shall as soon as may be practicable inform the member in writing as to the nature of the complaint, and shall afford the member an opportunity to provide a written response to the complainant's allegations.

(2) Thereafter the Dean shall have power to make such further enquiry as he may think fit with a view to (i) identifying the issues to be addressed, and (ii) ascertaining whether or not any material facts bearing on those issues are substantially in dispute between the parties.

Action where facts not disputed

4. (1) Where the material facts bearing on the issues identified under rule 3 (2) above are not substantially in dispute between the parties, the Dean shall remit the matter to the Complaints Committee which may

(a) dismiss the complaint in terms of rule 1(3) above;

(b) uphold the complaint in whole or in part and impose, if it thinks fit, one or more of the penalties set out in rule 6 below;
(c) with the consent of the member, uphold the complaint in whole or in part and remit it to the Disciplinary Tribunal for the imposition of one or more of the penalties set out in rule 12 below; or

(d) remit the complaint to the Tribunal for determination and disposal.

(2) Before giving any consent under paragraph (1) above, the member shall be informed by the Complaints Committee that it intends to act in accordance with that paragraph; and notified of the facts on which the Committee intends to uphold the complaint, in whole or in part.

Action where facts disputed

5. (1) Where the material facts bearing on the issues identified under rules 3(2) above are substantially in dispute between the parties, the Dean shall remit the matter to the Complaints Committee which may-

(a) dismiss the complaint in terms of rule 1(3) above;

(b) subject to such directions as it may specify, remit the matter to the Investigating Committee to ingather evidence or further evidence bearing upon the facts of the case; or

(c) remit the complaint to the Disciplinary Tribunal for determination and disposal.

(2) The member shall be informed as to-

(a) any remit of the complaint to the Investigating Committee under paragraph (1) above; and

(b) the membership of the Investigating Committee;

and the Investigating Committee and the member shall be provided with such information as is in the Faculty’s possession in relation to the complaint.
(3) Subject to any directions given by the Complaints Committee, the Investigating Committee shall -

(a) invite the member at his discretion to make written or oral representations as to the complaint;

(b) make such other investigations as they think fit; and

(4) Without prejudice to the generality of paragraph (3) above, the Investigating Committee may at their discretion interview or take statements from such witnesses (including the complainant, the member and any third party), and ingather such documents or other evidence, as they consider may bear upon the facts of the case.

(5) On completion of their investigations the Investigating Committee shall report in writing on such evidence as they have ingathered to the Complaints Committee. In so doing, the Investigating Committee may, if they think fit, comment on the credibility and reliability of any such evidence, and shall set out the facts which they find admitted or proved.

(6) Thereupon the Complaints Committee shall afford to the complainant and the member an opportunity to comment on the substance of the Investigating Committee’s report.

(7) Having considered the facts found the evidence obtained by the Investigating Committee and any comment thereon, the Complaints Committee may:

(a) dismiss the complaint in terms of rule 1(3) above;

(b) with the consent of the member, uphold the complaint in whole or in part and impose, if it thinks fit, one or more of the penalties set out in rule 6 below;

(c) with the consent of the member, uphold the complaint in whole or in part and remit it to the Disciplinary Tribunal for the imposition of one or more of the penalties set out in rule 11 below; or

(d) remit the complaint to the Tribunal for determination and disposal.

(8) Before giving any consent under paragraph (7)(b) or (c) above, the member
shall be informed by the Complaints Committee that it intends to act in accordance with that paragraph; and notified of the basis on which the Committee intends to uphold the Complaint, in whole or in part.

(9) Notwithstanding any remit to the Investigating Committee under this Rule, the Complaints Committee may at any stage, at its discretion, revert to dealing with the complaint in terms of rule 4 if the facts bearing on the issues identified under rule 3(2) above cease to be substantially in dispute between the parties.

Imposition of penalties by Complaints Committee

6. (1) Subject to paragraph (2) below, the penalties which may be imposed on the member by the Complaints Committee under rule 4(1)(b) or 5(3)(b) above are as follows -

(a) verbal admonition;

(b) formal written reprimand;

(c) severe written censure;

(d) order for cancellation or repayment in whole or in part of any fees exigible in respect of the work which has given rise to the complaint;

(e) a fine not exceeding £7,500;

(f) suspension from practice, with or without conditions, for a specified period not exceeding one year.

(2) Before imposing any penalty referred to in paragraph (1) above, the Complaints Committee, shall invite the member at his discretion to make written or oral representations as to such imposition.

(3) In deciding on the appropriate penalty, the Complaints Committee may take into account any period of interim suspension imposed under rule 2 above.
7. (1) Any decision of the Complaints Committee under rule 1, 4, 5 or 6 above may be unanimous or by a majority.

(2) For the purposes of any such decision, each member of the Complaints Committee shall have an equal vote.

8. (1) With leave of the Complaints Committee, which shall only be granted on cause shown, the complainant or the member may appeal to the Disciplinary Tribunal against the dismissal or final disposal (including determination) of the complaint.

(2) Any application for leave, specifying the grounds on which it is sought, shall be made in writing within fourteen days of intimation of the dismissal or final disposal (including determination) of the complaint as the case may be.

(3) On an application for leave being received, the other party or parties shall be afforded an opportunity to make written representations as to why leave should not be granted.

(4) The decision of the Committee to grant the application shall be final.

(5) The decision of the Committee to refuse the application shall be final, unless, within seven days, the matter is brought before the Disciplinary Tribunal on review and, on cause shown, the Tribunal grants leave to appeal.

(6) A review hearing under paragraph (5) above shall be heard by a Committee of the Tribunal, comprising one Senior and one Junior Counsel, and one lay person appointed by the Chairman from the panels maintained under rule 19 below.

(7) The procedure to be followed in an appeal where leave is granted will be mutatis mutandis that set out in rule 11(4)—(13).

(8) The Tribunal shall not allow an appeal unless it is satisfied that the decision of the Complaints Committee was wrong in law, or that the Committee proceeded on a basis of fact contrary to the weight of the evidence.

Remit to Disciplinary Tribunal
9. (1) Where the Complaints Committee remits the complaint to the Disciplinary Tribunal, the member shall be informed of:
   
   (a) the remit; and

   (b) the membership of the Tribunal.

Remit for imposition of Penalties

10. In the case of a remit to the Tribunal for the imposition of penalties -

   (1) The Dean shall -

   (a) provide the member with such information as is in the Faculty’s possession in relation to the complaint;

   (b) instruct a solicitor to pursue the complaint, and the solicitor shall in turn instruct counsel from a panel of three counsel of at least 10 years standing approved by the Faculty for the purpose. The solicitor and counsel may arrange for such assistance to be engaged in relation to the complaint as they think appropriate.

   (2) The procedure to be followed will be that mutatis mutandis that set out in rule 11(4) - (11) below.

   (3) The Tribunal shall give their decision, together with the reasons therefor, in writing and such decision shall be notified to the Dean.

Remit for determination and disposal

11. (1) In the case of a remit to the Tribunal for determination and disposal, the Dean shall instruct a solicitor to pursue the complaint, and the solicitor shall in turn instruct counsel from a panel of three counsel of at least 10 years standing approved by the Faculty for the purpose. The solicitor and counsel may engage such assistance in relation to the investigation and prosecution of the complaint as they think appropriate.
(2) The Dean shall provide the solicitor with such information as is in the Faculty's possession in relation to the complaint.

(3) The solicitor shall instruct counsel to draft a formal Complaint which shall be intimated to the member who shall be entitled to lodge answers thereto. Such formal complaint shall set out the specific charges being made against the member and may on cause shown be amended at any time prior to the determination of the complaint.

(4) The procedure to be followed in the course of a remit to the Tribunal, and the conduct of any hearing, shall be at the discretion of the Chairman, but the Tribunal shall act in accordance with the principles of natural justice and observe the particular requirements set forth in the succeeding paragraphs of this rule.

(5) The Chairman may, at any time after the remit of the complaint to the Tribunal, hold such preliminary hearing or hearings as he thinks fit in order to address any procedural or other issues that may arise. For the purposes of any such preliminary hearing, the Chairman may, at his discretion, sit alone or convene a full or partial Tribunal.

(6) The parties to the case shall be given due notice of the date, time and place of any hearing before the Tribunal.

(7) In respect of a hearing, at which evidence is to be led or considered, the parties to the case shall, where ordered by the Tribunal:

(a) exchange lists of witnesses;

(b) lodge productions with the Clerk to the Tribunal; and

(c) exchange precognitions of witnesses.

(8) At any hearing, the case against the member shall be conducted by counsel referred to in paragraph (1) above, and the member may conduct his own case or have it conducted on his behalf by counsel or a solicitor.

(9) Any hearing shall be held in public unless ex proprio motu or on the application of the complainer, the Dean or the member, the Tribunal
considers that it would be appropriate for it to be held in private.

(10) Any incidental question of law arising in the course of the proceedings before the Tribunal shall be decided by the Chairman of the Tribunal.

(11) Subject to paragraphs 5 and 10 above, each member of the Tribunal shall have an equal vote in the determination and disposal of the complaint. Any decision of the Tribunal may be unanimous or by a majority.

(12) The Tribunal may determine the complaint by dismissing it or by upholding it in whole or in part.

(13) The Tribunal shall give in writing their decision as to the determination and disposal of the complaint, together with the reasons therefor, and such decision shall be notified to the Dean.

Imposition of penalties by Disciplinary Tribunal

12. (1) Where the complaint has been remitted by the Complaints Committee to the Disciplinary Tribunal -

(a) for the imposition of penalties, or

(b) for determination and disposal, and the Tribunal have upheld the complaint in whole or in part,

they may impose on the member, if they think fit, one or more of the penalties set out in paragraph (2) below.

(2) Subject to paragraph (4) below, the penalties which may be imposed under paragraph (1) above are as follows -

(a) any penalty mentioned in rule 6(1)(a) to (d) above;

(b) a fine not exceeding £15,000;

(c) suspension from practice, with or without conditions, for a specified period not exceeding five years;

(d) suspension from membership of Faculty, with or without conditions,
for a period not exceeding five years;

(c) expulsion from such membership.

(3) Before imposing any penalty under this rule, the Tribunal shall invite the member at his discretion to make written or oral representations as to such imposition.

(4) In deciding on the appropriate penalty, the tribunal may take into account any period of interim suspension imposed under rule 2 above.

(5) The penalty of a fine under paragraph (2)(b) above shall not be combined with the penalty of suspension or expulsion from membership of Faculty under paragraph (2)(c) or (d) above.

Miscellaneous

13. (1) Where, in response to an invitation under these rules, the member chooses to make oral representations, he shall be entitled to be accompanied or represented for that purpose by counsel or a solicitor.

(2) In the determination of any complaint the member shall be given the benefit of any reasonable doubt.

Intimation of decisions, etc.

14. (1) The Dean or the Complaints Committee as the case may be shall, as soon as may be after the relevant event, intimate to the member and to the person who made the complaint -

(a) any interim suspension of the member under rule 2 above;

(b) any dismissal, determination or disposal of the complaint under these rules, or any action which has been or is proposed to be taken in the matter.

Publication of decisions

15. (1) (a) Where the Complaints Committee or the Tribunal upholds a complaint of professional misconduct, details of the relevant determination and of any penalty imposed, shall normally be published.
(b) Where the Complaints Committee or the Tribunal upholds a complaint of inadequate professional service, unless the member so requests, publicity shall not normally be given to the determination or dismissal of the complaint.

(c) Where the Complaints Committee or the Tribunal dismisses any complaint, whether of professional misconduct or of inadequate professional service, unless the member so requests, publicity shall not normally be given to that decision.

(2) Any publication under paragraph (1) above shall be made in register kept by the Faculty for that purpose, which shall be available for inspection.

(3) Additional publicity in any form may be ordered at the discretion of the Committee or Tribunal if in their judgment the circumstances of the case so require, or the Committee or Tribunal, as the case may be considers that there are special circumstances justifying that course.

Petition for removal

16. In the event of-

(a) the interim suspension of the member from membership of the Faculty under rule 2 above, or

(b) the suspension or expulsion of the member under rule 6 or 12 above, the Dean shall on behalf of the Faculty petition the Court of Session to remove the member from the public office of advocate.
PART II

CONSTITUTION OF COMMITTEES AND TRIBUNAL, ETC.

Complaints Committee

17. The Complaints Committee shall consist of three persons drawn from the Dean; the Vice-Dean; two other senior members of Faculty nominated by the Dean; and the panel of lay persons nominated by the Scottish Ministers for the purposes of these procedures. Either the Dean or the Vice-Dean shall be in the chair. Each committee shall include one lay person. The Dean shall have power to nominate a senior member of Faculty to serve on a complaints committee on an ad hoc basis.

Investigating Committee

18. (1) The Investigating Committee in a given case shall consist of one senior and two junior counsel selected by the Complaints Committee from a panel of three senior and six junior counsel approved by the Faculty for the purpose.

(2) The Chairman of the Committee shall be the member of the committee who is most senior as counsel, and the clerk to the Committee shall be the member of the Committee who is most junior as counsel.

(3) Where the member on cause shown objects within a reasonable time to any member of the Committee, or where any member of the Committee declines to serve on it, the Complaints Committee shall select another member of the panel to serve in his place.

Disciplinary Tribunal

19. (1) Subject to paragraph (3) below, the Disciplinary Tribunal shall consist of a Chairman and six other persons appointed as follows:

(a) the Chairman, who shall be a retired Senator of the College of Justice or a retired Sheriff Principal or other appropriate person, shall be appointed by the Lord President of the Court of Session for a period of three years and, in relation to a case referred to the Tribunal within that period, for such further period as may be necessary to bring it to a conclusion.
(b) four counsel (including at least one senior counsel) shall be selected by the Chairman from a panel of twelve counsel (including at least five but not more than six senior counsel) approved by the Faculty for the purpose;

(c) two lay persons shall be selected by the Chairman from the panel of lay persons nominated by the Scottish Ministers for the purposes of these procedures.

(2) The clerk to the Tribunal shall be the Clerk of Faculty or such other counsel as the Dean may appoint.

(3) Where, in any particular case, the Chairman is of the opinion that it is appropriate that a solicitor should serve on the Tribunal, he shall select one solicitor from a panel of three solicitors of at least 10 years' standing nominated by the President of the Law Society of Scotland for the purpose and, in that case, paragraph (1) above shall apply in relation to the appointment of the Tribunal with the modification that, in sub-paragraph (b), for the word "four" there shall be substituted the word "three".

(4) Where the member on cause shown objects within a reasonable time to any member of the Tribunal, or where any member of the Tribunal declines to serve on it, the Chairman shall select another member of the same panel to serve in his place on the Tribunal or, in the case of the Chairman of the Tribunal, the Lord President of the Court of Session shall appoint another Chairman for the purposes of the particular case.

Further provisions as to panels

20. (1) Without prejudice to the continued service of panel members selected for particular cases, one-third of each of the panels referred to in these rules shall retire by rotation each year.

(2) A person shall not be eligible for re-nomination to any of the said panels within three years of retiring from it or, as the case may be, of completing a case requiring continued service beyond normal retirement date.
PART III

MISCELLANEOUS

Expenses

21. (1) Subject to the following paragraphs of this rule, all expenses reasonably incurred in connection with the handling of a complaint under these rules shall be paid by the Faculty.

(2) Where a complaint is upheld, expenses shall not be recoverable by the member unless, in exceptional circumstances, the Committee or the Tribunal so direct.

(3) The Complaints Committee or Disciplinary Tribunal may at their discretion limit or inhibit the recovery of expenses by any party whose conduct in relation to the complaint proceedings is held to be unreasonable.

(4) Where the conduct of any party in relation to complaint proceedings is held to be vexatious, obstructive or dishonest, the Complaints Committee or the Disciplinary Tribunal may at their discretion find that person liable to meet the expenses reasonably incurred by any other party, or by the Faculty, in connection with the handling of the complaint.

(5) Any dispute as to the reasonableness of any expenses payable under paragraph (1) or (4) above shall be remitted to the Auditor of the Court of Session whose decision shall be final.

Interpretation

22. In these rules, the following expressions shall, unless the context otherwise requires, have the following meanings respectively assigned to them -

"complaint" means a complaint such as is referred to in rule 1 above;

"Complaints Committee" has the meaning assigned to it in rule 18 above;

"counsel" includes counsel not in practice as such;
"Dean" means the Dean of Faculty;

"Disciplinary Tribunal" has the meaning assigned to it in rule 20 above;

"disposal", in relation to a complaint, includes the imposition of any penalty under these rules;

"Faculty" means the Faculty of Advocates;

"Faculty Office Bearers" means the Dean, Vice-Dean, Treasurer, Clerk and Keeper of the Library and Chairman of Faculty Services Limited;

"Investigating Committee" has the meaning assigned to it in rule 19 above;

Citation and commencement

23. (1) These rules may be cited as the Faculty of Advocates Disciplinary Rules 2001.

(2) These rules shall come into operation on *** and shall apply to complaints initiated on or after that date.