The Committee will meet at 1.30pm in the Hub, Castlehill, Edinburgh.

1. Inquiry into alternatives to custody (in private): The Committee will discuss lines of questioning for the witnesses.

2. Prostitution Tolerance Zones (Scotland) Bill (in private): 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 Civil Legal Aid (Scotland) Regulations 2002, (SSI 2002/494),
   
   the Advice and Assistance (Scotland) Amendment Regulations 2002, (SSI 2002/495) and
   
   the Civil Legal Aid (Scotland) (Fees) Amendment Regulations 2002, (SSI 2002/496).

5. Inquiry into alternatives to custody: The Committee will consider a paper from the adviser on community sanctions in Europe.
6. **Inquiry into alternatives to custody:** The Committee will take evidence from—

Colin Mackenzie, Convener and Chris Hawkes, Member, Criminal Justice Standing Committee, Association of Directors of Social Work (ADSW), and Colin Quinn.

7. **Prostitution Tolerance Zones (Scotland) Bill:** The Committee will take evidence from—

Inspector Elizabeth McLean, Strathclyde Police, and Deputy Chief Constable Tom Wood, Lothians and Borders Police and Morag McLaughlin, Head of Policy, Crown Office and Procurator Fiscal Service.

Alison Taylor
Clerk to the Committee, Tel 85195

The following papers are attached for this meeting:

- **Agenda items 1, 5 and 6**
  - Note by the Clerk and SPICe (private paper) J1/02/40/1
  - Note by the Adviser J1/02/40/2
  - Written evidence from Association of Directors of Social Work J1/02/40/3

- **Agenda items 2 and 7**
  - Note by the Clerk and SPICe (private paper) TO FOLLOW J1/02/40/4
  - Briefing paper by SPICe TO FOLLOW J1/02/40/5
  - Written evidence from:
    - Scottish Police Federation (SPF) J1/02/40/6
    - Law Society of Scotland J1/02/40/7
    - Association of Chief Police Officers in Scotland (ACPOS) J1/02/40/8
  - Association of Police Superintendents (ASPS) J1/02/40/9

- **Agenda item 5**
  - Note by the Clerk (SSIs attached) J1/02/40/10

**Papers not circulated:**

HM Prisons Inspectorate’s Intermediate Inspection report on HMP & YOI Comton Vale (9 – 10 September 2002) is available from the Committee Clerks in Room 3.11, Committee Chambers or from HM Prisons Inspectorate.
Agenda item 7

The Prostitution Tolerance Zones (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
Justice 1 Committee

Community Sanctions in Europe

Note by the Adviser and the Clerk

1. This paper provides a brief and selective review of the use of community sanctions in Europe. The data comes from recently published books, articles and reports and from personal correspondence with contacts in these jurisdictions. Notes on individual jurisdictions follow.

2. The Committee is invited to consider the following, and whether members wish to make a bid to the Convener’s Liaison Group to visit a relevant jurisdiction as part of its inquiry into the alternatives to custody. Such a visit would take place in January or February of next year. Alternatively, the Committee may wish to seek written evidence, or evidence by video link, on alternatives to custody in these jurisdictions.

What can Scotland learn from the European experience?

3. Scotland (and England and Wales) have at least as wide a range of community penalties available to the courts as any jurisdiction and more than most. This has been the case for some time.

4. It is difficult to say whether we use community sanctions more or less than other jurisdictions because of difficulties in comparing systems. What we do know is that Scotland’s rate of imprisonment is one of the highest in Europe. Although community sanctions have been used more frequently over the last ten years, the use of prison has also increased and the conclusion is that judges are using community sanctions as an alternative to fines rather than as an alternative to a short custodial sentence.

5. Not all jurisdictions share Scotland’s concern with reducing offending as an aim of community sanctions. For example, Finland would regard crime prevention and social policy more generally as tools to reduce crime while punishment is intended to mark society’s disapproval and administer a just sanction. Most European jurisdictions do not systematically evaluate their sanctions and thus data on effectiveness is not readily available.

Netherlands

6. Although the Netherlands had a reputation as a liberal state with a low prison population up to the mid 1990’s, since then, the prison population has been rising and this is forecast to continue. Along with other Northern European countries there has been increased support for penal repression which has occurred at the same time as the rise in support for far right political parties. Community sanctions (task penalties, equivalent to Community service) have been made more onerous to convince judges that they were a proper punishment. There has been a financially driven
drive to increase the use of community penalties which has only been partly successful due to judicial resistance. It might be interesting for the Committee to visit the programmes of short term detention combined with intensive training and community service operating in Amsterdam and Rotterdam.

Scandinavia

Finland
7. A significant reduction has been achieved in prison population since 1950 to bring Finland into line with the overall Scandinavian level. There is no simple explanation about how this has been achieved. Having started from a high level (historical levels of punishment for theft and drunk driving), Finland has always been suspicious of treatment and there is no expectation in society that punishment should reduce offending or transform offenders. Criminal justice policy became viewed as an integral part of social policy with an emphasis on harm reduction and sharing costs fairly. Crime prevention became central in Finland in the 1970s and 80s. Sentencing legislation was passed which placed a central emphasis on neo-classical proportionality, (just deserts). There was a strong political will to reduce a prison population seen widely as far too high. All major stakeholders shared this view and there was a strong shared commitment to the policy of reducing the prison population. The media in Finland dealt with law and order issues in a responsible manner. There was general respect for expert knowledge and for evidence based policy making.

8. More practically legislation reduced sentence lengths for property offences. There is wide use of what in Finland are called “conditional prison sentences”. These are similar to what used to be suspended sentences in England. A prison sentence is imposed but it is not served unless the offender commits a new offence for which an unconditional (i.e. immediate) prison sentence is imposed. In such cases the court can (though it does not have to) implement the original prison sentence that was suspended. This is regarded as quite successful, although has been criticised because there are too many offenders who receive consecutive conditional sentences. There is no research evidence of effectiveness. Conditional sentences are widely used in continental Europe and have been recently introduced with mixed success in Canada.

9. 90% of CSO’s in Finland are de facto rather than de jure alternatives to custody. CSO’s are strictly enforced with breaches resulting in a custodial sentence. Limited research evidence suggests that recidivism after CSO is marginally better than prison. This would confirm Scottish research.

10. Finland is widely respected for its almost unique success in reducing its prison population. However it has not made extensive use of community programmes aimed at reducing offending behaviour because culturally Finns have never had much faith in rehabilitation and do not see this as a significant aim of punishment.
Denmark
11. The prison population in Denmark has remained stable over the last thirty years despite a rise in levels of reported crime. The suspended sentence is the third most used sanction after fines and imprisonment. It can be imposed with or without supervision (around 20% have conditions imposed). There are community based treatment programmes for drunk drivers, drug abusers and sex offenders. These programmes are run by the Health Department not the Prisons and Probation Department. Community Service is used with increasing frequency and is the single most important community sanction. There has been limited evaluation on effectiveness. There is considerable support in Denmark for rehabilitative measures and the range available and frequency of use of community sanctions is expected to increase.

Norway
12. As in Finland, punishment is about penalty and not treatment. Rehabilitation never took hold in these jurisdictions a classical tradition. Norway uses suspended sentences and community service. Social work with offenders is based on cognitive behavioural models both inside and outside prisons: Reality Therapy, Cognitive Skills or New Start.

Sweden
13. There is a “successful” system where offenders sentenced to short prison sentences could have these converted to home detention with electronic monitoring and intensive supervision including drug tests and home visits. Only 6% breached conditions. All prison sentences of less than two years are referred to the department of prisons and probation for implementation. There is an administrative decision taken as to whether the sentence should be served in the community or in custody. There are rules and procedures governing the decision making of the agency. This policy has effectively reduced the number of prisoners serving short sentences in Swedish prisons.

Switzerland
14. Tonry and Rex (2002) note that Switzerland uses programmes of intermittent confinement (weekend prison) heavily and has found that they satisfactorily balance state interests in imposing retributive punishments and avoiding unnecessary damage and disruption to offenders.
Justice 1 Committee

Inquiry into alternatives to custody inquiry

Submission from the Association of Directors of Social Work

The Association of Directors of Social Work welcomes this opportunity to provide evidence to the Justice 1 Committee on the subject of Alternatives to Custody. The Association regards this as a matter of significant importance and a crucial part of an effective Scottish criminal justice strategy.

What currently exists?

A broad range of community penalties are currently available to the courts. These penalties fall into three main types:

Fixed punishment without any requirement to address offending behaviour, these include the Admonition, Fine, The Community Service Order and The Restriction of Liberty Order (electronic monitoring).

Community disposals designed to address offending behaviour and influence future behaviour, these include the Probation Order and the Drug Treatment and Testing Order. The Probation Order can and normally has additional requirements these include offending behaviour programmes, sex offender programmes, domestic violence programmes, programmes designed to address anger management and racially motivated offending. These orders can and are regularly used to address specific offender groups such as young offenders and women offenders. The Probation Order can also require an offender to reside at a specified place.

Orders that combine fixed punishment, addressing offending behaviour or provide social skills, these include the Probation Order with a requirement to complete unpaid work (Section 229(4)) and the Supervised Attendance Order in which both social skills training and unpaid work are combined.

The majority of this disposal range is available throughout Scotland with the exception of Drug Treatment and Testing Orders; these are only available through a few authorities. There is however an uneven usage of this broad range of alternative disposals reflecting a lack of consistency in sentencing and a judicial preference in some Sheriffdoms for the use of custody.

Whilst not being a penalty, Bail has a significant role to play in ensuring remanded cases do not occupy prison space. There is a limited provision of Bail Information and Bail Supervision; the restriction on this service is largely due to the low level of financial allocation it attracts.

Other jurisdictions use a number of community sentences not available in Scotland. These include the Suspended Sentence (with or without supervision) also known as Deferred Custody. Weekend Imprisonment, although not technically a community
disposal it does allow offenders to maintain employment and family income. In addition, it is generally regarded that Supervised Deferred Sentence could bring a new and useful sentencing option. Other jurisdictions have also shown that Probation Orders with a requirement of electronic monitoring are more effective in obtaining positive results than electronic monitoring alone.

The Association recognises that there is some merit in extending the range of sentencing options but these will be of little benefit if they are not used as alternatives to custody and in consequence draw more offenders unnecessarily into community based supervision.

**Level of Service Provision**

Since 1991 the provision of Criminal Justice Social Work has been subject to a ring-fenced allocation from central government. Many local authorities have found this allocation inadequate to provide the necessary comprehensive criminal justice service and have to a greater or lesser extent given limited subsidy from local authority funding.

The financial allocation mechanism is based upon retrospective workloads and a weighting formula based on ‘need’. The first element of this mechanism does not take account of immediate court demand and the weighting element does not treat all areas of Scotland equally and as a consequence leads to a disparity of service provision between courts.

The level of financial resource available to the criminal justice social work service is currently insufficient to provide an enhanced service to significantly increase the use of alternatives to custody.

A new funding mechanism is required that accurately reflects the high number of offenders kept out of custody through the provision of community based supervision and management and should be relative to the actual cost of custody. Targets are then required to increase the number of offenders who are to be directly diverted from prison into community supervision.

**Effectiveness**

The preferred measure of effectiveness is widely regarded as being a reduction or cessation in re-offending. There is no established mechanism in Scotland to routinely measure this definition of effectiveness. This puts us at a significant disadvantage in knowing what does and does not work.

International research is however very clear as to what is and is not effective. The work of Don Andrews (2001) at Carleton University, Ottawa has drawn on large meta-analysis studies of many North American programmes with offenders and has drawn the following conclusions.

“Dispositions are handed down for a variety of reasons – because offenders deserve to be punished, or to remove them from circulation, or because the punishment is seen as a deterrent. Research shows that in fact the only action which
is effective is treatment – not punishment”. “Incarceration produced between 3 and 7% increase in re-offending … electronic monitoring and drug tests also produced a slight rise (5% and 3%). Studies of ‘boot camps’ showed no measurable effect on recidivism”. “The risk of recidivism (and the likelihood of success in treatment) depends upon certain factors. The ones most influential were

- Anti-social attitudes and associates – 22% increased risk
- Anti-social personality – 21% increased risk
- Family influence – 18% increased risk
- Poor education/employment – 12% increased risk

Hence the best programmes are those, which target education, values, attitudes, self-control, substance abuse and family relationships.

The best results have been obtained by treating low risk cases with minimal intervention and high risk cases with stronger programmes”.

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<td><strong>Low risk cases</strong></td>
<td>7% risk of recidivism</td>
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Research undertaken in Scotland suggests that probation reduces the likelihood of re-offending (Mclvor and Barry 1988). In a five-year follow-up study, the rate and frequency of reconviction were lower following the imposition of a Probation Order (Mclvor and Barry 2000). The majority of respondents in the follow-up study also attributed their reduced offending to Probation supervision.

Research Findings No 54. (Scottish Executive) states that 85% of Supervised Attendance Orders are completed and those offenders on such orders were less likely to be re-convicted within a year of the order.

Many workers in criminal justice social work will also see effectiveness in the achievement of reduced offending in both severity and frequency together with reduced drug misuse. This is particularly so when the offender has a chaotic lifestyle with few, if any, perceived reasons to behave differently.

**Allocation of community penalties**

The number of Probation and Community Service Orders has in recent years increased, as has the use of custody, this may indicate that Probation and Community Service are being used least effectively. The fear is, more people are being drawn into these orders in place of the financial penalty, instead of the orders being reserved for the ‘higher risk’ offender. As the research by Andrews (above) describes high intervention in cases of low risk increases recidivism whereas high programme intervention in cases of high risk reduces recidivism.

There is also a wide concern that Community Service is not being used as intended as an alternative to custody, rather, it is being used as a sentence in its own right.
The widely used practice of imposing short prison sentences is predicated upon the notions of punishment, deterrence or to prevent persistent nuisance. They are not based upon effectiveness. Alternative community based disposals will not only hold the offender for longer periods within the contract of the court it will also actively aim to change behaviour. A radical move would be to remove the short-term sentencing option from both District and Sheriff Courts.

The principal of twin-track sentencing if applied would make a significant impact upon rates of custody. High-risk, violent offenders are most appropriately dealt with in custody both for reasons of security and community safety; lower risk offenders are most effectively managed within the community. Sentencing practice does not reflect the twin track principle.

**Conclusion**

The Association of Directors of Social Work believes that criminal justice social work has a significant and important contribution to make in the provision of alternatives to custody. Not only can this lead to a more cost-effective criminal justice system it will also make the community a safer place. The obstacles to achieving these ambitions are the inconsistent use of existing sentencing options and a funding mechanism for criminal justice social work, which does not take account of the immediate and diverse needs of all of Scotland’s courts.

Colin D Mackenzie
Convener
ADSW
Standing Committee on Criminal Justice
9 September 2002

**References**


Justice 1 Committee

Prostitution Tolerance Zones (Scotland) Bill

Submission from the Scottish Police Federation

Thank you for the opportunity to submit written evidence to the Justice I Committee on the above subject. The Scottish Police Federation is the staff association which represents all police officers in the ranks of Chief Inspector and below, about 15,000 officers, over 98% of the police in Scotland.

We have given considerable thought and debate to the proposed Bill and we can say at the outset that there is widespread appreciation of these efforts to tackle an extremely difficult problem. The subject was debated at our Annual Conference in April and has since been considered by our Joint Central Committee (national executive) and views have been sought from street level practitioners, particularly officers from the four main Scottish cities which are likely to be most affected.

Our views are based on an operational policing perspective and not on any moral grounds. We are concerned about general public safety, the safety of women involved in street prostitution and the maintenance of good order. We believe that it is important that laws are clear, simple and easily understood by the public, the police and all elements of the criminal justice system.

We note that the Bill will enable the enacting of appropriate byelaws, which would allow local authorities to establish tolerance zones. We can think of no precedent where a byelaw has been implemented which sets aside the criminal law of the land and we question whether this would be legally competent.

Our members see this as confusing and detracting from the clarity of the law. Since time immemorial street prostitution has been recognised as a criminal act, which would, under your proposals, remain a criminal act in all but de-restricted areas. The vast majority of our members who were contacted about this were uneasy about ‘turning a blind eye’ to prostitution in the unofficial tolerance zones. Their view was that government should challenge the notion that prostitution is acceptable and inevitable rather than provide for its decriminalisation in defined geographical areas.

We know that in Aberdeen and in Edinburgh there have been experiments with ‘tolerance zones’ and that some police officers have expressed a degree of support. We believe, however, that most officers are of the view that tolerance zones, established under the authority of byelaws, would create more problems than they would solve. We note that the stated view of the Association of Chief Police Officers in England and Wales expressed in July of this year by their spokesman on prostitution and vice related matters is also one of opposition to ‘tolerance zones’.
Officers in Edinburgh and Aberdeen have reported a regular influx of prostitutes from as far away as Leeds and Glasgow to the experimental tolerance zones. It is reported that they frequently brought with them their pimps, some of whom dealt in drugs and engaged in other criminal activity. We have been informed by our members of a specific incident in a tolerance zone where a prostitute assaulted her pimp, who was himself on licence for murder, by stabbing him.

In our view, the legal effect of section 4 of the Bill would be to negate section 46(1) of the Civic Government (Scotland) Act 1982 which relates to the offences of loitering, soliciting or importuning by prostitutes. In all other respects the law would remain unchanged.

We see room for confusion in applying the provisions of the Criminal Law Consolidation Act 1995 section 11(1)(a) which deals with persons exercising control over prostitutes or living on the earnings of prostitutes and section 11(4) of the same act which deals with living on the immoral earnings of a female in a prescribed area where prostitution in itself was not illegal. The phrase “exercising control over prostitutes” begs the question as whether, in allowing or policing a tolerance zone as envisaged, would leave the police, the Scottish Executive or particular local authority at risk of complaint and prosecution.

These tolerance zones would still, in our view, require considerable operational policing. Contrary to the claim in the Financial Memorandum to the Bill, our information is that the unofficial tolerance zone in Edinburgh was specifically policed by up to ten officers in the course of an evening, either by dedicated foot patrols or by passing attention from car crews specifically instructed to do so. This level of police cover is far in excess of what could have been described as normal and would undoubtedly have incurred considerable expense and resource implications. The notion that an official tolerance zone could be policed as a ‘normal’ area is disputed.

We believe that there would be a natural tension between the required policing of a tolerance zone and the belief of prostitutes that their activities in the zone were lawful. Such policing could easily be misconstrued as and lead to complaints of harassment. We reject any idea of police ‘no go’ areas because we believe participants in other areas of crime may see these as fertile areas in which to operate. The link between prostitution and drugs for example has been well documented.

Our over-riding view is that street prostitution is undesirable and that the proposal for ‘tolerance zones’ is an attempt to create an ‘out of sight out of mind’ solution. Many people are of the view that the proposals abandon these women to the abuse which is inflicted upon them.
The public does not welcome street prostitution generally as evidenced by their clear opposition to the unofficial tolerance zones which have operated. We appreciate that the sponsors of the Bill seek to use areas which are not residential in nature but these areas change. This appears to have been the case in both areas in Edinburgh which were residentially developed and where the new residents quite naturally began to object. In these cases it was a simple matter to establish a complaint and for the police to act to prevent further problems. This would not be quite so easy if they first had to seek the repeal of a byelaw before action could be taken. It also had to be said that people who own and work in business premises in these zones were unhappy about the activities which took place around their premises outwith normal business hours.

Currently, when members of the public complain about the activities of prostitutes and those associated with them, the police can take immediate and clear action. On the reasonable assumption that complaints would continue regardless of a legally defined zone, police action would be less immediate and clear and this situation would potentially bring the police and the public into conflict. Already we have witnessed public demonstrations about these issues at police stations in the Leith area of Edinburgh.

We hope this will be of assistance to you.

Douglas J. Keil QPM
General Secretary.
Scottish Police Federation
19 November 2002
Justice 1 Committee

Prostitution Tolerance Zones (Scotland) Bill

Submission from the Law Society of Scotland

The Criminal Law Committee has considered this Bill. It is clear from the Bill, that if tolerance zones are to operate effectively, then the conditions regulating their establishment would have to be in force and effectively policed.

It is also important that the views of consultees referred to in Section 2(4) are taken into account before an area is legally designated as a tolerance zone and when the area is coming up for review.

The Committee notes that consultation with local residents, shopkeepers and businesses will take place before implementation of a tolerance zone. It would also be appropriate to consult with organisations, which are attended by children or vulnerable persons, such as schools and day care centres.

The Committee is of the view that Section 5(5) should provide for a right of appeal from the Council to the sheriff on both fact and law. The Council’s decision should also be subject to judicial review.

I hope these remarks are helpful.

Michael P Clancy
Director
Law Society of Scotland
22 November 2002
I refer to correspondence, of 19 November 2002, to Mr Andrew Brown, Chief Constable, Grampian Police, regarding the above matter and would take this opportunity to advise you that Mr Brown has asked that I provide you with the necessary response, in my capacity as Secretary of ACPOS Crime Standing Committee. Having therefore consulted Crime Committee colleagues accordingly, I can now advise you as follows.

At the outset, one colleague questioned whether the Local Authority itself, ie the relevant City Council, would have responsibility for designating such areas as Tolerance Zones, or would, for example, the Licensing Board, or a similar body specifically created for the purpose, undertake this role. It was considered that further information in this regard would have been helpful.

In addition, as regards the proposed power Contained in Section 6 of the Bill, which would enable Chief Constables to apply to the Local Authority for the suspension or modification of such a Zone, a number of points were raised. The first of these relates to the responsibility of Chief Constables, in respect of which it was suggested that this would perhaps place undue onus on Chief Constables, in terms of providing the basis for a misguided perception that Chief Constables would assume responsibility for the operation of the Zone, when this should ultimately rest with the Local Authority.

It was similarly suggested that Chief Constable's were likely to become the focal point for complaints from members of the public, resident' groups, women’s groups etc., in respect of any such Zones, when these might be more appropriately addressed by the Local Authority responsible for its creation.

One colleague also questioned the ability of Chief Constables to make such application for suspension or modification of any such Zone on the basis of behaviour which would be made lawful, by virtue of the insertion of sub-section 3, to Section 46 of the Civic Government (Scotland) Act 1982.

Clearly, therefore, these are matters which would benefit from further consideration, not permitted at this stage due to the timescale permitted for this response.

That said, moving on to consider the likely impact on crime in general, caused by the creation of a Tolerance Zone, colleagues took the view that this was difficult to quantify with any degree of accuracy, particularly for Forces without a current visible street prostitution problem.

For example, the proposed Bill does not appear to take into account that when women meet their clients, they are often conveyed to other areas where sexual acts take place. These areas, as I’m sure you will appreciate, are often secluded and badly lit, which can add to the vulnerability of the women involved.
In addition, the introduction of such a Zone it was suggested, may lead to the creation of an environment where additional types of criminality would thrive. You will be aware, for example, that in Glasgow, street prostitution is very closely linked to chronic drug misuse and it is therefore considered that drug dealers, as well as those who would seek to control and organise prostitution are likely to frequent any such Zone. I understand, however, that the link between drug misuse and prostitution is not as evident in Edinburgh.

It was also considered, however, that previously legitimate users of the Zone may feel unable to continue to do so, due to the nature of activities taking place there. Furthermore, local business could also be affected by a lack of trade, as well as by an increase in criminality around their premises.

Insofar as the practicalities involved in policing a Tolerance Zone are concerned, by virtue of the fact that certain Local Authorities may choose to designate such a zone, whereas others may choose not to do so, it was suggested that this could result in soliciting being legal in certain parts of the country whilst remaining illegal in others, creating national anomalies not consistent with achieving an effective strategic approach to the matter.

As was suggested in the previous round of consultation, therefore, given the diverse and complex nature of prostitution in Scotland, whilst accepting the need to examine the effective management of those areas in which soliciting occurs, what is required is the development of a national policy framework for Scotland. Only by taking such an approach, which recognises the underlying causes of prostitution, addresses the offending element and contains a set of appropriate interventions for those already involved in this behaviour, is it considered that any measurable progress can be made.

I hope this is helpful.

G Pearson QPM MA
Secretary
ACPOS
Assistant Chief Constable
Strathclyde Police
Justice 1 Committee

Prostitution Tolerance Zones (Scotland) Bill

Submission from the Association of Police Superintendents

General

The Association’s main response is based on addressing the issues raised in the Committee’s letter of 19 November 2002.

The question as to whether there is a need for this Bill is not a matter for the police to comment on. The authority to designate an area as a ‘Prostitution Tolerance Zone’ will lie with the local authority, although the chief officer of police of the area will be a statutory consultee.

The main concerns of the police relate to the prevention of crime, the protection of the public, including women involved in street prostitution, safer streets for all – residents and passers-by included.

In addition the law requires to be unequivocal and easily understood by the police, the public and potential offenders. It is interesting to note that zones would be created by decriminalising prostitution within the designated area and that this would achieved by the use of a local bye-law. It is presumed that the legality of this approach has been verified as we are not aware of any precedent whereby a bye-law can over-ride primary legislation.

Issue 1 - Power to suspend or modify operation of zone

It would be important for the chief officer of police to have the authority to apply to the local authority for the operation of the zone to be suspended or modified. The Bill does not specify the grounds on which such an application could be made, however there is a plethora of scenarios where this might be necessary either on grounds of public safety, road safety or criminal investigation.

Issue 2 – Impact on Crime in General of having a tolerance zone

We have little doubt that Prostitution Tolerance Zones would be a magnet for many types of criminal activity. Experience has shown that prostitutes would be attracted from all over the UK, along with their pimps, as would drug dealers and other criminal elements keen to exploit the opportunities for criminal profit. This would very quickly affect the quality of life of people living in, or close to the area and also have an adverse effect on business in the area.
On the other hand, experience has shown that due to the increased police presence and interest in the area, reported crime can actually be lower than elsewhere.

A major problem for authorities would be in identifying a suitable area to designate as a PTZ as there are few non-residential areas left in cities.

**Issue 3 – Practicalities and Costs of Policing a Tolerance Zone**

The creation of zones would undoubtedly place additional burdens on the police. Unless these areas are to be left as ‘no go’ areas, which the police would not accept, there would be a need for high profile police presence to ensure public safety. The higher crime profile would demand extra policing to combat and deal with the aftermath. CCTV would also be necessary. We have no doubt that there would be significant practical difficulties in policing a tolerance zone given the competing interests of the local community, placing the police in an invidious position.

**Issue 4 – Legal Effect of Section 4 of the Bill**

This is where the law would become ambiguous. Common law offences would still apply, such as breach of the peace, while apparently soliciting etc would be ‘legal’. In some areas prostitution zones are simply a place for prostitutes to meet clients, usually with cars, with sexual acts taking place elsewhere, outwith the zone. Creation of a zone does not resolve the wider issues of complaints from people some distance from the zone over prostitutes and clients having sex in cars and other open spaces. Such people are also most vulnerable when remote from the zone – clients susceptible to assault and robbery etc and the prostitute to assault.

Jack Urquhart
ASPS
21 November 2002
Background

1. The above named set of Regulations relate to the affirmative draft Legal Aid (Scotland) Act 1986 Amendment Regulations 2002 which were considered and agreed to by the Committee at its previous meeting of 19 November 2002 (see Committee paper J1/02/39/6), although they make other provisions with regard to civil legal aid and advice and assistance.

2. All of the negative Regulations covered by this note are linked in that they also relate to the arrangements for civil legal aid to be extended to those utilising the appeals process for both the Social Security Commissioner and the Child Support Commissioner. The Executive has advised that it was not possible to bring forward these regulations as a package for the Committee to consider as SSI 2002/494 took a great deal longer to draft as it consolidates a number of regulations.

The Civil Legal Aid (Scotland) Regulations 2002 (SSI 2002/494)

3. The principal objective of the Civil Legal Aid (Scotland) Regulations 2002 (attached) is to consolidate all the amendments made to the Civil Legal Aid (Scotland) Regulations 1996. The Executive has also taken the opportunity to make provision within the Regulations for a number of policy and minor technical changes to the Civil Legal Aid Regulations. The technical changes seek to update and improve the operation of the Regulations. The policy amendments are set out below.

4. The first change is set out in regulation 18 of the instrument “Legal aid in matters of special urgency”. This sets out the steps for handling specially urgent work in advance of an application for civil legal aid being determined. These provisions should ensure that a client does not have to make a payment up front to a solicitor in these cases. Members will recall that the Committee recommended in its report on Legal Aid that SLAB, in carrying out its review considers the scope there may be for applying the rules differently to ensure that the scheme does not unduly disadvantage particular groups (paragraphs 94-97).

5. The second policy change relates to the appeals process for both the Social Security Commissioner and the Child Support Commissioner, this is contained in regulation 47. This regulation provides for a separate application to be made for civil legal aid in respect of appeals to the Commissioners. They exclude any winnings as a result of an appeal from the normal clawback arrangements and
also ensure that Scottish civil legal aid is only available for Scottish cases and not cases transferred from England and Wales to be heard in the Court of Session.

6. The 2002 Regulations also provide for an increase in the sum disregarded from the normal legal aid clawback arrangements (property recovered or preserved) where advice has been given in matrimonial cases. This sum has been increased from £2,500 to £4,200. This increase in respect to matrimonial cases will also apply to advice and assistance. Provisions in this respect are also contained in the Advice and Assistance (Scotland) Amendment Regulations 2002 dealt with later on in this note. The Committee recommended in its report (paragraphs 104 –108) that the Executive/SLAB consider the introduction of hardship provisions relating to civil legal aid in the case of property recovered or preserved). The Committee also recommended in its report on its inquiry into legal aid that the Executive should assess current exemptions from clawback and assess whether they are in line with inflation and whether they should be uprated in line with inflation.

Subordinate Legislation Committee

7. The Subordinate Legislation Committee (SLC) considered this instrument at its 31st meeting of 2002 (Subordinate Legislation Committee, 42nd Report, 2002 (extract attached). The Committee agreed that the Justice 1 Committee’s attention be drawn to Regulation 11 in respect of European Convention on Human Rights (ECHR) compatibility and Regulation 6 and 35 for the reason of defective drafting. The Subordinate Legislation Committee concerns with regard to Regulation 35 and the Executive’s response are summarised.

8. The SLC noted that the effect of regulation 11 “Circumstances in which resources of spouse not to be taken into account and resources of cohabitees" appears to be to allow more favourable treatment of same sex couples than married or cohabiting men and women, which may have human rights implications.

9. The Executive say that the effect of regulation 11 is to ensure that the resources of a person's spouse, or cohabitee of the opposite sex, are taken into account when that person's disposable income and disposable capital are determined for the purposes of an application for civil legal aid. The Justice Department does not consider that the regulation has human rights implications as the Scottish Ministers have a discretion (in terms of the enabling power at section 42(3) of the Legal Aid (Scotland) Act 1986) to decide whose resources are to be taken into account for this purpose.

10. The SLC observes that although the Department has discretion to decide how resources are to be assessed for the purposes of civil legal aid, this discretion must be exercised in accordance with the ECHR. Assessment of resources has relevance to the availability of legal aid and combining the resources of married and co-habiting heterosexual couples but not those of co-habiting same sex couples clearly may result in same sex couples having greater access to civil legal aid than couples of opposite sex. This appears to the SLC, particularly in the light of recent case law, to be prima facie discriminatory within the terms of Article 14 of the Convention (prohibition of discrimination)¹.

¹ ARTICLE 14 PROHIBITION OF DISCRIMINATION The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race,
11. However, the SLC is aware that Article 14 is, generally speaking, an ancillary provision and cases cannot (as yet) be brought for breach of Article 14 on its own. The breach must occur in relation to a substantive right. It is clear from long-standing case law, however, that civil legal aid comes within the ambit of Article 6 of the Convention (right of access to a fair trial).\(^2\)

12. The SLC therefore draws the attention of the lead committee and the Parliament to Regulation 11 on the ground that there is a doubt as to whether it is within devolved competence in so far as it may contravene Article 14 as read with Article 6 ECHR.

The Advice and Assistance (Scotland) Amendment Regulations 2002 (SSI 2002/495)

13. The main aim of the Advice and Assistance (Scotland) Regulations 1996 (the 1996 Regulations') is to exempt awards by the Commissioners or payments to conclude proceedings from the normal clawback arrangements of legal aid costs.

14. The Advice and Assistance (Scotland) Amendment Regulations 2002 (attached) amends the 1996 Regulations to provide for an increase in the sum disregarded from the normal legal aid clawback arrangements where advice has been given in matrimonial cases. The sum disregarded from the normal legal aid clawback arrangements in matrimonial cases has been increased from £2,500 to £4,200.

15. This increase in respect to matrimonial cases will also apply to civil legal aid. Provisions in this respect are contained in the Civil Legal Aid (Scotland) Regulations 2002 dealt with earlier in this note.

16. The Executive acknowledges that these regulations are the fifth amendment to the 1996 Regulations. However, the Executive hopes to consolidate the 1996 Regulations once consolidation of the Civil Legal Aid Regulations and the Assistance By Way of Representation Regulations has been completed. Proposals from the Law Society of Scotland regarding an increase in the level of

\[\text{colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status, Schedule 1, the Human Rights Act 1998, Chapter 42}\]

\(^2\) \text{ARTICLE 6 RIGHT TO A FAIR TRIAL} 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. 3. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court, Schedule 1, the Human Rights Act 1998, Chapter 42
civil fee may also have a bearing on when the 1996 Regulations can be consolidated.

The Civil Legal Aid (Scotland) (Fees) Amendment Regulations 2002 (SSI 2002/496)

17. The Civil Legal Aid (Scotland) (Fees) Amendment Regulations 2002 (attached) amend the Civil Legal Aid (Scotland) (Fees) Regulations 1989 (‘the 1989 Regulations’) to prescribe the fees that are paid to solicitors and counsel when representing legally aided persons before the Social Security Commissioner and the Child Support Commissioner.

18. It also provides for solicitors to choose whether to accept payment of judicial expenses (if awarded) or legal aid payments. Solicitors have been permitted to make this choice by Scottish Legal Aid Board (SLAB) since 1986. Prior to this the Law Society of Scotland allowed solicitors this choice. The Executive has received legal advice that the powers to allow this choice is not within their legal authority. These Regulations therefore seek to regulate this practice. The Executive has consulted with the Law Society, the Faculty of Advocates and SLAB on the Regulations.

19. In addition, the instrument also removes references to the Restrictive Practices Court from the ambit of the 1989 Regulations, as that Court’s powers in Scotland have been absorbed into the Court of Session under the Competition Act 1998 which inserted a new section 41A into the Fair Trading Act 1973.

20. Again, the Executive acknowledges that these regulations are the eighth amendment to the 1989 Regulations but hopes to consolidate them after the the Civil Legal Aid Regulations and the Assistance By Way of Representation Regulations consolidations have been completed.

Subordinate Legislation Committee

21. The Subordinate Legislation Committee also considered these instruments at its 31st meeting of 2002 and agreed that the attention of the Parliament need not be drawn to SSI 2002/495 and SSI 2002/496 (Subordinate Legislation Committee, 42nd Report, 2002).

Procedure

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

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3 This was a superior court of record created by the Restrictive Trade Practices Act 1956. Its jurisdiction was to determine matters arising under the legislation controlling restrictive trade practices and resale price maintenance, principally determining whether or not restrictive agreements registered with the Director General of Fair Trading are contrary to the public interest.

4 Schedule 12 of the Competition Act 1998 inserted a new section 41A into the Fair Trading Act 1973 to provide for the meaning of relevant Court.
23. The instruments were laid on 7 November 2002 and are subject to annulment under the Parliament’s standing orders until 16 December 2002.

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

25. The Committee may wish to consider whether a member of the Committee should lodge a motion to annul the Civil Legal Aid (Scotland) Regulations 2002 (SSI 2002/494). The Committee could debate the motion at its meeting on the 10 December.