The Committee will meet at 2.00 pm in Committee Room 2.

1. **Item in private:** The Committee will consider whether to take item 6 in private

2. **Subordinate legislation:** Hugh Henry MSP (Deputy Minister for Justice) to move the following motion—

   S2M-00412 Hugh Henry: The Title Conditions (Scotland) Act 2003 (Consequential Provisions) Order 2003—That the Justice 2 Committee recommends that the draft Title Conditions (Scotland) Act 2003 (Consequential Provisions) Order 2003 be approved

3. **Criminal Justice Bill:** The Committee will take evidence on the Criminal Justice Bill currently before the UK Parliament from—

   Hugh Henry, the Deputy Minister for Justice

4. **Vulnerable Witnesses (Scotland) Bill:** The Committee will take oral evidence on the general principles of the Bill at Stage 1 from—

   Hugh Henry, Deputy Minister for Justice, Barbara Brown, Head of Civil Justice & Evidence Policy Branch and Lesley Napier, Vulnerable Witnesses Bill Team Leader

5. **Petition PE578:** The Committee will consider PE578 from Donald MacKinnon on Public Bodies (Complainers’ Rights)

6. **Vulnerable Witnesses (Scotland) Bill:** The Committee will review the evidence received and consider its approach to its Stage 1 report
The following papers are enclosed for this meeting:

Item 2 – Subordinate Legislation

Note by the Clerk (SSI attached) J2/S2/03/8/1

Item 3 – Sewel Motion

Note by the Clerk (Executive Memorandum attached) J2/S2/03/8/2

Item 4 – Vulnerable Witnesses (Scotland) Bill

Note by the Clerk (Finance Committee Report on the Financial Memorandum and Subordinate Legislation Committee Report on delegated powers scrutiny attached) J2/S2/03/8/3

All written submissions to the Vulnerable Witnesses (Scotland) Bill are available online at: http://www.scottish.parliament.uk/justice2/call/j203-evidence-01.htm.

Item 5 – Petition PE578

Members are reminded to bring a copy of the petition and note by the clerk circulated for last week’s meeting.

The following papers are enclosed for information:

Scottish Prison Service Sixth Prison Survey (2003) – circulated electronically only

Forthcoming Meetings:
Wednesday 1 October – Joint meeting with Justice 1 Committee (morning)
Tuesday 7 October – Joint meeting with Justice 1 Committee meeting (afternoon)
Tuesday 28 October – Committee meeting (afternoon)
Tuesday 28 October – Joint meeting with Justice 1 Committee (afternoon)
Tuesday 4 November – Joint meeting with Justice 1 Committee (afternoon)
BACKGROUND
The main purpose of the Title Conditions (Scotland) Act 2003 (“the Act”) is to clarify and reform the law relating to real burdens. A real burden is a form of obligation that either restricts an owner’s use of his or her land, or obliges him or her to do something in relation to that land, and which benefits another piece of land in both instances.¹ The Executive Note on this order states that the Act will create a new system of land regulation in a post-feudal Scotland and is likely to be used daily by conveyancers.

As a result of the Act, a number of modifications to a range of other enactments have been deemed by the Scottish Executive to be necessary or expedient. This order therefore makes modifications to the following enactments:

- Lands Clauses Consolidation (Scotland) Act 1845
- Abolition of Feudal Tenure etc (Scotland) Act 2000
- Title Conditions (Scotland) Act 2003
- Housing (Forms) (Scotland) Regulations 1974
- Town and Country Planning (Control of Advertisements) (Scotland) Regulations 1984

This order also rectifies drafting faults and minor inconsistencies and errors that occur in the Title Conditions (Scotland) Act and related legislation.

PROCEDURE
The Justice 2 Committee has been designated lead Committee and is required to report to Parliament by 27 October 2003.

The Subordinate Legislation Committee considered the instrument at its meeting on 16 September 2003 and a drafting query was raised. The concerns of the Subordinate Legislation Committee are outlined in its 6th Report 2003:

“The Committee asked the Executive to explain why, given that the Regulations amend the parent Act itself, section 168(5) has not been cited in the preamble as an enabling power.”

¹ The SPICe Briefing on the subject, the Title Conditions (Scotland) Bill: an overview (02-85), endeavours to demystify the world of title conditions and is available from document supply.
The Executive responded as follows:

“The Executive accepts that the Order, as it amends the parent Act itself, does rely on the use of the powers contained in section 128(5), to which the Executive assumes the Committee is referring. The preamble to the Order, in addition to the powers expressly cited, also makes reference to all other powers which would enable the Scottish Ministers to make the Order. The Executive consider that this reference is sufficient to allow reliance to be placed on the powers contained in section 128(5) and the omission of an express reference to section 128(5) will not affect the validity of the Order.”

The Subordinate Legislation Committee agreed with the Executive that it was a drafting fault only that does not affect the validity of the Order. The Subordinate Legislation Committee therefore reported the Order to the lead committee and the Parliament on the basis of failure to follow proper drafting practice.

The instrument was laid on 10 September 2003. Under Rule 10.6, the draft Order being subject to affirmative resolution, it is for the Justice 2 committee to recommend to the Parliament whether the instrument should come into force. The Minister for Justice has, by motion S1M-00412 (set out in the Agenda), proposed that the Committee recommends the approval of the Order. The Minister will attend to speak to and move the motion. The debate may last for up to 90 minutes.

At the end of the debate, the Committee must decide whether or not to agree to the motion, and then report to the Parliament accordingly. Such a report need only be a short statement of the Committee’s recommendation.

25 September 2003

Clerk to the Committee
Sewel motions

During the passage of the Scotland Bill it was established that it would be the convention of the UK Parliament that it would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament ("the Sewel convention"). Sewel motions are a result of this convention and are the means by which the Executive obtains the Scottish Parliament’s consent to Westminster legislation on devolved matters.

The attached motion seeks the Parliament’s consent for the UK Parliament to legislate in Scotland through the Criminal Justice Bill on new matters relating to the criminal trials process.

Criminal Justice Bill

The Criminal Justice Bill was introduced in the House of Commons on 21 November 2002. The Scottish Parliament agreed on 5 December 2002 that it should be considered by the UK Parliament. The provisions do not generally apply in Scotland. The limited exceptions are in relation to search warrants in serious fraud investigations, certain reporting restrictions where it was desirable to have UK wide application and provision in relation to the situation where suspended sentences given out by the courts in England and Wales were breached while the individual concerned was in Scotland.

New provisions of the Bill in Parts 6 and 12 extend to Scotland. These contain measures for: reporting restrictions in relation to the allocation and sending of offences; transfer of adult mandatory life prisoners from England and Wales to Scotland; transfer of prison sentences; transfer of community sentences; and transfer of Custody Plus Orders. An Executive memorandum is attached to this note.

Members can access the Bill and its Explanatory Notes by clicking on the link to:

http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmbills/008/2003008.htm
Procedure

Standing Orders do not set out a formal procedure for the Parliament’s consideration of Sewel motions. In some cases Sewel motions have been considered directly by the Chamber. In other cases they have been considered by the relevant subject committee before they are debated by the whole Parliament, as applies in this case.

Whatever mechanism is employed, conferring consent by resolution of the Parliament does require there to be some proceedings in the Chamber. The Parliament will therefore debate the motion on Thursday 9 October. The Committee is invited to consider the motion and the implications for Scotland and report its conclusions to the Parliament in advance of this debate.

The Deputy Minister for Justice will attend the meeting to outline the Executive’s intentions in relation to the legislation and the Committee will have the opportunity to question the Minister and officials on these points.

Following its consideration of the motion it will be for the Committee to report to the Parliament accordingly. Such a report need only be a short statement of the Committee’s conclusions.

25 September 2003 Clerk to the Committee
MEMORANDUM
CRIMINAL JUSTICE BILL

Purpose
1. This memorandum has two purposes. Firstly, to provide an update, where this is necessary, with regard to those provisions within devolved competence which were detailed in the memorandum submitted by the Scottish Executive in November 2002, when the Bill was introduced (attached as an annex to this memorandum for reference), and which the Scottish Parliament agreed on 5 December should be considered by the UK Parliament. Secondly, to provide details of new provisions in the Bill which are within the competence of the Scottish Parliament.

2. The memorandum is in four Parts. Part 1 gives general background on the Bill, Part 2 provides update information, where this is required, on those matters covered in the original memorandum and Part 3 describes those provisions where consideration is required for matters within devolved competence which have (a) been added since introduction, or (b) where there are implications which were not clear at the point of introduction and which were therefore not detailed in the original memorandum. Part 4 contains the Executive’s consideration of the matters discussed in the memorandum.

PART 1
The Bill: background and contents

3. The Criminal Justice Bill, which was introduced in the House of Commons on 21 November 2002, is the legislation which has emerged from the consultation which took place through the White Paper ‘Justice for All’, published in July 2002. (CM 5563) The White Paper set out the options which the UK Government had in mind with regard to reforms to the criminal justice system in England and Wales. It took account of Lord Auld’s report into the practices and procedures of the criminal courts in England and Wales and also the Halliday report into sentencing framework, but also covered a wider spectrum of criminal justice issues, including police reform.

4. The Bill consists of a package of reforms to the criminal trials process from charge to verdict, including a package of reforms to the sentencing framework providing new sentencing options, provisions addressing drug-related offending, and juvenile sentencing. The Bill is a mix of new provision and re-enactments of previous legislation. The provisions of the Criminal Justice Bill, relating as they do to reforms to the criminal justice system in England and Wales (with limited application to Northern Ireland), do not therefore generally apply in Scotland. The limited exceptions to this were detailed in the Sewel memorandum submitted by the Executive in November 2002. These were in relation to search warrants in serious fraud investigations, certain reporting restrictions where it was desirable to have UK wide application and provision in relation to the situation where suspended sentences given out by the courts in England and Wales were breached while the individual concerned was in Scotland. The Scottish Parliament agreed on 5 December 2002 that, although it would have been within their competence to legislate on these matters, in this instance it was appropriate for the necessary provision to be included in the Criminal Justice Bill.
PART 2

Update information

Part 9 - Reporting restrictions in relation to prosecution rights of appeal

5. The memorandum submitted by the Executive in November 2002 described the provisions in Part 9 of the Bill which were to give the prosecution a right of appeal against judicial rulings that terminate the case early, before the jury had been given the opportunity to consider the evidence, and the reporting restrictions associated with certain parts of the procedure. It was explained that, in order to preserve the integrity of the trial process and ensure that if the appeal was successful matters prejudicial to the continuing or fresh trial were not reported, it was proposed to restrict press and media reporting of the procedures relating to the appeal application and the appeal itself. Other matters relating to the trial would continue to be able to be reported, subject to any normal reporting restrictions which may apply. Details of the appeal would be able to be reported at the conclusion of the trial. Where there is one defendant, the trial judge, the Court of Appeal and the House of Lords would all have the power to vary the restrictions after taking into account any objections from the defendant. In order to make them effective, the Scottish Parliament agreed that the provisions in relation to reporting restrictions contained in Part 9 of the Bill would apply in Scotland as in the rest of the UK.

6. It has since been proposed that a further category of appeal should be added. The original appeal scheme in the Bill applied only to judicial rulings which would terminate the case before the jury had considered the evidence. The further category applies to non-terminating evidential rulings, made up to the end of the prosecution case, which would result in prosecution evidence being excluded and so significantly undermine the prosecution case. This category will apply both to single rulings and to a series of rulings which are together significantly undermining. Given that the principle behind the reporting restrictions remains the same, that is, to preserve the integrity of the trial process by ensuring that matters prejudicial to the trial are not reported before it is appropriate, it is proposed that the reporting restrictions which apply to appeals against terminating rulings should apply equally to the non-terminating category.

Part 10 - Reporting restrictions in relation to retrial for serious offences

7. The Bill also makes provision, in Part 10, to enable a fresh prosecution to be pursued for certain serious offences where new evidence may cast doubt on an acquittal. Reporting restrictions were proposed in these instances to combat the risk of prejudicing the subsequent proceedings, so that the press and media would be prevented from reporting an application for a retrial or the details of the application. These were to last until the application was dismissed or the retrial finished. The purpose of the restrictions was to try to ensure that a fair trial could take place and in particular to ensure that any potential jury was not prejudiced. As with the reporting restrictions on prosecution appeals, in order to make them effective it was proposed, and the Scottish Parliament agreed, that they should apply in Scotland as in the rest of the UK.
8. However, as the Bill has proceeded the reporting restrictions regime has been modified so that the restrictions no longer apply automatically, but instead apply at the discretion of the Court of Appeal. This is because Ministers considered that it may be necessary in the interests of justice for the Court to apply reporting restrictions at an earlier stage in a re-investigation than could readily be specified on the face of the Bill. The Court will decide whether such restrictions are required, and their content and duration, according to what is necessary in the interests of justice. Any such orders are to be enforceable in the same way as any other court order, by exercise of the court’s contempt jurisdiction. However, given that the jurisdiction of the Court of Appeal does not extend to Scotland, there would be no basis for contempt proceedings in relation to a breach of an order occurring in Scotland. It is considered, therefore, that further provision in relation to the enforcement of such orders is required for the restrictions to continue to apply in Scotland, as already agreed by the Executive and the Scottish Parliament. It is proposed, therefore, to introduce an offence relating to breach of the order, which will be enforceable in the jurisdiction in which the breach occurred. Thus, any breach of an order in Scotland would be an offence in Scots law and would allow prosecution in the Scottish courts. These provisions will, therefore, have the same practical effect as those contained in the Bill at introduction and are in fact similar to the enforcement provisions in respect of reporting restrictions in the Youth Justice and Criminal Evidence Act 1999.

Part 12 - Transfer of Suspended Sentence Orders

9. The previous memorandum described the provisions in Part 12 of the Bill for suspended sentence orders. The suspended sentence is a custodial sentence, which is suspended for a specified period while the offender undertakes certain community requirements imposed by the court, for example requirements to perform unpaid work or comply with a curfew. The suspended sentence order contains these community requirements. The suspended custodial sentence will not be activated unless, during the supervision period, he fails to comply with a community requirement or he commits another offence.

10. A new Schedule makes provision so that if the offender is, or will be, living in Scotland at the point of sentence or while he is subject to the community requirements, the England and Wales court may not make a suspended sentence order unless it is satisfied that arrangements exist for those community requirements to be complied with in the area in which the offender lives or intends to live in Scotland. Where the England and Wales court makes or amends an order in order for it to be complied with in Scotland, supervision of the requirements becomes the responsibility of a local authority in Scotland.

11. The Scottish courts are also given power to amend the community requirements of a suspended sentence order if, during the period of supervision in Scotland, the offender or supervising officer makes application to the court. Additionally, if the offender breaches the requirements of the order, the court in Scotland will be able to consider and determine the breach and, where necessary, require the offender to appear before the court in England and Wales to determine whether there has been a breach and send a report to that court. The England and Wales court retains responsibility for implications of the breach and activating the suspended custodial sentence. This avoids the need for the local authority supervising officer and the
offender to travel to courts in England and Wales for hearings in relation to breach or amendment and gives the courts in Scotland similar powers to those which they already have in relation to the transfer of community orders (previously probation and community service orders) from England and Wales to Scotland, except that Scottish courts can deal with the consequences of a breach of a community sentence.

PART 3

New provisions

Part 6 - Reporting restrictions in relation to allocation and sending of offences

12. Part 6 of the Bill amends the procedure to be followed by Magistrates’ Courts in determining whether cases triable either way should be tried summarily or on indictment, and provides for the sending to the Crown Court of those cases which need to go there. The new procedures are designed to enable cases to be dealt with in the level of court which is appropriate to their seriousness, and to ensure that they reach that court as quickly as possible. Certain UK wide reporting restrictions already apply to the current arrangements. These are, section 8 of the Magistrates’ Court Act 1980, section 11 of the Criminal Justice Act 1987, paragraph 6 of Schedule 6 to the Criminal Justice Act 1991 and paragraph 3 of Schedule 3 to the Crime and Disorder Act 1998. The purpose of these reporting restrictions is to prevent the publication of information disclosed in pre-trial proceedings which might prejudice the subsequent trial.

13. Under the new arrangements, the reporting restrictions in section 8 of the Magistrates’ Court Act 1980 will be replaced by a similar provision to cover the proceedings in the Magistrates’ Court up to the point where a case is sent to the Crown Court, and the provisions in Schedule 3 to the Crime and Disorder Act 1998 will be amended so that they will apply to any application for dismissal. This latter measure will replace the reporting restrictions in the Criminal Justice Act 1987 and the Criminal Justice Act 1991, although those in the 1987 Act will not be repealed, but will be retained insofar as they apply to preparatory hearings in serious fraud cases. It is proposed that these amended provisions apply UK wide, as with their predecessors, and thus to retain the status quo in that respect. The provisions in the Bill relating to allocation were included at introduction, but the detail relating to reporting restrictions has been included only as the Bill has proceeded.

Part 12 - Transfer of Adult Mandatory Life Prisoners from England and Wales to Scotland

14. Schedule 1 to the Crime (Sentences) Act 1997 (“the 1997 Act”) makes provision for the transfer of prisoners, including life prisoners, between different jurisdictions in the UK. Broadly, there are two types of transfer: those requested by the prisoner, which involve the transfer of a period of custody and/or post-release supervision (usually on a permanent basis), and those at the discretion of the responsible Minister, which will typically be temporary and include transfers to face trial, to attend court as a witness or to take part in a public inquiry. We are here concerned only with the former type.
15. Transfers may be made on a restricted basis (under which the prisoner remains subject to law of the sending/sentencing jurisdiction for the purposes of release and/or supervision) or on an unrestricted basis (under which the prisoner becomes subject to law of the receiving jurisdiction for all purposes, being treated as if he or she had been sentenced to an equivalent sentence by a court in that jurisdiction). The decision as to whether a transfer should be restricted or unrestricted is at the discretion of the Minister making the transfer, namely, the responsible Minister in the sending jurisdiction. A policy statement was agreed by Ministers in October 1997, which states that where there is no effect on the sentence or on any post-release supervision requirement (i.e. no increase or reduction), a transfer will normally be granted on an unrestricted basis. Further, although the legislation does not require the consent of the Minister in the receiving jurisdiction, the policy statement provides that a transfer should not be made unless the agreement of the receiving jurisdiction has been obtained.

16. At present, in English law, those sentenced to mandatory life imprisonment for a crime committed when aged 18 or over are subject to release at the discretion of the Home Secretary. Following the House of Lords’ decision in *R v Secretary of State for the Home Department ex parte Anderson* [2002] 4 All ER 1089, which ruled that the Home Secretary's involvement in the early release of adult mandatory life sentence prisoners was incompatible with such prisoners' rights under article 6 ECHR, the Home Secretary has announced various changes to the law. The essential effect of the relevant provisions in Part 12 of the Bill and in Schedules 17 and 18 is to remove the Home Secretary from sentencing matters (i.e. fixing the tariff) and to give this role to the courts, who will set a “minimum term” which prisoners must serve before being eligible for release on licence. In addition, the Home Secretary’s discretion as to whether or not to accept a release recommendation from the Parole Board will be removed and a direction from the Board will be binding on him.

17. The result of these provisions is, broadly, to bring English law into line with the changes to Scots law made by the Convention Rights (Compliance) (Scotland) Act 2001. Section 1(3) of that Act amended section 2 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (“the 1993 Act”) so as to require a court which sentenced an adult to a mandatory life sentence to specify the "punishment part" of the sentence. When the punishment part has expired, the case must be reviewed by the Parole Board, whose direction for release is binding on the Scottish Ministers.

18. Once the Bill’s provisions come into force, those prisoners affected by them will, as with any other prisoner sentenced under English law, be eligible for transfer to Scotland under the transfer provisions set out in Schedule 1 to the 1997 Act. They will, under the existing legislation, be able to transfer on a restricted basis, but the policy intention is that, in appropriate cases, there should also be the option of an unrestricted transfer. In order to provide for this we need to make some modifications to section 10 of the 1993 Act (which deals with life prisoners transferred to Scotland from other jurisdictions). Essentially, we require to provide a legislative mechanism for the minimum term given to prisoners under the new sentencing proposals to be treated, on an unrestricted transfer, as a punishment part. That will then permit the Scots early release law to apply to such prisoners. We also need to make changes so
that those who fall within the transitional cases dealt with in Schedule 18 are appropriately provided for and may transfer on an unrestricted basis.

19. An exception to this is those life prisoners in respect of whom a whole life minimum term is set. For them there can be no unrestricted transfer. This is because there is no “equivalent sentence” which can be passed by a Scottish court, as section 2 of the 1993 Act requires a court in Scotland to specify the punishment part in terms of years and months and not as an indeterminate period. For this reason, we consider that those with a whole life order will only be able to transfer on a restricted basis. (It is not considered that any change to legislation is needed to provide for this, as it follows from the terms of the 1997 Act.)

Part 12 – Transfer of Prison Sentences

20. This provision is a minor addition to the package of measures in the Bill dealing with transfers of prisoners within the UK. The provision will repeal paragraph 15(5) of Schedule 1 (Unrestricted transfers: general) to the Crime (Sentences) Act 1997 (“the 1997 Act”).

21. Paragraph 15(5) of Schedule 1 to the 1997 Act relates to the treatment of prisoners who will be transferring to Scotland on an unrestricted basis and provides that where the transfer is to include supervision in the community, the person to whom the transfer relates shall be treated as if a supervised release order had been made in respect of him by a court in Scotland specified by Scottish Ministers. (The reference in paragraph 15(5) to the Secretary of State is to be construed as a reference to the Scottish Ministers by virtue of the Scotland Act 1998 (Consequential Modifications) (No.2) Order 1999, Schedule 2, paragraph 130(10)(b) (S.I. 1999/1820)).

22. A supervised release order is a court order provided for by section 209 of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”), which comprises a period of imprisonment followed by a period of supervision in the community not exceeding the term of the prison sentence nor 12 months, whichever is the shorter. A supervised release order can be imposed "where the court considers that it is necessary to do so to protect the public from serious harm".

23. It appears that provision in paragraph 15(5) covering transfers into Scotland was introduced in the 1997 Act as part of the package of measures surrounding the introduction of Release Supervision Orders in England and Wales. The RSO provisions were similar to those of a supervised release order. In the event, the RSO provisions were never brought into force and the provision was later repealed. However, paragraph 15(5) survives in force.

24. The continued existence of this paragraph is considered undesirable and poses a number of legal, policy and practical difficulties for the Scottish Ministers in its operation. Thus, the opportunity is being taken now to repeal the provision and the repeal will form part of the wider changes to the regime for the transfer of prisoners to be made in the Bill. For that reason, the Bill provides a suitable early opportunity to make the repeal and this is considered preferable to waiting for an opportunity in the Scottish Parliament, which is unlikely to arise in the near future.
25. The repeal of the provision does not significantly affect the powers of the Scottish Ministers, who may still deal with prisoners transferred to Scotland from England and Wales in accordance with provision elsewhere in Schedule 1 to the 1997 Act.

Part 12 - Transfer of Community Sentences

26. Part 12 of the Bill contains provisions for the introduction in England and Wales of the new community order, which replaces the current range of community sentences in operation there. Essentially, the courts, in imposing a community order, will have the ability to impose a range of supervision requirements including, for example, unpaid work, drug rehabilitation, curfew and electronic monitoring requirements. The equivalent community disposals in Scotland are principally probation and community service orders.

27. Schedule 8 makes provision to allow courts to impose a community order on an offender, who is or will be living in Scotland, subject to being satisfied that arrangements exist for those community requirements to be complied with in the area to which the offender lives or intends to live in Scotland. The range of requirements which may be imposed in transfer cases is more restricted than can be applied in England and Wales because some of the options for supervision requirements, such as attendance centres, do not exist in Scotland. Where an order is made by a court in England and Wales together with a requirement that it be complied with in Scotland, the appropriate Scottish local authority assumes responsibility for supervision of the requirements.

28. Community orders which transfer to Scotland are to be treated as if they are corresponding orders of the Scottish courts and the Scottish legislation in relation to such orders is to apply. Subject to certain exceptions, Scottish courts may exercise any power in respect of the transferred order which they could exercise in relation to the corresponding order in Scotland. This means that the Scottish court may not only amend where required the supervision requirements of the order, but may also deal with the consequences of a breach of any of the community requirements.

29. The powers available to Scottish courts in respect of community orders remain as hitherto in dealing with transferred probation orders and community service orders (known more recently as community rehabilitation and community punishment orders) from England and Wales.

30. The Bill also gives rise to minor consequential amendments for the transfer of community sentences from Scotland to England and Wales. Specifically, provision will be needed for the Scottish court to specify what are the corresponding requirements for any probation order, which transfers to England and Wales.

Part 12 - Transfer of Custody Plus Orders to Scotland

31. Part 12 of the Bill makes provision for custody plus orders, which are sentences consisting of between 14 and 90 days in custody within an overall sentence length of between 28 and 51 weeks. All of the time not spent in custody is spent on
licence. The licence will have conditions set by the court. If the licence conditions need to be altered an application has to be made by the court. Failure to comply with a licence condition leads to an administrative recall to prison. The Parole Board will scrutinise the recall and determine the date of release. The court is not involved.

32. Custody plus is a prison sentence and as such the Secretary of State must have the final say as to whether it transfers or not. The Bill provides that when the court is imposing a custody plus order and the offender is to reside in Scotland the court may ascertain whether the requirements it wishes to include can be complied with in the area of Scotland in which the offender wishes to reside. This is done in consultation with the Scottish local authority in the area in which the offender resides or wishes to reside. If the Secretary of State decides not to transfer the offender, he must return the offender to court to amend the order so that the licence conditions can be served in England and Wales.

33. If the offender applies for a transfer after the sentence is imposed, the Secretary of State will first indicate whether he would be willing to transfer the offender if the licence conditions can be amended to allow them to be complied with in Scotland. The court can then amend the order. The Secretary of State still has the final decision as to whether the offender will transfer. This decision is made, as currently, in consultation with the Scottish Prison Service.

34. Provision is also made for further amendment or revocation of a transferred custody plus order to be dealt with by application in writing to the England and Wales court. In cases where the offender contests the proposed amendment to the licence requirements the court in Scotland will be given the power to consider the application, therefore limiting the necessity for supervising officers and offenders to travel to courts in England and Wales.

35. The provisions in this part of the Bill relating to custody plus also refer to intermittent custody orders. Intermittent custody orders will be transferred and treated on the same basis as custody plus orders, with only the licence period following the last custodial period being transferred to Scotland.

PART 4

Summary and consideration

36. The Executive considers that the provisions within devolved competence in the Criminal Justice Bill agreed to by the Scottish Parliament on 5 December 2002 should continue to be dealt with by the UK Parliament. This is the case with the reporting restrictions in prosecution appeals and in re-trial for serious offences, where no new issues of substance are raised by the changes which have been made in the Bill as it has progressed. The provisions in relation to transfer of the suspended sentence order are similar to the regime already in place (by virtue of Schedule 4 to the Powers of Criminal Courts (Sentencing) Act 2000, to be repealed and replaced by Schedule 8 to the Bill) for the transfer of community orders, which provides that the court in Scotland can deal with amendment or breach of the order, and no new issues of substance are raised by the changes.
37. The Executive also believes that those aspects which are within devolved competence in respect of the new matters detailed in this memorandum should be considered by the UK Parliament as well. With regard to UK wide reporting restrictions in the allocation and sending of offences, the proposed new arrangements are similar in effect to those they replace and no major issues of principle are raised for Scotland. As far as the transfer of adult mandatory life prisoners from England and Wales to Scotland is concerned, the modifications that would be made in the Bill to section 10 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 would enable the desired policy governing the transfer of such prisoners to be maintained. In addition, the transfer arrangements can be seen as part of the package containing the new sentencing provisions, and so it is considered appropriate that they are also included in the Bill. The repeal of paragraph 15(5) of Schedule 1 to the Crime (Sentences) Act 1997, as part of the package containing the new arrangements for transfer of prisoners, removes a provision which is considered now to be unnecessary and removes the difficulties which the continued operation of that provision would pose for the Scottish Ministers. It is considered appropriate that the repeal is included in the Bill. In relation to the transfer of community orders to Scotland, the provisions in Schedule 8 to the Bill are necessary to reflect the changes to the nature of community orders in England and Wales provided for in Part 12 of the Bill. It is therefore considered appropriate that they are included in the Bill. The powers of the Scottish courts under the new arrangements in the Bill are similar to those that they already have currently in relation to the transfer of the community sentences under existing arrangements. As with suspended sentences, the courts will have the power to deal with amendment of the requirements of custody plus and intermittent custody orders, where the proposed amendment is contested by the offender, and this is similar to the regime already in place.

38. Finally, these provisions are not expected to have substantive financial implications for Scotland. The use of suspended sentences and custody plus orders will be determined by the courts in England and Wales. Both are new sentences and where transfer to Scotland takes place will place a supervision requirement on Scottish local authorities for the first time. At this stage it is not possible to give definitive projections of likely numbers and costs, but the number of transfers is likely to be small and the average cost of supervision is around £2,000 per case per annum.

Scottish Executive
September 2003
ANNEX – SEWEL MEMORANDUM CRIMINAL JUSTICE BILL, NOVEMBER 2002

Purpose

1. To provide details of the Criminal Justice Bill and to highlight those provisions which are within the competence of the Scottish Parliament and which the Parliament is invited to agree should be considered by the UK Parliament.

The Bill: background and contents

2. The Criminal Justice Bill, which was introduced in the House of Commons on 21 November, is the legislation which has emerged from the consultation which took place through the White Paper ‘Justice for All’, published in July 2002. (CM 5563) The White Paper set out the options which the UK Government had in mind with regard to reforms to the criminal justice system in England and Wales. The White Paper took account of Lord Auld’s report into the practices and procedures of the criminal courts in England and Wales and also the Halliday report into sentencing framework, but also covered a wider spectrum of criminal justice issues, including police reform.

3. The Bill consists of a package of reforms to the criminal trials process from charge to verdict, including a package of reforms to the sentencing framework providing new sentencing options, provisions addressing drug-related offending, and juvenile sentencing. The Bill is a mix of new provision and re-enactments of previous legislation. It is in 14 Parts as follows:

- Part 1 – makes amendment to the Police and Criminal Evidence Act 1984 such as extension of powers to stop and search.
- Part 2 - makes certain provision in relation to bail, such as grant and conditions.
- Part 3 – contains measures in connection with conditional cautions given by the police.
- Part 4 – deals with the charging and release of persons in police detention and introduces a new method of instituting proceedings.
- Part 5 – makes various provision with regard to disclosure, including initial duties of disclosure by the prosecutor, defence disclosure and contents of defence statement.
- Part 6 – makes provision related to the allocation and transfer of offences, for instance, the transfer of cases to the Crown Court.
- Part 7 – makes certain arrangements in connection with trial procedure, including application by the prosecution for complex or lengthy trials, or where there is danger of jury tampering, to be conducted without a jury.
• Part 8 – deals with the provisions necessary to enable live links to be used in criminal proceedings, including matters relating to rules of court.

• Part 9 – is about prosecution appeals and includes restrictions on reporting and offences where this is contravened.

• Part 10 – makes provision for retrial for serious offences and covers matters such as new evidence, the interests of justice, restrictions on reporting and offences where this is contravened.

• Part 11 – on evidence, consists of three Chapters, the first in relation to evidence of “bad character”, the second dealing with hearsay evidence and its admissibility, and the third is supplementary.

• Part 12 – on sentencing, consists of 8 Chapters. Chapter 1 makes certain general provisions about sentencing, such as its purpose, reductions in sentences for guilty pleas, increases for racial or religious aggravation, definition of community sentence, etc. Chapter 2 deals with community orders and Chapter 3 with prison sentences of less than 12 months. Chapter 4 makes further provision about orders given under Chapters 2 and 3, such as the duties of a responsible officer, unpaid work requirement, drug rehabilitation requirement, etc. Chapter 5 makes provision in connection with dangerous offenders and, for example, specifies relevant offences. Chapter 6 deals with the release of prisoners on licence and includes provision for recall. Chapter 7 makes other provision about sentencing, such as deferment, and Chapter 8 is supplementary.

• Part 13 – miscellaneous, contains various provision such as guilty pleas and non-attendance at court, jury service, etc.

• Part 14 – general, deals with matters such as orders and rules, commencement, etc.

Matters within devolved competence

4. The provisions of the Criminal Justice Bill, relating as they do to reforms to the criminal justice system in England and Wales (with limited application to Northern Ireland), are almost entirely outwith the competence of the Scottish Parliament. There are, however, a few exceptions to this as explained in paragraphs 5 to 12 below.

Certain provision in relation to search warrants

5. The purpose of the proposed amendment, in Part 1 of the Bill, to section 2 of the Criminal Justice Act 1987, is to enable an "appropriate person" (either a member of the Serious Fraud Office or some other person authorised by the Director) accompanying a constable who is executing a search warrant under that section to exercise certain powers. These are the same powers that are currently available to the constable and amount to entering and searching premises and taking possession of or preserving documents. The appropriate person will only be able to exercise these powers in the company, and under the supervision, of a constable. Section 2 of the 1987 Act already extends to Scotland and it is proposed that this amendment will have
similar extent. This will mean that where a fraud investigation is being undertaken by
the Director of the Serious Fraud Office in England and Wales and Northern Ireland,
the powers available to investigators acting on his behalf are consistent across the UK.
As a matter of practice such warrants would not be executed without the involvement
of Scottish police officers.

Reporting restrictions

6. The Bill makes provision, in Part 9, to give the prosecution a right of appeal
against judicial rulings that terminate the case early, before the jury has been given the
opportunity to consider the evidence. The prosecution will be able to appeal such
rulings made either at the pre-trial hearing or during the trial up to the conclusion of
the prosecution case. It is proposed that there will be an interlocutory appeal system,
which means that, depending on the circumstances of the case, either the trial will be
adjourned or the jury will be discharged pending the outcome of the appeal. If the
appeal is successful either the original trial will resume or a fresh trial will take place.
Unsuccessful appeals will result in the acquittal of the defendant.

7. In order to preserve the integrity of the trial process and ensure that, if the
appeal is successful, matters prejudicial to the continuing or fresh trial are not
reported, it is proposed to restrict press and media reporting of the procedures relating
to the appeal application and the appeal itself. Other matters relating to the trial
would continue to be able to be reported. Details of the appeal would be able to be
reported either at the conclusion of the appeal, if this resulted in the acquittal of the
defendant, or at the conclusion of the trial, if the appeal was successful. Both the trial
judge and the Court of Appeal will have power to vary the restriction after taking into
account any objections from the defendant. Provisions in relation to such reporting
restrictions are contained in Part 9 of the Bill and, in order to make them effective, it
is proposed that these would apply also in Scotland.

8. The Bill also makes provision, in Part 10, to enable a fresh prosecution to be
pursued for certain serious offences where new evidence may cast doubt on an
acquittal. It is also proposed to bring in reporting restrictions in these instances to
combat the risk of prejudicing the subsequent proceedings, so that the press and media
would be prevented from reporting an application for a retrial or the details of the
application. This would last until the application was dismissed or the retrial finished.
Provisions in relation to such reporting restrictions are contained in Part 10 of the Bill
and it is proposed that they apply to Scotland.

9. Finally, Part 13 makes certain changes in relation to reporting restrictions for
preparatory hearings held in long and complex fraud cases so that these extend to
Northern Ireland, which is not covered in the present legislation. The current
legislation does extend to Scotland and it is proposed that this will continue to be the
case in this re-enactment.

Certain provisions in relation to breach of sentence

10. Part 12 of the Bill makes provision in relation to sentencing. In particular,
Chapter 3 makes certain arrangements in relation to prison sentences of less than 12
months and, inter alia, certain provision in relation to breach, revocation or
amendment of suspended sentence order, and the effect of a further conviction.
Where an offender is convicted in Scotland of an offence, and the court is informed
that the offence was committed during the operational period of a suspended sentence
passed in England and Wales, then it is proposed that the court must intimate the
notice of the conviction to the court where the suspended sentence was passed. This
is, in fact, a re-enactment of current provision in this respect.

Other sentencing matters

11. Chapter 7 of Part 12 makes certain miscellaneous changes to sentencing
provision. Within these changes there are provisions made in relation to the alteration
of maximum penalties for summary and either way offences, including amendment of
paragraph 1 of schedule 2 of the European Communities Act 1972, which extends to
Scotland. However the changes to that paragraph only alter the maximum penalties in
relation to England and Wales.

Amendments

12. Finally, there are minor and consequential amendments to the Criminal
Procedure (Scotland) Act 1995 and the Social Work (Scotland) Act 1968 to take
account of the new definition of community order in England and Wales.

Consideration and proposal

13. The Executive considers that the matters within the Criminal Justice Bill that are
within devolved competence should be considered by the UK Parliament. The Bill
itself is concerned with changes to the criminal justice system in England and Wales,
and there are no substantive changes to Scots law. In the interests of justice there is,
however, a good argument that reporting restrictions should apply to the new
procedures identified above across the UK and on a consistent timescale. It would be
undesirable for gaps to be left in reporting restrictions, for example, after the
legislation is passed and pending future legislative opportunities in the Scottish
Parliament. The Executive therefore considers that the Sewel route is appropriate to
cover reporting restrictions. On grounds of consistency and also in the interests of
justice it is also proposed to extend to Scotland the provisions on search warrants.
The provisions with regard to sentencing maintain the status quo as far as Scotland is
concerned and other amendments are minor and consequential.

Scottish Executive
November 2002
MEMORANDUM

CRIMINAL JUSTICE BILL

Purpose

1. This memorandum has two purposes. Firstly, to provide an update, where this is necessary, with regard to those provisions within devolved competence which were detailed in the memorandum submitted by the Scottish Executive in November 2002, when the Bill was introduced (attached as an annex to this memorandum for reference), and which the Scottish Parliament agreed on 5 December should be considered by the UK Parliament. Secondly, to provide details of new provisions in the Bill which are within the competence of the Scottish Parliament.

2. The memorandum is in four Parts. Part 1 gives general background on the Bill, Part 2 provides update information, where this is required, on those matters covered in the original memorandum and Part 3 describes those provisions where consideration is required for matters within devolved competence which have (a) been added since introduction, or (b) where there are implications which were not clear at the point of introduction and which were therefore not detailed in the original memorandum. Part 4 contains the Executive’s consideration of the matters discussed in the memorandum.

PART 1

The Bill: background and contents

3. The Criminal Justice Bill, which was introduced in the House of Commons on 21 November 2002, is the legislation which has emerged from the consultation which took place through the White Paper ‘Justice for All’, published in July 2002. (CM 5563) The White Paper set out the options which the UK Government had in mind with regard to reforms to the criminal justice system in England and Wales. It took account of Lord Auld’s report into the practices and procedures of the criminal courts in England and Wales and also the Halliday report into sentencing framework, but also covered a wider spectrum of criminal justice issues, including police reform.

4. The Bill consists of a package of reforms to the criminal trials process from charge to verdict, including a package of reforms to the sentencing framework providing new sentencing options, provisions addressing drug-related offending, and juvenile sentencing. The Bill is a mix of new provision and re-enactments of previous legislation. The provisions of the Criminal Justice Bill, relating as they do to reforms to the criminal justice system in England and Wales (with limited application to Northern Ireland), do not therefore generally apply in Scotland. The limited exceptions to this were detailed in the Sewel memorandum submitted by the Executive in November 2002. These were in relation to search warrants in serious fraud investigations, certain reporting restrictions where it was desirable to have UK wide application and provision in relation to the situation where suspended sentences given out by the courts in England and Wales were breached while the individual concerned was in Scotland. The Scottish Parliament agreed on 5 December 2002 that, although it would have been within their competence to legislate on these matters, in this instance it was appropriate for the necessary provision to be included in the Criminal Justice Bill.
PART 2

Update information

Part 9 - Reporting restrictions in relation to prosecution rights of appeal

5. The memorandum submitted by the Executive in November 2002 described the provisions in Part 9 of the Bill which were to give the prosecution a right of appeal against judicial rulings that terminate the case early, before the jury had been given the opportunity to consider the evidence, and the reporting restrictions associated with certain parts of the procedure. It was explained that, in order to preserve the integrity of the trial process and ensure that if the appeal was successful matters prejudicial to the continuing or fresh trial were not reported, it was proposed to restrict press and media reporting of the procedures relating to the appeal application and the appeal itself. Other matters relating to the trial would continue to be able to be reported, subject to any normal reporting restrictions which may apply. Details of the appeal would be able to be reported at the conclusion of the trial. Where there is one defendant, the trial judge, the Court of Appeal and the House of Lords would all have the power to vary the restrictions after taking into account any objections from the defendant. In order to make them effective, the Scottish Parliament agreed that the provisions in relation to reporting restrictions contained in Part 9 of the Bill would apply in Scotland as in the rest of the UK.

6. It has since been proposed that a further category of appeal should be added. The original appeal scheme in the Bill applied only to judicial rulings which would terminate the case before the jury had considered the evidence. The further category applies to non-terminating evidential rulings, made up to the end of the prosecution case, which would result in prosecution evidence being excluded and so significantly undermine the prosecution case. This category will apply both to single rulings and to a series of rulings which are together significantly undermining. Given that the principle behind the reporting restrictions remains the same, that is, to preserve the integrity of the trial process by ensuring that matters prejudicial to the trial are not reported before it is appropriate, it is proposed that the reporting restrictions which apply to appeals against terminating rulings should apply equally to the non-terminating category.

Part 10 - Reporting restrictions in relation to retrial for serious offences

7. The Bill also makes provision, in Part 10, to enable a fresh prosecution to be pursued for certain serious offences where new evidence may cast doubt on an acquittal. Reporting restrictions were proposed in these instances to combat the risk of prejudicing the subsequent proceedings, so that the press and media would be prevented from reporting an application for a retrial or the details of the application. These were to last until the application was dismissed or the retrial finished. The purpose of the restrictions was to try to ensure that a fair trial could take place and in particular to ensure that any potential jury was not prejudiced. As with the reporting restrictions on prosecution appeals, in order to make them effective it was proposed, and the Scottish Parliament agreed, that they should apply in Scotland as in the rest of the UK.

8. However, as the Bill has proceeded the reporting restrictions regime has been modified so that the restrictions no longer apply automatically, but instead apply at the discretion of the Court of Appeal. This is because Ministers considered that it may be
necessary in the interests of justice for the Court to apply reporting restrictions at an earlier stage in a re-investigation than could readily be specified on the face of the Bill. The Court will decide whether such restrictions are required, and their content and duration, according to what is necessary in the interests of justice. Any such orders are to be enforceable in the same way as any other court order, by exercise of the court’s contempt jurisdiction. However, given that the jurisdiction of the Court of Appeal does not extend to Scotland, there would be no basis for contempt proceedings in relation to a breach of an order occurring in Scotland. It is considered, therefore, that further provision in relation to the enforcement of such orders is required for the restrictions to continue to apply in Scotland, as already agreed by the Executive and the Scottish Parliament. It is proposed, therefore, to introduce an offence relating to breach of the order, which will be enforceable in the jurisdiction in which the breach occurred. Thus, any breach of an order in Scotland would be an offence in Scots law and would allow prosecution in the Scottish courts. These provisions will, therefore, have the same practical effect as those contained in the Bill at introduction and are in fact similar to the enforcement provisions in respect of reporting restrictions in the Youth Justice and Criminal Evidence Act 1999.

**Part 12 - Transfer of Suspended Sentence Orders**

9. The previous memorandum described the provisions in Part 12 of the Bill for suspended sentence orders. The suspended sentence is a custodial sentence, which is suspended for a specified period while the offender undertakes certain community requirements imposed by the court, for example requirements to perform unpaid work or comply with a curfew. The suspended sentence order contains these community requirements. The suspended custodial sentence will not be activated unless, during the supervision period, he fails to comply with a community requirement or he commits another offence.

10. A new Schedule makes provision so that if the offender is, or will be, living in Scotland at the point of sentence or while he is subject to the community requirements, the England and Wales court may not make a suspended sentence order unless it is satisfied that arrangements exist for those community requirements to be complied with in the area in which the offender lives or intends to live in Scotland. Where the England and Wales court makes or amends an order in order for it to be complied with in Scotland, supervision of the requirements becomes the responsibility of a local authority in Scotland.

11. The Scottish courts are also given power to amend the community requirements of a suspended sentence order if, during the period of supervision in Scotland, the offender or supervising officer makes application to the court. Additionally, if the offender breaches the requirements of the order, the court in Scotland will be able to consider and determine the breach and, where necessary, require the offender to appear before the court in England and Wales to determine whether there has been a breach and send a report to that court. The England and Wales court retains responsibility for implications of the breach and activating the suspended custodial sentence. This avoids the need for the local authority supervising officer and the offender to travel to courts in England and Wales for hearings in relation to breach or amendment and gives the courts in Scotland similar powers to those which they already have in relation to the transfer of community orders (previously probation and community service orders) from England and Wales to Scotland, except that Scottish courts can deal with the consequences of a breach of a community sentence.
PART 3

New provisions

Part 6 - Reporting restrictions in relation to allocation and sending of offences

12. Part 6 of the Bill amends the procedure to be followed by Magistrates’ Courts in determining whether cases triable either way should be tried summarily or on indictment, and provides for the sending to the Crown Court of those cases which need to go there. The new procedures are designed to enable cases to be dealt with in the level of court which is appropriate to their seriousness, and to ensure that they reach that court as quickly as possible. Certain UK wide reporting restrictions already apply to the current arrangements. These are, section 8 of the Magistrates’ Court Act 1980, section 11 of the Criminal Justice Act 1987, paragraph 6 of Schedule 6 to the Criminal Justice Act 1991 and paragraph 3 of Schedule 3 to the Crime and Disorder Act 1998. The purpose of these reporting restrictions is to prevent the publication of information disclosed in pre-trial proceedings which might prejudice the subsequent trial.

13. Under the new arrangements, the reporting restrictions in section 8 of the Magistrates’ Court Act 1980 will be replaced by a similar provision to cover the proceedings in the Magistrates’ Court up to the point where a case is sent to the Crown Court, and the provisions in Schedule 3 to the Crime and Disorder Act 1998 will be amended so that they will apply to any application for dismissal. This latter measure will replace the reporting restrictions in the Criminal Justice Act 1987 and the Criminal Justice Act 1991, although those in the 1987 Act will not be repealed, but will be retained insofar as they apply to preparatory hearings in serious fraud cases. It is proposed that these amended provisions apply UK wide, as with their predecessors, and thus to retain the status quo in that respect. The provisions in the Bill relating to allocation were included at introduction, but the detail relating to reporting restrictions has been included only as the Bill has proceeded.

Part 12 - Transfer of Adult Mandatory Life Prisoners from England and Wales to Scotland

14. Schedule 1 to the Crime (Sentences) Act 1997 (“the 1997 Act”) makes provision for the transfer of prisoners, including life prisoners, between different jurisdictions in the UK. Broadly, there are two types of transfer: those requested by the prisoner, which involve the transfer of a period of custody and/or post-release supervision (usually on a permanent basis), and those at the discretion of the responsible Minister, which will typically be temporary and include transfers to face trial, to attend court as a witness or to take part in a public inquiry. We are here concerned only with the former type.

15. Transfers may be made on a restricted basis (under which the prisoner remains subject to law of the sending/sentencing jurisdiction for the purposes of release and/or supervision) or on an unrestricted basis (under which the prisoner becomes subject to law of the receiving jurisdiction for all purposes, being treated as if he or she had been sentenced to an equivalent sentence by a court in that jurisdiction). The decision as to whether a transfer should be restricted or unrestricted is at the discretion of the Minister making the transfer, namely, the responsible Minister in the sending jurisdiction. A policy statement was agreed by Ministers in October 1997, which states that where there is no effect on the sentence or on any post-
release supervision requirement (i.e. no increase or reduction), a transfer will normally be granted on an unrestricted basis. Further, although the legislation does not require the consent of the Minister in the receiving jurisdiction, the policy statement provides that a transfer should not be made unless the agreement of the receiving jurisdiction has been obtained.

16. At present, in English law, those sentenced to mandatory life imprisonment for a crime committed when aged 18 or over are subject to release at the discretion of the Home Secretary. Following the House of Lords’ decision in *R v Secretary of State for the Home Department ex parte Anderson* [2002] 4 All ER 1089, which ruled that the Home Secretary's involvement in the early release of adult mandatory life sentence prisoners was incompatible with such prisoners' rights under article 6 ECHR, the Home Secretary has announced various changes to the law. The essential effect of the relevant provisions in Part 12 of the Bill and in Schedules 17 and 18 is to remove the Home Secretary from sentencing matters (i.e. fixing the tariff) and to give this role to the courts, who will set a “minimum term” which prisoners must serve before being eligible for release on licence. In addition, the Home Secretary's discretion as to whether or not to accept a release recommendation from the Parole Board will be removed and a direction from the Board will be binding on him.

17. The result of these provisions is, broadly, to bring English law into line with the changes to Scots law made by the Convention Rights (Compliance) (Scotland) Act 2001. Section 1(3) of that Act amended section 2 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (“the 1993 Act”) so as to require a court which sentenced an adult to a mandatory life sentence to specify the "punishment part" of the sentence. When the punishment part has expired, the case must be reviewed by the Parole Board, whose direction for release is binding on the Scottish Ministers.

18. Once the Bill’s provisions come into force, those prisoners affected by them will, as with any other prisoner sentenced under English law, be eligible for transfer to Scotland under the transfer provisions set out in Schedule 1 to the 1997 Act. They will, under the existing legislation, be able to transfer on a restricted basis, but the policy intention is that, in appropriate cases, there should also be the option of an unrestricted transfer. In order to provide for this we need to make some modifications to section 10 of the 1993 Act (which deals with life prisoners transferred to Scotland from other jurisdictions). Essentially, we require to provide a legislative mechanism for the minimum term given to prisoners under the new sentencing proposals to be treated, on an unrestricted transfer, as a punishment part. That will then permit the Scots early release law to apply to such prisoners. We also need to make changes so that those who fall within the transitional cases dealt with in Schedule 18 are appropriately provided for and may transfer on an unrestricted basis.

19. An exception to this is those life prisoners in respect of whom a whole life minimum term is set. For them there can be no *unrestricted* transfer. This is because there is no “equivalent sentence” which can be passed by a Scottish court, as section 2 of the 1993 Act requires a court in Scotland to specify the punishment part in terms of years and months and not as an indeterminate period. For this reason, we consider that those with a whole life order will only be able to transfer on a *restricted* basis. (It is not considered that any change to legislation is needed to provide for this, as it follows from the terms of the 1997 Act.)
Part 12 – Transfer of Prison Sentences

20. This provision is a minor addition to the package of measures in the Bill dealing with transfers of prisoners within the UK. The provision will repeal paragraph 15(5) of Schedule 1 (Unrestricted transfers: general) to the Crime (Sentences) Act 1997 (“the 1997 Act”).

21. Paragraph 15(5) of Schedule 1 to the 1997 Act relates to the treatment of prisoners who will be transferring to Scotland on an unrestricted basis and provides that where the transfer is to include supervision in the community, the person to whom the transfer relates shall be treated as if a supervised release order had been made in respect of him by a court in Scotland specified by Scottish Ministers. (The reference in paragraph 15(5) to the Secretary of State is to be construed as a reference to the Scottish Ministers by virtue of the Scotland Act 1998 (Consequential Modifications) (No.2) Order 1999, Schedule 2, paragraph 130(10)(b) (S.I. 1999/1820)).

22. A supervised release order is a court order provided for by section 209 of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”), which comprises a period of imprisonment followed by a period of supervision in the community not exceeding the term of the prison sentence nor 12 months, whichever is the shorter. A supervised release order can be imposed "where the court considers that it is necessary to do so to protect the public from serious harm".

23. It appears that provision in paragraph 15(5) covering transfers into Scotland was introduced in the 1997 Act as part of the package of measures surrounding the introduction of Release Supervision Orders in England and Wales. The RSO provisions were similar to those of a supervised release order. In the event, the RSO provisions were never brought into force and the provision was later repealed. However, paragraph 15(5) survives in force.

24. The continued existence of this paragraph is considered undesirable and poses a number of legal, policy and practical difficulties for the Scottish Ministers in its operation. Thus, the opportunity is being taken now to repeal the provision and the repeal will form part of the wider changes to the regime for the transfer of prisoners to be made in the Bill. For that reason, the Bill provides a suitable early opportunity to make the repeal and this is considered preferable to waiting for an opportunity in the Scottish Parliament, which is unlikely to arise in the near future.

25. The repeal of the provision does not significantly affect the powers of the Scottish Ministers, who may still deal with prisoners transferred to Scotland from England and Wales in accordance with provision elsewhere in Schedule 1 to the 1997 Act.

Part 12 - Transfer of Community Sentences

26. Part 12 of the Bill contains provisions for the introduction in England and Wales of the new community order, which replaces the current range of community sentences in operation there. Essentially, the courts, in imposing a community order, will have the ability to impose a range of supervision requirements including, for example, unpaid work, drug rehabilitation, curfew and electronic monitoring requirements. The equivalent community disposals in Scotland are principally probation and community service orders.
27. Schedule 8 makes provision to allow courts to impose a community order on an offender, who is or will be living in Scotland, subject to being satisfied that arrangements exist for those community requirements to be complied with in the area to which the offender lives or intends to live in Scotland. The range of requirements which may be imposed in transfer cases is more restricted than can be applied in England and Wales because some of the options for supervision requirements, such as attendance centres, do not exist in Scotland. Where an order is made by a court in England and Wales together with a requirement that it be complied with in Scotland, the appropriate Scottish local authority assumes responsibility for supervision of the requirements.

28. Community orders which transfer to Scotland are to be treated as if they are corresponding orders of the Scottish courts and the Scottish legislation in relation to such orders is to apply. Subject to certain exceptions, Scottish courts may exercise any power in respect of the transferred order which they could exercise in relation to the corresponding order in Scotland. This means that the Scottish court may not only amend where required the supervision requirements of the order, but may also deal with the consequences of a breach of any of the community requirements.

29. The powers available to Scottish courts in respect of community orders remain as hitherto in dealing with transferred probation orders and community service orders (known more recently as community rehabilitation and community punishment orders) from England and Wales.

30. The Bill also gives rise to minor consequential amendments for the transfer of community sentences from Scotland to England and Wales. Specifically, provision will be needed for the Scottish court to specify what are the corresponding requirements for any probation order, which transfers to England and Wales.

**Part 12 - Transfer of Custody Plus Orders to Scotland**

31. Part 12 of the Bill makes provision for custody plus orders, which are sentences consisting of between 14 and 90 days in custody within an overall sentence length of between 28 and 51 weeks. All of the time not spent in custody is spent on licence. The licence will have conditions set by the court. If the licence conditions need to be altered an application has to be made by the court. Failure to comply with a licence condition leads to an administrative recall to prison. The Parole Board will scrutinise the recall and determine the date of release. The court is not involved.

32. Custody plus is a prison sentence and as such the Secretary of State must have the final say as to whether it transfers or not. The Bill provides that when the court is imposing a custody plus order and the offender is to reside in Scotland the court may ascertain whether the requirements it wishes to include can be complied with in the area of Scotland in which the offender wishes to reside. This is done in consultation with the Scottish local authority in the area in which the offender resides or wishes to reside. If the Secretary of State decides not to transfer the offender, he must return the offender to court to amend the order so that the licence conditions can be served in England and Wales.

33. If the offender applies for a transfer after the sentence is imposed, the Secretary of State will first indicate whether he would be willing to transfer the offender if the licence conditions can be amended to allow them to be complied with in Scotland. The court can
then amend the order. The Secretary of State still has the final decision as to whether the offender will transfer. This decision is made, as currently, in consultation with the Scottish Prison Service.

34. Provision is also made for further amendment or revocation of a transferred custody plus order to be dealt with by application in writing to the England and Wales court. In cases where the offender contests the proposed amendment to the licence requirements the court in Scotland will be given the power to consider the application, therefore limiting the necessity for supervising officers and offenders to travel to courts in England and Wales.

35. The provisions in this part of the Bill relating to custody plus also refer to intermittent custody orders. Intermittent custody orders will be transferred and treated on the same basis as custody plus orders, with only the licence period following the last custodial period being transferred to Scotland.

PART 4

Summary and consideration

36. The Executive considers that the provisions within devolved competence in the Criminal Justice Bill agreed to by the Scottish Parliament on 5 December 2002 should continue to be dealt with by the UK Parliament. This is the case with the reporting restrictions in prosecution appeals and in re-trial for serious offences, where no new issues of substance are raised by the changes which have been made in the Bill as it has progressed. The provisions in relation to transfer of the suspended sentence order are similar to the regime already in place (by virtue of Schedule 4 to the Powers of Criminal Courts (Sentencing) Act 2000, to be repealed and replaced by Schedule 8 to the Bill) for the transfer of community orders, which provides that the court in Scotland can deal with amendment or breach of the order, and no new issues of substance are raised by the changes.

37. The Executive also believes that those aspects which are within devolved competence in respect of the new matters detailed in this memorandum should be considered by the UK Parliament as well. With regard to UK wide reporting restrictions in the allocation and sending of offences, the proposed new arrangements are similar in effect to those they replace and no major issues of principle are raised for Scotland. As far as the transfer of adult mandatory life prisoners from England and Wales to Scotland is concerned, the modifications that would be made in the Bill to section 10 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 would enable the desired policy governing the transfer of such prisoners to be maintained. In addition, the transfer arrangements can be seen as part of the package containing the new sentencing provisions, and so it is considered appropriate that they are also included in the Bill. The repeal of paragraph 15(5) of Schedule 1 to the Crime (Sentences) Act 1997, as part of the package containing the new arrangements for transfer of prisoners, removes a provision which is considered now to be unnecessary and removes the difficulties which the continued operation of that provision would pose for the Scottish Ministers. It is considered appropriate that the repeal is included in the Bill. In relation to the transfer of community orders to Scotland, the provisions in Schedule 8 to the Bill are necessary to reflect the changes to the nature of community orders in England and Wales provided for in Part 12 of the Bill. It is therefore considered appropriate that they are included in the Bill. The powers of the Scottish courts under the new arrangements in the Bill are similar to those that they already have currently in relation to the transfer of the...
community sentences under existing arrangements. As with suspended sentences, the courts will have the power to deal with amendment of the requirements of custody plus and intermittent custody orders, where the proposed amendment is contested by the offender, and this is similar to the regime already in place.

38. Finally, these provisions are not expected to have substantive financial implications for Scotland. The use of suspended sentences and custody plus orders will be determined by the courts in England and Wales. Both are new sentences and where transfer to Scotland takes place will place a supervision requirement on Scottish local authorities for the first time. At this stage it is not possible to give definitive projections of likely numbers and costs, but the number of transfers is likely to be small and the average cost of supervision is around £2,000 per case per annum.

Scottish Executive
September 2003
ANNEX – SEWEL MEMORANDUM CRIMINAL JUSTICE BILL, NOVEMBER 2002

Purpose

1. To provide details of the Criminal Justice Bill and to highlight those provisions which are within the competence of the Scottish Parliament and which the Parliament is invited to agree should be considered by the UK Parliament.

The Bill: background and contents

2. The Criminal Justice Bill, which was introduced in the House of Commons on 21 November, is the legislation which has emerged from the consultation which took place through the White Paper ‘Justice for All’, published in July 2002. (CM 5563) The White Paper set out the options which the UK Government had in mind with regard to reforms to the criminal justice system in England and Wales. The White Paper took account of Lord Auld’s report into the practices and procedures of the criminal courts in England and Wales and also the Halliday report into sentencing framework, but also covered a wider spectrum of criminal justice issues, including police reform.

3. The Bill consists of a package of reforms to the criminal trials process from charge to verdict, including a package of reforms to the sentencing framework providing new sentencing options, provisions addressing drug-related offending, and juvenile sentencing. The Bill is a mix of new provision and re-enactments of previous legislation. It is in 14 Parts as follows:

- Part 1 – makes amendment to the Police and Criminal Evidence Act 1984 such as extension of powers to stop and search.
- Part 2 - makes certain provision in relation to bail, such as grant and conditions.
- Part 3 – contains measures in connection with conditional cautions given by the police.
- Part 4 – deals with the charging and release of persons in police detention and introduces a new method of instituting proceedings.
- Part 5 – makes various provision with regard to disclosure, including initial duties of disclosure by the prosecutor, defence disclosure and contents of defence statement.
- Part 6 – makes provision related to the allocation and transfer of offences, for instance, the transfer of cases to the Crown Court.
- Part 7 – makes certain arrangements in connection with trial procedure, including application by the prosecution for complex or lengthy trials, or where there is danger of jury tampering, to be conducted without a jury.
- Part 8 – deals with the provisions necessary to enable live links to be used in criminal proceedings, including matters relating to rules of court.
- Part 9 – is about prosecution appeals and includes restrictions on reporting and offences where this is contravened.
• Part 10 – makes provision for retrial for serious offences and covers matters such as new evidence, the interests of justice, restrictions on reporting and offences where this is contravened.

• Part 11 – on evidence, consists of three Chapters, the first in relation to evidence of “bad character”, the second dealing with hearsay evidence and its admissibility, and the third is supplementary.

• Part 12 – on sentencing, consists of 8 Chapters. Chapter 1 makes certain general provisions about sentencing, such as its purpose, reductions in sentences for guilty pleas, increases for racial or religious aggravation, definition of community sentence, etc. Chapter 2 deals with community orders and Chapter 3 with prison sentences of less than 12 months. Chapter 4 makes further provision about orders given under Chapters 2 and 3, such as the duties of a responsible officer, unpaid work requirement, drug rehabilitation requirement, etc. Chapter 5 makes provision in connection with dangerous offenders and, for example, specifies relevant offences. Chapter 6 deals with the release of prisoners on licence and includes provision for recall. Chapter 7 makes other provision about sentencing, such as deferment, and Chapter 8 is supplementary.

• Part 13 – miscellaneous, contains various provision such as guilty pleas and non-attendance at court, jury service, etc.

• Part 14 – general, deals with matters such as orders and rules, commencement, etc.

Matters within devolved competence

4. The provisions of the Criminal Justice Bill, relating as they do to reforms to the criminal justice system in England and Wales (with limited application to Northern Ireland), are almost entirely outwith the competence of the Scottish Parliament. There are, however, a few exceptions to this as explained in paragraphs 5 to 12 below.

Certain provision in relation to search warrants

5. The purpose of the proposed amendment, in Part 1 of the Bill, to section 2 of the Criminal Justice Act 1987, is to enable an "appropriate person" (either a member of the Serious Fraud Office or some other person authorised by the Director) accompanying a constable who is executing a search warrant under that section to exercise certain powers. These are the same powers that are currently available to the constable and amount to entering and searching premises and taking possession of or preserving documents. The appropriate person will only be able to exercise these powers in the company and under the supervision, of a constable. Section 2 of the 1987 Act already extends to Scotland and it is proposed that this amendment will have similar extent. This will mean that where a fraud investigation is being undertaken by the Director of the Serious Fraud Office in England and Wales and Northern Ireland, the powers available to investigators acting on his behalf are consistent across the UK. As a matter of practice such warrants would not be executed without the involvement of Scottish police officers.
Reporting restrictions

6. The Bill makes provision, in Part 9, to give the prosecution a right of appeal against judicial rulings that terminate the case early, before the jury has been given the opportunity to consider the evidence. The prosecution will be able to appeal such rulings made either at the pre-trial hearing or during the trial up to the conclusion of the prosecution case. It is proposed that there will be an interlocutory appeal system, which means that, depending on the circumstances of the case, either the trial will be adjourned or the jury will be discharged pending the outcome of the appeal. If the appeal is successful either the original trial will resume or a fresh trial will take place. Unsuccessful appeals will result in the acquittal of the defendant.

7. In order to preserve the integrity of the trial process and ensure that, if the appeal is successful, matters prejudicial to the continuing or fresh trial are not reported, it is proposed to restrict press and media reporting of the procedures relating to the appeal application and the appeal itself. Other matters relating to the trial would continue to be able to be reported. Details of the appeal would be able to be reported either at the conclusion of the appeal, if this resulted in the acquittal of the defendant, or at the conclusion of the trial, if the appeal was successful. Both the trial judge and the Court of Appeal will have power to vary the restriction after taking into account any objections from the defendant. Provisions in relation to such reporting restrictions are contained in Part 9 of the Bill and, in order to make them effective, it is proposed that these would apply also in Scotland.

8. The Bill also makes provision, in Part 10, to enable a fresh prosecution to be pursued for certain serious offences where new evidence may cast doubt on an acquittal. It is also proposed to bring in reporting restrictions in these instances to combat the risk of prejudicing the subsequent proceedings, so that the press and media would be prevented from reporting an application for a retrial or the details of the application. This would last until the application was dismissed or the retrial finished. Provisions in relation to such reporting restrictions are contained in Part 10 of the Bill and it is proposed that they apply to Scotland.

9. Finally, Part 13 makes certain changes in relation to reporting restrictions for preparatory hearings held in long and complex fraud cases so that these extend to Northern Ireland, which is not covered in the present legislation. The current legislation does extend to Scotland and it is proposed that this will continue to be the case in this re-enactment.

Certain provisions in relation to breach of sentence

10. Part 12 of the Bill makes provision in relation to sentencing. In particular, Chapter 3 makes certain arrangements in relation to prison sentences of less than 12 months and, inter alia, certain provision in relation to breach, revocation or amendment of suspended sentence order, and the effect of a further conviction. Where an offender is convicted in Scotland of an offence, and the court is informed that the offence was committed during the operational period of a suspended sentence passed in England and Wales, then it is proposed that the court must intimate the notice of the conviction to the court where the suspended sentence was passed. This is, in fact, a re-enactment of current provision in this respect.
Other sentencing matters

11. Chapter 7 of Part 12 makes certain miscellaneous changes to sentencing provision. Within these changes there are provisions made in relation to the alteration of maximum penalties for summary and either way offences, including amendment of paragraph 1 of schedule 2 of the European Communities Act 1972, which extends to Scotland. However the changes to that paragraph only alter the maximum penalties in relation to England and Wales.

Amendments

12. Finally, there are minor and consequential amendments to the Criminal Procedure (Scotland) Act 1995 and the Social Work (Scotland) Act 1968 to take account of the new definition of community order in England and Wales.

Consideration and proposal

13. The Executive considers that the matters within the Criminal Justice Bill that are within devolved competence should be considered by the UK Parliament. The Bill itself is concerned with changes to the criminal justice system in England and Wales, and there are no substantive changes to Scots law. In the interests of justice there is, however, a good argument that reporting restrictions should apply to the new procedures identified above across the UK and on a consistent timescale. It would be undesirable for gaps to be left in reporting restrictions, for example, after the legislation is passed and pending future legislative opportunities in the Scottish Parliament. The Executive therefore considers that the Sewel route is appropriate to cover reporting restrictions. On grounds of consistency and also in the interests of justice it is also proposed to extend to Scotland the provisions on search warrants. The provisions with regard to sentencing maintain the status quo as far as Scotland is concerned and other amendments are minor and consequential.

Scottish Executive
November 2002
JUSTICE 2 COMMITTEE

8th Meeting 2003 (Session 2)

Tuesday 30 September 2003

Vulnerable Witnesses (Scotland) Bill: Reports from Finance Committee and Subordinate Legislation Committee

Note by the Clerk

1. Attached are reports to the Justice 2 Committee on the Vulnerable Witnesses (Scotland) Bill from the Finance Committee and the Subordinate Legislation Committee. The Committee is required to take these reports into account in reaching its conclusions on the Bill.

2. The Committee’s attention is drawn in particular to:

   - paragraph 38 of the Finance Committee report (which suggests a line of questioning for the Minister); and

   - from the Subordinate Legislation Committee report: paragraphs 10-13 (powers to add additional special measures); paragraphs 14-31 (relating to district courts); and paragraphs 34-39 (powers relating to phased implementation of the Bill).

Clerk to the Committee
25 September 2003
JUSTICE 2 COMMITTEE

8th Meeting 2003 (Session 2)

Tuesday 30th September 2003

Vulnerable Witnesses (Scotland) Bill

Report by the Finance Committee on the Financial Memorandum
Finance Committee

Remit and membership

Remit:

1. The remit of the Finance Committee is to consider and report on-
   (a) any report or other document laid before the Parliament by members of
   the Scottish Executive containing proposals for, or budgets of, public
   expenditure or proposals for the making of a tax-varying resolution, taking
   into account any report or recommendations concerning such documents
   made to them by any other committee with power to consider such
   documents or any part of them;

   (b) any report made by a committee setting out proposals concerning public
   expenditure;

   (c) Budget Bills; and

   (d) any other matter relating to or affecting the expenditure of the Scottish
   Administration or other expenditure payable out of the Scottish
   Consolidated Fund.

2. The Committee may also consider and, where it sees fit, report to the
   Parliament on the timetable for the Stages of Budget Bills and on the handling of
   financial business.

3. In these Rules, "public expenditure" means expenditure of the Scottish
   Administration, other expenditure payable out of the Scottish Consolidated Fund
   and any other expenditure met out of taxes, charges and other public revenue.

   *(Standing Orders of the Scottish Parliament, Rule 6.6)*

Membership:

Des McNulty (Convener)
Wendy Alexander
Ted Brocklebank
Fergus Ewing (Deputy Convener)
Kate Maclean
Jim Mather
Dr Elaine Murray
Jeremy Purvis
John Swinburne
Committee Clerking Team:

Clerk to the Committee
Susan Duffy

Senior Assistant Clerk
Jane Sutherland

Assistant Clerk
Emma Berry
Finance Committee

Report on the Financial Memorandum of the Vulnerable Witnesses (Scotland) Bill

The Committee reports to the Justice 2 Committee as follows—

Background

1. Under Standing Orders, Rule 9.6, the lead committee in relation to a Bill must consider and report on the Bill's Financial Memorandum at Stage 1. In doing so, it is obliged to take account of any views submitted to it by the Finance Committee.

2. This report sets out the views of the Finance Committee in relation to the Financial Memorandum published to accompany the Vulnerable Witnesses (Scotland) Bill, for which the Justice 2 Committee has been designated by the Parliamentary Bureau as the lead committee at Stage 1.

Introduction

3. At its meeting on 9 September 2003, the Finance Committee took evidence on the Financial Memorandum from—

Ed Morrison, Director of Finance;

and Jackie Robeson, Head of Practice, Scottish Children’s Reporter Administration;

John Ewing, Chief Executive;

and Cliff Binning, Head of Operational Policy and Planning, Scottish Court Service;

Philip Shearer, Solicitor (Technical), Scottish Legal Aid Board.

4. At a separate session on the 16 September, the Committee took evidence on from the following Scottish Executive officials—

Barbara Brown, Head of Civil Justice and Evidence Branch;

Lesley Napier, Head of Bill Team;

and Merlin Kemp, member of Bill Team, Scottish Executive.

Lindsey Anderson, Principle Depute, Policy Group

and Stephen Woodhouse, Finance, Crown Office.

5. In addition to the oral evidence taken at these meetings, we received written evidence from the Scottish Legal Aid Board (via the Justice 2 Committee) and from the Scottish Court Service. The submission from the Scottish Court Service is
reproduced at Annexe A and we would like to express our gratitude to all who took time to provide us with evidence in relation to this Financial Memorandum.

**Financial Memorandum**

6. The Financial Memorandum published to accompany the Bill sets out the cost of its implementation as well as any annual recurring costs. It acknowledges that, as well as the Scottish Executive, there will be costs on the Crown Office and Procurator Fiscals Office, the Scottish Court Service and judicial salaries, Scottish Legal Aid Board, the Scottish Children’s Reporters Administration and local authorities.

7. The Memorandum contains tables summarising the annual running costs and the one-off costs, giving an overall cost of £5.15m. The Memorandum also provides some detail on the margins of uncertainty in reaching this figure and suggests that the Executive has, in its calculations, erred on the side of more expense. The majority of the costs are arrived at by estimating, albeit in an educated way, factors such as numbers of eligible witnesses and take up of special measures.

8. The Committee agrees that the Financial Memorandum for the Vulnerable Witnesses (Scotland) Bill complies with standing orders and welcomed the level of detail given in the Financial Memorandum in relation to the estimated number of cases and estimates of costs.

**Summary of Evidence**

9. During its oral evidence session, the Committee heard a number of concerns which it raised with the Scottish Executive. These concerns are outlined below.

*Scottish Children’s Reporters Administration (SCRP)*

10. The SCRP welcomed the Bill, especially the extension of provisions to adult vulnerable witnesses. It is this additional protection which has contributed significantly the estimate of £200,000 for implementing the Bill for the SCRP.

11. The SCRP is confident that the £200,000 represents the best estimate of the additional costing of the Bill.

12. The figure of 200 hearings on special measures is the SCRP’s best estimate based on historical data. The SCRP recognised that there will necessarily be some unreliability in the figures, given that the Bill potentially introduces a change in culture in the courts. The SCRP believes that as the implementation is phased there will be clarity about the special measures that are available.

13. The SCRP noted that there was a risk that additional costs (not detailed in the Financial Memorandum) could arise during children’s referral proceedings when parents and children who have legal aid make use of the vulnerable witness provisions.

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1 Robeson, Col 174, Official Report, 9 September 2003
Scottish Court Service (SCS)

14. The Scottish Court Service had been in discussions with the Justice Department of the Scottish Executive during preparation for the Financial Memorandum of this Bill and is broadly content with the financial assessments made in it.

15. In relation to additional CCTV provision, the SCS are content that the upgrade of a further 10 courts will enable them to handle 80% of all court business. In addition they have access to mobile CCTV facilities which will enable them to offer CCTV in other perhaps more remote areas. The SCS does, however recognise that there may be occasions when court cases are moved to other courts in order to access CCTV facilities, and that there may be some costs associated with this which are not highlighted in the Financial Memorandum.

16. The SCS is confident that the figure of 9,000 notices and applications a year for special measures is based on reasonably reliable information for the High Court and solemn business in the sheriff courts. However they noted that the extrapolation with regard to summary business is not as robust (although the estimate provided is at the maximum end).

17. Likewise the SCS is confident that the costing estimates in the Financial Memorandum are robust and believe that although some costs could be higher if, for example, an advocate is used to take evidence on commission, in reality the costs will be lower as sheriffs may take on this work. The SCS did however note that the costing estimates were one of the unknown variables of this Bill, although they had no basis on which to challenge this estimate.

18. In evidence to the Committee, the SCS stated that it is essential to allow the phased introduction of the Bill as this will enable the SCS to gain better information about the take up of the provisions before moving to each subsequent phase of the implementation. This is significant given the questions over data reliability in relation to summary cases.

Scottish Legal Aid Board (SLAB)

19. The Scottish Legal Aid Board raised several concerns in relation to the financial implications of this Bill. It noted that whilst it had contributed to the original consultation Vital Voices: Helping Vulnerable Witnesses Give they had not been directly consulted on the Financial Memorandum to the Bill.

20. The SLAB had specific concerns regarding the methodology employed to calculate the number of potential cases in civil and criminal proceedings who may use vulnerable witness provisions. In evidence to the Committee, it stated that it was not clear from the Financial Memorandum whether the figures on potential uptake of the Bill’s provisions included defence witnesses, as opposed to just witnesses for the Crown. In addition, the SLAB was not clear how the figures in the Financial Memorandum relate to civil proceedings.

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2 Ewing, Col 168, Official Report, 9 September 2003
3 Ewing, Col 167, Official Report, 9 September 2003
4 Ewing, Col 172, Official Report, 9 September 2003
5 Shearer, Col 175, Official Report, 9 September 2003
21. In both these circumstances the SLAB expressed concern that no estimated costings on the SLAB fund were given in the Financial Memorandum.

22. In relation to the fixed fees currently paid to solicitors, the SLAB noted that there may be a need to revisit the fixed fee level in response to the pressure to increase the level of core fixed notices or prescribe a separate block fee for all work in connection with a Child Witness Notice\(^6\).

23. The SLAB questioned some of the costs ascribed to some of the functions carried out during cases given that the costs of staff carrying out work such as commissions can vary.

24. The SLAB also expressed some concern that the Financial Memorandum allocates no funding to cover the costs of defence witnesses and supporters. The SLAB indicated that they could perceive that defence witnesses may seek vulnerable witness protection and it was unclear from where these costs would be recovered.

25. Finally the SLAB noted that the Financial Memorandum had assumed that in civil cases the costs of vulnerable witness protection would be recovered through damages awarded as part of the case. The SLAB questioned this assumption given that vulnerable witness protection would be more usually utilised in family cases where it was unlikely that damages would be sought.

**Scottish Executive**

26. The Scottish Executive reported to the Committee that it had carried out a range of consultations in relation to the Financial Memorandum. These included direct consultation with the Scottish Court Service, the Crown Office and the Scottish Executive’s Justice Department which works with Police and Legal Aid. It had also carried out a series of meetings with other bodies such as Scottish Women’s Aid where the impact of the Bill was more generally discussed\(^7\).

27. The Scottish Executive acknowledged that whilst they had not directly consulted with the SLAB, there was still a lot of work to be undertaken in implementing the Bill where they would work with SLAB.

28. In relation to the methodology used to estimate the number of cases, the Scottish Executive recognised that the figures were estimates, although in the case of High Court cases and Sheriff Court Solemn cases these estimates were based on some existing data collection such as the witness service database. In relation to summary cases where there is less data available the Scottish Executive believes that it has erred on the side of caution in estimating the number of cases which may occur, i.e. it has opted for the highest estimates.

29. Both the Scottish Executive and the Court Service noted that the phased implementation of the Bill was essential in that it would highlight any areas where case numbers had been inaccurately predicted especially in relation to summary cases.

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\(^6\) SLAB Written Submission

\(^7\) Kemp, Col 217, Official Report, 16 September 2003
30. The Executive acknowledges that some costs may be higher than the estimates used, e.g. £500 for commissions but believes that these are reasonable average costs.

31. Both the Scottish Executive and the Crown Office were content with the overall costings provided in the Financial Memorandum but stressed that the phased implementation of the Bill was essential as it allowed for additional funding to be secured from future spending reviews should the costs prove to be higher than provided for by the current Financial Memorandum.\(^8\)

32. The Bill has a range of implications for the workloads of solicitors and advocates. The Executive acknowledged that whilst some of the new procedures may involve additional work, other changes would be more in line with modernising practice and should not therefore attract additional funding. The Executive did not consider that the fixed payments for solicitors should be reviewed at this stage. They did however acknowledge that this was something that could be considered in the future as part of a review of fixed payments. In addition the Scottish Executive stated that whilst they had considered a separate block fee for Child Witness Notices, they had rejected this concept as it was important that dealing sensitively with vulnerable witnesses should be considered part of the mainstream work of the legal profession and police.\(^9\)

33. The Scottish Executive confirmed that there are no costs attached to supporters who are currently available in the court system. Such supporters are not paid but where they are involved in taking a witness to court may claim back expenses. The Scottish Executive argued that the specific inclusion of the role of supporters in the bill would not therefore require any additional funding. The Executive does, however, intend to bring forward guidance on the role of supporters. The Scottish Executive also argued that as supporters do not normally attract any payments this would militate against professional supporters being used (e.g. Psychologists).

34. In relation to CCTV provision, the Scottish Executive and the Court Service are content that the initial 19 courts to be equipped with CCTV will be satisfactory to enable good provision across Scotland. There are no specific plans for the Scottish Executive to allocate further funding to address those remaining courts without CCTV provision. However, the Executive indicated that it would expect the Scottish Court Service to continue to improve the technology infrastructure across its estate as has been the practice to date.

35. Finally, in closing, the Scottish Executive and the Court Service stated that they believed that the additional funding provided in the Financial Memorandum accurately reflected the balance between the acknowledged additional cost of the implementing the bill and those that would be absorbed through a cultural change in the justice system.

\(^8\) Brown, Col 225, Official Report, 16 September 2003
\(^9\) Kemp, Col 222, Official Report, 16 September 2003
Recommendations and Conclusions

36. The Committee welcomed the detailed nature of the Financial Memorandum which enabled the Committee to undertake its scrutiny role in a satisfactory way.

37. The Committee concluded that whilst case figures and costings given in the Financial Memorandum were estimates, where sufficient data was available, the Executive had been cautious in their financial provision.

38. The Committee would recommend however that the Justice 2 Committee explore with the Minister the mechanisms available to the Scottish Executive to monitor the numbers and costs of cases utilising vulnerable witness protection during the phased implementation of the Bill. This would ensure that any potential shortfalls in funding could be identified as soon as possible.

39. The Committee would also recommend that there is continued dialogue between the Scottish Executive and the Scottish Legal Aid Board to ensure that the balance between modernising practice and appropriate remuneration is maintained.
During the evidence session before the Finance Committee on 9 September, the Convenor invited the Scottish Court Service to read the written submission made by the Scottish Legal Aid Board on the above Bill and offer comments upon it if we wished.

I have now read the submission made by SLAB. The extent to which the cost to Legal Aid has been addressed within the Financial Memorandum is a matter for the Scottish Executive Justice Department. However, I would offer the following observations which may assist the Committee in setting the SLAB concerns in context.

I understand that the detailed procedural arrangements to give effect to the Bill’s provision will be set out in subordinate legislation and rules of court. It is to be hoped that these will provide for arguments relating to the use of special measures to take place during one of the existing procedural hearings which apply in most criminal or civil cases, such as the intermediate diet in summary criminal cases. The proposed introduction of mandatory preliminary hearings in the High Court will also provide an opportunity for these matters to be addressed without the need for an additional hearing for this purpose. Since the Legal Aid Board already funds the appearance of defence agents at such hearings, this should help reduce any incremental cost of implementing the provisions in the Bill.

The Committee were concerned about the overall estimate of the number of applications, particularly in summary cases which I suggested might vary by up to 1,000 from the total quoted. It might be helpful for the Committee to set this in context if I point out that in recent years the sheriff courts have dealt with around 100,000 summary criminal complaints each year. Thus a variation of 1,000 applications in summary cases represents only 1% of the total cases coming to the courts and well within the level of fluctuations seen year on year.

The figures used in the Financial Memorandum can only be an estimate at this stage since the eventual impact of the legislation will be influenced by a range of unquantifiable factors, including future decisions by the courts on the acceptability of the use of special measures in individual cases.

JOHN EWING
CHIEF EXECUTIVE