The Committee will meet at 10.15 am in Committee Room 4.

1. **Criminal Proceedings etc. (Reform) (Scotland) Bill**: The Committee will take evidence at Stage 1 of the Bill from—

   Wilma Dickson, Head of Criminal Procedure Division, Scottish Executive;
   
   Paul Johnston, Senior Principal Legal Officer, Office of the Solicitor to the Scottish Executive;
   
   Cliff Binning, Head of Operations and Policy Unit, Scottish Court Service;
   
   Scott Pattison, Head of Policy Group, Crown Office and Procurator Fiscal Service;
   
   Noel Rehfisch, Bill Team Leader; and
   
   Richard Wilkins, Bill Team Member.

2. **Subordinate Legislation**: The Committee will consider the following negative instruments—

   the Police Act 1997 (Criminal Records) (Scotland) Regulations 2006, (SSI 2006/96); and
   
   the Police Act 1997 (Criminal Records) (Registration) (Scotland) Regulations 2006, (SSI 2006/97).

Callum Thomson
Clerk to the Committee
Papers for the meeting—

**Agenda item 1**

SPICe briefing on Criminal Proceedings etc. (Reform) (Scotland) Bill: Bail

SPICe briefing on Criminal Proceedings etc. (Reform) (Scotland) Bill: Penalties

SPICe briefing on Criminal Proceedings etc. (Reform) (Scotland) Bill: Proceedings

SPICe briefing on Criminal Proceedings etc. (Reform) (Scotland) Bill: JP Courts and JPs

SPICe briefings are available on the Parliament’s website at:
http://www.scottish.parliament.uk/business/research/index.htm

Note by Committee Adviser (PRIVATE PAPER) *(to follow)*

Note by the Clerk and SPICe (PRIVATE PAPER) *(to follow)*

**Agenda item 2**

Note by the Clerk on SSI 2006/96 and SSI 2006/97

**Documents not circulated—**

Copies of the following documents have been supplied to the clerk:

- Scottish Executive Social Research, *The Operation and Effectiveness of the Scottish Drug Court Pilots*; and


These documents are available for consultation in Room T3.60. Additional copies may also be obtainable on request from the Parliament’s Document Supply Centre.

**Forthcoming meetings—**

Wednesday 26 April, Committee Room 1;
Wednesday 3 May, Committee Room 2;
Wednesday 10 May, Committee Room 6;
Wednesday 17 May, Committee Room 6;
Wednesday 24 May, Committee Room 4.
The Scottish Executive’s Minister for Justice introduced the Criminal Proceedings etc (Reform) (Scotland) Bill in the Parliament on 27 February 2006. The Parliament’s Justice 1 Committee has been designated as lead committee in relation to the Bill.

The Bill includes provisions:

- changing the system of bail and remand
- changing the law on criminal proceedings (mainly in relation to summary court procedure)
- increasing the sentencing powers of summary courts
- expanding the range of alternatives to prosecution
- changing the way in which fines can be collected and enforced
- establishing justice of the peace courts in place of district courts
- changing the way in which justices of the peace are appointed and trained
- placing the Inspectorate of Prosecution in Scotland on a statutory footing

This briefing considers the provisions on bail set out in Part 1 of the Bill. It also sets out background information on bail and remand. Separate SPICe briefings consider other aspects of the Bill.
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### CURRENT LAW AND PRACTICE IN RELATION TO BAIL

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- providing research and information services to the Scottish Parliament

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KEY POINTS OF THIS BRIEFING

The current law on bail includes the following:

- a court may grant bail in relation to a person who has been: (a) accused of an offence and is awaiting trial; (b) convicted of an offence and is awaiting sentencing (e.g., where sentence is deferred for the preparation of a social enquiry report); or (c) given a custodial sentence and is appealing against the conviction and/or sentence

- where a person is granted bail, his/her release is subject to conditions imposed by the court

- the principal reasons for refusing a person bail are concerned with the likelihood of: (a) interference with witnesses or evidence; (b) further offending; and (c) failing to appear in court, as well as: (d) the danger the person poses to the public

- a breach of bail involving the commission of a further offence is treated as an aggravation of the new offence, whilst any other breach of bail (e.g., where an accused fails to appear for trial) is treated as a separate offence

Part 1 of the Bill will:

- set out in statute the factors, currently established in case law, which courts must have regard to when considering whether or not to grant bail

- provide that anyone who is prosecuted under solemn procedure for a violent, sexual or drug trafficking offence, and who already has a solemn conviction for such an offence, should only be granted bail in exceptional circumstances

- require the courts, when granting or refusing bail, to state the reasons for their decisions

- add a further standard condition of bail, namely that the accused “does not behave in a manner which causes, or is likely to cause, alarm or distress to witnesses”

- provide for certain increases to the maximum sentences which courts may impose for a breach of bail

- where there is a bail appeal, require the original court to provide written reasons for its decision on bail

- extend the period during which an accused may be held in custody pending a decision by a court on bail
INTRODUCTION

The Criminal Proceedings etc (Reform) (Scotland) Bill [as introduced] Session 2 (2006) (‘the Bill’), together with Explanatory Notes (and other accompanying documents) (all references in the briefing are to the ‘Explanatory Notes’), Policy Memorandum and Delegated Powers Memorandum, was introduced in the Parliament on 27 February 2006.

This briefing considers the provisions on bail set out in Part 1 (sections 1-5) of the Bill. However, the main focus of the briefing is on providing background information on bail and remand. Separate SPICe briefings consider other aspects of the Bill.

BACKGROUND

The Scottish Executive established the independent Sentencing Commission for Scotland (‘the Sentencing Commission’) in 2003. It was asked to consider and make recommendations to the Executive on a number of matters, including the use of bail and remand. Further information about the Sentencing Commission, including its membership and the various topics which it is looking at, is available on its website.


The Sentencing Commission’s report (2005) states that:

“Our review has convinced us that there is a serious problem in this area of the criminal justice system and that the law, procedures and practices in relation to bail and remand have resulted in a loss of public confidence. (...) We found that in some instances the law itself was unclear; that reasons for bail decisions were not always apparent; and that sanctions for breach of bail were not always applied, or were applied inconsistently. Breaches of bail in its many forms, such as non-appearance, the commission of further offences and other failures to observe bail conditions all figured highly in our analysis, as did the procedures and practices used by courts and other bodies.” (para 2.1)

The report also states that the problem of those released on bail failing to appear in court was assessed as being endemic, and notes that its recommendations on bail and remand are aimed at achieving:

- a reduction in offending by those on bail
- a reduction in the number of people who fail to appear in court after being granted bail, or otherwise breach conditions of bail
- a reduction in the number of people who are remanded in custody (without compromising the safety of the public)
- a general improvement in the consistency and effectiveness of decision making in relation to bail and remand
The Sentencing Commission’s recommendations (38 in total) are summarised at pages 37-40 of its report. Various recommendations are addressed to the Scottish Executive, the Lord Advocate (as head of the Crown Office and Procurator Fiscal Service) and the judiciary. Not all of the recommendations require legislation for their implementation. Some of the recommendations are considered below in relation to provisions of the Bill.

In September 2005, the Scottish Executive published ‘Bail and Remand: The Scottish Executive Action Plan’ (2005a) (‘the Action Plan’). The Ministerial Foreword states that:

“We asked the Sentencing Commission to report on the use of bail and remand, because we shared public concern that this part of the system should be tougher and more transparent. The action on bail and remand that we will take has been informed by their work.

Scottish Ministers are determined to:
- Tighten the process of granting bail;
- Ensure that the court gives reasons for all bail decisions;
- Make new provision for drug testing and treatment as a condition of bail; and
- Ensure that breach of bail is dealt with robustly.” (p i)

It goes on to state that:

“Scottish Ministers will also make additional changes which go beyond the Sentencing Commission recommendations to address issues of particular public concern. So we will include in legislation sets of circumstances which will count against the grant of bail for serious repeat offenders. And to help break the cycle of drug related reoffending we will introduce the option of drug testing and treatment as a condition of bail.” (para 7)

The Scottish Executive’s proposals for reform (both legislative and non-legislative) are outlined at pages 6-8 of the Action Plan. It notes that the potential impact of the Executive’s plans in this particular area is linked to wider reforms aimed at improving the effectiveness and efficiency of the justice system.

The provisions contained in Part 1 of the Bill are intended to take forward commitments in the Action Plan to reform the law on bail.

CURRENT LAW AND PRACTICE IN RELATION TO BAIL

A number of methods may be used to secure the attendance of an accused at the first court hearing relating to a criminal case. The method used may impact on the likelihood of a court releasing the accused on bail pending further court hearings. An accused:

- may be arrested by the police and brought to court in custody
- may be arrested but then released by the police on an undertaking that he/she will appear in court on a date shortly thereafter
- may appear in court on a date agreed by the authorities and the accused’s lawyer
- may appear in court in response to a written instruction (citation) to appear on a certain date

The Lord Advocate has issued ‘Guidelines to Chief Constables’ (1998) on when a person who has been arrested and charged with an offence should or should not be liberated by the police
pending court proceedings.¹ In relation to the subsequent approach of the courts, the Sentencing Commission’s consultation paper (2004, para 3.2)) notes that:

“In irrespective of the method by which the accused is brought to court, once he has appeared in relation to a complaint or petition, the Court will have to decide whether to grant bail or remand the accused in custody pending further proceedings. It would be unusual, however, for the issue of bail to arise in the case of someone who appears in answer to a citation. It would be even more unusual for such a person to be remanded in custody. In summary proceedings, in addition to the options of bail or remand, the Court may simply order an accused to appear at a subsequent calling of the case. In solemn proceedings, where the accused appears on petition, a bail order will always be made unless the accused is remanded in custody.”

Release on bail

Much of the law on bail is still contained within the common law (eg the reasons for refusing bail). However, other aspects of the law are set out in statute (eg when bail may be applied for and the standard conditions on which it may be granted). Statutory provisions on bail are set out in Part III (sections 22A to 33) of the Criminal Procedure (Scotland) Act 1995 (‘the 1995 Act’). A court may grant bail in relation to a person who has been:

- accused of an offence and is awaiting trial²
- convicted of an offence and is awaiting sentencing (eg where sentence is deferred for the preparation of a social enquiry report)
- given a custodial sentence and is appealing against the conviction and/or sentence³

Where a person is granted bail, his/her release will be subject to conditions imposed by the court. The standard bail conditions are that the accused:

- attends court hearings for the case (eg any intermediate diet or trial diet)
- does not commit any offence while on bail
- does not interfere with any witnesses or in any other way obstruct the course of justice
- makes him/herself available in relation to the preparation of any report, etc (eg a social enquiry report) aimed at assisting the court in deciding how to deal with the accused

In cases involving sexual offences, it is also a standard condition of bail that the accused does not seek personally to take a precognition (statement) from the complainer.

In addition to these standard conditions, a court may decide to impose additional special conditions aimed at ensuring that the standard conditions are complied with. There is no statutory list of special conditions, but the more common ones include requirements that the accused resides at a particular address, observes a curfew and/or reports to the police at regular intervals.

¹ The matter is considered in the consultation paper issued by the Sentencing Commission (2004, paras 3.8-3.11).
² Bail may also be continued/granted during the course of a trial which takes place over more than one day.
³ Bail pending an appeal is also referred to as ‘interim liberation’.
In addition to the power of the courts to grant a person bail, the Crown has the power to liberate an accused who has been remanded in custody by a court (without bringing the accused back to court). The Crown uses this power:

- where it decides to abandon proceedings against an accused (e.g. where it becomes clear that there is insufficient evidence to continue with the prosecution)
- where proceedings cannot be progressed within statutory time limits (e.g. in relation to cases dealt with under summary procedure, the trial must start within 40 days of the accused being remanded in custody)

Recent changes to the law on bail include those made by the Bail, Judicial Appointments etc (Scotland) Act 2000. The Act contains provisions (amending the 1995 Act) aimed at ensuring that the law on bail is compatible with article 5 of the European Convention on Human Rights. Changes made to the 1995 Act included the removal of statutory restrictions which prevented a sheriff from considering bail for certain serious offences. The High Court or the Lord Advocate already had (and still have) the power to grant bail for any crime. However, a sheriff had no power to grant bail to any person charged with murder or treason, or to any person charged with attempted murder, culpable homicide, rape or attempted rape who had a previous conviction for any of those offences. These restrictions on the powers of sheriffs were removed.

**Reasons for refusal of bail**

The Sentencing Commission’s consultation paper (2004, para 2.3) notes that the case law relating to the European Convention on Human Rights:

> “indicates some broad categories of what are considered to be ‘relevant and sufficient’ reasons for the refusal of bail, but these are neither exhaustive nor prescriptive. States are accorded a ‘margin of appreciation’ (in other words, a certain amount of discretion) in formulating their domestic law where this involves balancing individual rights and community interests.”

The Sentencing Commission’s report (2005) outlines four principal reasons why the Crown may oppose bail, relating to: (a) the dangerousness of the accused; (b) interference with witnesses or evidence; (c) further offending; and (d) the likelihood of the accused failing to appear in court. It states (para 4.4) that there may be opposition to bail:

> “Where the circumstances or nature of the offence are such that there is reason to believe that the accused is a danger to the public or himself/herself;

Where there are reasonable grounds to suspect that the accused may intimidate or threaten witnesses, or interfere with or dispose of evidence or whether there is any other risk of prejudice to enquiries still to be made if he/she is released;

Where from the criminal record of the accused and/or the number of current charges it is obvious that he/she is carrying on a career of crime;

Where there are reasonable grounds to suspect that the accused intends to abscond or where he/she has a history of failing to appear at court.”

It should be noted, in relation to the first of the above reasons, that all crimes are bailable and thus the gravity of an alleged offence is not in itself a sufficient reason for refusing bail. It should

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4 See, in particular, article 5(3) of the European Convention on Human Rights.
also be noted that, as the law currently stands, a court will generally grant bail to an accused awaiting trial if this is not opposed by the Crown (irrespective of any factors which might otherwise have led the court to remand the accused).

The considerations relating to the grant or refusal of bail are somewhat different where the court is considering the matter post conviction. The Sentencing Commission’s consultation paper (2004, para 7.2) notes that:

“Unlike the pre-trial situation, once the accused has been found (or pleaded) guilty, the presumption of innocence no longer applies and the protections of Article 5 of the Convention no longer apply. Furthermore, the Crown has no locus on the matter of bail.”

The consultation paper goes on to discuss the considerations which courts have regard to when making decisions on bail at this stage of a case.

**Review and appeal of bail decisions**

In relation to an accused awaiting trial, both the accused and the Crown may seek to have a court’s decision on bail reconsidered. This may be done by:

- review – where the court which made the original decision is asked to review that decision in the light of changed circumstances
- appeal – where the decision is appealed to the High Court (normally dealt with by a single judge)

Where the issue of bail arises between conviction and sentencing, both the accused and the Crown can seek review of a decision but it is only the accused that has a right of appeal.

**Breach of bail**

Where a person breaches bail by committing a further offence, the breach is treated as an aggravation of the new offence. Other breaches of bail (e.g. where an accused fails to appear for trial) are regarded as separate offences. Thus, a breach resulting from the commission of a further offence may result in any sentence for the new offence being increased to reflect the aggravation, whilst other types of breach may be prosecuted and sentenced in the normal way.

The Sentencing Commission’s consultation paper (2004) notes that in some instances the court may specify what proportion of a sentence is due to it being committed whilst on bail (especially where imposing a fine or custodial sentence). In other cases the court may impose a global sentence without stating what part reflects the aggravation. It goes on to state that there is no consistent approach on this point, it being a matter for the discretion of the individual sentencer.

The section of this briefing dealing with statistics and research (see below) includes information relating to the breach of bail – mainly taken from research commissioned by the Scottish Executive and carried out by researchers in Aberdeen University Law School – ‘Offending on

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5 The European Convention on Human Rights.
6 Prior to 1 April 1996 all bail breaches were treated as separate offences.

*providing research and information services to the Scottish Parliament*
Bail: An Analysis of the Use and the Impact of Aggravated Sentences for Bail Offenders’ (Brown et al 2004).

In addition to the information presented below, the research found that courts are not always aware that an accused was on bail when an offence was committed (eg because the fact that an accused was on bail had yet to be added to the relevant Scottish Criminal Record Office database when checked by the police). In addition, it found evidence that bail aggravations are sometimes dropped by procurators fiscal in return for a guilty plea to the substantive charge.

PROVISIONS OF THE BILL

Unlike much of the Bill (which seeks to reform the summary justice system only), the provisions in Part 1 of the Bill dealing with bail generally apply to both solemn and summary criminal cases (with the exception of certain restrictions on bail which only apply to solemn cases). The provisions amend or add to existing statutory provisions on bail set out in the Criminal Procedure (Scotland) Act 1995 (‘the 1995 Act’).

Factors relevant to the grant and refusal of bail

Section 1 of the Bill inserts three new sections into the 1995 Act – sections 23B, 23C and 23D.

For the most part, the proposed new sections 23B and 23C of the 1995 Act aim to set out in legislation the factors currently set out in case law which courts must have regard to when considering whether or not to grant bail, including grounds for refusal of bail. The report of the Sentencing Commission (2005, para 3.17) recommends such a step. It notes that, although there was a strong dissenting minority within the Commission, the majority felt that potential benefits in relation to transparency and consistency of decision-making outweighed any potential disadvantages (eg relating to loss of flexibility).

One of the planned changes to existing law is set out in the proposed new section 23B(3) of the 1995 Act, which provides that the attitude of the Crown in relation to bail will not restrict the discretion of the court on whether or not to grant bail. As noted earlier in this briefing, as the law stands a court will generally grant bail to an accused awaiting trial if this is not opposed by the Crown. The report of the Sentencing Commission (2005, para 5.11) recommends that this practice should continue and that statute should make it clear that a court is obliged to grant bail to an accused awaiting trial where this is not opposed by the Crown. However, the Scottish Executive has rejected this recommendation, preferring instead to emphasise the discretion of the court.

The proposed new section 23D of the 1995 Act sets out restrictions on bail applying to certain solemn cases. It provides that an accused who is charged under solemn procedure with: (a) a violent or sexual offence and has a previous solemn conviction for such an offence; or (b) a drug trafficking offence and has a previous solemn conviction for such an offence, should only be granted bail where the court finds that there are “exceptional circumstances justifying bail”. This proposal is not connected to any of the recommendations made by the Sentencing Commission but is intended by the Executive to address an issue of particular public concern – the granting of bail for serious repeat offenders. The Executive argues that the presumption against bail, in such cases, is justified on the basis that there would generally be a significant risk of further serious offending whilst on bail.
It should be noted that section 23D of the 1995 Act would not rule out the possibility of bail in such cases. The courts would have to decide what amounts to “exceptional circumstances justifying bail”. The approach of the courts to any such provision would impact on the significance of any actual change in the law. In this respect it may be noted that the **Policy Memorandum** published along with the Bail, Judicial Appointments etc (Scotland) Bill⁷ suggested that, under existing common law rules, accused in such cases would only be granted bail in exceptional circumstances:

“There is well established case law which sets out the principles to be applied in determining whether it is appropriate for bail to be granted. These include considerations of public safety and securing justice. In addressing this, the court would consider previous convictions (including convictions for similar offences). In practice, the common law would therefore constrain a sheriff from exercising his discretion to grant bail to persons accused of serious sexual or violent offences who had previous convictions for similar offences in the absence of genuinely exceptional circumstances where the accused could show that he would not present a risk to public safety if released.” (para 14)

**Bail conditions and reasons for bail decisions**


In terms of an amended section 24 of the 1995 Act, courts would, when granting or refusing bail, be required to state the reasons for their decisions. The report of the Sentencing Commission (2005, para 3.15) recommends such a requirement.

Section 24 of the 1995 Act is also amended by the addition of a further standard condition of bail, namely that the accused “does not behave in a manner which causes, or is likely to cause, alarm or distress to witnesses”. One of the existing standard conditions prohibits an accused from interfering with witnesses. However, the Explanatory Notes published along with the Bill state that the current standard condition:

“will not always deal adequately with the sort of behaviour that can be of concern as it may require the accused to threaten or intimidate the witness in some way specifically intended to deter them from giving evidence rather than general abuse per se.” (para 24)

Section 25 of the 1995 Act is amended in a number of ways, including the addition of a requirement that the court explain to an accused, when granting bail, the effect of bail conditions and the consequences of any breach of those conditions.

**Breach of bail**

Section 3 of the Bill amends sections 27 and 28 of the 1995 Act.

Changes to section 27 of the 1995 Act include increases in the maximum custodial sentences which a court may impose for a breach of bail (other than a breach of bail involving the

⁷ Now enacted as the Bail, Judicial Appointments etc (Scotland) Act 2000.
commission of a further offence whilst on bail). For example, the maximum period of custody for a failure to appear at a court hearing whilst on bail is increased: (a) in summary cases from three to 12 months; and (b) in solemn cases from two to five years. In addition, a court sentencing an offender in such circumstances would have to impose a sentence which is additional to any sentence imposed in relation to the offence for which the offender was on bail. In relation to custodial sentences, this means that the periods of imprisonment should be served consecutively (rather than being allowed to run in tandem).

As noted earlier in this briefing, the fact that an accused was on bail when he/she committed a further offence is treated as an aggravation of that new offence, rather than as a separate offence (see section 27(3) of the 1995 Act). Thus, the accused may receive a greater sentence for the new offence than would otherwise have been the case. Section 27(5) of the 1995 Act already provides for increases to maximum available sentences where an offence is committed whilst on bail (eg by an additional six months imprisonment in relation to a sheriff court conviction). It may be noted that Part 3 of the Bill generally seeks to increase the sentencing powers of sheriffs dealing with summary cases to 12 months imprisonment.\footnote{Part 3 of the Bill is considered in a separate SPICe briefing.} Thus, a sheriff dealing with a summary case would (including the changes proposed in the Bill) be able to sentence an offender to a maximum custodial sentence of 18 months in relation to an offence which is aggravated by being committed whilst on bail.

As the law currently stands, a court which imposes an aggravated sentence, on the basis that an offence was committed whilst on bail, must state the extent of and reasons for the additional element in the sentence. In addition, the Bill will require the court to explain any reasons for not imposing a higher sentence where the fact that an offence was committed whilst on bail does not lead to a different sentence.

In relation to the above, it may be noted that the recommendations of the Sentencing Commission (2005, paras 7.9-7.10) include: (a) that those who abuse bail through further offending or otherwise should always be the subject of a court disposal; and (b) that the court should always state explicitly what has been done in respect of a bail aggravation.

**Bail review and appeal**

Section 4 of the Bill amends sections 30 (bail review) and 32 (bail appeal) of the 1995 Act. The difference between the review and appeal of bail decisions is outlined earlier in this briefing (in relation to current law and practice).

In relation to bail review, the Bill aims to clarify the basis upon which an accused/offender may seek a review. In relation to bail appeals, the Bill includes a requirement that the original court provides written reasons for its decision on bail.

**Time for dealing with bail applications**

Section 5 of the Bill (amending sections 22A, 23 and 177 of the 1995 Act) extends the period during which an accused may be held in custody pending a decision by the court on bail. Currently, a decision must be made within 24 hours. The Bill provides that the decisions must be made by the end of the court day after the accused’s first appearance or application for bail.
In relation to any application for bail which is made on a Friday, it is the intention of the Scottish Executive that changes set out in the Bill should allow a continuation of the application, with the accused being held in custody, until the following Monday. This would not be possible under the existing provisions.

STATISTICS AND RESEARCH

**Prisoners held in custody on remand**

The Sentencing Commission’s consultation paper (2004, para 1.23) notes that the average daily remand population in prisons increased by around one third during the 30 year period from 1973 to 2002. There has not, however, been a consistent rise during this period. In relation to the number of prison receptions,\(^9\) the consultation paper states that during the same 30 year period the number of remand receptions remained relatively static (para 1.24). However, the Scottish Executive has indicated that, prior to April 1996, data on prison receptions may have been affected by significant variations in counting methods – making accurate comparisons difficult. The Sentencing Commission’s consultation paper goes on to note that the most recent figures available at the time (up to 2002) do show a marked increase in the number of remand receptions (this is reflected in figures reproduced below).

The Scottish Executive’s statistical bulletin *Prison Statistics Scotland, 2004/05* (2005b) includes figures for the number of prisoners held on remand during the last nine financial years. Chart 1 presents figures for the average daily prison population – both the total population (including those held on remand) and the remand population alone.\(^10\)

![Chart 1: Average Daily Prison Population - total & remand](chart1.png)

Chart 2 below presents figures for the number of prison receptions – both the total number and those remanded in custody alone.\(^11\)

\(^9\) Prison ‘receptions’ are similar to but not the same as ‘persons received’ into prison. Further information is provided in *Prison Statistics Scotland, 2004/05* (Scottish Executive 2005b, p 48, paras 6-7).

\(^10\) The figures are taken from Table 1 (p 14) of the statistical bulletin. The precise figures are reproduced in the appendix to this briefing (Table 1).

\(^11\) The figures are taken from Table 10 (p 20) of the statistical bulletin. The precise figures are reproduced in the appendix to this briefing (Table 3).
Comparing the two charts, it can be seen that remand forms a higher proportion of total prison receptions than it does of the average daily prison population. During the period covered by the charts, remand formed between 15% and 19% of the total average daily prison population (18% in 2004/05), and between 40% and 50% of the total number of prison receptions (50% in 2004/05). This difference is due to the fact that, on average, prisoners spend less time in custody when on remand than they do when serving sentences. The Sentencing Commission’s consultation paper (2004, para 1.35) states that:

“The average period spent on remand is around 23-24 days, resulting in a high throughput of remand receptions into prisons. This places a considerable strain on prisons because of the comprehensive nature and complexity of the initial reception and processing procedures.”

The Scottish Executive’s statistical bulletin (2005b, Table 1, p 14) also provides, in relation to the average daily prison population, separate figures for: (a) untried prisoners held on remand; and (b) convicted prisoners held on remand whilst awaiting sentence. Untried prisoners form by far the largest part of the average daily remand population. For example, in 2004/05 the total average daily prison population (including remand) was 6,779, with:

- untried remand prisoners forming 15% of the total
- convicted remand prisoners awaiting sentence forming 3% of the total

The Sentencing Commission’s consultation paper (2004, para 1.34) states that it has been estimated that around half of untried prisoners held on remand go on to be convicted and receive a custodial sentence.

Although forming a smaller part of the whole, convicted prisoners held on remand whilst awaiting sentence have experienced a very high level of growth during the period covered by the statistical bulletin – from an average daily figure of 83 prisoner places in 1996/97 to 185 prisoner places in 2004/05 (a 123% increase). In relation to prison receptions, the Sentencing Commission’s consultation paper (2004, para 1.27) notes that the number of prisoners who were remanded whilst awaiting sentence increased from 1,459 during calendar year 1993 to 3,953 during 2002.

Additional statistics are reproduced in the appendix to this briefing (Table 4).
The use of bail

The Sentencing Commission’s consultation paper (2004, para 1.8) notes that:

“Available statistics on bail are not currently considered by the Scottish Executive to be entirely reliable and those published in an annex to the research report on ‘Offending on Bail: An Analysis of the Use and the Impact of Aggravated Sentences for Bail Offenders’ were, therefore, described as ‘experimental’. Given this level of qualification, the statistics which follow should be seen as giving only a general impression of the volume of bail cases and their nature.”

The consultation paper ( paras 1.9-1.11) goes on to report that:

“For the years 1995 to 1999, the available figures suggest a steady state, with the number of bail orders averaging around 34,000 and the number of individuals bailed averaging 24,000. 

Thereafter, the figures increased each year to reach 51,000 bail orders for 32,000 individuals in 2002. The fact that these figures have shown increases since the year 2000 may reflect actual increases but it is also known that recording practices have improved with the advent of electronic recording.

If approximately 32,000 individuals were given a bail order in 2002, this represents something like 22% of persons proceeded against in the courts.”

More up-to-date information on bail orders has been provided by the Scottish Executive’s Justice Department, and is reproduced in Tables 1 and 2 below. It may be noted that some of the figures provided differ from those presented by the Sentencing Commission (particularly in relation to the number of bail orders made). The figures produced below exclude modifications to existing bail orders. This may not have been the case in relation to figures produced in the past.

Table 1: Number of Bail Orders made – by type of court (1995-2004)

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<tbody>
<tr>
<td>District Court</td>
<td>5,653</td>
<td>5,596</td>
<td>5,138</td>
<td>5,239</td>
<td>4,449</td>
<td>3,959</td>
<td>3,968</td>
<td>4,743</td>
<td>6,294</td>
<td>6,187</td>
</tr>
<tr>
<td>Sheriff Court</td>
<td>26,169</td>
<td>25,980</td>
<td>26,268</td>
<td>28,116</td>
<td>27,297</td>
<td>29,695</td>
<td>34,557</td>
<td>40,986</td>
<td>42,532</td>
<td>47,191</td>
</tr>
<tr>
<td>High Court</td>
<td>10</td>
<td>18</td>
<td>20</td>
<td>38</td>
<td>32</td>
<td>130</td>
<td>189</td>
<td>239</td>
<td>457</td>
<td>408</td>
</tr>
<tr>
<td>Total</td>
<td>31,832</td>
<td>31,594</td>
<td>31,497</td>
<td>33,393</td>
<td>31,779</td>
<td>33,784</td>
<td>38,715</td>
<td>45,968</td>
<td>49,283</td>
<td>53,794</td>
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Source: Scottish Executive Justice Department

Table 2: Number of Individuals given Bail Orders (1995-2004)

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<tbody>
<tr>
<td>Individuals</td>
<td>24,639</td>
<td>24,508</td>
<td>24,357</td>
<td>24,959</td>
<td>24,039</td>
<td>25,098</td>
<td>27,792</td>
<td>31,893</td>
<td>34,427</td>
<td>37,316</td>
</tr>
</tbody>
</table>

Source: Scottish Executive Justice Department

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13 The research report ‘Offending on Bail: An Analysis of the Use and the Impact of Aggravated Sentences for Bail Offenders’ (Brown et al 2004) is considered below in relation to breach of bail.

14 A single individual may be given more than one bail order during the course of a year.

15 It should be noted that some of the information provided is based on provisional data. In addition, although increases in figures since 2000 may reflect actual increases, it is also known that recording practices have improved since then. Finally, in relation to Table 1, it should be noted that the total figures include a small number of cases where the court type is not known.
Some statistical information on the numbers of people granted bail when charged with various serious offences (e.g., murder and rape) is provided in relation to parliamentary questions answered by the Minister for Justice in 2005 – see S2W-15293 and S2W-18830.

**Breach of bail**

The Sentencing Commission’s consultation paper (2004, para 6.1) states that:

“Breach of bail is a serious problem. A significant number of offences are committed by persons already on bail; there are many instances in which accused persons fail to appear in court on the due date, whether for trial or sentence, and there are repeated cases in which a person on bail breaches other conditions of his bail order, such as a curfew condition, or one which requires him to stay away from particular locations.”

As noted in relation to the use of bail, available statistics on bail are not currently considered by the Scottish Executive to be entirely reliable. This concern also applies to statistics relating to breach of bail. Additional information about offending whilst on bail is provided by research commissioned by the Executive and carried out by researchers in Aberdeen University Law School – ‘Offending on Bail: An Analysis of the Use and the Impact of Aggravated Sentences for Bail Offenders’ (Brown et al 2004). Findings of this research include (pp i-ii):

“The overall rate of offending on bail in 2001 across the seven courts examined was 29%. The rate of offending on bail in 1995 across five of these courts (no data being available for two of them) was also 29%. The rate of offending across the same five courts in 2001 was 28%.”

“Younger accused are more likely to offend on bail than older accused. The rate of offending for accused aged 16-20 was 35% while it was only 6% for those aged between 41-60.”

“The longer an accused is on bail the more likely he/she is to offend on bail, except for cases where an accused is on bail for a year or longer.”

“The different courts examined showed wide variation in their rates of use of aggravated sentences for proven offending on bail, with results ranging from 22% (in Hamilton and Edinburgh Sheriff Court) to 89% (in Aberdeen District Court).”

“The sentencing practice of individual judges in relation to aggravated sentences showed considerable variation even within specific courts.”

“Factors mentioned by sentencers that would make it more likely that an aggravated sentence would be passed included the fact that the subsequent offence was analogous in nature to the main offence for which bail was originally granted and the fact that the offender had a long history of breaches of bail.”

“Factors mentioned by sentencers that would make it less likely that an aggravated sentence would be passed included the fact that the offender had pleaded guilty at an early stage and the fact that the subsequent offence took place a considerable time after bail was granted for the original offence.”

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16 The seven courts were Aberdeen, Edinburgh, Hamilton and Stonehaven sheriff courts, plus Aberdeen, Edinburgh and Glasgow (both lay and stipendiary) district courts. The Sentencing Commission’s consultation paper (2004, para 1.16) notes that the figure for offending on bail ranged from 19% in one sheriff court to 36% in another and that the overall results cannot necessarily be presumed to be representative of the Scottish picture as a whole.
The above research was concerned with offending whilst on bail. A bail order may also be breached by, for example, the failure of an accused to attend a trial. The Sentencing Commission’s consultation paper (2004, para 1.20) states that:

“There are no readily available figures on the number of outstanding warrants held by the police for the apprehension of accused persons who have failed to appear in court after being granted bail but it is believed that the number may run into thousands.”

Some statistical information on failure to appear for trial whilst on bail is provided in relation to a parliamentary question answered by the Minister for Justice in 2005 – see S2W-17430. It sets out figures for proven charges of failing to appear for trial having been granted bail, during the period 1999-2003. The figures ranged between 3,193 (estimated data for 2003) and 4,182 (data for 2001).

APPENDIX: ADDITIONAL REMAND STATISTICS

Table 3: Average Daily Prison Population and Prison Receptions

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<tbody>
<tr>
<td>Total</td>
<td>5,993</td>
<td>6,059</td>
<td>6,029</td>
<td>5,975</td>
<td>5,883</td>
<td>6,186</td>
<td>6,475</td>
<td>6,621</td>
<td>6,779</td>
</tr>
<tr>
<td>Remand</td>
<td>1,021</td>
<td>927</td>
<td>971</td>
<td>976</td>
<td>881</td>
<td>1,019</td>
<td>1,247</td>
<td>1,246</td>
<td>1,216</td>
</tr>
<tr>
<td>% Remand</td>
<td>17%</td>
<td>15%</td>
<td>16%</td>
<td>16%</td>
<td>15%</td>
<td>16%</td>
<td>19%</td>
<td>19%</td>
<td>18%</td>
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</table>

Source: Scottish Executive 2005b (Tables 1 and 10)

Table 4: Average Daily Prison Population – by form of remand

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<tbody>
<tr>
<td>Remand: total number</td>
<td>1,021</td>
<td>927</td>
<td>971</td>
<td>976</td>
<td>881</td>
<td>1,019</td>
<td>1,247</td>
<td>1,246</td>
<td>1,216</td>
</tr>
<tr>
<td>% of total</td>
<td>40%</td>
<td>40%</td>
<td>41%</td>
<td>42%</td>
<td>42%</td>
<td>45%</td>
<td>49%</td>
<td>49%</td>
<td>50%</td>
</tr>
</tbody>
</table>

Source: Scottish Executive 2005b (Table 1)

SOURCES


The Scottish Executive’s Minister for Justice introduced the Criminal Proceedings etc (Reform) (Scotland) Bill in the Parliament on 27 February 2006. The Parliament’s Justice 1 Committee has been designated as lead committee in relation to the Bill.

The Bill includes provisions for:

- changing the system of bail and remand
- changing the law on criminal proceedings (mainly in relation to summary court procedure)
- increasing the sentencing powers of summary courts
- expanding the range of alternatives to prosecution
- changing the way in which fines can be collected and enforced
- establishing justice of the peace courts in place of district courts
- changing the way in which justices of the peace are appointed and trained
- placing the Inspectorate of Prosecution in Scotland on a statutory footing

This briefing considers the provisions set out in Part 3 of the Bill to increase the sentencing power of the summary courts, extend the scope of monetary penalties and introduce new alternatives to prosecution. Separate SPICe briefings consider other aspects of the Bill.
KEY POINTS OF THIS BRIEFING

Part 3 of the Bill will:

- increase the sentencing powers of sheriffs in summary cases to a maximum of 12 months’ imprisonment and a £10,000 fine

- introduce an order-making power to enable the Scottish Ministers to amend the penalties available to the proposed JP court

- extend the range of situations in which the courts can impose compensation orders

- increase the maximum level of ‘fiscal fine’ from £100 to £500

- introduce new alternatives to prosecution – the “compensation offer” and the “work order”

- enable disclosure to a court of accepted fiscal fines, compensation offers or work orders on subsequent conviction for another offence within two years (although these will not be recorded as convictions)

- bring in new arrangements for fine enforcement including the appointment of “fines enforcement officers” to manage the collection of fines imposed by the courts and prosecutors. These officers will have a range of powers to encourage payment and to enforce payment if it is not forthcoming e.g. the power to arrest the earnings of offenders who fail to pay
INTRODUCTION
The Criminal Proceedings etc (Reform) (Scotland) Bill [as introduced] Session 2 (2006) (‘the Bill’), together with Explanatory Notes (and other accompanying documents), Policy Memorandum and Delegated Powers Memorandum, was introduced in the Parliament on 27 February 2006.

This briefing considers the provisions in the Bill on the sentencing powers of the summary criminal courts and on alternatives to prosecution, set out in Part 3 (sections 33 to 45) of the Bill. Separate SPICe briefings consider other aspects of the Bill.

BACKGROUND
The Scottish Executive established the independent Summary Justice Review Committee, under the chairmanship of Sheriff Principal John MclInnes, in November 2001 (hereafter referred to as ‘the MclInnes Committee’). The Committee was asked to review the provision of summary justice in Scotland and to make recommendations for the more efficient and effective delivery of summary justice. In carrying out its work, the McInnes Committee conducted a number of consultation exercises and commissioned both a survey of public opinion and several pieces of research on particular topics. Further information about the McInnes Committee, including its membership and the work it commissioned, is available on the Executive’s Summary Justice Reform website.

In March 2004, the McInnes Committee published its report ‘The Summary Justice Review Committee: Report to Ministers’ (hereafter referred to as ‘the McInnes Report’). The Scottish Executive consulted on the report between March and July 2004, with a total of 240 written responses being received from a range of organisations and individuals. A ‘Summary of Responses to the Written Consultation’ (MRUK Ltd) was published in February 2005.

In March 2005, the Scottish Executive (2005a) published its plans for summary justice reform in ‘Smarter Justice, Safer Communities: Summary Justice Reform – Next Steps’. The Bill is intended to take forward those plans which require legislation.

PENALTIES

Introduction
Part 3 of the Bill increases the penal and monetary penalties available to the sheriff summary court, extends the use of compensation orders, introduces new alternatives to prosecution and makes changes to the system of fines enforcement.

SHERIFF SUMMARY COURT - INCREASE IN PENALTIES

Sheriff summary court – current sentencing powers
Currently the sheriff court, sitting as a court of summary jurisdiction (i.e. without a jury) has a maximum sentencing power for common law offences of 3 months imprisonment and/or a fine
of £5,000 (the current “prescribed sum”)

Second or subsequent convictions for offences involving violence or dishonesty and offences under certain statutes (listed in section 34 of the Bill) can attract higher levels of imprisonment (but less than 12 months), as can some offences which are triable under either summary or solemn procedure (i.e. with a jury) (section 35).

**Sheriff summary court – McInnes Committee**

The McInnes Committee made a number of recommendations relating to the summary justice system, including changes to the sentencing powers of the summary courts. In this regard, the Committee proposed an increase in the maximum term of imprisonment to 12 months for the sheriff summary court together with an increase in the maximum monetary penalty to £20,000 (McInnes Report, Recommendation 9).

The Committee reasoned that an increase in sentencing powers was necessary in order to expand the range of cases which could be handled by the lower courts.

**Sheriff summary court - provisions in the Bill**

Most of the recommendations made by McInnes on the sentencing powers of the summary criminal courts will be given legislative effect by the Bill.

The effect of this part of the Bill (sections 33 to 35 and 37) is to increase the maximum term of imprisonment available in the summary sheriff court to 12 months and the maximum fine to £10,000 (rather than the £20,000 recommended by McInnes). The maximum fine available on conviction for common law offences tried summarily is increased by virtue of section 37 of the Bill which doubles the “prescribed sum” from £5,000 to £10,000. For offences under the Antisocial Behaviour etc (Scotland) Act 2004, the maximum fine increases from £2,500 (Level 4 on the standard scale) to the new prescribed sum. For offences under the Emergency Workers (Scotland) Act 2005 the maximum fine is increased from £5,000 (Level 5 on the standard scale) to the prescribed sum.

**JP court: power to increase penalties**

**Current Penalties**

Together with the sheriff summary court, the district court is a court of summary jurisdiction, though with lesser sentencing powers. The district court is administered by local authorities and presided over by lay or stipendiary magistrates. It deals with a range of minor offences including breach of the peace, assault, vandalism, speeding and other minor road traffic offences. The maximum sentence available to the Court is 60 days imprisonment and a fine of up to Level 4 on the standard scale (currently £2,500).

Section 36 of the Bill provides the Scottish Ministers with an order-making power, under affirmative procedure, to amend the penalties available to the proposed JP courts which will gradually replace the existing district courts under the court unification scheme proposed under Part 4 of the Bill (details of the new JP court are given in another briefing in this series of

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1 The prescribed sum is the maximum monetary penalty available to the sheriff summary court for common law and certain statutory offences (See section 225(8) of the 1995 Act).

2 The standard scale is available for offences triable only summarily (section 225(1) of the Criminal Procedure (Scotland) Act 1995. The 5 levels are: £200, £500, £1,000, £2,500 and £5,000.
briefings on the Bill). That power is subject to a maximum limit of a period of 6 months imprisonment or a fine not exceeding level 5 of the standard scale.

**Compensation orders – current provisions**

Compensation orders were introduced by Sections 58-67 of the Criminal Justice (Scotland) Act 1980, which came into effect in April 1981. The compensation order is made by the court in recognition of the victim’s loss rather than to provide full compensation and is restricted to acts which, directly or indirectly, resulted in personal injury, loss or damage.

A compensation order can be imposed as the sole sentence or in conjunction with most other disposals and can be used for most sentences. When making a compensation order, courts are required to take the offender's means into account and to give priority to a compensation order over a fine. The making of the order is discretionary and the courts are not required to give reasons where they choose not to impose such orders.

The Scottish courts have held that the current law permits the award of compensation only in cases where there is evidence of “personal loss, injury or damage” (Brown v Laing 2004 SCCR 132) and that being distressed, insulted or offended does not amount to personal injury (Smillie v Wilson 1990 SCCR 133).

Compensation was ordered in 7 per cent of convictions in 2003, most frequently in convictions for vandalism (48 per cent of such convictions). The average value of compensation order awarded was £253 in 2003. *(Scottish Executive 2006)*

**Compensation orders - McInnes Committee**

The McInnes Committee recommended an extension of the court’s power to make compensation orders to circumstances, “…where the victim of offending behaviour has been subjected to behaviour which is frightening, distressing, annoying or has caused nuisance or anxiety”. *(McInnes Report, paragraph 11.54).*

**Compensation orders – provisions in the Bill**

Section 38 of the Bill extends the scope of compensation orders to cover acts where the victim has suffered “alarm or distress” which was directly caused by the actions of the convicted person. Section 38(1)(b) also inserts a definition of “victim” (for the purpose of making a compensation order) into the Criminal Procedure (Scotland) Act 1995 (the 1995 Act) to include acts against the property of the person against whom the offence was directed.

**ALTERNATIVES TO PROSECUTION**

The McInnes Committee recommended that:

“… alternatives to prosecution be made more widely available, more flexible and more robust, to enable the courts to focus on more rapid handling of serious crimes and offences while giving police and procurators fiscal the range of powers they need to respond quickly and appropriately to minor offences.” *(McInnes Report, page 117).*
The Committee’s recommendations included changes to the scope and level of existing fixed monetary penalties, a new fiscal compensation order and another new disposal, the ‘work order’ – also known as the ‘fine on time’.

**Conditional offers of fixed penalties – current provisions**

The conditional offer of a fixed penalty or “fiscal fine” was introduced by section 56 of the Criminal Justice (Scotland) Act 1987. Since then, fiscal fines have been available as alternatives to prosecution for any offence which could be tried in the district court excluding certain road traffic offences. In practice, fiscal fines are used to deal with a wide variety of offences, including shoplifting, minor breaches of the peace, minor assaults and simple possession of Class B and C drugs.

Payment of a fiscal fine, or at least of the first instalment, removes the possibility of prosecution. At present, recovery of any unpaid portion of the fine can only be enforced through civil diligence. Acceptance, however, does not constitute an admission of guilt and is not recorded as a conviction. When introduced, the maximum penalty which could be imposed by a fiscal fine was one half of the Level 1 fine on the standard scale (then £25). Current legislation permits a fiscal fine of up to level 1 (£200) on the standard scale but this is currently limited by regulations to a maximum of £100 (half of Level 1 on the standard scale). This level has been in place since 1996.

**Fixed penalty notices – current provisions**

The conditional offer of a fixed penalty or “fiscal fine” was introduced by section 56 of the Criminal Justice (Scotland) Act 1987. Fiscal fines are available as alternatives to prosecution for any offence which can competently be tried in the district court, excluding certain road traffic offences. In practice, fiscal fines are used to deal with a wide variety of offences, both common law and statutory. This includes shoplifting, breaches of the peace, minor assaults, and minor statutory offences such as drinking in prohibited public places and simple possession of Class B and C drugs.

**Fixed penalties and compensation offers – McInnes Committee**

While fiscal fines and fixed penalty notices have been welcomed by many as a means of keeping first time minor offenders out of court, avoiding stigmatising people with criminal records for minor offences and freeing up court time for more serious cases, concern has been expressed that extending the use of such penalties represents an increasing movement towards:

> “…a bureaucratic, administrative type of criminal justice [with the] consequent danger of diluting the moral content of the criminal law”. (Paterson et al, p109)

The McInnes Committee, however, considered that penalty notices can be an efficient and effective way of dealing with high-volume low-level crime. The Committee recommended that steps be taken to increase the use of both fiscal fines and FPNs by extending the scope of these non-court disposals. The Committee considered that FPNs could be extended to cover certain statutory offences of a regulatory nature including licensing offences, environmental and other forms of minor civil infringements of the law covered by the Civic Government (Scotland)

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3 In 1995, the jurisdiction of the district court was extended by section 60 of the Criminal Justice (Scotland) Act 1995 to include all offences which can be tried summarily, thereby also increasing the scope of the fiscal fine.
Act 1982 (McInnes Report, paragraph 9.12). Such offences are currently either processed through the courts or, in many cases, no action is taken. The Committee also recommended that the level of fiscal fines should be increased from to £100 or £500 (McInnes Report, recommendation 25). This would, the Committee felt, bring such penalties more into line with the current level of court fines while at the same time not raising them to a level which would act as a disincentive to acceptance.

**The fiscal compensation offer**

As noted earlier in this briefing, currently compensation orders can only be made by a court (section 249 of the 1995 Act) on conviction of an offence and can be made instead of or in addition to, other disposals.

The McInnes Committee proposed that procurators fiscal should also be able to make use of compensation orders, separate from or in addition to a fiscal fine, and that this disposal should be available in circumstances where the victim has been subjected to behaviour which is frightening, distressing, annoying or has caused nuisance or anxiety. (McInnes report, paragraph 11.54). The Committee also recommended that fiscal compensation orders should have no prescribed upper limit.

**Fixed penalties and compensation offers - Executive consultation**

Respondents to the Executive’s consultation on the recommendations contained in the McInnes Report gave mixed responses to the proposals to increase the scope and use of fixed penalties generally. Issues identified included:

- Difficulties arising if alternatives to prosecution were utilised for public order offences where there could be room for debate or dispute
- lack of transparent guidance regarding the number of FPNs that should be issued before an accused person ought to face prosecution
- if fiscal fine and fixed penalty levels were increased this could impact on collection levels
- the process would be conducted away from an open court, which would lead to a reduction in transparency in the justice system
- the procurator fiscal would become ‘judge and jury’ in the case and may have little information (particularly about an accused person’s means) to inform their decisions
- the fine would be viewed as a debt to be repaid rather than a show of society’s disapproval of an offender’s conduct
- increased fiscal fine levels may not act as a deterrent to further offending
- in imposing an alternative there is no opportunity to assess defence evidence before a decision is reached. (MRUK Ltd 2005, paragraph 17)

Concerns were expressed also that the “opt-out” approach (see below) to the offer of alternatives to prosecution would be difficult for offenders to understand, difficult to administer and would, in effect, equate silence with guilt.

On the proposed fiscal compensation orders, several respondents felt that these would be appropriate where the level of compensation was easily quantifiable. The Law Society of
Scotland agreed that fiscal compensation orders could be beneficial, but took a stronger line stating that these should only be available in cases where there had been malicious damage or in some cases of theft. Other respondents, such as the Scottish Law Agents’ Society, felt that their use would result in the fiscal becoming prosecutor, judge and jury and that such orders would take little account of the victim’s wishes (MRUK Ltd 2005). The Society also thought some victims would prefer accused people to be prosecuted rather than receiving compensation themselves.

The Executive decided to accept most of the McInnes recommendations in relation to fiscal fines and fiscal compensation orders (described as compensation ‘offers’ in the Bill). However, the Bill contains no changes to the scope or level of FPNs although the Executive has undertaken to consider such changes following the pilot antisocial behaviour project. The Executive decided, also, to prescribe an upper limit on compensation offers.

In a written answer to a parliamentary question by Karen Whitefield MSP seeking reassurance that the wider use of fiscal fines will be the correct disposal for the offences concerned, the Lord Advocate, Colin Boyd, said:

“It is important that procurators fiscal use the powers responsibly and proportionately, so a training programme will of course be involved. … Once an offender has accepted an offer of a fine, then, on request by the victim, that will be communicated to the victim so that they can be reassured that the matter has been dealt with properly. Of course, that will be the case only when there is a victim, which is not the case in many instances. I hope that that gives the member the reassurance that she seeks.” (Scottish Parliament 2006)

**Fixed penalties and compensation offers – provisions in the Bill**

Section 39 of the Bill introduces major changes to the procedures and administration of fiscal fines, makes changes to the maximum level of fiscal fine, allows for the possibility of discounting fixed penalties and introduces the compensation offer. The main provisions relate to:

- **Acceptance of a conditional offer** – section 302 of the 1995 Act is amended to reverse the current situation under which a conditional offer is accepted when payment in full or in part is made and prosecution follows where the alleged offender takes no action. The new provisions provide an “opt-out” approach in that an offer of a fiscal fine will be deemed to be accepted unless notice to the contrary is sent to the clerk within (in most cases) 28 days of the offer being made (s39(1)(a)(iii)). In effect, an alleged offender who wants to challenge an accusation in court will now have to take positive action to do so.

- **Disclosure of an accepted offer** - section 302 of the 1995 Act is further amended to change the current provision that acceptance of a fiscal fine cannot be disclosed to a court on conviction for subsequent offences. The Bill provides that where an offer of a fiscal fine is accepted, or deemed to have been accepted, it will be open to the fiscal to disclose this fact on conviction for any subsequent offences committed within two years of the day of acceptance (s39(1)(a)(v)). The fiscal may also disclose to the court the fact that an offer has not been accepted, on conviction for the offence for which the offer was made.

- **Changes the fiscal fine maximum** - this is increased from £100 to a Level 2 fine (£500) on the standard scale (s39(1)(e))

- **Provision for discounting fixed penalties** - the Scottish Ministers are given an order-making power to enable discounts to be offered and to determine the circumstances and extent of such discounts (s39(1)(f)). Note that discounting of fines is preferred by the Executive to the punitive approach recommended by McInnes of converting unpaid fiscal fines (and FPNs) to court registered fines and increasing them by 50 per cent.
Section 39 also:

- **Creates the fiscal compensation offer** – this new fiscal disposal will be available for any offences which can be tried summarily and for which a compensation order could be made by the court under section 249 of the 1995 Act (see new section 302A(13) added by s39(2) of the Bill). It will operate administratively in essentially the same way as conditional offers of fixed penalties in terms of notification procedures. It is also similar in that acceptance of the offer discharges liability to conviction and that the offer is accepted when payment is made, or deemed to be accepted if no notice of refusal is given. Also, like conditional offers, acceptance does not count as a conviction but may be disclosed to a court in the same circumstances. The maximum amount of a compensation order will be fixed by statutory instrument but will not exceed level 5 on the standard scale (£5,000)

- **Allows combined fixed penalty and compensation offers** – new section 302B of the 1995 Act gives the fiscal the power, where he thinks it appropriate, to issue a fixed penalty offer combined with a compensation offer. The alleged offender must accept or refuse both

- **Provides for the recall of a fixed penalty or compensation offer** – the Bill makes provision (new section 302C of the 1995 Act) for fixed penalty or compensation offers to be recalled on application to the clerk by an alleged offender who claims not to have received the offer. Application may be made to the court to review the clerk’s decision

- **Allows these penalties to be treated as court imposed fines for the purpose of enforcement** - Section 39(3) amends section 303 of the 1995 Act to ‘convert’ fixed penalty offers and compensation offers into court imposed fines and therefore subject to the same enforcement procedures (as opposed to civil diligence), though fiscal fine defaulters will not be subject to imprisonment.

**Work orders**

The idea of work orders, also known as the “fine on time” or the “community fiscal fine”, was raised in the Executive’s Supporting Safer, Stronger Communities: Scotland’s Criminal Justice Plan but not considered by the McInnes Committee. The Criminal Justice Plan proposed that a prosecutor should have available the option to fine an individual's time in cases where an accused may be unwilling or unable to take up the offer of a fiscal fine, *(Scottish Executive, 2004, paragraph 3.16)*

**Work orders – Executive consultation**

The Executive intends to pilot the use of work orders in a limited number of areas and to consult further before taking any decision on rolling out the disposal more widely. *(Scottish Executive, 2006a, paragraph 242)*

The Lord Advocate, responding to a parliamentary question by Karen Whitefield MSP, observed that:

“Under the bill, the Scottish ministers will be able to make regulations on work orders. It is envisaged that communities may be consulted on the work that needs to be done in their areas”. *(Scottish Parliament 2006)*

**Work orders – provisions in the Bill**

Work orders are introduced by section 40 of the Bill. This section provides the fiscal with the option of making a work offer to an alleged offender in relation to any offence which can be tried
summarily. This notice will contain details of the alleged offence, the number of hours of unpaid work involved and the date by which this work should be completed.

Unlike conditional offers of fiscal fines or compensation offers, the alleged offender will have to take positive action to accept the offer (usually within 28 days). If accepted, the fiscal may make and issue a work order. Liability to prosecution for the alleged offence remains until the work order has been completed. In a similar manner to fiscal fines or compensation offers, work offers may be disclosed to a court in the event of a subsequent conviction within two years of completion of the work order.

The Bill adds new section 303ZA(14) to the 1995 Act. This gives the Scottish Ministers the power to make regulations to determine the nature of the work and the minimum and maximum number of hours to be worked. These regulations will be laid before the Parliament and subject to negative resolution.

**Disclosure of previous offers**

Section 41 of the Bill amends the provisions in the 1995 Act to make similar provisions in relation to the disclosure of previous offers of a fixed penalty and compensation offers (accepted or deemed to have been accepted in the last two years) and work orders (completed in the last two years) as currently apply to disclosure of previous convictions when an accused is found guilty of a subsequent offence.

**Time bar – current provisions**

Section 136 of the 1995 Act provides that in relation to any offence triable only summarily and consisting of a contravention of any enactment, unless the enactment fixes a different time bar, proceedings require to be commenced within 6 months. Time bar does not apply to common law offences.

**Time bar – provisions in the Bill**

Section 42 of the Bill adds a new section (136B) to the 1995 Act to the effect that the period between an offer of a fixed penalty, compensation offer or Work Offer and a refusal (or recall in the case of the first two alternatives) does not count in relation to the operation of the time bar applied by section 136. For Work Offers which are accepted but not completed, the period between the date of the offer and the date specified for completion, is also disregarded for time bar purposes.

**FINE ENFORCEMENT**

**Fine enforcement - current position**

Court imposed fines have fallen absolutely and as a proportion of all court disposals over the last decade because many offences previously dealt with by a fine are now subject to alternatives to prosecution such as police conditional offers, community sentences or fiscal fines. That said, financial penalties remain the most common penalty imposed by the courts and fines were the main penalty imposed in 64 per cent of convictions in 2003. *(Scottish Executive, 2006)*
Sheriff courts are currently responsible for the collection and enforcement of fines and compensation orders imposed by both the sheriff courts and the High Court. The district courts are responsible for collecting and enforcing fines imposed in the district courts and a range of other financial penalties, including fiscal fines and fixed penalties, which can only be enforced through civil diligence.

A recent report by the Fines Working Group, led by the Scottish Court Service, put the level of fines imposed in the Sheriff Court in 2003-04 at just over £15.2 million and estimated that around 80% of fines were eventually paid, leaving approximately £3 million of fines left unpaid each year (Feb 2006). The unpaid 20% is dealt with in a number of different ways. Scottish Court Service data for 2001/02 shows that, in respect of Sheriff and High Court financial penalties, 12% was discharged by the offender spending time in prison, 3.5% was discharged through the offender undertaking a supervised attendance order with the remaining 4.5% discharged either by judicial order, death of the accused, successful appeal against sentence or as a result of the fine being written off due to enforcement difficulties.

In the district courts, £9.05m was collected in payment for fixed penalties and fiscal fines and £5.02m was collected in payment for court imposed fines, registered fines and compensation orders, a total of £14.07m. (Scottish Courts Service 2006)

The Working Group estimated the costs of recovery of fines and other financial penalties at £1.2 million in the sheriff courts and around £2 million in the district courts, representing an estimated total of £3.2 million recovery costs per year.

In recent years, efforts have been made to reduce the level of unpaid fines and the burden on the courts and police in enforcing and collecting payment. Options available to the courts include use of:

- **dedicated fines enforcement or advisory officers** - note, however, that these officers have no power to vary payment arrangements or to invoke alternatives such as seizure of earnings or deductions from benefits
- **means enquiry courts** - which examine an offenders situation and can vary payment arrangements accordingly
- **Supervised Attendance Orders (SAO)** - the SAO was introduced by the Law Reform (Miscellaneous Provisions) (Scotland Act) 1990 and first introduced to Scotland on a pilot basis in 1992. An SAO may only be made when the court considers this more appropriate than imposing a period of imprisonment. In effect, the SAO substitutes a period of supervised unpaid work (fine on time) for the unpaid fine. SAOs run between 10 and 100 hours as ordered by the court. The mandatory use of SAOs is being piloted at Ayr Sheriff Court and Glasgow District/Stipendiary Magistrates Court for fine default up to £500, thereby removing the possibility of imprisonment in such cases (though a custodial sentence is possible for breach of an SAO)
- **Enforcement of the fine by way of civil diligence** - (e.g. through such means as the arrestment of earnings) and deductions from benefit – though these options appear to be little used

**Fine enforcement – McInnes Committee**

The McInnes Committee looked at the administration and enforcement of court imposed fines and other financial penalties in some detail (Chapter 32). The Committee strongly supported the use of the fine as a flexible disposal which is relatively cheap to administer, less disruptive of
offenders’ lives than other sentences and which has a lower reconviction rate than other court imposed penalties (McInnes Report, paragraph 32.6).

Nevertheless, the Committee noted a number of problems with the current fines enforcement and collection systems. These included:

- the sheriff courts and district courts operate separate systems for the enforcement and collection of fines. To add to the confusion, payment arrangements and methods vary between district courts
- attendance at means enquiry courts is low with a large number of warrants being issued for non-appearance
- enforcement of fines is a costly and time consuming process and police forces give it a low priority
- imprisonment for fine default, though reducing, remains a resource-intensive and ineffective alternative

The McInnes Committee argued that:

“…the enforcement system as it is at present, while successful in collecting and accounting for payments which are made, fails to secure prompt payment of sums which those fined are unwilling to pay and does not cope well with those who genuinely cannot pay” (McInnes Report, paragraph 32.32).

McInnes went on to recommend a different approach to fines enforcement which is:

- “consistent and flexible across Scotland
- applies equally to compensation orders, court imposed fines, fiscal fines, fixed penalty notices and other financial sanctions for breaches of the criminal law
- makes it easy to pay for those who are willing to pay
- minimises or eliminates the involvement of courts and the police once the initial fine or other sanction has been imposed
- ensures that all an offender’s outstanding fines which are in default are dealt with by a single enforcement process
- eliminates direct imprisonment for fine default
- provides clear and graduated sanctions for non-payment
- reduces or eliminates the cost to public funds of the enforcement process”.

To achieve these ends, McInnes recommended that:

- fine enforcement should be the responsibility of a single public sector delivery organisation which would have a variety of new powers (McInnes Report, recommendations 130-131).
- the Executive should consider options for making the deduction from benefits scheme operate more effectively and consider how arrestment of earnings orders might be better used as a means of fine enforcement (McInnes Report, recommendations 132-133).
- that a unit fines system should be considered in the context of the revised approach to Summary Justice (McInnes Report, recommendation 134).
**Fine enforcement – provisions in the Bill**

The Executive considered the recommendations of the McInnes Committee on fine enforcement in the light of the proposed phased unification of the Scottish summary criminal courts (see Part 4 of the Bill) which, when achieved, will place all fine enforcement and collection in the hands of a single agency - the Scottish Courts Service.

**Fines enforcement officers**

Section 43 of the Bill adds new sections 226A to 226l to the 1995 Act. The purpose of these new sections is to address some of the enforcement weaknesses in the current system identified by McInnes by creating the new role of fines enforcement officer (FEO) and providing these officers with a range of duties, powers and sanctions in respect of court imposed fines and other financial penalties. These duties, powers and sanctions will include:

- the provision of advice and support to help offenders with payment of financial penalties (226A(2)(a))
- a duty to ensure offenders comply with court enforcement orders (s226A(2)(b)) and the power to vary these on the application of the offender in relation to time to pay and the size of instalments (s226C(1)). Subsection (4) provides Ministers with the power to make regulations
- the power to seize (immobilise or impound) an offender’s vehicle (s226(D)(1)) and if the fine, or part of it, remains unpaid, to apply to the court for an order to sell or otherwise dispose of the vehicle (subs (6)) Subsection (10) gives Ministers the power to make regulations for in relation to this section
- the power for the FEO to make a request to the court to have deductions made from benefits to obtain unpaid fines (s226E(1))
- the power, under a warrant for civil diligence granted at the same time as an enforcement order is made, for the FEO, in the case of default, to arrest an offender’s earnings and/or funds the offender has in the bank or other financial institution (s226F). This power will be subject to regulations which may be made by Ministers (subs (6))
- the power to refer an enforcement order, with a report, back to the court where the offender fails to cooperate and/or where payment appears unlikely

New section 226H of the 1995 Act, provides offenders with the right to apply to the court for review of any variation to an enforcement order made by an FEO or any refusal of an application to vary an enforcement order. This section also gives offenders a right to ask the court to review any vehicle seizure order made by an FEO. In all cases where a court reviews the actions of an FEO it may confirm, vary or quash the order or make any other order it thinks fit. (s226H(3))

**SOURCES**


The Scottish Executive’s Minister for Justice introduced the Criminal Proceedings etc (Reform) (Scotland) Bill in the Parliament on 27 February 2006. The Parliament’s Justice 1 Committee has been designated as lead committee in relation to the Bill.

The Bill includes provisions:

- changing the system of bail and remand
- changing the law on criminal proceedings (mainly in relation to summary court procedure)
- increasing the sentencing powers of summary courts
- expanding the range of alternatives to prosecution
- changing the way in which fines can be collected and enforced
- establishing justice of the peace courts in place of district courts
- changing the way in which justices of the peace are appointed and trained
- placing the Inspectorate of Prosecution in Scotland on a statutory footing

This briefing considers the provisions on criminal proceedings set out in Part 2 of the Bill. It also sets out background information on the summary justice system. Separate SPICe briefings consider other aspects of the Bill.
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KEY POINTS OF THIS BRIEFING

Summary justice:

- the Scottish Executive established an independent Summary Justice Review Committee (‘the McInnes Committee’) in 2001, with the task of reviewing the provision of summary justice in Scotland and making recommendations for the more efficient and effective delivery of summary justice

- the McInnes Committee identified a need to improve the speed with which the summary justice system operates. It noted that statistics pointed to a worsening, between 1997 and 2003, in the time taken to deal with cases, and stated that a system which fails to dispose of over half of all cases within six months of the date of the offence cannot truly be considered to be summary

- the Scottish Executive has also highlighted the importance of speed within the summary justice system, and has stated that the Bill will help improve the speed with which cases can be processed

Part 2 of the Bill includes provisions which will:

- allow the police, when releasing suspects on undertakings that they will attend court on a certain date, to attach conditions to their release (breach of which would amount to an offence)

- make changes in relation to the disclosure of convictions during summary court proceedings

- allow summary court trials (and certain other summary court hearings) to take place in the absence of the accused, provided that the court: (a) is satisfied that the accused has been properly cited to appear; and (b) considers it to be in the interests of justice to proceed

- generally require that the defence provides advance notification of any ‘special defences’ (eg self-defence or alibi) which it intends to rely upon in a summary trial

- make changes to provisions dealing with the agreement of evidence in summary court cases, with the intention of encouraging more agreement of uncontroversial evidence

- give courts the power to excuse ‘procedural irregularities’ which may occur during criminal cases – in relation to both summary and solemn procedure cases following an application by either the Crown or the accused (or a convicted person)
INTRODUCTION

The Criminal Proceedings etc (Reform) (Scotland) Bill [as introduced] Session 2 (2006) (‘the Bill’), together with Explanatory Notes (and other accompanying documents) (all references in the briefing are to the ‘Explanatory Notes’), Policy Memorandum and Delegated Powers Memorandum, was introduced in the Parliament on 27 February 2006.

This briefing considers the provisions on criminal proceedings, mainly relating to summary court cases, set out in Part 2 (sections 6 to 32) of the Bill. It also sets out background information on the summary justice system. Separate SPICe briefings consider other aspects of the Bill.

BACKGROUND

The Scottish Executive established the independent Summary Justice Review Committee, under the chairmanship of Sheriff Principal John McInnes, in November 2001 (hereafter referred to as ‘the McInnes Committee’). It was asked to review the provision of summary justice in Scotland and to make recommendations for the more efficient and effective delivery of summary justice. In carrying out its work, the McInnes Committee conducted a number of consultation exercises and commissioned both a survey of public opinion and several pieces of research on particular topics. Further information about the McInnes Committee, including its membership and the work it commissioned, is available on the Executive’s Summary Justice Reform website.

In March 2004, the McInnes Committee published its report ‘The Summary Justice Review Committee: Report to Ministers’ (hereafter referred to as ‘the McInnes Report’). The Scottish Executive consulted on the report between March and July 2004, with a total of 240 written responses being received from a range of organisations and individuals. A ‘Summary of Responses to the Written Consultation’ (MRUK Ltd) was published in February 2005.

In March 2005, the Scottish Executive (2005a) published its plans for summary justice reform in ‘Smarter Justice, Safer Communities: Summary Justice Reform – Next Steps’. The Bill is intended to take forward those plans which require legislation.

The above work on summary justice covers a range of topics, including the district courts/lay justice, fines enforcement and alternatives to prosecution. Some of these topics produced particularly strong responses during their consideration (eg over 50% of the written responses to the Scottish Executive’s consultation on the McInnes Report were from Justices of the Peace and Justice of the Peace Committees). In the rest of this briefing, references to the above work are in relation to those parts which have direct relevance to the provisions set out in Part 2 of the Bill.

SUMMARY JUSTICE

The Policy Memorandum published with the Bill states that:

“Summary justice can be defined as all criminal prosecutions in Scotland not heard by a court involving a jury. Such cases account for 96% of all criminal prosecutions in Scotland (over 130,000 cases per year) including all minor
offences that are prosecuted but also some more serious cases such as assault and almost all road traffic cases.” (para 3)

Summary cases are dealt with in the sheriff and district courts (in the latter by one or more lay justices – in Glasgow only they may also be heard before a legally qualified stipendiary magistrate). Solemn cases do involve juries (if the case goes to trial) and are dealt with in the sheriff courts and in the High Court. Further information on the criminal courts is set out in the SPICe subject map ‘The Scottish Criminal Justice System: the Criminal Courts’ (Oag et al 2003). Also see Chapter 4 of the McInnes Report.

The McInnes Committee identified a number of principles which it felt should form the basis of the summary justice system, including:

- fairness – fair to victims, witnesses and accused
- effectiveness – effective in deterring, punishing and helping to rehabilitate offenders (eg by taking action against an offender as quickly as possible, thus maintaining a link between the crime and consequences in the offender’s mind)
- efficiency – efficient in the use of time and resources (eg by ensuring that the flow of information between those involved in the system is streamlined)

In its consideration of these principles, the McInnes Committee identified the need to improve the speed with which the summary justice system operates:

“The Committee felt that a more summary justice system was of considerable value; indeed, it regarded speeding up the process of justice as core to what it was trying to achieve.” (McInnes Report, para 2.14)

“We take the view that overall speed in dealing with cases is a particularly important aspect. Not only is it the primary focus of our remit – ‘to make recommendations for the more efficient and effective delivery of summary justice in Scotland’ – but it is also our view that improvements in overall speed of the system are likely to deliver significant benefits to victims and witnesses through earlier access to justice and reducing wasted court attendances. It will also contribute to reducing re-offending. Disposals can be more appropriately tailored to fit the offending behaviour the sooner they are made after the offence has been committed, while there is little doubt that delays in the system allow some offenders to believe there is no effective sanction against their behaviour, which is thus likely to continue unchecked.” (McInnes Report, para 2.26)

The McInnes Committee considered information on the speed of the justice system, collected by tracking summary cases up to the date of the last court hearing in relation to the case (eg when an accused is sentenced or is found not guilty). Table 1 below reproduces statistics on the time taken from the date of the police report to the procurator fiscal up to final disposal of the case. Table 2 covers the period from the date of the offence up to final disposal. The Committee had access to figures for a number of months during both 1997 (from the date of the report to procurator fiscal only) and 2003 (from the date of the report and from the date of the offence).

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1 Considered in Chapter 2 of the McInnes Report.
2 The data is based on summary cases closed: (a) April to September 1997; and (b) July to September 2003. The data only relates to cases which have been prosecuted and brought to court (eg it excludes cases which are dealt with by means of non-court disposals).
Table 1: Time taken to dispose of cases – from date of report to PF to date of last court hearing

<table>
<thead>
<tr>
<th>Court</th>
<th>Percentage of cases completed by</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>10 weeks</td>
</tr>
<tr>
<td>District court 1997</td>
<td>29%</td>
</tr>
<tr>
<td>Sheriff court 1997</td>
<td>30%</td>
</tr>
<tr>
<td>District court 2003</td>
<td>25%</td>
</tr>
<tr>
<td>Sheriff court 2003</td>
<td>25%</td>
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</tbody>
</table>

(source: McInnes Report, para 33.6)

Table 2: Time taken to dispose of cases – from date of offence to date of last court hearing

<table>
<thead>
<tr>
<th>Court</th>
<th>Percentage of cases completed by</th>
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<tbody>
<tr>
<td></td>
<td>10 weeks</td>
</tr>
<tr>
<td>District court 2003</td>
<td>6%</td>
</tr>
<tr>
<td>Sheriff court 2003</td>
<td>17%</td>
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</table>

(source: McInnes Report, para 2.29)

The McInnes Committee noted that the statistics pointed to a worsening, between 1997 and 2003, in the time taken to deal with cases. It also stated that:

“In our view, and in that of most of those who responded to our initial consultation, a system which fails to dispose of over half of all cases within 6 months of the date of offence cannot truly be considered to be summary.”

(McInnes Report, para 2.30)

The McInnes Committee was in favour of having time targets as a means of improving the speed of the system (and monitoring such improvement). For example:

“In relation to cases which come to court, the overarching time target should relate to improving the overall time taken from the point at which the system becomes aware of the crime or offence (or possibly the date when a person is cautioned and charged) to the date of disposal or the date on which sentence is deferred other than for reports. Within that target, individual organisations would inevitably have sub-targets for their contribution to the overall process, eg the time taken by the police to report cases to the procurator fiscal, the time taken by procurators fiscal to get cases ready for court and the ability of the court to accept such cases when they are ready.”

(McInnes Report, para 33.14)

The McInnes Committee also considered the possibility of having a statutory time limit for summary cases. For example, setting a period of months from the time a person is charged with an offence, within which the case must be brought to trial or dropped (subject to possible extension of the time limit where, for example, a delay is caused by the accused). The Committee was sympathetic to the idea but felt that it was not workable at this point in time:

“we have reluctantly come to the view that, while it would be desirable to send a clear message about the need for a swifter system, the principal beneficiaries of a statutory time limit at present would be accused who manage to delay their cases or who are lucky enough to be able to take advantage of systemic delays. (...) We have no doubt that there would be justifiable and widespread public concern if large numbers of cases were to fall simply because they had passed a certain time barrier.”

(McInnes Report, para 33.10)
PROVISIONS OF THE BILL

The Policy Memorandum published with the Bill also highlights the importance of speed within the summary justice system:

“Of principal importance is the issue of speed – the quicker ‘the system’ deals with offending behaviour the more likely the intervention will be effective in deterring further offending. Speedy case disposal also benefits victims and witnesses by resolving the case as soon as possible and allowing them to get on with their lives.” (para 57)

It goes on to state that:

This Bill introduces a number of changes to the law relating to criminal proceedings which, taken together, will improve the speed with which cases can be processed, allow those responsible for managing cases to deal with them flexibly and effectively and contribute to the overall goal of a system which deters offending and reoffending through every phase of its operation. (para 58)

Most, but not all, of the provisions in Part 2 of the Bill stem from the McInnes Report. This briefing looks at some of the more significant proposals (rather than seeking to outline all of the provisions). A bullet point summary of the various provisions is provided at pages 12 to 13 of the Policy Memorandum. The Bill amends or adds to existing statutory provisions on criminal proceedings set out in the Criminal Procedure (Scotland) Act 1995 (‘the 1995 Act’).

Police functions – liberation of an accused on an undertaking

A number of methods may be used to secure the attendance of an accused at the first court hearing relating to a criminal case. An accused:

- may be arrested by the police and brought to court in custody
- may be arrested but then released by the police on an undertaking that he/she will appear in court on a date shortly thereafter
- may appear in court on a date agreed by the authorities and the accused’s lawyer
- may appear in court in response to a written instruction (citation) to appear on a certain date

Section 6 of the Bill (amending sections 21 and 22 of the 1995 Act) makes changes in relation to the second of the above options. The Scottish Executive intends that the changes should facilitate a more flexible use of such undertakings. The changes made by the Bill include allowing the police to attach conditions to an undertaking (breach of which amounts to an offence). The conditions which may be imposed include some of the standard conditions which may be imposed where a court grants bail to an accused (eg that the person does not interfere with witnesses or otherwise obstruct the course of justice).3

In addition, the maximum custodial sentence which a sheriff may, under summary procedure, impose for breach of an undertaking is increased from three to 12 months. This increase in maximum sentence is in line with changes made by the Bill in relation to breach of bail

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3 A separate SPICe briefing considers the provisions of the Bill dealing with bail and includes background information on bail.
conditions, and with general increases to the maximum level of penalty that courts may impose under summary procedure.\(^4\)

At present, most summary criminal cases commence with the citation of the accused (the fourth of the above bullet point options). However, the McInnes Committee felt that greater use of undertakings could lead to a reduction in the time it takes to get accused to court, and recommended that:

“in the great majority of cases in which a summary prosecution is likely, the accused, if not detained in custody, should sign an undertaking to appear at a particular court on a particular date, and at a particular time. We recommend that this be introduced in phases.” (p 138)

This area has also been considered by the Sentencing Commission for Scotland, which recommended that the police should have the power to impose conditions (eg to provide greater protection to victims) when releasing someone on an undertaking.\(^5\)

**Summary procedure – effective communications and administrative proceedings**

Sections 7 to 9 of the Bill contain provisions which are intended to improve efficiency within the summary justice system by: (a) encouraging more effective communications (including the greater use of electronic communications); and (b) allowing for some administrative proceedings to be handled without a judge being present. For example:

- provision that the electronic version of a ‘complaint’ (the official document setting out the charges faced by an accused person in a summary criminal case) shall be treated as the principal version of the document (section 7)
- provision for a wider range of options for informing an accused person or witness of a court hearing (eg allowing police officer witnesses to be cited to court by email) (section 8)
- allowing a clerk of court to fix a date for trial, in response to a written plea of not guilty, without the involvement of a judge (section 9)

**Summary procedure – disclosure of convictions**

Section 166(7) of the 1995 Act provides that, where a person is convicted of an offence, the court may have regard to any previous convictions in determining the appropriate sentence. Section 166(3) sets out the general position that the judge should not consider any previous convictions prior to the charge(s) being proved. Thus, the general rule is that previous convictions may be taken into account in sentencing but not in relation to questions of guilt or innocence.\(^6\)

There are, however, a number of exceptions to the rule that previous convictions should not be considered by a judge who is still involved in determining the guilt or innocence of an accused. One exception covers the situation where evidence of a previous conviction is required in support of the current charge (eg where evidence of a previous conviction leading to a person being disqualified from driving is required in support of a charge of driving whilst disqualified).

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4 See the separate SPICe briefing dealing with Part 3 of the Bill (Penalties).
5 See the report of the Sentencing Commission for Scotland (2005) at para 4.11.
6 See section 101 of the 1995 Act in relation to solemn proceedings.
Where the above mentioned exception applies, a court is required to deal with the charge requiring evidence of a previous conviction separately from any other charges which an accused may face. The McInnes Report notes that this leads to the result that:

“where an offender is charged with driving while disqualified and other motoring offences arising out of the same incident, such as dangerous or careless driving or drunk driving, the court will fix two summary trials and two intermediate diets. One of these will be restricted to driving while disqualified and having no insurance, which is an inevitable consequence of driving while disqualified. The other will deal with the other motoring offences, whatever they may be.” (para 17.2)

The McInnes Committee considered that this separation was unnecessary and recommended that the law should be amended in relation to summary cases:

“to allow all charges arising out of the same incident or on the same occasion to be included on the same complaint and to go to trial at the same time, even though one or more of the charges discloses a previous conviction”. (McInnes Report, p 157)

Section 12(2) of the Bill (inserting a new section 166B into the 1995 Act) seeks to implement the above recommendation in relation to summary proceedings.

There are no plans to make a similar change in relation to solemn proceedings. Although it may be argued that a trained judge dealing with a summary court trial should have the ability to put the fact that an accused person has previous convictions to one side, and look at the charge before the court objectively, there may be less confidence in the ability of a jury in a solemn trial to take a similar approach.

The above discussion relates to ‘previous convictions’. The McInnes Report (para 16.14) notes that, as the law currently stands, a court involved in sentencing an offender “may only take into account a conviction for an offence committed prior to the commission of the offence under consideration”. It states that courts should be able to consider the whole of a person’s offending behaviour when determining sentence. For this reason, the McInnes Committee recommended that:

“the law is changed to enable all convictions to be taken into account at the time of sentencing irrespective of whether the offences were committed prior to or subsequent to the offence under consideration”. (McInnes Report, para 16.14)

Section 12(2) of the Bill (inserting a new section 166A into the 1995 Act) seeks to implement the above recommendation in relation to summary proceedings. Thus, convictions for offences committed after the offence currently being dealt with by the court (‘post-offence convictions’) could be considered by a judge during sentencing. There are no plans to make a similar change in relation to solemn proceedings.

Summary procedure – trial and other court proceedings in absence of the accused

The Policy Memorandum (para 107) states that:
“Proceedings in absence [of the accused] are already competent in respect of a number of summary cases where the offence is statutory and a sentence of imprisonment is not an option available to the judge on a finding of guilt. The Bill’s provisions allow intermediate diets, trial diets and diets allocated for sentencing to take place in the absence of the accused in all types of summary case. The court will only proceed to deal with the diet in the accused’s absence:

– if it is satisfied that the accused has been properly cited; and
– it considers it to be in the interests of justice to proceed.”

This intended change in the law is made by section 14 of the Bill. Also see section 17 of the Bill in relation to companies and other bodies.

The issue of trial in absence of an accused is considered in Chapter 25 of the McInnes Report. It states that trials in absence are currently very rare and highlights the current restrictions on their use, such as the fact that they cannot be used in relation to any common law offences (eg theft, assault or breach of the peace). The McInnes Report states that:

“In the experience of Committee members many accused fail to appear on the day of their summary trial. Scottish Court Service statistics show that in 2002-03 8% of sheriff court trial hearings – over 4000 hearings – resulted in the issue of a warrant for the arrest of the accused.” (para 25.3)

It goes on to highlight some of the problems caused by such failures to appear – affecting witnesses, the police, the Crown and the courts. It also states that failures to appear can be a deliberate strategy on the part of the accused, seeking to delay proceedings until witnesses’ memories have faded.

In light of the above, the McInnes Committee recommended that trial in absence should be competent in all summary cases, provided the court is satisfied that the accused has received notice of the trial and of the fact that it may proceed in absence if there is a failure to attend. Further recommendations of the Committee included:

- legal representation – that trial in absence should be competent with or without the accused having legal representation, and that the court should have the power to appoint a solicitor to represent an accused but not be required to do so
- sentencing – that the court should be able to proceed to sentencing following trial in absence but that it should not be competent to impose a custodial sentence without the offender being present
- safeguards in addition to the right of appeal – that the original court should have the power to quickly reconsider decisions taken as part of a trial in absence where a manifest error or injustice has occurred

The McInnes Committee was of the view that the above proposals would be consistent with the rights of an accused person as protected by the European Convention on Human Rights.

As noted above, section 14 of the Bill provides for trial in absence of the accused in summary cases, and also for certain other types of court hearing to proceed in the absence of the accused. It also carries forward the above mentioned recommendations of the McInnes Committee in relation to legal representation and sentencing. The Bill does not, however, contain provision for the reconsideration, by the original court, of decisions taken as part of a trial in absence.
The Policy Memorandum notes that the proposals on this topic are controversial. In relation to solemn proceedings, section 10 of the Criminal Procedure (Amendment) (Scotland) Act 2004 amended the 1995 Act in order to extend the previously very limited circumstances in which a trial could proceed in the absence of the accused. The new provisions, in section 92(2A) of the 1995 Act, provide that a court dealing with a solemn case may proceed with a trial in the absence of the accused provided that: (a) evidence has already been led which substantially implicates the accused; and (b) taking into account the point in the proceedings at which the failure to appear occurred the court is satisfied that it is in the interests of justice to do so.

The above provisions in relation to solemn cases are narrower than those proposed in relation to summary cases, in that they only apply where an accused fails to appear after a trial has already started and evidence led which substantially implicates the accused. The accused would have been present during that initial part of the trial. The bill which was enacted as the Criminal Procedure (Amendment) (Scotland) Act 2004 did not, when introduced in the Parliament, contain this limitation on the circumstances where trial in absence is competent. However, the Parliament’s Justice 1 Committee, whilst acknowledging the problems experienced by victims and witnesses where an accused fails to appear for trial, rejected the proposal that an accused should be tried in absence from the outset.\(^7\) Factors taken into account by the Committee included concerns relating to the legal representation of an absent accused:

> “Overwhelming evidence presented by practitioners and other witnesses suggests that it would be difficult for the person appointed to conduct the case in the absence of any information about lines of defence.” (Scottish Parliament Justice 1 Committee 2004, para 135)

The Deputy Minister for Justice noted during the Stage 3 parliamentary debate, that the Scottish Executive had accepted that the provision should be changed to restrict it to cases where evidence against the accused has already been led.

Thus, the question arises as to whether provisions allowing trial in absence should be wider in relation to summary cases. In the Policy Memorandum published with the Bill, the Scottish Executive states that:

> “In view of the lower sentencing maxima in the summary courts the potential consequences of proceedings in absence for an accused in a summary case falls far short of those in solemn cases. It is hoped that the existence of these provisions will act as a strong deterrent to those accused who consider trying to defeat the ends of justice by failing to appear – and that they will only need to be used occasionally.” (para 112)

It may also be noted that summary trials are generally shorter and thus much less likely to take place over more than a single day. Thus, the proportion of summary trials where an accused will have the opportunity to abscond part way through the trial will be smaller than is the case in relation to solemn trials.

\(^7\) See the [Stage 1 Report](#) of the Justice 1 Committee (2004) at paras 127 to 141.
Summary procedure – failure of an accused to appear for a court hearing

Section 15 of the Bill (amending section 150 of the 1995 Act) includes provisions changing the penalties under summary procedure for the failure of an accused to appear for a court hearing. The maximum custodial sentence in summary sheriff court cases is increased from three to 12 months. In addition, a court sentencing an offender for a failure to appear would have to impose a sentence which is additional to any sentence imposed in relation to the original offence. The provisions are similar to those contained in section 3 of the Bill in relation to the failure of an accused to attend court whilst on bail.

Summary procedure – obstructive witnesses

Section 16 of the Bill (replacing section 156 of the 1995 Act with five new sections) deals with situations where a witness fails to appear for a court hearing (or where the court is satisfied that there is likely to be such a failure). The intention is to provide courts with more extensive powers, similar to those which courts currently have under solemn procedure (set out in sections 90A to 90E of the 1995 Act). The summary court would, for example, be able to release a witness on bail (where the witness had been apprehended following a failure to appear). The current solemn procedure provisions were inserted into the 1995 Act by the Criminal Procedure (Amendment) (Scotland) Act 2004.

Preparation for summary trial – notice of defences

Section 19 of the Bill (replacing sections 149 and 149A of the 1995 Act with a new section) includes provisions aimed at ensuring that ‘special defences’ (e.g., self-defence and alibi) are normally intimated by the defence at or before the ‘intermediate diet’ held in a case. Intermediate diets are administrative diets held in summary criminal cases, commonly 14 to 28 days in advance of the trial, for the purpose of ascertaining whether the case is likely to proceed to trial on the date assigned. At present, depending on the type of special defence, the law mostly provides that either no advance warning or significantly less advance warning has to be given. The Policy Memorandum published with the Bill states that:

“Last minute notification of special defences often leads to the case being adjourned (at the request of the prosecutor who needs to address the defence).”
(para 129)

The above change in the law is covered by one of the recommendations of the McInnes Committee (see para 20.21 of the McInnes Report). The recommendation was made in the context of the Crown also ensuring that it provides the defence with relevant information (e.g., full witness statements) in advance of the intermediate diet – thus allowing the defence to properly prepare its case by the time of the intermediate diet.

Preparation for summary trial – proof of uncontroversial matters

The Policy Memorandum (paras 133 to 134) states that:

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8 The maximum custodial sentence available for a failure to appear where a person is prosecuted in a district court is not affected, and thus remains at 60 days.
9 A separate SPICe briefing considers the provisions of the Bill dealing with bail.
“The Executive is firmly of the view that, where a case is to proceed to trial, so far as possible, only those witnesses whose evidence is expected to be contested should have to attend.

There are already measures in place (section 258 of the 1995 Act) which permit the agreement of uncontroversial evidence. The Criminal Procedure (Amendment) (Scotland) Act 2004 further enhanced those measures in respect of solemn cases. The relevant provisions in this Bill extend the application of those enhanced measures to summary proceedings.”

The changes to summary procedure are made by section 20 of the Bill (amending section 258 of the 1995 Act). It provides that either the Crown or defence can, where it has served a notice of uncontroversial evidence (a statement setting out evidence which it considers is unlikely to be challenged by the other side in the case) and that notice has been challenged, ask the court to direct that the challenge is unjustified and that the notice should be admitted as evidence. The Scottish Executive hopes that this will encourage more agreement of evidence, thus leading to a reduction in the number of witnesses who have to attend court to give evidence in relation to matters which are not really in dispute.

The views of the McInnes Committee on agreement of evidence are set out at paras 20.23 to 20.33 of its report. It notes that:

“There are many summary criminal trials at present in which police and civilian witnesses are cited to attend court to give evidence when the evidence which they are likely to give is of a relatively formal or straightforward nature over which there is no material dispute. (...) Examples of such evidence include:

- the cautioning and charging of accused by the police and the response to such charges;
- the transmission of documentary and other productions, for example, from the scene of a crime to an analyst;
- the testing of the accuracy of police car speedometers in some speeding cases; and
- the ownership of property which has been stolen.” (McInnes Report, para 20.24)

In light of this, the McInnes Committee recommended that either side in a case should be given the right to challenge the refusal of the other side to accept evidence as non-controversial. The Committee also made recommendations in relation to the use of signed witness statements which are not covered by provisions in the Bill.  

Appeals against decisions in summary cases

Chapter 31 of the McInnes Report includes a brief overview of arrangements for appeals in criminal cases (see in particular paras 31.1 to 31.2).

Section 25 of the Bill (amending sections 180, 186 and 194 of the 1995 Act) seeks to introduce greater flexibility in relation to various time limits applying to appeals against decisions in summary cases:

\[10\] The Policy Memorandum published with the Bill comments on this at para 136.
• section 180(4) of the 1995 Act provides that, where a single High Court judge refuses a person leave to appeal against conviction (or conviction and sentence), the appellant may lodge an appeal against that decision within 14 days. The Bill provides that the High Court may extend that 14 day period where the appellant can produce justification for doing so (a similar provision was introduced in relation to appeals against decisions in solemn cases by the Criminal Justice (Scotland) Act 2003 – see section 107(4A) of the 1995 Act)
• sections 186(5) and 194(2) of the 1995 Act allow various time limits applying to the production of documents necessary for an appeal to be extended by a sheriff principal in certain limited circumstances. The Bill provides that the sheriff principal shall have a more general power to extend such time limits where justification is provided

The McInnes Committee had concerns in relation to the time taken to deal with appeals and recommended that a summary appeal court should be established to help relieve the High Court of some of the burden of dealing with appeals (see Chapter 31 of the McInnes Report). Currently, all appeals are dealt with by the High Court. The Committee’s proposals on this topic included recommendations that the new court:

• should be composed of experienced sheriffs appointed for a number of years as part-time members (thus also allowing them to continue with some of their normal duties)
• that the new court should deal with appeals against sentences imposed in summary cases and also with appeals against summary convictions where the High Court directs that the case is an appropriate one for the summary appeal court

The Policy Memorandum published with the Bill (para 152) states that the Scottish Executive considered the above proposals for a summary appeal court but that, following improvements in the handling of appeals and discussions with the judiciary, had decided to continue with the current position under which all criminal appeals are dealt with by the High Court. It states the Executive will review the position once the criminal courts are covered by a unified courts administration.11

Statistical information on criminal appeals, including the number of appeals and the time taken to deal with appeals, is set out in the Scottish Executive’s statistics release ‘Criminal Appeal Statistics, Scotland, 2004/05’ (2005b).

Solemn cases

Sections 26 to 29 of the Bill contain provisions which only apply to solemn procedure. This is, in part, to achieve consistency between summary and solemn procedures, following the proposals for change to summary cases contained in the Bill.

Recovery of documents

Section 31 of the Bill (inserting a new section 301A into the 1995 Act) gives sheriff courts the power to grant orders for the recovery/production of documents in criminal cases. These powers may be used in relation to all summary procedure cases, and also in relation to solemn procedure cases in the sheriff courts. The Scottish Executive envisages that it will be the

11 A separate SPICe briefing, looking at the provisions of the Bill dealing with JP Courts and JPs, deals with court unification.
accused/defence that will seek documents under these powers (the Crown having other methods at its disposal).

In relation to solemn procedure cases in the sheriff courts, an application to the court for use of the above powers can generally only be made after the indictment is served on the accused. It has been suggested that this restriction may unduly delay the defence in preparing its case and that it should be possible to apply at any time after the appearance of the accused on petition.

**Power to excuse procedural irregularities**

Section 32 of the Bill (inserting a new section 300A into the 1995 Act) gives courts the power to excuse ‘procedural irregularities’ which may occur during criminal cases. This power can be exercised in relation to both summary and solemn cases following an application by either the Crown or the accused (or a convicted person). The Policy Memorandum states that:

“There has been concern for some time about the fact that procedural errors in the handling of criminal cases can have disproportionate consequences for one or more of the parties in the case. It is considered that there is a need for a provision entitling the court to relieve any party to a criminal case from the consequences of failure to comply with rules of criminal procedure when this is in the interests of justice in the view of the court.” (para 186)

The Bill sets out some examples of what may amount to procedural irregularities (eg a failure to adjourn a case properly or to intimate a defence properly). It also sets out some restrictions in terms of what cannot be excused (eg a failure to properly apply rules in relation to the admissibility of evidence). In excusing a procedural irregularity, the court would be able to take action necessary to restore or continue the criminal proceedings affected by the irregularity as if it had not occurred.

The Scottish Executive has indicated that decisions of a court in relation to the excusal of procedural irregularities would be open to appeal under existing powers of appeal.

**SOURCES**


The Scottish Executive’s Minister for Justice introduced the Criminal Proceedings etc (Reform) (Scotland) Bill in the Parliament on 27 February 2006. The Parliament’s Justice 1 Committee has been designated as lead committee in relation to the Bill.

The Bill includes provisions:

- changing the system of bail and remand
- changing the law on criminal proceedings (mainly in relation to summary court procedure)
- increasing the sentencing powers of summary courts
- expanding the range of alternatives to prosecution
- changing the way in which fines can be collected and enforced
- establishing justice of the peace courts in place of district courts
- changing the way in which justices of the peace are appointed and trained
- placing the Inspectorate of Prosecution in Scotland on a statutory footing

This briefing considers unification of the administration of the summary criminal courts, as well as some of the key provisions on Justice of the Peace Courts (‘JP Courts’) and Justices of the Peace (‘JPs’) set out in Part 4 of the Bill. Separate SPICe briefings consider other aspects of the Bill.
KEY POINTS OF THIS BRIEFING

Summary criminal courts – current arrangements:

- the Sheriff Courts are administered by the Scottish Court Service (‘SCS’) and the district courts by local authorities
- the administration of justice in the sheriff courts is regulated by sheriffs principal. It is currently the statutory duty of local authorities to manage the district courts
- local authorities are required to provide legally qualified court clerks and suitable and sufficient premises and facilities for district courts

Summary criminal courts – Part 4 of the Bill provides for:

- the unification of the summary criminal courts, with all summary courts being administered by the SCS once unification is complete and local authority involvement in court administration ending
- the establishment of Justice of the Peace Courts (‘JP Courts’), eventually replacing the district courts
- Scottish Ministers to secure the adequate and efficient provision of all courts of summary criminal jurisdiction
- Scottish Ministers to assume responsibility for the appointment of legally qualified clerks for JP Courts, as employees of the SCS

Judges in the summary courts – current arrangements and recommendations for change:

- currently in Scotland, there is a mixture of professional judges (mainly sheriffs) who deal with more serious summary cases, and lay justices who deal with the remainder
- a majority of the McInnes Committee recommended a move to a wholly professional judiciary for criminal cases
- a note of dissent was lodged by two members of the McInnes Committee setting out their reasons for the retention of lay justice

Judges in the summary courts – Part 4 of the Bill provides for:

- a continuing role for lay justices in Scotland
- Scottish Ministers to assume responsibility for the appointment, training and appraisal of lay justices
INTRODUCTION

The Criminal Proceedings etc (Reform) (Scotland) Bill [as introduced] Session 2 (2006) (‘the Bill’), together with Explanatory Notes (and other accompanying documents) (all references in the briefing are to the ‘Explanatory Notes’), Policy Memorandum and Delegated Powers Memorandum, was introduced in the Parliament on 27 February 2006.

This briefing considers unification of the administration of the summary criminal courts, as well as some of the key provisions on Justice of the Peace Courts (‘JP Courts’) and Justices of the Peace (‘JPs’) set out in Part 4 of the Bill. Separate SPICe briefings consider other aspects of the Bill.

BACKGROUND

On 19 September 2001 the then Minister for Justice, Jim Wallace, announced a review of the summary justice system. The term summary justice refers to all criminal cases which are not heard by a jury. Such cases currently account for 96% of all criminal prosecutions in Scotland. Following the announcement, an independent committee was appointed to review the operation and efficiency of summary justice in Scotland. Announcing the membership and remit of the committee in a Scottish Executive press release on 30 November 2001, Mr Wallace said:

“We want to promote a criminal justice system which is prompt and efficient. The great majority of criminal cases are dealt with in the summary courts and it is vital that they work well. I am pleased that this review will be taken forward by a committee which can draw from a depth of expertise and wide range of interests involved in the provision of summary justice”.

The Summary Justice Review Committee (‘the McInnes Committee’) was established under the chairmanship of Sheriff Principal John McInnes. The Committee’s remit was:

“To review the provision of summary justice in Scotland, including the structures and procedures of the Sheriff Courts and District Courts as they relate to summary business and the inter-relation between the two levels of court, and to make recommendations for the more efficient and effective delivery of summary justice in Scotland”.

The McInnes Committee met formally on 23 occasions and published its report ‘The Summary Justice Review Committee: Report to Ministers’ (‘the McInnes Report’) on 16 March 2004. It made recommendations on a number of significant issues, including the structure of the summary justice system and the procedures to be followed in the summary courts. In order to involve all interested parties and to aid its own consideration of the issues contained in the report, the Scottish Executive held a consultation exercise based on the McInnes Report between March and July 2004. An independent analysis (MRUK Ltd 2005) of that consultation was published on 28 February 2005.
PROPOSALS FOR A UNIFIED SUMMARY COURT SYSTEM

One of the first issues the McInnes Committee addressed was that of the future structure of the summary court system. An early consultation addressed the issue of whether there should be a single summary court system. The Committee also sought views on whether, assuming the administration of the summary court system was unified, there should be a unitary or two-level summary court, and which judges – lay and professional or professional only – should deliver summary justice.

Current organisation and administration of summary justice in Scotland

Currently, the sheriff courts in Scotland are administered by the Scottish Court Service (‘SCS’) and the district courts by local authorities. The administration of justice in the sheriff courts is regulated by sheriffs principal in the exercise of their authority as set out in the Sheriff Courts (Scotland) Act 1971. Sheriffs principal have a statutory responsibility to secure the speedy and efficient disposal of business in the courts within their sheriffdom. They are responsible for matters such as:

- the programming of court business
- the allocation of business to individual sheriffs
- the general conduct of court business
- judicial leaves of absence

The recruitment of sheriffs is regulated by the Judicial Appointments Board and their training by the Judicial Studies Committee.

The present system of district courts was established by the District Courts (Scotland) Act 1975. This Act reorganised the previous system of justice of the peace courts and burgh courts in the light of the local government reorganisation following the Local Government (Scotland) Act 1973. Under the 1975 Act, the district courts were aligned with each of the reorganised local authorities. There are currently district courts in 30 of the 32 local authority areas in Scotland, the exceptions being Shetland and Orkney where all summary business is dealt with in the sheriff court.

In many local authority areas there is more than one district court, giving a total of 64 district courts throughout Scotland. Each district court has jurisdiction within a Commission area, which coincides with the associated local authority boundary. The district court bench in Scotland is normally staffed by lay JPs (the exception being legally qualified stipendiary magistrates in Glasgow), with one, two or three JPs presiding (the norm being one).

It is the statutory duty of local authorities to manage the district courts. Local authorities are obliged by statute to provide legally qualified court clerks, and suitable and sufficient premises and facilities for district courts. There is no statutory or administrative provision for any central control or organisation of these courts. Each local authority decides for itself what building and other facilities to provide and how to prioritise the provision and up-keep of such facilities. Funding from central to local government includes an element for the provision of a district court, but it is ultimately for local authorities to decide where to target their resources.

The clerks working in the lay district courts are legally qualified. It is the clerk’s duty to advise JPs on matters of law, practice and procedure. However, the clerk takes no part in decisions on conviction or sentence.
Views of the McInnes Committee on the organisation and administration of summary justice

It was noted by the McInnes Committee that local authorities have considerable latitude in interpreting the above statutory requirements and that there is no requirement for minimum training for JPs, nor any centrally prescribed training or competences.

The McInnes Committee felt that the result appeared to be wide geographical variation in the number of days training provided and funded per year. They also stated that the amount of time that clerks spend on criminal court work, as opposed to other council legal activities, is not consistent and consequently their quality and experience is variable. The Committee noted that central prescription of training was originally envisaged when the District Courts (Scotland) Act 1975 was framed, with section 14 providing that:

“[Scottish Ministers] may make schemes and provide courses for the instruction of justices of the peace, and it shall be the duty of the Justices’ Committee of a Commission area to implement and administer any such schemes in accordance with arrangements approved by [Scottish Ministers].”

However, the Report noted that no such schemes had been provided. The District Courts Association has taken steps to introduce a National Competence-Based Framework, and arranges regular training courses, but it has no power to require that all justices attend.

The McInnes Committee also considered the potential benefits of having a unified system with regard to investment in the court estates and noted that “a stated objective of the SCS is to provide courthouses of appropriate size and quality”. This means that the SCS takes all reasonable steps to ensure that all sheriff courts comply with statutory requirements (eg in relation to health and safety and disability access). It also noted that the terms of the Scottish Strategy for Victims are applied consistently across sheriff courts and where possible, arrangements are made for the segregated accommodation of prosecution and defence witnesses, and that particular provision is applied for vulnerable witnesses.

The McInnes Committee noted that a Victim Support Scotland Witness Service is now established in all sheriff courts, and that to replicate this service in the district courts (under the current structure) would require Victim Support Scotland to co-ordinate its witness service provision with 32 local authorities.

The McInnes Committee also felt that there was a need for a clear strategy to meet the physical requirements of the Disability Discrimination Act 1995 (DDA), and the equal need to deliver good quality interpretation facilities to meet the ECHR requirements of a fair trial. Whilst acknowledging that local authorities are addressing DDA requirements, the Committee recognised that the courts are only a small part of what they do. It noted that the SCS had undertaken a full independent review of its built estate and had begun a phased programme of work designed to address the physical requirements of Part III of the DDA. It also noted that in relation to court interpretation facilities, local authority practice is variable and concluded that it is easier for the SCS to address centrally the issue of monitoring and driving up standards of court interpretation.

The McInnes Committee also found that there were clear variations in terms of investment in the district court estate. Whilst some areas had provided new accommodation or refurbished old
premises, the standard in other areas was not so high and in a few places was poor. The Committee felt that, within the current management structure, it would be impossible to devise an overall strategy for the district court estate.

The McInnes Committee also considered the issue of IT investment and planning. It felt that the continuing development of links between IT networks in the criminal justice system would play an important part in improving the effectiveness of summary justice in the future. Whilst applauding the commitment of local authorities to the improvement of data flow in relation to district court business, the Committee felt that similar issues arose in relation to IT as in relation to estates and that the current fragmentation of the district court structure was not conducive to the development of a national IT strategy for the courts.

National Criminal Justice Board

The McInnes Committee’s report also highlighted that there was increasing awareness that there should be more focus within the criminal justice system on the effectiveness of the system as a whole in delivering ‘end-to-end justice’ – ie from the point at which a crime or offence is detected to the point at which the resulting case has been disposed. Background work carried out as part of a review undertaken in 2002 by the Crown Agent, Andrew Normand, revealed that there was widespread concern amongst staff in the core delivery agencies – the police, the Crown Office and Procurator Fiscal Service, and the SCS – about the failure of the system to operate effectively in this way:

“This research established a very clear recognition of the need for closer and more effective working relationships between the different criminal agencies and it disclosed an apparently genuine commitment to the idea that things should be different and better.” (Scottish Executive 2003a, para.6.20)

The above work also disclosed serious problems of inter-agency communication, knowledge and understanding and ‘organisational empathy’. In response, it recommended that:

“There should be a top level national board of senior officials and officers to oversee the operation and performance of the Criminal Justice system against the overarching aim, objectives and targets, to keep those under review, to ensure co-ordinated and consistent planning across the system and to be responsible for a national CJS plan.” (Scottish Executive 2003a, para.11.20)

In response, the first meeting of a National Criminal Justice Board was held on 1 December 2003, and local criminal justice boards have been established across Scotland. The McInnes Committee agreed that such a system-based approach is required and that it would be more likely to be effective if the system as a whole was as simple as possible. The Committee argued that a unified administration of the summary courts would provide “a single, clear line of judicial and management responsibility for the delivery of justice in 96% of the cases which come before the courts in Scotland” (McInnes Report, para. 5.35).

Recommendations of the McInnes Committee and responses to those recommendations

For all of the reasons discussed above, the McInnes Committee unanimously recommended the unification of the administration of the summary courts under the Scottish Court Service (‘SCS’):
The Committee concluded that unified administration would offer:

- planning for and investment in infrastructure, IT and training on a consistent basis across Scotland
- benefits to court users through administration by an organisation specialising in this distinctive area of service provision
- greater flexibility both in terms of case management and in terms of making optimal use of resources
- a system capable of greater consistency, transparency and accountability
- a system which is more responsive when change is required
- a more pro-active system of case management

Before reaching any decisions on the recommendations which the McInnes Committee put forward, the Scottish Executive held a period of open consultation to obtain the views of organisations with an involvement in the criminal justice system, as well as the public generally. Of the 137 respondents who offered a clear view on unification (57% of total responses), 69% agreed with the recommendations of the McInnes Report in this area. Relevant points highlighted in an independent analysis (MRUK Ltd 2005) of the consultation responses are outlined briefly below.

The analysis commented on the fact that many of the submissions in favour of unification did not provide detailed arguments for that view, but instead simply expressed support for the McInnes Committee’s arguments which were said to be clear and persuasive. On efficiency and effectiveness, many respondents agreed that unification would benefit the smooth operation of the court system if the same body handled all courts administration. The Scottish Police Federation, the Association of Chief Police Officers in Scotland, many JPs and Justice of the Peace Committees, believed that unification would result in greater efficiency and effectiveness in the delivery of summary justice and an enhanced service overall. The Glasgow Bar Association wholeheartedly agreed with the recommendation for unification and believed that it would lead to higher levels of training and result in better consistency of decision-making and more cost-effective use of information technology.

Those respondents in favour of unification did, however, offer a number of caveats. On the issue of staffing, many respondents (particularly local authorities) noted that careful consideration and discussion of the views of existing staff working in the district courts would be necessary and pointed out that no such canvassing of those opinions appeared to have been undertaken. It was felt that this would be important given that current district court staff have an intimate knowledge of the district court estate and administration, and that this would be invaluable in ensuring a smooth transfer to the SCS.

In addition, local authorities, JPs and Justice of the Peace Committees stated that they would have to be satisfied that all staff who were identified as carrying out district court work were transferred to the SCS with full protection of terms and conditions of employment, and that any arrangement for the continuing use of district court buildings would not be to the detriment of local authorities.

Organisations against the unification of the system included COSLA, some JPs and some Justice of the Peace groups, the Sheriff's Association and some local authorities. Most of the organisations against unification acknowledged that there was significant variation in the level and effectiveness of district courts across Scotland, but felt that a different means of achieving common standards should be sought. They argued that this would prove to be far less disruptive and would preserve the best practice that had been built up in some areas. Perhaps
more importantly, they felt that this approach would serve to strengthen the “community-based justice” concept.

Concern was raised by a number of respondents including COSLA, JPs and local authorities, that despite the McInnes Committee not finding “a system in crisis” and stating that “there were few voices demanding a revolutionary change”, that it had nonetheless recommended unification of the summary courts.

On the concept of community involvement, some JPs and COSLA were concerned about the potential loss of community participation in the justice system that might be caused by unification. COSLA commented that the administration of the district courts at a local government level was a better expression of community participation than administration from a centralised court system. They went on to say that of all the courts and tribunals in Scotland, the district courts are the closest to the people they serve. Although the Sheriff’s Association had no objections to unification in principle, it was concerned about the proposals as it was not aware of any complaints or difficulties that had been expressed with the service provided by local authorities and legally qualified clerks.

The loss of local courts and staff was a particular cause of concern for many respondents. North Lanarkshire’s Justices of the Peace Committee stated that the proposals of the McInnes Committee “should not be at the cost of rationalisation of experienced local authority legal and administrative staff”. This view was further expanded upon by East Lothian Council which stated that the estimates given by the SCS as to the number of new staff it would require were substantially lower than the number of staff, both administrative and legal, that were currently employed by the local authorities for this purpose.

A number of alternatives to unification were suggested by respondents including COSLA, local authorities and JPs. It was suggested that it would be better to address any inconsistencies in the administration of lay justice by introducing clear guidelines and good practice guides for district courts. It was felt that these would build on existing services and would encompass possible increased responsibilities that would alleviate the burden on sheriff courts. West Lothian Council thought that many of the criticisms of the district court contained in the McInnes Report could be overcome by the provision of specific, central funding to local authorities.

THE SCOTTISH EXECUTIVE’S RESPONSE IN RELATION TO COURT UNIFICATION

General

In *Smarter Justice, Safer Communities: Summary Justice Reform – Next Steps* (Scottish Executive 2005) the Scottish Executive stated that after taking into consideration the recommendations of the McInnes Committee and the views of those who had responded to the consultation, that it had decided to proceed with unification of summary courts administration. It was proposed that unification should be phased in across Scotland, on a sheriffdom by sheriffdom basis, as this would allow change to be effectively managed and lessons to be learned as the project rolled out, and appropriate local solutions to be developed as part of the unification project. The Executive has stated that unification will be based firmly on the principle of strengthening links between courts and communities, and that a new unified system will continue to see court business conducted in locations throughout Scotland, taking into account the needs of victims, witnesses and the communities themselves.
The Scottish Executive acknowledged that further work was required on issues such as costs, estates, staffing and IT to ensure that unification progresses smoothly. It stated that work would be taken forward with local authorities, district courts and other relevant partners to ensure that the needs of court users, staff and organisations involved in the change process are taken into account.

The responsibility for administering district courts (currently administered by local authorities) will transfer to the SCS on a phased basis as unification takes place in each sheriffdom. It is intended that unification will bring the entire summary judiciary (sheriffs and justices of the peace) within each sheriffdom under the responsibility of one individual – the sheriff principal. Section 48(1) of the Bill provides that:

“A sheriff principal has day-to-day responsibility for the efficient administration of any JP court located in that sheriff principal’s sheriffdom”.

The Policy Memorandum published with the Bill states that this will allow the sheriff principal to apply the available judicial resources flexibly to meet local need, and provide the opportunity for a more consistent approach to be taken to the management of summary business in each area. It is expected that unification of the first sheriffdom will not take place until the 2007/08 financial year. In November 2005, Scottish Ministers announced that, in principle, the first sheriffdom to be unified would be Lothian and Borders, to be followed by Grampian, Highland and Islands.

The Policy Memorandum also states that the Bill facilitates the creation of a unified summary court system with two tiers of jurisdiction – the sheriff summary court and a lower tier summary court to be known as the ‘justice of the peace court’ or ‘JP court’. This lower tier is currently referred to as the district court. As noted above, once unification is complete, all summary courts will be administered by the SCS. Thus the role of local authorities in court administration will come to an end. In effect, the Bill provides for the eventual abolition of the district courts and their replacement by JP courts.

**JP Courts**

Sections 46 to 53 of the Bill provide for the establishment of JP courts in Scotland. Section 46 places a duty upon the Scottish Ministers to “secure the adequate and efficient provision of courts of summary criminal jurisdiction”. The courts are to be established by reference to a particular sheriff court district and there is to be at least one JP court located in every sheriff court district except where, in relation to a district, the Scottish Ministers determine that a JP court is not necessary. Currently there are no district courts in the sheriff court districts of Lerwick, Orkney and Lochmaddy. It is not anticipated that any JP courts will be established in these districts. The Bill also makes provision for the Scottish Ministers to provide by order the relocation of a JP court and also the disestablishment of a JP court.

The territorial jurisdiction of the JP court, following unification, will be based on the sheriff court district in which the court is located. At present, offences dealt with by the district courts must be committed within the geographical jurisdiction of the local authority area in which the court sits. Sheriff court district and sheriffdom boundaries have traditionally been set to achieve compatibility with local authority boundaries where possible. After the last major re-organisation of boundaries in 1975, a primary effect of the re-organisation was, in most cases, to make local authority areas and sheriff court districts co-terminous. Sheriffdoms comprised areas described by reference to the appropriate local government areas. Subsequently, as a matter of policy,
sheriff court district boundaries followed local authority boundaries. However, following a review of the sheriff court district and sheriffdom boundaries in 1996, there remains an incongruity between certain sheriff court districts and local authority boundaries (mainly around Glasgow). This was mainly because alignment of the boundaries at that stage would have placed too much strain on neighbouring sheriff courts following from what would have been a consequent transfer of business from Glasgow Sheriff Court.

The McInness Committee felt that were clear system management attractions in aligning the local authority and sheriff court district boundaries, and in the alignment of COPFS and police areas accordingly. The Committee recommended that the opportunity presented by restructuring the summary court system should be used to ensure that sheriff court districts are, as far as is practicable, co-terminous with police and procurator fiscal operating areas and with local authority boundaries (McInnes Report, p 58).

Section 49 of the Bill provides that a JP court has territorial jurisdiction in respect of offences committed within:

(a) the sheriff court district in which it is located, and
(b) any other district in the same sheriffdom.

Sections 9 and 10 of the Criminal Procedure (Scotland) Act 1995 make further provision in relation to the territorial jurisdiction of the JP courts.

The Bill imposes a general duty on the Scottish Ministers to provide suitable and sufficient premises for the lower tier summary courts. To this end, the Bill enables the Scottish Ministers to take ownership of district court buildings where they consider this necessary for the purpose of administering the summary courts. Provisions within the Bill also entitle Ministers to lease or licence court accommodation from local authorities. Arrangements relating to court premises are to be developed as part of the phased unification process and will be carried out by local implementation teams.

At present, sections 6 to 8 of the Criminal Procedure (Scotland) Act 1995 set out the constitution and powers of district courts. Section 6(2) of the 1995 Act provides that a district court may be constituted by one or more JPs. Some district courts sit with benches of three JPs, in others only one JP presides. Section 6(2) of the 1995 Act is modified in the schedule to the Bill and, as modified, will allow the JP court to be constituted by one or more JPs. However, section 50(2) of the Bill enables Ministers to amend section 6(2) of the 1995 Act so that it provides that a JP court (when not constituted by a stipendiary magistrate) may be constituted by one JP only.

As is currently the case in the district courts, each JP court will have a clerk of the court who will be legally qualified. Following unification, Scottish Ministers will assume responsibility for the appointment of clerks who will be employees of the SCS.

With regard to the transitional arrangements for proceedings where a district court is disestablished, section 53 of the Bill makes clear that any proceedings which were instituted in the district court, but which have not been completed when it is disestablished, will continue in the appointed JP court as if instituted there. Cases will be heard and disposed of as if the appointed JP court always had jurisdiction over the proceedings.
LAY AND PROFESSIONAL JUDGES IN THE SUMMARY COURTS

Given its unanimous recommendation for a unified summary court system, the McInnes Committee then went on to consider the type of judges who should sit within such a system. They were keen to explore whether there should be a mix of lay and professional judges which would replicate the current system of professional sheriffs who deal with more serious summary cases and lay justices who deal with the remainder. Or, whether there was a case for Scotland to move towards a wholly professional judiciary.

This issue proved to be somewhat controversial and led to a minority of members on the McInnes Committee dissenting from the majority view that Scotland should now move to a wholly professional judicial system. The following paragraphs: (a) set out some of the factors which led the Committee to recommend the adoption of a wholly professional judicial system; (b) examine the Note of Dissent (McInnes Report 2004, Annex A) which was included in the Committee’s Report, setting out the views of two of the members who favoured the retention of lay justice; and (c) consider some of the responses to the recommendation of the Committee in this area. This is followed by consideration of the Executive’s response on this topic.

Recommendations of the McInnes Committee

The McInnes Committee were made aware of strong and conflicting views on this issue. The Committee’s initial consultation, which was carried out in 2002, attracted responses mainly from those who worked within the criminal justice system. Although 62% of responses were in favour of retaining lay justice, this reflected practically unanimous support for retention amongst JPs and JP organisations. (Out of 125 responses to the initial consultation, 38 were from JP Commission areas and 24 were from individual JPs.) Professional legal organisations were typically in favour of a fully professional judiciary.

In order to follow up on the consultation and to obtain wider views on the issue, the McInnes Committee commissioned a survey of Scottish public attitudes to aspects of the summary justice system. The ‘Summary Justice Review: Public Views on Key Issues’ was published in 2003 (Scottish Executive 2003b).

The majority of the McInnes Committee were of the view that the results of the survey showed that members of the public held the same range of views on lay versus professional justice as those who were more directly involved in the criminal justice system. The survey showed that relatively few of those questioned had had any recent contact with the summary justice system which led the majority of the Committee to conclude that:

“it is not surprising that the researchers noted limited understanding of the differences between lay and professional justice, and considerable willingness to admit limited knowledge.” (McInnes Report, para 7.6).

The McInnes Committee concluded that responses from the public had, in some areas, presented a somewhat confusing picture on the attributes of lay and professional judges. For example, when asked whether there should be a continuing role for lay justice in the future, 60% of the sample favoured the continuation of lay justice, with 24% preferring a wholly professional summary system. However, when asked which type of judge they would rather face on the bench, 50% of those questioned said that they would prefer to face a professional judge with only 15% favouring a lay justice. Given these responses, the McInnes Committee concluded that the issue of lay versus professional justice was not one which could be resolved in the...
abstract and set about deriving its recommendation from an analysis of the recent history and current context of summary justice in Scotland.

Two of the key issues which the McInnes Committee considered in this area were: (a) the declining number of cases which are dealt with in the district courts; and (b) the issue of community participation and the value of the link allegedly provided by lay justices between the criminal justice system and the local community in which the district is situated. These issues are explored below.

The McInnes Committee pointed out that there had been notable changes in the number of cases calling in the district courts in the period 1992-2002. In 1992, 85,000 accused were proceeded against in the district courts compared with an estimated 37,000 in 2002. The Committee stated that this was largely due to the expansion of alternatives to prosecution, for example, the growth of fiscal fines, and the marking of cases by the procurator fiscal. Between 1992 and 2000 the number of persons called to the sheriff summary courts fell by over 15%, before increasing by 11% to an estimated 90,400 in 2002. A breakdown of the caseload dealt with by persons proceeded against each of the courts in recent years is provided in the table below.

### Persons proceeded against in court, 1992-2002

<table>
<thead>
<tr>
<th>Year</th>
<th>All Courts</th>
<th>Solemn Courts</th>
<th>Summary Courts</th>
<th>District: Stipendiary Magistrate</th>
<th>District: Lay Justice</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>Sheriff Summary</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1992</td>
<td>198,038</td>
<td>5,183</td>
<td>96,344</td>
<td>11,732</td>
<td>84,705</td>
<td>192,781</td>
</tr>
<tr>
<td>1993</td>
<td>183,674</td>
<td>5,250</td>
<td>92,742</td>
<td>10,472</td>
<td>74,920</td>
<td>178,134</td>
</tr>
<tr>
<td>1994</td>
<td>178,067</td>
<td>5,341</td>
<td>93,466</td>
<td>10,893</td>
<td>68,183</td>
<td>172,542</td>
</tr>
<tr>
<td>1995</td>
<td>176,423</td>
<td>4,936</td>
<td>94,758</td>
<td>10,649</td>
<td>66,039</td>
<td>171,446</td>
</tr>
<tr>
<td>1996</td>
<td>174,844</td>
<td>5,393</td>
<td>96,955</td>
<td>9,973</td>
<td>62,485</td>
<td>169,413</td>
</tr>
<tr>
<td>1997</td>
<td>171,932</td>
<td>5,126</td>
<td>95,097</td>
<td>9,943</td>
<td>61,648</td>
<td>166,688</td>
</tr>
<tr>
<td>1998</td>
<td>158,815</td>
<td>5,003</td>
<td>88,741</td>
<td>7,794</td>
<td>57,182</td>
<td>153,717</td>
</tr>
<tr>
<td>1999</td>
<td>146,474</td>
<td>5,407</td>
<td>85,216</td>
<td>6,689</td>
<td>49,020</td>
<td>140,925</td>
</tr>
<tr>
<td>2000</td>
<td>136,772</td>
<td>5,160</td>
<td>81,517</td>
<td>5,081</td>
<td>44,899</td>
<td>131,497</td>
</tr>
<tr>
<td>2001</td>
<td>139,345</td>
<td>5,151</td>
<td>87,438</td>
<td>5,644</td>
<td>41,075</td>
<td>134,157</td>
</tr>
<tr>
<td>2002</td>
<td>138,900</td>
<td>5,300</td>
<td>90,400</td>
<td>6,200</td>
<td>37,000</td>
<td>133,600</td>
</tr>
</tbody>
</table>

Note: (a) the 2002 figures are estimates; (b) the ‘All Courts’ figures include a small number of cases where the court type was not known.

Source: McInnes Report, para 4.28

The majority of the McInnes Committee concluded that there were a number of reasons for the decline in the number of cases being dealt with by the district courts, including the fact that total recorded crime in 2002 was 25% less than the total recorded in 1991. They stated that the other key reason for decline was the introduction of a wider range of alternatives to prosecution for police and the procurator fiscal. Another possible reason advanced in evidence to the McInnes Committee was a lack of confidence in the district court among procurators fiscal, resulting in many relatively minor cases being prosecuted in the sheriff court instead. (It should be noted that no specific details on which procurator fisicals had expressed this view were included in the McInnes Report.)

The McInnes Committee also noted that, between 2001 and 2002, while recorded crime went up by only 1%, non-sexual crimes of violence and crimes of indecency both rose by 9%, further noting that within the latter category, rape and attempted rape rose by 21%. The McInnes Committee acknowledged that there may be room for debate as to what proportion of the increase was attributable to increased criminality and what proportion to greater willingness to
report the certain crimes to the police. They were, however, convinced that there could be no
debate about the impact of these changes on the solemn courts. They concluded that it was,
therefore:

“not surprising that one of the recent trends in public policy has been the need
to move criminal casework downwards throughout the system in order to relieve
increasing pressure on the solemn courts”. (McInnes Report, para 7.24)

The McInnes Committee concluded that in order to accommodate the potential increase in
sheriff solemn business, it would be necessary to increase the sentencing powers of sheriffs
when sitting summarily to allow them to deal with those less serious cases heard under solemn
procedure, and that continuing with this process would result in an increase in the jurisdiction of
whoever heard cases below the level of the sheriff summary court. The conclusion of the
substantial majority of the Committee was that:

“If lay justice were to be retained, the lay courts would have to have much
greater sentencing powers if they were to take on a considerable proportion of
the summary caseload and that lay justices would have to be prepared to use
those powers. Otherwise the Crown would continue to choose to prosecute
most summary cases before professional judges. Most of the Committee are
not convinced that the increased sentencing powers which would be required
are appropriate for lay justices”. (McInnes Report, para 7.72)

The McInnes Committee also examined the value of the link, allegedly provided by lay justice,
between the criminal justice system and the local community in which a district court is situated.
The Committee argued that the available statistics did not necessarily demonstrate a particularly
close match between those who are appointed as JPs and the general profile of the Scottish
population. The available data on JPs shows that there are just over 3,800 in Scotland and that:

- around 700 justices regularly sit on the bench
- just under 1,100 (29%) of all justices are female
- 8% of all justices are aged 40-49
- 25% of all justices are aged 50-59
- 27% of all justices are aged 60-69
- 39% of all justices are aged 70 or over

The McInnes Committee noted that information on the social status and ethnic origins of justices
was not collected, and also that they had been told by JPs in both Scotland and England about
difficulties in recruiting and retaining younger justices who are in employment. A majority of the
Committee felt that it would be possible, over time, to achieve a ‘closer match’ with the Scottish
population but were not convinced that the effort and cost which would be required in this
exercise would be the best way of improving community involvement in the justice system. The
majority of the Committee felt that local criminal justice boards chaired by the sheriffs principal
would be one possible model through which wider community involvement in the system could
be achieved. Local criminal justice boards could be supported by local consultative forums
which could:

“feed in views on blockages and delays to the system and could also be a good
opportunity for professionals and lay people to meet face to face and explore
their understandings (and misunderstandings) of how the system works”.
(McInnes Report, para 7.62)
For the substantial majority on the McInnes Committee, these and other factors led them to recommend that Scotland should move to a wholly professional justice system. The majority of the Committee recognised that, in the context of their review of the summary justice system, there was a need to relieve pressure on the solemn courts and that this implied a movement of cases from the High Court to the sheriff and jury court, and in turn a movement of cases from solemn to summary procedure. If those wider changes were to take place, this would increase the number of more serious offences which the summary courts should deal with.

The majority of the McInnes Committee also concluded that extra judicial capacity would be required and stated that there were good arguments for a new class of judge with a criminal jurisdiction which extended only to summary business:

“An entry level judicial post which could handle the more routine business would free up sheriffs to deal with the more serious cases including, in particular, summary cases which would previously have been handled in the solemn courts and those solemn cases which would previously have been prosecuted in the High Court”. (McInnes Report, para 7.79)

The majority gave some consideration to the name for this new class of judge and felt that ‘summary sheriff’ was an accurate description of the job as envisaged.

**McInnes Committee - note of dissent**

Two members of the McInnes Committee, Sheriff Brian Lockhart and Helen Murray JP, disagreed with the majority of the Committee on this issue and lodged a Note of Dissent setting out their reasons for the retention of lay justice. With regard to community participation, they stated that “lay justice is a powerful expression of community participation in the regulation of society” and argued that it seemed inconsistent to retain a lay element in the most serious cases, whereby untrained juries make key decisions based on evidence, but to remove the lay element in the context of summary justice. They also stated that arguments based on the fact that lay justice is not found in most other parts of the world (it is used in England and Wales), ignore the point that lay involvement “depends on the cultural and political tradition of a country”, and that as the role of lay justice in Scotland has evolved over a period of 400 years it is capable of further evolution.

They also highlighted a number of arguments in favour of retaining lay justice including:

- the importance of community links and community awareness which JPs enjoy
- the proposition that the lay bench represents the community it serves
- the capacity of non-professionals to reach a balanced judgement on their peers
- the fact that justices are volunteers who are less vulnerable to ‘case-hardening’

On the composition of lay judiciary, they acknowledged that:

“in the past the process of identifying candidates to become a JP had in some cases tended to produce a bench much in the image of the one which preceded it, rather than improving the representative nature of the bench with each succeeding generation of JPs”. (McInnes Report, Annex A para 13)
However, it was pointed out that improvements had been made in some areas in the past 20 years, moving towards a more open system of recruitment where nominations come from the local community followed by a structured and robust selection process.

The Note of Dissent also commented on the capacity of lay justices to perform their judicial role. It saw no reason why lay justices could not properly fulfil the judicial role. Lay justices must understand the legal framework within which the court operates. It was argued that this knowledge could be gained through appropriate training. In relation to points of law and rules of evidence, it was noted that JPs have the advice of legally qualified clerks.

It was stated that the key qualities required of a judge included “the ability to follow a reasoned argument, think logically, act with confidence and fairness and make decisions”. The Note of Dissent argued that the possession of these qualities depended on personal characteristics and experience of life, and that individuals from a wide range of backgrounds have many, and sometimes all, of these qualities and could therefore become good judges.

The Note of Dissent also acknowledged that the main body of the McInnes Report had recognised the need to move criminal case work downwards through the system to relieve increasing pressure on the solemn courts. It was suggested in the Note that:

“the existence of a lay court running parallel to the sheriff court would allow less serious cases to be dealt with expeditiously rather than competing for priority, as in the present overstretched sheriff court”. (McInnes Report, Annex A para 26)

Whilst recognising that every case is important, it was argued that it was wrong for those involved in a case to wait for justice simply because their case was not seen as a priority. The Note of Dissent argued that the district court is a major resource which could potentially absorb more business and relieve pressure on the sheriff courts.

The Note of Dissent concludes by stating that the future of lay justice in Scotland should be made on the grounds of principle rather than expediency, tidiness or personal preference. It goes on to state that with their capacity to deal appropriately with cases on different levels of seriousness there is a separate role for both sheriffs and lay justices.

**Responses to the recommendations of the McInnes Committee**

The following paragraphs provide a brief summary of relevant responses received in relation to the Scottish Executive’s consultation on the McInnes Report. Of the 219 responses which commented on the role of judges in the summary courts, 200 responses (91% of those commenting on this recommendation) supported the Note of Dissent. The most noticeable support for the Note of Dissent was from JP Committees and individual JPs. Only 20 respondents (just over 9% of those commenting on this recommendation) were in favour of the abolition of lay justice. Respondents in this latter group included the Law Society of Scotland, the Glasgow Bar Association and ACPOS.

Many respondents on this issue simply agreed with the Note of Dissent. However, more detailed arguments for the retention of lay justice were also received, with many respondents arguing for retention by pointing to the historical tradition of lay justice in Scotland. It was also argued that the McInnes Report did not provide sufficient and reliable evidence that the present system was not working. The majority of JPs, the Justices’ Committees for Skye & Lochalsh, Western Isles
and West Dunbartonshire, and also the District Courts Association argued that if lay justice were to be abolished it would be important for it to be replaced by a system providing a clear improvement. Other respondents argued that the general public were likely to be confused by two types of professional sheriff, and were concerned that an inability to distinguish between the two could reduce the credibility of the role of sheriff.

Several respondents were fearful of the prospect of courts being closed in rural areas, where the system was perceived to have closer links to communities than those in large urban districts, and that this could undermine the confidence of the public. Some local authority submissions noted the historic commitment to local democracy in the office of JP, and argued that offenders being dealt with locally by their fellow citizens is an integral part of the justice process. COSLA made the following point regarding the community argument:

“Lay justice is a powerful expression of community participation in the regulation of society and we believe that local JPs, supported by Councils, are likely to enjoy the confidence of the community which they serve. We do not believe this level of confidence would be retained under a different regime, and we cannot see how an appropriate level of community participation would continue within a different summary justice system should lay justice be abolished”. (MRUK Ltd 2005, para. 4.7)

Many responses from JPs and Justice of the Peace Committees, commenting on the prospect of a wholly professional summary judiciary, found it insulting to suggest that it takes a professional or legal mind to establish whether a complaint is proved. Also, the District Courts Association agreed wholeheartedly with the Note of Dissent and argued that there was clear distinction between sitting in judgement and having knowledge of the law. It stated that:

“It is simply not correct to say that only lawyers, by virtue of their legal training, are fit to fill this role. Little in legal training is directed at acquiring the qualities of a judge. It is also worth noting that juries, with no prior training or knowledge of the law, are expected to grasp and decide facts in complex solemn cases”. (MRUK Ltd 2005, para. 4.37)

A minority of respondents were persuaded by the majority view in the McInnes Report and agreed that lay justice should be abolished. The Society of Local Authority Chief Executives and Senior Managers (SOLACE) felt that lay justices are an “anachronism in this day and age”, and pointed out that most jurisdictions in the Commonwealth, North America and Europe do not have lay judges. The Scottish Law Agents’ Society was also in favour of abolition and argued that, if Scotland is moving to a unified summary court system, then the case for moving at the same time to professional judges throughout the system is unquestionable. Amongst those who were in favour of abolition there was a belief that, with unification taking place, there would be a reduction of the number of cases coming to court so there would be no place left for what was seen by some as “an inconsistent, inefficient and confusing system of lay justice”.

THE SCOTTISH EXECUTIVE’S RESPONSE IN RELATION TO LAY AND PROFESSIONAL JUDGES IN THE SUMMARY COURTS

In Smarter Justice, Safer Communities: Summary Justice Reform – Next Steps (Scottish Executive 2005) the Scottish Executive stated that it had taken very seriously all of the arguments which had been expressed on the future of lay justice in Scotland. It was stated that, as lay justices are a powerful expression of the partnership between professionals and
communities, the decision had been taken to retain the role of lay justices as an important element of the Executive’s community engagement strategy. The Executive concluded that:

- there continues to be a place for lay justice in Scotland
- while there may be scope to develop further roles for lay justices, there is a continuing role for them in dealing with trial business
- there is a need to invest in the recruitment, training and appraisal of lay justices, and to review the way in which they are appointed, so as to enable them to meet the challenges set out in the ‘Criminal Justice Plan’ (Scottish Executive 2004)

Sections 54 to 64 of the Bill set out the provisions for the appointment, training and appraisal of JPs.

Section 54 of the Bill sets out the arrangements for the appointment of JPs. Currently each local authority has a Justice of the Peace Advisory Committee (‘JPAC’), chaired by the Lord Lieutenant, whose main task is to select and put forward to the Scottish Ministers candidates for appointment as lay justices. The Committees are non-statutory. At present, different JPACs use different methods in order to recruit lay justices. Some JPACs use open recruitment processes and advertise JP vacancies to the public, while others rely primarily on nominations from JPAC members.

The Policy Memorandum states that the intention behind the changes to the recruitment process is that recruitment should be carried out in a transparent and fair manner in all parts of the country, ensuring that all those who may be interested in becoming JPs are aware of the opportunities and the process of application. In order to achieve this aim, orders will set out how justice of the peace advisory committees (‘JPACs’) will be established, and how the new JPACs will work with the Judicial Appointments Board (‘JAB’) to ensure that lay justice appointments are transparent and fair. It is intended that JPACs will agree protocols with the JAB setting out how they will recruit JPs in their area. The Policy Memorandum states that protocols are likely to set out requirements for recruitment processes and that these may relate to public advertisement and a structured interview process amongst other things. It is likely that an assessor from the JAB will attend each part of the JPACs recruitment process, and will submit a report on the process to the JAB. However, final decisions on who will be appointed as a JP will be taken by the locally constituted JPACs in each sheriffdom chaired by the sheriff principal.

The Bill also makes significant changes to the terms of appointment for JPs. Currently, JPs are appointed until the age of 70 at which point they join the supplemental list and become signing justices. They are appointed to a commission area which is their local authority area. The intention of the Bill is that, in future, JPs will be appointed a sheriffdom-wide area for a period of five years. At the end of each five-year term JPs will be eligible for reappointment until they reach the age of 70. The Policy Memorandum states that the intention behind the five-year appointment period is that it will provide an obvious and appropriate ‘break point’ at which JPs can leave office if they decide that they are no longer willing or able to continue to perform their duties. The system also provides a mechanism by which a sheriff principle can, in extreme cases, recommend against the reappointment of a JP.

The Bill also provides that a JPs can be removed during their five-year term of appointment. Again, it is stated that this should be in extreme circumstances. At the request of the local sheriff principal, a tribunal can be established to investigate whether a JP is unfit for office on the grounds of inability, neglect of duty, misbehaviour, inadequately performing the functions of a JP, or a failure to meet the conditions of appointment. The tribunal would be appointed by the Lord President and would consist of: (a) a sheriff principal; (b) a person who is and has been for
at least ten years a solicitor or advocate; and (c) another person. The Bill does not specify who
the other person should be. The sheriff principal who chairs a tribunal will come from outside the
JPs sheriffdom.

Once appointed, it is intended that changes to training and appraisal will serve to ensure that
JPs are given the opportunity to maintain the required level of performance.

As mentioned above, steps have been taken by the District Courts Association to improve the
quality and consistency of JP training. This has included the publishing of materials which allow
competence-based training to be undertaken. The Scottish Executive intend to build on these
steps by investing in training, in order to ensure that all lay justices are provided with a
consistent and high standard of training. The exact structure by which training will be delivered
has not been specified and will be the subject of discussion with stakeholders.

Section 56 of the Bill allows the Scottish Ministers to make provisions in relation to both the
training and appraisal of JPs. Currently, the Criminal Procedure (Scotland) Act 1995 allows
Ministers to make schemes and provide courses for the instruction of JPs, but does not confer
any powers in relation to appraisal. The Scottish Executive envisages that the training and
appraisal of JPs will come under the oversight of the Lord President (section 56(2) and (4)). The
Executive has stated that it is likely that all new JPs will undergo a mandatory induction scheme
and that the content of this scheme will be drawn up or approved by the Judicial Studies
Committee – a non-statutory body which organises training courses for the Scottish judiciary.
The scheme would then be issued or approved by the Lord President. The Executive envisages
that all existing JPs will be required to undertake a minimum amount of ongoing training each
year, including refresher training within two years of taking up their new five year appointments.

With regard to the appraisal of JPs, the Scottish Executive envisages that JPs will be appraised
against a competence framework which would be drawn up by the Judicial Studies Committee.
Again, this competence framework would be approved by the Lord President. Section 56(3) of
the Bill allows the order in relation to training and appraisal to include the power to establish
committees. These committees will have the power to devise or adopt appropriate training and
appraisal courses and systems; to ensure that these courses or systems are delivered or used;
and to provide advice about training and appraisal. The Executive has stated that the
composition of the committees and their functions will be set out in more detail in the draft order.

**SOURCES**

MRUK Ltd. (2005a) *Report of the Summary Justice Review Committee: Summary of Responses
to the Written Consultation*. Edinburgh: Scottish Executive. Available at:
http://www.scotland.gov.uk/library5/justice/sjcscr-00.asp

[Accessed 13 April 2006]

Scottish Executive. (2003a) *Criminal Justice System Objectives Review: Proposals for the
Integration of Aims, Objectives and Targets in the Criminal Justice System*. Edinburgh: Scottish
Executive. Available at: http://www.scotland.gov.uk/library5/justice/cjsobjectrev-00.asp

Scottish Executive. Available at: http://www.scotland.gov.uk/Topics/Justice/19008/16732

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1. The Committee considered the Police Act 1997 (Criminal Records) (Scotland) Regulations 2006 and Police Act 1997 (Criminal Records) (Registration) (Scotland) Regulations 2006 at its last meeting on 29 March.

2. These two instruments are attached, as is the *Official Report* for this meeting (hard copy only).

3. The Convener considers that there are some outstanding issues relating to both instruments which merit further consideration. As such, officials from the Scottish Executive have been asked to attend in order that these matters can be clarified.

Dougie Wands  
Senior Assistant Clerk