The Committee will meet at 2.30pm in Committee Room 3.

1. **Item in private**: The Committee will consider whether to discuss agenda item 2 in private.

2. **Mental Health (Scotland) Bill**: The Committee will discuss lines of questioning for the witnesses.

3. **Convener’s report**: The Committee will consider the Convener’s report.

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

   - The Criminal Legal Aid (Scotland) (Fees) Amendment (No. 2) Regulations 2002 (SSI 2002/440),
   - The Criminal Legal Aid (Scotland) Amendment Regulations 2002 (SSI 2002/441), and
   - The Criminal Legal Aid (Fixed Payments) (Scotland) Amendment (No. 2) Regulations 2002 (SSI 2002/442).
5. **Mental Health (Scotland) Bill:** The Committee will take evidence on the general principles of the Bill at Stage 1 from—

   Professor John Blackie, Law School, University of Strathclyde and Claire Connelly, School of Law, University of Glasgow.

6. **Petition:** The Committee will consider the following petition—

   Petition PE347 by Mr Kenneth Mitchell on couping of horses.

7. **Protection of Children (Scotland) Bill (in private):** The Committee will consider a draft report to the Education, Culture and Sport Committee at Stage 1.

The following papers are attached for this meeting:

**Agenda items 2 and 5**
Note by the Clerk (private paper) J1/02/36/1
SPICe briefing on the Mental Health (Scotland) Bill J1/02/36/2

**Agenda item 3**
Correspondence from Minister for Justice regarding correspondence from STOP: Closure of Peterhead Prison Officers Partners Committee J1/02/36/3

**Agenda item 4**
Note by the Clerk (SSIs attached) J1/02/36/4

**Agenda item 6**
Note by the Clerk (petition attached) J1/02/36/5

**Agenda item 7**
Note by the Clerk (private paper) J1/02/36/6
Submission for the Protection of Children (Scotland) Bill from:
Care Standards Tribunal J1/02/36/7
Scottish Police Federation J1/02/36/8
Sheriffs’ Association J1/02/36/9
British Medical Association J1/02/36/10
COSLA J1/02/36/11
Association of Chief Police Officers in Scotland J1/02/36/12
Law Society of Scotland J1/02/36/13
Papers not circulated:


Agenda items 2 and 5

The Mental Health (Scotland) Bill (and Explanatory Notes and Policy Memorandum for the Bill) are available from Document Supply or on the Scottish Parliament website at: http://www.scottish.parliament.uk/parl_bus/legis.html

Agenda item 8

The Protection of Children (Scotland) Bill (and Explanatory Notes and Policy Memorandum for the Bill) are available from Document Supply or on the Scottish Parliament website at: http://www.scottish.parliament.uk/parl_bus/legis.html

Papers for information circulated for the 36th meeting, 2002

Correspondence from Minister for Education and Young People to Convener of Education, Culture and Sport Committee regarding Social Care Workforce and Youth Crime Action Plan
Correspondence from the Minister for Justice regarding HM Prison Aberdeen
Response from Scottish Executive to Justice 1 Committee’s report on the Prison Estates Review consultation
Correspondence from the Scottish Executive Justice Department regarding the consultation on various powers of investigation under Part 8 of the Proceeds of Crime Act 2002
NOTE BY THE SCOTTISH EXECUTIVE ON THE GRANT THORNTON RESPONSE TO THE SCOTTISH EXECUTIVE CONSULTATION ON THE FUTURE OF THE PRISON ESTATE

1. This Note sets out comments by the Scottish Executive to the “Grant Thornton Response to Scottish Executive Consultation on the Future of the Prison Estate” dated 21 May 2002 (“the Response”), which was submitted to the Executive as part of Aberdeenshire Council’s response to the Executive’s proposals on the future of the Scottish prison estate. It also takes account of an additional letter dated 6 June 2002 from Grant Thornton in relation to accounting treatment issues, and of the evidence given to the Justice 1 Committee on 11 June 2002 by Peter Cutler and Luke de Lord of Grant Thornton.

General comments

2. Grant Thornton were commissioned by Aberdeenshire Council as part of the Council’s campaign against the Executive’s proposal to close Peterhead prison and as their Response states, their brief was to focus on the Peterhead issue. The Response contains a number of comments relating to the Executive’s proposals in general and how they have been arrived at. We note however that Grant Thornton said in their oral evidence to the Justice 1 Committee [col. 3887] that they would probably have taken about 6 months to carry out a review of the proposals equivalent to that done by PricewaterhouseCoopers, whereas production of the Grant Thornton response took less than 2 months.

3. The Response is described as being a review of the Scottish Executive’s consultation paper and, in particular, of the PricewaterhouseCoopers Financial Review that accompanied that paper. However, the consultation proposals are based on SPS’s own Estates Review Report, which has also been published as part of the consultation exercise. The Grant Thornton Response makes no reference to the SPS document and there is no indication that Grant Thornton have even read it, since it answers many of the questions raised by Grant Thornton. Grant Thornton did not at any time during preparation of their Response contact the Scottish Prison Service to obtain or check any information.

4. It is also worth noting that many of the issues mentioned by Grant Thornton repeat made by HM Chief Inspector of Prisons in the report of the interim inspection of Peterhead that he carried out in March 2002. SPS do not accept these points, and HMCIP has already been advised of this in the SPS response (part of Justice Committee paper JC1/02/25/7) to his Report.

5. The Executive’s detailed comments on the Grant Thornton Response are set out below, along with a comment on the additional letter from Grant Thornton on accounting treatment is also given.
Responses to individual findings

- “The Executive’s Review does not start from the major policy decision as to whether long term adult male sex offenders (LTAMSOs) should be centralised or accommodated in dispersed locations.”

6. Para 167 of the SPS Estates Review states - “The SPS remains committed to the STOP 2000 programme and see the role of a specialised sex offender centre being within the public sector but that this should not be at Peterhead.” Appendix C of the Review document also deals with issues concerning the delivery of the Sex Offender Programme.

7. There is no international agreement amongst experts on the question of whether long-term sex offenders should be centralised or accommodated in dispersed locations. Nearly all jurisdictions in the world disperse. Only Scotland (partly) and New Zealand (partly) keep some long term sex offenders in a separate prison.

- “The Review is not based on a comprehensive assessment of the benefits and costs of options.”

8. We disagree. The analysis has been rigorously conducted and verified by SPS and the Executive, while PwC have conducted a thorough and comprehensive financial review.

- “Key non-financial aspects relating to the decision to close Peterhead Prison have been ignored or considered only superficially; these may affect critically the deliverability of any option which seeks to replace the Peterhead Centre.”

9. Non-financial aspects have been considered thoroughly and, along with the strong financial arguments, point to a better location being in the central belt, from where most of the prisoners held in Peterhead originate and to which they will return.

- “The Consultation document does not evaluate whether the STOP programme can be successfully transferred from HMP Peterhead to other prisons. The possibility of increased recidivism as a result of closure of HMP Peterhead is not considered.”

10. The STOP 2000 programme is already being delivered in other locations. SPS currently has more trained STOP staff in the central belt than at Peterhead, and this disparity is likely to grow regardless of what is decided as regards the future of Peterhead (e.g. because of implementation of Cosgrove Report recommendations).
11. There is no intention of reducing the level of input to work with sex offenders or any other very dangerous and violent criminals as a consequence of the Estates Review, and there is no evidence to substantiate the assertion that there would be an increase in recidivism because current delivery of STOP 2000 at Peterhead would be transferred elsewhere. SPS is firmly committed to working with sex offenders to address their offending behaviour. However, it will be many years before there will be enough hard evidence on which to base an evaluation of whether the STOP/STOP 2000 programme has reduced recidivism either generally or as delivered at any particular institution, including Peterhead.

12. SPS do not regard the figures in paragraph 7.1.4 of the Response as a true measure of recidivism, as they refer only to offenders who are known to have come back into SPS custody. Recent evidence indicates that re-offending by sex offenders may be considerably lower than has regularly been portrayed, but substantial further research will be needed before any firm conclusions can be drawn. In the meantime, SPS continues to attach considerable importance to the effective delivery of the STOP 2000 programme and the Estates Review conclusions were reached on that basis.

- “Surveys of the buildings on the Peterhead site carried out within the context of the HM Prisons Inspectorate Report suggest that the residential accommodation is far from the end of its useful life - as asserted by the Review - but is indeed well maintained.”

13. No survey of the buildings was carried out by HMCIP, who relied on a brief inspection.

14. Whilst the buildings are not in any danger of falling down, there has been repeated evidence of water penetration and the mass concrete is generally in poor condition with walls beginning to crack and crumble. The infrastructure of water, power, and sewage supply is already overloaded and in need of replacement. The cells are too small to permit integral sanitation, and they are not in groups that would readily facilitate the use of electronic night sanitation at Peterhead. The existing accommodation at Peterhead is substandard and new build, if affordable, would be the best option if the site were to be retained.

- “Not all of the options for the provision of LTAMSO facilities have been identified and assessed. Redevelopment to meet future demand could easily be accommodated on the Peterhead site.”

15. The Estates Review, at paragraph 155, considers 5 options for remaining at Peterhead and 3 for moving to another site. The former accept that redevelopment is a possible, if not preferred, option.

16. It is not clear that future demand could “easily” be accommodated on the Peterhead site. A 500 place houseblock would place a major strain on other
parts of the inadequate buildings and services at Peterhead and would cost around £300 million in NPV terms if built and run by the public sector. If built and run by the private sector, it would cost about £150 million. Grant Thornton do not include appraisal of the option for a 700 place prison on the site, which it is estimated would cost £206 million NPV if built and run by the private sector or £439 million MPV if built and run by the public sector.

- **The PwC analysis does not cover a wide range of Public Private Partnership (PPP) options; those that are included are narrowly defined.**

17. It is always possible to produce additional options, and so the process of option appraisal could be extended indefinitely. In order to achieve results it is vital to identify a limited number of realistic options and to cost them rigorously.

18. The options set out in the consultation paper and verified in the PwC Report are based on two models that are known from experience to work and also include a third hybrid one (private build/public operate) which has not been implemented for prisons anywhere so far as is known. Grant Thornton add another two which would be experimental. They do not advance compelling evidence to demonstrate that these would perform better than the hybrid option assessed in the Estates Review.

- “The PPP Private Build Public Operate option is discounted too easily with no identification of a structure that could address the public sector to private sector interface issue and the associated risk transfer difficulties.”

19. Considerable time and energy was spent on the interface issues, with the compilation of a detailed risk matrix assessing the possibilities of risk transfer - see Appendix A of the PricewaterhouseCoopers Report.

20. Although the private build/public operate option has been adopted elsewhere, it is untried in prisons. The Executive’s assessment is that the time required to develop and implement such an option, and its likely balance sheet treatment, would almost certainly make it broadly equivalent in cost and time to the public sector build operate option.

- “Costings prepared for the PPP Private Build Public Operate are too simplistic, being based on the Public Sector Comparator.”

21. The public sector comparator is an approved HM Treasury methodology used across Government, and is the standard starting point for considering hybrid PPP options. In the present context it is based on a prison designed to suit the way in which SPS currently operates, which it must do since the PSC must reflect current realities. As the Estates Review points out, the biggest element of costs over a 25-year period would be running costs, not building costs, and so the sensible place to start any comparison is on the running costs.
22. Also, a private build/public operate facility would almost certainly be required to appear on the Executive’s balance sheet. Grant Thornton provide no evidence for their assertion that it would be easy to keep it off balance sheet. PwC’s careful analysis and the discussions between Audit Scotland and SPS in the context of the Kilmarnock contract all suggest that any further move from the current Kilmarnock contract in the direction of the public sector would carry a very serious risk of placing the asset on the Government’s balance sheet, with the resulting requirement for capital costs to be met up front and additional demands on the Scottish Budget in consequence.

- “The PwC Review makes no mention of the relocation costs associated with the redeployment of Peterhead prison officers elsewhere within the SPS nor the duplication of overheads if LTAMSO centres are dispersed across multiple sites.”

23. Relocation costs are common to all the procurement models that the Executive has assessed, and are negligible in comparison with the total life costs of the options on which the Estates Review and PwC have concentrated.

24. The Estates Review Document at para. 167 states that there would continue to be a specialised sex offender centre within the public sector.

- “No serious assessment has been made of whether the market could price cost effectively for PPP Private Build Public Operate contract.”

25. Agreed. It would require considerable preparatory work before going to the market, during which slopping-out would continue. This is one reason why it would take markedly longer to end slopping-out under the private build/public operate option than for the PFI option. While there is an established market for private build private operate prisons, there is no such market in the UK for the private build public operate option and so no serious assessment of the kind referred to by Grant Thornton could be made save by testing the market by presenting a fully-fledged proposal. The analysis conducted by PwC suggests that even if the market could price cost effectively for such a proposal, it would be unlikely to offer value for money.

- “Indicative cost estimates for the redevelopment of Peterhead Prison to provide 500 places in new residential accommodation indicate that the NPV per prisoner place per annum is 25% lower than the equivalent figure for a PPP Private Build Private Operate 350 place prison calculated by PwC.”

26. Grant Thornton have not provided any detail of how their indicative cost figures were calculated or of cost drivers such as the proposed design and specifications etc. A 350-place houseblock would cost £170 million NPV, which equals £19.4k per prisoner place per year. A 500-place houseblock would cost
about £300 million NPV which equals £24k per prisoner place, i.e. it would be 25% higher, not lower.

- “The Consultation document and PwC also ignore the impact on the local economy of 291 Full Time Equivalents (FTEs) and the consequential effect on the local housing market.”

27. The Executive’s Enterprise and Lifelong Learning Department has assessed the possible economic implications both locally and nationally of closing Peterhead prison. If three new prisons were built as proposed there would be a small increase in employment nationally (to cope with rising numbers of prisoners). Grant Thornton ignore the positive impact of relocating about 200 FTEs to an area of higher unemployment, i.e. most of the central belt, if Peterhead were to close. The unemployment rate in the Peterhead Travel To Work Area is 2.9% (compared to the Scottish figure of 4.3%) so unemployment in the Peterhead area is well below average.

28. On a point of detail, the Peterhead staffing figure given by Grant Thornton is wrong despite accurate information having been made available by SPS. Grant Thornton give a figure of 255 staff (6 part time). However, the current staffing complement at Peterhead (which was supplied to Aberdeenshire Council) is 236.6 staff (FTE 233.6). 210 staff are currently in post.

29. As regards the housing market point, it is questionable whether maintenance of the local housing market is a valid consideration in decisions relating to the effective delivery of correctional services. In any case, many staff do not live in or immediately around Peterhead. As mentioned in paragraph 23 above, relocation costs would be negligible compared with the total cost of delivering any of the options that have been considered.

Additional letter from Grant Thornton re accounting treatment

30. The further letter from Mr Luke de Lord of Grant Thornton is noted. Mr de Lord says that Grant Thornton “believe that potential may exist to produce a project specification under a PPP Private Build Public Operate that could lead to an off-balance sheet status for the purchaser. Ultimately, this decision will rest with the procuring authority’s auditor.” He also says “Equally it is important to note that, whilst other sectors have achieved an off-balance sheet outcome for the purchaser of PPP Private Build Public Operate contracts, it is not easily achieved”.

31. Whether or not a particular PPP private build public operate prison would be on or off balance sheet is ultimately a matter of judgement. The Executive adopts the view of PricewaterhouseCoopers enunciated in Paragraph 4.8 of their Report, viz.
“We believe that the erosion of risk transfer in comparison with the PPP Private Build, Private Operate approach, but also by comparison with other accommodation PPP Private Build Private Operate projects, indicates a very high likelihood that a solution based upon the PPP Private Build Public Operate option would be on the SPS balance sheet and would thereby score as capital expenditure.”

Scottish Executive
27 June 2002
PRISON ESTATE REVIEW

As you know, the Executive published a consultation document on the Prison Estate on 21 March. The Justice 1 Committee held a related inquiry, to which the Deputy First Minister gave evidence on 23 May and 6 June. In addition, the Executive gave the Committee on 27 June Notes on the responses from Grant Thornton and Peter McKinlay to its own consultation. The Committee published its Report on 2 July. Ministers considered the Committee’s report carefully alongside responses to the Executive’s consultation document in shaping their final decisions. These were the subject of a Statement to the Parliament by the Deputy First Minister on 5 September. The Deputy First Minister also responded to questions on prison estate issues when he met the Justice Committees in joint session on 17 September.

I now enclose a formal response to the Committee’s report. This refers to and summarises relevant points from earlier proposals, evidence and statements and should be read alongside those. I hope that members of the Committee find it useful to have the Executive’s position set out in this form. For ease of reference, I also enclose copies of the two Notes and the Statement referred to above.
NOTE BY THE SCOTTISH EXECUTIVE ON PETER McKINLAY’S RESPONSE TO THE SCOTTISH EXECUTIVE CONSULTATION ON THE FUTURE OF THE PRISON ESTATE

1. This Note sets out comments by the Scottish Executive on the document entitled “The Operational Case for Retention of Peterhead Prison as the Main Prison for the Management of Long Term Adult Male Sex Offenders (LTAMSOs)” by Peter McKinlay dated May 2002, which was submitted to the Executive as part of Aberdeenshire Council’s response to the Executive’s proposals on the future of the Scottish prison estate. It also takes account of the evidence given by Mr McKinlay to the Justice 1 Committee of the Scottish Parliament on 11 June 2002.

General comments

2. Mr McKinlay was commissioned by Aberdeenshire Council to “produce a review/report of the offender rehabilitation/prisoner welfare aspects of the case for retaining a sex offenders prison in Peterhead”. While acknowledging Mr McKinlay’s experience as a former head of the Scottish Prison Service, it is worth noting that he left that position in 1991 and so the original STOP programme was introduced after Mr McKinlay left SPS.

3. Our detailed comments on Mr McKinlay’s report are set out below.

Buildings

4. Paragraph 2.2: Mr McKinlay was offered free access to Peterhead by SPS so that he could see the situation there for himself, but he did not take advantage of that offer.

5. A building survey is not needed to identify obvious deficiencies in accommodation such as lack of electric power and sanitation in cells, or obvious limitations such as cell size to what can be done through refurbishment. Widespread experience has led to a trend away from refurbishing old buildings e.g. hospitals, as they are often expensive and difficult to refurbish, and once completed are unsatisfactory and expensive to run and maintain compared with purpose-built modern buildings. The Executive notes that in his evidence to the Justice 1 Committee (col. 3859), Mr McKinlay said he would not disagree with the conclusion that it would probably not be cost effective to try to make the existing accommodation fit for purpose for the next 25 to 30 years.

6. Paragraph 2.3: The fabric of Peterhead Prison is strong but inflexible. The replacement of windows alone would be a major undertaking. The small size of the cells would not permit installation of in-cell sanitation, and the small aperture of the doors would not allow the retrofitting of doors that are compliant with SPS security standards. It is not therefore an “alarming deterioration in the fabric” but a more realistic appraisal of relative costs, recent SPS and other Government Department experience, and an increase in the required building standards that underpin the Estates Review options.
7. Paragraph 2.4: various refurbishment options for Peterhead have been looked at over the years, including in relation to the gatehouse as Mr McKinlay mentions. SPS Estates Review established a set of realistic costings, taking into account the tendency for cost overrun when complex buildings are designed commissioned and built for the public sector, for future investment, both by SPS on its own estate and by the private sector based on recent experience of actual building costs.

8. Paragraph 2.5: consideration of a new prison on the Peterhead site was not given "short shrift" by SPS or the Executive. On the contrary, that option has received very careful consideration. A 350-place block is an option set out in the Estates Review. It would cost about £170 million in NPV terms (Estates Review, para. 168), which would be not far short of the cost of a 700-place prison built and run by the private sector (£206 million NPV). The methodology used for assessing this 350-place option for Peterhead is similar to that used at Barlinnie and a direct comparator at Shotts, which Mr McKinlay does not mention. The establishment of a 350-place houseblock at Shotts, separated from the main prison, would cost £147 million NPV, considerably less than the £170 million NPV cost at Peterhead and would produce a better facility than Peterhead. A 500-place houseblock on the Peterhead site would cost about £300 million NPV, i.e. nearly 50% more than a 700-place prison built and operated by the private sector would cost on the same site, quite apart from the cost of the expanding and upgrading of the ancillary facilities that would have to accompany such an increase in prisoner numbers.

9. Building new accommodation at Peterhead would not resolve the operational difficulties in running the prison that there have been for many years. In particular, the present difficulty of securing and retaining staff would be exacerbated. Mr McKinlay suggests that it would be possible to build a new 500-place accommodation block on the site while prisoners stayed in the existing accommodation until the new build was ready, in conjunction with upgrading or relocating the ancillary accommodation. However, there would still be inevitable disruption to the running of the prison while that work was going on; the need to site the new building(s) so as not to interfere with the existing ones would almost certainly result in a final layout that would be substandard in terms of efficiency and operational requirements; and while the site is indeed extensive there are parts of it that would not be suitable for building on and this would further constrain the siting of the new buildings.

Geographical location

10. In circumstances where, as Mr McKinlay agrees, to do nothing is not an option the case for relocation needs to be evaluated on exactly the same basis and given equivalent weight as the case for retention. His report does not do this. The same reasons in favour of relocation exist today, though in more acute form, as were evident when the SPS concluded many years ago that it would be best to close Peterhead but was prevented from doing so by overall prisoner numbers.

11. Paragraph 3.3: the Executive does not dissent from the figures given by Mr McKinlay as regards the results of the recent Prisoners’ Survey. However, where we disagree is on the interpretation of the Survey results and the weight that those results should be given in terms of the decision-making process. The Executive
accepts that it is important to know the views of prisoners, but they need not be the main driver of policy decisions.

12. Several prisoners have approached individual members of SPS staff to say that they felt coerced into answering the survey in a particular way. The same suggestion has been made in connection with the petition that was allegedly signed by some 200 prisoners and submitted to the Scottish Parliament. It is not possible to quantify this.

13. In any case, in SPS's view what prisoners are essentially saying in their responses to the Survey is not that they like being at Peterhead but that they feel safe when kept separate from other prisoners and have staff dedicated to their needs. These elements could of course be provided at another location. In the last sentence of paragraph 3.3 of his report, Mr McKinlay states that on the evidence of the Survey results it is extremely unlikely that the level and quality of visits would support family contact for this group of offenders in any other prison; but the Executive does not see anything in the Survey results that supports such a statement.

14. It should also be noted that the original decision to move sex offenders to Peterhead was taken for operational reasons and not to meet the wishes of prisoners. There was no demand at the time by sex offenders that they should be moved to Peterhead.

15. Paragraph 3.4: The Executive recognises that good relationships have indeed been developed between prisoners and staff; but no evidence has been led by Mr McKinlay or anyone else that those relationships would necessarily be lost if Peterhead were to close, since we would expect many staff to wish to continue to work with these offenders in their new location, or, if they were lost, that it would take another 10 years to replicate them.

16. The logical conclusion is that the vital prisoner concern is with safety, that location is secondary and that most prisoners at Peterhead would opt for a more central location if equivalent levels of safety could be delivered there. SPS believe firmly that this could be delivered.

17. Paragraph 3.7: it is stated that the evidence of the Prisoner Survey indicates that throughcare, preparation for release and post-release support are not significant issues. It is true that the Survey responses do not mention these as issues, but that is hardly surprising since

- the Survey did not include any questions on the subject;

- the prisoners surveyed were still in custody and so by definition would not have gone through the full throughcare process; and

- many prisoners are transferred to other establishments as part of their preparation for release, but their experience of Peterhead would not be reflected in their Survey responses which would instead relate to their current establishment (of course, this point applies to all of the Survey data, not just the throughcare issue).
18. SPS’s experience is that effective throughcare, and in particular the necessary relationships between SPS staff and those of external agencies, and between those external staff and prisoners, are more difficult to maintain in a location that is distant from where the throughcare is to be delivered. Whilst it is true that many sex offenders do not want to return to their home area on release, they do not have a choice of which social work department deals with their case (it is always the area team within the jurisdiction where the original offence was committed).

19. The strength and depth of social work provision at Peterhead and has been a concern to SPS for some time. Mr McKinlay does not mention the potential long term difficulty that those working with sex offenders may get “burned out” and need refreshing, which would be easier to do among the much larger population of staff which would be available in the central belt. This is an issue of considerable importance given the need to address long term stress at work and related issues.

20. **Paragraph 3.9**: Mr McKinlay says that it should be possible for transfers of individual prisoners to other prisons as part of their progression to be made smoothly. SPS agrees with that statement. This already happens, which confirms that sex offenders can be managed successfully in prisons other than Peterhead.

21. **Paragraph 3.10**: all would agree with the need for prisoners to feel secure, but prisoners could be offered modern accommodation in a prison in the central belt in which they would feel secure.

22. Nor is there general acceptance that a holistic approach is more effective than dispersal to mainstream prisons. Only two jurisdictions in the world, New Zealand (partly) and Scotland (partly), practice separation at prison level; and Scotland did not decide to do so because it was a good idea from a point of view of effectiveness but because of the lack of any alternative use for Peterhead, coupled with the inability to close it as SPS would have wished. All sex offenders in England and Wales are in mainstream prisons.

23. **Paragraph 3.12**: not all experts would agree with Professor Marshall’s comments. It is noteworthy that he worked in sex offender units in Canada which were all within mainstream prisons. Evidence has not been produced to support his assertion that it would take “several years to achieve the standards operating at present in Peterhead Prison”. Staff at Barlinnie and Polmont are already delivering the STOP 2000 programme.

24. **Paragraph 3.15**: Mr McKinlay says that it is irrelevant whether Peterhead would be chosen as a sensible location for a prison if that decision were being made today. However, since significant investment is being contemplated the question of where that investment should be made must be a highly relevant consideration. The need is to meet the demands of a rising prisoner population and to improve to modern standards the conditions in which prisoners are held, (mainly by removing slopping out and introducing modern heating and ventilation. In looking at such investment decisions it is essential to undertake an unbiased assessment of what the best option would be and to cost this against the alternatives. That is what the Estates Review did.
25. The fact that Peterhead was chosen over 100 years ago as a site for a prison for reasons that long ago ceased to apply is irrelevant to today’s decision making, and Mr McKinlay is wrong to say that Peterhead was chosen as a policy preference as the prison in the SPS estate best suited for this purpose. As previously explained, SPS would have closed the prison years ago had overall population pressures allowed it. Retention of Peterhead at that time was a pragmatic choice by SPS at the time. What the Estates Review did is take an unbiased look at the options in the light of present-day needs and assess the value for money of each of them.

26. Paragraph 3.16: it would not be reasonable to interpret the statements Mr McKinlay quotes as early indications of policy thinking. The role of the prison did indeed, despite what Mr McKinlay says, “grow like Topsy” and it was considered at the time as being far from ideal. No U-turn in policy has been involved: SPS has believed for many years that Peterhead is not a good location.

27. Paragraph 3.17: as Mr McKinlay recognises, relocation is perfectly possible: it has been done before and could be done again relatively easily. Mr McKinlay asserts that Glenochil has always presented problems because of its design, and voices reservations about the ability of staff in Glenochil to remove themselves from situations of tension. However, as he himself says such considerations are less of an issue with sex offenders than with high security prisoners. The Glenochil design affords more controlled movement of prisoners and is therefore more staff efficient due to the controlled access/egress to each flat and to each section within that flat. Mr. McKinlay refers to difficulties in monitoring prisoner movements from one vantage-point. But there is no need for such central monitoring as control is exerted from smaller, more secure, areas.

28. The essential question is whether Glenochil, which is currently one of Scotland’s two high security prisons, would find it easier to manage about 400 sex offenders or 400 high security prisoners. SPS is in no doubt that it would be easier to manage the sex offenders.

29. Paragraph 3.18: the Estates Review needs to be seen as a whole in the context of present conditions. It postulates the building of 3 new 700-place prisons to meet quality requirements and current and projected prisoner numbers. This makes the “Grand Design” debate of over 20 years ago irrelevant. With new prisons there would be more room within the central belt to move prisoners to more secure accommodation than exists at Peterhead, Glenochil or indeed at Shotts. The movement from Peterhead would be relatively easy given the existence of large new prisons in better locations, and the experience of Peterhead itself shows that the management of sex offenders can be transferred successfully.

Staff and Prisoners and their Families

30. Paragraph 4.1: it is understandable that prisoners and staff may be reluctant to leave somewhere they have got used to. There is however the undertaking given by SPS, and reiterated by Ministers, that there will be no compulsory redundancies. No issue of constructive dismissal arises, due to the mobility of prison staff who are required to move when called upon to do so. Those terms and conditions are stated clearly in staff’s contracts of employment.
31. When the prisons at Dungavel, Longriggend and Penninghame were closed in 2000, the closures and resultant relocations of staff were successfully implemented.

32. Paragraph 4.2: SPS staff at Barlinnie, Polmont and other establishments would regard themselves and their families as being valued and respected members of their communities just as much as those at Peterhead. In any case, these are not valid arguments for whether a facility paid for by the taxpayer should be retained in an unsuitable site at a greater cost to the taxpayer than suitable alternatives. There is no evidence for the assertion in the last sentence of paragraph 4.2. If it were true, SPS would not find it as difficult as it currently does to recruit people to work in the prison.

33. Paragraph 4.4: Mr McKinlay’s account is of historical interest but is now out of date. The current SPS vision statement incorporates these previous statements in a wider vision to which this paragraph does not refer. The statement quoted is not that to which SPS would now subscribe. The SPS vision concentrates on correctional excellence.

34. As Mr McKinlay points out, only around 30 prisoners a year complete the STOP programme at Peterhead. This is only a small part of the Peterhead prison population, and a yet smaller proportion of that in Scotland as a whole. The Executive’s proposals for Peterhead are an integral part of those for the entire prison estate and should not be considered in isolation.

A Scenario for the Future

35. Paragraph 5.1: there is as yet no “hard evidence” that the culture of Peterhead prison has a positive impact on sex offenders or that it has had any benefit in reducing recidivism. As Dr Andrew Coyle of King’s College, University of London, said in his response to the Executive’s proposals:

“The delivery of these programmes is still at an early stage and it would not be wise to base any decision about the future of Peterhead or of the location of this group of prisoners solely on an opinion about the worth or otherwise of these programmes.”

36. A recent study by Professor Roger Hood of Oxford University suggests that re-offending by sex offenders is very low. The Executive is committed to delivering effective evidence-based programmes to prisoners, and therefore has to take account of research evidence.

37. Paragraph 5.2: despite what is said here, options for retaining the Peterhead site were in fact considered as part of the Estates Review (see paragraphs 12 and 13 above).

38. Mr McKinlay is incorrect in saying that prisoner numbers are forecast to fall as a result of alternatives to custody. As the consultation documents make clear, prisoner numbers are projected to continue to increase over the next 10 years. The increased use of non-custodial sentences is expected to reduce the size of that increase, which is why the Executive’s proposals are based on prisoner numbers
rising only to around 7,200 instead of the figure of 7,700 that would otherwise be used – but they will not reduce numbers from current levels.

39. Even if what Mr McKinlay says about prisoner numbers were correct, which it is not, he does not explain how his figure of £230 million has been calculated. The Executive does not recognise that figure. In any case, the crucial issue is that the number of prisoners is projected to increase above the 6,200 for which SPS is currently resourced (it already stands at over 6,700), and so more resources would be needed whatever option is chosen.

40. **Paragraph 5.3:** Mr McKinlay’s proposal here explicitly relies on successful delivery of sex offender programmes at prisons other than Peterhead. This seems inconsistent with his recommendation that Peterhead should house all LTAMSOs.

41. **Paragraph 5.4:** despite what is said here, cost cannot be treated as a secondary consideration. Delivering value for money must be an integral element of whatever option is eventually adopted.

**Conclusion**

42. **Paragraph 6.1:** Mr McKinlay asserts that mainstream prisons in Scotland would become more difficult to manage if Peterhead closed, and that there would more victims of sex crime. However, he has produced no hard evidence to support these assertions and the Executive does not accept that any of them is correct.

Scottish Executive
27 June 2002
Scotland needs prisons fit for the 21st century. We consulted on proposals to achieve that goal, we have listened to what people said and we have considered the issues carefully. I now set out our plans to modernise Scotland's prison system.

Our approach combines investment in existing and new prisons. It builds on the existing roles of both the private sector and the public sector. This morning, I shall announce the largest ever investment programme in publicly run prisons, which will set us on the path to ending slopping out. That will be a significant achievement not only for the Executive but for the Parliament. Such an achievement is possible because we faced up to hard facts and hard choices during the estates review. It has not been a time for wishful thinking or political opportunism.

I shall also set out our response to rising prisoner numbers, especially the dramatic increase in remand numbers. I will set out our commitment to openness, accountability and excellence in all the work that is done by and in prisons and with prisoners. I believe that we have made the right choices, which will be welcomed by those who share our commitment to modernising public services and to correctional excellence. Prisons must help make Scotland a safer place by reducing reoffending.

I turn first to the alternatives to prison. Where public safety or the seriousness of the offence demands a prison sentence, the prison place must be there. However, sometimes people go to prison for the lack of a better alternative. We are committed to providing the right mix of custodial and non-custodial sentences for the courts to use. At the time of the estates review, we were already committed to those alternatives. We are in the process of extending the availability of drug treatment and testing orders. We have opened drugs courts in Glasgow and Fife. We have achieved national roll-out of restriction of liberty orders—or tagging orders—and there are early signs of an encouraging rate of take-up by the courts.

We will go further still. I am considering extending the use of supervised attendance orders, which I believe offer the scope to end the use of imprisonment for fine default. That further progress should reduce the projected prisoner population by 700 places, which is a prison's worth of alternatives to custody. I shall also look closely at other proposals to offer the courts a more flexible mix of custodial and non-custodial disposals.

Even the most enthusiastic advocates of alternatives to prison recognise that new prison places are required to reduce overcrowding and to end slopping out. Some of our prisons are more than 100 years old. Most were built for locking people up, not for helping them confront and change their offending behaviour, and some were not even built as prisons. In the decades before the creation of the Parliament, all those prisons were starved of investment. The estates review threw into sharp relief the fact that the public sector has
not built a prison for about 20 years and has fallen behind modern standards for the efficient management of prisons. That must end.

As well as building on the role of the private sector, we will invest to secure reforms in our publicly run prisons. All our prisons—public, private, existing and new—must provide an excellent service. The public has a right to expect that and to see the evidence on whether it is happening. We believe that there is more to do to ensure openness, transparency and excellence in all the work that is done in Scotland’s prisons and with offenders in the community by the Scottish Prison Service and partner organisations.

The evidence of reform is beginning to come through. The Prison Service has reached a partnership agreement with the unions, which will be signed later this year. The agreement commits them to working together to making the public sector more competitive. That is in line with our commitment not only to excellence in public services but to valuing the staff who provide them. We believe that public services should become more competitive, including by adopting modern flexible working practices. We also believe that those who provide services to the public should be good employers.

We want to see further reforms in the public sector: first, to the way in which performance is managed; secondly, to our existing prison buildings; and, thirdly, in order to provide the new places that we need. In each of those areas, the public sector can learn from, and work in partnership with, the private sector. That is a big challenge for the public sector, but I want to see the public sector rise to that challenge. Above all, I want the Scottish public to have the best services at the best value, whether those come from the public or private sector.

The first area that I mentioned concerns performance management. The chief inspector of prisons has drawn attention to the focus and clarity that has been brought by contract management for private prisons. He has called on the Prison Service to introduce similar measures in the public sector. I have instructed the SPS to bring forward proposals to achieve that. I expect that to result in published performance agreements for publicly run prisons and full reporting of performance against those targets. The Parliament has a key role in holding ministers and the Prison Service to account for the performance of our prisons. I see an important role for the justice committees in that aspect of our proposals. I look forward to discussing that when I meet them in joint session later this month.

Secondly, I want to see our existing prisons transformed. We have set the SPS the challenge of saving £12.5 million out of current expenditure, which it is succeeding in doing. Today, in advance of our announcement of the outcome of the spending review, I confirm that every penny of those savings will go into investment in publicly run prisons. Furthermore, I confirm that we will roll forward the SPS’s existing capital investment programme for the next three years. We will top that up with new money in the spending review. The result will be a prison modernisation fund of more than £110 million for the next three years, which is a massive investment in publicly run prisons—more than ever before.
The modernisation fund will be used to back the implementation of development plans, which will start at Edinburgh, Perth, Polmont and Glenochil. Those plans draw on the best of modern prison design and set out to recreate that in our existing prison estate. I hope that we will be able to go on from there to all other publicly run prisons. As we proposed in the estates review, we will continue the work that is now under way at Barlinnie to create a fully modernised 530-place prison. We are investing the equivalent of the cost of a new prison in the publicly run estate. Taken together with other plans and work that is already in hand, that will create the equivalent in modern places of two new prisons spread across the publicly run estate.

Our investment in publicly run prisons will transform the existing prison estate, but we cannot create enough spaces in existing prisons to respond to the current levels of overcrowding and likely future growth. Prisoner numbers are at record levels and are set to go higher still over the next few years. Remand numbers in particular have seen a step change: the remand population is 28 per cent higher now than it was in the same period last year.

We have decided to respond to that growth with two new 700-place prisons, which will be on sites in central Scotland that the SPS will identify in consultation with local authorities and others. I emphasise that a number of sites are still under consideration and that no decisions have been taken.

After careful consideration, we have decided that the first of those prisons should be privately built and privately run. That route brings the new capacity on stream as quickly as possible to respond to the rapid rise in numbers. I have already said that the remand numbers show the biggest increase. To secure value for money, we will procure fully flexible prison places, but our intention is to use those places to respond to the current rapid rise in remand numbers.

In tendering for the prison, we will seek innovative proposals to provide care and opportunities for those on remand, including needs assessment and detoxification services. Innovative proposals may also feature an appropriate role for voluntary and charitable not-for-profit organisations. As part of our commitment to openness and accountability, we will publish the contract for that prison just as we have done for Kilmarnock.

The second new prison is my challenge to the public sector. I want the Scottish Prison Service and the trades unions to have the chance to show that they can bridge the gap between the private and the public sector on competitiveness. If they can produce for me a robust and credible plan for the second new prison—a plan that is competitive, offers value for money and delivers the places that we need on time—I am prepared to take that project forward in the public sector or as a privately built, publicly operated prison. However, I repeat that I will have to be satisfied that the proposals offer value for money to the taxpayer, that they are affordable, and that they will deliver.

I turn now to the question of how we protect our communities by managing sex offenders. The debate has focused on Peterhead, but the issue goes much wider. Peterhead houses some 300 sex offenders and as many again are in other prisons. We have already responded to the McLean committee's report with the measures that are in the Criminal Justice (Scotland) Bill. We
are taking forward the recommendations of the Cosgrove committee. I am publishing today the report of an independent expert group of psychologists and psychiatrists, including specialists from Peterhead led by Alec Spencer of the Scottish Prison Service.

The focus of our efforts will now move on to proposals for comprehensive sex offender programmes across the prison estate, integrating existing work for long-term offenders with that for short-term prisoners and young offenders. We will welcome comments on the Spencer group’s report before the end of the year. Thereafter, the SPS will hold discussions with partner agencies. Further proposals will be brought forward for the next session of Parliament.

We have listened to the consultation responses on Peterhead. We have heard how we might improve access to night sanitation, and we have heard from the families of offenders that some prefer to visit a prison where there are only sex offenders. We have always recognised the work of the staff at Peterhead as world class. We have always pledged that their work and the ethos that they have created will be protected. As our priority is to develop wider sex offender programmes, now is not the time to move the long-term programmes from Peterhead. Peterhead will therefore remain open and will continue to be the main centre for long-term sex offenders. The SPS will invest to improve the existing accommodation by installing electric power in cells. It is discussing the offer from the Prison Officers Association Scotland relating to prisoner access to night sanitation.

An important influence on our thinking has been the turnaround in the attitude of the local community—from initial, understandable, apprehension, to what is now committed support. I pay tribute to the dignified and effective campaign on behalf of Peterhead, in particular by the partners of the staff and by Aberdeenshire Council.

The decisions that we have reached combine alternatives to prison with investment in publicly run prisons and new prisons, in order to meet the rapid rise in prisoner numbers and to drive forward reforms in the public sector. Those measures meet the objectives that we set in the estates review. They show that we have listened. They are backed by our commitment to the principles of openness and democratic accountability that underpinned the creation of the Parliament. This programme of modernisation sets us on the path to ending slopping out, as the Parliament has long called on us to do. The measures are about more than buildings; they are a necessary further step in our work to modernise and reform the SPS and to sharpen its focus on correctional excellence. The measures have not been easy to shape, but I believe that they have benefited from the scrutiny that the Parliament is here to provide. In that spirit, I commend them to the Parliament.
Introduction

1. On 21 March 2002, the Deputy First Minister and Minister for Justice announced the Scottish Executive’s proposals for the future of the Scottish prison estate. The proposals had been produced by a wide-ranging Prison Estates Review conducted by the Scottish Prison Service. After the initial report of the Review, Ministers commissioned a Financial Review by an independent firm of accountants (PricewaterhouseCoopers) so as to verify the Review’s costing of the various options for the procurement of new prisons.

2. The aim of the Review was to develop proposals for producing a prison estate that would be fit for purpose for the 21st century and so contribute to the achievement of correctional excellence. As such, the proposals focused on 3 main challenges: to provide enough places for the prisoner population; to end the practice of slopping out in our prisons as quickly as possible; and to find the option which represents the best value for money to the taxpayer.

3. The main elements of the proposals announced on 21 March were:
   - the procurement of 3 new prisons, each of around 700 places, to be built and operated by the private sector;
   - the closure of Low Moss and Peterhead prisons; and
   - a reduction in size of Barlinnie prison to around 530 places, all of which would however be in fully modernised accommodation.

4. The proposals were then subject to a period of public consultation, which ended on 12 June. The proposals were also considered by the Justice 1 Committee of the Scottish Parliament, which published its report on 2 July.

5. After careful consideration of the responses to the consultation exercise, including the Justice 1 Committee’s Report, the Deputy First Minister and Minister for Justice announced the Executive’s decisions on 5 September 2002. While confirming the validity of the Estates Review’s objectives, the decisions as announced represented a significant change from the original proposals in several respects, namely:
   - there are to be only 2 new prisons instead of 3, following a reassessment of the potential for alternatives to custody to reduce the projected prison population;
   - one of the new prisons will be built and operated by the private sector under a Public Private Partnership (PPP) arrangement as originally proposed, but;
the public sector will be given the opportunity to demonstrate that it can provide
the second new prison in a way that would be competitive, give value for
money and deliver the required number of prisoner places on time;
Peterhead prison will remain open; and
there is to be a substantial programme of investment in existing public sector
establishments, totalling over £110m over the next 3 years.

6. The Executive has also announced 2 wider initiatives aimed at improving
the operation of the prison system in general.

7. Firstly, the Deputy First Minister also announced on 5 September the
publication of a report by a group of experts, chaired by Alec Spencer of the
Scottish Prison Service, on the management of sex offender prisoners. Comments on that report are being sought by the end of 2002 with a view to there
being subsequent discussions between the SPS and partner agencies. The aim is
then to bring further proposals on the management of sex offenders before the
next session of the Parliament.

8. Secondly, the SPS has been asked to develop a new framework for
managing the performance of public sector prisons; including the publication of
performance agreements, improvement targets and details of performance by
each establishment. The aim is for that framework to be produced in 2003.

9. The Executive has made it clear that it would welcome comments from the
Justice Committees of the Parliament in taking forward both of these initiatives.

Response

10. The Scottish Executive’s response to the points made in the Justice 1
Committee Report is set out below.

Delay in the publication of the Prison Estates Review

11. It is not correct to describe publication of the Review as having been
“delayed” by 2 1/2 years. That is approximately how long it took in total to conduct
the Review, which began in December 1999 and was published in March 2002.
The Executive accepts that it might have been possible to publish the Review
some time before March 2002. However, there were sound objective reasons why
this was not done given the amounts of public money involved, the complexity of
the issues and the importance of securing a prison estate that is fit for purpose in
the context of the overall objective of achieving a Safer Scotland.

12. The need to examine the private-build/public-operate option more closely
was identified before the Review was finalised, and was a contributing factor to the
length of time taken to finalise the proposals. However, there were also other
factors involved. For instance, time was needed to enable the initial cost
comparisons among the various options to be checked, and in particular for PwC
to carry out their Financial Review. Also, Cabinet reshuffles during the period of
the Review also delayed finalising of the proposals by some 3 months, since new
Cabinet members had to be brought up to speed on the proposals and have an opportunity to contribute to their finalisation.

**The state of the existing prison estate**

13. The priorities identified by the Committee in its Report are those set out as being the key aims of the Estates Review. The Executive welcomes the Committee’s agreement with those aims.

**Prisoner numbers**

14. The Executive agrees with the Committee about the need to view prisons issues in the context of criminal justice policy as a whole. The Estates Review did precisely that, by making it clear that the overarching aim was that the Scottish Prison Service would play its part in contributing to ‘A Safer Scotland’.

15. The projections of prisoner numbers on which the Estates Review was based were not commissioned specifically for the Review, but instead were those that are regularly produced by the Executive’s Justice Statistics Unit. Those projections are based on historical trends and known changes in the law, such as legislative changes in the proportion of sentence required to be served in order to be eligible for early release, and are generally recognised as being the best estimates available. Prisons are a demand-led service: all those committed to custody on remand or after conviction must be accommodated and the projections of prisoner numbers are the best starting point from which to judge likely future levels of demand.

16. However, the Estates Review was not based solely on the existing projections of prisoner numbers, nor was it based on “penal expansionist assumptions”. The planning assumptions for the Review were derived by adjusting those projections to take account of the estimated impact of alternatives to custody (SE Consultation Paper, paragraph 29). Further developments in alternatives to custody since the Estates Review proposals were published have meant that the estimate of their likely impact on prisoner numbers has increased, from around 500 to over 700. That has enabled the Executive to reduce the number of new prisons to be built following the Review from the 3 originally proposed to only 2. The Executive believes that decision strikes an appropriate balance between the likely impact of alternatives to custody and the need to accommodate in suitable conditions all those who are committed to custody by the courts.

**Rehabilitation and throughcare**

17. The Executive agrees with the Committee about the importance of rehabilitation and throughcare. It takes the view that good quality opportunities should be available for all prisoners whether they are in the public or the private sector.
18. The SPS monitors participation of prisoners in programmes, and can provide a range of reliable data such as total prisoner learning hours and participation in anger management and drugs courses. However, the SPS accepts that better data is needed and is developing proposals to achieve this in the context of how to improve its performance management systems. It is recognised that the real effectiveness of rehabilitation efforts can only be judged by what happens once prisoners are released, and the SPS is considering how best to research these outcomes (for instance with ex-prisoners).

**Optimum prison size**

19. The SPS Estates Review (paragraphs 57-61) explained the reasons for setting an optimum size of around 700 places for new prisons. Those reasons were the key operational factors of proportionality, management complexity and operational stability as well as cost per prisoner place. Like the rest of the Executive, the SPS is under an obligation to deliver value for money to the taxpayer and decisions on the procurement of any new prison will require to meet that criterion.

**Private build, public operate option**

20. The private build-public operate option was considered in depth as part of the Estates Review (see paragraphs 78-83 of the SPS Estates Review and Chapter 4 of the PwC Financial Review). That work included consideration of the Carter and Mouchel Reports that were produced by HM Prison Service in England and Wales. The announcement of the Estates Review decisions on 5 September leaves the way open for a private build-public operate solution for the second new prison if SPS and its staff wish to make a case for that as the way to bridge the gap between the private and public sectors.

**Comparison of the options**

21. The Executive shares the Committee’s concern about the cost differential between the public and the private sectors. The SPS has in recent years been working to address that differential. For instance new systems for staff attendance patterns and absence management have recently been introduced. Those efforts will continue.

22. Nevertheless, the Estates Review clearly showed that at the present time the differential remains considerable.

23. As announced on 5 September, the SPS has been instructed to bring forward proposals to improve the performance management of its establishments. That work is expected to result in published performance agreements for publicly run prisons and full reporting of performance against those targets. Those measures should contribute to increasing the efficiency of the public sector.
Ability of the public sector to manage building projects

24. The SPS is committed to developing, maintaining and deploying the expertise needed to manage its existing estate and the procurement of new prisons. However, in common with other parts of the public sector, it does not believe that all the work of designing and constructing new prisons is best done by assembling full design teams within the SPS. Instead, it is more appropriate to buy in those skills since that provides maximum flexibility to deal promptly with fluctuating demand over time and thus delivers best value for money. In that connection it is worth noting that it is over 20 years since the SPS procured a new public sector prison (HMP Shotts).

25. The SPS believes that its expertise can best be used not to devise detailed building specifications but rather to specify the outcomes that a new prison would be required to produce (see, for example, Paragraph 2.1.4 of the PwC Financial Review). The suppliers will then be required to produce those outcomes through devising the detailed specification for, and then delivering, a new prison.

Different building specifications

26. The Committee itself recognised in its Report that the building specification for a new prison will be inextricably linked to staffing levels. It follows that since staffing levels in the public sector are different than in the private sector due to different working practices, the specification for a new public sector prison will be different from that for a prison to be operated by the private sector. In his evidence to the Committee the Chief Executive was making the point that a new public sector prison would have to be larger than a private sector one holding the same number of prisoners, since the public sector prison would have more staff due to different working practices.

Staffing levels

27. There is no objective evidence that staffing levels at HMP Kilmarnock are adversely affecting its performance. The statistics show that in relation to the key performance indicators set for SPS by Ministers, Kilmarnock’s performance is similar to that of comparable public sector establishments. In the three and a half years since Kilmarnock opened there has been no major incident at the prison; no prisoners have escaped or absconded; and the level of assaults on prisoners and on staff is no worse, and the level of drug test failures is significantly lower, than at comparable Scottish prisons.

28. The most recent HMCIP inspection report showed a substantial fall in staff turnover at Kilmarnock, from 32% to 14%. That figure, unlike the SPS equivalent, also includes members of staff who have left Kilmarnock and moved to other establishments operated by Premier Prison Services. Overall, staff turnover is not markedly worse than in comparable public sector prisons.

29. The Estates Review used Kilmarnock as the point of comparison solely for the purpose of option appraisal, so that each of the options for provision of new prisons would be compared on a like for like basis. No assumption has been made about staffing levels at any new prison.
Industrial relations

30. As mentioned above some changes have already been effected, such as changes to staff working patterns. However, in the past progress on such initiatives has been slow. For instance, the changes to working patterns took 3 years to deliver, during which time a day of industrial action took place.

31. The Executive has welcomed the recent signs of willingness to negotiate new working practices within the SPS. The Voluntary Industrial Relations Agreement reached between the SPS and the trades unions is an encouraging step in that direction, and the Executive expects to see the SPS and its staff build on that progress.

Private vs. Public

32. The Committee’s Report states that “the absence of comparable performance data to support a like-for-like operational comparison makes it almost impossible to assess the financial options on a comparable basis”. The Executive disagrees. The 3 options for delivery of new prisons that were devised and considered by the Estates Review were all based on the same outline brief to meet a common set of requirements (see paragraph 67 of the SPS Estates Review document). The costings of the options are therefore directly comparable, as was confirmed by the PwC Financial Review.

Decreased prison provision in the public sector

33. The consultation paper stated that under the original Estates Review proposals most prisoner places in Scotland would continue to be provided by the public sector. The Review decisions mean that there will now be at most 2, and possibly only 1, new privately operated prison instead of the 3 originally proposed. Therefore the proportion of prisoners held in the public sector will be significantly higher than would otherwise have been the case.

34. As the Estates Review documents made clear, prisoner numbers are expected to continue to rise for the foreseeable future. It is not expected that numbers will fall from present levels. If they do fall, or even if they increase by less than anticipated, that should increase rather than decrease the scope for flexibility in managing the estate since it would make it easier to move prisoners between establishments to facilitate the implementation of development plans or for other purposes.

Accountability

35. The Executive believes that public accountability and scrutiny of all prisons, not just those in the private sector, is vital.

36. HMP Kilmarnock is subject to the same legal requirements and scrutiny framework as any other Scottish prison. It is subject to inspection by HM Inspectorate of Prisons; has been inspected 3 times in the 3 1/2 years since it opened; has a visiting committee, appointed by local authorities, which reports to the Scottish Ministers; and falls within the jurisdiction of the independent Prison
Complaints Commissioner. In addition, compliance with the contract is monitored by a Controller and Deputy Controller based in the prison, who are experienced staff employed by SPS.

37. The Chief Inspector of Prisons has commended the focus and clarity that has been brought by contract management for private prisons. He has also recommended that the SPS consider how the performance management of its other prisons can be improved in light of the experience at HMP Kilmarnock, and as announced on 5 September that work is being taken forward (see paragraph 8 above). In his evidence to the Committee Dr Jim McManus, the Chairman of the Parole Board for Scotland, said that

“Private prisons are much more accountable than state prisons. The contract under which they are run specifies in minute detail what they must provide on a daily basis...The presence of a controller, appointed by Scottish Ministers, and the requirement that all staff are approved by public authorities provides a strong measure of protection for the interests of the state and of prisoners.”

38. The Executive also does not accept that there has been a culture of secrecy in the SPS about Kilmarnock. The contract for Kilmarnock has been published and is publicly available on the SPS website. The contracts for any new private prisons will also be published on a similar basis.

Contracts

39. The Executive agrees with the Committee’s recommendation that flexibility should be built into the contracts for any new private prisons. It will proceed on that basis in the procurement of any such prisons, taking into account experience from HMP Kilmarnock. In the current contract with Kilmarnock, there is a mechanism for making change to the contract. Neither party to the contract has invoked this mechanism to date.

Rehabilitation at HMP Kilmarnock

40. The Executive agrees with the Committee that a holistic regime (i.e. a complete and self-contained system) is most appropriate. This requires a balance between work, appropriate programmes, social interaction (including visiting from family and friends from outwith the prison), and some personal space. No establishment has a perfect balance but Kilmarnock has a number of very positive features such as the longest time out of cell of any establishment in Scotland and the fullest working week with time off permitted for approved activities such as programme interventions. The SPS is committed to continuous improvement in the areas of rehabilitation and throughcare, and has demonstrated this by the creation of a directorate dedicated to this area of work.

Financial Review of the Scottish Prison Estate

Comparability and disaggregation of the figures

41. The options for provision of a new prison were considered on a like for like basis. In particular, the building and service specifications for HMP Kilmarnock
were taken as the starting point for all of the options considered by the Estates Review. The costings developed by the Estates Review were verified by PwC on that basis.

42. The PwC report was prepared on the basis that the outputs and outcomes of custodial services delivered under a contract for a privately operated prison would not be qualitatively different from the standard which the SPS would be expected to deliver under a public build–public operate option. Staffing levels and building specifications are inputs rather than outputs, and the same outputs may be achieved with different inputs. The focus was on the standard of service to be delivered by the private sector taking account of all the specified requirements of the SPS, rather than on how that service would be delivered.

**Analysis of cost structure at HMP Kilmarnock**

43. The fundamental issue in assessing performance under any PPP contract is whether the outputs required by the public sector are being delivered. While no prison is perfect, the performance of HMP Kilmarnock against the specified key performance indicators is similar to that of comparable public sector prisons.

44. Indicative levels for staff numbers and starting pay at HMP Kilmarnock were agreed at the outset of the contract between SPS and the operator. The Executive is committed to building on what was done in the Kilmarnock contract to incorporate key aspects of the bidder’s proposals on terms and conditions into the contract for any new prison.

**Mouchel Report**

45. The different options for delivery of a new prison that were considered by the Mouchel Report (public sector build and operate, private sector build and operate, and private build-public operate) were all considered by the Estates Review and the PwC Financial Review. The Estates Review team had access to the Mouchel report and its findings prior to the completion of the Estates Review documentation; and the Mouchel Report was also considered in detail by PwC. The Mouchel Report agreed with the conclusion of the Estates Review, as verified by the PwC Financial Review, that new prisons constructed, maintained and operated by the private sector offer best value for money.

**Other Options**

**Not-for-profit organisations**

46. In his statement of 5 September, the Deputy First Minister said that in seeking tenders for the new privately built and operated prison the SPS would seek innovative proposals to provide care and opportunities for those on remand, including needs assessment and detoxification services. Such proposals could feature an appropriate role for voluntary and charitable not-for-profit organisations.

47. The Executive notes that there is no relevant precedent for the use of a not for profit route for the financing, construction and operation of a new prison. However, the use of a Not for Profit solution for a new prison is not ruled out on
principle. If a Not for Profit bid were to be submitted the Executive would consider it carefully.

New houseblocks

48. The Executive agrees that investment in the existing public sector estate should proceed with a view to ending slopping out as quickly as possible. The SPS is already proceeding with substantial investment in refurbished and new accommodation. New houseblocks are being built at Edinburgh and Polmont at a total cost of around £35m. Refurbishment of an existing houseblock at Barlinnie was completed in March 2002 and refurbishment of another is currently underway.

49. As announced on 5 September, over £110m is to be invested in major capital developments at Edinburgh, Glenochil, Perth and Polmont over the next 3 years. Development plans are to be drawn up for all SPS establishments to inform decisions on longer-term investment.

50. As a result of the decisions announced by the Deputy First Minister on 5 September, it is anticipated that slopping out will be ended by about a year after the opening of the second new prison.

Options for existing prisons

HMP Barlinnie

Scottish Executive’s preferred option

51. D Hall at Barlinnie has already been fully refurbished at a cost of around £5m at 1996-97 prices. In order to provide as many prisoner places as a new 360-place houseblock 2 more existing houseblocks would require to be fully refurbished, which it is expected would be at a similar cost per houseblock plus an allowance for inflation.

52. The preference for a new houseblock at Barlinnie instead of full refurbishment of existing halls is not based solely on a comparison of building costs. As stated in paragraph 136 of the SPS Estates Review, the fully refurbished D Hall at Barlinnie is less flexible than a new build houseblock would be, with restricted capacity to absorb population peaks. As well as being operationally undesirable, this lack of flexibility means that a refurbished houseblock would cost more to operate than a newly built one. Based on a comparison between the new houseblock currently being built at Edinburgh and the refurbished D Hall at Barlinnie, 2 fully refurbished houseblocks would require around twice as many staff as a new 360-place houseblock.

Overcrowding

53. As stated in paragraph 137 of the SPS Estates Review, the timing of action to reduce the size of Barlinnie would depend on the availability of alternative accommodation elsewhere in the prison estate. Thus the SPS would require to be satisfied that this action would not lead to overcrowding before proceeding. In addition, the partially refurbished B and C Halls at Barlinnie would remain available for use as contingency accommodation if required.
Future of the prison

54. Barlinnie is seen as a key site that ought to be retained. It has an excellent location, and there has already been significant investment in the residential accommodation and ancillary facilities. As a result of the Executive’s decisions announced on 5 September considerable additional investment will now take place which will secure Barlinnie for the foreseeable future. The SPS will continue to keep prisoner numbers under review not only at Barlinnie but across the whole prison estate. Once the planned redevelopment at Barlinnie has been completed there would be room on the site to accommodate additional numbers of prisoners if required without major disruption to the existing prisoner population.

HMP Low Moss

Condition of the building

55. The Executive welcomes the Committee’s agreement with the proposals for Low Moss.

Feasibility study

56. The feasibility study referred to, entitled “Constructing the Future”, was one of several submissions about possibilities for development that were prepared by SPS establishments for internal consideration. However, none of those submissions were full option appraisals nor did they include comparative analysis of the options for delivering new prisons. The Estates Review looked at the broad picture of what the ideal prison estate would be and how best to achieve it. While as part of that work the Review considered the future of a number of existing establishments and also the number of new prisons that might be required to meet future pressures on the prison estate, its remit did not include considering possible sites for any such new prisons. Therefore, while the work done in preparing “Constructing the Future” may be of value in developing any proposals for development of the Low Moss site, that study did not form part of the Estates Review considerations nor was it considered by PwC.

HMP Peterhead

Condition of the buildings

57. The Deputy First Minister announced on 5 September that HMP Peterhead is to remain open. Work is to go ahead as soon as possible to install Electric Power In Cell (EPIC).

58. In the longer term, development plans are to be prepared for each existing public sector establishment, including Peterhead, to inform decisions on future capital investment by the SPS. It is expected that those plans will take into account the condition and suitability of the existing buildings at each establishment.
Slopping out

59. Discussion has begun between the SPS and local POA(S) representatives of the POA(S) proposal for providing prisoners with access to night sanitation. A joint SPS/POA(S) working group has been established to consider the issue, which it is hoped will make an initial report by the end of October 2002.

Other points on Peterhead

60. The arguments advanced by the Committee and other respondents on other issues concerning HMP Peterhead, such as throughcare and the potential risks of transferring the work done at Peterhead to another location, were considered carefully by the Executive, and taken into account in reaching the decision to keep Peterhead prison open.

Management of sex offenders

61. The general issues concerning management of sex offenders that were raised by the Committee, such as effectiveness of the STOP programme, were all considered in the Report of the Review Group on the Future Management of Sex Offenders within Scottish Prisons (the Spencer Group), which was published on 5 September. Comments on the Report’s conclusions have been invited from interested parties by the end of 2002. Discussions between the SPS and partner agencies will then take place with a view to the Executive placing proposals before the next session of Parliament.

Overall conclusions

62. The Executive welcomes the Committee’s agreement with the aim of ending slopping out as quickly as possible. As described in paragraphs 48-50 above, significant progress is already being made in improving the quality of the public sector estate and much more is planned. However, as explained in paragraphs 88-94 of the Estates Review consultation paper an end to slopping out cannot delivered solely by improvements to and/or new building within the existing public sector estate. New prisons are also required, and it is for that reason and also to accommodate the projected increase in prisoner numbers that the Executive has decided to proceed with the procurement of 2 new prisons.

63. The Executive remains of the view that the Estates Review and the Financial Review by PwC were thorough and robust, and set out clearly the basis on which the Estates Review proposals were arrived at.

64. The Executive does not agree that the Estates Review was undertaken in a vacuum and not in the context of wider penal reform. The Executive shares the Committee’s desire to see a reduction in offending and reoffending and to establish a full range of effective community disposals across the country, and those considerations were fully taken into account in developing the Estates Review proposals.
DRAFT

CODE OF PRACTICE ISSUED UNDER SECTION 410 OF THE PROCEEDS OF CRIME ACT 2002

Introduction

1. This code of practice governs the exercise of the investigation powers in chapter 3 of Part 8 of the Proceeds of Crime Act 2002 ("the Act"). It is issued by the Scottish Ministers under section 410 of the Act. The code provides guidance as to how such powers in respect of confiscation, civil recovery and money laundering investigations are to be operated in Scotland. There is a separate code of practice in respect of the powers for England, Wales and Northern Ireland in chapter 2, issued by the Home Secretary under section 377. These powers of investigation are not available where cash has been detained under chapter 3 of Part 5, where an interim administration order has been made or where civil recovery proceedings have started. They are also not available for revenue investigations (Part 6).

2. A summary of the powers and access to them is provided in the table attached to this code.

3. Where a person fails to comply with any provision of the code, he or she is not by reason only of that failure liable to any criminal or civil proceedings, but the code is admissible as evidence in such proceedings and a court may take account of any failure to comply with its provisions in determining any questions in the proceedings. Minor deviations from the provisions of the code do not constitute a breach of the code provided there has been no significant prejudice to the investigation or persons connected to the investigation.

4. The code should be readily available at all police stations for consultation by police and members of the public. The code should also form part of the published instructions or guidance for customs officers. The Lord Advocate and the Scottish Ministers will also make arrangements for the code to be publicly available.

Persons covered by the code

5. This code of practice applies to all those who execute the five powers of investigation set out in chapter 3, namely production orders, search warrants, customer information orders, account monitoring orders and disclosure orders.

6. In Scotland, application to the court for the relevant order will be made by the procurator fiscal in relation to a confiscation or money laundering investigation, and by the Scottish Ministers in relation to a civil recovery investigation. The exception is that it will be the Lord Advocate who applies for a disclosure order in relation to a confiscation investigation; disclosure orders are not available for money laundering investigations. For the purposes of chapter 3 of Part 8 of the Act, such a person is
called an ‘appropriate person’. The definition is found at section 412 of the Act. When such an order is granted, a ‘proper person’ will then execute it.

7. Chapter 3 has a basic framework by which ‘proper persons’ execute the investigation powers. A definition of ‘proper person’ is also found at section 412. These are police and customs officers in relation to a confiscation or money laundering investigation and the Scottish Ministers or a person named by them in relation to a civil recovery investigation. The identity of the proper person in each case depends on the type of investigation and the specific power.

General provisions relating to all the orders and warrants

Action to be taken in serving an order or warrant

8. In all cases, the investigatory powers should be exercised courteously and with respect for the persons and property of those concerned.

9. In deciding the method of service of an order, the proper person should take into account all the circumstances of the investigation including the possible need to prove that service was effected and the person or body on whom the order is served.

10. When serving the order, warrant or (in the case of a disclosure order and customer information order) notice under the order, a covering letter must be provided which includes the following information (unless it is already included in the order or notice):

   - the name of the recipient of the order or warrant or the name by which he or she is known;

   - a warning in plain language that failure without reasonable excuse to comply with the requirement is an offence and could result in prosecution;

   - a warning that disclosure of information about the investigation may contravene section 342 (‘offences of prejudicing investigation’), and that if anyone contacts the recipient of the order or warrant about the investigation they should report such to the proper person;

   - that the recipient of the order or warrant should seek legal advice or ask the proper person about any doubts or concerns they may have, or for guidance on complying with the orders;

   - the duty not to falsify, conceal, destroy or otherwise dispose of, or cause or permit the falsification, concealment, destruction or disposal of documents which are relevant to any confiscation, civil recovery or money laundering investigation which the recipient of the order knows or suspects is being or is about to be conducted; and a warning that to do so is an offence punishable by up to five years imprisonment and an unlimited fine; and

   - the duty not to disclose to any other person information or any other matter that is likely to prejudice any confiscation, civil recovery or money
laundering investigation which the recipient of the order knows or suspects is being or is about to be conducted and a warning to do so is an offence punishable by up to five years imprisonment and an unlimited fine.

11. When serving a disclosure order or a customer information order, the proper person must inform the recipient of his or her right to refuse to comply with any requirement imposed on him or her unless the proper person has, if required to do so, produced evidence of his or her authority.

12. Where it appears to the proper person that the recipient of a order or warrant has genuine difficulty in reading or understanding English he shall, where necessary and practical, identify someone who can act as an interpreter.

13. Sections 393(1) and 400(1) of the Act provide that an offence is committed if, without reasonable excuse, a person or financial institution fails to comply with a requirement imposed by a disclosure or customer information order. The other orders are treated as orders of the court and therefore attract contempt proceedings if they are not complied with. The recipient of the order should be warned in plain language that failure without reasonable excuse to comply with the requirement of an order is an offence that could result in prosecution, imprisonment and/or a fine.

14. What in law amounts to a reasonable excuse may depend on the facts of each particular case and will be a matter for decision by a court.

15. Section 450 of the Act empowers the Scottish Ministers to direct that any person named by them for the purposes of a civil recovery investigation under Part 8 or any person authorised by them to receive relevant information under section 391 (disclosure orders) may identify himself or herself by means of a pseudonym when authorised to carry out functions under the Act. An application may be made or service of an order or warrant may be carried out using a pseudonym. A certificate signed by the Scottish Ministers is sufficient to identify such persons and the person may not be asked any question which is likely to reveal his or her true identity.

16. No document or information may be retained which is subject to legal privilege (with the one limited exception in respect of the disclosure order) which in Scotland will be interpreted according to existing Scottish law, practice and procedure. A recipient of the order or warrant has the right to withhold material and information sought which is subject to legal privilege. Under section 412 of the Act, items subject to legal privilege are communications between a professional legal adviser and his or her client, or communications made in connection with or in contemplation of legal proceedings and for the purpose of those proceedings.

17. Aside from the legal privilege provision, requirements for information made under the powers of investigation have effect in spite of any restriction on the disclosure of information, however imposed. They therefore take precedence over other general rules regarding confidentiality.

_Record of Proceedings_
18. The proper person must keep or cause to be kept a record of the exercise of the powers conferred by the provisions of chapter 3 of Part 8.

19. The record must, in relation to each requirement made, include:

- a copy of the order or warrant and copies of any notices given under an order
- the date on which the order, warrant or notice was served
- the date and place that the information or documents were received in response to the order;

*Retention of documents and information*

20. The retention and return of documents, material and information should be subject to procedures already in place more generally. Intelligence that arises during the proper person’s investigation may be passed to the National Criminal Intelligence Service, police, customs, the Assets Recovery Agency and/or other departments and agencies (provided there is a statutory gateway in place for the passing of information between those bodies for that purpose).
PRODUCTION ORDERS

Definition

21. A production order is an order which can be served on any person or institution, for example a financial institution, requiring the production of material; this might include documents, such as bank statements (section 380(5)).

Statutory requirements

22. The application must specify a person who is subject to a confiscation investigation or a money laundering investigation or property which is subject to a civil recovery investigation. The application must also state that the order is sought for the purposes of a confiscation, civil recovery, or money laundering investigation. It must identify the specific material sought or describe the type of material sought and it must specify a person who appears to possess or be in control of the material. It must also state whether production of the material or access to the material is required.

23. The person named in the order must either produce the material, or provide access to it, as directed by the order. This is within a period decided at the sheriff’s discretion, but section 380(6) of the Act provides seven days as the normal period.

Person who may apply for a production order

24. As with the other orders, an application may be made by an ‘appropriate person’; the definition depends on the type of investigation (section 412).

Particular action to be taken before an application for a production order

25. The proper person must ascertain as specifically as is possible in the circumstances the nature of the material concerned and where relevant its location.

26. The proper person must also make enquiries to establish what if anything is known about the likely occupier of the premises where the material is believed to be located and the nature of the premises themselves; and to obtain any other information relevant to the application.

27. The proper person must consider whether he or she requires production of the material or access to it. In most circumstances he or she would want production so as to retain it. There are occasions however where, for example, he or she may simply want sight of information contained in larger material, e.g. an entry in a register.

Particular action to be taken executing a production order

28. The 7-day time limit will apply unless it appears to the sheriff that a shorter or longer period would be appropriate. Reasons which the appropriate person might put to the sheriff for changing the 7 day period are that the investigation may be prejudiced unless there is a shorter time limit, or that it would not be reasonably
practicable for the recipient of the production order to comply with the seven day time limit due to the nature or amount of documentation required. There will be cases when the best practice is to contact the recipient of the production order (e.g. a financial institution) before the application is made to discuss a reasonable time limit.

29. When a production order is served on a person, business or institution under section 380(5)(a) of the Act, the order or the covering letter must, in addition to the matters specified in paragraph 10 of the general section, state:

- that the order was made under section 380(5)(a) of the Act
- the material or class of required to be furnished
- the period of time within which such documents must be furnished.

30. Where an order is made under section 380(5)(b) of the Act (for access to material), the order or covering letter must, in addition, state:

- that the order was made under section 380(5)(b) of the Act
- the material or class of material required to satisfy the production order
- the proper person’s right of access to such material.

31. Section 385 deals with service of a production order on a government department. A production order served on a government department can contain a requirement for the person on whom the order is served and anyone else who receives it to bring it to the attention of the official who holds the material even if they are unknown at that stage.

Provisions relating to the handling and retention of documents produced or accessed in response to a production order.

32. Documents will be handled and retained in accordance with Scottish legal practice and procedures.

Order to grant entry

33. An order to grant entry might be used, for example, to enable a proper person to be granted entry to a building in circumstances where a production order had been made in respect of material in a particular company’s office in that building.

34. An order to grant entry differs from a search warrant in that the order to grant entry is to overcome any physical obstacle in serving the production order. It does not include the power to search the premises.
SEARCH WARRANTS

Definition

35. A search warrant (defined at section 387(4)) can be issued in the three circumstances set out in paragraphs 39-41 below. It enables the proper person to enter and search the premises specified in the warrant and to retain material which is likely to be of substantial value to the investigation. The search warrant does not include a power to stop a person, make an arrest or to search a person. The Act and the code only apply to searches of premises. For the purpose of this code and the legislation "premises" is defined in section 412 of the Act. The definition provides that premises includes any place and, in particular, includes any vehicle, vessel, aircraft or hovercraft, any offshore installation, any tent or moveable structure.

36. This code does not apply to searches conducted under other legislation or under section 289 (recovery of cash) of the Act, and does not apply to searches conducted with consent without a search warrant.

Persons who can execute search warrants

37. This part of the code deals with proper person’s powers to execute search warrants, namely to search the premises and seize and retain relevant material found on premises.

Statutory requirements

38. A search warrant may only be issued if one of three statutory requirements is met.

39. The first requirement is met if a production order has not been complied with and there are reasonable grounds for believing that the material specified in the production order is on the premises specified in the search warrant.

40. The second requirement is met if the material which is sought can be identified but it is not practicable to communicate with the person against whom a production order might be made or with any person against whom an order to grant entry into premises might be made. This might be the case, for example, where the person who owns the material or who controls access to the premises on which the material is held is abroad and therefore it is not possible to communicate with that person. In such circumstances, it is clear that a production order in respect of that person would have no effect. In order for this requirement to be met, the sheriff must also be satisfied that the investigation might be seriously prejudiced unless immediate access to the premises is secured.

41. The third requirement is met if there are reasonable grounds for believing that there is material on the premises which cannot be identified precisely enough for the purposes of a production order and that the material relates to property or a person specified in the application (see section 388 of the Act for full details). This might be the case where it is impossible to describe the material in precise detail but it is known
that suspect material belonging to a person on a premises. In order for this requirement to be met, the sheriff must also be satisfied that it is not practicable to communicate with anyone who might grant entry to the premises or that entry to the premises will not be granted unless a warrant is produced or that the investigation might be seriously prejudiced unless immediate access to premises is secured.

**Particular action to be taken before an application for a search warrant**

42. The proper person must note that a search warrant is the most invasive of the powers of investigation.

43. The proper person must ascertain as specifically as is possible in the circumstances the nature of the material to be specified in the application and its location.

44. The proper person must also make reasonable enquiries to establish what, if anything, is known about the likely occupier of the premises and the nature of the premises themselves; whether they have been previously searched and if so how recently; and obtain any other information relevant to the application.

**Time of searches**

45. In terms of section 390(2) of the Act, searches made under a warrant in respect of a civil recovery investigation must be made within one calendar month from the date of issue of the warrant.

**Entry other than with consent**

46. Before entering the premises, the proper person must first attempt to communicate with the occupier, or any other person entitled to grant access to the premises, by explaining the authority under which entry is sought to the premises and asking the occupier to allow entry, unless:

- the premises to be searched are known to be unoccupied
- the occupier and any other person entitled to grant access are known to be absent, or
- there are reasonable grounds for believing that to alert the occupier or any other person entitled to grant access by attempting to communicate with them would frustrate the object of the search or endanger the proper person concerned or other people.

47. Before a search begins, the proper person must identify him or herself (subject to the provisions relating to pseudonyms) and show an official form of identification, state the purpose of the search and the grounds for undertaking it.

**Conduct of searches**
48. Premises may be searched only to the extent necessary to achieve the object of the search, having regard to the size and nature of whatever is sought. No search may continue once the proper person is satisfied that whatever is being sought is not on the premises. This does not prevent a further search of the same premises if additional grounds come to light which support a further application for a search warrant. Examples would be when as a result of new information, it is believed that articles previously not found or additional articles are on the premises.

49. Searches must be conducted with due consideration for the property and privacy of the occupier of the premises searched and with no more disturbance than necessary. Proper persons might want to consider the possibility of using reasonable force as a last resort if this appears to be the only way in which to give effect to their power of search.

Leaving premises

50. If premises have been entered by force the proper person must, before leaving them, be satisfied that they are secure either by arranging for the occupier or the occupier's agent to be present or by any other appropriate means.

Seizure of material

51. Where a proper person considers that information which is held in a computer and is accessible from the premises specified in the warrant is relevant to the investigation, the proper person may require the information to be produced in a form which can be taken away (for example a computer printout or a removable computer disk). Care should be taken to ensure that the person producing the material in this form does not delete evidence from the computer, either deliberately or accidentally.

Particular record of proceedings in executing a search warrant

52. Where premises have been searched under a warrant issued under chapter 3 of Part 8 of the Act, the proper person must make or have made a record of the search. The record shall include:

- the address of the premises searched
- the date, time and duration of the search
- the authority under which the search was made
- subject to the provisions relating to pseudonyms, the name of the proper person and the names of all other persons involved in the search
- the names of any people on the premises if they are known
- either a list of any material seized or a note of where such a list is kept and, if not covered by a warrant, the grounds for their seizure
- whether force was used, and, if so, the reason why it was used, and
- details of any damage caused during the search, and the circumstances in which it was caused.
CUSTOMER INFORMATION ORDERS

Definition

53. A customer information order compels a financial institution covered by the application to provide any ‘customer information’ it has relating to the person specified in the application. ‘Customer information’ is defined at section 398 of the Act. A ‘financial institution’ means a person carrying on a business in the regulated sector, which is defined at Schedule 9 to the Act.

Particular action to be taken executing a customer information order

54. Section 397(6) of the Act requires a financial institution to provide any customer information which it has relating to the person specified in the application if it is given notice in writing by the proper person. Section 397(7) gives the proper person power to request the manner and time by which the financial institution provides the information. The proper person is expected to impose a reasonable time limit depending on the nature of the institution and the information which is requested. There will be cases when the best practice is to contact the financial institution before the notice is served to discuss a reasonable time limit.
ACCOUNT MONITORING ORDERS

Definition

55. An account monitoring order is an order that requires a specified financial institution to provide account information on a specified account for a specified period, up to 90 days in the manner and at or by the times specified in the order. ‘Account information’ is information relating to an account held at a financial institution – this would most commonly be transaction details.

Statutory requirements

56. The application will specify the financial institution from which the account information is to be obtained.

57. The order will also set the manner and deadline by which the financial institution must produce account information and the period for which the order should last.
**DISCLOSURE ORDERS**

**Definition**

58. A disclosure order is an order authorising the Lord Advocate or the Scottish Ministers to give notice in writing to any person requiring him or her to answer questions, to provide information or to produce documents with respect to any matter relevant to the investigation in relation to which the order is sought. **It is only available for confiscation and civil recovery investigations.** Disclosure orders are not available for money laundering investigations.

59. Once a disclosure order has been made, the Lord Advocate or the Scottish Ministers may use the extensive powers set out in section 391(4) of the Act throughout the investigation. Thus, unlike the other orders covered by chapter 3 of Part 8 of the Act which have to be applied for separately on each occasion, a disclosure order gives the Lord Advocate or the Scottish Ministers continuing powers for the purposes of the investigation. The Lord Advocate or the Scottish Ministers must serve a notice on any person they wish to question or to ask to provide information or documents.

60. **Under section 391(6), where a person is given notice under a disclosure order, he or she can require that evidence of the authority to give the notice be provided. Where this happens, a copy of the disclosure order should be given to the person.**

**Persons who can apply for a disclosure order**

61. Only the Lord Advocate or the Scottish Ministers can apply for a disclosure order.

**Statutory requirements**

62. **The Lord Advocate or the Scottish Ministers have to satisfy the judge that a confiscation or civil recovery investigation is going on and the order is sought for the purpose of that investigation.**

**Particular action to be taken in executing a disclosure order**

63. **Production of documents or information in response to a disclosure order should follow similar processes to those set out for production orders.**

64. The disclosure order also contains a power to ask questions. **The preferred course of asking questions is to conduct a formalised interview in accordance with the procedure set out below.**

65. **Along with each requirement the recipient will be advised of his or her rights and duties including:**
• his or her right not to have statements made by him or her used in evidence in criminal proceedings against him or her other than in the circumstances specified in section 394(2)

• his or her right to refuse to comply with any requirement made of him or her unless the Lord Advocate or the Scottish Ministers have, if required to do so, produced evidence of their authority

• his or her right to be questioned fairly

• his or her right at the end of any interview to be given an opportunity to clarify anything he or she has said or to say anything further he or she wishes.

66. In respect of interviews, the interviewee should be notified of:

• the place at which the interview is to take place, and

• where attendance is not required at once, the time and date of the interview.
## Summary of the powers of investigation under the Proceeds of Crime Act 2002

<table>
<thead>
<tr>
<th>Purpose of power</th>
<th>Who can apply for it – confiscation investigation?</th>
<th>Who can apply for it – laundering investigation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Production order</strong></td>
<td>Procuration fiscal</td>
<td>Procuration fiscal</td>
</tr>
<tr>
<td>Obtain material already in existence in control of a known person e.g. bank statements and correspondence</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Search warrant</strong></td>
<td>Procuration fiscal</td>
<td>Procuration fiscal</td>
</tr>
<tr>
<td>(1) Search premises where production order not complied with; or (2) Search premises where production order likely to be ineffective and seize material</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Disclosure order</strong></td>
<td>Lord Advocate</td>
<td>Not available in a laundering investigation</td>
</tr>
<tr>
<td>Require any person to produce documents or answer questions relating to investigation</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Customer information order</strong></td>
<td>Procuration fiscal</td>
<td>Procuration fiscal</td>
</tr>
<tr>
<td>Trawl financial institutions for accounts in the name of a particular person or organisation</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Account monitoring order</strong></td>
<td>Procuration fiscal</td>
<td>Procuration fiscal</td>
</tr>
<tr>
<td>Monitor future transactions through a known account for up to 90 days</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
PRISON ESTATE REVIEW

As you know, the Executive published a consultation document on the Prison Estate on 21 March. The Justice 1 Committee held a related inquiry, to which the Deputy First Minister gave evidence on 23 May and 6 June. In addition, the Executive gave the Committee on 27 June Notes on the responses from Grant Thornton and Peter McKinlay to its own consultation. The Committee published its Report on 2 July. Ministers considered the Committee’s report carefully alongside responses to the Executive’s consultation document in shaping their final decisions. These were the subject of a Statement to the Parliament by the Deputy First Minister on 5 September. The Deputy First Minister also responded to questions on prison estate issues when he met the Justice Committees in joint session on 17 September.

I now enclose a formal response to the Committee’s report. This refers to and summarises relevant points from earlier proposals, evidence and statements and should be read alongside those. I hope that members of the Committee find it useful to have the Executive’s position set out in this form. For ease of reference, I also enclose copies of the two Notes and the Statement referred to above.

GREGOR LINDSAY
Private Secretary
MENTAL HEALTH (SCOTLAND) BILL:
‘JUSTICE ISSUES’

SARAH M DEWAR

This briefing is one in a series on the Mental Health (Scotland) Bill (SP Bill 64) (‘the Bill’). It considers a range of ‘justice issues’ arising from the Bill. These include the reforms in Parts 8 – 12 of Bill to the disposals that can be made by the criminal courts in respect of accused persons and offenders with a mental disorder, and the new offences created in Part 17 of the Bill designed to protect people with a mental disorder from abuse. The briefing also includes consideration of the interaction between the Bill and the Criminal Justice (Scotland) Bill (SP Bill 50) and the Mental Health (Public Safety and Appeals) (Scotland) Act 1999. Related SPICe briefings are listed at the back of this briefing.
KEY POINTS OF THIS BRIEFING

- The Bill seeks to modernise the statutory framework for meeting the needs of people with mental disorders, based on the recommendations of the Millan Committee.

- It creates the Mental Health Tribunal, which will sit with a legal member, a medical member and a member with experience in the delivery of mental health services. The Tribunal will perform a wide variety of functions under the Bill (Parts 3 and 18).

- Parts 8–12 of the Bill deal with the approach to people in the criminal justice system that also have a mental disorder.

- The Bill envisages a more limited role for the Risk Management Authority in relation to restricted patients than was envisaged by the Millan Committee.

- Part 17 of the Bill creates new statutory offences, and reinforces existing offences, intended to protect mental disorder who are vulnerable to sexual abuse.

- The Criminal Justice (Scotland) Bill contains provisions on high-risk offenders who also have a mental disorder. However, the Scottish Executive envisages that only minor consequential amendments will be required to deal with this overlap.

- The Scottish Law Commission is currently considering the defences of insanity and diminished responsibility. There are no provisions on these defences in the Bill.

- The Bill will repeal the Mental Health (Public Safety and Appeals)(Scotland) Act 1999, which was enacted as a result of the ‘Ruddle’ case. However, the ‘public safety’ test contained in that Act is re-introduced in the Bill, contrary to the recommendation of the Millan Committee.

- The Bill amends the criteria for admission to the high security State Hospital at Carstairs.

- The Bill does not include a continuing right of appeal for patients in relation to the level of security of the establishment they are held in. This is contrary to the recommendation of the Millan Committee.
BACKGROUND


In order to be covered by the provisions of the Bill a person must be suffering from a ‘mental disorder’, which is subdivided into three categories: mental illness, personality disorder and learning disability (s 227). For a fuller discussion of the three categories see paras 291–298 of the Policy Memorandum to the Bill (Scottish Executive 2002c) and the SPICe briefing entitled The Mental Health (Scotland) Bill 1 – Definitions, Coverage and Administration (Scottish Parliament Information Centre 2002c) at pages 1 – 2.

THE MENTAL HEALTH TRIBUNAL (PARTS 3, 18 AND SCHEDULE 2)

At present, the sheriff court is the principal decision making forum in relation to mental health legislation. The Bill creates a new specialist Mental Health Tribunal. This Tribunal’s role will be “complex and multi-faceted”. In relation to civil mental health law it will approve applications for long-term compulsory treatment, and for both civil patients and people with a mental disorder who are facing criminal charges, it will hear appeals and consider reviews of any mental health orders made (Scottish Executive 2002c, para 31).

The Tribunal will have a senior legal figure as its president. Each Tribunal hearing will have three members, including a legally qualified chair. There will also be a medical practitioner with experience in mental health and a person with experience in the assessment, planning and delivery of mental health services (e.g. a social worker) (Scottish Executive 2002c, para 34).

PERSONS WITH A MENTAL DISORDER AND CRIMINAL PROCEEDINGS (PARTS 8 – 12)

The Bill reforms the law relating to people with mental disorders who enter the criminal justice system.

It should be noted that the approach of Part 8 of the Bill is to insert provisions into the Criminal Procedure (Scotland) Act 1995 (‘the 1995 Act’).

Pre-sentence mental health orders (Part 8, Chapter 1)

The Bill provides for three new orders that will be available to the courts prior to sentencing (and in the case of two of them also prior to any finding of guilt or
It should be noted that these orders are collectively intended to ensure that persons involved in criminal proceedings and suffering from a mental disorder are appropriately assessed and treated and that information is gathered as to what final disposal might be appropriate. However, their effect is not to prevent any trial from proceeding.

Assessment Order (section 92 of the Bill inserting sections 52A-52H into the 1995 Act)

The key features of an assessment order are as follows:

- Its stated purpose is “to allow the appropriate examination and assessment of persons involved in criminal proceedings” (Scottish Executive 2002c, para 131).

- The procurator fiscal can apply to the court for this type of order prior to any finding of guilt or innocence in the case (s 52A(1)). Where the person is already in custody, the Scottish Ministers can also apply to the court for an order prior to any conviction and additionally after conviction but prior to sentence (s 52B(2) & (3)). The court can also make an order on its own initiative at any point in the proceedings prior to sentence (s 52D(2) & (3)).

- It can be made on the evidence of one medical practitioner who does not have to be a specialist in mental disorders (s 52(2)(a)).

- It authorises removal to and detention in a specified hospital and also the giving of compulsory treatment in certain circumstances (s 52C).

- The Millan Committee recommended that compulsory treatment should only be possible in an emergency, or with a second opinion from an “approved medical practitioner” (ie an individual approved by a Health Board as having expertise in the treatment of a mental disorder (s 19)) (Scottish Executive 2001a, recommendation 25.4). To follow this recommendation in relation to people subject to assessment orders, the Executive has stated that it will introduce an amendment to the Bill (Scottish Executive 2002c, para 133).

- The responsible medical officer (RMO), ie the medical practitioner placed in charge of the case, must make a report made to the court on the patient’s condition not later than 28 days after the making of the order so that the court can decide how to proceed (s 52F). Previously, the decision as to how to proceed (including the decision as to whether continued detention was appropriate) was the RMO’s alone (Scottish Executive 2001a, chapter 25, paras 11 – 12).
Only one assessment order can be made, after which it will only be possible to make a treatment order if continued detention in hospital is thought appropriate (Scottish Executive 2002b, para 157).

_Treatment order (section 92 of the Bill inserting sections 52J-52S into the 1995 Act)_

The key features of a treatment order are as follows:

- It is designed for use in respect of persons with a mental disorder awaiting trial or sentence, requiring care or treatment that can only be provided in hospital (Scottish Executive 2002c, para 134).

- The procurator fiscal can apply to the court for this type of order prior to any finding of guilt or innocence in the case (s 52J(1)). Where the person is already in custody, the Scottish Ministers can also apply to the court for an order prior to any conviction and additionally after conviction but prior to sentence (s 52K(2) & (3)). The court can also make an order on its own initiative at any point in the proceedings prior to sentence (s 52M (2) & (3)).

- It can be made on the evidence of a medical practitioner and an approved medical practitioner (s 52L(2))

- The order authorises removal to and detention in a specified hospital and the giving of compulsory treatment in certain circumstances (s 52L(6)).

- Unless revoked earlier by the court, the order ends at the end of the period for which the person is remanded or committed (s 52R).

_Interim Compulsion Order (section 93 of the Bill inserting a new section 53 and sections 53A-E into the 1995 Act)_

The key features of an interim compulsion order are as follows:

- It is available for an offender convicted of an offence punishable by imprisonment (other than where the sentence is fixed by law, as with the offence of murder) (s 53(1)).

- Generally, it is intended to be used where the offender may present a high risk to the public and the court needs to gather further evidence on the offender, the perceived risk and what final disposal might be appropriate (Scottish Executive 2002c, paras 138 – 139).

- Specifically, it is to be used where the final disposal is likely to be a compulsion order with a restriction order or a hospital direction (in respect of which see further below at page seven) (s 53(3) and (6)). In contrast, the existing power to make an interim hospital order (which is to be replaced by the power to make an interim compulsion order) is only used where it is anticipated that the final disposal will be to the high security State Hospital at Carstairs. The change takes account of the view of the Millan Committee that high risk offenders might also in
future be held in medium secure facilities (Scottish Executive 2001a, chapter 26, paras 25, 27 and recommendation 26.6).

- Initially, an order will last up to 12 weeks but can be renewed every 12 weeks (if this is supported by medical evidence) with a limit of 12 months for its total duration (ss 53(8)(b) & 53C (4) & (5)).

Remand for inquiry into mental condition (section 94 of the Bill amending section 200 of the 1995 Act)

For offenders whose risk is less significant, s 200 of the 1995 Act permits the court to remand an individual, including (where appropriate) remand in hospital, in order that psychiatric reports can be obtained prior to sentence. The Bill removes the time limit within which a person may appeal against committal to hospital.

Disposal of cases where the offender has a mental disorder

At the time of sentencing, where the convicted offender has a mental disorder the court has the opportunity to make a range of mental health disposals. When considering these disposals, the Millan Committee observed (Scottish Executive 2001a, chapter 26, para 2):

“There are (…) problems in ensuring that the appropriate disposal is selected in a particular case. Evidence to the Committee highlighted the tension between the need of the criminal justice system for clear disposals, selected at or shortly after conviction; and the nature of psychiatric diagnoses, which are of necessity often provisional, and subject to change in the light of new evidence.”

The disposals in respect of which reforms are proposed in the Bill are as follows:

Probation with a condition of treatment (Part 8, chapter 2, s 96 amending s 230 of the 1995 Act)

This is an existing order aimed at mentally disordered offenders whose situation does not require imprisonment or detention in hospital. The Bill provides for two minor reforms: 1) the extension of the period for which the offender is required to accept treatment under the order (s 96(a)); and 2) the imposition of a duty on the court to check that the service which the offender is ordered to attend is appropriate and available (s 96(b)).

Compulsion order (Part 8, chapter 2, s 95 inserting ss 57A – C into the 1995 Act and Part 9)

The key features of a compulsion order are as follows:

- It replaces the existing hospital order under the Mental Health (Scotland) Act 1984 Act. Its effect is similar to a “compulsory treatment order” (Part 7 of the Bill) used for patients under civil mental health law. For more information about compulsory treatment orders see the SPICe briefing entitled The Mental Health
It is available where an offender has been convicted of a crime punishable by imprisonment (other than where the sentence is fixed by law, as with the offence of murder) (s 57A(1)).

The criteria that must be satisfied for an order to be made include the requirement that the offender has a mental disorder that would benefit from treatment and that there would be a significant risk to the offender or others if the order was not made (s 57A(3)).

Although similar, the criteria for making the order are not the same as for civil patients, contrary to the recommendation of the Millan Committee (Scottish Executive 2002c, paras 190 – 194).

The court requires to be satisfied, on the evidence of a medical practitioner and an approved medical practitioner, that the criteria set out above are met before making an order. Regard must also be had to a report prepared by a mental health officer (ie a specialist social worker) (ss 57A(2) & s 57B). A mental health officer currently has no input in relation to the decision to make a hospital order.

It can authorise a range of measures including detention in hospital for six months and treatment in the community (s 57A(7)). In contrast, the existing hospital order, as its name suggests, requires detention in hospital.

The Millan Committee were not opposed to the treatment of mentally disordered offenders in the community but considered that the court should refer the matter to the Mental Health Tribunal who, having considered a proposed plan of care, would report back to the court on the appropriateness of a community based disposal (Scottish Executive 2001a, chapter 26, paras 48 – 50 and recommendations 26.12 – 14). The Bill does not follow this approach.

The order has to be reviewed at mandatory intervals (every 6 months in the first year of its existence and annually thereafter) by the patient’s “responsible medical officer” (RMO). This officer has the power to revoke the order but any decision to extend the order is reviewed by the Mental Health Tribunal. Also, the Tribunal makes any variation of the order on application of the RMO. The patient can also apply periodically to have the order revoked or varied (Part 9).

Compulsion orders with restriction orders (Part 10)

The key features of the combination of a compulsion order with a restriction order are as follows:

Where a restriction order is imposed with a compulsion order, the offender is thought to require additional scrutiny as he or she progresses through the mental health system and must initially be detained in hospital (Scottish Executive 2002c, para 153).
As with compulsion orders, the RMO reviews the orders but at mandatory twelve monthly intervals. In addition, the RMO only makes recommendations regarding revocation, variation or discharge of the orders. It is the Scottish Ministers who make an application to the Mental Health Tribunal, which in turn assesses whether there should be any change in the patient’s status. The patient can also apply periodically to the Tribunal to have the order revoked or varied (Part 10, chapter 2).

When considering an application, the Mental Health Tribunal has to apply a different test than the one used in relation to simple compulsion orders, namely, the “public safety” test (in respect of which see further at page 12 below) (s 133).

Hospital direction (Part 11)

The key features of this type of disposal (which should not be confused with existing powers to make a hospital order) are:

- The criteria for its use currently in the Bill are very similar to those applicable in relation to a compulsion order and several of the other pre-sentence orders. The Millan Committee made a recommendation for additional criteria that do not appear in the Bill (Scottish Executive 2001a, recommendation 26.9). The Executive proposes to introduce an amendment to the Bill to address this (Scottish Executive 2002c, para 148).

- After such amendment to the Bill, the intention is that a hospital direction will be appropriate where a person has a mental disorder meeting the criteria for admission to hospital but either the mental disorder and the offence are not closely linked, or that the offender is likely to remain a risk to the public even after appropriate treatment for the mental disorder (Scottish Executive 2002c, para 148).

- Hospital directions will be periodically reviewed, in a similar way to compulsion orders with restriction orders under Part 10.

- Unlike the regime for compulsion orders with restriction orders, a patient subject to a hospital direction cannot be conditionally discharged, ie the patient cannot be returned to the community under controlled conditions with procedures for rapid recall if the patient deteriorates (Scottish Executive 2002c, paras. 164 and 167). Instead they must be transferred to prison to serve the remainder of their sentence.

- Also unlike the regime for compulsion orders with restriction orders, Scottish Ministers can revoke the direction without resort to the Mental Health Tribunal if they receive a report from the responsible RMO containing that recommendation. The patient must then be transferred to prison or other institution (s 152).
Prisoners requiring treatment for a mental disorder (Part 8, chapter 3 and Part 12)

There are occasions where an offender already serving a prison sentence will require a transfer from prison to hospital to receive the appropriate care and treatment for their mental disorder. In this case a ‘transfer for treatment direction’ will be appropriate.

The key features of this direction are:

- It is equivalent to the existing ‘transfer direction’ which can be made under section 71 of the Mental Health (Scotland) Act 1984.

- It can be made by Scottish Ministers on the basis of the evidence of a medical practitioner and an approved medical practitioner (s 97). It can be made with or without restrictions (s 99).

- The Millan Committee envisaged that the Bill would contain a right to appeal for the prisoner against the making of the direction (as is the case at present with transfer directions). It also recommended that there should also be a right to appeal for the prisoner against a refusal to make a direction (Scottish Executive 2001a, chapter 26, para 53, recommendation 26.15). These rights do not currently appear in the Bill. Officials from the Scottish Executive have stated they will introduce amendments to address these issues.

- Without a restriction direction also being imposed, the patient is subject to the same regime as those patients subject to compulsion orders under Part 9 of the Bill (Scottish Executive 2002b, para 272).

- With a restriction direction also being imposed, the patient is subject to the same regime as those patients subject to hospital directions under Part 11 of the Bill (Scottish Executive 2002b, para 273).

MANAGEMENT OF AND RESPONSIBILITY FOR RESTRICTED PATIENTS

In relation to the management of and responsibility for restricted patients the following points are worthy of note:

- Scottish Ministers can authorise the temporary release from detention of a restricted patient, as well as transfers of patients between hospitals with the same level of security. The Millan Committee recommended that the Risk Management Authority should undertake this role (along with dealing with urgent recalls from conditional discharge) but this recommendation has not been followed (Scottish Executive 2001a, recommendation 27.3 and Scottish Executive 2002c, para 175).

- The Risk Management Authority’s role in relation to restricted patients is instead to provide best practice advice on risk management and assessment issues relevant to restricted patients. It will also be able to provide specific advice on the care plans of individual restricted patients (Scottish Executive 2002c, para 178).
The Millan Committee also envisaged a role for the Parole Board, re-constituted as the Restricted Patients Review Board, in relation to questions of discharge and transfers of restricted patients to lower levels of security. However, this recommendation has not been followed (Scottish Executive 2001a, recommendation 27.2 and Scottish Executive 2002c, para 175).

Instead, the Bill provides that the Mental Health Tribunal will authorise all discharges of restricted patients. The Executive is also planning to introduce an amendment so that transfers out of the State Hospital can only be authorised by the Tribunal (Scottish Executive 2002c, paras 178 and 180).

ACQUITTED PERSONS SUFFERING FROM MENTAL DISORDER

A person could be acquitted of an offence but yet urgently require admission to hospital as a civil patient. The Millan Committee recommended that in this situation the court dealing with the alleged offence should have the power to order that, on acquittal, the accused person may be held in a place of safety for up to six hours for a medical examination (Scottish Executive 2001a, recommendation 25.8). The Executive has stated that it will introduce an amendment to the Bill to implement this recommendation (Scottish Executive 2002c, para 173).

OFFENCES UNDER THE BILL (PART 17)

The Millan Committee concluded that the sex offences found in the general criminal law did not provide sufficient protection for people suffering from a mental disorder. The main problem they identified was that most of these offences were based on proving a lack of consent and this may be difficult to establish when a person is severely mentally impaired (Scottish Executive 2001a, chapter 21, paras 22–23). Since the Committee reported, a decision of the High Court has established that in a rape case lack of consent could be presumed where a woman suffering from a mental disorder was incapable of giving such consent. Despite this development, the Executive concluded that specific legislative provision for people suffering from mental disorders would provide greater certainty than could be provided by developing case law. Accordingly, the Bill repeals and replaces existing legislative provision designed to protect vulnerable people with certain types of mental disorder from sexual exploitation. It seeks to address criticisms of the existing law by being gender-neutral, applicable to all forms of mental disorder (as opposed to being limited to types of learning disability) and applicable to all forms of sexual act (Scottish Executive 2002c, paras 273, 280–282).

The Bill also retains an existing offence designed to ensure access by authorities to mentally disordered persons in order that those authorities can carry out their functions under the Bill (Scottish Executive 2002a, chapter 19, para 42).

**Sexual abuse of a person with a mental disorder (section 213)**

This new offence is committed where a person knowingly commits a sexual act with a person who has a mental disorder and that person has not consented to the act. The maximum penalty for such an offence is life imprisonment. Under the equivalent
provision in existing legislation the maximum penalty is two years imprisonment but the Executive thought this as inappropriate to deal with the most serious offences (Scottish Executive 2002c, para 275).

**Sexual abuse by staff and formal carers (section 215)**

This new offence is designed to cover sexual acts: 1) involving a person with a mental disorder and a person employed to deliver care to that person; or 2) involving a person with a mental disorder and a doctor or therapist involved in a professional relationship with that person. The maximum penalty for this offence is two years imprisonment (Scottish Executive 2002c, paras 277 – 278).

**Ill treatment or neglect (section 217)**

The existing offence of ill treatment or neglect of a person with a mental disorder by an individual providing care is amended by the Bill. The offence in the Bill applies to the full range of care settings, including the person’s home, and covers family members or other individuals providing informal care, as well as formal carers. The maximum penalty remains at two years imprisonment (Scottish Executive 2002c, paras 287 – 288).

**Obstruction (section 218)**

The Bill continues to make it an offence to obstruct a person authorised under the Bill (e.g., a mental health officer or medical practitioner) to carry out his or her functions under the Bill. An example of obstruction is refusing access to premises in order that an authorised person may interview or examine a person with a mental disorder. The maximum penalty is three months imprisonment (Scottish Executive 2002b, paras. 417 – 418).

**THE INTERACTION OF THE BILL WITH ORDERS IN THE CRIMINAL JUSTICE (SCOTLAND) BILL**

The Criminal Justice (Scotland) Bill introduces a new sentence of an order for lifelong restriction (OLR). An OLR is to be used as a final disposal for any offender who is convicted of a serious violent or sexual offence, or a life endangering offence, or an offence that indicates a propensity for such behaviour (see s 1 inserting s 210F into the 1995 Act). To assist in the decision as to whether this disposal is appropriate, the court can make a “risk assessment order” resulting in a report (“a risk assessment report”) being prepared by a person accredited by the Risk Management Authority (see s 1 inserting s 210B into the 1995 Act).

The Policy Memorandum to the Criminal Justice (Scotland) Bill provides guidance on how the Criminal Justice (Scotland) Bill and the mental health legislation should interact in relation to final disposals for high risk mentally disordered offenders. It suggests that OLRs should not be used where the risk posed by the offender is closely related to the mental disorder. On the other hand, where the risk is not closely related, the recommendation appears to be for the use of an OLR with a hospital direction (Scottish Executive 2002a, paras 12 and 25 – 28). The Policy
Memorandum to the Mental Health (Scotland) Bill makes no further comment in this regard.

In relation to which pre-sentence order is appropriate, s 1 of the Criminal Justice (Scotland) Bill (inserting s 210D into the 1995 Act) provides that where the offender meets the criteria for a interim hospital order (to be replaced by an interim compulsion order under the new Mental Health (Scotland) Bill) and a risk assessment order, an interim hospital order must be made. When this order is made, a person accredited by the Risk Management Authority will prepare a report assessing the risk the offender presents to the public. The Policy Memorandum to the Mental Health (Scotland) Bill states simply that for serious offenders where an interim compulsion order is made, “the assessment will be informed by procedures and guidance developed by the Risk Management Authority” (Scottish Executive 2002c, para 138). Scottish Executive officials have suggested that consequential amendments to s 1 of the Criminal Justice Bill will be appropriate to take account of the replacement of an interim hospital order with an interim compulsion order. These will be brought at a later stage, once it is clear which of the two Bills will be enacted first.

INSANITY AND DIMINISHED RESPONSIBILITY

Criminal law contains provisions which allow some people with mental disorders to be treated as not fully responsible for their actions: the plea of insanity in bar of trial or “unfitness to plead”, the special defence of insanity and, in relation to charges of murder, the plea of diminished responsibility. The Millan Committee found dissatisfaction with the way these operate and recommended that the Scottish Law Commission review the relevant law (Scottish Executive 2001a, chapter 29, recommendations 29.2 – 29.6). This review is ongoing and the aim is that the Commission will issue a report by the end of 2003 (Scottish Executive 2002c, para 172).

Under the current legislation (principally the Criminal Procedure (Scotland) Act 1995), the result of a finding of an insanity or diminished responsibility is that some form of mental health disposal generally will be made (Scottish Executive 2001a, chapter 29, para 1). Consequential amendments to the current legislation will be introduced by amendment the Bill to take account of the changes in the types of mental health disposal that will be available as a result of the Bill (Scottish Executive 2002c, para 172).

THE RUDDLE CASE AND THE MENTAL HEALTH (PUBLIC SAFETY AND APPEALS) (SCOTLAND) ACT 1999 (‘THE 1999 ACT’)

The Ruddle Case

In August 1999, Noel Ruddle successfully appealed for his absolute discharge from the State Hospital on the basis that he did not meet the criteria for continued detention under the Mental Health (Scotland) Act 1984. Ruddle was convicted of culpable homicide, with a diagnosis of paranoid schizophrenia, and received a hospital order with restrictions (equivalent of the compulsion order with a restriction order proposed under the Bill). The diagnosis was subsequently revised to a
personality disorder. Under the 1984 Act a person could only be detained under such an order if treatment was likely to alleviate or prevent deterioration in his condition. The sheriff ruled that Ruddle was not receiving such treatment and therefore was entitled to be discharged.

The “public safety” test

The 1999 Act passed in response to the Ruddle case introduced a new “public safety” test, the effect of which is that a sheriff or the Scottish Ministers cannot discharge a restricted patient if they still suffer from a mental disorder and detention in hospital is necessary to protect the public from serious harm. This test takes precedence over the consideration of whether a patient would benefit from medical treatment for their mental disorder.

The approach of the Millan Committee

In relation to the public safety test, the Millan Committee commented as follows (Scottish Executive 2001a, chapter 28, para.18):

“The fundamental question is whether it should be the mental health system or the criminal justice system which should deal with offenders who present a risk to public safety, but who would not benefit from treatment delivered under compulsion. In our view where a person who has offended requires treatment in hospital in order to reduce the risk he or she presents to the public, such treatment should be provided. However, where treatment is not indicated, it should be the criminal justice system which ensures public safety.”

Consequently, the Committee recommended the repeal of the provision (s 1 of the 1999 Act) that provided the public safety test (Scottish Executive 2001a, chapter 28, recommendation 28.1).

The approach of the Bill

As schedule 4 of the Bill repeals the 1984 Act, its effect is to render redundant all sections of the 1999 Act that inserted provisions into the 1984 Act. This includes s 1 of the 1999 Act that inserted the public safety test. However, the public safety test has been re-introduced elsewhere in the Bill for restricted patients (s 133(2)) thus retaining the effect of the 1999 Act.

There are two other lesser known aspects of the 1999 Act repealed by schedule 4 of the Bill. The first of these is the amendment of the definition of ‘mental illness’ to include ‘personality disorder’ (the 1999 Act, s 3). However, individuals with a personality disorder will remain within the ambit of the new mental health legislation. For the Bill covers those suffering from a ‘mental disorder’ and s 227 of the Bill makes personality disorder one of the three sub-categories of ‘mental disorder’ (along with mental illness and learning disability).
The other aspect of the Bill repealed by schedule 4 is the right of restricted patients and Scottish Ministers to appeal any decision made in relation to them (the 1999 Act, s 2). However, this is re-introduced elsewhere in the Bill (s 221).

**CRITERIA FOR ADMISSION TO THE STATE HOSPITAL**

In the current criteria for admission to a high security state hospital there is a reference to an individual appropriate for admission having “dangerous, violent or criminal propensities” (1995 Act, ss 58(5) & 59A(4)). The Millan Committee concluded for a variety of reasons that this terminology was no longer appropriate (Scottish Executive 2001a, chapter 27, para 75). Consequently, under the Bill, admission to a state hospital is now considered appropriate where the patient suffers from a mental order of a nature or degree that he or she requires treatment under conditions of special security and cannot be suitably cared for in a hospital other than a state hospital. The court must use these criteria when considering whether to admit the offender to a state hospital as part of an interim compulsion order, a compulsion order, a transfer for treatment direction or a hospital direction (Scottish Executive 2002c, paras. 196 – 197).

The Millan Committee recommended an additional criterion for admission: that the patient poses a risk of harm to others or of self-harm (Scottish Executive 2001a, recommendation 27.16). This is not included in the Bill. However, the Executive suggests that the admission criteria in the Bill, whilst not specifically encouraging referrals on the basis of self-harm, would not rule them out in exceptional cases (Scottish Executive 2002c, paras 198 – 200).

**APPEALS ON LEVELS OF SECURITY**

At present, patients held in high or medium secure hospitals have no right to apply to be transferred to a lower security establishment in circumstances where their condition improves and they believe that the level of security at which they are held is no longer justified. The Millan Committee took the view that this is “inconsistent with respect for the patient’s rights”. It recommended that a patient should be able to appeal to the Mental Health Tribunal at any point against the level of security at which he or she is held (Scottish Executive 2001a, chapter 27, paras 81 – 91) and recommendations 27.18 – 23). The Scottish Executive did not follow this recommendation because of “a number of practical difficulties” with the proposal. It did not elaborate further on what these were but undertook to reconsider the issue as part of its review of the governance of the State Hospital (Scottish Executive 2002c, para 188 – 189).
BIBLIOGRAPHY


Scottish Executive, 2001b, Renewing Mental Health Law – Policy Statement, Edinburgh. Available online at:


Scottish Executive, 2002a, Policy Memorandum to the Criminal Justice (Scotland) Bill, Edinburgh. Available online at:

http://www.scottish.parliament.uk/parl_bus/bills/b50s1pm.pdf [Accessed: 3 October 2002]

Scottish Executive, 2002b, Explanatory Notes to the Mental Health (Scotland) Bill, Edinburgh. Available online at:


Scottish Executive, 2002c, Policy Memorandum to the Mental Health (Scotland) Bill, Edinburgh. Available online at:

http://www.scottish.parliament.uk/parl_bus/bills/b64s1pm.pdf [Accessed: 3 October 2002]

Scottish Parliament Information Centre, 2002a, Timeline of Mental Health Law Reform, Edinburgh. Available online at:


Scottish Parliament Information Centre, 2002b, The Draft Mental Health (Scotland) Bill, Edinburgh. Available online at:


Scottish Parliament Information Centre, 2002c, The Mental Health (Scotland) Bill 1 – Definitions, Coverage and Administration, Edinburgh. Available online at:

Scottish Parliament Information Centre, 2002d, The Mental Health (Scotland) Bill 2 – Compulsory Treatment, Edinburgh. Available online at:


Scottish Parliament Information Centre, 2002e, The Mental Health (Scotland) Bill: Medical Treatment, Edinburgh. Available online at:


**Internet references**

Mental Health (Scotland) Bill [as introduced] (SP Bill 64). Available online at [accessed 16 October 2002]:

http://www.scottish.parliament.uk/parl_bus/bills/b64s1.pdf

**Related SPICE briefings**

The following SPICE briefings are currently available on the Bill, the draft Bill that preceded it and on the background to the reforms:

- Timeline of Mental Health Reform
- The Draft Mental Health (Scotland) Bill
- The Mental Health (Scotland) Bill 1 – Definitions, Coverage and Administration
- The Mental Health (Scotland) Bill 2 – Compulsory Treatment
- The Mental Health (Scotland) Bill: Medical Treatment

The following briefing is also in the process of preparation:

The Mental Health (Scotland) Bill: Patient Advocacy and Patient Rights.