The Committee will meet at 9.30 am in Committee Room 2.

1. **Subordinate legislation**: Allan Wilson MSP (Deputy Minister for Environment and Rural Development) to move the following motion—


2. **Subordinate legislation**: The Committee will consider the following negative instrument—

   The Victim Statements (Prescribed Offences) (Scotland) Amendment Order 2004 (SSI 2004/287).

3. **Alternatives to custody**: Further to its decision on 10 December 2003 to agree a proposal for a comparative review of alternatives to custody, the Committee will consider an interim report on the review.

4. **Work programme**: The Committee will consider its forward work programme.

5. **Civil Partnership Bill**: The Committee will give further consideration to its approach to the Bill.

6. **Emergency Workers (Scotland) Bill (in private)**: The Committee will consider a draft stage 1 report.

Alison Walker
Clerk to the Committee
Tel: 0131 348 5195
Papers for the meeting—

Agenda item 1
Note by the Clerk
Compiled submissions received on the proposed code
J1/S2/04/26/1
J1/S2/04/26/2

Agenda item 2
Note by the Clerk
J1/S2/04/26/3

Agenda item 3
Note by the Clerk
J1/S2/04/26/4

Agenda item 4
Note by the Clerk (TO FOLLOW)
J1/S2/04/26/5

Agenda item 5
Note by the Clerk (TO FOLLOW)
J1/S2/04/26/6

Agenda item 6
Note by the Clerk (PRIVATE PAPER) (TO FOLLOW)
Correspondence from Jackie Baillie MSP
J1/S2/04/26/7
J1/S2/04/26/8

Late papers from the 25th meeting, 2004—
Correspondence from the Scottish Executive
Correspondence from the Law Society of Scotland
J1/S2/04/25/11
J1/S2/04/25/12

Papers for information—
Scottish Executive Post-Council Report on the Justice and Home Affairs Council of EU Ministers, 8 June 2004
J1/S2/04/26/9
Note by the Clerk

Purpose of the proposed code

1. The Proposed Scottish Outdoor Access Code has been drawn up by Scottish Natural Heritage under section 10 of the Land Reform (Scotland) Act 2003 ("the Act") and approved, with modification, by Scottish Ministers.

Background

Land Reform (Scotland) Act 2003

2. Part 1 of the Act establishes statutory rights of responsible access to land and inland water for recreation and passage and other purposes.

Scottish Outdoor Access Code

3. Section 10 of the Act requires Scottish Natural Heritage (SNH) to draw up a proposed Scottish Outdoor Access Code setting out guidance on the rights and responsibilities of access for land managers and those exercising access rights.

4. Sections 10(3) and (5) of the Act requires that the proposed Code must be approved by Ministers and by the Parliament by affirmative resolution procedures before it can be issued by SNH.

5. The Code does not itself have any legal status. However, under section 28(1)(b) of the Act, a Sheriff may, in determining whether someone exercising access rights or managing land has done so responsibly, have regard to whether or not that person had disregarded the guidance set out in the Code.

Consultation

6. The Executive Note states that SNH undertook an extensive consultation on the proposed Code between 26 March and 30 June 2003. More than 1300 responses were received. SNH revised the proposed Code in light of comments received and it was approved by the SNH Board in December 2003. The proposed Code was then submitted to Scottish Ministers for their approval.

Approval by Scottish Ministers

7. The Executive Note also states that Scottish Ministers have made a number of amendments to the proposed Code to ensure that it conforms to statutory, policy and operational requirements of government departments and agencies. The Note further states that all of these amendments have been made in consultation with SNH and none are considered to be of substance. A version of the proposed Code showing the changes made by the Scottish Executive is attached at annex A.
Committee call for evidence

8. The Justice 1 Committee issued a call for written evidence on the proposed Code on 7 June 2004. A closing date for submission of comments was set for 21 June 2004. By that date 17 submissions had been received. These are compiled as paper J1/S2/04/26/2 and are also available to view on the Scottish Parliament website.

9. The majority of respondents welcome the proposed Code. However, many submissions raise questions or concerns about particular aspects of the Code and suggest that these should be raised by the Committee with the Minister.

Key issues

Liability

10. Academics from the University of Aberdeen Law School comment specifically on the provisions of the Code relating to liability. They welcome the relatively full treatment of liability in the proposed Code but raise concerns that there is no specific statement on the legal principle of ‘volenti non fit inuiria’, in terms of which it is a defence to an action by a person who has suffered injury or damage to show that the person willingly accepted the risk of injury or damage, knowing the risks involved but accepting them nonetheless. They suggest that without such a statement, the picture of liability could be regarded as incomplete. The need for a clear statement on liability was also raised by another respondent, Malcolm G Strang Steel.

Nature Conservation (Scotland) Act 2004

11. Several respondents ask for clarification of how the Nature Conservation (Scotland) Act 2004 relates to the Code and wider Land Reform (Scotland) Act. RSPB Scotland points out that the Code refers frequently to the Wildlife and Countryside Act 1981 which has been updated by the new Act. The RSPB questions whether the Code will be updated to take account of this. The Ramblers’ Association and Scottish Countryside Activities Council (SCAC) consider that provisions in the Nature Conservation (Scotland) Act relating to reckless disturbance and third party damage to designated sites could be used in an inappropriate way by land managers to undermine the intentions of the land reform legislation. The Scottish Countryside Rangers Association (SCRA) suggests that careful guidance will be required to ensure a consistency of approach and to avoid confusion and contradiction.

Updating the Code

12. SCRA asks for clarification on the timescales for reviewing the Code and also whether SNH or the Scottish Executive will be able to produce interim guidance notes when changes are made to relevant legislation. The Mountaineering Council of Scotland (MCoFS) raises a number of questions regarding the procedure for updating the Code including what role the National Access Forum will play in this and whether there will be consultation on any rewording.

Publicity and guidance

13. Several respondents consider that publicity and guidance on the Code will be very important. NFU Scotland submits that the promotion of the Code’s
general themes and messages to the wider public will be crucial to raise awareness of its content and expresses support for the work SNH is undertaking in this respect. Given the length of the Code, RSPB Scotland supports the intention to produce shorter, user-friendly, targeted ‘codes’ for specific groups or areas. Woodland Trust Scotland asks for more practical advice to be provided to land managers and for a ‘kite marking’ system for signs, advice notes and guides to ensure that they comply with the Code.

Access to fields with farm animals

14. NFU Scotland highlights a potential contradiction in the text regarding access to fields where there are horses, cattle and other farm animals. At paragraph 2.2 on page 7, the ninth bullet point suggests that access rights can be exercised in such fields. However, later in the document it is highlighted that there are a number of situations where accessing land with farm animals should be avoided. The SRPBA highlights the potential danger from cows with calves, whether or not a person is walking a dog. It suggests that in order to highlight this, paragraph 3.29 should be reworded to be consistent with the text in the box at the bottom of page 22. An individual respondent (submission no.1) also raises this issue.

Access to fields with crops

15. A number of submissions raise questions and concerns about people exercising access rights to fields with crops. The Scottish Rural and Property Business Association (SRPBA) considers that by encouraging people to use any ‘unsown ground’, the Code could encourage people to use ‘tramlines’, created by the wheels of agricultural machinery. The SRPBA considers that this should be specifically excluded. NFU Scotland considers that the term ‘unsown ground’ is unclear as people may not know what areas are unsown at particular times of the year. It suggests that the Code should advise keeping to paths or the edges of fields. The Ramblers’ Association Scotland also believes there is some uncertainty in the wording but takes a different view and asks the Committee to seek clarification from the Minister that responsible use of tramlines should be supported.

16. SCAC suggests that better advice and guidance would be welcome about the implementation of various agri-environment schemes and policies to make it clear that set aside land which attracts subsidy payments can be linked with access provision. SCRA submits that land managers may be confused about the relationship between regulations for such schemes and statutory access rights and asks for a clear statement about this.

Access to farmyards

17. NFU Scotland considers that the text relating to this subject remains contradictory highlighting that in two places the Code states that access rights do not apply while at another providing guidance as to circumstances under which access may be taken, albeit outside the right of access. It suggests that the Code needs to establish a consistent line. The SRPBA suggests that local authorities be encouraged to commit funds to re-route paths away from farmyards.

Crossing railway lines
18. The Ramblers’ Association, SCAC, Mountaineering Council of Scotland (MCofS) and the Scottish Canoe Association all raise concerns about the lack of guidance to the public in the proposed Code on how to cross railways. The Ramblers’ Association considers that this is particularly important where railway lines pass through areas of farmland, woodland or moorland where statutory rights will apply on both sides of the track and the public will expect to use any obvious crossing point to get from one side to the other. All four organisations consider that Network Rail is at fault as it has been unable to agree any guidance with SNH. MCofS considers the Code should also describe Network Rail’s responsibilities as a land manager. It also suggests that if suitable wording cannot be expressed at the current time, then this should be incorporated into the first revision of the Code following resolution of the dispute with Network Rail.

Access for disabled people

19. The Fieldfare Trust raises concerns that the proposed Code makes no substantive mention of the needs of disabled people despite specific mention of this in the Act. It considers that the Code could become a deterrent to disabled people venturing into the countryside if it gives the impression that the measure of reasonable behaviour is to be set by the capabilities of people without disabilities. The Trust suggests that the Code should include examples that refer to and cover the needs of disabled people. The Trust goes on to question whether any conflict could arise with the requirements of the Disability Discrimination Act 1995 and recommends that the Code clarifies responsibilities of land managers with regard to this Act. Finally, the Trust raises concerns that the proposed Code makes no mention of the specific requirements in the Land Reform (Scotland) Act for local authorities to take into account the needs of disabled people when planning, developing and managing access.

Customary access

20. The SRPBA highlights what it considers to be a lack of clarity regarding the definition of ‘customary access’. It suggests that the scope and operation of such access does vary from place to place but the Code gives the impression that it is of a fairly consistent nature where it is relevant. The Association believes that this needs to be corrected and the legal mechanisms explored in more detail. The Scottish Golf Union considers that references in the Code to customary access to golf courses for sledging should be removed as the Land Reform (Scotland) Act excludes such activities. In contrast, the Ramblers’ Association would like clarification that activities such as cross country skiing would be possible on golf courses under the basis of existing custom and tradition.

Environment and Rural Development Committee consideration

21. The Environment and Rural Development Committee considered the proposed Code at its meetings on 16 and 23 June. The Committee had the benefit of being able to see the submissions made in response to the Justice 1 Committee’s call for evidence. A letter from the Convener of the Committee, setting out its views is attached at annex B.
22. The Committee wishes to emphasise that it very much welcomes the proposed code and would strongly encourage the Justice 1 Committee to recommend its approval. The letter also raises a number of points which the Committee hopes the Justice 1 Committee can clarify with the Minister. These relate to guidance on signage, interaction between the provisions of the Land Reform (Scotland) Act 2003 and the Nature Conservation (Scotland) Act 2004, guidance on access for those undertaking commercial activities, liability of landowners and managers in respect of those taking access and dissemination of the Code in an accessible form.

**Commencement of access rights**

23. The access rights established by Part 1 of the Act cannot come into effect until the proposed Code has been approved by the Parliament. The Executive Note states that it is hoped that Part 1 can be commenced in autumn 2004. This commencement would be made by order.

**Financial consequences**

24. The Scottish Executive’s note suggests that the Code will have no financial effects on the Scottish Executive, local government or on business.

**Subordinate Legislation Committee**

25. The Subordinate Legislation Committee considered the proposed Code at its meeting on 8 June 2004 and determined that the attention of the Parliament need not be drawn to it (Subordinate Legislation Committee, 25th Report, 2004 (Session 2)).

**Procedure**

26. The Justice 1 Committee has been designated lead committee and is required to report to the Parliament by 6 September 2004.

27. The proposed Code was laid on 1 June 2004. Under Rule 10.6.1(a), the Code being subject to affirmative resolution before it can be made, it is for the Justice 1 Committee to recommend to the Parliament whether the instrument should be approved. The Minister for Environment and Rural Development has, by motion S2M-1455 (set out in the agenda), proposed that the Committee recommends the approval of the Proposed Code. The Deputy Minister for Environment and Rural Development will attend in order to speak to and move the motion. The debate may last for up to 90 minutes.

28. 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.

**Consideration by the Parliament**

29. The proposed Code will be considered by the Parliament on Thursday 1 July 2004.
Scottish Outdoor Access Code

Proposed Code

Public access to the outdoors: your rights and responsibilities
Contents

1 Introduction
This part provides an introduction to statutory access rights and responsibilities, sets out three key principles to underpin the definition of responsible behaviour within the Code, and briefly explains the purpose and status of the Code.

2 Access rights
This part describes where, when and for what activities you can exercise access rights, where these rights do not apply and which activities fall outside their scope.

3 Exercising access rights responsibly
This part explains how people can exercise access rights responsibly. The main responsibilities are then described:
   a) take responsibility for your own actions (paragraphs 3.8 to 3.12);
   b) respect people's privacy and peace of mind (paragraphs 3.13 to 3.21);
   c) help land managers to work safely and effectively (paragraphs 3.22 to 3.42);
   d) care for your environment (paragraphs 3.43 to 3.52);
   e) keep your dog under proper control (paragraphs 3.53 to 3.56); and,
   f) take extra care if you are organising an event or running a business (paragraphs 3.57 to 3.64).

4 Managing land and water responsibly for access
This part explains how land managers can manage their land and water responsibly in relation to access rights. The main responsibilities are then described:
   a) respect access rights when managing your land or water (paragraphs 4.7 to 4.10);
   b) act reasonably when asking people to avoid land management operations (paragraphs 4.11 to 4.17);
   c) work with your local authority and other bodies to help integrate access and land management (paragraphs 4.18 to 4.22); and
   d) take account of access rights if you manage contiguous land or water (paragraphs 4.22 to 4.25).

5 A practical guide to access rights and responsibilities
This part provides a practical guide to help people decide what best to do in everyday situations, including canoeing, cycling, deer stalking, farmyards, fields, fishing, forests and woods, golf courses, grouse shooting, horse riding, sporting events and wild camping.

6 Where to get help and information
This part summarises where you can get more advice and information, how access and recreation can be managed, and what you should do if you encounter someone behaving irresponsibly.

Annex 1 – Existing criminal offences created by statute
This annex provides an overview of the main criminal offences created by statute.

Index
Part 1. Introduction

Statutory access rights and responsibilities

1.1 Scotland’s outdoors, extending from the parks and open spaces in our towns to the remote and wild areas of land and water in the Highlands, provides great opportunities for open-air recreation and education. Open-air recreation provides people with great benefits for their health and well-being and contributes to the good of society in many other ways. Part 1 of the Land Reform (Scotland) Act 2003 gives everyone statutory access rights to most land and inland water. People only have these rights if they exercise them responsibly by respecting people’s privacy, safety and livelihoods, and Scotland’s environment. Equally, land managers have to manage their land and water responsibly in relation to access rights.

1.2 The Scottish Outdoor Access Code provides detailed guidance on the responsibilities of those exercising access rights and of those managing land and water. By doing so, the Code provides a practical guide to help everyone make informed decisions about what best to do in everyday situations, and provides the starting point for short promotional codes and more detailed advice.

1.3 The Code is based on three key principles and these apply equally to the public and to land managers.

- **Respect the interests of other people.** Acting with courtesy, consideration and awareness is very important. If you are exercising access rights, make sure that you respect the privacy, safety and livelihoods of those living or working in the outdoors, and the needs of other people enjoying the outdoors. If you are a land manager, respect people’s use of the outdoors and their need for a safe and enjoyable visit.

- **Care for the environment.** If you are exercising access rights, look after the places you visit and enjoy, and leave the land as you find it. If you are a land manager, help maintain the natural and cultural features which make the outdoors attractive to visit and enjoy.

- **Take responsibility for your own actions.** If you are exercising access rights, remember that the outdoors cannot be made risk-free and act with care at all times for your own safety and that of others. If you are a land manager, act with care at all times for people’s safety.

The status of the Code

1.4 This Code has been approved by Ministers and the Scottish Parliament. The detailed guidance in the Code should help to ensure that few problems arise. However, if there is a problem, the Code is expected to be a reference point for determining whether a person has acted responsibly. For example, where a dispute cannot be resolved and is referred to the Sheriff for determination, the Sheriff will consider whether the guidance in the Code has been disregarded by
any of the parties. In this sense, the Code may be said to have evidential status. Failure to comply with the Code, however, is not, of itself, an offence.

1.5 Although the Code provides guidance on access rights and responsibilities, it is not an authoritative statement of the law. Only the courts can provide this. Wherever possible, the Code makes use of examples to help illustrate what a particular responsibility means. These examples are not meant to be exhaustive.

1.6 Advice on where to get help and information is provided in Part 6 of the Code.

Some key terms

1.7 Throughout the Code, references are made to six general terms for convenience:

- **Land manager.** The Land Reform (Scotland) Act 2003 refers to owners and occupiers, and these include landowners, farmers, crofters, tenants, foresters and fishery owners. In some circumstances, this may include those acting for owners or occupiers where these other parties have possession of the land (for example, land agents and contractors). Many public bodies (see below) and voluntary bodies, such as the National Trust for Scotland, Royal Society for the Protection of Birds and the John Muir Trust, are also owners and occupiers of land. The term “land manager” is used to cover all of these types of owner and occupier.

- **Outdoors.** This term includes mountains, moorland, farmland (enclosed and unenclosed), forests, woods, rivers, lochs and reservoirs, beaches and the coastline, and open spaces in towns and cities.

- **Public body.** This term includes all Government Departments (including the Scottish Executive, Ministry of Defence and NHS Boards), local authorities and the national park authorities. It also includes a wide range of public agencies with a role in providing access, in managing land or water, or in promoting access to the outdoors, including Scottish Natural Heritage, British Waterways, Forestry Commission, VisitScotland, SportScotland, Scottish Water, the local enterprise companies and the area tourist boards.

- **Local authorities.** References to local authorities should be taken to include the national park authorities. Both local authorities and national park authorities have the same duties and powers under Part 1 of the Land Reform (Scotland) Act 2003. Therefore, within a national park it is the national park authority, rather than the local authority, which has the relevant duties and powers under the Act.

- **Access rights.** This term means the statutory access rights established under the Land Reform (Scotland) Act 2003 unless stated otherwise.

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1 Although legal offences do exist for many types of irresponsible or anti-social behaviour (see paragraphs 2.12 and 2.13, and Annex 1).
- **Core paths.** Local authorities have powers to establish and maintain core paths. It is the duty of each local authority to draw up a plan for a system of core paths to give the public reasonable access throughout their area.

- **Land/Land and inland water.** Access rights apply to most land and inland water. References to land should be taken to include inland water.
Part 2. Access rights

A summary of your access rights

1. Everyone, whatever their age or ability, has access rights established by the Land Reform (Scotland) Act 2003. You only have access rights if you exercise them responsibly.

2. You can exercise these rights, provided you do so responsibly, over most land and inland water in Scotland, including mountains, moorland, woods and forests, grassland, margins of fields in which crops are growing, paths and tracks, rivers and lochs, the coast and most parks and open spaces. Access rights can be exercised at any time of the day or night.

3. You can exercise access rights for recreational purposes (such as pastimes, family and social activities, and more active pursuits like horse riding, cycling, wild camping and taking part in events), educational purposes (concerned with furthering a person’s understanding of the natural and cultural heritage), some commercial purposes (where the activities are the same as those done by the general public) and for crossing over land or water.

4. Existing rights, including public rights of way and navigation, and existing rights on the foreshore, continue.

5. The main places where access rights do not apply are:
   - houses and gardens, and non-residential buildings and associated land;
   - land in which crops are growing;
   - land next to a school and used by the school;
   - sports or playing fields when these are in use and where the exercise of access rights would interfere with such use;
   - land developed and in use for recreation and where the exercise of access rights would interfere with such use;
   - golf courses (but you can cross a golf course provided you don’t interfere with any games of golf);
   - places like airfields, railways, telecommunication sites, military bases and installations, working quarries and construction sites; and
   - visitor attractions or other places which charge for entry.

6. Local authorities can formally exempt land from access rights for short periods. Local authorities and some other public bodies can introduce byelaws.

7. Access rights do not extend to:
   - being on or crossing land for the purpose of doing anything which is an offence, such as theft, breach of the peace, nuisance, poaching, allowing a dog to worry livestock, dropping litter, polluting water or disturbing certain wild birds, animals and plants;
   - hunting, shooting or fishing;
   - any form of motorised recreation or passage (except by people with a disability using a vehicle or vessel adapted for their use);
   - anyone responsible for a dog which is not under proper control; or to
   - anyone taking away anything from the land for a commercial purpose.

8. Statutory access rights do not extend to some places or to some activities that the public have enjoyed on a customary basis, often over a long period of time. Such access is not affected by the Land Reform (Scotland) Act 2003 and will continue.
Introduction

2.1 The Land Reform (Scotland) Act 2003 establishes access rights and these must be exercised responsibly. This part of the Code summarises where and when you can exercise these rights and for what purposes, and lists those areas where, and activities to which, access rights do not apply. Understanding the extent of access rights will help you to exercise them responsibly.

Where and when you can exercise access rights

2.2 Everyone, whatever their age or ability, can exercise access rights over most land and inland water in Scotland, at any time of day or night, providing they do so responsibly\(^2\). These rights do not extend to all places or to all activities (see paragraphs 2.11 to 2.15). Provided you do so responsibly (see Parts 3 and 5 of the Code), you can exercise access rights in places such as:

- hills, mountains and moorland;
- woods and forests;
- most urban parks, country parks and other managed open spaces;
- rivers, lochs, canals and reservoirs;
- riverbanks, loch shores, beaches and the coastline;
- land in which crops have not been sown;
- on the margins of fields\(^3\) where crops are growing or have been sown;
- grassland, including grass being grown for hay or silage (except when it is at such a late stage of growth that it is likely to be damaged);
- fields where there are horses, cattle and other farm animals;
- on all core paths agreed by the local authority\(^4\);
- on all other paths and tracks where these cross land on which access rights can be exercised;
- on grass sports or playing fields, when not in use, and on land or inland water developed or set out for a recreational purpose, unless the exercise of access rights would interfere with the carrying on of that recreational use;
- golf courses, but only for crossing them and providing that you do not take access across greens or interfere with any games of golf;
- on, through or over bridges, tunnels, causeways, launching sites, groynes, weirs, boulder weirs, embankments of canals and similar waterways, fences, walls or anything designed to facilitate access (such as gates or stiles).

2.3 You can also exercise access rights above\(^5\) or below the land (for example, you can exercise access rights in the air and in caves). Access rights apply under water as well as on the surface.

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\(^2\) Sections 1 and 2, Land Reform (Scotland) Act 2003

\(^3\) Section 7(10) of the Land Reform (Scotland) Act 2003 states land on which crops are growing does not include “headrigs, endrigs or other margins of fields in which crops are growing”.

\(^4\) Local authorities must produce, within three years of the legislation coming into force, core path plans setting out their proposals for a system of paths — called “core paths” — sufficient for the purpose of giving the public reasonable access throughout their areas.

\(^5\) Subject to any regulations governing the use of air space in any particular place.
2.4 You can exercise access rights at any time of the day or night, provided you do so responsibly. The Code provides specific guidance on responsible access at night (see paragraphs 3.19 and 3.20).

2.5 Access rights do not apply on some types of land and these are described in paragraph 2.11. Where some land management operations are taking place, such as crop spraying or tree felling and harvesting, you might be asked to avoid using particular routes or areas for your own safety (see paragraphs 3.24 to 3.28). In some places, local authorities and some other public bodies may have introduced byelaws or other statutory regulations which might affect how you can exercise access rights (see paragraph 2.11).

What you can do under access rights

2.6 You can exercise access rights for recreational purposes, some educational activities and certain commercial purposes, and for crossing over land and water.

2.7 “Recreational purposes” is not defined in the legislation. It is taken to include:

- **pastimes**, such as watching wildlife, sightseeing, painting, photography and enjoying historic sites;
- **family and social activities**, such as short walks, dog walking, picnics, playing, sledging, paddling or flying a kite;
- **active pursuits**, such as walking, cycling, horse riding and carriage driving, rock climbing, hill-walking, running, orienteering, ski touring, ski mountaineering, caving, canoeing, swimming, rowing, windsurfing, sailing, diving, air sports and wild camping; and
- **participation in events**, such as walking or cycling festivals, hill running races, mountain marathons, mountain biking competitions, long-distance riding events, orienteering events and canoeing competitions.

2.8 Access rights extend to any educational activities concerned with furthering a person’s understanding of the natural or cultural heritage. For example, access rights would extend to the students, leader and any support staff on a visit to the outdoors to learn about wildlife or landscapes or geological features. People carrying out field surveys of the natural or cultural heritage, such as of birds or plants, as a recreational activity or for educational purposes, are covered by access rights (see paragraph 3.64).

2.9 Access rights extend to activities carried out commercially or for profit, provided that these activities could also be carried on other than commercially or

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6 Section 1, Land Reform (Scotland) Act 2003. Natural heritage is defined as including the flora and fauna of the land, its geological and physiographical features and its natural beauty and amenity. Cultural heritage is defined as including structures and other remains resulting from human activity of all periods, traditions, ways of life and the historic, artistic and literary associations of people, places and landscapes.
for profit (ie by the general public for recreational purposes or for educational activities or for crossing land). For example, a mountain guide who is taking a customer out hill-walking is carrying on a commercial activity but this falls within access rights because the activity involved – hill-walking – could be done by anyone else exercising access rights. The same would apply to a canoe instructor from a commercial outdoor pursuits centre with a party of canoeists. Other examples would be a commercial writer or photographer writing about or taking photographs of the natural or cultural heritage.

2.10 Access rights can also be used to cross land and inland water. This means going into land or inland water, passing over it and then leaving it for the purpose of getting from one place to another place, and is not limited to recreational purposes or educational activities. Access rights for recreational purposes, for relevant educational activities and for relevant commercial purposes refer to going into, passing over and remaining on land or inland water for these purposes and then leaving it.

Where do access rights not apply?

2.11 Access rights do not apply in the following places.

- Land on which there is a house, caravan, tent or other place affording a person privacy or shelter, and sufficient adjacent land to enable those living there to have reasonable measures of privacy and to ensure that their enjoyment of the house or place is not unreasonably disturbed. The extent of this land may depend on the location and characteristics of the house (see paragraphs 3.13 to 3.17).

- Gardens which are separated from houses but only accessible to the residents who have common rights in them (these are usually found in cities such as Edinburgh and Glasgow).

- Land on which there is a building or other structure or works, plant or fixed machinery, and land which forms the curtilage of a building or which forms a compound or other enclosure containing any structure, works, plant or fixed machinery. Examples of non-residential buildings and structures include: farm buildings and yards; animal and bird rearing pens; sports centres, pavilions and stands; club houses; factories; warehouses and storage areas; military bases and other installations; pipelines; chemical and other processing plants; canal locks and lifts; water treatment and sewage works; horticultural nurseries; and, fish farms and hatcheries.

- Land in which crops have been sown or are growing. Crops are taken to include cereals (such as wheat and barley), vegetables (such as potatoes, turnips and cabbages), fruits (such as strawberries and raspberries). Grass being grown for hay or silage and which is at such a late stage of growth that it is likely to be damaged by you exercising access rights is a crop (see paragraph 3.37).

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7 Sections 6 and 7, Land Reform (Scotland) Act 2003
8 However, you can exercise statutory access rights on the margins of fields, along paths and tracks, and on any unsown ground (see paragraphs 2.2 and 3.35 to 3.37).
- Grass sports pitches or playing fields whilst they are in use for their intended purpose (for example, you cannot exercise your access rights on a grass football field whilst there is a football match in progress).

- Any sports pitch or playing field with an artificial surface (such as synthetic grass or rubber), whether or not in use.

- On golf greens, bowling greens, cricket squares, lawn tennis courts or other similar area on which grass is grown and prepared for a particular recreational purpose, whether or not in use.

- Land or water that has been developed or set out for a recreational purpose, whilst in use and where your exercise of access rights would interfere with the recreational use intended for that land, such as horse racing gallops\(^9\).

- On land contiguous to any school and used by that school (such as a playing field).

- Places where you have to pay to go in\(^10\), such as castles, historic houses and gardens, historic sites, and visitor attractions.

- Building, civil engineering or demolition sites.

- Railway and airfield infrastructure and airports.

- Working quarries and other surface workings.

- Land or water where public access is, by or under any other legislation, prohibited, excluded or restricted. This would normally be for safety grounds or public security reasons\(^11\). In some places, byelaws, management rules or other regulations may have been introduced by a local authority or other similar public body and these may affect how you can exercise access rights. All byelaws need to be consistent with the access provisions in the Land Reform (Scotland) Act 2003\(^12\).

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\(^9\) Section 7 (8) of the Land Reform (Scotland) Act 2003 states that this does not include land on which groynes have been constructed, deepening of pools has been undertaken, fishing platforms have been erected or where other works for the purposes of fishing have taken place. Access rights can therefore be exercised in these places.

\(^10\) Section 6 (1)(f) of the Land Reform (Scotland) Act 2003 states that these are places where the public were admitted only on payment on at least 90 days in the year to 31 January 2001 and on at least 90 days in each year thereafter.

\(^11\) For example, military bases and other installations. On other land or water managed by the Ministry of Defence there is usually a presumption in favour of recreational access wherever this is compatible with the primary military purpose. Follow any local information on access to such land. See Part 5 for further information.

\(^12\) Local authorities and some other public bodies (see paragraph 6.7) can introduce byelaws. Section 30, Land Reform (Scotland) Act 2003 states that all byelaws must be reviewed and, if necessary, modified by the appropriate local authority or public body so that they are consistent with the provisions in the Act. This must be done within two years of the Act coming into force.
Land exempted from access rights through an order made by a local authority (for exemptions lasting for six or more days, the order needs to be confirmed by Ministers and be subject to public consultation)\(^\text{13}\).

What activities are excluded from access rights?

2.12 Access rights must be exercised in ways that are lawful and reasonable. By definition this excludes any unlawful or criminal activity from the time at which it occurs. Furthermore, being on or crossing land for the purpose of doing anything which is an offence or a breach of an interdict or other order of a court is excluded from access rights. This means that a person intent on such a purpose is excluded from access rights at the time they seek to enter the land. This is also taken to include the carrying of any firearm, except where the person is crossing land or water to immediately access land or water, or return from such, where shooting rights are granted, held or held in trust or by any person authorised to exercise such rights.

2.13 A list of the more obvious statutory offences relating to people’s behaviour is provided at Annex 1. This list includes poaching, vandalism, not clearing up after your dog has fouled in a public place, being responsible for a dog worrying livestock, dropping litter, polluting water, and disturbing wild birds, animals and plants. There are also common law offences such as breach of the peace.

2.14 The Land Reform (Scotland) Act 2003 excludes some other conduct from access rights\(^\text{14}\), including:

- Hunting, shooting or fishing. These activities still require the permission of the relevant owner.
- Motorised activities, such as motor biking and scrambling, off-road driving, the use of any powered craft on water, microlighting, and the use of powered model craft. These activities still require the permission of the relevant owner or manager. Access rights, however, do extend to a person with a disability who is using a motorised vehicle or vessel built or adapted for use by that person\(^\text{15}\).
- Being on or crossing land while responsible for a dog that is not under proper control (see paragraph 3.55).
- Being on or crossing land or water for the purpose of taking away, for commercial purposes or for profit, anything in or on the land or water (for example, mushrooms or berries picked for commercial use, or gravel and stones).

What about public rights of way and navigation?

2.15 Public rights of way are different from access rights and have been recognised in Scots law for centuries and are a valuable part of our cultural

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\(^{13}\) Section 11, Land Reform (Scotland) Act 2003. This power might need to be used for some sporting events, such as motorised hill trials, car rallies and water skiing competitions, and some other events, such as agricultural shows, car boot sales, music festivals, wedding receptions and events involving the sale of goods or catering.

\(^{14}\) Section 9, Land Reform (Scotland) Act 2003

\(^{15}\) Subject to the Highway Code being adhered to.
heritage. For a right of way to be established under the common law, it must run from one public place to another public place along a more or less defined route (it need not be an identifiable path), and it must have been used openly and peaceably by the public, otherwise than with the permission, express or implied, of the landowner, for at least 20 years. Many rights of way have been established for walkers only, but some have been established for use by horse riders and cyclists, and a small number exist for motorised vehicular use.

2.16 All public rights of way will continue to exist and are unaffected by the Land Reform (Scotland) Act 2003. You can exercise access rights over public rights of way where these routes pass over the land listed in paragraph 2.2. Where a public right of way passes over land excluded from access rights, such as the land associated with a building or land on which crops are growing, you can still use the route as a right of way. Although access rights do not extend to the use of motorised vehicles, you can still use a vehicular right of way where it has been established.

2.17 Existing public rights of navigation will continue on navigable lochs and rivers.

What about public rights on the foreshore?

2.18 Public rights on the foreshore and in tidal waters will continue to exist. These have not been fully defined but include shooting wildfowl, fishing for sea fish, gathering some uncultivated shellfish, lighting fires, swimming, playing on the sand and picnicking. Access rights also extend to these places.

What about activities and places not covered by access rights?

2.19 Provided you exercise them responsibly, access rights established by the Land Reform (Scotland) Act 2003 are wide-ranging in terms of the places and activities that they extend to. Nonetheless, access rights do not apply to some places where the public have enjoyed access perhaps over a long period of time. Examples include passing through some farmyards and across some dams. Certain activities that are not included in statutory access rights have also been practiced for a long time by the public, such as gathering natural berries or fruit for personal use or sledging on some golf courses. Such access and activities are not affected by the Land Reform (Scotland) Act 2003.

16 Information on rights of way is available from local authorities. Also see www.access-scotland.com for links to other appropriate bodies.
17 Section 5, Land Reform (Scotland) Act 2003
18 The foreshore is the land between the upper and lower ordinary spring tides.
3. Exercising access rights responsibly

Exercising access rights responsibly: at a glance

You must exercise access rights responsibly and this part of the Code explains how you can do this. A summary of your main responsibilities is provided below.

1. Take personal responsibility for your own actions. You can do this by:
   - caring for your own safety by recognising that the outdoors is a working environment and by taking account of natural hazards;
   - taking special care if you are responsible for children as a parent, teacher or guide to ensure that they enjoy the outdoors responsibly and safely.

2. Respect people’s privacy and peace of mind. You can do this by:
   - using a path or track, if there is one, when you are close to a house or garden;
   - if there is no path or track, by keeping a sensible distance from houses and avoiding ground that overlooks them from close by;
   - taking care not to act in ways which might annoy or alarm people living in a house; and
   - at night, taking extra care by keeping away from buildings where people might not be expecting to see anyone and by following paths and tracks.

3. Help land managers and others to work safely and effectively. You can do this by:
   - not hindering a land management operation, by keeping a safe distance and following any reasonable advice from the land manager;
   - following any precautions taken or reasonable recommendations made by the land manager, such as to avoid an area or route when hazardous operations, such as tree felling and crop spraying, are underway;
   - checking to see what alternatives there are, such as neighbouring land, before entering a field of animals;
   - never feeding farm animals;
   - avoiding causing damage to crops by using paths or tracks, by going round the margins of the field, by going on any unsown ground or by considering alternative routes on neighbouring ground; and by
   - leaving all gates as you find them.

4. Care for your environment. You can do this by:
   - not intentionally or recklessly disturbing or destroying plants, birds and other animals, or geological features;
   - following any voluntary agreements between land managers and recreation bodies;
   - not damaging or disturbing cultural heritage sites;
   - not causing any pollution and by taking all your litter away with you.

5. Keep your dog under proper control. You can do this by:
   - never letting it worry or attack livestock;
   - never taking it into a field where there are calves or lambs;
   - keeping it on a short lead or under close control in fields where there are farm animals;
   - if cattle react aggressively and move towards you, by keeping calm, letting the dog go and taking the shortest, safest route out of the field;
   - keeping it on a short lead or under close control during the bird breeding season (usually April to July) in areas such as moorland, forests, grassland, loch shores and the seashore;
   - picking up and removing any faeces if your dog defecates in a public open place.

6. Take extra care if you are organising an event or running a business. You can do this by:
   - contacting the relevant land managers if you are organising an educational visit to a farm or estate;
   - obtaining the permission of the relevant land managers if your event needs facilities or services, or is likely, to an unreasonable extent, to hinder land management operations, interfere with other people enjoying the outdoors or affect the environment;
• talking to the land managers who are responsible for places that you use regularly or intensively.
What is responsible behaviour?

3.1 You share the outdoors with other people who earn their living from it or who live there or who enjoy it in other ways, and also with Scotland’s diverse wildlife. You are exercising access rights responsibly\(^\text{19}\) if you:

- do not interfere unreasonably with the rights of other people; and
- act lawfully and reasonably, and take proper account of the interests of others and of the features of the land.

3.2 If you follow the guidance in this part of the Code, then you will be exercising access rights responsibly and not causing unreasonable interference. Part 5 of the Code provides a practical guide to your rights and responsibilities, and to the responsibilities of land managers, for many everyday situations.

3.3 If you do not follow the guidance, then you could cause unreasonable interference. This could result in some form of damage (such as breaking a fence or trampling crops) or significant disturbance (such as hindering a land management operation, blocking a gate with a vehicle or intentionally or recklessly disturbing a wild animal). In these sorts of cases, you may fall outwith access rights and you could be asked to leave the land or water you are visiting. In some cases, you might also be committing a criminal offence (see paragraphs 2.12-2.13 and Annex 1).

3.4 In practice, exercising access rights responsibly is about making informed decisions about what it is reasonable to do in everyday situations. The responsibilities that follow reflect this. You also need to be aware that whilst you might visit a place only occasionally and feel that you cause no harm, the land manager or the environment might have to cope with the cumulative effects of many people. Acting with awareness and common sense underpins responsible behaviour.

3.5 Access rights apply both on and off paths but must be exercised responsibly. However, when you are close to houses or other occupied buildings, or in fields of crops, or in places where the environment is particularly vulnerable to damage, it may be sensible to follow paths and tracks where they exist. Doing so can help to facilitate access and help to safeguard the interests of land managers and the environment.

3.6 Land managers must not interfere unreasonably with your exercise of access rights. Their responsibilities are set out in Section 4.

3.7 In exercising access rights, there are six general responsibilities and this Part of the Code provides guidance on how to meet them. They apply regardless of your activity and the type of place you are visiting. These six responsibilities are described below.

\(^{19}\) Section 2, Land Reform (Scotland) Act 2003
\(^{21}\) For example, Occupiers’ Liability (Scotland) Act 1960 and the Health & Safety At Work Act 1974.
Take responsibility for your own actions

3.8 Land managers owe a duty of care to people entering onto their land\(^{21}\). The Land Reform (Scotland) Act 2003\(^{22}\) states that the extent of the duty of care owed by a land manager to another person present on land or water is not affected by the access provisions within the Act. This means that access rights do not alter the nature of the liability owed by a land manager.

3.9 Members of the public owe a duty of care to land managers and to other people. Adapting your behaviour to prevailing circumstances and using common sense will help to avoid incidents or accidents. If your recreation is one which is likely to cause a hazard (for example, cycling fast or driving a cart or carriage with horses or dogs) you should take particular care not to cause risk to others. If you are on shared-use routes you must show care and consideration for others, deferring to those who are most vulnerable.

3.10 It is important to remember that the outdoors is not risk-free. The outdoors is a working environment, used for many activities, such as farming and forestry. Cattle and other farm animals can react aggressively in some situations, and fences and walls are needed to keep cattle and other animals in a field. Land managers may put up signs asking you to avoid using a particular path or area whilst land management operations, such as tree felling or crop spraying, are underway. Take care to read such signs and pay attention to the advice given.

3.11 There are also many natural hazards, such as uneven ground, rough paths, cliffs, steep and rocky ground, fast-flowing rivers and deep water with undercurrents. For some activities, such as mountaineering and canoeing, these challenges provide the basis for people’s enjoyment of the outdoors. Whatever your activity, you need to take account of natural hazards, use common sense and take care. There is a longstanding legal principle called “volenti non fit injuria” which means that a person taking access will generally be held to have accepted any obvious risks or risks which are inherent in the activities they are undertaking.

3.12 Remember that children do not always have the experience to make good judgements on what to do in certain situations. If you are responsible for children, either as a parent, teacher or guide, take special care to ensure that they enjoy the outdoors responsibly and safely.

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\(^{21}\) Section 5(2), Land Reform (Scotland) Act 2003.
\(^{22}\) Section 6 (1)(b)(iv), Land Reform (Scotland) Act 2003
Key points to remember in taking responsibility for your own actions:

- care for your own safety by recognising that the outdoors is a working environment and by taking account of natural hazards; and
- take special care, if you are responsible for children as a parent, teacher or guide, to ensure that they enjoy the outdoors responsibly and safely.

Respect people’s privacy and peace of mind

Houses and gardens

3.13 Everyone is entitled to a reasonable measure of privacy in their own home and garden. In exercising access rights, particularly if you are close to a house or garden, you must respect people’s privacy. You should also avoid unreasonably disturbing their peace of mind.

3.14 For this reason, the Land Reform (Scotland) Act 2003 states that you cannot exercise access rights on “sufficient adjacent land” next to a house (this also includes a caravan, tent or other place affording a person privacy or shelter). This means land sufficient to allow those living there to have reasonable measures of privacy and to ensure that their enjoyment of their house is not unreasonably disturbed\(^2\). There are two important things to remember:

- you cannot exercise access rights in this area of “sufficient adjacent land” and so you need to be able to identify such areas; and
- when exercising access rights close to a house or a garden, you need to respect the privacy and peace of people living there.

3.15 ‘Sufficient adjacent land’ is defined in this Code as normally being the garden around someone’s house. For most houses, this should be reasonably obvious on the ground: a formal garden next to the house and surrounded by a wall, hedge or fence. Some houses might have no garden at all or be located right next to a road, track or path. In some cases, the garden might be near to the house but not adjoining it or it might be more difficult to identify, perhaps because there is no obvious boundary such as a wall, fence or hedge. Things to look out for in judging whether an area of land close to a house is a garden or not include:

- a clear boundary, such as a wall, fence, hedge or constructed bank, or a natural boundary like a river, stream or loch;
- a lawn or other area of short mown grass;
- flowerbeds and tended shrubs, paving and water features;
- sheds, glasshouses and summer houses;
- vegetable and fruit gardens (often walled but sometimes well away from houses).
3.16 Some larger houses are surrounded by quite large areas of land referred to as the “policies” of the house. These are usually areas of grassland, parkland or woodland. Here, too, you will need to make a judgement in the light of the particular circumstances. Parts of the policies may be intensively managed for the domestic enjoyment of the house and include lawns, flowerbeds, paths, seats, sheds, water features and summerhouses. Access rights would not extend to these intensively managed areas. The wider, less intensively managed parts of the policies, such as grassland and woodlands, whether enclosed or not, would not be classed as a garden and so access rights can be exercised. In these areas of grassland, parkland or woodland, you can also exercise access rights along driveways, except where the ground becomes a garden, and pass by gatehouses and other buildings.

3.17 When close to a house or garden, you can respect people’s privacy and peace of mind by:

- using a path or track if there is one;
- keeping a sensible distance from the house, and avoiding ground that overlooks the house or garden from close by, if there is no path or track;
- keeping a sensible distance from a waterside house if you are on a river or loch;
- not lingering or acting in ways which might annoy or alarm people living in the house; and
- keeping noise to a minimum.

Other buildings and their curtilage

3.18 Access rights do not extend to the curtilage of any other building. Generally, such land will normally be closely connected, physically and in terms of purpose, to the building and forming one enclosure with it. It will usually be possible to judge what is the curtilage of a building by the presence of some physical feature such as a wall, fence, an area of hardstanding or some other physical boundary. Where there is no physical feature, you will need to make a judgement about what land is used together with a building. When exercising access rights close to such buildings, use your common sense and remember to respect the privacy and peace of mind of those working there.

Access at night

3.19 Access rights can be exercised at any time of day or night. There are many reasons why people take access at night, including the valuable recreational experience it can provide, the need to do so during the winter or at other times of the year when remoter places are being visited, and to get home late at night. In exercising access rights at night, please remember that residents can be fearful for their personal security and safety and of possible criminal activities being carried out under the cover of darkness, and so your presence might be misunderstood. Also remember that, in some places, land managers might be carrying out work such as pest control at night. Natural and man-made hazards will also be less obvious.
3.20 If you are out at night, take extra care to respect people’s privacy and peace of mind. Wherever possible, keep away from buildings and use paths and tracks where they exist. If you come to a field of animals, it might be better to go into a neighbouring field or on to adjacent land. Take extra care when going over fences, gates, drystane dykes and other similar features.

Public rights of way

3.21 You can still use public rights of way that run through gardens or along driveways, or which pass next to houses.

<table>
<thead>
<tr>
<th>Key points to remember in respecting people’s privacy and peace of mind:</th>
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<tbody>
<tr>
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<td>them from close by, if there is no path or track;</td>
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<td>and by following paths and tracks.</td>
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Help land managers and others to work safely and effectively

3.22 The outdoors is mostly a working environment that provides a livelihood for many people, including farmers, crofters, gamekeepers, foresters and estate owners. Damage and disturbance can cost people and their businesses both time and money. By law, land managers must take reasonably practicable steps to ensure that the public is not put at risk by their work. Therefore, in exercising your access rights you need to help land managers to work safely and effectively, particularly when you:

▪ come across land management operations;
▪ encounter farm animals;
▪ wish to go into or through a field of crops; and
▪ come across gates, fences, walls and other similar features.

3.23 Guidance on what to do in these situations is provided below. Guidance is also provided about what to do when you wish to follow a path or track through

25 Health & Safety at Work Act 1974
farmyards and land associated with other buildings where access rights do not apply. Practical guidance on what to do when you encounter land use activities like deer stalking, grouse shooting, low-ground shooting and fishing is provided in Part 5.

- Access over land on which a management operation is underway

3.24 Land managers need to conduct their work as safely and effectively as possible. Hindering such work can cost them time and money, and can be potentially hazardous to your safety and to the safety of those working on the land. Under the Health & Safety at Work Act 1974, land managers need to take reasonably practicable steps to protect people’s safety. Most situations will be adequately dealt with by recommendations and advice, but in a limited number of cases, such as during and after spraying crops in a field with sulphuric acid or pesticides, they can be under a legal obligation to ensure that unprotected people are kept out of the field for a specified period of time, ranging from a few hours to four days in the case of sulphuric acid.

3.25 Much of the work of land managers is clearly visible when it is in progress and usually poses only very localised and obvious dangers, or lasts only for a short time. These activities include:

- ploughing fields, and sowing and harvesting crops;
- planting trees or hedges, or cutting down branches;
- moving animals from field to field or to farm buildings;
- muirburn;
- cutting grass on playing fields or golf courses;
- erecting fences, walls, hedges and gates;
- routine water discharges from reservoirs and canals, and routine maintenance and repairs on reservoirs, canals or water intakes; and
- dredging in rivers, canals and lochs.

3.26 If you come across such work whilst it is in progress, proceed carefully and keep a safe distance. The land manager might ask you to follow a particular route, and following this advice can help to minimise risk to your safety and that of others. Do not climb over any stored materials, such as straw bales or timber stacks, or any machinery.

3.27 In a limited number of cases, the hazards can be more serious or less obvious, such as:

- crops being or have been recently sprayed with pesticides;
- trees being felled and harvested in a forest;
- military training or land with unexploded munitions;
- dangerous materials being used or stored.

In these sorts of cases, land managers must undertake a risk assessment and take reasonably practicable steps to ensure that people are not put at risk. Where a risk cannot be prevented or adequately controlled by other means, then

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26 The Control of Pesticides Regulations (as amended) 1986
27 Muirburn is controlled burning of moorland to help regenerate heather
the precautions could include managing access within the area involved. Relevant information will normally need to be provided on the nature, location and duration of the risk (see paragraph 4.15). If such work is to run over several months, alternative routes may be provided. In some cases, you might be asked not to use a particular route or area, or not to do a particular activity whilst there is still a danger. Follow these precautions as they seek to protect your safety and that of others.

3.28 Any such precautions need to be for the minimum area and time to let the work be conducted safely and effectively (see paragraphs 4.11 to 4.17), and any alternative routes provided need to be reasonably practicable for people to use. In some cases, such as tree felling areas in a forest where there is frequent public access, signs may indicate that it is safe to go along a particular route if the activity has stopped, such as for the weekend.

### Key points to remember if you come across a land management operation:

- keep a safe distance and take heed of reasonable advice provided by the land manager to ensure that you do not hinder the work;
- for some types of operation, such as crop spraying and tree felling, the land manager has to ensure that people are not affected – follow any precautions provided for your safety;
- do not climb over any stored materials, such as straw bales or timber stacks.

- Access where there are farm animals

3.29 In exercising access rights in fields where there are cows, sheep, horses, deer, pigs or other animals, you need to be aware that animals may react in different ways to your presence. Cows can be inquisitive and come towards you. If you have a dog with you, cows may react aggressively. Some animals, such as bulls, may react aggressively to protect other animals in the field. Sheep are more likely to run away from you although they can be aggressive when there are lambs present. Horses are more likely to come towards you. Deer in enclosed fields are most likely to turn aggressive during the rutting season and when there are young deer present. Pigs can turn aggressive at any time.

3.30 Take care in exercising access rights in fields where there are farm animals by following this guidance:

- before entering such a field, particularly if there are young animals present, take account of any signs\(^{28}\) and, where possible, look for an appropriate alternative route in a neighbouring field or on adjacent land;
- if there is a bull or pigs in the field, go into a neighbouring field or onto adjacent land;

\(^{28}\) For example, official signs (approved by Government) about biosecurity measures or signs advising you that pregnant ewes have been put in a field just before lambing.
if you go into a field where there are animals, keep to paths or tracks where they exist or keep well away from the animals;

keep a close eye on the animals and if they come towards you remember to keep calm and that it might be safest to leave the field at the first chance;

do not take a dog into a field where there are lambs, calves or other young animals (see paragraph 3.55 for more detailed guidance);

if you go into a field of cows with a dog, keep as far as possible from the animals and keep the dog on a short lead\(^{29}\) or under close control\(^{30}\) – if the cows react aggressively and move towards you, remember to keep calm and take the shortest, safest route out of the field, letting go of the dog if you believe that the animals may attack; and

if you go into a field of sheep with a dog, keep as far as possible from the animals and keep the dog on a short lead or under close control.

3.31 In more open country, keep a sensible distance from animals, particularly when there are calves or lambs present.

3.32 Some animal diseases, such as foot and mouth, can be spread by people, dogs or vehicles, though the risk of recreational users doing so is very small. In exercising access rights, you can help to maintain animal health and biosecurity by:

- never feeding or directly contacting farm animals;
- taking all litter, including any food or associated packaging, away with you;
- leaving gates as you find them;
- keeping dogs under proper control and removing dog faeces (see paragraph 3.55); and
- not parking your vehicle in a field where there are farm animals.

3.33 If there is an outbreak of a contagious notifiable disease, such as foot and mouth, more detailed advice will be provided by the Scottish Executive. Following any official signs and using disinfectant footpads or baths where these are provided can help to minimise the spread of the disease.

3.34 Cow and sheep droppings can carry diseases, such as \textit{E.coli}, which can then be passed on to humans. Although the risk of catching such diseases is very small, they are most likely to arise if you picnic or camp where there are farm animals, or if you do not follow good hygiene practice (for example, by drinking water from local streams or burns).

**Key points to remember in taking access where there are farm animals:**

- be aware that cows, especially cows with calves, can react aggressively to your presence and so keep a safe distance from them and watch them carefully;

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\(^{29}\) A short lead is taken to be less than two metres.

\(^{30}\) Under close control means that the dog responds to your commands and is kept close at heel.
before entering a field of animals, check to see what alternatives there are – it might be easier and safer to go into a neighbouring field or onto adjacent land;

do not take your dog into a field where there are young farm animals, such as lambs and calves;

if you take a dog into a field where there are cattle, then keep as far as possible from the animals and keep your dog on a short lead or under close control – if the cows react aggressively and move towards you, let the dog go and take the shortest, safest route out of the field;

never feed farm animals and take all your litter away with you;

leave gates as you find them.

- Access where there are crops

3.35 You can exercise access rights on the margins of fields, even if these have been sown, and on any land in which crops have not been sown or are not growing. You can also exercise access rights in fields of stubble and in fields where grass is growing for hay and silage, except where the grass is at a late stage of growth. Your ability to take responsible access in such fields will vary depending upon the circumstances at the time.

3.36 When exercising access rights in a field of crops, avoid damaging the crop by:

- using any paths or tracks;
- using the margins of the field (if the margin is narrow or has been planted, avoid causing unnecessary damage by keeping close to the edge in single file);
- going along any unsown ground (providing this does not damage the crop); or by
- considering alternative routes on neighbouring ground.

3.37 You can exercise access rights in fields where grass is growing for hay and silage, except when it is at such a late stage of growth that it might be damaged. Such fields will normally have thick, long grass, and have no animals grazing in them. “A late stage of growth” is taken to be when the grass is about 8 inches or 20cm high. To avoid churning up the surface (this may contaminate the grass with soil and make it indigestible for cows and other animals), it is best to keep to paths or tracks if you wish to cycle or ride through such fields (see Part 5).

Key points to remember when taking access in fields of crops:

- avoid damaging crops by using any paths or tracks, or by going around the margins of the field, or by keeping to any unsown ground, or by going onto neighbouring ground;
- **Gates, fences, drystane dykes and similar features**

3.38 In exercising access rights in the outdoors, you will encounter fences, drystane dykes and other similar features. These are very important in land management and can cost a lot of time and effort to put up and look after. Use a gate, stile or other access point where these have been provided. Make sure that you leave all gates as you find them. If you come across a closed gate, make sure that you close it again as, for example, farm animals and horses may otherwise escape and cause injury to themselves and other property. If a gate is locked and you need to go over it, then make sure that you climb the gate at the hinged end and take care not to damage it. Do not park your car, van or bike in front of entrances to fields and buildings.

3.39 Drystane dykes and fences can sometimes be easily damaged. If you need to go over one, make sure you do so near to fence posts or where the wall looks strongest. Take care to avoid damaging the wall or fence.

- **Access through farmyards and other buildings and associated land**

3.40 Access rights do not extend to farmyards. Farmyards are often busy places and so health and safety may be a particular issue. Many farmers also have concerns about security and privacy. However, traditionally, access to the countryside is often taken through farmyards. Using paths and tracks will often be the best means of access and will help the land manager. Accordingly, farmers are encouraged to continue to allow people to go through farmyards where this would not interfere unreasonably with land management requirements or privacy.

3.41 If you are following a path or track which goes through a farmyard, the guidance is as follows:

- if the route is a right of way or a core path, then you can follow this through the farmyard at any time;
- if a reasonable, passable alternative route is signposted around the farmyard and buildings, then follow this.

In the absence of a right of way, core path or a reasonable, signposted route around the farmyard and buildings, you:

- might be able to go through the farmyard if the farmer is content or if access has been taken on a customary basis in the past;
- could exercise your access rights to go around the farmyard and buildings.
If you do go through a farmyard, proceed safely and carefully, watch out for moving vehicles and livestock, and respect the privacy of people living on the farm.

3.42 Access rights do not apply on land which forms the curtilage of a building, such as a factory or a warehouse and storage area. Nor do they apply to a compound or enclosure containing a structure, works, plant or machinery, such as a chemical or processing plant, or a water treatment and sewage works. Generally, such land will normally be closely connected, physically and in terms of purpose, to the building, forming one enclosure with it and surrounded by a fence or wall. If there is no fence or wall, use your common sense and keep a safe distance away.

**Care for your environment**

- **Natural heritage**

3.43 Scotland's natural heritage\(^{31}\) contributes greatly to people's quality of life and health, and awareness and enjoyment of their surroundings. It adds to local identity and sense of place. The physical environment provides outstanding opportunities for active pursuits. Opportunities to experience the natural heritage are a key part of an improved quality of life for everyone. This, in turn, can help to build people's awareness and appreciation of its value and importance.

3.44 The diversity and importance of Scotland's wildlife means that we must look after the special features of our natural heritage, such as rare birds, plants and animals. Looking after these special features can involve management and, in some particularly important places, protection through various national and international designations.

3.45 In enjoying the natural heritage, you can help by remembering that some plants can be easily damaged and that some birds and other animals can be easily alarmed or distressed if you do not take care. Also, be aware that other people might have exercised access rights in the same area before you – repeated visits may result, for example, in a nesting site being abandoned. In exercising access rights, therefore, you must take proper account of the features of the land and water\(^{32}\), including the natural heritage, and land being managed for conservation. You can best do this by:

- not intentionally or recklessly disturbing or destroying plants, eggs, birds and other animals, or geological features;
- not lingering if it is clear that your presence is causing significant disturbance to a bird or other wild animal;

\(^{31}\) This term includes plants, animals and geological features, as well as natural beauty and amenity. Scotland's biodiversity is a key part of its natural heritage.

\(^{32}\) Section 2 (3) of the Land Reform (Scotland) Act 2003
following any agreed information\textsuperscript{33} aimed at preventing significant disturbance to protected plants, birds or other animals, or at preventing the spread of erosion in more sensitive areas;

- taking extra care to avoid disturbing more sensitive birds and animals, particularly during their breeding season; and by

- taking your litter away with you.

3.46 Some types of irresponsible behaviour towards wild birds, animals and plants are an offence under the Wildlife and Countryside Act 1981 and related legislation (see Annex 1 for further details). For example, you must not intentionally disturb specially protected birds while nesting, or their young, and you must not intentionally uproot any wild plant. In a small number of areas and for very specific reasons, such as to protect a rare plant or bird, you might be asked to follow a specific route or not to exercise your access rights. In these areas, management might take several forms (see Part 6 of the Code for more information on the types of management that you might encounter):

- Voluntary agreements between land managers and recreational governing bodies or clubs. For example, climbers might be requested not to climb particular cliffs or sections of cliffs during the breeding season through the voluntary agreement of the land manager and recreational groups.

- Scottish Natural Heritage might have put up signs asking you to exercise access rights in a particular way or to avoid a specific area or route in order to protect the natural heritage\textsuperscript{34}.

- A local authority or other public body, such as Scottish Natural Heritage, might have introduced byelaws\textsuperscript{35} or other measures\textsuperscript{36} designed to prevent damage or to help conserve the natural heritage.

To exercise access rights responsibly, follow any requirements placed upon you\textsuperscript{37} and this will help you to avoid causing significant damage or disturbance.

3.47 Some places are more prone to damage from recreational activities and so you might need to take extra care. For sensitive natural habitats, such as riverbanks, loch shores, marshes, blanket and raised bogs, mountain tops, steep slopes and coastal dunes, the key need is usually to prevent damage, such as erosion, as much as possible.

3.48 Broken glass, tins and plastic bags are dangerous to people and animals and are unsightly. You must take your litter away with you\textsuperscript{38}. Doing so will reduce

\textsuperscript{33} Agreed between land managers, recreation bodies and conservation bodies. This information might be provided locally or be more widely available.

\textsuperscript{34} Under Section 29 of the Land Reform (Scotland) Act 2003, Scottish Natural Heritage can put up signs to protect the natural heritage.

\textsuperscript{35} Under Section 12 of the Land Reform (Scotland) Act 2003 for example.

\textsuperscript{36} For example, through a nature conservation order under the Wildlife & Countryside Act 1981.

\textsuperscript{37} Under Section 2 (2)(b)(ii) of the Land Reform (Scotland) Act 2003 you must follow a sign put up by Scottish Natural Heritage.

\textsuperscript{38} Environmental Protection Act 1990
the hazard to people or animals, and will add to people’s enjoyment of the outdoors.

Key points to remember to help you care for your environment:

- do not intentionally or recklessly disturb or destroy plants, eggs, birds and other animals, or geological features;
- do not linger if it is clear that your presence is causing significant disturbance to a bird or other wild animal;
- follow any agreed local information aimed at preventing significant disturbance to protected plants, birds or other animals, or at preventing the spread of erosion in more sensitive areas;
- take extra care to prevent damage in more sensitive natural habitats and to avoid disturbing more sensitive birds and animals, particularly during the breeding season;
- follow any voluntary agreements between land managers and recreational bodies, or requests made by local authorities, Scottish Natural Heritage or other public bodies;
- take your litter away with you.

- Cultural heritage

3.49 Scotland’s cultural heritage\(^{39}\) contributes greatly to our enjoyment of the outdoors. Cultural heritage sites, such as monuments and archaeological sites, play an important role in our enjoyment, both as popular visitor attractions and as places of quiet reflection. These sites are also important in their own right for what they tell us about the past\(^{40}\).

3.50 Although some cultural heritage sites are managed as public attractions, most are not and many are not even immediately obvious on the ground. Many sites survive as ruins and some are only visible as earthen or stone mounds. Some, like standing stones or burial mounds, are quite small but others, like abandoned settlements, can extend across large areas of land. Many of these places have a fairly natural appearance, such as an avenue of trees in a designed landscape or a hill-top settlement.

3.51 Some cultural heritage sites are protected by the law (these are called scheduled monuments), though many lack formal protection. You may not always be aware of the importance of a site or recognise that it is vulnerable to the pressure of visitors and might be easily damaged. In exercising your access

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\(^{39}\) This term includes structures and other remain resulting from human activity of all periods, traditions, ways of life and the historic, artistic and literary associations of people, places and landscapes.

\(^{40}\) For more information on Scotland's cultural heritage, see [www.access-scotland.com](http://www.access-scotland.com).
rights, therefore, you need to treat these sites carefully and leave them as you find them by:

- not moving, disturbing, damaging or defacing any stones, walls, structures or other features;
- not digging or otherwise disturbing the ground surface (at these sites, some activities such as camping, lighting fires or using metal detectors can lead to such disturbance);
- not taking anything away, including loose stones and objects; and by
- not interfering with or entering an archaeological excavation.

3.52 Scottish Ministers have new powers to put up signs asking you to avoid a specific area or route in order to protect the cultural heritage. Following such requests can help you to avoid causing significant damage or disturbance.

Key points to remember to help you care for your cultural heritage:

- leave any cultural heritage site as you find it and do not take anything away;
- do not camp, light fires or use metal detectors on any cultural heritage site; and
- follow any local, agreed guidance aimed at preventing damage to a site.

Keep your dog under proper control

3.53 Access rights extend to people with dogs, provided that the dog(s) are “under proper control”. Many people own dogs and about one in five visits to the outdoors are by people with dogs. Walking a dog is the main opportunity for many people to enjoy the outdoors, to feel secure in doing so and to add to their health and well-being. On the other hand, many people, including many farmers and land managers, have concerns about dogs when they are not under proper control as this can cause serious problems, including worrying of and injury to livestock, disturbance of wildlife and alarming other people. Farmers also have concerns about dogs spreading diseases, particularly if dogs have not been regularly wormed.

3.54 In exercising access rights, you must keep your dog(s) under proper control. You must also ensure that your dog does not worry livestock. What

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41 Under Section 29 of the Land Reform (Scotland) Act 2003, Scottish Ministers can put up signs to protect the cultural heritage.
42 Section 9 (d) of the Land Reform (Scotland) Act 2003.
43 It is good practice to keep your dog regularly wormed, particularly if you take your dog into the outdoors frequently.
44 Dogs (Protection of Livestock) Act 1953. Under the Animals (Scotland) Act 1987, a farmer, in some cases, has the right to shoot your dog if it is attacking livestock.
'proper control' means varies according to the type of place you are visiting. Essentially, there are four important things to remember:

- do not take your dog into a field where there are young animals;
- do not take your dog into a field of vegetables and fruit (unless you are on a clear path);
- keep your dog on a short lead or under close control\(^{45}\) in a number of other places; and
- remove any faeces left by your dog in a public open place.

3.55 These responsibilities are explained in more detail below.

- **Fields where there are lambs, calves and other young animals.** Dogs can worry young livestock and cows can be aggressive when protecting their calves. For these reasons, do not take your dog(s) into a field where there are lambs, calves or other young animals. Go into a neighbouring field or onto adjacent land. In more open country, keep your dog on a short lead if there are lambs around and keep distant from them.

- **Fields of vegetables or fruit.** The main risk in these fields is that of diseases in dog faeces being transmitted to people. If there is a clear path, such as a core path or a right of way, follow this but keep your dog to the path. In all other cases, it is best to take access in a neighbouring field or on adjacent land.

- **Fields where there are cows or horses.** Cows can be frightened by dogs and may react aggressively or panic, causing damage to themselves or property, or be dangerous to the dog owner and the dog. Where possible, choose a route that avoids taking your dog into fields with cows or horses. If you do need to go into such a field, keep as far as possible from the animals and keep your dog(s) on a short lead or under close control. If cows react aggressively and move towards you, keep calm, let the dog go and take the shortest, safest route out of the field.

- **Fields where there are sheep.** If you need to go into a field of sheep, keep your dog on a short lead or under close control and stay distant from the animals. In more open country, when there are sheep around keep your dog under close control and keep distant from them.

- **Areas where ground-nesting birds are breeding and rearing their young.** You can reduce the likelihood of your dog disturbing ground nesting birds during the breeding season – usually from April to July – by keeping your dog on a short lead or under close control in areas where ground nesting birds are most likely to be found at this time. These areas include moorland, forests, grassland, loch shores and the seashore.

- **Reservoirs and stream intakes.** Some reservoirs and streams are used for public water supply. If there are intakes nearby, keep your dog out of the water.

\(^{45}\) A short lead is taken to be two metres and “under close control” means that the dog is able to respond to your commands and is kept close at heel.
- **Recreational areas and other public places.** Do not allow your dog to run onto sports pitches, playing fields or play areas when these are in use. In places where other people are around, particularly children, keeping your dog under close control or on a short lead will help to avoid causing them concern.

3.56 If you are handling a group of dogs be sure that they do not pose a hazard to others or act in a way likely to cause alarm to people, livestock or wildlife. Dog faeces can carry diseases that can affect humans, farm animals and wildlife. The highest risks are in fields of cattle, sheep and other animals, in fields where fruit and vegetables are growing, and in public open places where people can come into direct contact with dog faeces, such as sports pitches, playing fields, golf courses, play areas, along paths and tracks, and along river banks and loch shores. If your dog defecates in these sorts of places, pick up and remove the faeces and take them away with you⁴⁶.

<table>
<thead>
<tr>
<th>Key points to remember if you have a dog with you:</th>
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<tbody>
<tr>
<td>- never let your dog worry or attack livestock;</td>
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<tr>
<td>- do not take your dog into fields where there are lambs, calves or other young animals;</td>
</tr>
<tr>
<td>- do not take your dog into fields of vegetables or fruit unless you are on a clear path, such as a core path or right of way;</td>
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<tr>
<td>- if you go into a field of farm animals, keep as far as possible from the animals and keep your dog(s) on a short lead or under close control</td>
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<tr>
<td>- if cattle react aggressively and move towards you, keep calm, let the dog go and take the shortest, safest route out of the field;</td>
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<tr>
<td>- during the bird breeding season (usually April to July), keep your dog under close control or on a short lead in areas such as moorland, forests, grassland, loch shores and the seashore;</td>
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<tr>
<td>- pick up your dog’s faeces if it defecates in a public open place; and</td>
</tr>
<tr>
<td>- in recreation areas and other public places, avoid causing concern to others by keeping your dog under close control.</td>
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| Take extra care if you are organising a group, an event or running a business |

⁴⁶ Not doing so in any public open place is an offence under the Dog Fouling (Scotland) Act 2003. A public open place does not include agricultural land but it is responsible to lift faeces where there is a risk to farming interests.
3.57 As an individual, you can exercise access rights as part of an organised group or by taking part in an organised event. Access rights also extend to some types of commercial activity (see paragraph 2.9). As a general rule, the larger a group or event, or the more regularly use is made of a particular place, the greater is the risk of causing unreasonable interference with the rights and needs of land managers and other people, and of causing impacts on the environment. Therefore, if you are responsible for organising a group or an event, or for running a recreational or educational business requiring access to the outdoors, you need to show extra care.
- Organised groups

3.58 Remember that your presence as a group can have an impact according to the size of the group, where you are and the time of year. In deciding your route and the size of your group, think about the needs of land managers and other people who are enjoying the outdoors. Take particular care in parking vehicles so that they do not block gates or entrances to buildings.

3.59 If you are responsible for organising an educational visit to a farm or estate for a specific purpose, such as learning about how a farm or estate works, or to see a particular attraction (such as an important wildlife site), make sure that you are fully aware of any operational requirements, sensitive areas or potential hazards. Contact the relevant land manager(s) in advance and follow their advice on what precautions you might need to take in relation to land management operations.

- Events

3.60 Events are held for a wide range of purposes. All events are organised to some degree, and their scale and timing can sometimes raise safety concerns, hinder land management operations or harm the environment. If you are organising an event, it is good practice to liaise with the relevant land managers. You need to obtain the permission of the relevant land manager(s) if your event:

- needs new or temporary facilities and services (such as car parking, fencing, signs, litter bins, marked courses or toilets); or

- due to its nature or to the number of participants or spectators, is likely, to an unreasonable extent, to hinder land management operations, interfere with other people enjoying the outdoors or affect the environment.

3.61 For reasons such as safety or charging for entry, you might need to seek an order from the local authority to exempt a specific area from access rights for the duration of your event. For larger events, you can help to reduce impacts on the interests of other people and the environment by:

- liaising regularly with the land managers and with others who have an interest in the event and its effects (such as the local authorities, local resident groups and conservation bodies);
- having control of the numbers of participants and spectators, and being sensitive to the capacity of the location to absorb large numbers of people;
- making sure that the privacy of local residents is respected and that they suffer minimal inconvenience (for example, by making sure that local roads and parking areas can cope with the traffic from the event);
- making sure that you have plans for the safety of participants, spectators and others;

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47 Group outings by club members are not classed as events.
48 See Section 11 of the Land Reform (Scotland) Act 2003. Further information is also provided in paragraph 2.11 of this Code.
- Running a business which utilises access rights

3.62 If you instruct, guide or lead people in recreational or educational activities (see paragraphs 2.8 to 2.9), either commercially or for profit, take extra care to minimise any adverse effects that you might have on the interests of other businesses, such as a farm or an estate, and on the environment. Doing a full risk assessment of your activities will provide a good starting point and you can show extra care by:

- planning your activities in ways that minimise possible impacts on land management and the interests of others should you wish to use a particular place regularly or if your visit might cause any particular concerns about safety or the environment;
- talking to the land managers who are responsible for places that you use regularly or intensively; and by
- obtaining the permission of the relevant land manager(s) if you wish to use a facility or service provided for another business by the land manager (such as an equestrian facility).

- if you are running a business that utilises access rights consider assisting with care of the resource used by your business.

3.63 If you wish to take detailed photographs of houses or other buildings, you need to respect the privacy and peace of mind of those living or working there. Talking to the occupier can help a lot. If you wish to film a TV programme to further people’s understanding of the natural or cultural heritage and which requires only hand-held equipment and involves no vehicles off the road, talk to the land managers beforehand and listen carefully to any advice provided. If you need to use vehicles or stay in an area for a few days or put down equipment or are filming for other purposes, you still require the permission of the relevant land managers. If you are writing a guidebook, leaflet or other promotional material about access in an area, try to talk to the relevant land managers to see if any local issues relating to privacy, safety or conservation need to be referred to in the publication.

- Undertaking surveys

3.64 Access rights extend to individuals undertaking surveys of the natural or cultural heritage where these surveys have a recreational or educational purpose.
within the meaning of the legislation. A small survey done by a few individuals is unlikely to cause any problems or concerns, provided that people living or working nearby are not alarmed by your presence. If you are organising a survey which is intensive over a small area or requires frequent repeat visits, or a survey that will require observation over a few days in the same place, consult the relevant land manager(s) about any concerns they might have and tell them about what you are surveying, for what purpose and for how long. If the survey requires any equipment or instruments to be installed, seek the permission of the relevant land managers.

**Key points to remember if you are organising an event or running a business:**

- contact the relevant land manager(s) if you are organising an educational visit to a farm or estate for a specific purpose, and follow any advice on what precautions you might need to take;

- obtain the permission of the relevant land manager(s) if your event needs new or temporary facilities and services or is likely, due to the nature of the event or the number of people involved, to hinder land management operations, interfere with other people enjoying the outdoors or affect the environment to an unreasonable extent;

- for larger events, make sure that you minimise impacts on the interests of other people and the environment;

- if you run a business which utilises access rights, show extra care by minimising the impacts of your activities and by trying to talk to the land managers who are responsible for places that you use regularly or intensively.
Part 4. Managing land and water responsibly for access

Managing land and water responsibly for access: at a glance

As a land manager, you must manage your land or water responsibly for access and this part of the Code explains how you can do this. A summary of your main responsibilities is provided below.

1. **Respect access rights in managing your land or water.** You can do this by:
   - not purposefully or unreasonably preventing, hindering or deterring people from exercising access rights on or off paths and tracks;
   - using paths and tracks as a way of managing access across your land so that access is integrated with land management;
   - taking access rights into account when planning and implementing any major land use change or development.

2. **Act reasonably when asking people to avoid land management operations.** You can do this by:
   - asking people, if you have an opportunity to do so whilst undertaking a land management operation, to follow a particular route;
   - taking precautions, such as asking people to avoid using a particular route or area or to avoid doing a particular activity where there are more serious or less obvious hazards to their safety, such as from tree felling or crop spraying;
   - keeping any precautions to the minimum area and duration required to safeguard people’s safety;
   - telling the public, especially if levels of public access are high or if the operation is particularly dangerous, about any precautions at any obvious access points (such as car parks and gates).

3. **Work with your local authority and other bodies to help integrate access and land management.** You can do this by:
   - remembering that people respond best to land managers who show that people are welcome;
   - working closely, where appropriate, with your local authority and its access officers and ranger service, local access forum and other bodies to help provide good paths across your land and to manage access positively;
   - thinking about how you would like to see access provided for and managed on your land or water and involving your local authority in this.

4. **Take account of access rights if you manage contiguous land or water.** You can do this, wherever possible, by:
   - respecting any rights of way or customary access across your land or water;
   - avoiding the use of “no access” signs or the locking or removal of gates or other access points, particularly on paths or tracks likely to be used by the public or without providing an alternative means of access;
   - working with your local authority and other bodies to provide and manage routes across your land that would best help to integrate access and land management;
   - considering what impact your work might have on people exercising access rights on neighbouring land and modifying your work where this is reasonably practicable.

4.1 The Land Reform (Scotland) Act 2003 establishes access rights to most land and inland water in Scotland and places responsibilities on both users and land managers. This part of the Code explains how land managers can meet their obligations under the Act. It sets down some general responsibilities and provides guidance on them. These responsibilities apply to all land managers,
including individuals, companies, local authorities, charities and other institutions, and other public bodies.\textsuperscript{49}

**What is responsible behaviour?**

4.2 The Land Reform (Scotland) Act 2003\textsuperscript{50} states that, for land and water where access rights apply, you are using and managing your land and water responsibly in relation to access rights if you:

- do not cause unreasonable interference with the access rights of anyone exercising or seeking to exercise them; and if you

- act lawfully and reasonably, and take proper account of the interests of people exercising or seeking to exercise access rights.

4.3 If you follow the guidance in this part of the Code, then you will be managing your land and water responsibly in relation to access rights. Part 5 of the Code provides a practical guide, for many everyday situations, to access rights and to your responsibilities, and those of people exercising access rights. This guidance suggests a few simple measures that promote a positive approach and should ensure that you can continue with your work without any significant modifications being needed.

4.4 Following the guidance in this Code will also ensure that people who wish to exercise or who are exercising access rights are not unreasonably prevented, hindered or discouraged from doing so. A positive approach towards paths and tracks, and towards informing the public about land management operations, will go a long way to minimising problems and encouraging responsible attitudes. Many land managers already adopt this approach.

4.5 Guidance on the responsibilities of people exercising access rights is set out in Part 3 of this Code. This guidance asks people to:

- take responsibility for their actions;
- respect the privacy of others;
- help land managers to work safely and effectively;
- care for their environment;
- keep dogs under proper control; and to
- take extra care if they are organising an event or running a business utilising access rights.

4.6 Much of the guidance in Part 3 will help to minimise any interference likely to be caused by people exercising access rights and ensure that you can continue to manage your land safely and effectively. Your responsibilities are set out below.

\footnotetext{49}{See paragraph 1.7}
\footnotetext{50}{Section 3, Land Reform (Scotland) Act 2003}
4.7 The Land Reform (Scotland) Act 2003 states that, for the purpose or main purpose of preventing or deterring any person entitled to exercise access rights from doing so, you must not:

- put up any sign or notice;
- put up any fence or wall;
- position or leave at large any animal;
- carry out any agricultural or other operation on the land; or
- take, or fail to take, any other action.\(^{51}\)

4.8 This essentially means not obstructing or hindering people from exercising access rights, either by physically obstructing access or by otherwise discouraging or intimidating them. Local authorities have a duty to uphold access rights and have powers to remove prohibition signs, obstructions and dangerous impediments, and to recover costs from the land manager responsible for the sign, obstruction or impediment.\(^{52}\)

4.9 This Code defines an obstruction or impediment as anything that stops or hinders anyone from exercising access rights responsibly. Obviously, land management involves putting up signs or notices, building fences or walls, ploughing fields, moving animals, storing materials, carrying out potentially dangerous land management operations (see paragraphs 4.11 to 4.17) and many other tasks. Given this, there is a need to define the point at which an action is deemed to be either deliberate or unreasonable in obstructing or hindering someone from exercising access rights. Examples of what might be deliberate or unreasonable could include:

- not reinstating a core path or right of way which has been ploughed, or had its surface otherwise disturbed, within 14 days of this happening;\(^{53}\)
- asking people to avoid using a route or area when there is no safety-related reason to do so, or keeping up such a sign when the hazard has ceased (for example, keeping up a sign saying that a field has been sprayed with acid beyond that required by Regulations);
- locking a gate on any path or track without reasonable cause or on any well-used path or track without providing an appropriate alternative for non-motorised access;

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\(^{51}\) Section 14 (1), Land Reform (Scotland) Act 2003

\(^{52}\) Section 14, Land Reform (Scotland) Act 2003

\(^{53}\) Failure to do this is an offence under Section 23 of the Land Reform (Scotland) Act 2003.

\(^{55}\) For example, good reasons to lock a gate might be where it is important to prevent the movement of farm animals from one field into another field of farm animals or directly onto a public road, or where the local authority agrees that there is a problem with unauthorised motorised access.

\(^{56}\) A “well-used” path or track is likely to be a core path, a public right of way, a signposted or promoted route, or one that is close to a town or village and which is likely to be used by local people and visitors.
• putting up a fence, wall or other barrier across a path or track without providing a gate or other access point, or putting up a high fence over long stretches of open country without providing gates, gaps or other access points;
• placing a fence or other barrier right across a river without reasonable cause, or without leaving an appropriate gap where the river is used by canoeists;
• putting an electric wire or barbed wire across a gate or stile without providing some sort of protection for people;
• deliberately or unnecessarily making a path or track that might be used by the public difficult to use, such as by dumping materials or leaving machinery across it or by storing slurry or other waste, or providing an animal feeding site, over or next to it, when this could readily be done elsewhere, or by not reinstating the surface following land management operations;
• removing a path or a gate, or an access point to a river or loch, without providing a reasonable alternative nearby;
• erecting a sign or notice worded in a way which intimidates or deters the public;
• leaving an animal known to be dangerous in a field or area where there is a path or track likely to be used by the public;
• allowing a guard dog or working dog to intimidate people, especially close to paths and tracks;
• closing off an existing roadside parking area that is used for access purposes without giving appropriate notice to the local authority; or
• failing to take account of access rights when planning and undertaking a major land use change, such as planting new forests, building a golf course or developing new buildings and roads.

4.10 Paths and tracks can be a good way of providing for and managing access on your land so that it is integrated with land management. This is because many people, including disabled people and older people, prefer to use paths rather than go across fields or along roads and you have a better idea of where people are likely to be. Of course, people are not obliged to use paths and there will be places for which a fixed path may not be necessary or helpful and where only occasional access will be sought. However, it is sensible to retain paths wherever they exist and to reinstate them after land management operations have been undertaken. The Land Reform (Scotland) Act 2003 introduces a wide range of new duties and powers for local authorities to create, protect and manage paths, and to remove obstructions (see Part 6 of the Code). If you are in any doubt about doing something that might affect access rights along a path or track, talk to your local authority about it.

Key points to remember:

• do not purposefully or unreasonably prevent, hinder or deter people from exercising access rights on or off paths and tracks;

• use paths and tracks as a way of providing for and managing access across your land so that access is integrated with land management;
• take account of access rights when planning and implementing any major land use change or development.

**Act reasonably when asking people to avoid land management operations**

4.11 The establishment of access rights does not prevent you, as a land manager, from carrying out a wide range of land management operations as safely and effectively as possible (and so meet your obligations under the Health & Safety at Work Act 1974 and other relevant legislation). A key responsibility placed on those exercising access rights is to not hinder this work (see paragraphs 3.24 to 3.28).

4.12 Much of your work is clearly visible when it is in progress and poses only very localised and obvious hazards or lasts only a short time. These activities include:

- ploughing, and sowing and harvesting crops;
- planting trees and hedges, or cutting branches;
- moving animals from field to field or to farm buildings;
- muirburn;
- cutting grass on playing fields or golf courses;
- erecting fences, walls, hedges and gates;
- routine maintenance and repairs on reservoirs or water intakes; or
- dredging in rivers and lochs.

People exercising access rights are asked to proceed carefully and to keep a safe distance if they come across such work whilst it is in progress (see paragraph 3.26). If there is an opportunity to do so, you can ask people to follow a particular route (for example, to go around the edge of the field or into a neighbouring field or onto adjacent ground) to help minimise risks to their safety.

4.13 In a limited number of cases, such as when crops are being sprayed with pesticides or trees are being felled and harvested in a forest, or when dangerous materials are being used or stored, more serious and/or less obvious hazards can arise. You need to ensure that a suitable risk assessment has been carried out in order to identify any significant risks to the public and any precautions that need to be taken. In certain cases, the only way to prevent or adequately control the risks may be to manage access by the public, as in the case of red flag procedures used during active military training. If such management is required, give clear information to the public regarding:

- use of a particular route or area while the relevant operation is carried out; or to

- carrying on a particular activity (for example, it might be safe for someone to walk through or around a field but not to picnic) while the relevant operation is going on or for a set period thereafter.
4.14 If you are organising a corporate, community or social event, such as an agricultural show, car boot sale, wedding reception, music festival, tournament or a car rally, you can ask people to avoid using a particular route or area for the duration of the event. In many cases, as with land management operations, informal arrangements will be sufficient to ensure that any interference from the exercise of access rights is kept to a minimum. If more formal arrangements are necessary, you can ask your local authority to exclude the land from access rights for the duration of the event\(^{57}\).

4.15 People exercising access rights need to follow any precautions regarding the use of a particular route or area or carrying out a particular activity (see paragraph 3.27), but these precautions need to be reasonable and practicable. This means that the area involved and duration of any precaution needs to be kept to the minimum required to allow the work to be conducted safely and effectively, and that any request is appropriate for the type of operation and the level of risk involved\(^{58}\). As far as is reasonable and practicable:

- keep the boundaries of the area affected to identifiable features on the ground (such as a dyke, fence or stream) or to a specified distance if there is no clear feature;
- tell the public, at any obvious access points (such as car parks and gates), where and for how long an operation is going on, using any standard wording that is already used or which becomes available;
- provide or suggest alternative routes, especially if the operation is likely to affect a well-used path or track, or a popular recreation site.

4.16 This does not mean that for every such operation you must tell the public or provide alternative routes. Generally, the higher the likely levels of public access (such as along well-used routes, at popular places or at the weekend) or the more dangerous an operation is likely to be, the more you need to give information or identify alternative routes. The action you take needs to be appropriate for the level of risk involved, which depends on the nature of the work, the site and the levels of recreational use expected.

4.17 In considering what is reasonable and practicable, you could:

- use any readily available information or guidance on how any effects of a land management operation can be minimised;
- use any general risk assessments developed for land management operations; and
- think about where and when people are likely to be exercising access rights, and whether the hazard is unlikely to be obvious to the public.

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\(^{57}\) Under Section 11 of the Land Reform (Scotland) Act 2003. Local authorities can approve orders for up to five days. Orders for six or more days require public consultation and Ministerial approval.

\(^{58}\) This requirement also applies to any official signage, such as that used for animal biosecurity purposes.
Key points to remember:

- if it is necessary for safely and effectively undertaking a land management operation, you can ask people to go around the edge of the field or to go into a neighbouring field;
- where there are more serious or less obvious hazards, you can take precautions, such as asking people to avoid using a particular route or area or to avoid doing a particular activity;
- these requests need to be for the minimum area and duration required to safeguard people’s safety.

Work with your local authority and other bodies to help integrate access and land management

4.18 The Land Reform (Scotland) Act 2003 requires that you take proper account of the interests of those exercising or seeking to exercise access rights. The responsibilities placed on those exercising access rights (Part 3) will help to minimise any interference with your work.

4.19 There will be occasions, though, when steps need to be taken to provide for and manage access and recreation. For example, if you experience relatively high levels of public access, manage land close to a town or city, or believe that access is causing problems for your work or for the environment, then it is sensible to work with your local authority, your local access forum and others, including representative bodies for recreation and land management, to help facilitate and manage for access. Local authorities have a wide range of duties and powers to help with these sorts of situations (see Part 6 of this Code). If your local authority is wishing to develop new routes or other facilities, or promote responsible access through a ranger service or good signposting, then working with them makes a lot of sense.

4.20 Paths are often an effective way of providing for access across land as most people prefer to walk or ride along paths and they provide a good opportunity to successfully integrate access with land management. Local authorities have a new duty to prepare a core paths plan for their areas and have new powers to implement these, such as through path agreements. You can get involved in planning the core path network for your area by suggesting, for example, the best routes across your farm, croft or estate. If you wish to encourage people to avoid sensitive areas or to go around, rather than through, farmyards, providing and/or signposting paths can help greatly. Working with your local authority and other bodies can help to achieve this.

4.21 Where appropriate, therefore, you could:

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59 Section 3, Land Reform (Scotland) Act 2003. Those exercising access rights need to take proper account of the interests of others (such as land managers and other people exercising access rights) and this is reflected in the responsibilities set out in Part 3 of this Code.
suggest routes, including possible core paths, where access would cause least problems for your work and privacy;
- signpost practicable routes around farmyards, and around other working areas, if you do not wish the public to take access through such areas;
- work to protect paths when carrying out land management operations;
- identify particular margins around fields of growing crops that you would wish to encourage people to use;
- suggest places where people could best gain access to rivers or lochs with least impact on your work and privacy;
- suggest how you would like to see the local authority ranger service work on your land; and
- identify where best to provide people with advice and information.

Doing this should put you in a better position to influence the work and priorities of your local authority, your local access forum and others, and to seek any financial assistance and other support that might be available.

4.22 If you are contacted by the organiser of a group or event (see paragraphs 3.57 to 3.64), reply positively. If your consent is required, you are encouraged to give this if your concerns or those of others can be properly addressed.

Key points to remember:

- people tend to respond best to land managers who show that people are welcome;
- where possible, work closely with your local authority and others to help provide good paths across your land and to manage access positively, such as through the local authority ranger service;
- think about how you would like to see access provided for and managed on your land or water and involve your local authority in this.

Take account of access rights if you manage contiguous land or water

4.23 The guidance set out in paragraphs 4.5 to 4.22 apply to land managers responsible for land or water on which access rights can be exercised. This part of the Code provides guidance to land managers who are responsible for land or water on which these rights are not exercisable but where the management of their land or water may affect the exercise of access rights on contiguous land.

60 Section 10 (1) (d), Land Reform (Scotland) Act 2003 allows the Code to be used to give advice to managers of land to which access rights do not apply but which is contiguous with such land.
4.24 Land on which access rights cannot be exercised includes farmyards, railway and airfield infrastructure, building and construction sites, gardens, the curtilages of buildings and some dams (see paragraph 2.11). In using and managing this land, you need to take account of how this might affect the exercise of access rights on neighbouring land, particularly through those farmyards and across those dams where people might currently take access with few problems arising. In these sorts of situations, it would be reasonable for people to expect that such customary access could continue. Rights of way may cross your land and these rights will continue.

4.25 Wherever possible:

- respect any rights of way or customary access across your land or water;
- avoid the use of “no access” signs or the locking or removal of gates or other access points, particularly on paths or tracks likely to be used by the public or without providing an alternative means of access;
- work with your local authority and others to provide and manage routes across your land that would best help to integrate access and land management; and
- consider what impact your work might have on people exercising access rights on neighbouring land and modify your work where this is reasonably practicable.
5. A practical guide to access rights and responsibilities

5.1 The responsibilities listed in part 3 of the Code apply regardless of your activity and those listed in part 4 of the Code apply to all land managers. This part of the Code indicates how these responsibilities apply to the more common situations encountered in the outdoors. By doing so, it provides a practical guide to help the public and land managers to decide what best to do in these sorts of situations. It does not cover all situations or activities but it should help to indicate what is or is not responsible behaviour. The guide is arranged alphabetically, as follows:

- Air sports
- Beaches and the foreshore
- Canals
- Canoeing, rafting, rowing and sailing
- Car parking
- Climbing
- Cultural heritage sites
- Cycling
- Dams
- Deer stalking in forests and woods
- Deer stalking on the open hill
- Disabled access
- Dogs
- Farmyards
- Fields of grass, hay and silage
- Fields of growing crops
- Fields where crops are being sprayed and fertilised
- Fields which crops are being ploughed or where crops are being harvested
- Fields with young animals present
- Fields with farm animals
- Fishing
- Forests & woods
- Forests & woods with ongoing forest operations
- Gates, fences & drystone dykes
- Golf courses
- Grouse shooting
- Hills, mountains & moorland
- Horse riding
- Houses & gardens
- Human waste
- Lighting fires
- Litter
- Low-ground shooting
- Margins of fields of growing crops
- Military lands
- Nature reserves & other conservation areas
- Paths & tracks
- Picnicking
- Picking wild berries and mushrooms
- Public parks & other open spaces
- Riverbanks & loch shores
- Rivers, lochs & reservoirs
- School playing fields
- Sporting and other events
- Sports pitches
- Swimming
- Unfenced grassland with farm animals
- Wild camping
- Wildlife watching and surveys

5.2 Various recreation and land management bodies, as well as many public bodies, produce more detailed advice and guidance about good practice relevant to their activities or interests. These can cover a wide range of issues, including good behaviour, safety and the environment. As such, they can complement the guidance relating to the responsible exercise of access rights provided in this Code. Given the range of guidance and advice provided, it makes good sense to be aware of these and to follow the suggestions for good practice. Find out more by contacting a relevant body or going to www.access-scotland.com.

5.3 Recreation and land management bodies are recommended to contact SNH before finalising advice on access and good practice and to ensure that such advice is compliant with the provisions of the Act and consistent with the Code.
<table>
<thead>
<tr>
<th><strong>Responsible behaviour by the public</strong></th>
<th><strong>Responsible behaviour by land managers</strong></th>
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</thead>
<tbody>
<tr>
<td><strong>Air sports</strong></td>
<td>If you are responsible for a hilltop, escarpment or other well-used launching or landing point, you could work with your local authority and relevant recreation bodies to ensure that any disturbance or damage by air sports is minimised.</td>
</tr>
<tr>
<td>Access rights are exercisable above the surface of the land and so extend to non-motorised air sports, such as paragliding. By their very nature, many of these activities require the use of hilltops and escarpments. Maintain good liaison with relevant land managers at well-used launching and landing points. Take care not to alarm wildlife or farm animals and avoid damaging crops. If you wish to set up a landing point, such as for an event, contact the relevant land manager(s).</td>
<td></td>
</tr>
<tr>
<td><strong>Beaches and the foreshore</strong></td>
<td>Access to Scotland’s beaches and coastline is important, particularly as many people enjoy these places. Where appropriate, work with your local authority and other bodies to help facilitate and manage such access.</td>
</tr>
<tr>
<td>Access rights extend to beaches and the foreshore. Follow any local guidance aimed at reducing dune or machair erosion or at avoiding disturbance of nesting birds. Public rights on the foreshore will continue to exist, including shooting wildfowl, fishing for sea fish, lighting fires, beachcombing, swimming, playing and picnicking.</td>
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<tr>
<td><strong>Canals</strong></td>
<td>All managers of canals are encouraged to facilitate access to towpaths by all types of user and to provide information on where people can best exercise access rights on canals and towpaths.</td>
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<tr>
<td>Access rights extend to canals, canal towpaths and canal embankments, but the amount of recreational and commercial use and the safety issues arising means that this use has to be managed. If you wish to canoe or undertake other water-based activities on canals, follow any local byelaws or regulations, including the Waterways Code. Remember that canals can sometimes be confined and may contain deep water. For safety reasons, always give way to motorised craft. Canal locks and lifts are regarded as structures and so access rights do not apply. However, access across some lock gates might be possible where specific provision for access has been made. Some people stay overnight on boats on canals and so you need to respect the privacy and peace of those living in boats. Take care not to cause alarm or annoyance, especially at night. Some towpaths can provide good access for cycling and horse riding, but when a towpath becomes too narrow or dangerous, such as where there are low bridges, then dismount. Keep dogs on a short lead to avoid causing problems for other users and for wildlife.</td>
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<tr>
<td><strong>Canoeing, rafting, rowing and sailing</strong></td>
<td>Where appropriate, work with your local authority and/or recreation groups to identify suitable parking and launching sites. Where intensive recreational use causes safety, operational or environmental concerns you could work with your local authority and/or recreation groups to determine what management measures might be needed. Wherever possible, if a club or group of users wishes to have a motorised</td>
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<td>Responsible behaviour by the public</td>
<td>Responsible behaviour by land managers</td>
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<tr>
<td>Respect the needs of anglers by avoiding nets or other fishing tackle. When close to anglers keep noise and other disturbance to a minimum. On lochs, keep a safe distance from anglers. On rivers or other confined waters, await a signal from the angler or ghillie to proceed if they have a line in the water and follow any suggested route they indicate if safe and practicable to do so. Take extra care when entering and leaving water to avoid damaging the banks or disturbing wildlife, and use a public slipway if one is close by. Do not pollute the water. If you wish to canoe or sail on a loch or reservoir used intensively by a commercial fishery, be aware that this can be very disruptive, may raise safety issues because of the high number of anglers in a relatively small area and may impact on the operation of these businesses. Always talk to the land manager before going onto such water.</td>
<td>rescue boat present for safety reasons give permission for this.</td>
</tr>
<tr>
<td><strong>Car parking</strong></td>
<td>Where appropriate, such as where there is a lot of informal parking causing local concerns, work with your local authority and other bodies to see if a formal car park could be provided.</td>
</tr>
</tbody>
</table>
| Access rights do not extend to any motorised activities. However, many people use their cars to get into the outdoors and parking a vehicle without regard to the interests of other people can cause problems. Therefore, when you park your vehicle it is important not to cause any damage or create an obstruction by:  
  * not blocking an entrance to a field or building;  
  * not making it difficult for other people to use a road or track;  
  * having regard for the safety of others;  
  * trying not to damage the verge; and  
  * using a car park if one is nearby. | |
<p>| <strong>Climbing</strong> | Where possible, work with your local authority and other bodies to help identify paths or routes across your land which are suited for cycling. If you need to put a fence across a path or track then install a gate which allows multi-use access. |
| Access rights extend to climbing. Follow any agreements between a land manager and recreational groups that seek, for example, to safeguard a rare bird nesting site (such an agreement might ask you not to climb particular cliffs or sections of cliffs during the breeding season). If you are camping close to a cliff, follow the guidance for wild camping. | |
| <strong>Cycling</strong> | |
| Access rights extend to cycling. Cycling on hard surfaces, such as wide paths and tracks, causes few problems. On narrow routes, cycling may cause problems for other people, such as walkers and horse riders. If this occurs, dismount and walk until the path becomes suitable again. Do not endanger walkers and horse riders: give other users advance warning of your presence and give way to them on a narrow path. Take care not to alarm farm animals, horses and wildlife. If you are cycling off-path, particularly in winter, avoid: | |
| Where possible, work with your local authority and other bodies to help identify paths or routes across your land which are suited for cycling. If you need to put a fence across a path or track then install a gate which allows multi-use access. | |</p>
<table>
<thead>
<tr>
<th>Responsible behaviour by the public</th>
<th>Responsible behaviour by land managers</th>
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</table>
| • going onto wet, boggy or soft ground; and  
• churning up the surface. | Owners are encouraged to support access across dams if there are no specific safety issues. Take steps to advise people of any water discharges likely to cause a hazard. Whenever possible, respond positively to any requests for information concerning water discharges to support the exercise of access rights. |

**Dams**

Dams are generally regarded as structures and in these cases access rights do not apply. However, access across dams is accepted by many land managers and so you should be able to continue to take access across such dams. Follow any local guidance on safety precautions.

**Deer stalking in forests and woods**

Deer control can take place within forests all year round, often around dawn and dusk. You can help to minimise disturbance by taking extra care at these times, and by following any signs and notices, if deer stalking is taking place.

**Deer stalking on the open hill**

Deer management can take place during many months of the year but the most sensitive time is the stag stalking season (usually from 1 July to 20 October, but with most stalking taking place from August onwards). During this season, you can help to minimise disturbance by taking reasonable steps to find out where stalking is taking place (such as by using the Hillphones service where one is available) and by taking account of advice on alternative routes. Avoid crossing land where stalking is taking place. Stalking does not normally take place on Sundays.

**Disabled access**

Access rights apply to everyone, including people with a disability. Access rights extend to being on or crossing land in a motorised vehicle or vessel which has been constructed or adapted for use by a person with a disability and which is being used by that person. Follow the Highway Code at all times. If you are using such a vehicle or vessel, take care to avoid disturbing animals or wildlife, and respect the needs of other people exercising access rights and the needs of land managers.

**Dogs**

Access rights apply to people walking dogs provided that their dog(s) is kept under proper control. Your main responsibilities are:

• never let your dog worry or attack livestock;
• do not take your dog into fields where there are lambs, calves or other young animals;
• do not take your dog into fields of vegetables or fruit unless there is a clear path, such as a core path or a right of way, but keep your dog to the path;
• if you go into a field of farm animals, keep your dog(s) on a short lead or under close control and keep as far as possible from the animals;
• if cattle react aggressively and move towards you, keep calm, let the dog go.

Do not allow a guard dog or working dog to alarm people, especially close to paths and tracks.
<table>
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<tr>
<th><strong>Responsible behaviour by the public</strong></th>
<th><strong>Responsible behaviour by land managers</strong></th>
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<tr>
<td>and take the shortest, safest route out of the field;</td>
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<tr>
<td>• during the bird breeding season (usually April to July), keep your dog under close control or on a short lead in areas such as moorland, forests, grassland, loch shores and the seashore;</td>
<td>Many paths and tracks go through farmyards. If there is no right of way or core path through your farmyard, you are encouraged to continue to allow access where this does not interfere unreasonably with your work. You could work with your local authority to signpost the best route through or around your farmyard.</td>
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<tr>
<td>• in recreation areas and other public places avoid causing concern to others by keeping your dog under close control or on a short lead; and</td>
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<tr>
<td>• pick up and remove your dog’s faeces if it defecates in a public open place.</td>
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**Farmyards**

Although access rights do not extend to farmyards, many people take access through farmyards when following paths and tracks. In practice:

- if a right of way or core path goes through a farmyard, you can follow this at any time;
- if a reasonable, passable alternative route is signposted around the farmyard and buildings, then you should follow this.

In the absence of a right of way, core path or reasonable, signposted route around the farmyard and buildings, you:

- might be able to go through the farmyard if the farmer is content or if access has been taken on a customary basis in the past; or you
- could exercise your access rights to go around the farmyard and buildings.

If you do go through a farmyard, proceed safely and carefully, watch out for machinery or livestock, and respect the privacy of those living on the farm.

**Fields of grass, hay, and silage**

When grass has just been sown, treat it like any other crop and follow the appropriate guidance (see fields of growing crops). When on land in which grass is being grown for hay or silage you can exercise access rights unless it is at such a late stage of growth that it might be damaged. Such grass will be grown in enclosed fields and have no animals grazing on it. A "late stage of growth" is considered to be when the grass is above ankle height (about 8 inches or 20cm). In such cases, use paths or tracks where they exist or go along the margins of the field. Grass can also be grown for turf, usually on relatively flat ground and in large fields. In these cases, use paths or tracks where they exist or go along the margins of the field, when the turf is at an early stage of establishment or if you are cycling or horse riding.

Leaving uncultivated margins can help people to exercise access rights responsibly and help to support wildlife so it makes sense, wherever possible, to do this.

**Fields of growing crops**

When exercising access rights in a field of crops, avoid damaging the crop by:

- using any paths or tracks;
- using the margins of the field (if the margin is narrow or has been planted, avoid causing unnecessary damage by keeping close to the edge in single file);

Leaving uncultivated margins can help people to exercise access rights responsibly and help to support wildlife so it makes sense, wherever possible, to do this.
<table>
<thead>
<tr>
<th><strong>Fields where crops are being sprayed and fertilised</strong></th>
<th><strong>Responsible behaviour by land managers</strong></th>
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<tbody>
<tr>
<td>Land managers often need to apply fertilisers or other materials, such as slurry or lime, to fields of crops. The duration of the hazard depends on the material used but can extend from a few hours to four days in the case of sulphuric acid. As these can be dangerous to public health, land managers are required to ensure that people do not enter land on which pesticides have been used.</td>
<td>Keep the area affected, and the duration and type of any limitation, to the minimum required. Where reasonably practicable, provide information on the area sprayed, the material used and the dates for the period of risk at any obvious access points, such as car parks and gates. Remove signs and notices when they are no longer needed.</td>
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<td>Follow any advice asking you to avoid using particular routes or areas at these times.</td>
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<tr>
<th><strong>Fields which are being ploughed or where crops are being harvested</strong></th>
<th><strong>Responsible behaviour by land managers</strong></th>
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<tbody>
<tr>
<td>Access rights extend to such fields but do not hinder such work. If you encounter such work while it is underway, proceed carefully, keep a safe distance and follow any advice provided by the land manager. It might be safest to go into a neighbouring field or keep to the edge of the field.</td>
<td>Where necessary, tell people about the area affected and for how long, and provide an alternative route if a core path is affected. Reinstate a path that has been ploughed.</td>
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<tr>
<th><strong>Fields with farm animals</strong></th>
<th><strong>Responsible behaviour by land managers</strong></th>
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<tbody>
<tr>
<td>Access rights extend to such fields, but remember that some animals, particularly cows with calves but also horses, pigs and farmed deer, can react aggressively towards people. Before entering a field, check to see what alternatives there are. If you are in a field of farm animals, keep a safe distance and watch them carefully. If you have a dog with you, see the guidance on dogs above.</td>
<td>Keep animals known to be dangerous away from fields crossed by a core path or other well-used route. If this is not possible, tell the public and signpost a reasonable alternative route.</td>
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<tr>
<th><strong>Fields with young animals present</strong></th>
<th><strong>Responsible behaviour by land managers</strong></th>
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<tbody>
<tr>
<td>You can avoid disturbing sheep close to lambing time, or young animals such as calves, lambs, foals and farmed deer, by going into a neighbouring field or onto adjacent land. If this is not possible, keep as far from the animals as possible. Do not take dogs into fields where there are young animals present.</td>
<td>Where possible, avoid putting sheep close to lambing in fields where there is a well-used route or, if this is not possible, you could indicate a reasonable alternative route.</td>
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<tr>
<th><strong>Fishing</strong></th>
<th><strong>Responsible behaviour by land managers</strong></th>
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<tbody>
<tr>
<td>Access rights do not extend to fishing. Anglers need to be careful when casting lines so be aware of where people are on the water and on the land. If a canoeist or other person on the water is close by wait until they have passed by before casting. If you have a line in the water, allow people on the water to pass at the earliest opportunity. Indicating where you would prefer canoeists or rafters to pass by can help but be aware that it might not always be possible for them to follow the route you suggest.</td>
<td>Respect the needs of people exercising access rights responsibly. If a canoeist, rafter or other person is on the water, let them pass by before casting a line. Ensure your clients are aware that people can exercise access rights along riverbanks and loch shores, as well as on the water. Where appropriate, work with your local authority and recreation bodies to help to integrate access with fishing and other riparian activities, and help facilitate responsible access along riverbanks and loch shores.</td>
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<tr>
<td><strong>Forests and woods</strong></td>
<td><strong>Responsible behaviour by the public</strong></td>
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<td></td>
<td>You can exercise access rights in forests and woods. If you are cycling or horse riding, keeping to suitable paths and tracks can help to minimise any damage. If you have a dog with you, keep it under close control or on a short lead during the spring (April to July) so that breeding birds are not disturbed. Livestock might be present in some forests and woods so take care if you come across any animals. Be careful not to trample young trees.</td>
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<td></td>
<td><strong>Forests and woods with ongoing forest operations</strong></td>
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<td>Tree felling, timber extraction and haulage may affect an area of forest and forest roads for several months. Read any signs warning you of forest operations, such as tree felling and extraction, and follow any precautions taken by the land manager. This will ensure that you do not hinder these operations and ensure your safety and that of people working there. In some cases, signs may indicate that it is safe to go along a route if the activity has stopped, such as for the weekend. If you come across machinery, keep a safe distance. Take extra care if you are walking, cycling or riding along forest tracks as heavy timber lorries might be using the tracks. Do not climb on to timber stacks and keep children away from them.</td>
</tr>
<tr>
<td><strong>Gates, fences, drystone dykes and hedges</strong></td>
<td>Use a gate where one has been provided and leave it as you find it. Do not climb over gates, fences, dykes or hedges unless there is no reasonable alternative nearby. If you have to climb over a fence, avoid causing any damage by doing so near to a post. Climb a gate at the hinge end.</td>
</tr>
<tr>
<td><strong>Golf courses</strong></td>
<td>You can only exercise access rights to cross over a golf course and in doing so, you must keep off golf greens at all times and not interfere with any golf games or damage the playing surface. Golf courses are intensively used and managed, and there can be hazards such as where golfers are playing “blind” shots. In exercising access rights:</td>
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<tr>
<td></td>
<td>▪ allow players to play their shot before crossing a fairway;</td>
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<td></td>
<td>▪ be still when close to a player about to play;</td>
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<td></td>
<td>▪ follow paths where they exist; and</td>
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<tr>
<td></td>
<td>▪ keep your dog on a short lead.</td>
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<td></td>
<td>To avoid damaging the playing surface, cyclists and horse riders need to keep</td>
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<tr>
<th><strong>Responsible behaviour by the public</strong></th>
<th><strong>Responsible behaviour by land managers</strong></th>
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<tr>
<td>to paths at all times and not go on to any other part of a golf course.</td>
<td>responsibly.</td>
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<tr>
<td>When fertilisers or pesticides have been used, the duration of any hazard depends on the material used but should not normally extend more than a few days. Golf course managers can ask you to avoid using particular routes at these times. Following such advice can greatly help to minimise risks to safety.</td>
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<tr>
<td><strong>Grouse shooting</strong></td>
<td>Be aware of where recreational use is likely, such as along paths, popular routes and ridge lines. Where appropriate, tell people about where shooting is taking place by using signs and information boards (in accordance with this Code) to give on-the-day information on shoots and alternative routes.</td>
</tr>
<tr>
<td>The grouse shooting season runs from 12 August to 10 December, with most shoots taking place during the earlier part of the season. You can help to minimise disturbance by being alert to the possibility of shooting taking place on grouse moors and taking account of advice on alternative routes. Avoid crossing land where a shoot is taking place until it is safe to do so.</td>
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</tr>
<tr>
<td><strong>Cultural heritage sites</strong></td>
<td>You can charge for services provided and for entry to buildings. Public bodies should provide information to visitors on how they might best avoid causing any damage or disturbance to a site.</td>
</tr>
</tbody>
</table>
| Access rights do not apply to buildings or to other cultural heritage sites where a legitimate entry charge is levied. In other cases, such as many unsupervised historic or archaeological sites, access rights apply. These sites can be of great value, though they might not always be obvious on the ground, so it is important to look after them. Follow any local byelaws, regulations or approved guidance asking you to modify your behaviour in order to protect a cultural heritage site. Leave the site as you find it by:  
  • taking care not to move, disturb, damage or deface any stones, walls, structures or other features;  
  • not removing anything from it;  
  • not lighting fires, camping or using metal detectors there;  
  • not interfering with or entering any archaeological excavations. | |
| **Horse riding** | Where possible, work with your local authority to help identify paths or routes across your land which are suitable for horse riding and help to integrate access and land management. |
| Access rights extend to horse riding. Riding on firm or hard surfaces, such as wide paths and tracks and well-drained ground, causes few problems. On narrow routes, horse riding may cause problems for other people, such as walkers and cyclists. If this occurs, take extra care by giving way to walkers where possible or by looking for an alternative route. If you are riding off-path, particularly in winter, take care to avoid:  
  • going onto wet, boggy or soft ground; and  
  • churning up the surface. | |
| Take care not to alarm farm animals and wildlife, particularly if you go round a field margin. Do not go into fields where there are grazing horses or animals that might be a danger. Get permission if you wish to carry out repetitive schooling on other people’s land or wish to use jumps or custom-made gallops. | |
| Houses and gardens | Access rights do not extend to houses and gardens. In some cases, the extent of a garden might be difficult to judge. Things to look out for in judging whether an area of land close to a house is a garden or not include:  
- a clear boundary, such as a wall, fence, hedge or constructed bank, or a natural boundary like a river, stream or loch;  
- a lawn or other area of short mown grass;  
- flowerbeds and tended shrubs, paving and water features;  
- sheds, glasshouses and summer houses;  
- vegetable and fruit gardens (often walled but sometimes well away from houses).  

Some larger houses are surrounded by quite large areas of land referred to as the “policies” of the house. Parts of the policies may be intensively managed for the domestic enjoyment of the house and these will include some of the features listed above. Access rights do not extend to these intensively managed areas. The wider, less intensively managed parts of the policies, such as grassland and woodlands, whether enclosed or not, would not be classed as a garden and so access rights can be exercised.  

Use a path or track, if there is one, when you are close to a house and keep a sensible distance away if there is no path or track. Take care not to act in ways that might annoy or alarm people living there. At night, take extra care by following paths and tracks and, if there are no paths or tracks, by keeping well away from buildings.  

| Human waste | If you need to urinate, do so at least 30m from open water or rivers and streams. If you need to defecate, do so as far away as possible from buildings, from open water or rivers and streams, and from any farm animals. Bury faeces in a shallow hole and replace the turf.  

| Lighting fires | Wherever possible, use a stove rather than light an open fire. If you do wish to light an open fire, keep it small, under control and supervised – fires that get out of control can cause major damage, for which you might be liable. Never light an open fire during prolonged dry periods or in areas such as forests, woods, farmland, or on peaty ground or near to buildings or in cultural heritage sites where damage can be easily caused. Heed all advice at times of high risk. Remove all traces of an open fire before you leave.  

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| these are not in use. | You may want to signpost alternative routes through your policies.  

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Lighting fires

At times of drought, work with your local authority (fire services) to inform people of the high risks involved.
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<tr>
<td><strong>Litter</strong></td>
<td>If you have a litter problem on your land, you could raise this with your local authority or local access forum.</td>
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<tr>
<td>Take away all your litter. Take particular care not to drop things like bottles, cans or plastic bags as these can damage machinery and if eaten by a farm animal or a wild animal they can cause severe injury or death. Do not leave any food scraps or associated packaging as these might be eaten by animals and help to spread diseases.</td>
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<tr>
<td><strong>Low-ground shooting</strong></td>
<td>Be aware of where recreational use is likely, such as along paths and other popular routes. Provide as much information as possible on where shooting is likely to take place. You could think carefully about the siting of release pens to minimise opportunities for disturbance, such as away from well-used paths and tracks.</td>
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<tr>
<td>Low-ground shooting can take several forms. Pheasant and partridge shooting takes place during the autumn and winter in woods and forests, and on neighbouring land. Wildfowl shooting, such as for ducks, also takes place in the autumn and winter, usually on the foreshore or on land close to water and usually around dawn and dusk. You can help minimise disturbance by being alert to the possibility of shooting taking place in these areas during the autumn and winter and by taking account of advice on alternative routes. Avoid crossing land when shooting is taking place. Avoid game bird rearing pens and keep your dog under close control or on a short lead when close to a pen.</td>
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<tr>
<td><strong>Margins of fields of growing crops</strong></td>
<td>Leaving uncultivated margins can help people to exercise access rights responsibly and help to support wildlife so it makes sense, wherever possible, to do this. In popular places you may wish to encourage people to use particular routes.</td>
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<tr>
<td>You can exercise access rights on the margins of fields in which crops are growing, even if the margin has been sown with a crop. Some margins can be managed for wildlife (remember that some farmers may receive payments for doing this) and for encouraging game birds so take care by keeping dogs on a short lead or under close control and by not lingering if birds become significantly disturbed by your presence. If the margin is narrow or has been planted, avoid causing unnecessary damage, particularly if you are cycling or horse riding, by keeping in single file and staying close to the edge of the field.</td>
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<tr>
<td><strong>Military lands</strong></td>
<td>Provide as much information as possible, in advance, on access arrangements where this does not put safety or security at risk. Ensure that signs give a clear indication of where the public may go and explain why some precautions, such as red flag/lamp procedures, are necessary. Keep the duration of these precautions, and the area affected, to the minimum required.</td>
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<tr>
<td>The Ministry of Defence has a presumption in favour of safe public enjoyment of its estate wherever this is compatible with operational and military training needs, public safety and security. The MoD needs to carefully manage access when active military training is underway, and where there are unexploded munitions. Always take note of advice from range staff, troops and from warning signs. If in doubt, look for an alternative route or turn back. Red flags (in daytime) and red lamps (at night) indicate live firing areas, which might not be fenced. Do not enter a range if flags are raised or lamps lit. Be careful when crossing the land as there could be trenches or voids, and never pick up objects as they could be harmful. Be prepared for sudden noises that can startle people and horses.</td>
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<tr>
<td><strong>Nature reserves and other</strong></td>
<td>Providing information on the importance of the site and on the best routes for people to follow, and providing good paths, can help to minimise damage and</td>
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<tr>
<td>Access rights extend to these places but remember that they are carefully managed for nature conservation and to safeguard rare animals and plants. Take care to avoid damaging the site or disturbing its wildlife, or interfering with</td>
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<td><strong>conservation areas</strong></td>
<td>Responsible behaviour by the public</td>
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<td>Its management or enjoyment by others. Depending on your activity, you might be requested to follow a specific route or to avoid exercising access rights in a specific area: following such local guidance can help to safeguard the natural heritage of these areas.</td>
</tr>
<tr>
<td><strong>Paths and tracks</strong></td>
<td>Access rights extend to all paths and tracks except where they go over land on which access rights do not apply. Rights of way are unaffected by the legislation. Access rights apply off-path, but when you are close to houses or in fields of crops or in places where the environment is particularly vulnerable to damage, it may be sensible to follow paths and tracks where they exist. This can help to facilitate access and help safeguard the interests of land managers and the environment. Walkers, cyclists and horse riders can all exercise access rights on paths and tracks. However, on some paths, such as those which are heavily-used or which are prone to damage, the local authority may have provided local advice on what types of use are appropriate or how different users should behave to reduce risks to safety or to minimise damage to the path surface. Following such advice can help to minimise problems.</td>
</tr>
<tr>
<td><strong>Picnicking</strong></td>
<td>Access rights apply to picnicking. Take care to consider the needs of other people in choosing where to picnic. For your own health, avoid picnicking in fields where there are farm animals (or may have been recently) or where the farmer has indicated that the field has recently been sprayed with lime or slurry. Do not feed any farm animals and take all litter, including any food scraps, away with you.</td>
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<tr>
<td><strong>Picking wild berries &amp; mushrooms</strong></td>
<td>Customary picking of wild fungi and berries for your own consumption is not affected by the legislation. Care for the environment by following any agreed guidance on this activity. However, being on or crossing land or water for the purpose of taking away, for commercial purposes or for profit, anything in or on the land or water is excluded from access rights.</td>
</tr>
<tr>
<td><strong>Public parks and other managed open spaces</strong></td>
<td>Access rights can be exercised in most urban parks, country parks and other managed open spaces. These parks are normally provided for recreational and educational purposes, but may also be managed to help safeguard the environment. Where the levels or types of use are such that peoples’ safety or the environment is at risk, local guidance or management measures, such as management rules, regulations or byelaws, might have been introduced. Follow</td>
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<td>such guidance to help ensure that safety or the environment is not put at risk.</td>
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<tr>
<td><strong>Riverbanks and loch shores</strong></td>
<td>Access rights can be exercised along riverbanks and loch shores except where a garden or other curtilage goes right up to the water's edge. Be aware that riverbanks and loch shores are often a refuge for wildlife and may be used for fishing and related management. Show consideration to people fishing and keep a safe distance if an angler is casting a line. Some lochs and reservoirs are used intensively as commercial fisheries and so can be potentially dangerous where a lot of anglers are casting in a small area. Take extra care in such areas. If you wish to use a boat and there is a public slipway or launching point available nearby you should use it. Take extra care if you are passing by or landing on an island as these can often be a good refuge for wildlife. Respect the needs of those exercising access rights by letting people pass before casting a line. If you take steps to improve riparian habitats, to provide fishing paths or to place fences in moving water, respect the needs of those exercising or seeking to exercise access rights. For example, if you wish to use fencing to help regenerate or improve riparian habitats, provide gates or other access points or a reasonable, alternative route.</td>
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<tr>
<td><strong>Rivers and lochs</strong></td>
<td>Access rights extend to rivers, lochs and reservoirs (but never go close to spillways or water intakes). Care for the interests of other users and for the natural heritage of rivers and lochs by: - not intentionally or recklessly disturbing birds and other animals; - not polluting the water as it may be used for public water supply; - making sure that the river, loch or reservoir is appropriate for your activity and the numbers involved; - following the guidance in the Code, and any local byelaws, to ensure that your activity will not interfere unreasonably with the interests of other users, such as anglers, or the environment. Where appropriate, work with your local authority and other bodies to help identify areas for parking vehicles at popular sites and places where people can best take access to the river or loch without causing any problems. Avoid putting fences from one side of a river to the other side without reasonable cause or without putting in gates at the sides or leaving a gap in rivers used by canoeists. Public bodies could take steps to promote the use of reservoirs where access would not conflict with water quality.</td>
</tr>
<tr>
<td><strong>School playing fields</strong></td>
<td>Access rights do not apply to land next to a school and which is used by the school (such as school playing fields). When not in use by the school, such land may provide a valued local green space for the community. Schools are encouraged to permit such use by the public when not in use by the school.</td>
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<tr>
<td><strong>Sporting and other events</strong></td>
<td>Land managers sometimes hire out their land for sporting events, such as for car rallies, golf tournaments, archery or clay pigeon shoots, and other events, such as local shows, pop concerts, and sheep dog trials. These events are usually well-organised, sometimes with a charge for entry, and with marshals and signs directing visitors. Land managers can ask you to follow an alternative route while the event is underway. In some cases, the local authority may have formally excluded the area from access rights for the period of the event and you must respect this. Inform the public of any limitations, in advance and at obvious access points, such as gates and car parks. Keep any limitations to the minimum required.</td>
</tr>
<tr>
<td><strong>Sports pitches</strong></td>
<td>You cannot exercise access rights on any sports pitch, playing field or other areas set out for a recreational purpose (such as for archery or other target sports) while it is in use and take account of grounds maintenance operations,</td>
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<td>If you have several pitches, consider providing a signposted route around the margins of the area covered by the pitches.</td>
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<td>Responsible behaviour by the public</td>
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<td>which can include the application of fertilisers or pesticides. In crossing over a sports pitch or playing field, take care not to damage the playing surface. Horse riders and cyclists need to go around such areas.</td>
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<tr>
<td><strong>Swimming</strong></td>
<td>Indicating where people can best take access to a river or loch can help to minimise any problems.</td>
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<tr>
<td>Access rights extend to swimming (subject to any local byelaws). Remember that swimming in open water can be dangerous, particularly for children, and that the water might be used for public water supply. Help to minimise problems for other users by:</td>
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<tr>
<td>• do not swim close to water intakes, abstraction points or spillways;</td>
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<td>• avoiding nets or other fishing tackle;</td>
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<td>• not disturbing anglers and other water users;</td>
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<td>• not polluting the water;</td>
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<tr>
<td>• being aware that in prolonged dry spells fish might be distressed due to low water levels.</td>
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<tr>
<td><strong>Unfenced grassland with farm animals</strong></td>
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<tr>
<td>You can exercise access rights over open pasture. Keep a sensible distance from animals, particularly where there are calves or lambs present, and avoid driving them over the land. Make sure that your dog does not chase or worry livestock by keeping it under close control or on a lead.</td>
<td>If you are experiencing large numbers of roadside campers or have well-used wild camping areas, you could work with your local authority and with recreational bodies to assist the management of such camping.</td>
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<tr>
<td><strong>Wild camping</strong></td>
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<tr>
<td>Access rights extend to wild camping. This type of camping is lightweight, done in small numbers and only for two or three nights in any one place. You can camp in this way wherever access rights apply but help to avoid causing problems for local people and land managers by not camping in enclosed fields of crops or farm animals and by keeping well away from buildings, roads or historic structures. Take extra care to avoid disturbing deer stalking or grouse shooting. If you wish to camp close to a house or building, seek the owner’s permission. Leave no trace by:</td>
<td>If you are experiencing large numbers of roadside campers or have well-used wild camping areas, you could work with your local authority and with recreational bodies to assist the management of such camping.</td>
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<tr>
<td>• taking away all your litter;</td>
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<tr>
<td>• removing all traces of your tent pitch and of any open fire (follow the guidance for lighting fires);</td>
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<td>• not causing any pollution.</td>
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<tr>
<td><strong>Wildlife watching and surveys</strong></td>
<td>Wherever possible, co-operate with people who wish to carry out a survey and allow the taking of small samples where this would not cause any damage.</td>
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<tr>
<td>Watching and recording wildlife is a popular activity and falls within access rights. If you wish to intensively survey an area, make frequent repeat visits or use any survey equipment, consult the relevant land manager(s) to let them know of your intentions. Take extra care not to disturb the wildlife you are watching.</td>
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Part 6. Where to get help and information

6.1 By providing a detailed guide to access rights and responsibilities, which should help everyone make informed decisions about what best to do in everyday situations, the number of issues or problems that might arise should be reduced. Some issues and problems, however, are inevitable and may range from differences in interpreting access rights and responsibilities to coming across undesirable behaviour. Also, in some places the number of people or range of recreation activities might be causing significant problems for land management, people’s safety or the environment and so some form of management might be needed. This part of the Code provides advice on:

- where to find out more about access rights and responsibilities;
- what can be done to manage access and recreation; and
- what you should do if you encounter someone behaving irresponsibly.

6.2 In dealing with any issue or problem that might arise, it is important that everyone shows courtesy and consideration to other people. Good manners are fundamental to good relations between those enjoying the outdoors and those who live and work there. Respecting the needs of other people and following the guidance in the Code will help a great deal.

Getting more advice and information

6.3 The Code cannot cover every possible situation, setting or activity. Free information and advice on access rights and responsibilities, and on who to contact in your local authority is available online at:

www.access-scotland.com

6.4 This website also provides links to a wide range of representative bodies for recreation and land management, and to relevant public bodies. It also provides information on SNH’s education programme and on where to seek grants and other support.

6.5 If you need more detailed advice or guidance, you should phone your local authority or national park authority directly (ask for the access officer or ranger service) or contact your local SNH office (see www.access-scotland.com for contact details).

Facilitating and managing access and recreation

6.6 In some cases, the number of people visiting a place or the range of recreational activities taking place might cause some problems for land management, people’s safety or the environment. Equally, in some places, better provision of paths and other facilities might be needed to maximise people’s enjoyment of the outdoors, particularly by people with disabilities. In these
situations, some form of formal provision and/or management will be needed. Local authorities, national park authorities and other public bodies, local access forums and representative bodies for recreation and land management, as well as land managers, can all help to provide for and manage access and recreation.

6.7 What sort of facilities or management is needed in an area will vary according to its location, the level and type of recreational use and the range and complexity of issues arising. Steps that can be taken include the following.

- The promotion of responsible behaviour through more detailed codes of practice, education, interpretation, training and promotional campaigns\(^{61}\).
- Providing on-site advice through signage, waymarking and leaflets.
- Providing facilities, such as paths, gates and other access points, launching points, car parks and picnic areas, as a way of helping to manage access and recreation, and to integrate access and land management.
- Working with your local authority and national park authorities to identify routes, including core paths that can be easily used by disabled people.
- Running a ranger service to advise on and promote responsible behaviour, to contribute to educational and interpretive work, and to look after facilities.
- Taking precautions to safeguard people’s safety, such as asking people not to use a particular route or area, or not to undertake a particular activity, while there is a specific land management operation underway (see paragraphs 3.24 to 3.28 and 4.11 to 4.17).
- Voluntary agreements between land managers and recreation bodies to help safeguard natural heritage interests at sensitive times of the year (such as climbing on cliffs where rare birds are nesting and rearing their young) or to zone intensively used places for different recreational activities.
- Putting up notices for the purposes of advising people of any adverse effect that their presence or their activities may have on the natural heritage or the cultural heritage\(^{62}\).
- Management rules, byelaws\(^{63}\) or other regulations where more directive management is needed to avoid significant problems arising and where voluntary agreements have not worked. Local authorities can introduce management rules on their own land or byelaws on any land or water on which access rights can be exercised. Other public bodies, including Scottish Natural Heritage, Scottish Water, British Waterways, Ministry of Defence and the Forestry Commission, can all introduce byelaws on land or water that they own or otherwise control. These byelaws must be consistent with the Land Reform (Scotland) Act 2003.
- The exemption of an area from access rights for a specific period and purpose by a local authority or Scottish Ministers (see paragraph 2.11).
- To prevent damage to a Site of Special Scientific Interest, the owners or occupiers of the site may need to notify Scottish Natural Heritage of “potentially

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\(^{61}\) Scottish Natural Heritage and all local authorities have a statutory duty to publicise the Code. SNH also has a duty to promote understanding of the Code.

\(^{62}\) Section 29, Land Reform (Scotland) Act 2003. Scottish Natural Heritage has this power for the natural heritage and Scottish Ministers for the cultural heritage.

\(^{63}\) A local authority can introduce byelaws over any land on which the access rights can be exercised to keep order, prevent damage, prevent nuisance or danger, or preserve or improve amenity. They must follow agreed procedures and consult relevant interests.
damaging operations\textsuperscript{64}. Also, Ministers, on the advice of Scottish Natural Heritage, can issue a Nature Conservation Order\textsuperscript{65}. This may be used to restrict access to a specific area (to protect a raptor nest for example).

6.8 The new local access forums will have a key role to play in bringing together all key interests locally to advise local authorities or national park authorities and other bodies on any matter arising from the exercise of access rights and issues relating to rights of way and to the new core path plans that local authorities must prepare. The local access forums can also offer assistance to the parties of any dispute about these issues. You can find out more about local access forums by contacting your local authority or going online at www.access-scotland.com.

6.9 The Land Reform (Scotland) Act 2003 placed several new duties on local authorities and national park authorities\textsuperscript{66}. Each local authority and national park authority must:

- uphold access rights by asserting, protecting and keeping open and free from obstruction or encroachment any route or other means by which people exercise access rights;
- set up at least one local access forum for its area to advise it on any matter to do with the exercise of access rights or the core paths plan, and to offer help in any dispute arising;
- prepare a plan for its area, within three years, for a system of paths (known as core paths) sufficient to give people reasonable access throughout its area (procedures have been set out for doing this work and this includes consulting relevant interests); and
- review its byelaws and amend these where necessary.

6.10 Local authorities and national park authorities also have wide-ranging powers to help manage access and recreation. These powers include:

- employing a ranger service to help and advise people about access rights on any land or water where the access rights can be exercised and to perform such other duties on this land or water as the local authority determines;
- the introduction of measures for safety, protection, guidance and assistance to warn of, and protect people from any danger on land on which the rights are exercisable, to show or enclose recommended routes or established paths, and to give directions to such land;
- entering agreements to delineate and maintain core paths;
- entering a management agreement with a land manager to set out how much management is needed to preserve or enhance the natural beauty of the countryside or to promote enjoyment of the countryside in an area, or to help manage access to any cultural heritage site;

\textsuperscript{64} These might be replaced by the term “operations requiring consent” as proposed under the Nature Conservation (Scotland) Bill.

\textsuperscript{65} Under Section 29, Wildlife & Countryside Act 1981. A Special Nature Conservation Order can be made on a Natura site under The Conservation (Natural Habitats and etc) Regulations 1994.

\textsuperscript{66} From time to time, Scottish Ministers may issue formal guidance to local authorities and national park authorities on the performance of any of their functions under the Land Reform (Scotland) Act 2003.
the removal of any prohibiting sign, obstruction or dangerous impediment that is intended to prevent or deter anyone from exercising the access rights, and recover the costs of doing so;

- the introduction of management rules to manage recreational use on land or water under its control;

- the acquisition of land or water to enable or facilitate the exercise of access rights (they can do so compulsorily with consent of Ministers);

- the exemption of particular land or water from access rights for up to five days (longer exemptions require public consultation and Ministerial consent);

6.11 All relevant public bodies can help by respecting, safeguarding and promoting access rights and responsibilities through their policies, plans and actions. They could do this, for example, by:

- reviewing and amending or developing policies and programmes of assistance (such as grants);

- considering the impact of new development proposals on access rights (such as through the development control process);

- working positively to help the exercise of access rights on their land and water;

- setting a good example by fully meeting their obligations as land managers under the Code;

- co-ordinating their access policies and initiatives with other public bodies;

- providing information to the public and land managers about exercising access rights responsibly and managing land and water responsibly for access; and by

- making full use of their duties and powers.

What to do if you encounter irresponsible behaviour

6.12 In practice, only a small proportion of people behave irresponsibly and much of this is due to people not being aware of the implications of their actions. With people’s responsibilities set out in this Code and the greater emphasis on promoting responsible behaviour, the incidence of irresponsible behaviour should remain small. Inevitably, though, you might encounter some form of irresponsible behaviour. If you do, the sensible course of action is to talk to the people involved and ask them to explain their behaviour. Using aggressive language will only make a problem worse.

6.13 If a person is behaving irresponsibly and damage or significant disturbance is being caused, then you could ask them to modify their behaviour. If they refuse to do so, and this damage or significant disturbance continues, then they would not be exercising access rights responsibly and so they could then be asked to leave. If an individual does this persistently over a period of time, you could seek an interdict against that person. Never use force.

6.14 If a person’s behaviour is criminal, you should contact the Police.

6.15 If you are exercising access rights and come across what you believe is a deliberate or unreasonable obstruction that stops or hinders you from exercising access rights, you could report this to the local authority. The local authority could
then decide what to do in terms of removing the obstruction and upholding access rights.

6.16 A dispute over whether or not a member of the public or a land manager is acting irresponsibly could ultimately be referred to a Sheriff for a declaration. In dealing with this, it would be relevant to consider whether the person was following the guidance in this Code. Such action, though, should be relatively rare.
**Annex 1. Existing criminal offences created by statute**

This annex lists, in alphabetical order, the main categories of criminal behaviour that are statutory offences. The common law also provides for action where, for instance, a breach of the peace or malicious mischief is alleged. Access rights do not extend to any of these activities. The annex is meant to provide an overview summary. For detailed information, look at the relevant legislation. Provisions within the Highway Code for cycling and horse riding must be followed.

<table>
<thead>
<tr>
<th>Activity</th>
<th>Statutory reference</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aggravated trespass</td>
<td>Criminal Justice and Public Order Act 1994 (section 68)</td>
<td>A person commits this offence if, in relation to any lawful activity people are engaged in or about to undertake, the person does anything that is intended to intimidate and deter those people or to obstruct or disrupt the activity.</td>
</tr>
<tr>
<td>Collective trespass</td>
<td>Criminal Justice and Public Order Act 1994 (section 61)</td>
<td>If two or more people are trespassing with common purpose to reside on land for any time, and:</td>
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<td>• have caused damage or</td>
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<td>• used threatening, abusive or insulting words or behaviour, or</td>
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<td></td>
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<td>• have between them 6 or more vehicles, they can be directed to leave by the police. If they fail to do so, they commit an offence.</td>
</tr>
<tr>
<td>Control of dogs (fouling)</td>
<td>Civic Government (Scotland) Act 1982 (section 48)</td>
<td>If you are in charge of a dog and allow it to foul:</td>
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<td>• a footpath or footway, or</td>
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<td>• a grass verge maintained by a council and adjacent to a footpath/footway, or</td>
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<td></td>
<td></td>
<td>• any place maintained by a local authority for recreational or sporting purposes</td>
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<td>you are guilty of an offence.</td>
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<tr>
<td>Control of dogs (fouling)</td>
<td>Dog Fouling (Scotland) Act 2003 (Section 1)</td>
<td>A person commits an offence under this law if they do not immediately remove the faeces defecated by their dog in any public open place.</td>
</tr>
<tr>
<td>Control of dogs (worrying of livestock by dogs)</td>
<td>Dogs (Protection of Livestock) Act 1953 (Section 1)</td>
<td>If a dog worries livestock on any agricultural land the person in charge of the dog is guilty of an offence. Worrying includes a dog attacking or chasing livestock, or being loose in a field where there are sheep.</td>
</tr>
<tr>
<td>Control of dogs (worrying of livestock dogs)</td>
<td>Animals (Scotland) Act 1987 (Section 4)</td>
<td>This is not an offence, but is included here because this Act provides a defence for people who kill or injure a dog which is worrying livestock, subject to stringent conditions.</td>
</tr>
<tr>
<td>Damage to ancient monuments</td>
<td>Ancient Monuments &amp; Archaeological Areas Act 1979 (Sections 2, 19)</td>
<td>It is an offence to carry out, cause or permit any works, without the consent of Scottish Ministers, which result in the demolition or destruction of or any damage to a Scheduled Monument.</td>
</tr>
<tr>
<td>Damage or disturbance to animals</td>
<td>Wildlife &amp; Countryside Act 1981 (S.9-10) and The Conservation (Natural Habitats and etc Regulations 1994)</td>
<td>For protected species, it is an offence to:</td>
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<td>• kill or injure the animal,</td>
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<td>• capture or keep the animal,</td>
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<td>• destroy, damage or obstruct access to its place of shelter, and</td>
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<td></td>
<td></td>
<td>• disturb the animal while using its place of shelter. Other offences relate to badgers, bats, deer, seals, whales and dolphins. For protected species such as bats, otters, wildcats, great crested newts and natterjack toads, under</td>
</tr>
<tr>
<td>Activity</td>
<td>Statutory reference</td>
<td>Comments</td>
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<tr>
<td>European legislation it is an offence to:</td>
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<td>European legislation it is an offence to:</td>
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<td>• capture, kill or disturb the animal;</td>
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<td>• capture, kill or disturb the animal;</td>
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<tr>
<td>• take or destroy its eggs;</td>
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<td>• take or destroy its eggs;</td>
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<tr>
<td>• damage or destroy its breeding site or resting place.</td>
<td></td>
<td>• damage or destroy its breeding site or resting place.</td>
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<td></td>
<td>Contact your local Scottish Natural Heritage office for further information.</td>
</tr>
<tr>
<td>Damage or disturbance to wild birds</td>
<td>Wildlife &amp; Countryside Act 1981 (S.1-6) and The Conservation (Natural Habitats etc) Regulations 1994</td>
<td>There is a wide variety of offences relating to the killing or injuring any wild bird, capturing or keeping any wild bird, destroying or taking eggs, or destroying, damaging or taking the nest of any wild bird whilst it is in use or being built. Contact your local Scottish Natural Heritage office for further information.</td>
</tr>
<tr>
<td>Damage to plants</td>
<td>Wildlife &amp; Countryside Act 1981 (S.13) and The Conservation (Natural Habitats etc) Regulations 1994</td>
<td>It is an offence to dig up or remove any wild plant without the permission of the landowner. Certain plants are specially protected and it is an offence to pick, collect, cut, uproot or destroy these species, even if the landowner agrees. It is also an offence to keep, sell, advertise or exchange such plants. Specially protected plants are listed in Schedule 8 to the 1981 Act and in the list of European protected species in Schedule 4 to the 1994 Regulations. They include Killarney fern, floating-leaved water plantain, slender naiad and yellow marsh saxifrage. Contact your local SNH office for further information.</td>
</tr>
<tr>
<td>Driving a vehicle off road</td>
<td>Road Traffic Act 1988 Section 34</td>
<td>It is an offence to drive a motor vehicle without lawful authority on:</td>
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<td>• land of any description (not forming part of a road), or</td>
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<td>• a footpath or bridleway except in an emergency.</td>
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<td>It is not an offence to drive a motor vehicle on land within 15 yards of a road for the purpose of parking the vehicle – although this does not confer any legal right to park the vehicle.</td>
</tr>
<tr>
<td>Dropping of litter</td>
<td>Environmental Protection Act 1990 Section 87</td>
<td>It is an offence to leave litter in any public open place (a place in the open air where you can go without paying).</td>
</tr>
<tr>
<td>Fishing</td>
<td>Salmon &amp; Freshwater Fisheries (Protection) (Scotland) Act 1951 (Section 1) and Freshwater &amp; Salmon Fisheries (Scotland) Act 1976 (Section 1)</td>
<td>Fishing for salmon or sea trout without lawful authority or written permission from the owner of the fishing rights is a criminal offence. Fishing for brown trout and other freshwater fish without written permission or legal rights is a criminal offence in an area covered by a Protection Order.</td>
</tr>
<tr>
<td>Lighting fires</td>
<td>Trespass (Scotland) Act 1865 (Section 3)</td>
<td>You are guilty of an offence if you light a fire:</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• on or near any private road</td>
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<td></td>
<td>• on enclosed or cultivated land</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• in or near any plantation without the consent of the owner or land manager.</td>
</tr>
<tr>
<td>Lighting Fires</td>
<td>Civic Government (Scotland) Act 1982</td>
<td>Any person who lays or lights a fire in a public place so as to endanger any other person, or to give reasonable cause</td>
</tr>
<tr>
<td>Activity</td>
<td>Statutory reference</td>
<td>Comments</td>
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</tr>
<tr>
<td>Obstruction in a public place</td>
<td>Civic Government (Scotland) Act 1982 (section 53)</td>
<td>Any person on foot in a public place who wilfully obstructs the lawful passage of any other person is committing an offence. (A public place means any place to which the public have unrestricted access.)</td>
</tr>
<tr>
<td>Poaching</td>
<td>Night Poaching Act 1828 (Section 1)</td>
<td>It is an offence to take or destroy any game: • on any land, whether open or enclosed, or • on any public road. It is also an offence to go on any land at night with a gun for the purpose of taking or destroying game.</td>
</tr>
<tr>
<td>Poaching</td>
<td>Game (Scotland) Act 1832 (Section 31)</td>
<td>It is an offence to trespass on land without the leave of the owner or proprietor in search of game, woodcock, snipe, wild ducks or rabbits during daytime.</td>
</tr>
<tr>
<td>Polluting water</td>
<td>Water (Scotland) Act 1980 (Section 75)</td>
<td>If you deliberately or accidentally pollute any spring, well or adit used or likely to be used for: • human consumption • domestic purposes • manufacturing food or drink for human consumption you are guilty of an offence.</td>
</tr>
<tr>
<td>Polluting water</td>
<td>Control of Pollution Act 1974 (Section 31)</td>
<td>If you cause or knowingly permit to enter surface or ground water • Any poisonous, noxious or polluting matter, or • Any solid waste matter, you are committing an offence.</td>
</tr>
<tr>
<td>Safety</td>
<td>Health &amp; Safety at Work Act 1974 (Sections 8, 33)</td>
<td>It is an offence to interfere intentionally with or misuse anything provided for the safety, health or welfare of people.</td>
</tr>
<tr>
<td>Spawning salmon</td>
<td>Salmon Fisheries (Scotland) Act 1868 (Section 19)</td>
<td>It is offence to wilfully disturb any salmon spawn, or spawning beds and shallows where salmon spawn may be.</td>
</tr>
<tr>
<td>Trespassory assemblies</td>
<td>Criminal Justice and Public Order Act 1994 (section 70)</td>
<td>It is an offence to organise or participate in any trespassory assembly which has been prohibited by a Council on application from the chief officer of police. (Such prohibitions may only be ordered, for a period of up to 4 days, where such an assembly of 20 or more people would be without the landowner's permission, and may result in serious disruption to the life of the community, or serious damage to land or a building of historical, archaeological or scientific importance).</td>
</tr>
<tr>
<td>Using metal detectors in a protected place</td>
<td>Ancient Monuments &amp; Archaeological Areas Act 1979 (Section 42)</td>
<td>It is an offence to use a metal detector in a protected place without the written consent of Ministers. A protected place is any place which is either a site of a scheduled monument or of any monument under the ownership or guardianship of Ministers or a local authority by virtue of this Act or is situated in an area of archaeological importance. It is also an offence to remove any object of archaeological or historic interest discovered through the use of a metal detector.</td>
</tr>
<tr>
<td>Activity</td>
<td>Statutory reference</td>
<td>Comments</td>
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<td>detector in a protected place without the written consent of Ministers. Under Scots Law, all finds must be formally reported to the Crown and not to do so is an offence under Treasure Trove and under the Civic Government (Scotland) Act 1982.</td>
</tr>
<tr>
<td>Vandalism</td>
<td>Criminal Justice (Scotland) Act 1980 (Section 78)</td>
<td>Anyone who, without reasonable excuse, wilfully or recklessly destroys or damages another’s property commits this offence of vandalism.</td>
</tr>
</tbody>
</table>
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(to be inserted in published version)
ENVIRONMENT AND RURAL DEVELOPMENT COMMITTEE

Pauline McNeill
Convener
Justice 1 Committee

23 June 2004

Dear Pauline


As you know, the Environment and Rural Development Committee considered this proposed code at its meetings on 16 and 23 June. The Committee had the benefit of being able to see the submissions which have been made in response to your Committee’s call for evidence.

The Committee would like to offer some comments to the Justice 1 Committee as lead committee, and I would be grateful if you could take the following comments into account in your consideration of this proposed code.

1. The proposed code sets out in section 4.7 the prohibition on managers of land and water from erecting signs to prevent or deter access. The Committee notes that the proposed code does not, however, appear to provide guidance on the nature of, or language to be used on, signs which can be put up. The Committee had in mind allegations that unduly restrictive signs were erected during the foot-and-mouth disease crisis, which deterred people unnecessarily from accessing land in some cases. While signs of some sort may clearly be necessary at times, the Committee believes that it would be of benefit to have some more positive guidance on the language to be used on signs. The Justice 1 Committee may therefore wish to explore with the Minister for Environment and Rural Development whether it is intended to produce guidance on this issue.

2. The Committee notes the interaction between the provisions of the Land Reform (Scotland) Act 2003 and the Nature Conservation (Scotland) Act 2004. For example, the Nature Conservation Act seeks to prevent damage to anything on land which forms part of a site of special scientific interest. During the Parliamentary consideration of that act some concern was expressed that this type of provision could be used to restrict access unnecessarily. The Committee hopes that the Justice 1 Committee may be able to seek appropriate assurances from the Minister on this matter. In this context, the Committee also notes that a number of elements

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of the proposed code require to be updated to reflect the fact that the Nature Conservation (Scotland) Bill has now been enacted.

3. Section 2.9 of the proposed code sets out guidance on access for those undertaking commercial activities. The Committee is not entirely clear on how this guidance will apply, for example, to companies which offer group walking holidays. While the Committee understands that commercial activities involving groups are not excluded from access rights, it believes that clarification from the Minister for Environment and Rural Development on this matter may be helpful.

4. The Committee is aware that the issue of the liability of landowners and managers in respect of those taking access was considered at some length during the Parliamentary passage of the Land Reform Act. However, the Committee notes that some concerns remain about this, particularly where access is being taken to enclosed land. The Committee would therefore encourage the Justice 1 Committee to raise these issues with the Minister for Environment and Rural Development in order to clarify the precise effect of the code on the issue of liability.

5. Finally, the Committee is particularly concerned to ensure that the code is widely disseminated. The Committee would like to see it produced in a form which is accessible and widely available to both land managers and countryside users so that it forms a practical tool in all sectors of outdoor activity and tourism.

The Committee wishes to emphasise that it very much welcomes the proposed code and would strongly encourage the Justice 1 Committee to recommend its approval.

The Committee understands that section 10(8) of the Land Reform (Scotland) Act requires SNH to keep the code under review. The Committee would hope that the code will be reviewed regularly and thoroughly in the light of experience. The comments above are therefore offered in the hope that the Justice 1 Committee may be able to seek appropriate assurances or further details from the Minister, or recommend particular issues for early review.

I hope these comments are helpful in your committee’s consideration of the proposed code.

Yours sincerely

Sarah Boyack MSP
Convener
Purpose of the draft instrument

1. This Order corrects an omission in the Victim Statements (Prescribed Offences) (Scotland) Order 2003 by adding to the offences for which a victim will be afforded an opportunity to make a victim statement for the purpose of section 14(2) of the Criminal Justice (Scotland) Act 2003. It also revokes another Order, the Statements (Prescribed Offences)(Scotland) Amendment Order 2004 (SSI 2004/246) which was found to be defective by the Subordinate Legislation Committee.

Background

Criminal Justice (Scotland) Act 2003

2. The Order is made in exercise of powers conferred by section 14(2) and 88(1) of the Criminal Justice (Scotland) Act 2003. It amends the Victim Statements (Prescribed Offences) (Scotland) Order 2003 (“the 2003 Order”).

Provisions

3. The Criminal Justice (Scotland) Act 2003 confers upon victims of certain prescribed offences the right to be afforded an opportunity to submit a written statement to the Court about the impact of the crime upon them. The 2003 Order set out the offences in respect of which it was proposed that victims would have the right to submit a statement under the victim statements pilot schemes.

4. The Executive states that the intention of the scheme was to include sexual and non-sexual crimes of violence including certain statutory crimes.

5. The Victim Statements (Prescribed Offences) (Scotland) Amendment Order 2003 amended the 2003 Order to include robbery, following a request from the Justice 1 Committee.

6. The Victim Statements (Prescribed Offences)(Scotland) Amendment (No.2) Order 2004 corrects the 2003 Order in two respects: firstly by including a reference to Criminal Law (Consolidation) (Scotland) Act 1995 which had been omitted; and secondly by correcting an erroneous reference to the Road Traffic Act 1998 which should have read 1988.

Revocation

7. This Order also revokes The Victim Statements (Prescribed Offences) (Scotland) Amendment Order 2004 (SSI 2004/246) before this instrument can come into force. At its meeting on 1 June, the Subordinate Legislation Committee noted an incorrect reference in this instrument. Having considered
the Committee’s comments, the Executive considered that the most appropriate way forward was to revoke the Amendment Order before it came into force.

8. As a consequence, Article 10(2) of the Scotland Act 1998 (Transitory and Transitional Provisions) (Statutory Instruments) Order 1999, which requires instruments to be laid before the Parliament no less than 21 days before coming into force, has not been complied with. This requires the Executive to explain to the Presiding Officer why this is the case.

Financial consequences
9. The Scottish Executive’s note makes no reference to the financial consequences on Executive expenditure.

Subordinate Legislation Committee
10. The Subordinate Legislation Committee considered this instrument at its meeting on 22 June 2004¹ and determined that the attention of the Parliament need not be drawn to it (Subordinate Legislation Committee, 29th Report, 2004 (Session 2)).

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

12. The instrument was laid on 11 June 2004 and is subject to annulment under the Parliament’s Standing Orders until 19 September 2004.

13. In terms of procedure, unless a motion for annulment is lodged, no further action is required by the Committee. The instrument came into force on 17 June 2004.

¹ Subordinate Legislation Committee, 22nd Meeting, 2004 (Session 2).
Justice 1 Committee

Comparative Review of Alternatives to Custody

Note by the Clerk

Background

1. At its meeting on 17 September, the Committee agreed to develop a bid for funding for research on alternatives to custody in other jurisdictions. In its report of its inquiry into alternatives to custody, the former Justice 1 Committee highlighted the potential usefulness of conducting comparative research on the effectiveness of community disposals. The Committee reported that Scotland could learn valuable lessons from other jurisdictions, such as Finland, which have drastically reduced their prison populations. The current Justice 1 Committee agreed to commission such research to inform its future work on prisons and sentencing.

2. At its meeting on 10 December 2003, the Committee agreed a proposal for a comparative review of alternatives to custody. That work is being carried out by researchers from the Department of Applied Social Science of the University of Stirling.

3. The aims of the research are to:

   - identify the use of alternatives to custody in a number of jurisdictions;
   - assess the effectiveness of alternatives to custody within the jurisdictions concerned;
   - assess the applicability of the approaches studied to the situation in Scotland.

Interim report

4. In the first phase of the research project, the researchers were asked to analyse trends in the use of imprisonment world-wide in order to identify jurisdictions that have either:

   - succeeded in reducing their prison populations or;
   - maintained that population at a relatively low level in comparison to Scotland.

5. The findings of the researchers are contained within the executive summary and the interim report attached at annexes A and B.

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1 Justice 1 Committee, 3rd Report, 2003, Inquiry into Alternatives to Custody, Volume 1, p32, para 87
6. The researchers have investigated several different jurisdictions and have suggested that Finland, Sweden and Western Australia merit further investigation in the second phase of the research project. This phase will involve more detailed analysis of relevant published material with the collection of additional information which will enable trends in these jurisdictions to be better understood.

7. The Committee is invited to consider the interim report on the research and to consider the recommendation of the research team that the use of alternatives to custody in Finland, Sweden and Western Australia should be examined in more detail in phase two of the research project.
EXECUTIVE SUMMARY

This Interim Report presents the work of the first phase of the research project ‘A Comparative Review of Alternatives to Custody’ which is a review of the policies, practices and legislative changes associated with attempts to decrease prison populations in Europe, North America and Australasia.

The first phase of the research project analysed trends in the use of imprisonment worldwide in order to identify jurisdictions that have either

- succeeded in reducing their prison populations or
- maintained that population at a relatively low level in comparison to Scotland

Relevant data and publications were identified through the use of abstract databases, through government websites and relevant research organizations.

From a comparative perspective, the policies, practices and experiences of Finland, Sweden and Western Australia are considered worthy of in-depth scrutiny in the second phase of the research.

Finland has previously been used as a model for good practice in other jurisdictions. In the 1970s the prisoner rate in Finland was amongst the highest in Europe despite a decreasing trend. By the late 1980s/early 1990s Finland’s prison rate had reduced to match that of other Scandinavian countries and remained relatively stable during the 1990s (approximately 60 per 100,000).

While the reasons for Finland’s successful reduction of the prison population are complex, several factors clearly contributed:

- Changes in penal theory and thinking relating to criminal policy
- Changes in penal legislation, in sentencing and prison enforcement practices
- Political consensus that prison overcrowding was a problem that needed to be addressed.

Finland has relatively few alternatives to imprisonment. During the 1990s a majority of all criminal cases brought before the courts resulted in fines (60%) or a conditional sentence (20%). Around 10% of cases result in imprisonment and 6-7% in community service.

The Finnish reduction in the use of custody may be more indicative of a shift from an excessive use of imprisonment to a more ‘normalised’ situation rather than a major move towards decarceration. Although there were significant decreases in the prison population between 1992 and 1998, since 1998, the overall trend in imprisonment has increased (from 2569 in 1998 to 3469 in 2002) which needs to be closely examined.
Sweden provides an interesting jurisdiction to study as its prison population has remained more or less stable over the past 20 years.

A general principle of Swedish penal policy is that imprisonment should be avoided as far as possible, although Swedish law offers fewer sentencing options than do most countries. Up until the 1960s, the prison populations of Sweden and the UK were very similar but the Swedish prison population decreased after the 1960s, and the rate of imprisonment during the 1990s has not returned to the level of imprisonment evident in the late 1960s, in contrast to the UK prison population which has continually increased during this period. After a significant decrease in the prison population from 1995-1998, it increased significantly from 1998-2001. The number of receptions to prison has decreased between 2001-2004, mainly due to intensive supervision with electronic monitoring which is used as an alternative to prison for sentences of up to three months.

Traditionally punitive in approach, Western Australia has begun to reduce its rate of imprisonment since introducing a package of reforms.

Between 1991 and 2002 Western Australia witnessed a 43% increase in the numbers of offenders imprisoned. Further analysis revealed that the high imprisonment rate was as a result of the high use of short sentences. The rate of recidivism following prison was the highest in Australia as was the cost of imprisonment. The use of community service orders, by contrast was relatively low.

The package of reforms include legislative changes, administrative reforms, the expansion of diversionary options and court reforms which are being introduced in a phased manner to enable the impact of each reform on the prison population to be assessed. Some of the other key policy initiatives include the extension of adjournment of sentence from up to 6 to up to 24 months, early release of short-term prisoners, abolition of remission, clearer breach procedures, wider range of community work placements, expansion of community-based intervention programmes and expansion of diversionary measures. The initiative that is anticipated to have the most dramatic impact on prison numbers – the abolition of short sentences (up to 6 months) – is the last to be introduced. Since the reform programme was introduced, the rate of imprisonment in the state was said by the Western Australia Department of Justice in 2003 to have decreased by just under 13% over a period of 12 months. Whether this reduction in prison use has been sustained or improved and, if so, which of the reforms appear to have contributed to it would therefore be worthy of more detailed analysis.

In examining the polices, practices and experiences of Finland, Sweden and Western Australia great care will be taken to appreciate definitional issues. There is no universal definition of ‘alternatives to custody’, and anything that involves crime prevention and punishment outside custodial establishments could legitimately be defined as ‘alternative’ though strictly speaking the term is usually used to referred to
disposals that are explicitly intended to divert offenders from custodial sentences. The definition by Vass (1990) seems to apply to most countries: ‘Alternatives to custody are those penalties which, following conviction and sentence, allow an offender to spend part or all of his or her sentence in the community and outside prison establishments’. Other measures that do not come under this definition will be considered as a ‘penalty’.

The second phase of the research project will involve a more detailed analysis of relevant published material with the collection of additional information that will enable trends in prison populations in the jurisdictions of Finland, Sweden and Western Australia to be better understood. This will provide an opportunity to critically examine the applicability of their policy measures, approaches and experience to the situation in Scotland.

There are three main limitations of comparison of trends over different jurisdictions. Firstly, there is the issue of how populations are classified and counted which requires clarity in reporting to address this. Secondly, similar rates of imprisonment can conceal radically divergent practices. The sociological, technological, economic, environment and political contexts of jurisdictions need to be examined. Finally, cultural differences between countries also have an effect on official statistics, as different sorts of criminal behaviour are perceived differently in terms of seriousness. The role of public attitudes towards punishment and their willingness to support the use of alternatives to custody also needs to be considered.

Finally, when investigating new means to reduce rates of imprisonment, it is important to be cognisant of the issue of ‘widening the net’. Net-widening arises when penalties and sanctions, designed as substitutes for custodial sentences, become alternatives for other non-custodial sanctions. The consequence of this is that the criminal justice system expands subjecting more and newer groups of offenders to more intensive supervision, without in turn reducing the prison population.
A COMPARATIVE REVIEW OF ALTERNATIVES TO CUSTODY

Interim Report to The Scottish Parliament

Bill Munro
Gill McIvor
Susan Eley
Margaret Malloch

Department of Applied Social Science
University of Stirling
Stirling FK9 4LA

21 June 2004
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EXECUTIVE SUMMARY

This Interim Report presents the work of the first phase of the research project ‘A Comparative Review of Alternatives to Custody’ which is a review of the policies, practices and legislative changes associated with attempts to decrease prison populations in Europe, North America and Australasia.

The first phase of the research project analysed trends in the use of imprisonment world-wide in order to identify jurisdictions that have either

- succeeded in reducing their prison populations or
- maintained that population at a relatively low level in comparison to Scotland

Relevant data and publications were identified through the use of abstract databases, through government websites and relevant research organizations.

From a comparative perspective, the policies, practices and experiences of Finland, Sweden and Western Australia are considered worthy of in-depth scrutiny in the second phase of the research.

Finland has previously been used as a model for good practice in other jurisdictions. In the 1970s the prisoner rate in Finland was amongst the highest in Europe despite a decreasing trend. By the late 1980s/early 1990s Finland’s prison rate had reduced to match that of other Scandinavian countries and remained relatively stable during the 1990s (approximately 60 per 100,000).

While the reasons for Finland’s successful reduction of the prison population are complex, several factors clearly contributed:

- Changes in penal theory and thinking relating to criminal policy
- Changes in penal legislation, in sentencing and prison enforcement practices
- Political consensus that prison overcrowding was a problem that needed to be addressed.

Finland has relatively few alternatives to imprisonment. During the 1990s a majority of all criminal cases brought before the courts resulted in fines (60%) or a conditional sentence (20%). Around 10% of cases result in imprisonment and 6-7% in community service.

The Finnish reduction in the use of custody may be more indicative of a shift from an excessive use of imprisonment to a more ‘normalised’ situation rather than a major move towards decarceration. Although there were significant decreases in the prison population between 1992 and 1998, since 1998, the overall trend in imprisonment has increased (from 2569 in 1998 to 3469 in 2002) which needs to be closely examined.
Sweden provides an interesting jurisdiction to study as its prison population has remained more or less stable over the past 20 years.

A general principle of Swedish penal policy is that imprisonment should be avoided as far as possible, although Swedish law offers fewer sentencing options than do most countries. Up until the 1960s, the prison populations of Sweden and the UK were very similar but the Swedish prison population decreased after the 1960s, and the rate of imprisonment during the 1990s has not returned to the level of imprisonment evident in the late 1960s, in contrast to the UK prison population which has continually increased during this period. After a significant decrease in the prison population from 1995-1998, it increased significantly from 1998-2001. The number of receptions to prison has decreased between 2001-2004, mainly due to intensive supervision with electronic monitoring which is used as an alternative to prison for sentences of up to three months.

Traditionally punitive in approach, Western Australia has begun to reduce its rate of imprisonment since introducing a package of reforms.

Between 1991 and 2002 Western Australia witnessed a 43% increase in the numbers of offenders imprisoned. Further analysis revealed that the high imprisonment rate was as a result of the high use of short sentences. The rate of recidivism following prison was the highest in Australia as was the cost of imprisonment. The use of community service orders, by contrast was relatively low.

The package of reforms include legislative changes, administrative reforms, the expansion of diversionary options and court reforms which are being introduced in a phased manner to enable the impact of each reform on the prison population to be assessed. Some of the other key policy initiatives include the extension of adjournment of sentence from up to 6 to up to 24 months, early release of short-term prisoners, abolition of remission, clearer breach procedures, wider range of community work placements, expansion of community-based intervention programmes and expansion of diversionary measures. The initiative that is anticipated to have the most dramatic impact on prison numbers – the abolition of short sentences (up to 6 months) – is the last to be introduced. Since the reform programme was introduced, the rate of imprisonment in the state was said by the Western Australia Department of Justice in 2003 to have decreased by just under 13% over a period of 12 months. Whether this reduction in prison use has been sustained or improved and, if so, which of the reforms appear to have contributed to it would therefore be worthy of more detailed analysis.

In examining the polices, practices and experiences of Finland, Sweden and Western Australia great care will be taken to appreciate definitional issues. There is no universal definition of ‘alternatives to custody’, and anything that involves crime prevention and punishment outside custodial establishments could legitimately be defined as ‘alternative’ though strictly speaking the term is usually used to referred to disposals that are explicitly intended to divert offenders from custodial sentences. The definition by Vass (1990) seems to
apply to most countries: ‘Alternatives to custody are those penalties which, following conviction and sentence, allow an offender to spend part or all of his or her sentence in the community and outside prison establishments’. Other measures that do not come under this definition will be considered as a ‘penalty’.

The second phase of the research project will involve a more detailed analysis of relevant published material with the collection of additional information that will enable trends in prison populations in the jurisdictions of Finland, Sweden and Western Australia to be better understood. This will provide an opportunity to critically examine the applicability of their policy measures, approaches and experience to the situation in Scotland.

There are three main limitations of comparison of trends over different jurisdictions. Firstly, there is the issue of how populations are classified and counted which requires clarity in reporting to address this. Secondly, similar rates of imprisonment can conceal radically divergent practices. The sociological, technological, economic, environment and political contexts of jurisdictions need to be examined. Finally, cultural differences between countries also have an effect on official statistics, as different sorts of criminal behaviour are perceived differently in terms of seriousness. The role of public attitudes towards punishment and their willingness to support the use of alternatives to custody also needs to be considered.

Finally, when investigating new means to reduce rates of imprisonment, it is important to be cognisant of the issue of ‘widening the net’. Net-widening arises when penalties and sanctions, designed as substitutes for custodial sentences, become alternatives for other non-custodial sanctions. The consequence of this is that the criminal justice system expands subjecting more and newer groups of offenders to more intensive supervision, without in turn reducing the prison population.
SECTION 1: INTRODUCTION AND BACKGROUND

The Situation in Scotland

Scotland, like a number of Western jurisdictions, has in recent years witnessed a steady rise in the daily prison population, despite greater proportionate use being made of high tariff non-custodial disposals such as probation and community service orders (Scottish Executive 2002, Mclvor 1999). The damaging effects on offenders and their families of even short periods of imprisonment have been widely recognised, suggesting that where possible use should be made of non-custodial alternatives where this does not compromise public safety. Data from Scotland and elsewhere suggest that non-custodial sentences are at the worst no less effective than sentence of imprisonment (Scottish Executive 2003a, Lloyd, Mair and Hough 1995, May 1999). Moreover there is little dispute that, in comparison with imprisonment, non-custodial sentences are associated with markedly lower costs (Scottish Executive 2003b).

The majority of those serving custodial sentences in Scotland, however, have been sentenced for relatively minor, non-violent offences and a large proportion have been given sentences of six months or less. As far back as 1988 the then Scottish Secretary annunciated a commitment to ensuring that imprisonment was reserved for those who commit serious offences while non-custodial options, such as community service and probation, are used instead of short sentences of imprisonment (Rifkind 1989).

The Justice 1 Committee Enquiry in Alternatives to Custody gathered a large amount of information about the nature, operation and impact of alternatives to imprisonment in Scotland and, to a lesser extent, elsewhere in the UK. It also heard evidence of progress made in other jurisdictions towards reducing their prison populations, although a comparative analysis of imprisonment rates and alternatives to incarceration was beyond its scope. The current Justice 1 Committee believes that such an analysis would, however, be of value in informing its work on prisons and sentencing.

Aims and Objectives of the Research Project

In accordance with the specification issued by The Scottish Parliament, the aims of the current research project are to:

- identify the use of alternatives to custody in a number of jurisdictions
- assess the effectiveness of alternatives to custody within the jurisdictions concerned
- assess the applicability of the approaches studied to the situation in Scotland

The first phase of the work is an analysis of sentencing patterns across different jurisdictions to identify those that have succeeded in reducing rates of imprisonment against a more general increase in prison numbers. This
supplements the written and oral evidence to the Justice 1 Committee Enquiry into Alternatives to Custody and the Coulsfield Inquiry into Alternatives to Custody in the UK on the effectiveness of non-custodial sanctions and related services across different jurisdictions. From this analysis, it is proposed that three jurisdictions could be scrutinised in more detail in the second phase of the research. The second phase of the research project will involve a more detailed analysis of relevant published material relating to these jurisdictions and the collection of additional information which will enable trends in prison populations in these jurisdictions to be better understood and the applicability of their approach and experience to the situation in Scotland to be critically examined.

**The Scope of the Interim Report**

The first phase of the research project analysed trends in the use of imprisonment world-wide in order to identify jurisdictions that have succeeded in reducing their prison population or maintaining that population at a relatively low level in comparison to Scotland. Relevant data and publications were identified through the use of abstract databases, through government websites and relevant research organizations.

Figures on World prison populations and European prison populations were collated from three sources: Aebi, F (2002); Council of Europe (2002) and International Centre for Prison Studies (ICPS) <www.kcl.ac.uk/depsta/rel/icps/worldbrief/world.brief.html>. For reference purposes this will be simplified to: CoE/SPACE/ICPS.

This interim report presents a review of the policies, practices and legislative changes associated with attempts to decrease prison populations in Europe, North America and Australasia.
SECTION 2: GENERAL ISSUES

Effectiveness of Imprisonment

Over the past 20 years, the efficacy of imprisonment as an effective individual deterrent has been demonstrated to be limited. As Brownlee (1995) has shown, other sentences, such as a period of supervision in the community under a probation order, can be just as effective as imprisonment and in some cases more effective.

Reductions in the use of imprisonment as a sanction can be achieved in several ways including:

- Creation of formal sentencing guidelines
- Providing statutory directions to courts to sentence offenders to custody only when certain conditions are met
- Creation of new alternative sanctions to replace some custodial sentences

Alternative sanctions offer non-prison sentences that hold offenders accountable for their actions. Sanctions include fines, probation and a wide range of pre-charge, pre-plea and post-plea alternatives to custody. Across jurisdictions there are a number of preventative initiatives, for example the Perry Preschool project in the US (Schweinhart et al 1993), that seek to reduce the imprisonment rate by reducing the number of people who come into contact with the criminal justice system. The scope of this review will not extend to this area.

Problems of Definition

Alternatives to Custody

Across all the jurisdictions covered in this report, there exists a broad range of penalties and sanctions used either as a substitute for, or in conjunction with, imprisonment or fines. All countries vary in how widely, and in what way, these sanctions are used. In Spain, for example, alternatives to custody are few and community service (a penalty designed as a direct alternative to custody in many jurisdictions) functions, not as a main penalty under law, but as a privilege awarded through judicial discretion (Cid and Larrauri, 1998). This diversity of use, but similarity in name, only serves to highlight the ambiguity of terms such as ‘alternative to custody’ or ‘alternative sanctions’.

Ruggiero (1995) warns that there is no single definition of what ‘alternatives to custody’ are, and that anything which involves crime prevention and punishment outside custodial establishments can legitimately be defined as ‘alternative’. He quotes a definition by Vass (1990) which seems to apply to most countries: ‘Alternatives to custody are those penalties which, following conviction and sentence, allow an offender to spend part or all of his or her sentence in the community and outside prison establishments’ (quoted in Ruggiero 1995:53). This definition is useful as it includes parole and other forms of conditional release and it is the definition that will be used throughout
this report. Other measures that do not come under this definition will simply be referred to as ‘penalty’.

‘Widening the net’

It was Cohen (1985) who first outlined the relationship between net-widening and community alternatives. The problem of net-widening arises when penalties and sanctions, designed as substitutes for custodial sentences become alternatives for other non-custodial sanctions. The consequence of this is that the criminal justice system expands and becomes more intrusive, subjecting more and newer groups of offenders to more intense supervision, without in turn reducing the prison population. Van Swaaningen and de Jonge, (1995) have argued that in the Netherlands non-custodial sanctions changed from being diversionary ‘alternatives’ into principle modes of punishment. One of the consequences of this move was that community service orders in the Netherlands have only contributed to a very small decrease in short-term prison sentences. Cid and Larrauri (1998) put a similar argument in the case of Spain, where they noted an increasing severity in the case of suspended sentence and a lengthening of the community sentence order. The importance of highlighting this problem here, is that it is important to be cognizant when investigating new means to reduce rates of imprisonment, that both reductions and expansions in prison populations may be the result of inadvertent penal practices, such as greater flexibility within the judiciary, rather than by the conscious adoption of a greater number of new ‘alternatives’ (Muncie and Sparks, 1991).

Limitations of Comparison

When looking at variations in prisons in terms of patterns found across different jurisdictions the problems associated with the limitations of crime statistics were apparent. Muncie and Sparks (1991) highlight the fact that crime statistics represent the end result of what are very often complex institutional decision making processes, which in turn, have been abstracted from wider social context.

Three immediate problems are encountered when comparing trends over different jurisdictions. Firstly, different countries use different means of recording imprisonment; they use different categories for those imprisoned and they have different ways of classifying adulthood. However it is not only the issue of how populations are classified and counted; similar rates of imprisonment can conceal radically divergent practices (Muncie and Sparks, 1991). For example, Poland has a waiting list of offenders awaiting prison places (Christie, 2004) and many countries have higher numbers of unconvicted prisoners awaiting trial. Cultural differences between countries also have an effect on official statistics, as different sorts of criminal behaviour are perceived differently in terms of seriousness. In Germany and Italy for instance, the police and the media have a much lower profile with regards to street crime than they do in other jurisdictions, such as the United States or Britain (Nelkin, 1995). Maguire (1995) makes the point that no assumptions should ever be drawn from the analysis of official data without a clear
understanding of how these data were compiled, and what they were intended to represent.
Comparisons

Comparing Rates of Imprisonment

Worldwide, prison is the universal sanction for serious crime. The fifth edition of the World Prison Population List (Walmsley, 2003), shows that over 9 million people are held in penal institutions throughout the world. Just under half of these are in the United States, Russia and China.

Figure 1 overleaf shows the world rate of imprisonment (per 100,000 of the population). The data\(^1\) show Russia and the United States as having the largest prison populations, with Japan and Iceland the lowest. Prison population rates vary between different jurisdictions as well as between different regions within single countries. In Western Europe the mean is 85 (per 100,000 population), whereas in Eastern Europe it is 219. For Australia and New Zealand it is 111.5 (Walmsley, 2003) and for Scandinavia as a unit it is 56.

It is important to mention here, that crime rates alone cannot explain the rise in the prison population. Information from the International Crime Victims Survey (ICVS) suggests that levels of crime in many countries have fallen from between 1995 and 1999. In Canada, England and Wales, Finland, France, Netherlands, Northern Ireland, Poland, Scotland, Sweden, Switzerland and the United States, the decrease in crime trends recorded in the victim surveys is consistent with levels of crime reported by the police (Barclay and Tavares, 2002). Tkachuk and Walmsley (2001) argues that the rise in the prison population can be attributed to the belief in many jurisdictions, that prison is preferable to the alternatives.

Figure 2\(^2\) shows the proportion of prison sentences that are less than five years. 99% of Canada’s prison population have sentences under 5 years. This is also true of Denmark. Cyprus (98%) and Malta (97%) are next, with Germany at 87%. Greece has the longest prison sentences than any other country with only 30% below 5 years. Scotland’s are 58% below five years.

The next section will offer a review of policies, practices and legislative change to reduce imprisonment rates in Europe, North America and Australasia.

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\(^1\) More recent figures show that the United States has the highest prison population rate in the world (701 per 100,000 of the national population) followed by Russia (606) (World Prison Population List, 2003).

\(^2\) Care should be taken when analysing length of sentence as the information available is limited and collected over a very wide time frame depending on individual country. These figures do not include unconvicted prisoners (remand, pre-trial).
Figure 1: World Rate of Imprisonment (per 100,000 population)

World Rate of Imprisonment (per 100,000 population)

Source: CoE/SPACE/ICPS
Figure 2: Length of Imprisonment (< 5 years) in 33 jurisdictions

Source: CoE/SPACE/ICPS
SECTION 3: REVIEW OF POLICIES, PRACTICES AND LEGISLATIVE CHANGE TO REDUCE IMPRISONMENT RATES

Introduction

This section of the report outlines the rise in the prison population in Europe, North America and Australasia. It shows that the rise has not been consistent and variations can be seen across all jurisdictions. It highlights the difficulties involved when comparing jurisdictions that are so dissimilar in terms of legal systems, definition of offences, variability of penalties available to the courts, as well as to the considerable differences in cultural values and traditions within each country. In relation to the latter point, there are two significant elements when comparing different European jurisdictions in particular. Firstly, the wide diversity of languages across the region and secondly, the consequent lack of material on each of the jurisdictions in English. With these conditions in mind, two approaches are suggested as a means to select suitable jurisdictions for comparison. The first is a comparison of average length of sentence; the second is similarity of penal history and culture. The section considers those jurisdictions that are most suitable for applicability to the situation in Scotland.

EUROPE

Europe has experienced a rise in the prison population over the last few decades. As shown in Section 2 of this report, this rise has not been consistent and considerable variations can be observed across all European jurisdictions. For example, the Netherlands, previously known for its low prison rates, has experienced the largest rise of any western European country (205% 1997-2001). Portugal, England and Wales, Italy, Ireland, Spain and Germany have seen growth rates of between 40 and 62%. Scotland, Norway and Belgium have seen more moderate growth and only Northern Ireland, Finland and Denmark have seen their prison population fall over this period. From 1990 throughout Central and Eastern Europe, with the single exception of Slovakia, there was a marked rise in the use of imprisonment.

The International Centre for Prison Studies provides statistics on prison populations worldwide. Figure 3 shows the prison population of the EU member states (excluding eastern Europe). The EU average rate of prison population in 2001 was 85 per 100,000 population. This represented a rise of 1% from 2000. In 2001, Portugal, England and Wales, Scotland, Germany, Italy, and the Netherlands were above the EU average. Luxembourg and Spain, although above the average, has seen a slight decrease in the last year (2001).

If Eastern Europe is included, the EU average rate of prison population in 2001 was 125 per 100,000 population (a 12% rise from the previous year). All Eastern European countries exceeded this average (Figure 4) with the exception of Slovenia. Lithuania, Latvia and Estonia exceeded well beyond 100%. Slovenia’s rate of imprisonment is unique for Eastern Europe and is comparable to that of Cyprus, Denmark, Finland and Northern Ireland. Of the
Western European countries only England and Wales, Portugal, Spain and Scotland approach the level of some of the Eastern European Countries.
Figure 3: Prison Statistics EU Member States (excluding Eastern Europe)

Source: CoE/SPACE/ICPS

Figure 4: Prison Statistics EU Member States (including Eastern Europe)

Source: CoE/SPACE/ICPS
Problems of Comparison

Given this variation in trends within Europe is it debatable whether to consider Europe as a single entity when comparing the effectiveness of penalties and their impact on each country’s prison population. Individual European States may vary in their goals with respect to penal policy. This may have implications for the extent that these states may agree on a definition of what constitutes the problems of crime on a Europe wide basis and for determining which sanctions are universal to all European nation states (in terms of content and intention) and which are specific to a particular jurisdiction. Probation and penalties with a requirement for unpaid work are universal across many jurisdictions but have different aims (particularly when regarded as an alternative to custody) and are applied to very different categories of offender depending on local context. For example, in Spain the penalty with a condition of unpaid work does not operate as an alternative to custody but is seen as a privilege awarded at the discretion of a Judge (Cid and Larrauri, 1998).

There is still little methodological agreement on comparisons between criminal justice systems (Nelkin, 1996). Newburn and Sparks (2004) argue that there is an inherent danger when comparing different criminal justice systems and, that in assuming a universal reach of criminal justice ideas, policies and practices, our attention will be drawn towards convergence and similarity rather that to what is different and unique. This is especially true of considering groupings of countries, in this case Europe, as being made up of coherent unified blocks, and that what appears to be similar on the surface, in terms of shared history and tradition, turns out to reveal significant differences on deeper analysis. The need to recognise cultural variation may have implications for learning lessons from other jurisdictions with respect to penal policy.

An important issue when comparing alternatives to custody on a Europe-wide basis is the wide diversity of languages across Europe. The consequence of this is twofold. Firstly, much of the considerable transfer of criminal justice ideas and policy has happened across English speaking jurisdictions. This may mean that there is less focus on researching alternatives to custody in non-English speaking countries (as notions of evidence based practice are not as strong); this is the case in Spain, Austria and Italy. Secondly, much of the research that does exist is not available in English; this appears to be the case of Germany and France. While it is necessary for us to be cautious when interpreting trends and comparing jurisdictions and ‘we should not take for granted that surface similarity necessarily implies deeper convergences’ (Newburn and Sparks, 2004 p.12), it is possible to view Europe as a single entity when considering the effects of broader formative processes and influences affecting various regions.

Volatility and Stability in Prison Populations
In terms of drawing lessons and the transfer of policy, there are challenges to selecting those countries from Europe whose situation is comparable to Scotland. Given the lack of context available when looking at prison trends, a useful place to start is the comparison between various jurisdictions which not only share common histories and traditions but are subject to the same fields of influence. This is particularly useful as it at least offers some notion of correspondence over periods of sometimes irregular change. One of the most significant influences on the expansion of the European prison estate has been the increasing harmonisation of institutions and the economy brought about by the European Community.

Three interrelated areas where this has been significant have been:

- European harmonisation
- Increased volatility in criminal justice processes
- The adoption of discourses of ‘risk’ in criminal justice practices

**European Harmonisation**

In 1992 the Maastricht Treaty extended the European Community’s sphere of influence to include criminal justice. Sim et al (1995) have written that there is now substantial congruence in definitions of what constitutes crime problems between different nation states. The European Community has brought attention to three key areas: asylum and immigration; police and customs and judicial co-operation.

The first of these three areas of concern are reflected in the increased incarceration of foreign nationals in European Prisons as well as a universal rise in the incarceration of women across the region. Melossi (2003) writes that in Europe today the economic processes of harmonisation and globalisation have created the conditions for migration, while at the same time, has prepared the conditions for immigrants’ involvement in particular forms of officially recorded crime. These processes have also created an environment of uncertainty in many European countries, which in turn has led to an ‘amplified’ fear of crime. The over-representation of non-EU foreign nationals in European penal institutions can be seen particularly in Southern European countries of Spain, Greece and Italy (Melossi, 2003). In Belgium, France, Switzerland and Luxembourg, foreign nationals in prison constituted more than one-quarter of the population. In Eastern Europe, although the Romany population are not categorised as foreigners in official prison statistics, they make up a significant proportion of the prison population. In Hungary between 40 and 45% of all prisoners were Romany, with women and juveniles disproportionately represented amongst them (Sim et al, 1995).

Many scholars have argued that the harmonisation being brought about through the European Union has resulted in a ‘softening’ of the ‘Rule of Law’ and has led to a move towards the minimum of *legality* in member states (Scheuerman, 1999) (Garland, 1996). One particular feature of this has been the adoption of criminal justice policies (predominantly in the UK, France, Germany and Italy) based on discourses of ‘risk’ and notions of actuarial
justice (O’Malley, 2004). These developments have meant that, although, as we have mentioned above, there appears to be a substantial congruence in definitions of what constitutes crime problems between different nation states (in particular crimes associated with issues of asylum and immigration), there appears to be less harmony and greater flexibility in the responses to crime across European nations. The result of this is that much European penal policy and practice is characterised by an increasing amount of volatility and incoherence (O’Malley, 1999)
Eastern Europe

The effects of such volatility and flexibility are nowhere more apparent than in the Central and Eastern European Countries. Economic problems predominate in these countries and are a source of serious instability.

Figure 5 shows the prison population of Poland from 1987 to 2001. The volatility of the line is clear. From 1987 to 1990 following the political change of regime there was a steep decline in prison numbers (in the immediate aftermath of the political changes in Eastern Europe there were amnesties for prisoners and moves to remove prison staff that had since been discredited by their role and function within the previous regimes) (Walmsley, 1995). In Poland, this fall was followed by a gradual rise up to 1995. After 1995 there followed a period of short erratic change up to the steep rise from 1999 to 2001. Christie (2004) interprets such erratic change as reflecting a system where imprisonment is the main penalty and is lacking in formal release procedures. In regimes such as these, prison populations fluctuate through internal crisis and reliance on ‘waiting lists’.

Figure 6 describes the situation more commonly seen within Eastern European systems. When the prison population of the Czech Republic was considered, the large drop in the prison population from 1989 to 1990 is evident. This shape, although not as pronounced, is common to prison trends throughout the region.

Throughout Central and Eastern Europe, as the barriers of the previous regimes were removed, there was an unambiguous rise in the crime rate from 1990 until 1992/3. This rise in crime was reflected in the increasing use of imprisonment. Tkachuk and Walmsley (2001) argues that a climate of fear, especially in those countries where the new legal provisions had not caught up with the new forms of criminality, had led to crime in general being more likely to lead to longer terms of imprisonment. This was true even when the crime rates had reduced after 1993.

As previously described, most Central and Eastern European countries experienced a rise in their prison population after 1990 with the exception of Slovakia and Hungary. All Eastern European countries exceeded the EU average; Slovenia being a singular case with a rate of imprisonment below 53%. Lithuania, Latvia and Estonia exceeded well beyond 100%. Despite this negative background there has been a response with progress being made towards Western Europe standards. Major changes have been made to the organisational structure within which the prison system has been administered as well as changes in prison policies and attitudes of the prison administrations themselves (Walmsley, 1995). However, an important factor which has helped to increase the prison population in these European states has been the shortage of non-custodial alternatives. In Central and Eastern Europe there are very few penalties outside of a fine and imprisonment. Probation is very often under developed or not used at all and penalties with a condition of unpaid work are viewed with suspicion, as they are often closely associated with Soviet style forced labour (Walmsley, 1995).
Figure 5: Poland Prison Population trend

Poland Prison Population

Source: CoE/SPACE/ICPS

Figure 6: Czech Republic Prison Population trend

Czech Republic Prison Population

Source: CoE/SPACE/ICPS
**Average Length of Imprisonment**

When in 1993, the Council of Europe commissioned a feasibility study concerning the collection of crime and criminal justice data for Europe, the problems discussed above concerning the difficulties of comparison were considered. Although the question of language was not raised, there were many reservations regarding the comparability of legal systems, offence definitions and data collection procedures between the different European countries (Killias, 2003). However, it was decided by the Council, that the benefits of making such comparisons, despite serious limitations and lack of historical and cultural context, was more beneficial than not making such comparisons at all. Without more detailed qualitative information, statistical comparisons between countries can show significant similarities.

This report has shown that within the EU the overall rate of imprisonment is increasing. However, there are dangers in making too simplistic comparisons between countries when analysing prison trends, as apparent similarities in rates of imprisonment can conceal radically divergent practices (Muncie and Sparks, 1991). In the Council of Europe’s Annual Penal Statistics (SPACE) prison populations are usually given as the ‘prison population rate (per 100,000 inhabitants)’. This is sometimes referred to as the ‘stock’ or the ‘rate of imprisonment’. It is the most common way of summarising and comparing national prison populations yet it is in many ways, a limited and misleading index of prison use.

Another key measure of imprisonment is provided by the committal rate or ‘flow’ and is calculated as the number of entries in a prison over a year. Table 1 shows a stock versus flow comparison of those countries where information has been available in the European Union.

Tournier (1999) calls the measure in column 5 the ‘flow stock equation’ and argues that it offers a three-dimensional picture to prison growth. He offers 3 dual scenarios

*In the case of population inflation*

**Scenario A1** – an increase in annual entry flows, with stable or decreasing lengths of imprisonment (prison population inflation due to entry flows)

**Scenario B1** – an increase in lengths of imprisonment, with stable or decreasing entry flows (inflation is due to lengths of imprisonment)

**Scenario C1** – a simultaneous increase in entry flows and lengths of imprisonment (inflation is due to both entry flows and lengths of imprisonment).

*In the case of a decline in the population*

**Scenario A2** – a decrease in annual entry flows, with stable or increasing lengths of imprisonment (prison population decline is due to entry flows)

**Scenario B2** – a decrease in lengths of imprisonment, with stable or increasing entry flows (decline is due to lengths of imprisonment)
Scenario C2 – a simultaneous decrease in entry flows and lengths of imprisonment (decline is due to both entry flows and lengths of imprisonment) (Tournier 1999)

Table 1: Stock versus flow comparison of the EU countries

<table>
<thead>
<tr>
<th>Country</th>
<th>Number of Prisoners</th>
<th>Prison Population Rate per 100,000</th>
<th>Number of Entries into Prison*</th>
<th>Rate of Entries into Prison per 100,000</th>
<th>Length of Imprisonment (mths) L=P/Ex12</th>
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<td>Ireland (Northern)</td>
<td>872</td>
<td>51</td>
<td>4717</td>
<td>279.9</td>
<td>2.2</td>
</tr>
<tr>
<td>Italy</td>
<td>55743</td>
<td>97</td>
<td>78649</td>
<td>139.7</td>
<td>8.3</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>357</td>
<td>92</td>
<td>906</td>
<td>204</td>
<td>5.4</td>
</tr>
<tr>
<td>Malta</td>
<td>257</td>
<td>68</td>
<td>327</td>
<td>82.9</td>
<td>9.8</td>
</tr>
<tr>
<td>Poland</td>
<td>80004</td>
<td>207</td>
<td>95775</td>
<td>247.9</td>
<td>10.0</td>
</tr>
<tr>
<td>Portugal</td>
<td>13210</td>
<td>128</td>
<td>6936</td>
<td>67.1</td>
<td>22.9</td>
</tr>
<tr>
<td>Scotland</td>
<td>6172</td>
<td>115</td>
<td>34699</td>
<td>685.5</td>
<td>2.1</td>
</tr>
<tr>
<td>Slovakia</td>
<td>6941</td>
<td>132</td>
<td>19243</td>
<td>357.7</td>
<td>4.4</td>
</tr>
<tr>
<td>Slovenia</td>
<td>1155</td>
<td>58</td>
<td>5155</td>
<td>258.5</td>
<td>2.7</td>
</tr>
<tr>
<td>Spain</td>
<td>41131</td>
<td>102</td>
<td>41359</td>
<td>102.4</td>
<td>12.0</td>
</tr>
</tbody>
</table>

Notes

*Does not include entry following transfer from one prison to another; entry after removal from the establishment in order to bring a prisoner before a judicial authority; entry after prison leave; entry after escape.

Source: Council of Europe

Table 1 gives a useful guide to comparable penal systems. For example, from the trends over time showing number of entries, length of sentence and number of prisoners, indications of whether the increase in population is due to an increased number of prisoners, or to an increase in the length of sentence can be assessed.

Table 2: Number of entries, length of sentence and number of prisoners in Scotland

<table>
<thead>
<tr>
<th>Scotland</th>
<th>1998</th>
<th>1999</th>
<th>2001*</th>
</tr>
</thead>
<tbody>
<tr>
<td>No of Entries</td>
<td>E</td>
<td>37367</td>
<td>36032</td>
</tr>
<tr>
<td>Length of Sentence</td>
<td>d</td>
<td>1.9</td>
<td>2.0</td>
</tr>
</tbody>
</table>
Table 2 shows that while the number of entries to penal institutions was decreasing, the average length of sentence increased. It would therefore appear to be the length of sentence that has influenced the rise in population and not new entrants. This would place Scotland within scenario B1 in Tournier's model.

Ideally the comparison countries would fit the B2 model, where countries have encouraged reductions to their lengths of sentence. However there were no countries what fitted clearly with that scenario. Up until 2000, Spain was placed, like Scotland, within the B1 scenario up until 2000. In 2001, the number of entrants continued to decrease, however so did the length of sentence. This moves Spain to scenario C2.

When trends in other jurisdictions are examined, countries that fall within this category are Slovenia, Italy, and Hungary. As this model highlights the increasing length of sentence as the key variable in the rise of the prison population, it provides a basis for comparison as well as focusing our attention on post custody alternatives such as parole and other forms of conditional release. The following pages outline the uses of ‘alternatives to custody’ in that group of countries which conform, like Scotland, to the B1 model.

**Spain**

The increase in Spain’s prison population began at the end of the Franco dictatorship in 1975 (Cid and Larrauri, 1998). The Spanish constitution, similar to many European states within the continental judicial tradition, establishes a series of principles, including those of legality and the proportionality of punishment, through which the criminal justice system operates (Bergalli, 1995). The constitution stipulates the abolition of the death penalty and of torture, and supports the principle of the rehabilitation of offenders.

**Figure 7: Spain Prison Population Trends**
Figure 7 shows the rate of imprisonment of Spain from 1987 to 2001. Spain is an interesting country to look at. Its prison population peaked in 1994 and has gradually come down, with the exception of a slight rise in 2000, to 102 per 100,000 of the population. The beginning of this gradual decline corresponds with Spain’s adoption in 1995 of a new Criminal Code. The new Spanish Criminal Code was introduced as a means to move Spain closer to the penal standards elsewhere in Europe. It stipulated the shortening of maximum sentences for each offence and outlined alternatives to custody. The motivating factor behind this code was the notion that prison does not rehabilitate. The principle forms of punishment outlined in this code are: prison, weekend arrest, fines and restriction of rights (Cid and Larrauri, 1998) (see Table 3).

**Table 3: Principle forms of punishment** (Cid and Larrauri, 1998 p.149)

<table>
<thead>
<tr>
<th>Main Penalties</th>
<th>Alternative penalties (for sentences up to 2 years)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prison (6 months to 20 years)</td>
<td>Suspended sentence (with or without supervision)</td>
</tr>
<tr>
<td>Weekend Prison (1 to 24 weekends)</td>
<td>Interchange sentence (weekend arrest, unit fine, community service)</td>
</tr>
<tr>
<td>Unit-fines (1 day to 30 months)</td>
<td></td>
</tr>
<tr>
<td>Disqualification</td>
<td></td>
</tr>
</tbody>
</table>

**Alternatives**

*Parole* – for cases where three quarters of the sentence have already been served in custody – exceptions to this have been established where the prisoner has served two-thirds of their sentence. New developments have recently been proposed with the possibility of added conditions.

*Suspended Sentence* - sentences of up to two years imprisonment may be suspended for a period of between two and five years.
Interchange of custody - Sentences of up to two years imprisonment can be interchanged by other penalties (weekend custody, fines etc.).

Weekend Arrest – introduced to the new Criminal Code of 1995 as an alternative to custodial sentences of less than six months.

As mentioned above alternatives to custody in Spain are based on a rehabilitative model (Bergalli, 1995; Cid and Larrauri, 1998); they are not considered as the main punishments in law but are awarded by judges according to individualised assessment of the dangerousness of the offender. The possibility of suspending or interchanging imprisonment is available only in the case of short sentences (a reflection of a theory of rehabilitation which maintains that short periods of imprisonment are not adequate to allow treatment programmes within the prison to rehabilitate).

However despite the new Criminal Code, alternatives to prison are very rarely used. Penalties such as community service are not utilised as main punishments but conceded as privileges awarded through discretion. In this way, by not creating many sanctions other than prison, legislators in Spain seem to have transferred responsibility for finding alternatives to custody on to the discretion of the Judiciary (Cid and Larrauri, 1998).
Italy

Italy’s prison population saw a dramatic rise in 1991 and has continued to rise since (Figure 8). As mentioned earlier, it is possible that the rise in 1991 was influenced by a Governmental response to a crisis in immigration\(^1\).

The existing Criminal Procedure Code in Italy was approved in 1988. It replaced the previous Code, which dated back to 1930 as this was seen to reflect the authoritarianism of the political regime of that period. Ruggiero (1995) argues that the Italian model of penality is distinguished by its flexibility (perhaps the most surprising example of this is the existence of *negotiated alternatives* – defendants agree to negotiate their sentence e.g a life sentence can be replaced by a 30 year sentence. However, this alternative is intended mainly for the purpose of easing the courts workload and not as a way of reducing time spent in custody). Alternatives to custody are seen as an important expression of this flexibility as they are individualised and as in the case of Spain applied with discretion.

**Figure 8: Italy Prison Population Trend**

![Italy Prison Population Trend](image)

*Source: CoE/SPACE/ICPS*

**Alternatives to custody**

Two types of alternatives are explored here. The first relate to offenders who are already serving a sentence. The second completely diverts offenders from the prison system.

*Alternative for those already serving a sentence.*

---

\(^1\) From the late 1980s Italy changed from being a country of emigration to one of immigration. In 1991, after the fall of the dictatorship in Albania, 24,000 refugees arrived in Italy (Melossi 2003).
Conditional discharge (release)
The condition for its application is that the offence dealt with does not bring a statutory sentence in excess of two years. Another circumstance where a Conditional discharge can be applied for is if the defendant has not been previously sentenced and is not deemed to be a ‘habitual’ or ‘professional’ offender. Conditional discharge does not require any form of community supervision.

Alternatives to short sentences
In 1981, a new set of penalties were introduced to replace short custodial sentences. These were aimed at preventing a person sentenced to a short term of imprisonment from actually passing time in prison. In Italy these alternatives take three forms and can only replace short sentences of up to six months (Manna and Infante, 2000).

Fines (pena pecuniaria) - replaces short sentences up to one month. These fines are separate from the sanction of fines in Italy in general (it should be noted, however, that Italian courts do not imprison people for the non-payment of fines).

Semi-detention – prisoner spends at least ten hours a day in prison and can attend work or rehabilitative activities outside prison the rest of the time.

Supervision Order (libertà controllata) – replaces sentences of up to three months. This order dictates that a person does not leave his or her residence town and that they contact the police station daily.

It is important to note here that the above penalties have been rarely applied, due to the preferment of the conditional suspension of the sentence (Manna and Infante, 2000).

Diversion from custody
These forms of alternatives were introduced in 1975 and later extended and modified in 1986. They have been widely used in Italy and their main objective is the rehabilitation of the offender. The most significant alternatives to imprisonment include probation, based on the Anglo-Saxon model, house arrest, semicustody (semilibertà) and early release.

Probation can be applied to an offender who has received a prison sentence of less than three years or who still has three years to serve in prison. The period of probation must correspond to the sentence to be served, or remaining to be served (Manna and Infante, 2000). It is generally applied when there is a likelihood that the measure will contribute towards rehabilitating the offender. Probation is supervised by the social services. If the initial period of probation is successful, the rest of the penalty is cancelled; if not, the measure is revoked and the offender must serve the rest of his/her sentence in prison. Italy also has a specific form of probation, which is used for drug and alcohol misusers. This differs from the basic form of probation
and can only be applied to drug and alcohol misusers who are taking part or have requested to take part in therapeutic treatment.

*House arrest* can be applied to persons who have to serve a prison sentence not exceeding three years (although it can be increased to four years for some categories of offender e.g. pregnant women, elderly people and minors). This measure is usually applied if it is not possible to refer the offender to social services.

*Semicustody* consists in giving the offender the possibility to spend a part of the day outside prison in order to participate in educational, work or other activities that are useful for his/her social rehabilitation. Only those offenders who have already served at least half of the sentence are granted this alternative measure.

*Early release (liberazione anticipata)* - is granted to those offenders that have participated in a re-educational course, and consists of a reduction of 45 days for every six months of detention.

**Slovenia**

Slovenia falls within the same grouping as Scotland in that it has a rising prison population with falling entries and increasing length of sentence (Figure 9). Of all the Central and Eastern European countries, Slovenia is the most interesting as it is the only country with a rate of imprisonment as low as that of the Scandinavian countries; that fact alone is worthy of further investigation. Unfortunately, there is very little material available on the Slovenian criminal justice system or on its policy on ‘alternative’ penalties. There is no life sentence in Slovenia, although Slovene courts can pass a maximum sentence of thirty years. Despite this maximum sentence Slovene courts pass extremely low sentences (Tkachuk and Walmsley 2001). Ironically the steep rise in the prison population after 1996 may be the result of the Slovene prison system becoming ‘westernised’ (Christie, 2004).
Figure 9: Slovenia Prison Population trend

Figure 10: Austria Prison Population Trend

Source: CoE/SPACE/ICPS

**Austria**

Figure 10 shows the prison population for Austria. Although it does not fall within the grouping mentioned above, it is useful to look at the figures more closely. Austria previously had one of the highest prison rates in Western Europe. In the mid-eighties, prison numbers fell dramatically and Austria has managed to retain a rate below the EU average. Figure 10 illustrates that Austria’s prison population is relatively stable and does not vary significantly from the nation’s own average.
The next country that this section will look at in depth is the Netherlands. Although this country does not fall within scenario B1, it shares a similarity of penal history and culture with Scotland, and has experienced an accelerated prison growth over the last decade.

**The Netherlands**

Post-War Dutch policy on prisons has been famous for its liberalism and has been strongly associated in people’s minds with the principle of rehabilitation. The Dutch approach to penal policy, sustained by an exceptionally low prison rate compared to other European countries, had impressed many foreign academics and criminal justice officials. By the 1980s, when prison sentences became longer, the number of prison places increased and the hope of achieving the rehabilitative ideal through improved prison conditions had been toned down, Dutch penal policy maintained the rehabilitative ideal by legislating for penalties executed ‘closer to the community’ (van Swaaningen and Beijerse, 1993). This ‘social approach to crime’ was characterized by a commitment to reduce the use of short-term imprisonment and to increase the use of non-custodial penalties. During this period, fines were favored over custody, diversion from prosecution grew and community sentences and new non-custodial sentences came into use.

The Dutch criminal justice system, in which the public prosecutor had a central role, was an appropriate model in pursuing ‘extra judicial’ forms of diversion (van Swaaningen and de Jonge, 1995). Tak (2003) argues, however, that the stereotype of the Netherlands as a country with exceedingly mild penal policies is an oversimplification. In recent years, considerable changes in criminal law and law enforcement legislation have been adopted by the Dutch Parliament; as well as the reorganization of the police force and prosecution service, 1990s legislation saw the re-codification of ‘alternatives’ to custody.

The operation of community based alternatives based on the discretion of the public prosecutor was undermined when these ‘alternatives’ became formal sanctions imposed only under the authority of a judge. In 1991, after a report of the Advisory Committee on Alternative Sanctions (OCAS), the community service order became the new penalty of ‘restriction of liberty’. Following this report, many commentators argued that the primary objective of non-custodial sanctions changed; from being an ‘alternative to custody’ the sanctions were now perceived to be based on discipline and punishment. These new objectives were reflected in a change of terminology, where ‘alternatives to custody’ were now referred to as ‘assignment penalties’ (van Swaaningen and de Jonge, 1995).

Van Swaaningen and Beijerse (1993) argue that this re-codification transformed what were originally designed as diversion measures into principle modes of punishment. This move from diversion from custody to punishment, may not only reduce the rehabilitative effects of such sanctions, but may explain to some extent the substantial rise in the prison population over the last decade. The increase in community service orders in the
Netherlands has only contributed to a very small decrease in short-term prison sentences (van Swaanningen and de Jonge, 1995).

This new ‘restriction of liberty’ sentence is close to the generic ‘community sentence’ of the British Criminal Justice Act 1991 where magistrates and judges were given due power to specify the exact content of the sentence (Cavadino and Dignan 2000).

**Prison Trends**

The Netherlands has shown the largest increase in prison population compared to any other European Country. From 1987 the Dutch prison population rose by 205%, although the rate of imprisonment (per 100,000 of the population) is 26% below the European Union average (this is due to the fact that, compared to other European countries, the Netherlands began from an extremely low base line) (Figure 11). This increase in the Dutch prison population is attributable to a rise both in the use of custody and in the length of the sentences disposed (Tkachuk and Walmsley 2001). Tak (2003) warns that the low prison rate in the 1970s and the early 1980s was partly cosmetic. This was due to the fact that there were more people sentenced to custody than there were cells available. In the Netherlands at that time, offenders who were sentenced to imprisonment did not serve their prison sentence immediately after the court disposal, but were put on a ‘waiting list’ and called to serve their sentence as soon as room became available.
**Figure 11: The Netherlands Prison Population trend**

![Graph showing the trend of the Netherlands Prison Population from 1987 to 2001.](image)

Source: CoE/SPACE/ICPS

**Classification of penalties**

The Dutch Criminal Code distinguishes between penalties and measures. Penalties are aimed at punishment whereas measures are aimed at the ‘promotion of the security and safety of persons or property, or at restoring a state of affair’ (Tak, 2003 p.71).

**Imprisonment**

The most severe penalty in the Dutch penal system is imprisonment, which can only be imposed for crimes. The most severe form of imprisonment is life although it is very rarely imposed. The Criminal Code does not prescribe compulsory life imprisonment in any circumstances (since 1983 a fine may theoretically be imposed as the sanction for any crime).

The fixed-term prison sentence is the most frequently imposed form of imprisonment. The statutory minimum is one day and the maximum is fifteen years. Unlike other European countries, none of the offences in the Criminal Code carry a special statutory minimum term of imprisonment (Tak, 2003).

**Alternatives to Custody**

In the Netherlands the development of ‘alternatives from custody’ has been pursued mainly by practitioners (social workers, probation officers and voluntary organizations) and not by the Ministry of Justice. ‘Alternatives’ are only granted on the request of the offender and are supervised by the Dutch probation service. Many initiatives take the form of a condition for a suspended sentence (van Swaaningen and Beijerse, 1993).
**Suspended Sentence**

Since the 1987 law reform, a suspended sentence is possible for all principal sentences, with the exception of the task penalty. A prison sentence up to one year, detention (a custodial sentence for infractions, the minimum duration of which is one day and the maximum is one year), and fines may all be suspended totally or in part (Tak, 2003). On the proposal of the probation service, a judge can impose a suspended sentence under the condition that an offender participates in initiatives which have direct educational aims closely related to the nature of the offence. One such initiative is a *Training Scheme in Social Skills*. This scheme is supervised by the probation service and the public prosecutor reserves the right to prosecute if the condition is breached. Other similar schemes include *Alcohol Traffic Courses* and *an Incest Offender Treatment Scheme*. Some therapeutic schemes, such as the *Drug Related Crime Project* are alternatives to remand (van Swaaningen and Beijerse, 1993).

**Partly Suspended Sentences**

The court may impose a sentence that is suspended only in part. Since a sentence may consist of a combination of various principal penalties, a partly suspended prison sentence in combination with a task penalty or a fine is possible.

**Community Service Order**

The development of community sentences in the Netherlands started in the 1970s with the establishment in 1974 of the Advisory Committee on Alternative Sanctions (OCAS). Positive experiences of Community Service in England and Scotland encouraged the committee to suggest piloting the CSO as an ‘alternative’ sanction. This pilot was initiated in 1981. The Community Service Order could be imposed as a condition for waiving prosecution, or by the court as a condition attached to a suspended sentence. Statutory provisions governing the CSO for adult offenders were introduced in 1987 and for juvenile offenders in 1995. The court could only impose a Community Service Order when it would otherwise have imposed an unconditional prison sentence or a part suspended/part unconditional prison sentence of six months or less. Community service also could not be used as an alternative to a fine, a fine default detention, or a suspended prison sentence (Tak, 2003). As mentioned above, in 1991, after a report by the Advisory Committee on Alternative Sanctions (OCAS), the community service order became the new penalty of ‘restriction of liberty’ (van Swaaningen and de Jonge, 1995).

‘Restriction of Liberty’ in the Netherlands stands for the ‘assignment to exert certain legally described obligations’. Conditions with which ‘restriction of liberty’ is accompanied are: (i) they have to be useful acts; (ii) the sanction has to be exercised in the community; (iii) fulfillment needs to be supervised by the probation service, and (iv) they must bear some relation to the personality and the personal circumstances of the offender, the seriousness
of the offence and the circumstances under which it has been committed (Ministerie van Justitie, 1991 quoted in van Swaainingen and Beijerse, 1993).
Fines

Since 1983 all offences in theory could be sentenced with a financial penalty. The 1983 Financial Penalty Act expresses the principle that a fine should be preferred over a custodial sentence. The Dutch Criminal Code requires the court to give special reasons whenever a prison sentence is imposed in preference to a fine. However, there is no alternative available for fine default detention, currently within the Criminal Code (Tak, 2003).

Electronic monitoring

Electronic monitoring is an alternative to imprisonment or any other form of deprivation of liberty (e.g., pre-trial detention). Electronic monitoring is either applied in the latter stage of a prison sentence or prison program, or in combination with a suspended sentence. Electronic monitoring as a condition of a suspended sentence can be a substitute for a prison sentence of between six and twelve months in combination with a task penalty of 240 hours (Tak, 2003).

Early Release

Conditional release provisions were incorporated in the Criminal Code as early as in 1886 and were intended as a gesture of leniency for good conduct. In the early twentieth century the regulations on release were changed significantly to reflect a changing penal philosophy and consequently, conditional release became more concerned with the advancement of the rehabilitation of the offender into society. In 1980 a Committee was set up to consider whether conditional release should be retained. The Committee’s recommendation was to advocate the attachment of special conditions to the release. The new release legislation came into force in 1987. Early release allows that prisoners, serving a sentence up to one year must be released after having served six months plus one third of the remaining term; and that prisoners serving a sentence of more than one year must be released after having served two thirds of their sentence (Tak, 2003). Although the reforms were originally intended to reduce the pressure on the prison system by introducing a system of automatic early release, the main aim of the new conditional early release appears now to be the improvement of community safety by reducing the risk of recidivism.

The Nordic countries

The Nordic countries have placed considerable emphasis on social crime prevention as a strategy for dealing with crime, and this has been given high priority in many areas of social life (e.g., social work and education). There has been considerable co-operation between the Nordic countries and their crime-prevention agencies: The Crime Prevention Council in Denmark, The National Council for Crime Prevention in Finland, The Ministry of Justice and Ecclesiastical Affairs in Iceland, The Norwegian National Crime Prevention Council in Norway and The National Council for Crime Prevention in Sweden (The National Council for Crime Prevention 2001).
The Nordic countries tend to have large public sectors and well developed welfare systems with public expenditure on social welfare comparatively high. Crime prevention in the Nordic countries is strongly affiliated to areas outside the justice system and considerable emphasis is given to social and situational crime prevention. The criminal justice system is considered to have a marginal effect on the prevention of crime, with social policy viewed as an end in itself, not explicitly as a means of crime prevention. Informal social control, is seen as important, involving citizens themselves in crime prevention work and penal reforms in recent years have generally been informed by human rights considerations in contrast to the ‘populist punitivism’ of other European countries.

Finland

In the 1950s, Finland had a prison rate which was four times higher than in other Scandinavian countries (approximately 200 prisoners per 100,000 inhabitants compared to around 50 per 100,000 in Sweden, Denmark and Norway). This continued through the 1970s, with Finland having a prisoner rate amongst the highest in Europe despite a decreasing trend. By the late 1980s/early 1990s Finland’s prison rate had reduced to match that of other Scandinavian countries and remained relatively stable during the 1990s (approximately 60 per 100,000).

During the 1960s in particular, Finland experienced social and structural changes as it developed from a rural agricultural country into an industrial urban welfare state. This social restructuring was related to a steep rise in crime rates during the late 1960s. Interestingly, policies of penal reform and reduction were introduced despite the rapid increase in recorded crime1.

At the end of 1999, Finland had a population of over 5 million. Over 60% of the population live in urban municipalities, with the Helsinki metropolitan area accounting for almost one-fifth of the total Finnish population. Finland has a largely service-oriented industrial structure with trade, transport and communications, financing, community and other services accounting for around two-thirds of the economically active population.

While the reasons for Finland’s successful reduction of the prison population are complex, several factors clearly contributed:

- Changes in penal theory and thinking relating to criminal policy
- Changes in penal legislation, in sentencing and prison enforcement practices
- Political consensus that prison overcrowding was a problem which needed to be addressed.

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1 Examinations of the particular areas that were targeted for reduction indicate that significant reductions in the use of imprisonment (eg for drunk driving) did not lead to an increase in the recorded figures for this offence.
Coercive treatment (rehabilitation) was viewed as limited in its ability to reduce crime in any significant way and reforms were introduced to limit the use of coercive treatment and restrictions of liberty on rehabilitative grounds. Consideration of cost-benefit analysis resulted in the authorities looking beyond the traditional penal system in attempts to reduce crime and expenditure on criminal justice. This led to consideration of the possibilities of using environmental planning and situational crime prevention as a mechanism for controlling crime. Punishment was re-evaluated and regarded as one option among other forms of intervention, with general prevention (based on legitimacy and acceptance: principles of justice, proportionality and fairness) increasingly seen as more important than sentence severity.

In 1967, the number of prisoners in Finland was reduced by an amnesty which shortened prison sentences by one-sixth. This was followed by the decriminalisation of public drunkenness in 1969 which reduced the number of prisoners serving a sentence for unpaid fines from a daily average of 800 to less than 100 (Lappi-Seppala 2004). A number of other reforms have subsequently been introduced, notably restriction of the use of preventive detention. In 1971 this was restricted to dangerous violent recidivist offenders resulting in a significant decrease in the number of prisoners held in detention as recidivists. This now means that prisoners are not held in custody for longer than their original sentence and only a very small minority do not qualify for early release on parole.

Finland has relatively few alternatives to imprisonment:

- The fine has been the principal punishment and its use for more serious crimes was extended during the late 1970s (by raising the amount of day-fines).
- The conditional sentence, where sentences of up to two years can be imposed conditionally. This places the offender on probation for a period of one-three years but does not necessarily involve supervision for adult offenders.
- Conditional prison sentences can be combined with unconditional fines.
- Community Service was introduced in 1991 in four jurisdictions and extended to cover the country in 1994 (duration between 20-200 hours). It can replace custodial sentences of up to 8 months and is intended to replace an unconditional prison sentence (similar to Scotland).
- The amount of time actually spent in prison is controlled by the parole system and applies to all prisoners, except those serving their sentence in preventive detention or a life sentence.

During the 1990s a majority of all criminal cases brought before the courts resulted in fines (60%) or a conditional sentence (20%). Around 10% of cases result in imprisonment and 6-7% in community service (Joutsen et al 2001).

Victim-offender reconciliation programmes were initiated in 1983 and have expanded throughout the country. In 1996, victim-offender reconciliation programmes received a recognised legal status. They can influence the
decision of the prosecutor to waive further measures, or the decision of the court to waive punishment. During 1995, around 3000 conflicts involving around 4600 suspected offenders were submitted to a reconciliation programme.

Drunk driving is one of the key issues in debates on criminal policy and was addressed during the 1970s with the application of non-custodial alternatives. This represented a shift from the widespread use of custody to conditional imprisonment and the imposition of a fine. The introduction of community service has had an impact on this area.

The age of criminal responsibility in Finland is 15 years. Under 18s accounted for 0.5% of the Finnish prison population in 2002 (International Centre for Prison Statistics 2004a). Offences committed by under-15s are turned over to the municipal social welfare or child welfare board for consideration. There are no juvenile courts and use of specific penalties is limited. Use of unconditional sentence is restricted to situations where extraordinary reasons call for this. In 1996, a new sanction (a ‘juvenile penalty’) was used on an experimental basis for 15, 16 and 17 year olds. This involves a short period of unpaid work or ‘similar activity’. There are two alternatives to court proceedings:

- transfer to the municipal social welfare board (limited to cases that involve offenders aged 15-20) but is not used often.
- Mediation.

The female prison population is similar to many other European countries. In 2002 women constituted 5.6% of the prison population (195 individuals), an increase from 167 in 2001 (but representing a similar percentage of the total prison population) (Finnish Prison Service 2003). Foreign prisoners accounted for 8.5% of the prison population in 2002.

In 2001, the administration of prison, probation and parole services was reorganised into the Department for Punishment Enforcement which is divided into Prison Administration and Probation and After-Care Administration.

Commentators have attributed the change in Finnish penal policy to a number of factors:

- Political will and consensus by judiciary, prison authorities, civil servants and politicians
- Expert-oriented reforms (developed by a relatively small group of experts who shared similar objectives)
- Crime control has not been a central political issue in election campaigns
- The media have not contested the reforms in a sensationalist way – although this may change with increasing competition for readers/viewers.
- The judiciary have widely accepted and taken on board the concept of liberal criminal policy.

The level of crime does not appear directly related to the severity of sentences, but may be attributed more to structural, social and situational factors. The Finnish reduction in the use of custody may be more indicative of
a shift from an excessive use of imprisonment to a more ‘normalised’ situation rather than a major move towards decarceration. Joutsen et al (2001, p.38) note that “The criminal justice system is not the only, or even the most important system for controlling behaviour. Better results can be achieved by changing social structures and conditions conducive to crime, developing educational measures, and reducing the opportunity for crime”.

Although there were significant decreases in the prison population between 1992 and 1998, since 1998, the overall trend in imprisonment has increased (from 2569 in 1998\(^1\) to 3469 in 2002\(^2\)).

\(^1\) Data cited in International Centre for Prison Studies (2004a)  
\(^2\) Data cited in Statistics Finland (2003)
Sweden

Sweden has a strong welfare state and although unemployment rose between the 1970s – 1990s it was at a much lower rate than that of other European countries, the result of a pronounced policy to keep the level of unemployment down.

Up until the 1960s, the prison populations of Sweden and the UK were very similar but the Swedish prison population decreased after the 1960s, and the rate of imprisonment during the 1990s has not returned to the level of imprisonment evident in the late 1960s, in contrast to the UK prison population which has continually increased during this period. After a significant decrease in the prison population from 1995-1998, it increased significantly from 1998-2001. In 2001, 6% of those admitted to prison were under 21, with women constituting about 5-6% of the prison population, a figure which has remained relatively constant over the last decade. Prisoners in Sweden are usually released after serving two-thirds of their prison sentence.

The number of receptions to prison has decreased between 2001-2004, mainly due to intensive supervision with electronic monitoring which is used as an alternative to prison for sentences of up to three months.

Prison terms of up to three months can be served in partial house arrest (intensive supervision through electronic monitoring). This is used mainly for individuals convicted of drunk driving or less serious assaults.

The legal system is accusatorial with a prosecutor representing the state and a defence attorney representing the defendant. The majority of crimes, in particular traffic offences, are sanctioned by police officers or prosecutors in the form of summary fines.

Sweden has a three tier court system: district courts, courts of appeal and the Supreme Court. As well as the general courts, there are administrative courts including the Supreme Administrative Court, the Administrative Courts of Appeal, the County Administrative Courts, the Labour Court, the Market Court and the Rent and Leasehold Tribunals.

A general principle of Swedish penal policy is that imprisonment should be avoided as far as possible, although Swedish law offers fewer sentencing options than do most countries. A number of sanctions are available to the courts:

- Monetary fines are used primarily for less serious offences such as traffic violations. Day-fines can be administered, calculated on how serious the crime is and the offenders’ financial situation. On the spot fines can be imposed by the police.
• Probation may be given for crimes that require a more severe sanction than a fine and may be combined with special regulations such as contract care or community service.

• A person may be sentenced to treatment under the Care of Alcoholics and Drug Abusers Act – if the crime would not lead to more severe punishment than one year’s imprisonment.

• Conditional sentences may be prescribed for crimes for which the sanction must be more severe than a fine. Generally, this sanction will be combined with a fine, community service, payment for damages or other forms of restitution. Similarly, an under 21 year old may be placed in the care of the social services and fined.

• Conditional release usually takes place after two-thirds of the sentence have been served.

The prosecutor may decide not to prosecute those under the age of 18, individuals in need of psychiatric care and sometimes ‘drug abusers’ if they agree to treatment instead. This constitutes a commitment for special care.

Fines constitute the most common form of sanction (and can be issued by the prosecutor or by the courts), or as summary police fines. In 2001, approximately 11% of convicted persons received a prison sentence with 28% of those receiving a sentence of between two and six months.

Swedish statistics record all reported events as crimes even if some of them are later found not to have been criminal offences. While the number of crimes reported to the police increased by approximately 57% between 1975 and 2001 much of this was before 1990. Since 1990, the level of reported offences has been relatively constant, with a drop in the number of crimes reported between 1990-1995 (National Council for Crime Prevention 2001). Since 1975 the number of people convicted of offences has been reduced by more than half. The decriminalisation of drunkenness at the end of the 1970s accounted for a significant decrease in convictions. During this period, certain offences have come to be dealt with by summary fines issued by the police. Motoring offences constitute the most common crime type resulting in conviction (accounting for approximately 40% of convictions) followed by thefts (accounting for 21% of convictions in 2001). Conditional sentences and probation constitute alternatives to prison (fines do not).

The age of criminal responsibility in Sweden is 15. However, special rules apply up to the age of 21. An offender below the age of 18 can only be sentenced to imprisonment on special grounds and there have to be specific factors for imprisoning an offender between the ages of 18-21.

In 1999 a new sanction of secure youth care was introduced for youth people aged between 15-17 years replacing prison sentences for this group. Unpaid work was also added to social service care in 1999 and 18% of those admitted into the care of the social services were also sentenced to youth
service in 2001. Young people aged between 15-20 accounted for 20% of convicted persons in 2001. In 2002 there were no young people under the age of 18 held in prison in Sweden (International Centre for Prison Studies 2004b).

In 2002, women accounted for 5.3% of the prison population. While this is a relatively small proportion, the number of women being drawn into the penal system is increasing (International Centre for Prison Studies 2004b). Foreign prisoners accounted for 27.2% of sentenced prisoners in 2002 (International Centre for Prison Studies 2004b).

**Denmark**

Denmark has an adversarial criminal justice system which is administered by the Ministry of Justice (Minister of Justice head of office for both Denmark and Greenland¹). This office encompasses the police, the courts and prison system.

The prison population has decreased significantly in the last decade from 66 per 100,000 of the population in 1992 to 59 per 100, 000 in 2001 (International Centre for Prison Statistics 2004c). Indeed, Denmark is one of the few Western countries not to experience an increase in the rate of imprisonment during the 1990s. While prison admissions have increased, this has been offset by reductions in the average length of sentence.

Types of penalties include:

- Fines
- Lenient prison (7-30 days)
- Prison (1 month – life)
- Community service orders

Prison sentences and fines may be conditionally suspended and a list of conditions may be stipulated such as probation, abstaining from drug use and payment of damages. The probation and after-care service deals with people with suspended sentences on probation, parolees under supervision, and community service orders. Community Service Orders, which were made statutory in 1992 are not separate sanctions, but operate as a condition of a suspended sentence.

If more than one criminal act is being considered, the penalty must be contained within the range of the most serious offence so that penalties for different offences are not accumulated.

Parole is used widely, with more than 90% of prisoners released on parole after serving two-thirds of their sentence. About 50% of parolees are supervised by the Probation Service while the remainder are not subject to any conditions of parole.

¹ A criminal code was issued for Greenland in 1954 based on traditional forms of justice and which is solely offender-oriented.
The age of criminal responsibility is 15 years. Cases involving young people (which are often settled by a conditional withdrawal of charges) are handled by city court judges. A ‘Youth Contract’, where offenders aged between 15-17 are obliged to participate in designated activities, operates as a condition which can be attached to a withdrawal of charges. In 2002, young people under the age of 18 accounted for 0.3% of the Danish prison population (International Centre for Prison Statistics 2004).

Women accounted for 4.7% of the prison population in 2002 (International Centre for Prison Statistics 2004c). Foreign prisoners constituted 16.3% of the Danish prison population in 2002 (International Centre for Prison Studies 2004c). Possession of narcotic drugs is criminalised under Denmark’s criminal code, however possession of very small amounts for personal use does not result in enforcement of the law. Selling and trafficking can result in imprisonment.

**Norway**

Norway is a unified state with governmental power divided between the judiciary, executive and legislative branches. Executive branch consists of the King and members of the Cabinet. Legislative power is vested in the national parliament. Norway is administratively divided into 19 counties and approximately 450 municipalities. The criminal justice system is organised and financed centrally through central government and the Ministry of Justice and Police.

The prison population in Norway has been relatively stable over the past decade with a prison population rate of 58 (per 100,000 of national population) in 1992 and 59 in 2001 (International Centre for Prison Statistics 2004d). However, it would appear that the use of both prisons and community sanctions is likely to grow in the future (Larsson 2001). Increases in the prison population are likely to be the result of increased sentence length rather than increased prison admissions, influenced particularly by responses to drug-related crime.

The legal system is similar to those of other Nordic countries notably Denmark and Sweden. Court procedure is relatively informal with a strong lay influence in the judicial assessment of criminal matters. The main types of penalties are imprisonment, community service and fines. The maximum prison sentence is 21 years. Suspended prison sentences can be used, usually for young and/or first time offenders for lesser crimes. Community service is used for crimes that can be punished by up to one year in prison.

Norway has recently introduced intensive supervision and electronic monitoring based on Swedish programmes. However there has been a steady expansion of both the use of prison and community sanctions.

The age of criminal responsibility is 15. In 2002, young people under the age of 18 accounted for 0.5% of the prison population (Finnish Prison Service 2005).

Summary

A study of 36 countries conducted by the Council of Europe (1999) compared statistical information on crime and criminal justice. From this, the findings suggested that there was no relationship between the size of the prison population in a country and the level of recorded crime. The main factor influencing the prison population size was the length of sanctions imposed and the number of serious offences.

There appear to be three main types of legislative reforms that influence the prison rate:

- reforms that shape the penal system and sentencing alternatives
- reforms that change the penal value and level of sanctions for certain offence categories
- reforms that relate to the enforcement of prison sentences and parole systems

The experience from the Nordic countries highlights the potential to stabilise or reduce prison populations through a range of measures. However, changes in the political climate of many European countries and the increasing tendency to highlight ‘fear of crime’ as a significant electoral issue has impacted on both the media and political agenda of many countries, including Scandinavia. Commentators have indicated that this may have an effect of rates of incarceration, sentence length and use of community sanctions. The growing emphasis given to ‘law and order’ as a political and electoral issue has resulted in increased prison building in some Scandinavian countries. At the same time, reductions in spending on social welfare could have an impact on the emphasis given to social crime prevention through the welfare state.
Between 1980 and 2000, the number of people in US prisons increased by more than one million. Table 4 summarises the recent prison population trend in the United States of America. At 31.12.02 there was 2,033,331 prisoners including pre-trial detainees and remand prisoners (Bureau of Justice Statistics). A further 110,284 juveniles were held in custodial institutions at October 2000. Pre-trial detainees and remand prisoners constitute 19.7% of the prison population (59.9% of local jail inmates at 30.6.02). Female prisoners constitute 8.1% of the prison population (6.4% of state and federal inmates at 30.6.2001 and 11.6% of local jail inmates). A small significant proportion (0.5%) of prison populations are juveniles/minors/young prisoners with 0.2% of state and federal inmates and 1.2% of local jail inmates were aged under 18 at 30.6.2001 (International Centre for Prison Statistics 2004e).

Table 4: Recent prison population trend in United States of America

<table>
<thead>
<tr>
<th>Year</th>
<th>Prison Population Total</th>
<th>Prison Population Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1992</td>
<td>1,295,150</td>
<td>505</td>
</tr>
<tr>
<td>1995</td>
<td>1,585,586</td>
<td>600</td>
</tr>
<tr>
<td>1998</td>
<td>1,816,931</td>
<td>669</td>
</tr>
</tbody>
</table>


There have been new strategies in community-based alternatives to custody and a growing concern over the need to more fully consider the victims of crime as part of the sentencing process. Alternatives include probation (traditional and intensive), parole and other early release programmes, diversion, drug and alcohol treatment, halfway houses, mediation, restitution, community service, house arrests and electronic monitoring. In addition, there have been a number of community-based programmes initiated for women and young offenders. Several of these alternatives to custody directly involve victims for the first time in US corrections i.e. restitution, mediation.

Despite the existence of alternatives of custody, the prison populations and the physical estate has grown exponentially. The official capacity of the US prison system was 1,817,628 in 2000 (677,787 in local jails, 1,044,467 in state facilities and 95, 374 in federal facilities). In a recent report Lawrence and Travis (2004) present empirical analyses of 10 states that have experienced the largest growth in the number of prisons during the 1980s and 1990s. The authors reported that US prison growth has been pervasive, taking place in metro and non-metro counties (see Table 5). Prison systems have also expanded within states as new prisons were more geographically dispersed. In the 10 study states, 13% were home to at least one prison in 1979. In 2000 this had risen to 31%. Secondly, prison expansion has significantly impacted the total population in a select number of smaller communities. Thirteen counties in the 10 study states had 20 per cent or more of their resident population imprisoned in 2000. All 10 states, California, Colorado, Florida, Georgia, Illinois, Michigan, Missouri, New York, Ohio and...
Texas, had at least 5 counties where 5 per cent or more of the population was imprisoned.

Table 5: To show ten-state study totals (from Lawrence and Travis 2004)

<table>
<thead>
<tr>
<th>Ten-state totals</th>
<th>1979</th>
<th>2000</th>
<th>Change</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>N of prisons</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>In non-metro counties</td>
<td>97</td>
<td>158</td>
<td>63%</td>
</tr>
<tr>
<td>In metro counties</td>
<td>98</td>
<td>446</td>
<td>355%</td>
</tr>
<tr>
<td><strong>% of prisons</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>In non-metro counties</td>
<td>50</td>
<td>26</td>
<td></td>
</tr>
<tr>
<td>In metro counties</td>
<td>50</td>
<td>74</td>
<td></td>
</tr>
<tr>
<td><strong>% of counties with 1+ prisons</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>In non-metro counties</td>
<td>13</td>
<td>31</td>
<td></td>
</tr>
<tr>
<td>In metro counties</td>
<td>52</td>
<td>35</td>
<td></td>
</tr>
<tr>
<td><strong>% of residents in non-metro</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>In non-metro counties</td>
<td>16</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td><strong>% of prisoners in non-metro</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>In non-metro counties</td>
<td>52</td>
<td>23</td>
<td></td>
</tr>
<tr>
<td><strong>Total n counties</strong></td>
<td>1,052</td>
<td>1,052</td>
<td></td>
</tr>
<tr>
<td>In non-metro counties</td>
<td>758</td>
<td>431</td>
<td></td>
</tr>
<tr>
<td>In metro counties</td>
<td>294</td>
<td>621</td>
<td></td>
</tr>
</tbody>
</table>

Many of the initiatives in the counties and across the states of America may warrant our attention as entities per se in what they could offer best practice in Scotland. There is a well-established literature relating to policy transfer in the US and the UK (e.g. Newburn 2002). It is for pragmatic reasons that we do not propose to conduct an in-depth study of the US.

Canada

The Ministry of the Solicitor General is responsible for the Canadian criminal justice system. Unlike its neighbour, the US, criminal law in Canada is solely federal and the same across the country but it is administered provincially. The decision on whether an offender is imprisoned in a provincial or a federal prison is determined administratively. Sentences under two years are served in provincial prisons and sentences of two years or more are served in federal penitentiaries. The 68 federal and 153 provincial prisons are administered by the Correctional Service of Canada (CSC). Canada has provided an interesting case study to examine variation in imprisonment rates with an identical criminal law administered by 10 different political jurisdictions (Sprott and Doob 1998).

Sentencing options
The Criminal Code sets out the sentencing options available to the Judiciary. Sentencing options have changed over time with new ones created and the abolition of others. For example, the Criminal Code provided for whipping until 1972 and hanging until 1974. More recently, the discharge and the conditional sentence, have been added by new legislation. Even though the Criminal Code is a federal statute, the raft of sentencing options are not available everywhere in Canada. A sentencing option can be declared by Parliament to be available in particular province or territory if it set up a program to implement it. The fine option program in section 736 is designed in this way. This sentencing option may be in the Criminal Code but if no program is set up, the judge can not use it. There are nine sentencing options currently available to the judiciary: imprisonment which is subdivided into actual incarceration, intermittent sentence, conditional sentence and indeterminate sentence; fine; probation; discharge; restitution and prohibition.

**Incarceration**

In Canada, over the past twenty years, the rates of imprisonment have been historically high and relatively stable. Sentences have become longer and incarceration rates increased in the mid 1990s (National Crime Prevention Centre 1997). The official capacity of the Canadian prison system is 33,499. Table 6 summarises the recent prison population trends. The average prison population total (including pre-trial detainees and remand prisoners) was 36,024 in 2001 (Solicitor General Canada) comprising 12,794 federal prisoners (CSC), 18,666 provincial prisoners and 4,564 young offenders in custody. At mid 2001, pre-trial detainees and remand prisoners were 21.1% of the federal and provincial prisoners and female prisoners constituted 5%.

**Table 6: Recent prison population trend in Canada**

<table>
<thead>
<tr>
<th>Year</th>
<th>Prison Population Total</th>
<th>Prison Population Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1991</td>
<td>33,527</td>
<td>119</td>
</tr>
<tr>
<td>1994</td>
<td>37,740</td>
<td>129</td>
</tr>
<tr>
<td>1997</td>
<td>39,250</td>
<td>131</td>
</tr>
<tr>
<td>2000</td>
<td>36,143</td>
<td>117</td>
</tr>
</tbody>
</table>

Source: International Centre for Prison Studies (2004f)

**Intermittent Sentences**

While other jurisdictions have recently introduced intermittent sentences as a strategy to reduce prison populations, Canada has been using such a sanction for over 30 years (Manson 2001), making a significant contribution to all prison sentences imposed, for instance in the largest province of Ontario approximately one custodial term in five is an intermittent sentence (Reed and Roberts 1999). Intermittent sentences are typically served at weekends and ‘should be of particular use in addressing the problem of the incarceration of females’ (Roberts 2003: 244).

Roberts (2003) identifies some of the problems with intermittent sentences visible in Canada:
1. Intermittent sentences are served in cells at the weekend leaving them empty during the week;
2. Correction authorities have been unable to resource ‘weekend prisons’ tailor made for a population of men and women on intermittent sentences so weekend prisoners join the general full-time prison population.
3. In some provinces there has been ‘double-bunking’ in prisons where adults serving intermittent sentences have for administration purposes reported and signed in on Friday night, spent the weekend at home on a temporary absence pass and returned to prison to sign out on Sunday evening.

Intermittent sentences in Canada have the low ceiling of 90 days or around 12 weekends and have been favoured in the sentencing of younger offenders, for serious crimes that warrant imprisonment but only for a short period of time, and female offenders. Relatively low ceilings for part-time custody sanctions have been adopted recently in other jurisdictions including the Criminal Justice Bill 2002 for England and Wales.

**Conditional Sentences**

In terms of reducing the numbers of admissions to custody, the conditional sentence, introduced in 1996, has been considered a positive experience in Canada (Roberts 2003). The conditional sentence is intended only for custody-bound offenders where a custodial sentence of less than two years is appropriate and where the offender does not pose a physical threat to the community. Conditional sentencing must be consistent with the purpose and principles of sentencing set out in the Criminal Code.

The conditional sentence appears similar to the suspended sentence of imprisonment in England and Wales. The offender serves the sanction in the community for a period up to two years less one day. The key distinction between suspended and deferred sentences in the UK and conditional sentences in Canada is that the custodial period is actually discharged in the community in the conditional sentence and therefore does not have possible activation at a later date.

In a similar way to the imposition of a probation order in the UK, adults serving conditional sentences must report to a probation officer and remain within the jurisdiction of the court. Canadian courts also may set a bespoke set of conditions to the conditional sentence with the aim of rehabilitation and reducing recidivism. Conditions include abstinence from alcohol/drugs, weapons restriction, perform community service, treatment programmes, association restriction, house arrest without electronic monitoring, curfew, maintain employment, maintain residence, restitution, education and electronic monitoring.

In the first few years following the introduction of the conditional sentence in Canada, there was some opposition. The John Howard Society of Alberta (2000), for example, opposed the sentence on the following grounds:-
It remains unclear whether violent or sexual offenders are eligible for conditional sentences.

There are different views about the procedures to be followed in imposing conditional sentences.

The conditional sentence is almost indistinguishable from probation.

The new sentence has simply served to ‘widen the net’ (p.1-3).

‘Widening the net’ in this context would refer to the possibility that a form of imprisonment, the conditional sentence, has been imposed on offenders who, prior to 1996, would have received a less severe sanction such as a term of probation.

Comparing sentencing patterns before and after the implementation of conditional sentences, Roberts and Gabor (2004) provides evidence of the conditional sentence of imprisonment achieving a significant reduction in admissions to custody with only a minimal amount of ‘widening the net’ (see Table 7). Roberts and Gabor (2003: 100) report a significant negative correlation ($r = -0.45$, p$<0.05$) between changes of custody and the volume of conditional sentences imposed, i.e. a decarceration effect. Given the relatively low correlation, the 13 per cent reduction in custody rates in Canada is explained by a myriad of other factors.

Table 7: Sentencing patterns before and after the implementation of conditional sentences (1993/4-2000/2001)

<table>
<thead>
<tr>
<th>Province</th>
<th>Custody charge pre and post conditional sentences</th>
<th>Conditional sentences 4-year rate</th>
<th>Widening or reduction of net ***</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Rate* %**</td>
<td>Rate %</td>
<td></td>
</tr>
<tr>
<td>Ontario</td>
<td>-88 -5</td>
<td>231 +143 +8</td>
<td></td>
</tr>
<tr>
<td>Quebec</td>
<td>-117 -5</td>
<td>440 +323 +15</td>
<td></td>
</tr>
<tr>
<td>Alberta</td>
<td>-556 -19</td>
<td>201 -355 -12</td>
<td></td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>-920 -47</td>
<td>337 -583 -30</td>
<td></td>
</tr>
<tr>
<td>British Columbia</td>
<td>-224 -14</td>
<td>335 +111 +7</td>
<td></td>
</tr>
<tr>
<td>Newfoundland</td>
<td>-906 -38</td>
<td>437 -469 -19</td>
<td></td>
</tr>
<tr>
<td>Prince Edward Island</td>
<td>+160 +4</td>
<td>215 +375 +9</td>
<td></td>
</tr>
<tr>
<td>New Brunswick</td>
<td>-840 -32</td>
<td>432 -408 -15</td>
<td></td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>-257 -18</td>
<td>372 +115 +8</td>
<td></td>
</tr>
<tr>
<td>All jurisdictions ***</td>
<td>-270 -13</td>
<td>297 +27 +1</td>
<td></td>
</tr>
</tbody>
</table>

Source: Statistics Canada, Conditional Sentencing Special Study

*Changes in the rates of custody per 10,000 adults charged from the pre to post-implementation period.

**Percentage change in the use of custody from the pre to post implementation period.

***The totals for the nine jurisdictions have been weighted according to the number of correctional admissions in each province.

Principles of Sentencing
The general principles of sentencing in Canada include that maximum sentences are for the ‘worse offence or worse offender’ and the totality principle in relation to consecutive sentences. While the Judiciary does have discretion, sentences are generally not consecutive if the offences were committed together. The totality principle is if multiple offences are unrelated, sentences should not be imposed to be served consequentially if the total time in prison would be too long (based on the rationale that too long a sentence would impair the opportunity for rehabilitation). This principle has implications for victim acceptability as some victims may hold the view that the offender is only being made to ‘pay’ for the first offence.

The trend in Canada has been ‘to abolish the harsh punishments while creating more enlightened ones’ (Edgar 1999, p.113). Eighty-five per cent of Canadians support alternative penalties to imprisonment for non-violent crimes (Angus Reid Group 1997). The Canadian Charter of Rights and Freedom is part of the Constitution and offer what Edgar (1999) calls ‘a sort of trump card’ (p. 127) in relation to the rules of sentencing in Canada. Section 12 of the Charter guarantees the right not to be subjected to cruel and unusual punishment. The rigid rules of sentencing that violate section 12 involve minimum sentences and mandatory prohibition orders.

The shift towards more ‘enlightened’ alternatives to imprisonment has contributed to the establishment of a number of specialised courts in Canada including domestic violence courts, mental health courts and drug treatment courts. The next section will consider drug treatment courts as an alternative to the ‘revolving door’ of imprisonment in more detail.

**Drug Treatment Courts**

Drug Courts were established in the United States and are currently operating in Jamaica, Bermuda, Brazil, Ireland, Scotland and Australia. In the U.S., such programs report re-offending rates of about 3% (which vary significantly in eligibility criteria compared to Scotland) as well as significant cost savings to the public purse. The Toronto Drug Treatment Court was the first of its kind in Canada and began operation in December 1998. There are now Drug Courts in Vancouver and St. John’s with further courts in the planning stage. A Drug Treatment Court in Canada is relatively similar to the pilot Drug Court in Glasgow and in Fife. It is a special court within the legal system that emphasizes treating rather than incarcerating drug involved offenders. This special court provides and supervises substance abuse treatment for non-violent offenders who are assessed as addicted to drugs. The program relies on the collaboration of judges, Crown Prosecutors, duty counsel, police officers, probation officials, treatment staff, community/court liaison staff and other court officials. There is a significant contribution made by community agencies which provide specialized substance abuse treatment and ancillary services such as housing, health services and job training.

In Canada, the process of entry to a Drug Court is distinct from the Scottish experience and context specific to Toronto, Vancouver and St Johns. In the Toronto Drug Treatment Court (TDTC), participation in the program is
completely voluntary. Prospective participants are engaged as soon as possible after their arrest, following consultation with their lawyer. With the agreement of the Crown, the TDTC judge, and the treatment program, successful applicants begin treatment immediately. They also attend TDTC court sessions on a regular basis, where the judge reviews their progress in consultation with the TDTC treatment team. Participants can enter the TDTC either at a pre-plea or at a post-plea stage. Non-violent offenders charged with drug related offences are eligible. The Crown must determine that the offence was motivated by addiction and not committed solely for financial gain. Offenders who involve anyone under the age of 18 in the commission of their crimes are also ineligible. Offenders who sold drugs adjacent to a school, for instance, will not be considered for TDTC.

Participants initially attend court sessions twice a week and must follow a structured outpatient program designed to reduce their dependence on drugs. Working closely with a case manager, participants are subject to random drug tests, take part in individual and group counseling, and receive appropriate medical treatments such as methadone maintenance. Program staff work with partners in the community to address other needs, such as safe housing, stable employment and training opportunities.

A system of graduated incentives and sanctions is applied, which encourages continued compliance with the program. Sanctions range from verbal reprimand to expulsions and -- incentives ranging from verbal commendations to a reduction in court appearances. An offender participates in TDTC for approximately one year, or until he or she demonstrates control over their drug misuse, finds stable housing, and begins a job or training program. Upon successful completion of the program, an offender typically receives a non-custodial sentence. If unsuccessful, an offender will be sentenced as part of the regular court process.

One limiting factor on the impact of Drug Treatment Courts in Canada as an alternative to custody is the size of resources required for the capacity of offenders on the programme at any one time. For instance, the TDTC has only 50 ‘places’ for offenders. In Scotland, the potential capacity of the pilot urban and rural Drug Courts are significantly higher than in the metropolitan sites in Canada.

It is recognised that Drug Treatment Courts play an important role in Canada in diverting offenders with drug misuse problems away from imprisonment and into treatment. Drug Courts were introduced to Scotland in 2001 and are currently being evaluated for their effectiveness.
AUSTRALASIA

Australia

Introduction and background

Australia has a federal structure of government with the six states and two territories having responsibility for the majority of criminal justice policy and legislation. This being the case, there is considerable variation in the administration of criminal justice across the country and there are wide variations between jurisdictions in sentencing patterns and trends. The latter reflect to some extent differences in the characteristics of the populations served (for example, imprisonment rates tend to be higher in those jurisdictions with a high indigenous population) but they are also a manifestation of legislative and policy responses to crime. Western Australia, for example, has tended to place a greater emphasis upon the use of imprisonment and lesser relative emphasis upon the use of community-based alternatives than other states, a situation that, as we shall see, it is currently making concerted efforts to address.

Recent policy developments are broadly predicated upon the potentially greater effectiveness of community-based disposals, especially those which are based on ‘what works’ principles. However government responses have also, in the main, tended towards conservatism, for fear of being considered soft on crime. An increasing tendency is for particular attention to be paid to the development of policies to take account of the specific circumstances of the indigenous population and women who offend.

Trends in the use of imprisonment

Between 1993 and 2003 the prison population across Australia increased by nearly 50%, greatly exceeding the 15% growth in the Australian adult population over the same period. The result has been an increase in the adult imprisonment rate from 119 to 153 prisoners per 100,000 adult population between 1993 and 2003 (Australian Bureau of Statistics, 2004a). Taken over a longer timescale, there has been an average annual growth in the prison population of 5% per annum since 1984.

In 2003 nearly 55% of all prisoners were males aged between 20 and 34 years. The 25–29 year age group had the highest imprisonment rates for both males and females, with 659 male prisoners per 100,000 adult males, and 53 female prisoners per 100,000 adult females (Australian Bureau of Statistics, 2004a). The proportion of prisoners who are women increased from 4% in 1986 to 7% in 2002 and the number of female prisoners has increased annually by 8% over an 18-year period (Australian Institute of Criminology, 2003). The female rate of imprisonment has increased from 7 per 100,000 in 1986 to 19 per 100,000 in 2002. Between 1993 and 2003, the female prisoner population increased by 110%, in comparison to a 45% increase in the male prisoner population (Australian Bureau of Statistics, 2004a).
Table 8: Prisoner Characteristics in Australia 1993-2003

<table>
<thead>
<tr>
<th></th>
<th>All Prisoners</th>
<th>Mean age</th>
<th>Females</th>
<th>Indigenous</th>
<th>Known prior adult imprisonment</th>
<th>Remandees</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>no.</td>
<td>Years</td>
<td>%</td>
<td>%</td>
<td>%</td>
<td>%</td>
</tr>
<tr>
<td>1993</td>
<td>15,866</td>
<td>31.1</td>
<td>4.8</td>
<td>15.2</td>
<td>56.5</td>
<td>12.0</td>
</tr>
<tr>
<td>1994</td>
<td>16,944</td>
<td>31.4</td>
<td>4.9</td>
<td>16.5</td>
<td>60.5</td>
<td>11.5</td>
</tr>
<tr>
<td>1995</td>
<td>17,428</td>
<td>31.7</td>
<td>4.8</td>
<td>17.1</td>
<td>56.3</td>
<td>11.5</td>
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<tr>
<td>1996</td>
<td>18,193</td>
<td>31.8</td>
<td>5.3</td>
<td>18.0</td>
<td>57.4</td>
<td>12.7</td>
</tr>
<tr>
<td>1997</td>
<td>19,128</td>
<td>31.9</td>
<td>5.7</td>
<td>18.7</td>
<td>57.9</td>
<td>13.4</td>
</tr>
<tr>
<td>1998</td>
<td>19,906</td>
<td>32.5</td>
<td>5.7</td>
<td>18.8</td>
<td>62.1</td>
<td>14.0</td>
</tr>
<tr>
<td>1999</td>
<td>21,538</td>
<td>32.7</td>
<td>6.3</td>
<td>20.0</td>
<td>57.9</td>
<td>14.9</td>
</tr>
<tr>
<td>2000</td>
<td>21,714</td>
<td>32.9</td>
<td>6.4</td>
<td>18.9</td>
<td>56.4</td>
<td>17.4</td>
</tr>
<tr>
<td>2001</td>
<td>22,458</td>
<td>33.0</td>
<td>6.7</td>
<td>19.8</td>
<td>58.4</td>
<td>19.3</td>
</tr>
<tr>
<td>2002</td>
<td>22,492</td>
<td>33.4</td>
<td>6.6</td>
<td>20.0</td>
<td>58.3</td>
<td>19.6</td>
</tr>
<tr>
<td>2003</td>
<td>23,555</td>
<td>33.8</td>
<td>6.8</td>
<td>20.5</td>
<td>57.2</td>
<td>20.5</td>
</tr>
</tbody>
</table>

On June 30 2002 the indigenous imprisonment rate (1,488 per 100,000) was 12 times higher than the rate for non-indigenous prisoners (121 per 100,000) (Australian Institute of Criminology). As Table 8 shows, there has been an increase in the proportion of indigenous prisoners over the 10 year period from 1993-2003.

**Juveniles**

The increase in the adult prison population has been mirrored by a steady decrease in the juvenile population. Between 1981 and 2002 the overall incarceration rate for juveniles decreased from 65 to 24 per 100,000. The percentage of females in the juvenile prison population has decreased from 17% in 1981 to 10% in 2000. At 30 June 2003 indigenous juveniles comprised 47% of the population in juvenile corrective institutions. The incarceration rate for indigenous juveniles (256.7 per 100,000) was 19 times higher than the rate for non-indigenous juveniles (13.6 per 100,000).

**Remand prisoners**

In 2002, remand prisoners accounted for 20% of the total prisoner population (up from 12% in 1984). The rate of prisoners remanded in custody increased from 10 to 29 per 100,000 adult population between 1984 and 2002 while the rate of sentenced prisoners dropped from 127 in 1999 to 119 in 2002 (Australian Institute of Criminology, 2003). In 2003 the Australian Capital Territory - including Australian Capital Territory prisoners held in New South Wales prisons - had the highest proportion of unsentenced prisoners (34%). The lowest proportion of unsentenced prisoners was recorded in Western Australia (15%) (Australian Bureau of Statistics, 2004a). Based on annual figures, the number of unsentenced prisoners increased by 8% between 2002 and 2003 while the number of sentenced prisoners increased by 3% over the same period. The proportion of unsentenced prisoners remained constant between 2002 and 2003 (Australian Bureau of Statistics, 2004a).

**Sentenced receptions**

In October - December 2003 there were 5,973 sentenced receptions in Australia. The number of sentenced receptions decreased by 572 (9%) compared with the equivalent period in 2002. Decreases in sentenced receptions between 2002 and 2003 were recorded by all jurisdictions except the Northern Territory which recorded an increase of 12% (Australian Bureau of Statistics, 2004b).

**Periodic detention**

Periodic detention is a form of custody only used in NSW and the Australian Capital Territory. It is generally undertaken in two stages: a short custodial

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1 The age of criminal responsibility (7 – 10 years) and the maximum age for juvenile jurisdiction (16 – 17 years) vary by state and territory
sentence followed by a period of release when the offender is required to undertake community service at weekends or other days off.

The use of periodic detention has declined in recent years (for example, from 60% of custodial sentences imposed in NSW 1995-6 to 47% in 2000-1 (Beyond Bars, 2003). At December 2003 9% of persons in custody in NSW and 31% in ACT were in periodic detention (Australian Bureau of Statistics, 2004b).

These national figures mask underlying variations by state. As Table 9 indicates, the highest rates of imprisonment at June 2003 were in the Northern Territory and Western Australia while the lowest were in Victoria and ACT. Western Australia and NSW had the highest imprisonment rates for indigenous people while the rate of imprisonment of female offenders was highest in the Northern Territory and Western Australia and lowest in Tasmania and ACT.

A detailed comparison of imprisonment rates in NSW and Victoria revealed that the higher rate in NSW could be partly accounted for by: the use of periodic detention in NSW; its greater use of imprisonment for fine default; longer time spent in custody by sentenced prisoners; and a higher rate of sentenced receptions (Gallagher, 1995).

Community-based disposals

Community corrections comprise a variety of non-custodial programmes which vary in the nature and extent of supervision, the conditions of the order and the restrictions on the person’s freedom of movement in the community. They generally provide either a non-custodial sentencing option or a post-custodial mechanism for re-integrating prisoners into the community under continued supervision. Overall, the rate of use of community corrections was 351 per 100,000 adults in 2002. Male offenders accounted for 81% of the community corrections population in 2001-2002 (Australian Institute of Criminology, 2003).

Community corrections can be categorised as: restricted movement orders (home detention); reparation orders (e.g. monetary penalties, community service); and supervision (compliance) orders (parole, bail, sentenced probation). Supervision orders are most common (33,827 offenders in 2001-20021), though their use that year declined by 1% from the previous year. Reparation orders were made in respect of 17,175 offenders in 2001-20022, representing a decline of 25% from the previous year. Overall, the number of persons subject to community-based orders decreased further by 4% between 2002 and 2003, though some states (Victoria, Tasmania and the

---

1 Excluding Victoria
2 Excluding Victoria
Northern Territory) recorded increases (of 10%, 10% and 8% respectively) over the same period (Australian Bureau of Statistics, 2004b).
Table 9: Imprisonment Rates (Per 100,000 Adult Population) by States and Territories

<table>
<thead>
<tr>
<th></th>
<th>NSW</th>
<th>Vic.</th>
<th>Qld.</th>
<th>SA</th>
<th>WA</th>
<th>Tas.</th>
<th>NT</th>
<th>ACT</th>
<th>Aust.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Males</strong></td>
<td>321.2</td>
<td>186.6</td>
<td>341.4</td>
<td>230.1</td>
<td>360.6</td>
<td>240.6</td>
<td>942.9</td>
<td>193.6</td>
<td>290.8</td>
</tr>
<tr>
<td><strong>Females</strong></td>
<td>22.3</td>
<td>14.3</td>
<td>23.7</td>
<td>16.8</td>
<td>28.9</td>
<td>12.8</td>
<td>32.9</td>
<td>9.4</td>
<td>20.4</td>
</tr>
<tr>
<td><strong>Indigenous</strong></td>
<td>2,181.2</td>
<td>1,183.0</td>
<td>1,697.6</td>
<td>1,672.3</td>
<td>2,743.9</td>
<td>527.3</td>
<td>1,626.0</td>
<td>697.8</td>
<td>1,888.3</td>
</tr>
<tr>
<td><strong>Non-Indigenous</strong></td>
<td>135.2</td>
<td>93.8</td>
<td>139.0</td>
<td>87.5</td>
<td>125.7</td>
<td>109.3</td>
<td>111.3</td>
<td>93.2</td>
<td>119.4</td>
</tr>
<tr>
<td><strong>All prisoners</strong></td>
<td>169.4</td>
<td>98.3</td>
<td>180.7</td>
<td>121.3</td>
<td>193.7</td>
<td>123.8</td>
<td>513.6</td>
<td>99.6</td>
<td>153.4</td>
</tr>
</tbody>
</table>

In 2001-2 the indigenous community corrections rate (2,733 per 100,000 population) was 10 times higher than the rate for non-indigenous offenders (267 per 100,000 population) (Australian Institute of Criminology, 2003). At December 2003 the rate of persons in community-based corrections was 332 persons per 100,000 adult population (550 per 100,000 adult male population and 117 per 100,000 adult female population), a decrease of 6% on the previous year (Australian Bureau of Statistics, 2004a).

As Figure 12 indicates, the community-based corrections rate varies by state, being highest in the Northern Territory and lowest in Victoria. There is a tendency, therefore, for states with lower use of imprisonment also to have a lower use of community corrections and for those with a high use of imprisonment also to have a high use of community corrections.

**Figure 12: Community–Based Corrections Rate (per 100,000 adult population)**

![Community-based corrections rate chart](https://example.com/chart)

Source: Australian Bureau of Statistics (2004b) Corrective Services, Australia

In 2001-2 70% of all community correction orders were successfully completed. Supervision and restricted movement orders were most likely to be completed (74% and 75% respectively) while reparation orders were least likely to be completed (66%) (Australian Institute of Criminology, 2003).

**Victimisation**

Overall, the percentage of prisoners sentenced for violent offences increased between 1986 and 1995 but has remained steady thereafter (Australian Institute of Criminology, 2003). The steady growth in the prison population cannot therefore be attributed to an increase in serious crime. Victimisation data suggest that there was a decrease in most offence categories between 2001 and 2002 (see Figure 13). For example, victims of robbery decreased by 21% (with armed robbery reducing by 30%), motor vehicle theft decreased by 19%, unlawful entry with intent decreased by 9% and other theft decreased by 3% (Australian Bureau of Statistics, 2003).
In 2002, the victimisation rate (number of victims per 100,000 population) for unlawful entry with intent (2001 per 100,000 population) and motor vehicle theft (575 per 100,000 population) were the lowest since 1993, while the robbery victimisation rate (106 per 100,000 population) was the lowest since 1995. By contrast, the assault victimisation rate increased by 44% from 563 to 810 per 100,000 population between 1995 and 2002 while the sexual assault victimisation rate increased from 69 to 91 per 100,000 population between 1993 and 2002.

**Dealing with Drug-related Crime**

From 1985 onwards, drug policies in Australia were underpinned by a philosophy of harm minimisation. In the late 1990s, to combat the growing drug problem the Federal Government provided funding for the development of programmes aimed at diversion to education or treatment. As the National Drug Strategy Illicit Drug Diversion National Framework indicates:

> ‘In its Communiqué of 9 April 1999, the Council of Australian Governments (COAG) “agreed to work together to put in place a new nationally consistent approach to drugs in the community involving diversion of drug offenders by police to compulsory assessment”.

**COAG asked the Ministerial Council on Drug Strategy (MCDS) to develop a nationally consistent approach to diversion. In response, this report draws on the work of a number of expert working groups which were chaired by members of the Intergovernmental Committee on Drugs (IGCD) and included representatives of the IGCD and the Australian National Council on Drugs (ANCD). IGCD has provided expertise and policy advice to the expert working groups and the National Drugs Task Force during the development of this initiative.**

The diversionary scheme agreed by COAG emphasises diversion of offenders by police at apprehension to maximise
the opportunities for early intervention with illicit drug users. It is recognised however, that in order to reduce the harm to both the offender and the community, there should continue to be opportunities to provide offenders with access to assessment and treatment at all stages of the criminal justice process.’

(National Drug Strategy, 2001)

The shift in policy focus to diversion has resulted in the introduction of legislated and non-legislated diversionary measures, pre-court, pre-trial and following conviction. Drug diversion strategies are targeted upon drug offences and drug-related offences (such as offences committed under the influence or to fund drug use). Offenders diverted under these schemes have access to drug education and/or treatment (Vaughan, 2002). Examples include:

*Cannabis Infringement Notices (SA, NT, ACT)*: the issuing of a police fine for possession of small amounts of cannabis.

*Cannabis Cautioning Scheme (NSW, Vic, Qld, WA, Tas)*: the issuing of a police caution for simple use/possession offences.

*Drug Assessment and Aid Panel (SA)*: pre-prosecution referral for possession of drugs (excluding cannabis) for personal use. The panel can require the individual to undergo treatment and/or education.

*Pre-arrest diversion (nation-wide but varying in terms of police powers and the specific forms of diversion place)*: Informal warnings and formal cautions by the police.

*Pre-trial diversion (nation-wide)*: generally require an admission of guilt and may operate alongside bail. Examples include the CREDIT scheme in Victoria (Court Referral and Evaluation for Drug Intervention and Treatment) and the MERIT scheme in New South Wales (Magistrate Early Referral into Treatment).

Overall, the number of arrests for drug offences in Australia decreased by 25% between 1995-6 and 2001-2. The number of arrests for cannabis and heroin declined while the number of arrests for amphetamines and cocaine almost doubled over the same period\(^1\). Eighty per cent of drug arrests in 2001-2 involved ‘consumers’ rather than ‘providers’ and 80% of arrestees (whether consumer or provider and irrespective of drug type) were male (Australian Institute of Criminology, 2003).

*Drug Courts*

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\(^1\) An important phenomenon that occurred in cities in Australia towards the end of 2000 was a significant shortage in the availability of heroin. Weatherburn et al (2001) found that the ‘heroin drought’ in New South Wales had led to sharp falls in heroin use and appeared to have resulted in some heroin users seeking methadone treatment and others consuming more of other drugs, such as cocaine.
Drug Courts have been established in five Australian states - Western Australia, South Australia, Victoria, Queensland and New South Wales – and, most recently, in the Northern Territory\(^1\). A key distinction between the Drug Courts in different states is whether or not they have a legislative basis and whether they operate prior to adjudication or prior to sentencing. The introduction of Drug Courts in New South Wales, Queensland and Victoria has been supported by specific legislation while the Drug Courts in South Australia, Western Australia and the Northern Territory operate within existing bail legislation. As a consequence, the latter courts provide pre-sentencing programmes while the former operate post-conviction and sentence. Most Drug Courts are Magistrates Courts because, as Freiberg (2002) argues, they tend to deal with most of the potentially relevant cases, have fewer delays and are usually the first point of call for accused who have been convicted of an offence related to the misuse of drugs. Freiberg also proposes that magistrates courts in Australia have been proven to be more willing to experiment with innovative practices than have the higher (district and supreme) courts and were therefore more likely to ‘buy into’ the Drug Court pilots.

Makkai (2000) suggests that the impetus for the establishment of Drug Courts in Australia came from ‘moral entrepreneurs’, senior politicians at the state level and the media. Drug Courts – which were established at state level since law and order in Australia is primarily a state responsibility - were perceived as providing a policy answer as to how to deal with rising drug use and crime without appearing ‘soft’ on crime. They were largely based upon the Drug Court model that had evolved in the US and were consistent with a political focus on ‘whole of government’, joined-up initiatives. As Makkai observes, Drug Courts ‘fit well with the broader philosophical commitment to cross disciplinary approaches’.

Freiberg (2000) has suggested that there were three key influences on the development of Drug Courts in Australia. First, there was a growing recognition that interventions provided in the context of the criminal justice system could have positive outcomes. Second, there had been a move towards ‘managerial judging’ (as a result of increased scrutiny in relation to issues such as court delays, costs and sentencing practices) which led to judges becoming more directly involved in all aspects of a trial. Third, there were increasing financial constraints within public sector agencies, which had focused policy makers upon problem-solving and outcome focused programmes.

An evaluation of the New South Wales (with a randomised control) found lower levels of recidivism among ‘successful’ Drug Court participants than among those whose programmes were terminated and among ‘controls’. Non-terminated participants remained offence-free longer than terminated participants and randomly assigned controls and had fewer new offences involving shoplifting, other theft, house breaking and possession of drugs.

\(^{1}\) In addition to Drug Courts, other specialised courts in Australia include domestic violence/family courts, youth/children’s courts, mental health courts and indigenous courts.
Spending on illicit drugs reduced significantly when offenders participated in the programme, with this lower rate of spending maintained at 8 and 12 months. Significant improvements were also found in participants’ health and social functioning as assessed by standardised questionnaires. However, these benefits were somewhat offset by the high rate of attrition from the Drug Court programme, leading Freeman (2002) to recommend that the court should target offenders otherwise facing lengthy prison sentences, since they are likely to be successfully retained in the programme. An interim evaluation of the Southeast Queensland Drug Court found that the rate of re-offending was lower among Drug Court graduates, they took longer to re-offend, were reconvicted less frequently and were least likely to be reconvicted of a violent offence (Makkai and Veraar, 2003).

**Key policy developments**

In general terms, broad policy and legislative developments in Australia have mirrored those in other western jurisdictions. Thus in the 1970s and 1980s, the emphasis was upon expanding the range of community-based disposals as alternatives to imprisonment. In the 1990s came calls for tougher penalties, incapacitative sentencing and vindication of the rights of victims (Freiberg, 1987a). Public and political concern about crime resulted in increasingly punitive responses, particularly in respect of those offenders deemed to present the greatest risk of public harm. Even a traditionally liberal state like Victoria did not escape these pressures, as Freiberg (1997a, p.160) explains:

> “Until recently, in Victoria, the general judicial and political ethos was that imprisonment was a necessary and expensive evil, the use of which was to be a very last resort. However, that ethos has withered in the face of increasing public fear of crime, a fear that is paradoxically rising as the general crime rate falls.”

In Victoria, this resulted, as in other states, in the introduction of increased sentences for serious violent and sexual offenders and the introduction of indefinite imprisonment for some categories of offenders who were considered to pose a serious danger to the community.

**Truth in sentencing**

During the 1990s several states enacted ‘truth in sentencing’ legislation that abolished remission on prison sentences. The impact of these policies upon prison numbers appears to have been somewhat varied, depending upon the additional safeguards put into place. For example, the introduction of truth in sentencing in New South Wales appears to have resulted in a significant rise in the prison population (through an increase in the length of sentence served). As Gorta (1997) indicates, the average time spent in custody increased by 20% resulting in prison overcrowding. At the same time the duration of supervision following release was reduced to a quarter of what it had previously been. As Freiberg (1997a, p.158) has observed:
“Truth in Sentencing in New South Wales came to mean longer sentences, rather than a sentencing system in which the time served by offenders more closely reflected the sentence imposed by the courts.”

In Victoria, on the other hand, courts were directed (through the Sentencing Act 1991) to decrease their custodial sentences commensurately following the implementation of the policy and this appeared not to have resulted in increased time spent in prison (Freiberg, 1997b).

**Abolition of short sentences**

In the early part of the century, political concern is now focusing upon how to reverse the trend towards ever-increasing prison populations. One radical approach (particularly given its traditionally conservative approach to crime and punishment) has been pioneered by Western Australia, which has abolished sentences under 6 months for a large number of minor offences. Although the legislation has only recently been enacted and its impact on imprisonment rates cannot yet be assessed, the policy is being looked at with interest by other states. For example the Select Committee on the Increase in Prisoner Population (2001) recommended to the NSW Government that it adopt a similar policy and abolish short term prison sentences. Research in New South Wales estimated that the effect of abolishing sentences of 6 months or less would be a reduction in prison receptions from 150 to 90 prisoners per week; an overall reduction in the state prison population by about 10%; and cost savings of between $33m and $47m per year (Lind and Eyland, 2002).

From a comparative perspective, however, two states – Victoria and Western Australia are of particular interest for very different reasons and their policies and experiences would be worthy of further investigation.

**Victoria**

Despite having experienced an increase in its prison population in the last few years, Victoria stands out as having a low imprisonment rate in comparison with other states. Freiberg (1997a) has suggested that a number of factors have contributed to the state’s comparatively low level of imprisonment:

- the existence of an extensive range of non-custodial options that are well supported by the courts;
- a reluctance on the part of courts to imprison offenders for fine default and breach of community based orders;
- limited use of short term of imprisonment; and
- the restrained use of very long or indefinite sentences of imprisonment.

Victoria therefore is of interest as a jurisdiction that has managed to avoid the high levels of imprisonment that have occurred elsewhere in Australia through a combination of credible community-based alternatives and a cautious use by the judiciary of custodial sentences.
Western Australia

A contrasting example is provided by Western Australia, proposed for greater scrutiny in the second phase of the research. Between 1991 and 2002 Western Australia witnessed a 43% increase in the numbers of offenders imprisoned. Further analysis revealed that the high imprisonment rate was as a result of the high use of short sentences. Western Australia used sentences of 6-12 months three times more than the national average, with the extensive use of short sentences being even more apparent among the indigenous population. The rate of recidivism following prison was the highest in Australia as was the cost of imprisonment. The use of community service orders, by contrast was relatively low. To address this situation, the Government of Western Australia announced the introduction of a programme of major reforms in the adult justice system which include:

“...more effective measures for the management of adult offenders which encourage them to take responsibility for their actions and make reparation to victims and the community. Seeking to divert offenders from the criminal justice system at the earliest opportunity while protecting public safety is another important aspect of the reform.”

Western Australia Department of Justice (2002, p.7)

The package of reforms include legislative changes, administrative reforms, the expansion of diversionary options and court reforms which are being introduced in a phased manner to enable the impact of each reform on the prison population to be assessed. The initiative that is anticipated to have the most dramatic impact on prison numbers – the abolition of short sentences (up to 6 months) – is the last to be introduced.

Some of the other key policy initiatives include:

- The extension of adjournment of sentence from up to 6 to up to 24 months. Courts must contemplate adjournment when imposing a prison sentence and must provide reasons if an adjournment is not used. When adjourning a case the court can impose a pre-sentence order (PSO) which specifies the date and time of the next court appearance and which must include one or more of the following: programme requirement; community work requirement; supervision requirement; curfew requirement. At sentencing, the court must take into account the extent to which the PSO has been complied with and how long the offender has been subject to it.

- Early release of short-terms prisoners (up to 12 months) with or without additional programme, supervision or curfew requirements.

1 For example, in February 2002, 57% of prisoners serving sentences of 6 months or less were indigenous, 48% of whom were serving sentences for traffic, justice or public order offences (Western Australia Department of Justice, 2002).
• **Abolition of remission** with court directives to ensure that future sentences are commensurately shorter.

• **Clearer breach procedures** and the availability of alternative sanctions to prevent high rates of return to prison for failure to comply with parole conditions.

• A wider range of **community work placements** with opportunities for skills acquisition to enhance employment prospects.

• An expansion of **community-based intervention programmes**.

• The expansion of **diversionary measures** including:
  - Wider use of informal in formal police cautioning
  - Pre-court diversionary conferencing
  - Aboriginal dispute resolution services
  - Diversion from court of persons with mental health problems or learning disabilities to relevant agencies for treatment and/or support

Since the reform programme was introduced, the rate of imprisonment in the state was said to have decreased by just under 13% over a period of 12 months (Western Australia Department of Justice, 2003). Whether this reduction in prison use has been sustained or improved and, if so, which of the reforms appear to have contributed to it would therefore be worthy of more detailed analysis.

**New Zealand**

**Introduction and background**

The Criminal Justice Act 1985 defined contemporary sentencing and penal policy in New Zealand. Its objectives can be summarised as being to:

• protect the community from violent offenders
• create a more cost effective criminal justice system with an increased emphasis in community partnerships and decision-making
• provide for the needs of victims through the sentence of reparation
• discourage the use of imprisonment for property and other minor offenders

The move towards increasing bifurcation of sentencing appears to have been prompted by an increase in violent and sexual offending in the 1980s. In 1987 a Ministerial Council of Enquiry into violence recommended the introduction of longer prison sentences and less parole for serious violent and sexual offenders (Thorp, 1997).

**Sentencing trends**
New Zealand’s juvenile justice system is world renowned following the widespread introduction of restorative justice as an alternative to court sanctions in the Children and Young Persons Act 1989. However it has a higher adult prison population than many comparable western jurisdictions and witnessed an increase in the daily sentenced adult population from 129 per 100,000 in 1992 to 157 per 100,000 in 2001. At June 2003 the remand population represented 18.2% of prisoners while women constituted 4.4% of the population and 6.4% of the population was under 21 years of age (International Centre for Prison Studies, 2003). The Department of Corrections manages approximately 19,000 custodial sentences and community-based orders and around 6,000 prisoners per annum. In 2002 96% of the prison population and 80% of Community Probation offenders were male and 95% of prisoners were classified as either minimum or medium security. Fifty per cent of prisoners identify themselves as Maori, 36% as European and 12% as Pacific peoples. Government projections suggest that between 2003 and 2013 the number of prisoners will grow at 3.2% per year while the number of Community probation offenders will grow by only 1% per year. In the five years prior to 2003 the number of prisoners increased by 5.2% per year while the number of offenders subject to community corrections orders declined by 2.9% per year (New Zealand Department of Corrections, 2003a).

A report by the Department of Corrections in 2002 concluded that “New Zealand imprisons more offenders than like jurisdictions”, though its return to prison rate within two years (37%) is reported to be similar to that of Australia (36%) and lower than Scotland (47%) (New Zealand Department of Corrections, 2002). The New Zealand Government is currently involved in a prison and facilities development programme at a cost of $500 million over 5 years (New Zealand Department of Corrections, 2002).

Community corrections

New Zealand has a wider range of community-based sentencing options than most other countries. Its use of community-based sentences increased from 18% of convictions in 1987 to 32% of convictions in 1996. Over the same period the use of monetary penalties decreased from 56% to 34% of cases prosecuted. Subsequently, the use of community-based penalties decreased while the use of monetary penalties increased (New Zealand Ministry of Justice, 1998). Analysis of the trends in the use of community-based sentences led the Ministry of Justice to conclude that:

“Successive alternatives to custody simply became alternatives to other alternatives to custody. Such “alternatives” are not replacing prison institutions, but come to exist alongside that which they are

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1 The age of criminal responsibility in New Zealand is 10 years, however children aged between 10 and 13 years can only be prosecuted for murder and manslaughter and can only be convicted if aware that their actions were morally wrong or contrary to the law. In practice, therefore, prosecutions of young people under 14 years of age are very rare (Young, 1993). Youth Courts deal with young people under 17 years of age.
supposed to replace, with the effects of net-widening in the
community while the prison population is maintained or
increased...An expansion in the use of community-based
sanctions in various jurisdictions has mostly been accompanied
by a significant reduction in the proportion of offenders sent to
prison but not in the numbers of offenders sent to prison.”

In response, it recommended that alternatives to custody should be viewed as
penalties in their own right and that the principle of the lowest level of
intervention compatible with the public interest should always guide their use.

The Ministry of Justice report also suggested that greater use could be made
of monetary penalties – fines and reparation - which are relatively flexible,
less expensive to implement and less disruptive to offenders’ lives. However
non- or slow-payment of these penalties was acknowledged to impact upon
their credibility. Steps were being taken to improve fines enforcement by the
Collection Business Unit in the Department of Courts to limit the substitution
of costly alternative sentences and reduce the amount of fines remitted. This,
in tandem with improve economic factors, was thought likely to result in fiscal
savings while avoiding net-widening and up-tariffing.

Existing community-based options in New Zealand include community
service, supervision, release on electronically monitored home detention and
early release home detention in the 3 month period prior to parole. More
recent policy initiatives have been informed by the ‘what works’ effectiveness
research literature. These include the introduction of offender programmes
and an Integrated Offender Management system which takes into account the
circumstances of the offender and their offending as a means of planning and
managing their sentences in prison or in the community. The intention is that
– in line with the ‘risk principle’ – resources will be focused upon those
deemed to present a higher risk of re-offending. All offenders, except those
undertaking community service, will have a sentence plan which identifies
appropriate rehabilitative programmes and which entails regular progress
reviews. Programmes are defined as motivational, rehabilitative or re-
integrative, with the latter aimed at encouraging re-integration and self-
sufficiency (New Zealand Department of Corrections, 2003b). The suite of
available interventions also includes programmes (in prison and the
community) with a specific Maori focus to help Maori offenders to address
their offending within a culturally appropriate context (New Zealand
Department of Corrections, 2002).

Concluding remarks

In comparison with other similar jurisdictions, New Zealand’s use of
imprisonment has been high. Rising imprisonment rates have been
accompanied by longer sentences for serious offences, a declining use of
community-based sentences and the use of alternatives to imprisonment
instead of other alternatives such as reparation and fines. Whilst the
government appears to acknowledge its unenviable position in relation to
imprisonment it does not appear to be contemplating radical measures to reverse this trend. Instead, it has committed to an expensive prison building and refurbishment programme and appears to be placing great store on the effectiveness of offender sentence management processes and offending-related programmes and interventions to reduce recidivism and thereby indirectly bring its prison population down.

**Japan**

Japan has a traditionally low prison population in comparison to many other jurisdictions. Although in common with other countries it has witnessed an increase in its daily average sentenced population (from 37 per 100,000 adult population in 1992 to 48 per 100,000 in 2001) and by the end of 2002 had a prison occupancy rate in excess of capacity (106.5%) its use of imprisonment is still comparatively low (International Centre for Prison Studies, 2004g). In 2002 17.5% of prisoners were detained prior to trial or on remand following conviction and 5.6% of prisoners were women. Only 0.05% of convicted prisoners in 2000 were under 20 years of age (International Centre for Prison Studies, 2004g). Young people under 20 years of age are legally defined as juveniles and most are dealt with in the Family Court, with criminal prosecution reserved for those charged with serious offences. Young people dealt with by the Family Court may be made subject to probation supervision or detained in a child education or training home or a juvenile training school (Moriyama, 1993).

Japan’s legal system reflects a mixture of anglo-american, continental and oriental (Chinese) influences. A significant feature of Japanese responses to law-breaking, however, is the traditional focus upon the avoidance of disputes especially those arising among community members. Despite an increase in recourse to formalised processes via the criminal justice system, informal resolution of disputes without going to court remains the preferred option (Moriyama, 1993). As Braithwaite (1989) observes, the Japanese informal system of justice is based on mediation and arbitration, with apology to the victim and shame on the part of the offender being central features.

Japan’s low imprisonment rate appears to reflect this traditional emphasis upon informalism and avoidance of criminal justice involvement rather than the success of criminal justice policies at limiting prison use. Indeed, as Moriyama (1993) observes, Japanese society is broadly conservative (with, for example, high levels of public approval of the death penalty) and resistant to liberalising change. This is reflected in the rather limited and punitive range of penalties available to Japanese courts. These include: the death penalty, imprisonment with or without labour, penal detention (up to 30 days), fines and minor fines (along with potential confiscation of items used to perpetuate or obtain as a result of crime). Traffic offences are considered very serious in Japan and in 1989 there were eight penal establishments specifically for the detention of traffic offenders (Moriyama, 1993).

The majority of parolees and probationers in Japan are juveniles. The tradition of informalism also extends to the supervision of offenders in the community
which is undertaken by a body of volunteer probation officers appointed by the
ministry of justice and co-ordinated by a relatively small number (850 in 1993)
of paid probation officers (Moriyama, 1993).

Thus while Japan would appear to be an interesting example of a jurisdiction
that has succeeded in keeping its use of imprisonment to low levels, this can
be attributed to specific cultural factors rooted in historical traditions. Given
that most minor offences do not reach the formal criminal justice system,
Japan's use of imprisonment with those who are prosecuted and convicted
(and there is a very high conviction rate) appears, in comparative terms, to be
reasonably high.
SECTION 4: PROPOSED JURISDICTIONS FOR FURTHER STUDY

From a comparative perspective, the policies, practices and experiences of Finland, Sweden and Western Australia are considered worthy of in-depth scrutiny in the second phase of the research.

In this final section of the Interim Report, the series of reforms or initiatives that seemingly have tackled the increasing use of imprisonment in Finland, Sweden and Western Australia are summarised before considering Phase 2 of the research.

Finland

Finland has previously been used as a model for good practice in other jurisdictions.

In the 1970s the prisoner rate in Finland was amongst the highest in Europe despite a decreasing trend. By the late 1980s/early 1990s Finland’s prison rate had reduced to match that of other Scandinavian countries and remained relatively stable during the 1990s (approximately 60 per 100,000).

While the reasons for Finland’s successful reduction of the prison population are complex, several factors clearly contributed:

- Changes in penal theory and thinking relating to criminal policy
- Changes in penal legislation, in sentencing and prison enforcement practices
- Political consensus that prison overcrowding was a problem which needed to be addressed.

Finland has relatively few alternatives to imprisonment. During the 1990s a majority of all criminal cases brought before the courts resulted in fines (60%) or a conditional sentence (20%). Around 10% of cases result in imprisonment and 6-7% in community service.

The Finnish reduction in the use of custody may be more indicative of a shift from an excessive use of imprisonment to a more ‘normalised’ situation rather than a major move towards decarceration. Although there were significant decreases in the prison population between 1992 and 1998, since 1998, the overall trend in imprisonment has increased (from 2569 in 1998 to 3469 in 2002) which needs to be closely examined.

Sweden

Sweden provides an interesting jurisdiction to study as its prison population has remained more or less stable over the past 20 years.
A general principle of Swedish penal policy is that imprisonment should be avoided as far as possible, although Swedish law offers fewer sentencing options than do most countries.
Up until the 1960s, the prison populations of Sweden and the UK were very similar but the Swedish prison population decreased after the 1960s, and the rate of imprisonment during the 1990s has not returned to the level of imprisonment evident in the late 1960s, in contrast to the UK prison population which has continually increased during this period. After a significant decrease in the prison population from 1995-1998, it increased significantly from 1998-2001. The number of receptions to prison has decreased between 2001-2004, mainly due to intensive supervision with electronic monitoring which is used as an alternative to prison for sentences of up to three months.

**Western Australia**

Traditionally punitive in approach, Western Australia has begun to reduce its rate of imprisonment since introducing a package of reforms.

Between 1991 and 2002 Western Australia witnessed a 43% increase in the numbers of offenders imprisoned. Further analysis revealed that the high imprisonment rate was as a result of the high use of short sentences. The rate of recidivism following prison was the highest in Australia as was the cost of imprisonment. The use of community service orders, by contrast was relatively low.

The package of reforms include legislative changes, administrative reforms, the expansion of diversionary options and court reforms which are being introduced in a phased manner to enable the impact of each reform on the prison population to be assessed. Some of the other key policy initiatives include the extension of adjournment of sentence from up to 6 to up to 24 months, early release of short-term prisoners, abolition of remission, clearer breach procedures, wider range of community work placements, expansion of community-based intervention programmes and expansion of diversionary measures. The initiative that is anticipated to have the most dramatic impact on prison numbers – the abolition of short sentences (up to 6 months) – is the last to be introduced. Since the reform programme was introduced, the rate of imprisonment in the state was said by the Western Australia Department of Justice in 2003 to have decreased by just under 13% over a period of 12 months. Whether this reduction in prison use has been sustained or improved and, if so, which of the reforms appear to have contributed to it would therefore be worthy of more detailed analysis.

**Towards Phase 2 of the Research**

This Interim Report has presented the work of the first phase of the research project ‘A Comparative Review of Alternatives to Custody’. Section 3 has provided an analysis of sentencing patterns across different jurisdictions to identify those that have succeeded in reducing rates of imprisonment against a more general increase in prison numbers. This supplements the written and oral evidence to the Justice 1 Committee Enquiry into Alternative to Custody and the Coulsfield Inquiry into Alternatives to Custody in the UK on the
effectiveness of non-custodial sanctions and related services across different jurisdictions.
From this analysis of the policies, practices and legislative changes associated with attempts to decrease prison populations in Europe, North America and Australasia it was proposed in Section 4 that three jurisdictions could be scrutinised in more detail in the second phase of the research. Finland, Sweden and Western Australia are proposed as jurisdictions of relevance to Scotland.

In examining the polices, practices and experiences of Finland, Sweden and Western Australia great care will be taken to appreciate definitional issues. There is no universal definition of ‘alternatives to custody’, and anything that involves crime prevention and punishment outside custodial establishments could legitimately be defined as ‘alternative’ though strictly speaking the term is usually used to referred to disposals that are explicitly intended to divert offenders from custodial sentences. The definition by Vass (1990) seems to apply to most countries: ‘Alternatives to custody are those penalties which, following conviction and sentence, allow an offender to spend part or all of his or her sentence in the community and outside prison establishments’. Other measures that do not come under this definition will be considered as a ‘penalty’.

The second phase of the research project will involve a more detailed analysis of relevant published material with the collection of additional information that will enable trends in prison populations in the jurisdictions of Finland, Sweden and Western Australia to be better understood. This will provide an opportunity to critically examine the applicability of their policy measures, approaches and experience to the situation in Scotland.

There are three main limitations of comparison of trends over different jurisdictions. Firstly, there is the issue of how populations are classified and counted which requires clarity in reporting to address this. Secondly, similar rates of imprisonment can conceal radically divergent practices. The sociological, technological, economic, environment and political contexts of jurisdictions need to be examined. Finally, cultural differences between countries also have an effect on official statistics, as different sorts of criminal behaviour are perceived differently in terms of seriousness. The role of public attitudes towards punishment and their willingness to support the use of alternatives to custody also needs to be considered.

Finally, when investigating new means to reduce rates of imprisonment, it is important to be cognisant of the issue of ‘widening the net’. Net-widening arises when penalties and sanctions, designed as substitutes for custodial sentences, become alternatives for other non-custodial sanctions. The consequence of this is that the criminal justice system expands subjecting more and newer groups of offenders to more intensive supervision, without in turn reducing the prison population.
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02 June 2004

Dear Pauline

Emergency Workers Bill

Further to our telephone conversation of 1 June 2004, I write to advise that I have been contacted by the Loch Lomond Rescue Boat Service in relation to the Emergency Workers Bill. In particular the organisation would like to be considered as one of the organisations specifically named in the Bill as a provider of an emergency service.

I note that crew members of a vessel operated by the Royal National Lifeboat Institute or a person who musters the crew of such a vessel etc is included in the Bill. As the crew of the Loch Lomond Rescue Boat Service offer a similar service to that of the Royal National Lifeboat Institute it seems logical to also include them in the Bill.

I would be grateful if you would raise this issue with the Justice1 Committee when it next discusses the Emergency Workers Bill.

Yours sincerely

Jackie Baillie MSP
Dumbarton Constituency
POST COUNCIL REPORT ON THE JUSTICE & HOME AFFAIRS COUNCIL OF EU MINISTERS, 8 JUNE 2004

SUMMARY

This was the final JHA Council of the Irish Presidency. The UK was represented by Caroline Flint MP, the Home Office Parliamentary Under Secretary of State. There was recognition of the good work on Tampere completed by the Irish Presidency and Commissioner Vitorino, and general agreement was reached on a number of issues, such as the European Refugee Fund, Visa Information System (VIS), researchers and Confiscation Orders. However, the Council was still unable to agree over who should be appointed Director of Europol.

DISCUSSION ON THE SUCCESS OF THE TAMPERE PROGRAMME

A new 5-year programme will be developed, which will include better evaluation of Member States implementation of EU legislation. Issues that are central to the future programme were identified as: the integration of new Member States into the Schengen agreement; preventing illegal immigration; criminal procedure and cross-border prosecutions. France, Finland, Spain and Austria made it clear that mutual recognition of judicial decisions will be key to future co-operation. Austria also re-emphasised that it is opposed to the European Public Prosecutor. Sweden and Finland hoped that Qualified Majority Voting (QMV) would help to speed up progress on asylum and immigration measures. It was agreed that a key factor in this area will be the development of the European Borders Agency.

The Dutch Presidency aims to hold final discussions of the new programme at the October JHA Council, prior to an agreement at the December European Council, and invited written comments from Member States.

POLICE AND JUDICIAL CO-OPERATION & OTHER MISCELLANEOUS ITEMS

A consensus was reached with regard to an approach on the Framework Decision on Mutual Recognition of Confiscation Orders. An agreement on the Director of Europol could not be reached, but the Presidency will try to find a solution by the end of June. With regard to the EU drugs strategy for 2005-2012, Finland wants higher co-operation with third countries such as Russia.

IMMIGRATION AND ASYLUM ITEMS

There was general agreement on how to deal with the Council Decisions on establishing the European Refugee Fund, and the Visa Information System, and the Council Recommendation on researchers. The Commission also presented its Communication on international protection, which was compatible with international opinion; the UK was positive about this, and will no longer be pressing for zones of protection. The Commission’s other Communication relating to the links between legal and illegal migration, included discussions on biometric passports, the general consensus being that fingerprinting could be used in addition to facial imaging. As a result of some German concern about the Communication, the Presidency decided that the issues involved will be debated in July’s Council.
FOLLOW UP TO THE EUROPEAN COUNCIL DECLARATION ON TERRORISM

The Secretary General’s report recommended that there should be close links between the Situation Centre (SitCen) and Europol. This approach was welcomed by the UK, who supported a greater exchange of information driven by the Counter-Terrorism (CT) Co-ordinator. Germany supported an exchange between police, security and intelligence services, but only if Member States were prepared to include sensitive information. Germany also expressed concern about the role of the CT Co-ordinator, who they wanted to co-ordinate work within the Secretariat, rather than interior ministers.

AOB

Concerns about whether the Border Regulation Agency will be in place by January 2005 were raised, as a result of Spain’s reserve over Gibraltar. The UK clarified its stance on Gibraltar to ensure it will not be held responsible if the Regulation is not adopted in time.
Dear Pauline McNeill MSP,

Thank you for your letter of 16 June, requesting clarification on a number of points relating to the Emergency Workers (Scotland) Bill. As you will be aware, the Executive places considerable significance in progressing this Bill in order to meet its Partnership Agreement commitment to protect emergency workers from assault and obstruction. As you may recall, this Partnership Agreement commitment responded to the widespread concern about such attacks which came up time and again in my early contacts with the Trades Unions and Professional Associations. Perhaps surprisingly, there were strong representations from a number of them, including the BMA, for action to be taken to address less serious attacks. While they considered that serious incidents were being properly addressed they felt that something needed to be done to address less serious incidents and the Bill responds to that need.

I know that the same concerns were also reflected in the responses to your Committee’s consultation on this Bill. I note that the summary paper on your consultation recorded that “respondents welcome the proposals contained in the Bill as a response to a growing problem of attacks on emergency workers. They hope that the creation of a specific statutory offence of assaulting, obstructing or hindering an emergency worker, or a person assisting an emergency worker, in emergency circumstances will serve to have a deterrent effect, thus reducing such attacks.” I am pleased to note that the majority view of the respondents to your consultation corresponds so closely with the Executive’s belief in the merits of this Bill.

The Bill therefore targets in particular the primary responders to emergencies – mainly the traditional 999 services, but also prison officers who are the primary responders within prisons. In addition, it extends protection to all who assist these emergency services when responding to an emergency – covering the wide range of other services, organisations and individuals who might be part of the response teams in emergency circumstances. A detailed description of the differences between the
Bill and existing common and statutory law for the emergency workers identified in the Bill is set out at Annex B.

The extent to which the new provisions in the Bill are used will of course be determined by the extent to which such offences continue to be committed. The Executive believes that the range of measures we are taking to address attacks on public service workers, including the Bill, but also a public awareness campaign, work on training and identifying and spreading best practice will help reduce the number of incidents.

I believe that all the available evidence indicates that such attacks are currently at an unacceptable level. I simply cannot agree with the BMA’s reported view that there isn’t a problem when the recently published first ever NHS Scotland Occupational Health & Safety Survey revealed that an average of two NHS staff are violently or verbally attacked in Scotland every hour of the day. I think it is imperative that we progress with this legislation as part of our plan of action to address that problem.

The issues you raise in your letter are responded to in detail in annex A.

I hope this information is helpful. I am copying this response to Dr Sylvia Jackson, Convenor, Subordinate Legislation Committee.

ANDY KERR
EMERGENCY WORKERS (SCOTLAND) BILL

Policy development process

The Emergency Worker’s Bill is part of the Executive’s wider strategy for protecting public service workers and tackling anti-social behaviour. The Partnership Agreement states our commitment to “make communities safer, and people feel safer” and specifically undertakes to “protect emergency workers from assault and obstruction”. That undertaking was given in response to the increasing number of attacks on emergency workers, and reflects the heightened public and media interest in, and concern over, this issue.

Prior to the formal consultation period for this Bill, I undertook a series of consultative meetings with trades unions and professional bodies. At those meetings, we discussed the increasing problem of assaults on a variety of public sector workers, and sought views on the best way to address this problem for different categories of worker. Following those meetings, the view was reached that additional protection for emergency workers could best be provided through specific legislation, but that a broader package of non-legislative measures should be developed to discourage assaults against any worker serving the public.

Reasons for focusing on emergency workers responding to emergency circumstances

The Bill focuses on emergency workers in recognition of the invaluable service they provide society. We depend on them to save and protect our well-being, environment and possessions in difficult, and often dangerous, circumstances. The Executive believes it is absolutely unacceptable that such committed workers should face the additional threat of abuse, assault or obstruction.

The decision to confine this legislation to emergency circumstances was taken in recognition of the potentially far-reaching consequences of disruption to an emergency response. Such disruption – whether caused by assault, obstruction or hindrance – could have life-threatening implications for the individuals awaiting emergency services.

In listing emergency workers, the Bill is focusing on those who can reasonably expect to deal with emergency situations as a matter of course, and are therefore entitled to whatever additional protection we can provide them. Clearly, it is unacceptable for any one to be assaulted, no matter what their professional status, and the package of non-legislative measures we are developing seeks to address the issue of abuse of a broader range of workers. The Executive believes, however, that due to the routinely “emergency” nature of their work, emergency workers merit specific legislative attention.

Compilation of 9 groups of workers in section 1(3)

The Bill has focused primarily on the traditional 999, “blue light” services (police, firefighters, ambulance services, coastguard and RNLI members), in recognition of the fact that those workers will be responding to emergency circumstances as a matter of routine.
Prison officers have been added to the list in section 1(3)(b) of the Bill as, in the prison environment, they effectively replicate the role of police officers, and will respond to emergency circumstances accordingly.

The Bill’s protection has been extended to cover GPs, nurses (including community health visitors) and midwives, as the inherent nature of those workers’ jobs also requires them to respond to emergency situations.

Annex B sets out in some detail the difference between the Bill and existing common and statutory law protection for the identified groups of workers.

Consequences of new offences

We believe that the creation of a specific offence of assaulting, obstructing or hindering an emergency worker will act as a deterrent to those who might otherwise be tempted to stray into that type of conduct. The new legislation will send out a message that such behaviour is unacceptable and will enable us to categorise this type of unacceptable conduct more clearly than at present. Labelling this behaviour and stigmatising perpetrators accordingly should help to influence potential offenders away from such conduct.

Protection for any worker responding to emergency circumstances

Although the Executive believes that specific legislation is appropriate to mark and address the particular problems of emergency workers responding to emergencies, we will continue to rely on the common law, in conjunction with the wider package of preventative measures we are developing with the STUC and others, to protect all public service workers.

Section 1(2) of the Bill nevertheless extends protection to those outwith the categories of emergency worker listed in section 1(3), by establishing the offence of assaulting, obstructing or hindering a person who is assisting an emergency worker who is responding to an emergency situation. The professional status of those assisting makes no difference to the protection afforded to them by the Bill.

Extending the Bill to cover any “worker” in an emergency situation would give rise to problems of definition as to what groups were to be covered by the term “worker” and to issues as to those who would presumably be excluded by that approach (e.g. pensioners and the unemployed). Outwith those not generally recognised as emergency workers it would be very much more difficult to prove that an accused knew that a person was a “worker” responding to an emergency situation. It would also dilute the impact of the legislation. As indicated, we believe that it is important specifically to recognise and protect those who routinely deal with emergencies under often dangerous circumstances.

Approaches of other jurisdictions

I am not aware of whether other jurisdictions have undertaken approaches similar to this in tackling the problem of assaults and obstructions of emergency workers.
Statistics

The Bill Team has already provided the Committee with the statistics we have available on assaults and other attacks on emergency workers, including a copy of NHS Scotland Occupational Health & Safety Survey (1 June 2004 letter from Gery McLaughlin to Alison Walker)

Since that time, we have been provided with some updated information relating to attacks on fire fighters in 2003/04. That information is attached at Annex C.

We have also received some self-report data from prison staff surveys, detailing incidents of assaults:

Assaults on SPS Staff

<table>
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<th>Year</th>
<th>Number</th>
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<tbody>
<tr>
<td>1999-2000</td>
<td>13</td>
</tr>
<tr>
<td>2000-2001</td>
<td>14</td>
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<tr>
<td>2001-2002</td>
<td>12</td>
</tr>
<tr>
<td>2002-2003</td>
<td>29</td>
</tr>
</tbody>
</table>

One of the key benefits of the new legislation will be the degree to which it enables us to monitor more accurately this type of offence.

Impact on prosecution rates

Assaulting any person, regardless of their professional status, is already an offence under common law. The intention is for the new legislation to have a deterrent effect, which should decrease the number of offences and prosecutions.

Clearly, in raising awareness around this issue, and providing emergency workers with the reassurance that any incidents of assault, obstruction or hindrance will be dealt with appropriately, the new legislation might lead to a higher proportion of cases being reported. The deterrent effect of the legislation, however, is expected to reduce the total number of offences, thereby effectively negating the impact of higher incidences of reporting.

The Bill provides for more severe sentences than can currently be passed in the sheriff summary court. Its impact will be felt by those whose conduct is not sufficiently grave to result in a prosecution under solemn procedure – e.g. where assault does not result in substantial injury; where the accused does not have a record of similar, previous convictions; or where the obstruction does not result in adverse circumstances for the third party awaiting delivery of an emergency service.

The Bill makes it possible to try summarily, cases which might otherwise have been referred for trial under solemn procedure. This is likely to lead to a change in sentencing patterns in the summary courts, but the resulting reduction in cases being tried under solemn procedure means that any overall shift in sentencing patterns is unlikely.
Does the Executive anticipate any problems in proving the accused’s knowledge in relation to an offence?

The Bill Team has worked closely with Crown Office in the drafting of the Bill and the Executive is satisfied that the provisions are workable and capable of being operated by prosecutors and understood by courts.

(i) Emergency Worker – Sections 1 and 3

The Crown will be required to show that the accused knew, or ought to have known, that the victim was an emergency worker. In the majority of cases, the emergency worker will be clearly identifiable as such by virtue of his or her uniform and the matter of proving that the accused knew, or ought to have known that a person was an emergency worker will be relatively straightforward.

Even where the emergency worker is not in uniform, there are any number of ways by which it may be possible to show that the accused ought to have known the emergency worker’s status. The emergency worker might have declared himself verbally, or shown a warrant card. In the case of emergency medical workers, they might have been tending to an injured person inside an ambulance, carrying a stretcher, or have had a medical bag at their side. Such evidence would require to be considered on a case by case basis.

(ii) Persons Assisting – Section 1:

Section 1(2) of the Bill relates to a person assisting an emergency worker who is responding to emergency circumstances, rather than simply assisting in emergency circumstances. The evidence test would be that a reasonable person would have thought that the person was assisting the emergency worker.

It will therefore be dependent on the circumstances of the case whether or not someone is seen by the court as “assisting.” For example, in the case of a hospital porter cleaning up a pool of blood, it is likely to depend on how closely the porter’s actions are related to the emergency circumstances themselves. If the pool of blood was at a doctor’s feet, and there was a risk that the doctor would slip if the blood was not cleared up (thus impeding the response to the emergency situation), then it would seem likely that the porter would be recognised as assisting the emergency worker, and therefore entitled to the Bill’s protection.

If, however, the porter was cleaning up blood at a distance from where an emergency worker listed in the Bill was responding to the emergency situation, it is probably unlikely that the porter would be considered to be “assisting” that emergency worker. Should the porter be assaulted in those circumstances, the accused would be prosecuted under common law, and with reference to the Lord Advocate’s guidance to procurators fiscal, the fact that the porter was a worker serving the public would be treated as an aggravating factor.

(iii) Persons Assisting – Section 3:
“Assisting” is also relevant to section 3 of the Bill, which makes it an offence to assault, obstruct or hinder an emergency health worker, or a person assisting such a worker, in hospital accident and emergency premises. In order for an “assisting” offence under section 3 to be made out, it is not necessary to prove that the emergency worker benefiting from the assistance was responding to “emergency circumstances” since these are effectively taken to exist at all times in hospital accident and emergency premises. This is in contrast to the position of persons assisting under section 1 of the bill. The key evidential provision is contained in section 3(4), which states that a person is taken to be assisting an emergency health worker only if a reasonable person would have grounds for believing that to be so.

Again, it will depend on the circumstances as to whether or not a person will be taken as “assisting” for the purposes of section 3(4). However, it seems likely that “assisting” will require a degree of proximity between the assistance being provided and the general work which is being performed by the emergency health worker (which need not be related to a particular set of emergency circumstances) such that a reasonable person on viewing that scene would have grounds for thinking that assistance was being rendered.

Thus, in most cases where a hospital porter is mopping up blood in accident and emergency premises, it seems likely that section 3(4) could be met, since the mopping up could fairly easily be viewed as assisting the emergency workers in the general performance of their work (keeping the reception area hygienic, minimising the risk of personnel slipping, etc). In the absence of a requirement that the emergency health worker should be responding to emergency circumstances, there is no need for the porter’s actions to be so closely related to the performance of a particular task by the emergency health worker.

On the other hand, it might be more difficult to show that a reasonable person would have ground for believing that the actions of the hospital window cleaner (who passes through A&E premises once every 6 months) “assisted” the emergency health worker. The degree of proximity between the window cleaning and the work of the emergency health worker is clearly less.

(iv) Emergency Circumstances – Section 1

The existence of emergency circumstances is another aspect of the offence that requires to be proved, reflecting the policy desire to restrict the Bill to emergency circumstances. Sections 1(5) and 2(4) of the Bill clearly set out when emergency circumstances should be taken to exist.

In particular, whether the accused knew that an emergency worker was responding to emergency circumstances will be determined by reference to the evidential provision in section 2(4)(b), that a reasonable person would have had grounds for believing that the emergency worker was, or might have been, responding to emergency circumstances.
Does the Executive anticipate any particular problems in proving the accused’s knowledge in relation to offences committed against emergency workers who are not at the scene of the emergency? (for example, a person carrying a bag of blood along a corridor in a hospital to an emergency being dealt with elsewhere on the premises)

The same evidential provisions would apply as they would to alleged offences committed against emergency workers who are physically at the scene of the emergency. Thus, the prosecution would have to show (amongst other things) that the accused knew, or ought to have known, that a reasonable person would have had grounds for believing that the emergency worker was, or might have been, responding to emergency circumstances.

It is not possible to make generalisations on this point. Each case would require to be considered on its own merits. The fact that the emergency worker was wearing a nurse’s uniform is an example of a way in which the Crown might prove the state of knowledge of the accused. Further, the degree of urgency with which the emergency worker was travelling to the scene of the emergency, or a verbal declaration by the worker that he was responding to emergency circumstances would be examples of ways in which the Crown might establish that the accused knew, or ought to have known, the position.

It should be noted that where an offence is alleged to have taken place on hospital accident and emergency premises, there is no requirement on the Crown to prove the existence of emergency circumstances.

In any particular case, it will, of course, be for the Crown to decide in light of all the circumstances whether it would be in the public interest to prosecute, and if so, the charges which should be brought and the appropriate forum for prosecution.

What will the Crown be obliged to prove in relation to the knowledge of the accused in order to secure a conviction?

In the case of an emergency worker as listed in section 1(3) of the Bill, the evidence test is that the accused knew, or ought to have known, that the person was an emergency worker.

In respect of assisting persons, the evidence test is that a reasonable person would have grounds for believing that a person was assisting an emergency worker who was responding to an emergency circumstance.

As explained above, in respect of emergency circumstances, the evidence test is that a reasonable person would have grounds for believing that the emergency worker was, or might have been, responding to emergency circumstances.

What degree of obstruction or hindrance will be required to constitute an offence? Will it be necessary to show that the actions of the accused have affected the “operational capability” of the emergency worker before a conviction can be accused?

For an obstruction or hindrance to be an offence, the person obstructing or hindering must intend to obstruct/hinder the emergency worker, and must also have performed some act which constitutes an obstruction or hindrance. Action need not, however, result in damage or
injury for the obstruction/hindrance to be an offence. It must simply have obstructed or hindered the emergency worker in his or her attempts to respond to the emergency.

Section 1(3) – categories of workers

Social Workers

Social workers are not currently listed on the face of the Bill, as it was not considered that they responded, as a matter of routine, to emergency circumstances. However, it is recognised that social workers may face assaults from persons in their care who are mentally or emotionally disturbed and whom therefore they would not wish to have prosecuted. I am aware that in written evidence to the Justice 1 Committee, the British Association of Social Workers questioned whether legislation was actually the best solution for its workers, flagging instead the need for preventative action and safer working practices. I hope that the wider package of measures we are developing to discourage attacks against any worker serving the public will be particularly helpful in this regard.

As I indicated to the Committee on 9 June, in light of evidence relating to social workers’ front line response to certain emergency situations, I am happy to consider the matter of social workers’ inclusion in section 1(3) of the Bill further. If a sufficiently strong case is made, it will be possible to extend protection to this category of worker at a future date, through the Bill’s order-making power.

It is important, however, that we identify the right solution to work related violence for each different category of worker, therefore I would wish to consult further with the relevant bodies, before reaching a decision on this matter.

Fire Personnel

The provision at 1(3)(b) of the Bill catches only those who are fire fighters. It would not cover those who are employed as officers of the fire authority/joint board. Since, as we understand it, fire hydrant maintenance operators and members of the fire video unit are generally employees of the fire authority/joint board, then to that extent they would only be protected by the Bill’s provisions if they were considered to be “assisting” an emergency worker.

It is useful to note, however, that the Fire Services Act 1947 makes it a specific offence to damage a fire hydrant. The forthcoming Fire Services Bill will consider whether to increase the penalty for such an offence.

Prison staff

The provision at section 1(3)(d) of the Bill relates to prison officers in non-contracted out prisons and prisoner custody officers in contracted out prisons. It does not cover staff working in prisons who are not prison officers or prisoner custody officers. This is in line with the Bill’s policy intention to provide additional protection for those who are likely to have to deal with emergency situations as a matter of course through their employment. Teachers in educational units of prisons, therefore, would only be protected by the Bill’s provisions if they were considered to be “assisting” an emergency worker.
Sections 2(5) and 3(4) of the Bill make it clear that a person is taken to be assisting an emergency worker only if a reasonable person would have grounds for believing that to be the case. Accordingly, the protection afforded by the Bill to persons assisting emergency workers will only be triggered if this requirement is met.

**Power to modify (section 6)**

The Subordinate Legislation Committee was concerned that the power to make regulations to modify the Bill by adding or removing categories of worker covered by the Bill’s protection, and to make provision in connection with that modification, was too far reaching to be subject to annulment.

Having considered these concerns, I am content to amend the Bill to make the power to modification subject to affirmative resolution procedure.

**Andy Kerr MSP**
**Minister for Finance and Public Services**
**June 2004**
EMERGENCY WORKERS BILL: COMPARISON WITH EXISTING COMMON AND STATUTORY LAW

For most of the specified groups of emergency workers the Bill provides a clear statutory basis for protection in relation to the offence of obstructing or hindering emergency workers as compared with the common law. The Bill also provides differences in protection in comparison to the existing statutory protection for police and fire fighters.

Before setting out the detailed differences it is important to point out that it is not unusual to have overlaps between statutory offences and common law. The Executive believes that the kind of behaviour targeted by the Bill is sufficiently serious to be marked by a specific statutory offence. In doing this, the Bill sends out a message that this type of behaviour is unacceptable, and enables us to categorise this type of unacceptable conduct more clearly than at present. Ability to label this behaviour and stigmatise perpetrators accordingly will add to the armoury of the police and prosecution.

In terms of existing legal protection, it is an offence at common law for a person to assault any other person regardless of whether they are an “emergency worker” within the definition provided for by the Bill. However, there is no specific offence at common law or under statute of obstructing or hindering emergency workers as defined by the Bill (or persons assisting such workers) unless the conduct could be brought within an existing criminal offence, for example breach of the peace or malicious mischief. To the extent that any existing conduct could not be brought within for example breach of the peace, the Bill makes such acts a criminal offence, for example perhaps giving false information to an emergency worker.

The other distinction between the Bill and the common law is that the penalty under the Bill is higher than the maximum sentence which would normally be available at sheriff summary level – 9 months as compared with 3 months. More serious cases will continue to be prosecuted under solemn procedure, using the common law, where a higher penalty would be appropriate. The Bill’s impact will be felt by those whose conduct is insufficiently grave to result in a prosecution under solemn procedure – e.g. assault without substantial injury; assault without record of similar previous convictions; or obstruction without adverse consequences for 3rd party awaiting delivery of emergency services.

In addition to the common law, the police and fire fighters currently benefit from specific statutory provision and the extent to which the provisions of the Bill are additional differs to some extent.

**Police** – it is an offence under section 41(1)(a) of the Police (Scotland) Act 1967 to assault, resist, obstruct, molest or hinder a constable in the execution of his duty. The courts have interpreted an element of obstruction or hindering as requiring a physical element in order for an offence under section 41 to be made out. Section 2(1) of the Bill makes it clear that an offence of hindering or obstructing may be committed by means other than physical means. It specifically covers an example of such conduct, that of the giving of false information which would not otherwise be covered under the 1967 Act, provided of course the constable is acting in emergency circumstances.
**Fire fighters** – in terms of section 30(2) of the Fire Services Act 1947, it is an offence to obstruct or interfere with a fire fighter who is engaged in a fire fighting operation. In contrast to this, the Bill will cover fire fighters in all emergency circumstances (as defined by subsection (5)), regardless of whether they are extinguishing fires. In addition maximum penalties on conviction are higher for an offence under the Bill (under the 1947 Act, the maximum penalty is a fine not exceeding level 3 on the standard scale which is currently set at £1,000; the maximum penalty under the Bill is a fine not exceeding level 5 on the standard scale which is currently set at £5,000 and/or a period of imprisonment not exceeding 9 months.
EMERGENCY WORKERS (SCOTLAND) BILL

Her Majesty’s Fire Services Inspectorate began compiling figures for attacks on fire service personnel in 2002-03 based on returns from brigades.

As the request for brigades to record these incidents was made part way through the 2002-03 reporting year, it should be noted that the information shown represents only a partial picture of the problem of attacks on fire service personnel that year. The returns provided by brigades for 2003-04 cover the full reporting year.

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Key:

1 – Central Scotland Fire Brigade
2 – Dumfries and Galloway Fire Brigade
3 – Fife Fire and Rescue Service
4 – Grampian Fire Brigade
5 – Highland and Islands Fire Brigade
6 – Lothian and Borders Fire Brigade
7 – Strathclyde Fire Brigade
8 – Tayside Fire Brigade
9 – Scottish Total
Dear Pauline,

Emergency Workers (Scotland) Bill

Thank you for your letter of 16 June which raises a number of issues in relation to the proof of the offence provisions contained in the Emergency Workers (Scotland) Bill. The Society’s Criminal Law Committee has had the opportunity to consider the various points raised by the Justice 1 Committee and has the following comments to offer:

The accused’s knowledge as to the status of the victim

One of the essential elements in establishing an offence under sections 1(1), 1(2) or 3(1) of the bill is proof of the accused’s knowledge of the status of the victim, whether this is as an emergency worker or as a person assisting an emergency worker. In seeking to secure a conviction under these sections, the Crown will require to prove by corroborated evidence the accused’s knowledge of the victim’s capacity. The Criminal Law Committee has considered the evidential tests which may apply when it is alleged that the victim is

(a) an emergency worker; or
(b) a person assisting such a worker.

(a) The Emergency Worker

Sections 1(1) and 3(1) of the bill create offences of assaulting, obstructing or hindering an emergency worker while the worker is responding to emergency circumstances or working in the part of a hospital designated to deal with accidents and emergencies. The sections make no specific reference to the mens rea or mental element required to prove these offences.

In discussing statutory interpretation in his book, “Criminal Law”, (third edition) Sheriff Gordon states at paragraph 8.05:

“The most important factor in determining whether or not an offence requires mens rea is the wording of the relevant enactment: if Parliament enacts that mens rea is required or that its absence is irrelevant, then the courts will act accordingly, and any question of

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1 The Committee welcomes the clarification of the drafting of section 2(6) of the Bill provided by the Minister and the bill team in this regard. The Committee had interpreted this subsection as authority for the proposition that evidence from one source would be sufficient to establish that the accused had the necessary mens rea for an offence under sections 1(1) and 3(1). It is understood that the evidential concession relates to proof of the status of the emergency worker rather than to the accused’s knowledge of that status.
injustice or absurdity will be disregarded. There are, however, many statutes whose terms are not explicit, and it is in relation to them that difficulties of interpretation arise.”

He goes on to state at paragraph 8.06:

“The cases show that there are two opposing ways of approaching the interpretation of a statutory offence. The first is by way of a presumption that mens rea is always required, so that a statute will not be read as abrogating this fundamental requirement in the absence of clear words excluding mens rea: the second is by way of a literal interpretation of the statute, so that, if the statute uses what have been called “words of absolute prohibition”, it will be improper for the courts to read into it words such as “knowingly” which would imply mens rea.”

He concludes later in that paragraph:

“As a matter of theory and general principle the proper approach is by way of presumption in favour of mens rea. Such an approach is in accord both with moral requirements and with the accepted method of construing penal statutes and its correctness has been clearly affirmed in two leading Scots cases on the question2.”

The case of Annan-v-Tait 1982 SLT (Sh Ct) 108 debated which approach should be taken to statutory interpretation when considering proof of the mental element of the analogous offence of assaulting, obstructing, and hindering a police constable under the Police (Sc) Act 1967. The Crown in that case contended that it did not matter that the accused was unaware of the fact that the victim was a police officer at the time of alleged commission of the offence. The defence adopted the contrary position. In considering this issue the sheriff referred to the dictum of Lord Reid in the House of Lords case of Sweet-v-Parsley 1969 2 WLR 470:

“Our first duty is to consider the words of the Act: if they show a clear intention to create an absolute offence that is the end of the matter. But such cases are very rare. Sometimes the words of the section, which creates a particular offence make it clear that mens rea is required in one form or another. Such cases are quite frequent. But in a very large number of cases there is no clear indication either way. In such cases there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that whenever a section is silent as to mens rea there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require mens rea.”

In acquitting the accused, the sheriff held that mens rea was an essential element of proof of the offence under the Police (Sc) Act 1967.

Whilst it can be inferred therefore that there will be a presumption in favour of mens rea in relation to the offences contained in sections 1(1) and 3(1) of the bill, the Criminal Law Committee in evidence sought clarification as to the nature of the test to be applied in establishing the necessary mens rea for these offences.

In discussing the knowledge which an accused must have of the victim’s character, Sheriff Gordon states at paragraph 29.213 of his book:

“Where the Crown seek to establish an aggravation which depends on the character of the victim, it is necessary for them to show that the accused was aware of that character.

2 Mitchell-v-Morrison 1938 JC 64; Duguid-v-Fraser 1942 JC 1.
3 The Criminal Law of Scotland (3rd edition)
There is authority for this proposition so far as common law aggravations are concerned, and in practice the same rule is applied in the most common of the statutory assaults of this kind, contraventions of the Police (Sc) Act 1967. In Myles Martin and Ors\(^4\) and John Nicolson and Ors\(^5\), there were charges of assaulting persons who, it was alleged, the accused well knew or had reason to know were officers of law, which suggests that recklessness may be sufficient mens rea but that the point was not taken in these cases, and it may be that proof that the accused had “reason to know” will be relevant only as evidence of actual knowledge. On the other hand, it is still open to the courts to hold that it is sufficient that the accused knew or ought to have known of the character of the victim.”

On one view, therefore, it would be open to the courts to take a subjective approach and consider the accused’s actual knowledge of the character of the victim. Whilst, on the other, an objective approach of considering what the accused ought to have known could be used as evidence of the accused’s actual knowledge.

The Scottish Executive’s written evidence to the Justice 1 Committee has clarified the approach, which they intend to be taken to the interpretation of these sections and confirmed that the prosecution will, in their view, have to produce evidence to establish that the accused knew or ought to have known that his or her victim was an emergency worker. The written evidence from the Crown Office supports this approach.

However, the bill makes no reference to this test. Having regard to the differing approaches referred to in the passage from Sheriff Gordon’s book (above), the Criminal Law Committee would suggest that it would be helpful to state clearly on the face of the bill the nature of the mens rea which the Crown will be required to prove for an offence under sections 1(1) and 3(1).

On the basis of the test referred to by the Scottish Executive in evidence, the Criminal Law Committee has considered what the Crown would require to prove in practice in relation to the accused’s knowledge of the status of the emergency worker to secure a conviction under the bill.

If the test referred to by the Scottish Executive is adopted by the courts, then the Crown would have to establish from two sources of evidence that the accused knew or ought to have known that the victim was an emergency worker. This knowledge could be inferred from the facts and circumstances of the case. Proof of knowledge on the part of the accused person may not be problematic in cases where there is a recognisable uniform worn by the emergency worker. However, in cases where a doctor or nurse, for example, is acting in the community, this may be more problematic. Much will depend upon the inferences, which can be drawn from the evidence led in the case. Did the doctor or nurse carry any identifiable medical equipment, such as a medical bag or a stethoscope? Did any witnesses overhear the doctor or nurse identifying him- or herself to the accused? From evidence such as this, the Crown could lead prima facie evidence from which the inference of the accused’s knowledge about the status of the victim could be drawn.

However, if there was evidence to suggest that the accused was unaware that the victim was an emergency worker and if this evidence was believed, then the accused would be entitled to be acquitted. The case of Annan-v-Tait (referred to above) is authority for the concept of an honest mistake in fact in relation to the analogous offence under section 41 of the Police (Sc) Act 1967.

\(^4\) 1886 1 White 297
\(^5\) 1887 1 White 307
In that case, the accused had been charged with a contravention of section 41(2)(a) of the Police (Sc) Act 1967 (assisting the escape of a person in lawful custody). The evidence before the court disclosed that two plain clothes police officers had interrupted a street fight and taken one of the perpetrators into custody. The accused, Mr Tait, had attempted to rescue his friend. During the course of events, one of the constables had shouted that he was a police officer whilst his colleague had produced her warrant card to members of the crowd gathered there. The constable stated in evidence that the accused had not stopped struggling until eventually “it had got through to him that I was a police officer”. A defence witness had also stated that he had told Mr. Tait that the person with whom he was struggling was a police officer, at which point he had stopped struggling. In determining whether the accused had the necessary mens rea to commit the offence, the court had to consider whether Mr. Tait held an honest and reasonable belief in his ignorance of the constable’s capacity.

If this approach is adopted in construing the Emergency Workers (Sc) Bill, it can be seen that other people at the scene of the crime may believe that it is clear that the person is an emergency worker but if the evidence suggests that the accused made an honest mistake in fact as to the status of the worker, then the necessary element of mens rea will not have been proved beyond reasonable doubt by the Crown. The court will require to consider all the facts and circumstances of the case as a whole in reaching a determination as to whether the Crown has proved the accused’s knowledge of the victim’s status.

(b) Assisting an emergency worker

Sections 1(2) and 3(1) of the bill create offences of assaulting, obstructing or hindering a person assisting an emergency worker while that worker is responding to emergency circumstances or working in the part of a hospital designated to deal with accidents and emergencies. The sections make no reference to the mens rea or mental element required to prove these offences.

On the basis of the principles and case law referred to above when considering the position of emergency workers, the Criminal Law Committee would suggest that there will be a presumption in favour of mens rea in relation to these sections of the bill. However, clarification would again be welcomed as to the nature of the test to be applied in establishing the necessary mens rea.

In the Committee’s view, much will depend on the interpretation of sections 2(5) and 3(4) of the bill. These subsections state that “a person is to be taken to be assisting an emergency worker only if a reasonable person would have grounds for believing that to be so”. If these subsections are to be regarded as providing the relevant test which is to be applied in proving the mens rea element of the offences, then the Crown would require to show from evidence of two sources that a reasonable person would have grounds for believing that the victim is a person assisting an emergency worker. It would not be a defence in these circumstances for the accused to state that he or she did not know that the person was assisting the emergency worker. If evidence is led from which an inference can be drawn that a reasonable person would have grounds for believing that the person was so acting, then the mental element of the crime in regard to the victim’s status would be established.

However, if the purpose of these subsections is not related to the mens rea of the offence but rather to clarify the evidence necessary to establish the fact that a person is assisting an emergency worker, then the Crown would have to lead corroborated evidence from which that inference could be drawn and then lead evidence of the accused’s knowledge of the victim’s status.
In these circumstances, the Criminal Law Committee would again refer to the passage in Sheriff Gordon’s, “Criminal Law” at paragraph 29.21 (referred to above) concerning the accused’s knowledge of the victim’s character and the consideration thereafter as to the nature of the mens rea which requires to be proved.

If the same test, as that suggested by the Scottish Executive in relation to emergency workers, is applied, then the Crown would have to lead corroborated evidence to the effect that the accused knew or ought to have known that the victim was a person assisting an emergency worker. On this interpretation, the Committee also believes that the court would be entitled to consider evidence which suggested that the accused had made an honest error in fact as to the victim’s status and if accepted, acquit the accused on the basis of lack of mens rea.

Clarification of the position in this regard would be welcomed.

“Responding to emergency circumstances”

Having established knowledge as to the status of the victim, the Crown will require to prove in relation to offences under section 1 that the emergency worker was responding to emergency circumstances. Section 2(4) provides that circumstances will amount to emergency circumstances where inter alia “a reasonable person would have grounds for believing that the emergency worker is or might be responding to emergency circumstances”. Where there is nothing obvious to indicate that an emergency worker is responding to emergency circumstances, a person will not be guilty of an offence under section 1.

The Criminal Law Committee is concerned that as currently drafted this objective test may defeat the policy intention of the bill in certain situations, as it takes no account of the accused’s actual knowledge of the situation. An emergency worker may be responding to an emergency situation but there may be no obvious signs that this is in fact the case. The accused may, however, be aware of the circumstances and intervene in some way to obstruct the emergency worker. In this situation, an accused could avoid conviction under the bill as a reasonable person would have had no grounds for believing that the emergency worker was responding to the emergency circumstances. Section 4(2)(b) could perhaps be amended to insert reference to the accused’s actual knowledge of the situation as an alternative to the objective “reasonable person” test.

Emergency Workers not at the scene of the emergency

In considering the position of those who are not at the scene of the emergency but who are responding to emergency circumstances, it must first be established whether the person is an emergency worker or a person assisting an emergency worker.

Your letter refers to an example in which it is envisaged that a person is carrying a bag of blood along a corridor in a hospital to an emergency being dealt with elsewhere on the premises. Depending on the circumstances of the case, such a person could either be an emergency worker or a person assisting an emergency worker. The Criminal Law Committee makes this distinction because evidence from a single source shall be sufficient to establish whether a person is an emergency worker but it would appear that corroborated evidence would be required to prove that a person is assisting an emergency worker.

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Section 2(6) of the bill.
In proving the accused’s knowledge as to the victim’s status as an emergency worker who is responding to an emergency but who is not at the scene of the emergency, consideration must be given to the inferences which can be drawn from the facts and circumstances of the case. If the test referred to by the Scottish Executive is applied, then the court must consider whether the accused knew or ought to have known that the victim was an emergency worker on the basis of all the evidence.

If the victim is assisting an emergency worker but is not at the scene of the emergency, then depending on the interpretation of sections 2(5) and 3(4) consideration should be given to whether a reasonable person would have grounds for believing that the person was acting in this capacity or alternatively to whether the accused knew or ought to have known that the person was so acting.

If there are no definitive circumstances to which either inference can be attributed then there may be difficulties in establishing the necessary mens rea under the bill and it may be better to prosecute the accused at common law for an offence of aggravated assault. Proof of the aggravation would under the common law only require one source of evidence.7

To prove an offence under section 1, evidence would also require to be led to establish that the circumstances to which the emergency worker was responding were emergency circumstances. Section 2(4) of the bill would apply in this regard.

In the example given, therefore, evidence would have to be led from which an inference could be drawn that a reasonable person would have had grounds for believing that the person carrying the bag of blood along the corridor was or might have been responding to emergency circumstances. This again will depend on the facts of the case and the interpretation placed on the evidence by the court. If it is anticipated that there may be difficulties in establishing this inference, consideration could be given to proceeding under the common law.

Obstruction and hindrance.

Sections 2(1) and 3(3) provide some guidance as to what will constitute obstruction or hindrance for the purposes of the bill and make it clear that no physical element will be required in proof of these offences. Section 2(2) provides an example of non-physical conduct which will be regarded as “hindering”; the provision of false information to an emergency worker. This differs from the position in relation to section 41(1) of the Police (Sc) Act 1967 where it would appear that some physical element is required for a conviction of obstructing or hindering a police constable in the execution of his or her duty.8

As with contraventions of section 41(1) of the Police (Sc) Act 1967, however, proof of the offence of obstruction or hindering will depend on the facts and circumstances of the cases brought under the bill and the court will determine whether the conduct is sufficient to infer that there has been obstruction or hindrance. The jurisprudence in relation to section 41(1) is helpful in that it demonstrates the range of conduct covered by this offence.

In Walsh-v-McFadyen, the accused had been detained under section 14 of the Criminal Procedure (Sc) Act 1995. He was sitting on a couch at home when the police asked him to put on his shoes and go with them to the police station. He refused to do so and refused to stand up. The officers had to lift him physically from the house and he was convicted of hindering the police in the execution of their duty.

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7 Davidson 1841 2 Swin 630; Yates-v-HMA 1977 SLT (Notes) 42
8 It has, however, also been stated that the incorporation of “hinders” in the offence demonstrates that very little is required to satisfy this physical element
It was observed in that case that in certain circumstances, passivity amounted to hindrance and it might well be a matter of degree whether or not failure to co-operate with the police will amount to obstruction or hindrance. The Committee would suggest that the same will be true of such offences under the Emergency Workers (Sc) Bill.

The italicised section in the opinion of the High Court in Skeen-v-Shaw (referred to above) may also be of assistance in highlighting the essence of such an offence:

“Now we do not propose to consider…whether the word “hinders” in the context in which it appears also requires a physical aspect or requires a physical element but that word, by its very introduction, demonstrates how small a degree any physical element must be in the act of persons who place a difficulty in the way of the police in the execution of a purpose in the course of their duty.”

The court may ask, “Has the action of the accused person placed a difficulty in the way of the emergency worker responding to the emergency circumstances?” If so, then it may be held that the person has hindered or obstructed the emergency worker. As with the Police (Sc) Act 1967, the Criminal Law Committee would anticipate that a body of case law will develop to test the extent of the offence provisions under the bill.

I hope these comments are of some assistance and if I can provide any further information, please do not hesitate to contact me.

Yours sincerely,

Anne G. Keenan,
Deputy Director.
I attach the following papers:

**Agenda Item 4: Work Programme**

Note by the Clerk J1/S2/04/26/05

**Agenda Item 5: Civil Partnership Bill**

Note by the Clerk – to follow J1/S2/04/26/06
Correspondence from the Minister for Finance and Public Services J1/S2/04/26/15

**Agenda Item 6: Emergency Workers (Scotland) Bill**

Note by the Clerk - Private J1/S2/04/26/07
Submission by Scottish Partnership Forum J1/S2/04/26/13

**Papers for Information:**

Submission by the Activity Scotland Association J1/S2/04/26/14

28 June 2004 Tony Reilly
Justice 1 Committee

Work programme

Note by the clerk

Background

1. This paper sets out the forthcoming work programme of the Justice 1 Committee. The Committee is invited to consider and agree its forthcoming work programme.

Legislation

2. The Committee will finalise its stage 1 report on the Emergency Workers (Scotland) Bill by mid-September. Stage 2 is expected to take place in October 2004.

3. The Committee is also expected to be designated lead Committee on the Family Law Bill. The precise dates for the introduction of this Bill have not yet been confirmed by the Executive.

Post legislative scrutiny

4. The Committee is carrying out post-legislative scrutiny of the Protection from Abuse (Scotland) Act 2001. The Committee last considered the Act at its meeting on 31 March when it agreed to write to the Scottish Police College and the Law Society of Scotland about raising awareness of the provisions of the Act; to release a further press release about the Act, and write to the Scottish Executive to seek its views on issues noted in responses to the Committee. The Committee will consider responses from various organisations and a draft press release at a meeting in September.

Sewel motions

5. The Committee will continue to consider Sewel motions as required. In relation to some Sewel motions, the Committee may decide to invite written or oral evidence.

Subordinate legislation

6. The Committee will continue to scrutinise statutory instruments which are referred to it. In relation to more complex SSIs, the Committee may call for evidence to assist it in scrutinising the instruments.
Inquiries

Inquiry into the effectiveness of rehabilitation programmes in prisons
7. The Committee agreed its approach to its inquiry at its meeting on 25 February and subsequently at its meeting on 10 March. The agreed approach is attached at annex A.

Executive consultation
8. Members will be aware that the Executive issued a consultation on reducing reoffending in March. That consultation is now closed and it is likely that the Executive will make a policy announcement following on from that consultation at some point in the future, although the Executive is currently unable to give the Committee any dates for an announcement.

9. The Minister for Justice wrote to the Convener regarding the Executive’s consultation on 22 March and stated that whilst there is a degree of overlap in the work of the Committee and of the Executive in this area, much of the Committee’s work focuses on the design and impact of individual programmes in changing offenders’ behaviour. The Executive considers that the findings of the Committee will complement the larger strategic view that the Executive’s consultation is considering.

Written evidence
10. The Committee issued a call for evidence with a closing date of 5 May. The Committee has received 37 responses to the inquiry. These responses have been distributed to members and a summary of responses is attached at annex B.

Oral evidence
11. The Committee will start taking evidence on the inquiry on rehabilitation in prisons in September. Given time constraints and other ongoing work, it is suggested that the Committee should take evidence on its inquiry in 4 evidence sessions. This would allow oral evidence sessions to be completed by the October recess. It is suggested that North Edinburgh Drug and Advice Centre (NEDAC) should be removed from the list of witnesses for oral evidence. It is suggested that members could meet this group informally instead. Specialist staff who are employed within prisons have also been removed from the list of potential witnesses as members will have the opportunity to discuss issues with staff on prison visits. The Association of Directors of Social Work has also been removed from the list as the Committee will take evidence from social workers at its meeting in Glasgow.

12. The Committee is invited to agree the changes to the list of witnesses for oral evidence as outlined above.
13. In taking evidence from HM Inspector of Prisons in Scotland in relation to the inquiry, the Committee could also take evidence on his annual report which is due to be published in the Autumn.

14. The Committee is invited to consider whether to take evidence from HM Inspector of Prisons in Scotland on his annual report (in addition to the rehabilitation in prisons inquiry).

15. The Committee is invited to consider and agree a timetable for oral evidence in relation to its rehabilitation in prisons inquiry as outlined at annex C (members should note that this is subject to the availability of witnesses).

Regulation of the legal profession inquiry – follow up
16. The Committee has agreed to monitor progress in relation to implementing the recommendations made by the former Justice 1 Committee in its 11th Report 2002: Report on Regulation of the Legal Profession Inquiry. At a future meeting it will consider correspondence from the Scottish Executive; the Law Society of Scotland and the Faculty of Advocates, and take oral evidence from Scottish Legal Services Ombudsman.

Dangerous driving and the law
17. Further to its consideration of a number of petitions relating to dangerous driving and the law, the Committee has agreed to monitor this policy area. At a future meeting it will consider information awaited from the Crown Office, the Executive and the Department for Transport.

Transparency of legal fees
18. During the last parliamentary year, the Committee has considered correspondence relating to transparency of legal fees. At its meeting on 23 June it agreed to consider at a future meeting (a) the outcome of the Council of the Law Society of Scotland’s forthcoming consideration of the recommendation that a practice rule should be created rendering letters of engagement obligatory in respect of all forms of business and (b) whether to accept the offer of a meeting with members of the society’s Remuneration Committee to discuss transparency of legal fees. The Committee also agreed to include this matter in the evidence session with the Scottish Legal Services Ombudsman.

Security of tenure
19. Closed petition PE14 by the Carbeth Hutters’ Association asked the Scottish Parliament to bring in legislation which will ensure that people who have owned property on rented land for at least four years, where that property cannot be removed without being destroyed, have secure tenancies and access to rent control, to ensure that rents cannot be arbitrarily increased above inflation without reason, and that such owners cannot be deprived of their property without fair cause. The Justice 1 Committee has considered correspondence relating to this
matter on a number of occasions. The Committee has agreed to appoint an adviser to give advice on current legislation in respect of the length of leases, statutory provision for assured tenancies, implications under the European convention on human rights and possible remedies in law. The Committee will return to this matter again once it has considered advice from the adviser.

Petitions

20. The Committee is continuing its consideration of PE477 by Miscarriages of Justice Organisation (MOJO), calling for the Parliament to urge the Scottish Executive to provide assistance in setting up an aftercare programme in the form of a half-way home to help people who have been wrongfully incarcerated and have served long terms of imprisonment or whose conviction has been annulled at the appeal court. When it last considered the petition, the Committee noted a response from the Scottish Executive indicating that it is considering what practical steps might be taken to provide a new service, separate and distinct from that available to ordinary ex-prisoners. The Committee then agreed to forward responses from Safeguarding Communities-Reducing Offending and HOPE and the progress report on the Home Office and Citizens Advice Bureau Miscarriages of Justice Project being piloted by the Royal Courts of Justice Advice Bureau to the Executive, inviting it to take them into account in the context of considering what steps to take in relation to providing a service for victims of a miscarriage of justice and asking it to provide the Committee with a timescale for this work. The Committee will consider a response from the Executive at a future meeting.

European matters

21. The Committee is conducting ongoing scrutiny in relation to justice and home affairs in Europe. It has agreed to:

• await the publication of the EU white paper on divorce and, thereafter, consider further action regarding the proposals;
• seek an update from the Scottish Executive regarding plans for implementing the obligations under Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, including whether there are any implications for its plans for reform of family law, and
• carry out ongoing scrutiny of proposals from the European Commission relating to alternative dispute resolution.

22. The Committee will also go on a fact-finding trip to Brussels in September and hold a seminar on justice and home affairs in Europe in October.
Budget process

23. Following the results of the UK spending review, the Executive will publish its spending proposals for the next three years in September. This will be followed by the publication of the Executive’s draft budget. The Committee will scrutinise these spending plans at stage 2 of its consideration of the budget for 2005-06. This work will be undertaken jointly with the Justice 2 Committee and is likely to take place in October or November 2004.
Annex A: Inquiry into the effectiveness of rehabilitation programmes in prisons: agreed approach

Remit

1. The remit of the inquiry is organised along three central themes:

i) Policy
   penal policy as it relates to rehabilitation;

ii) Opportunity
   as it relates to how the principle of rehabilitation is acted out during and post-custody and whether opportunities “mirror” those outside;

iii) Conditions
   how the prison lifestyle (environment, culture, and surroundings) impacts the effectiveness and the effects of rehabilitation during and post-custody.

2. Key questions which the Committee seeks to explore are as follows:

i) Policy

3. The dynamic of imprisonment in Scotland, as advocated by the Scottish Prison Service (SPS), is to integrate a comprehensive value system into the day-to-day running of prisons. Rehabilitation is a key part of this dynamic. Research shows that the feasibility of achieving the goal of rehabilitation is greater where staff are able to meaningfully articulate the importance of rehabilitation.¹

   - Are the aims of rehabilitation clearly articulated to staff? Are the aims of rehabilitation clearly articulated to prisoners?
   - For the large number of prisoners facing short-term periods of custody, is rehabilitation a realistic objective?
   - Are staff able to meet qualitative assurance targets within current time-scales?
   - What are the mechanisms in the rehabilitation programmes? For example, how are prisoners referred? What is the induction process? How are prisoners assessed? How are programmes planned? What is the style of working under the remit of rehabilitation? What are the respective roles of prison officers, agency workers and volunteers? Any problems?
   - In cases of best practice, is it possible to replicate? The Committee will consider programmes, such as the STOP programme aimed at sex offenders and the Throughcare Centre at Saughton.

¹ Simon, 1999
• Possible changes to SPS structure as a single agency\(^2\) – will this impact on the allocation and administration of rehabilitation programmes?

ii) Opportunity

• What is the range of rehabilitative programmes being offered in Scotland's prisons?

• How do prison officers and inter-agency workers “act” to implement care and rehabilitation?

• Are the programmes having an effect in addressing offending during custody? If not, what should be done differently?

• Are the programmes having an effect in reducing re-offending following custody? If not, what should be done differently?

iii) Conditions

• Linked to last point, are vulnerable and difficult groups of prisoners receiving adequate rehabilitation? How are equalities issues addressed in the provision of rehabilitation services? In considering this question, the Committee will consider the following categories of prisoner: remands, short-term prisoners, young offenders, prisoners with mental health problems, women, ethnic minorities and disabled prisoners.

• Given concerns about overcrowding, are an adequate number of programmes being provided to rehabilitate prisoners?

• Do other factors related to conditions such as security measures inhibit rehabilitation?

• Is physical space an issue in provision of rehabilitation?

• Prisoners’ diet: Nutritional health and physical fitness are often cited as factors leading to improvements in physical and mental well-being (improve self-esteem and self worth). How might these factors of prison “lifestyle” play a role in rehabilitation?

\(^2\) The Executive launched a consultation entitled “Re:duce, Re:habilitate, Re:form – A consultation on Reducing Reoffending” in Scotland on 2 March 2004. Included in that consultation is the question of whether a single agency should be established to deliver custodial and non-custodial sentences.
Evidence
4. The Committee has agreed the following initial list of witnesses for oral evidence for phase one of the inquiry:

- Scottish Prison Service
- Scottish Prison Service – Trade Union Side
- Other specialist staff who are employed within prisons
- HM Chief Inspector of Prisons for Scotland
- Association of Directors of Social Work
- Local Authority Criminal Justice and Social Work Services
- SACRO (Safeguarding Communities – Reducing Offending)
- Scottish Consortium on Crime and Criminal Justice
- Scottish Executive Justice Department
- APEX Scotland
- Families Outside
- Association of Visiting Committees for Scottish Penal Establishments
- Academic interests/independent criminologists
- North Edinburgh Drug and Advice Centre (NEDAC) in Edinburgh which works with clients in and out of prison

Fact finding visits and external meetings
5. The Committee has secured funding for consultation of prisoners in a number of prisons. The Committee has also secured funding for fact finding visits to:

- Edinburgh Throughcare Centre;
- Possil Drugs Project;
- 218 The Alternative (Time Out Centre);
- HM Prison Cornton Vale;
- HM Prison Barlinnie;
- HM Prison Glenochil and,
- if time permits, HM Prison Peterhead.

6. The Parliament’s participation services unit has also identified a number of community groups which work with ex-offenders which members have agreed to meet informally.

7. The Committee has also agreed to hold a meeting in relation to the inquiry in Glasgow. This will provide the Committee with an opportunity to take evidence from local social workers who deliver rehabilitation services.
Justice 1 Committee

Inquiry into the Effectiveness of Rehabilitation Programmes in Prisons

Summary of Responses

Note by the Clerk

Introduction

1. On 11 March 2004, the Justice 1 Committee issued a call for evidence in relation to its inquiry into the effectiveness of rehabilitation programmes in prisons. The Committee requested views from a wide range of interested organisations and individuals and from the general public. The deadline for responses was 5 May 2004.

Background

2. At its meeting on 25 February 2004, the Committee agreed the remit for the inquiry and its broad themes, namely– (a) penal policy as it relates to rehabilitation; (b) opportunity as it relates to how the principle of rehabilitation is acted out during and following custody and whether opportunities “mirror” those outside, and (c) conditions, namely what impact the prison lifestyle (environment, culture and surroundings) has on the effectiveness and the effects of rehabilitation during and following custody.

Submissions received for the inquiry

3. At the time of writing, the Committee has received a total of 37 substantive responses to the call for evidence. Respondents include bodies representing police organisations, civic organisations and charities that work in the area of rehabilitation, local authorities and government agencies including the Scottish Prison Service, HM Prison Service and the Care Commission. These responses have been sent to members and are available on the Committee’s web page at the following address: http://www.scottish.parliament.uk/justice1/index.htm

4. The call for evidence requested comments in relation to aspects of the three themes of policy, opportunity and conditions. Comments received have been summarised under those three headings below.

Policy

*Communication of the aims of rehabilitation to prison staff and prisoners*

5. The Scottish Prison Service (SPS) states in its response that staff awareness sessions are an “integral and mandatory” part of programme delivery and that prisoners are made “well aware” of the range of programmes and their potential as part of SPS sentence management arrangements.

6. The response received from the Cornton Vale visiting committee considers, however, that there is not a shared understanding of the aims of rehabilitation amongst staff members and conjectures that this may be
because management’s expectations of them have changed and because new staff receive only six weeks’ training, largely on security and restraint issues. The response also states that there may be a problem in staff views on the need for good order compared with the need for positive prisoner-officer relationships necessary for rehabilitative approaches. According to the visiting committee, if aims have been clearly articulated to staff, a “significant number of staff do not agree with them or are not able to change their approach”.

7. In relation to prisoners, the visiting committee believes that many prisoners see the completion of programmes as a means to getting better parole reports and that, in relation to addressing addiction problems, other prisoners understand the aim but are not necessarily receptive to it.

8. Responses from other visiting committees expressed similar views on aims not being communicated in a manner that is formally understood.

9. The Parole Board for Scotland’s response states that—

“Most uniformed staff are acutely aware that their primary task is maintaining the safe and orderly confinement of those under their control - security, good order and discipline are always the first priority. Staff are recruited on the basis of their suitability for this role and are financially rewarded on the basis of that job. Some are then trained on programme delivery, but this is almost always a minority activity and not always protected from the dominant need for security and good order.”

10. The board’s response goes on to argue that, whilst staff may be told that rehabilitation is a key part of the dynamic, “experience might give them a different message”. Furthermore, the experience of the prisoner is primarily a punishment, to which rehabilitation is a “bolt-on”.

11. Submissions received from local authority social work departments also suggest that difficulties with communicating the aims of rehabilitation to staff and prisoners lie in the perceptions of those groups. For example, the response from Aberdeenshire Council questions whether SPS staff see their role as one of rehabilitation rather than containment and whether prisoners are motivated to seek rehabilitation within a prison setting.

12. On the other hand, the City of Edinburgh Council states in its response that all prisoners other than remand prisoners are given a social work induction session which includes a presentation on making self-referrals to the social work department and the throughcare rehabilitation process and that all prisoners subject to mandatory supervision on release are asked to provide feedback in writing about their views on how the throughcare process has been explained to them.

13. Nancy Loucks, an independent criminologist, suggests that, whilst the aims of rehabilitation may be clearly articulated to those whom the message reaches, they may not be actively communicated as “communication in
prisons can be an extremely laborious process” and “prisoners can have a very difficult time finding information, particularly if they do not know what or whom to ask”. She believes that the mechanisms of communication should be improved and cites the throughcare centre in HM Prison Edinburgh as a “positive example of how prison staff actively work to spread information to prisoners about what opportunities are available for them and how to access these opportunities”.

Rehabilitation of prisoners facing short-term periods of custody

14. Most responses expressed the view that rehabilitation of prisoners facing short-term periods of custody is not a realistic objective and many suggested that short-term sentences should be avoided altogether.

15. The SPS states that rehabilitation for short-term prisoners is not a realistic objective and explains that service sees its role in this area as more to do with assessment and support than with targeted interventions designed to rehabilitate.

16. According to Orkney Islands Council, “rather than improving rehabilitation work for short sentence prisoners in what will inevitably be a short period of time, with no opportunity to relate learning to the realities of living, the substitution of well resourced, rigorously supervised community sentences such as probation orders offers the best opportunity to improve community safety, improve social inclusion, and reduce re-offending”.

17. Other responses go on to affirm that not only is rehabilitation not realistic during a short-term sentence but that such sentences are actively detrimental to rehabilitation. For example, Angus Council states that “the damaging effects of imprisonment are known to include increased drug problems, high re-offending rates, family breakdown, loss of employment and poor employment prospects and loss of accommodation”. Arguing that there is little that can realistically be done to offset these damaging consequences, the council goes on to suggest that a custodial sentence should only be used where the offence is so serious that a non-custodial sentence cannot be justified, to protect the public from serious harm or where the offender has a demonstrable history of failing to respond to non-custodial sentences.

18. The Cornton Vale visiting committee believes that rehabilitation during a short-term sentence is “a wholly unattainable objective”, citing problems caused by short-term sentences in respect of childcare and tenancies, the administrative burdens on the prison and its health centre and social work team and the effect of poor prisoner-staff ratios on all the potentially rehabilitative aspects of prison life.

19. APEX Scotland’s response also focusses on the detrimental impact of a short-term sentence, stating that, “in these circumstances, offenders will not benefit from any programmes to address their behaviour and are likely to see out their short sentence with others who will reinforce rather than challenge anti-social attitudes and behaviour. Their social and personal circumstances are also likely to be much worse following release”.

20. The SACRO response advocates wider use of community-based disposals, “focussed on the principles of restorative justice, and incorporating reparative tasks where appropriate” but also expresses concern that the services and programmes needed for effective community-based disposals are not available throughout Scotland in an equitable manner. SACRO believes that this can result in sentencers in some courts, feeling they have no alternative to a custodial sentence and that “expansion of this provision is essential if sentencers are to be persuaded to make greater use of such alternatives to custody”.

21. **Professor Neil Hutton** questions not whether rehabilitation of short-term prisoners is a realistic objective but whether it is a desirable objective; he conjectures that, if the effective rehabilitation of short-term prisoners were achieved, the result would be that short-term sentences would be used more frequently by sheriffs as, in addition to providing punishment, they also provide access to rehabilitation. He argues that it is “widely accepted that rehabilitation programmes are much more likely to be effective when operating in the community” than when inside an institution.

22. **Nancy Loucks** offers a different view, believing that rehabilitation should be a priority for short-term as well as long-term prisoners, “especially as the literature shows that prisoners serving under a year in custody make up the largest number of receptions and have the highest risk of returning to custody”. She adds: “the literature suggests this is possible as long as prisoners have the opportunity to continue rehabilitative work after release AND are motivated to do so”.

23. **Glasgow City Council** believes that short-term sentences expose a need for collaborative working between community- and prison-based services, stating that such working is particularly valuable “for short sentence or even remand prisoners where there is insufficient time in custody to complete a full programme, but where the opportunity of imprisonment can be used to engage with the prisoner in a way which can be continued on release”. The council adds that, “if programmes interconnect well there may also be the scope for prison to pick up and continue with community programmes in the event of a person serving a sentence who had previously been worked with in the community”. Similarly, **South Lanarkshire Council** points out that short-term sentences disrupt support that a person may be getting in the community.

**Qualitative assurance targets for staff**

24. On the question of whether staff are able to meet qualitative assurance targets within current timescales, the **SPS** refers to key performance indicators that are reported to the Parliament annually and to its system of programme accreditation, “which has been emulated in other jurisdictions and by Community Justice in Scotland which subjects the raft of interventions and their delivery to external, expert scrutiny”.

25. **APEX Scotland** comments that SPS measurements of effectiveness and efficiency are in terms of inputs or outputs, i.e. the number of programmes and approved activities completed and the number of prisoner learning hours,
in relation to education but that there is “no way of knowing the outcome of these interventions, in terms of reducing re-offending, until an individual has been released from prison to the community”.

26. According to Aberdeenshire Council, the emphasis placed on responding to key performance indicators may even have a detrimental effect on achieving the qualitative targets and that “experience suggests that in some settings attendance on programmes may be based on requirements to meet KPI’s rather than assessment of need”. The council also suggests that the style of working in some of the programmes is “didactic with no time to ensure participants understand the process, or have required the skills necessary to transfer their learning from the prison programme to their community environment”.

The rehabilitation process

27. The SPS describes the rehabilitation process as follows—

Programme participation is driven by an assessment of prisoner risk and needs which, for the longer-term prisoner, is integrated into the sentence management process. Core assessments are augmented by programme-specific assessments and interim progress is monitored by on-going psychometric assessment. Some interventions require the use of specialist prison officers. Others, however, require co-facilitation involving several disciplines.

28. The SPS response also states that evidence of the efficiency of rehabilitation programmes in terms of recidivism is “scant and open to a number of interpretations” but that the issue of effectiveness is a complex one and, “while there is a weight of evidence pointing to the positive impact of interventions, other evaluations have not shown any positive outcome”.

29. The response from the Cornton Vale visiting committee comments in detail on the rehabilitation process. In particular, the response comments that many women succeed in passing smoothly through the process by keeping themselves to themselves and keeping their heads down and questions whether this is the “best preparation for eventual return to the community” or results in a “lowering of confidence and sociability which more than offsets any gains made through the formal rehabilitation process”.

30. In relation to staff involvement in the process, Cornton Vale visiting committee notes that “often the staff are as excited about the programmes as the prisoners and there is nothing more destructive for both parties than cancellation”. The response also comments, however, that some officers interpret “rehabilitation” as referring to core, SPS-produced programmes only, rather than the prison environment as a whole, and that “in general, staff who have become involved in specialist areas, closely tied in with the perceived aim of rehabilitation - and who therefore have been given extra training to allow them to fulfil their roles - show more sympathy with this holistic approach. In other words, training is crucial to success in this area”.
31. Aberdeenshire Council’s response comments that prison officers are trained to deliver programmes under the supervision of the SPS’s physiological services but that “the prison officer’s primary role remains security and containment”.

32. According to Fairbridge in Scotland, a major factor jeopardising chances of successful rehabilitation is that many prisoners face outstanding court cases on liberation, arguing that prisoners do not have a chance of a fresh start if they know that it is likely that they will be returning to prison after release. The charity argues for a more joined-up approach, proposing that there should be a “national crime strategy that begins the process of rehabilitation from the point of arrest to an assessed point well beyond liberation”.

33. The submission by East Renfrewshire, Inverclyde and Renfrewshire Criminal Justice Grouping draws attention to information management in respect of rehabilitation, stating that the SPS does not take account of work undertaken previously with prisoners in the community, that “no attempt is made to summarise the work undertaken within the prison to enable a meaningful exchange of information in preparation for community agencies re-engaging with offenders on return to the community” and that existing sentence management systems created to address this are “rarely adhered to”. The submission goes on to state that frequent movement of prisoners within SPS estates “currently mitigates against sequencing interventions based on client need and there are instances where clients have moved prisons midway through programmes”.

34. In its response, Families Outside argues that the rehabilitation process “should incorporate the maintenance of family relationships as a core element of activity monitored through contract performance monitoring” and that the implication of this would be to “locate the activities of rehabilitation in the context of individual and family circumstances”. In order to achieve this, the organisation advocates a person-centred approach to planning and delivering rehabilitation, rather than a focus on programmes.

Best practice
35. In relation to whether it is possible to replicate cases of best practice, the SPS states that a primary aim of creating its accreditation process is to facilitate this.

36. Aberdeenshire Council’s response, however, comments that it is “not always possible to replicate effective or accredited programmes in a ‘mechanistic’ way with the view that the approach will always work in every case over time and that recent analysis on effective methods points towards “a set of common principles and practices in offender interventions, as well as some precautionary principles regarding what does not work”.

37. The submission by South Lanarkshire Council highlights the value of best practice programmes in the community, stating that “programmes in the community are more demanding – because the person is living in the community it is possible to determine how effectively the individual puts the lessons of the programme into practice”.
Impact of creating a single agency

38. Most of the comments received on the question of whether creating a single agency for the delivery of custodial and non-custodial sentences would have an impact on the allocation and administration of rehabilitation programmes expressed views against creating such an agency.

39. According to the response from Angus Council, a single agency would be less effective at providing community-based services since local partnerships with key local authority services, children’s and child protection services and services to people with mental health, alcohol, drugs, learning disabilities and accommodation problems would be weakened by the removal of criminal justice social work from local authority control. The response also argues that establishing such an agency would be expensive, likely to “result in the loss of many experienced and highly skilled staff to retirement, severance or other branches of social work” and “less able to produce local solutions to local problems with a centralised management structure”. The response goes on to state that, with respect to the allocation and administration of programmes, “the establishment of a single agency would have no positive effect”.

40. The Parole Board for Scotland expresses the view that “it is difficult to see how a single agency could not be divided in its approach to its tasks”, given that the major part of the prisons budget is expended on items other than rehabilitation, and that security and good order are the major objectives of the prison. The board goes on to suggest that throughcare is an identifiable enterprise in itself, which could perhaps be brought under a single agency, leaving the security and order aspects of the prisons to the Scottish Prison Service.

41. SACRO states that it is important to ensure that resources are not diverted away from community-based initiatives to setting up and running a single agency “which will not have any effect on many of the issues in the Reducing Re-offending consultation”. SACRO favours increased multi-agency working in order to ensure that good local links essential to service delivery are facilitated, arguing that “merely merging prisons and local authority social work will do nothing to involve the very wide range of agencies that need to take responsibility for reducing re-offending and may lead to a breakdown in the essential local links between agencies”.

42. UNISON Scotland’s response expresses strong opposition to the creation of a single agency, believing that such an agency’s “dominant mode of delivery will be based on ‘correctional’ and ‘punative’ measures”. The union advocates community-based disposals and gives a detailed explanation of its opposition to the proposed agency.

43. Glasgow City Council’s response points out that, whilst the proposal to establish a single agency appears to offer the advantage of joining together prison- and community-based interventions, many community services that an offender may require – in respect of housing, addiction, employment and so on – are provided by “agencies other than those which may be drawn into a single agency” and, therefore, interfaces between a network of service providers would nonetheless be necessary in order to ensure a
comprehensive service. A similar view is expressed in the submission by South Lanarkshire Council, which recognises, however, that there could be “better joint planning and implementation of services as is already beginning to be evidenced in other areas of public service such as community care, integrated children’s services and community planning”.

44. On the other hand, the SPS comments that it is “too early to say” whether a single agency would have an impact on rehabilitation programmes and Fairbridge in Scotland is supportive of establishing a “national structure” designed to provide a “cohesive framework of rehabilitation from the point of arrest to an assessed point after liberation”.

Opportunity

Range of rehabilitative programmes

45. In response to this point, many responses simply described programmes that are available to prisoners.

46. The Parole Board for Scotland commented that the range of programmes offered “varies over time and place and often, it seems, at short notice”, making it difficult to maintain an accurate profile of what is happening.

Relationship between inter-agency workers and prisoner officers

47. The SPS comments states that “various professionals deliver or assist in delivering the SPS’s correctional agenda”, operating either separately or in teams “as appropriate to the particular activity and circumstances concerned”.

48. The Cornton Vale visiting committee’s response draws attention to practical difficulties that have hindered collaborative working, particularly the logistics of getting a high-security prisoner to the link centre to meet agency workers. The response also draws attention to problems with discretion on the part of prisoner officers in relation to prisoners’ interaction with agency workers.

49. According to the Parole Board for Scotland, it sometimes appears that the main role of non-officers in the process is secondary to officers, who can only do what they have been trained to do and, therefore, “if the one size does not fit you, it is possible that you will be left out”.

50. The East Renfrewshire, Inverclyde and Renfrewshire Criminal Justice Grouping’s response expresses the following view—

Prison social work involvement in the preparation and delivery of prisoner programmes is minimal and the trend in recent years has been to phase out social work involvement in this area. This undoubtedly results in programmes being delivered within a context devoid of community based criminal justice influence and knowledge.

51. The grouping also states that programmes are devised by the psychology department, which has no statutory responsibility for the welfare or
supervision of offenders in the community, and delivered by staff based exclusively within the prison who have “little to no experience of the practical and criminogenic issues experienced by offenders in the community”.

52. According to UNISON Scotland, the current system can see a prisoner assessed several times by different agencies and subject to “different interventions which are delivered by different agencies that have no shared objectives”. The union goes on to state that this is “wasteful of resources and inefficient”.

Effectiveness in addressing offending during custody and reducing offending following custody
53. The SPS reiterates that evidence of the efficiency of rehabilitation programmes is often difficult to interpret but also discloses that its initial assessment of interim effectiveness points to some improvements while the individual is in prison.

54. Cornton Vale visiting committee states that it is “impossible to say with any certainty” whether programmes are effective and suggests that the question itself “demonstrates the thinking that programmes to rehabilitate exist in a vacuum”. In relation to reducing offending following custody, the committee view is that, as “the majority of crimes are as a result of drug addiction or poverty” and “most women are being released into the same communities and with the same money problems”, it is “difficult to argue that programmes are going to have any effect post custody”.

55. The Parole Board for Scotland sees undertaking rehabilitative courses as a good sign in itself as it shows that the prisoner is aware that he/she has to impress others. However, the board argues that it is difficult to test the efficacy of, for example, alcohol-related courses when there is no alcohol available. The response states that there is therefore a need for a much greater degree of "normalisation" in prisons and suggests that this can best be achieved through use of semi-open and open establishments and regular, unsupervised, access to the community.

56. The Association of Directors of Social Work quotes from a research report commissioned by COSLA from the International Centre for Prison Studies, stating that “such evidence as is available indicates that the possibility of re-offending is more likely to be reduced by a series of factors outside the prison” and, therefore, “prison services should concentrate their efforts on ensuring that during the time in prison offenders are encouraged to develop life and work skills and are put in touch with the statutory and voluntary community agencies which can provide accommodation, employment and support after release”.

Conditions

Vulnerable groups and equalities issues
57. The SPS states that programmes are scrutinised with regard to equalities issues as part of the accreditation process “to ensure gender sensitivity and
the appropriateness of interventions to the level of intellectual functioning of programme participants”.

58. The submission from Cornton Vale visiting committee, however, states that vulnerable and difficult groups are not receiving adequate rehabilitation and cites budgetary constraints as a major factor—

There is an overall budget, which is inadequate at present and which is about to be reduced by 5%. This means that resources of all sorts are being stretched to the limit. Every category mentioned is suffering and will suffer in future as a result.

Many specific examples could be given of women with mental health problems, women from ethnic minorities, and women with disabilities suffering insensitive and even harsh treatment because of the pressure on resources. This can only hinder the rehabilitation prospects of such women.

59. The response from Fife Council highlighted concerns about use of custody for those with a mental disorder, suggesting that “the prison environment may not be conducive to the welfare of individuals with identifiable mental disorders and staff may not be trained to assess, or provide treatment”. The response also singles out the halfway house currently being piloted in Glasgow as being “an imaginative development for certain women offenders who would otherwise have been dealt with by custody” and suggests that a similar approach might be considered for other groups of vulnerable offenders.

60. In relation to young offenders, the Youthlink Scotland response highlights the often complex problems faced by this group in respect of offending and reoffending and argues that rehabilitation is “hampered by the lack of support which young people receive upon release”. The organisation believes that the Scottish Executive’s enhanced throughcare strategy should promote a holistic approach to supporting young offenders back into the community upon completion of their sentences in order to break the cycle of reoffending and make an effective contribution to the rehabilitation of young people leaving custody.

61. The ACPOS response suggests that the list of vulnerable and difficult groups of inmates may be worthy of expansion as “it makes no reference to members of the LGBT community or those with alcohol/drug dependency issues”.

Overcrowding

62. The SPS states that, notwithstanding concerns about overcrowding, an adequate number of programmes are being provided to rehabilitate prisoners—

Since the available international evidence on the positive effects is scant and there is strong evidence that similar programmes delivered in the community are significantly more effective than
the same ones delivered during incarceration, the quantum of rehabilitative effort is determined more by the available resources. It is in any case impossible to calculate demand accurately.

63. Cornton Vale visiting committee, however, reiterates that rehabilitation is not just about programmes but the entire prison environment and affirms that "when prisoners feel humiliated and degraded by their treatment in prison – often as a result of budgetary constraints on staffing levels and training – they will not respond well to "Rehabilitative Programmes", no matter how many or how few".

64. A similar view is expressed by the Parole Board for Scotland, stating that sharing cells eliminates privacy and makes a prisoner vulnerable at all times and adding that, in an environment where “survival requires almost all one's energy”, there is little energy left for addressing offending behaviour.

65. The response from the Scottish Human Rights Centre expresses a similar view about the “dehumanising” effect of the lack of personal space and adds that the resulting lack of space available for study, reading and writing can also impact on the success of rehabilitation.

66. A number of the responses from local authority social work departments expressed the view that overcrowding adversely affects the ability of prisons to deliver effective programmes.

67. Nancy Loucks points out that a common side effect of overcrowding is the transfer of prisoners between institutions at short notice and that “prisoners who start a programme but do not complete it tend to perform worse afterwards even compared to those who never participated in a programme”.

Other factors inhibiting rehabilitation
68. A number of submissions stated that other factors, such as security measures, a lack of “pro-social modelling” by staff, style of programme delivery and prisoners’ conflicting work commitments inhibit rehabilitation.

69. The SPS recognises this but states that the most problematic factor is the “artificiality of life” in prisons.

70. The response from Cornton Vale visiting committee states that there have been many situations where recreation, education, visits and contact with voluntary organisations have not gone ahead because of lack of sufficient staff to provide security. The response goes on to state that the “lack of an open prison for women in Scotland adds to this problem, with many non violent women being subjected to unnecessarily repressive of security”.

Physical space
71. The SPS recognises that physical space is an issue in relation to rehabilitation and explains that the issue is being addressed in the context of creating a prison estate for the 21st century. The response also explains that
the availability of space for rehabilitation itself is less of an issue than the relative “lack and poor quality of some of the living accommodation”.

72. Cornton Vale visiting committee reiterates the point that the entire prison environment is an important part of rehabilitation and therefore space problems such as there being no central dining area, a “very inadequate visits area” and classes constantly changing venue occur.

73. Nancy Loucks argues that physical space and facilities should be conducive to learning if they are to have an impact and that “prisoners and staff will both feel frustrated and unmotivated in prisons that appear to hold programmes in low esteem by virtue of placing them in poor accommodation with few resources”.

Prisoners’ diet and physical fitness
74. The SPS acknowledges that these factors are relevant and reiterates the service’s commitment to “improving well being, physical fitness and a suitable diet”.

75. Cornton Vale visiting committee finds that “it would be very difficult to provide a healthy diet on a per capita budget of £1.57 per day (soon to be reduced as part of the 5% savings required)” and that the diet on offer is “repetitive, high in fat content and unappealing”.

76. Nancy Loucks believes that physical health is an important and often neglected area of prisoner rehabilitation—

Educational programmes in some parts of North America include physical and sexual health as one if its core elements, including nutrition, hygiene, family planning, and sexually transmitted diseases. Anecdotal evidence from my own work continually shows a startling lack of awareness amongst many prisoners in basic issues of physical and sexual health.

77. The Prison Phoenix Trust advocates yoga and meditation for prisoners, pointing out that classes are inexpensive for prisons to incorporate into their regimes and that prisoners’ motivation and self-images are enhanced. The trust encloses with its submission further information about the benefits of yoga and meditation in respect of rehabilitating prisoners.
Annex C: Inquiry into the effectiveness of rehabilitation programmes in prisons timetable

Wednesday 15 September
Prisons inquiry: evidence session 1:
- Scottish Prison Service and Scottish Executive Justice Department (as a panel)
*Emergency Workers (Scotland) Bill: second consideration of Stage 1 report*

Brussels visit: 20 & 21 September 2004

Wednesday 22 September
Prisons inquiry: evidence session 2:
- Scottish Prison Service – Trade Union Side
- Association of Visiting Committees for Scottish Penal Establishments
- Families Outside

Wednesday 29 September
Prisons inquiry: evidence session 3:
- HM Chief Inspector of Prisons for Scotland (also evidence on HMCIP’s annual report)
- SACRO (Safeguarding Communities – Reducing Offending); Scottish Consortium on Crime and Criminal Justice; APEX Scotland (as a panel)

Wednesday 6 October
Prisons inquiry: evidence session 4 (in Glasgow):
- Local Authority Criminal Justice and Social Work Services
- Panel of academic interests/independent criminologists
- Minister for Justice

October recess: 11 – 22 October
Justice 1 Committee

Civil Partnership Bill

Note by the Clerk

Background

1. The Committee recently considered and reported on a Sewel motion in relation to the Civil Partnership Bill which is currently going through the House of Lords.

2. At its meeting on 3 June, the Parliament agreed to the following motion:

“That the Parliament endorses the principle of giving same sex couples in Scotland the opportunity to form a civil partnership and agrees that the provisions in the Civil Partnership Bill that relate to devolved matters should be based on Scots law and considered by the UK Parliament”.

Recent developments

3. In its report the Committee welcomed the Deputy Minister’s commitment to return to it with any significant amendments to the Scottish sections of the Bill and, should there be such changes to those sections, to seek the Parliament’s approval by means of a further Sewel motion.¹

4. In the House of Lords last week, an amendment in the name of Baroness O’Cathain was agreed to. This amendment was a paving amendment for a group of amendments. Baroness O’Cathain stated that:

“This group of amendments would extend the benefits of the Bill to family members who have lived together on a long-term basis. Under my amendments, two sisters or any two close relations who have lived together for 12 years would be able to register a partnership and take advantage of the provisions of the Bill”.²

5. The Deputy Minister for Justice has written to the Committee in relation to this amendment. The letter is attached at annex A. It states that the amendment “fundamentally changes the Bill” and gives the Committee an assurance that if the amendment is not overturned in the House of Commons, the Executive will return the matter to the Scottish Parliament.

¹ Justice 1 Committee, 7th Report (Session 2), para 65
² Lords Hansard, 24 June 2004, column 1362
6. The Committee is invited to consider recent developments in relation to the Bill and whether any further action is required at this stage.
Annex A: letter from the Deputy Minister for Justice

CIVIL PARTNERSHIP BILL

I am writing to advise you that a significant amendment was made to the Civil Partnership Bill at Report Stage in the House of Lords.

The Baroness O’Cathain laid an amendment to widen the scope of the Bill to include people over the age of 30, who are within the prohibited degrees and have been living together for a continuous period of 12 years. The amendment appears to centre on addressing issues that can arise for carers and wider family members upon the death of an individual, particularly around inheritance tax and property succession. The debate on the amendment lasted some two hours and then proceeded to a division at which the amendment was carried by 148 votes to 130.

The amendment fundamentally changes the Bill and when proceedings reconvened in the afternoon, the Government benches opted not to engage any further with Report Stage on the Civil Partnership Bill. The Opposition moved some amendments but not others.

It is expected that the UK Government will seek to overturn the amendment and will use the Commons stages to achieve this. The Scottish Executive will work closely with the UK Government over the summer recess on the way forward.

I have assured the Committee and the Scottish Parliament that the Executive would bring back the Sewel motion agreed on 3rd June if the Civil Partnership Bill was materially amended at Westminster. If there is any prospect of the Baroness O’Caithan amendment persisting in the Bill, then I will return the matter to the Scottish Parliament. I will write further in due course on this point.

I appreciate this is a complex situation and I, or my officials, would be happy to discuss further.

HUGH HENRY
The Activity Scotland Association congratulates the Scottish Parliament on establishing access to Scottish land and inland water through the Land Reform (Scotland) Act 2003. This is enlightened legislation for the 21st century.

The Scottish Outdoor Access Code which forms an integral part of the legislation awaits final ratification from the Parliament in the near future. Whilst acknowledging the current Code provides a more balanced expression of the spirit of the legislation and is a practicable document for users, land managers and local authorities, their remain a few areas which would benefit from clarification by the Scottish Executive. The Justice 1 Committee has an opportunity to seek the views and intentions of the Executive on these points of remaining concern.

**Guidance for crossing railways**

Whilst acknowledging the existence of the hazard of a pedestrian crossing a railway line, this has taken place by tradition ever since railways came into being. By common practise, this occurs on pedestrian / level crossings and places a vital role in ensuring continued access to vast areas of the Scottish countryside especially in the Highland areas served by the railways to Inverness/Kyle of Loch Alsh/Wick, Fort William/Mallaig, Oban etc. The current high handed and intransigent approach of Network Rail has to be resolved if the ethos and spirit of this new legislation is to see the light of day. These lines in particular are in the main, single track with a small number of daily trains. Whilst there is a hazard for the pedestrian crossing the line, the actual risk of this happening is far, far less than say crossing the road or driving a car to the start of the walk. If an individual is given the personal responsibility to drive a car or cross a road, to climb a mountain or canoe a river, then why should one not have the personal responsibility to cross a railway line next year when one could do so last year? The hazard and risk has not changed from year to year. It would be hoped that the Committee could seek clarification from the Scottish Executive of a means for a practicable outcome from the current impasse with Network Rail. The Code should include guidance for how to cross such rail lines, the responsibilities of the access taker in such situations and on the responsibility of the managers of railways to take account of the land reform legislation.

The integration of the Land Reform (Scotland) 2003 Act in relation to Nature Conservation legislation should also be clarified so as to offer the best guidance for access takers and to clarify the position for land managers. There is a need for clarification as to how the Nature Conservation Act relates to the Code. In particular there is a need to clearly set out that the implementation of new provisions within that legislation must not undermine the intent of the Land Reform (Scotland) Act.

Dorothy Breckenridge
Committee Member
Activity Scotland Association
24 June 2004
Thank you for your letter of 24 June about the Emergency Workers (Scotland) Bill, asking about the provisions made by the Bill for the various categories of workers it specifies.

The rebirth of the Scottish Parliament after an absence of over 200 years has given Scotland the legislature it lacked over the past centuries, during which time comparable countries have increasingly enshrined their criminal laws in statute. It is only right that the new Scottish legislature should use its democratic powers to set out clearly in statute specific crimes and appropriate penalties which reflect the values of our modern society. I firmly believe that it is right that the Parliament should take this opportunity to spell out the values we believe in by supporting the Bill’s provisions and provide statutory penalties for the assault, obstruction and hindrance of emergency workers responding to emergencies.

While the common law applies to all the emergency services listed in the Bill, only the Police and the Fire Services at present enjoy the benefit of specific statutory protection from assault or obstruction. The Executive believes that is not sufficient and that all emergency workers should have similar statutory protection when responding to emergencies. The Bill therefore extends statutory protection for the first time to other emergency workers responding to an emergency – including nurses, doctors, the ambulance service, coastguards and others. This will give these emergency workers, and those assisting them in responding to emergencies, similar statutory protection to the police. The Bill will also increase the statutory protection of firefighters and make marginal improvements to the statutory protection of the police when responding to emergencies, as described in Annex B of my letter of 22 June.

I cannot wholeheartedly agree with the Law Society’s view on the applicability of ‘culpable and reckless behaviour’ as it is not clear that, in the absence of any duty to provide information to an emergency worker, there would be criminal liability for failing to provide such information. More generally, obstruction or hindrance of an emergency worker might be chargeable as ‘culpable or
reckless behaviour’ or perhaps ‘breach of the peace’. However, in both cases the operative word is ‘might’ as there is no certainty. In contrast, the Bill makes it clear that obstruction or hindrance is an offence and section 2(2) explicitly states that a person who gives false information with the intention that the emergency worker acts upon that information is to be regarded as hindering that emergency worker.

You also ask about the case law on section 41 of the Police (Scotland) Act 1967. In the case of Curlett v McKechnie\(^1\) the giving of false information to police officers was considered insufficient for conviction under section 12 of the Prevention of Crimes Act 1871. Section 12 was a predecessor to the offence under section 41 of the Police (Scotland) Act and applied to “assaulting, resisting or wilfully obstructing a constable in the execution of his duty”. The court held that in the context of that provision “obstruction” involved an element of physical obstruction since the juxtaposition of “obstruction” and “assault” required such an interpretation. In MacNeil v Thomson\(^2\) it was held that repeated actions by the accused did not amount to “hindering” under the Police (Scotland) Act since there was no physical element.

Other cases such as Skeen v Shaw and Anr\(^3\) and Walsh v McFadyen\(^4\) (decided under the Police (Scotland) Act) suggest that while the requirement of some physical action might easily be satisfied, a physical element, however small, would still be required before the offence of obstructing or hindering could be made out. Sections 2(1)(a) and 3(3)(a) of the Bill expressly provide that the offence of obstruction or hindering can be made out even where there is no physical element to that conduct.

I hope that this is helpful to the Committee in considering further its Stage 1 report.

All the Best

Andy

ANDY KERR

\(^1\) 1938 J.C. 176
\(^2\) (Sh. Ct.) (1979) SCCR p.235
\(^3\) 1979 S.C.C.R. Supp. 235
\(^4\) 2002 J.C. 93