JUSTICE 2 COMMITTEE

AGENDA

30th Meeting, 2006 (Session 2)

Tuesday 14 November 2006

The Committee will meet at 2.00 pm in Committee Room 6.

1. **Declaration of interests:** Michael Matheson MSP will be invited to declare any relevant interests.

2. **Decisions to take business in private:** The Committee will consider whether to take items 4 and 5 in private. The Committee will also consider whether to reflect on the main themes arising from evidence received in relation to the Custodial Sentences and Weapons (Scotland) Bill in private at subsequent meetings.

3. **Custodial Sentences and Weapons (Scotland) Bill:** The Committee will take evidence from—

   David McKenna, Chief Executive, and Neil Paterson, Director of Operations, Victim Support Scotland; and

   Susan Matheson and Donald Dickie, Scottish Consortium on Crime and Criminal Justice;

   and then from—

   Cyrus Tata, Co-Director, Centre for Sentencing Research, The Law School, University of Strathclyde;

   Richard Sparks, Professor of Criminology, Law School, University of Edinburgh; and

   Bill Whyte, Director, Criminal Justice Social Work Development Centre.

4. **Custodial Sentences and Weapons (Scotland) Bill – consideration of written evidence:** The Committee will consider the written evidence received.

5. **Custodial Sentences and Weapons (Scotland) Bill:** The Committee will consider the main themes arising from the evidence session, to inform the drafting of its Stage 1 report.

Tracey Hawe/Alison Walker
Clerks to the Committee
Papers for the meeting—

Agenda Item 3

Members are reminded to bring with them copies of the Bill, the Explanatory Notes and the Policy Memorandum, available from Document Supply or on the Parliament’s website: http://www.scottish.parliament.uk/business/bills/80-custsentwea/index.htm

Written submissions J2/S2/06/30/1
Lines of questioning (PRIVATE PAPER) J2/S2/06/30/2

Agenda Item 4

All written submissions (to be circulated in hard copy) J2/S2/06/20/3
Summary of written submissions by adviser (PRIVATE PAPER) (to follow) J2/S2/06/20/4

Documents circulated for information only—

Letter from Minister for Justice to Justice 2 Committee Convener on disclosure review, dated 3 November 2006

Correspondence from Peter Cherbi on the Legal Profession and Legal Aid (Scotland) Bill

Correspondence from H M Dalzell, dated 6 November 2006 (including article from Daily Telegraph: http://www.telegraph.co.uk/education/main.jhtml?xml=/education/2006/11/04/eknife04.xml)

Paper on the prisoner escort and court custody services contract by Sheila Bird

Forthcoming meetings—

- Tuesday 21 November 2006, 2pm, Committee Room 4
- Tuesday 28 November 2006, 2pm, Committee Room 2
Custodial Sentences and Weapons (Scotland) Bill: written submissions from witnesses

Please find attached written submissions to the Justice 2 Committee on the Custodial Sentences and Weapons (Scotland) Bill from:
- Victim Support Scotland
- Cyrus Tata

Clerk to the Justice 2 Committee
9 November 2006
J2/FP 2:2006, RESPONSE TO THE JUSTICE 2 COMMITTEE REGARDING THE CUSTODIAL SENTENCES AND WEAPONS (SCOTLAND) BILL

1. Introduction
Victim Support Scotland is the largest agency providing support and information services to victims of crime in Scotland. Established in 1985 the organisation currently employs around 180 staff and 1000 volunteers. In 2005-2006 our community based victim services and court based witness services supported 170 000 people affected by crime. Through our contact with victims and witnesses, we have identified a need to demystify the criminal justice process to the general public and to make sentencing more transparent. These are two of Victim Support Scotland's policy objectives and reflect the views we will be taking regarding the new bill.

2. Crime in Scotland
Victim Support Scotland is aware that crime in Scotland today is falling. Cathy Jamieson stated last week that violent crime is at its lowest level since devolution and that last year there were 20,000 fewer crimes recorded by the police. However, Scotland still has a problem with reoffending. Figures show that 45% of offenders discharged from prison or given a non-custodial sentence in 2002-2003 were reconvicted within two years. This must be addressed; Victim Support Scotland therefore welcomes new legislative initiatives and willingly accepts the opportunity to provide a response regarding the Custodial Sentences and Weapons (Scotland) Bill.

3. The Custodial Sentences and Weapons (Scotland) Bill
The Custodial Sentences and Weapons (Scotland) Bill contains provisions within two broad policy areas: provisions on custodial sentences and provisions relating to knives and swords. We have divided our response according to the two policy areas.
3.1 Custodial sentences

3.1.1 Time spent in custody
According to the new bill, sentences of 15 days or more will have a minimum of 50% spent in custody. Courts will have the power to increase the time spent in custody to a maximum of 75% of the sentence by considering the seriousness of the offence, previous convictions and the timing and nature of a guilty plea. The court will however not be able to take into account the risk the person may present to the public when determining the length of the custody part, since this will be assessed during the custody part and, if necessary, will be decided by the Parole Board. Victim Support Scotland does not see the Parole Board's assessment as an obstacle to the court's review and would like the protection of the public, including the views and opinions of the victim, to be taken into account by both the court and the Parole Board. The criminal justice system serves to reflect the wishes and needs of the public, and should fulfil the society's expectations of punishment and deterrence. For the court to take the protection of the public into account when determining the time spent in custody would seem to be in the public's interest. It may also increase people's view that "justice" has been done, which increases the public's faith and trust in the criminal justice system.

3.1.2 Release on licence
Before the expiry of the custody part of the sentence, the bill proclaims that a review should be made if the person would, if released on licence, "be likely to cause serious harm to members of the public". Victim Support Scotland supports the consideration of public safety, which includes the victim(s) and witnesses. A proper assessment of the offender's individual circumstances significantly improves today's practice of automatic and sometimes unconditional release.

If a person is seen to not cause a threat to members of the public, the person must be released on community licence. The licence may include certain conditions. If the prisoner breaches a licence condition, if Scottish Ministers think it is likely that a person will breach the licence or if it is in the public interest, the Scottish Ministers must revoke the licence. Victim Support Scotland supports the use of license conditions. We would however like to stress that for these conditions to be effective and fully respected, they have to be communicated appropriately to both the accused and the victim(s). Both parties should also be informed of the consequences if the offender breaches any of the conditions in the licence. Regarding revocation of licences, Victim Support Scotland supports the possibility for Scottish Ministers to take account of the public interest, including safety of the public at large. We are also positive to the mandatory wording, that the licence must be revoked, which will hopefully lead to consistency and predictability in the practice.

The community licence is in force until the sentence expires (for custody-only and custody-and-community prisoners) or for the remainder of the prisoner's life (life prisoners). Victim Support Scotland agrees with this practice, which will hopefully increase the public's faith in the justice system, as offenders will be seen to serve the entire court imposed sentence and not just the custody part of it.
3.1.3 Victim Notification Scheme
This need for victim(s) to receive information regarding community licence and attached licence conditions is not appropriately reflected in current legislation. Victim Notification Scheme is a statutory scheme, which gives eligible victims the right to receive certain information regarding the offender, for instance date of release. To be eligible to receive this information, the offender has to be sentences to a period of imprisonment of four years or more. This is a high threshold, which disqualifies many victims from receiving any information regarding the offender. According to Criminal Justice (Scotland) Act 2003, section 16, subsection (4)(a), Scottish Ministers may amend the specified time period. Due to an increased need for information attached to community licences and their conditions, Victim Support Scotland wish the Ministers would take this opportunity to specify a shorter time period, to allow more victims to be eligible to receive information.

3.1.4 Parole Board
If the person is seen to cause a threat, the person will be referred to the Parole board for further review. However, the Parole Board will not be able to prolong the period spent in custody beyond the period imposed by the court. Victim Support Scotland supports the practice of referring prisoners to the Parole Board, since it takes the concerns of the public, including victim(s) and witnesses, into account. The Parole Board is already operating (considering parole for prisoners serving a sentence of four years or more) and we commend the extension of the Parole Board’s functions, which will hopefully make parole releases more tailored to the individual prisoner.

3.1.5 Additional resources
The new provisions appear likely to have Implications for the workload of agencies such as Criminal Justice, Social Work, and the Parole Board. It will be important, therefore, that appropriate resources are made available to those agencies charged with the implementation of this legislation.

3.2 Weapons

3.2.1 Knives
The bill introduces a mandatory licensing scheme for the commercial sale of swords and non-domestically knives, to be known as a knife dealer’s licence, with local authorities being the licensing authorities. The knife dealer’s licence is required for people who carries out business as a dealer in knives and other specified articles, and is hence not needed for private sales between individuals. Many people that Victim Support Scotland comes in contact with have been victimised by knife violence. Even if the knife is not intended to be used, it may be carried for protection, intimidation etc. If a threatening situation arises, the knife is sometimes brought out, which increases the gravity of the situation and may lead to violence and injuries that had not taken place without the knife. The number of people jailed for carrying a knife has risen 20 per cent in the last five years. Victim Support Scotland therefore strongly supports the proposed regulation, as the need for a knife dealer’s licence will hopefully decrease the number of knifes in the general public’s hands.
3.2.2 Swords
The new bill proposes that the sale of swords will be banned, subject to exceptions for
specified religious, cultural or sporting purposes. By decreasing the number of swords in the
general public's hands Victim Support Scotland hope that this regulation, along with the
introduction of a knife dealer's licence, will decrease the general violence using these tools and
make Scotland's communities safer.

3.3 Conclusion
The provisions regarding custodial sentences strive to end automatic and unconditional early
release of offenders and to achieve greater clarity in sentencing. The new management regime
aim to provide a clearer system for managing offenders while in custody and on licence in the
community, to take account of public safety by targeting risks and to have victim's interests at
heart. The goal is to enhance public protection, reduce re-offending rates and increase public
confidence in the justice system by fulfilling society's expectations for punishment and
deterrence. The objective of the provisions regarding restricting the sale of non-domestic
knives and swords is to tackle knife crimes and violence in general by helping to prevent that
these potentially dangerous weapons fall into the wrong hands, which will lead to safer
communities. Victim Support Scotland is positive to the proposed regulations, which we hope
will fulfill their stated goals. The great number of knife crimes shows there is a great need to
reduce the number of knives in the general public's hands. Regarding the custodial sentences,
we hope that the new regulations will help the courts take greater consideration of the views
and needs of victim(s) and witnesses in their choice of sentence. We would like to stress that
regarding the new community licence regulations, both the offender and victim need to get
extensive information of the sentence, the reasons behind it and licence conditions for the new
regulations to be fully applied and appreciated by all parties.

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SUBMISSION FROM CYRUS TATA ON CUSTODIAL SENTENCES AND WEAPONS (SCOTLAND) BILL

I am grateful for the invitation to submit written and oral evidence on the Bill. I will restrict my submission to Parts 1 and 2 of the Bill (ie sentencing and sentence management arrangements).

Overall Aims of the Bill

Background documentation\(^1\) appears to suggest that the two most important aims:

- To provide for a more transparent sentencing regime which will improve public confidence in the criminal justice system
- To increase public protection by ending automatic, unconditional release from custody

My submission therefore examines these aims and evaluates the extent to which the Bill can be expected to realise these aims.

Setting of the ‘Custody Part’ in the proposed combined structure (section 6)

Section 6 of the Bill provides that the custody part must be a minimum of 50% of the overall sentence, but that this may be increased to 75% if the individual sentencing judge considers it appropriate. *What is the rationale for allowing individual sentencers to increase the custody element to 75%?* None of the accompanying documentation provides an explanation.

Section 6(4) provides that an individual sentencer may increase the custody element to 75% in view of: the seriousness of the offence/s; previous convictions; the timing and nature of a guilty plea. *Yet all three of these criteria currently form (and will continue to form) the basis of determining the overall headline sentence. Why should individual sentencers now be asked to make the same assessment twice?* At best this seems to provide for unnecessary duplication and confusion. However it also highlights a key contradiction in the Bill about the purpose of supervision, to which I will now turn.

“Public protection is of paramount importance.”\(^2\) This is why the new combined structure is proposed for all custodial sentences of 15 days or more: to be subject to licence in the community. Community supervision and licence conditions are intended to reduce the risk of re-offending both during the community part of the sentence and after the expiration of the sentence and thereby increase public protection. *Yet the proposal in section 6 to allow individual sentencers, in effect, to decrease to 25% the period of community supervision will undermine efforts to increase public protection.* It is likely that practices will vary between individual sentencers dealing with substantively similar cases.

The Bill proposes that individual sentencers should be allowed to increase the custody part of a sentence to up to 75% because they wish, in effect, to punish the offender twice: once in terms of the overall sentence and again by limiting the time for structured community supervision and support. *Yet ironically, in many of those very cases where the offender and the community will most need community supervision the community element will have been reduced.* Unlike indeterminate life sentenced prisoners, determinate sentenced prisoners cannot be held or subject to licence beyond 100% of their sentence. Therefore, by allowing individual sentencers to reduce the community part to just 25% it will in fact make management and supervision of offenders both more difficult and shorter. Thus, enabling individual sentencers, to reduce the community element to 25% will undermine the very reason for ending automatic unconditional release: public protection, which is claimed to be of “paramount importance”.

I would recommend, therefore, that the Bill should not enable individual sentencers to vary the custody percentage for determinate sentenced cases. The purposes of retribution, deterrence, culpability and seriousness can be (and are) achieved more transparently through the setting of the appropriate headline sentence.

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1 Most particularly: Scottish Executive (2006) *Release and post Custody Management of Offenders* (June); the Bill’s *Explanatory Notes* and *Policy Memorandum*; and the Sentencing Commission’s report (November 2003)

2 *Policy Memorandum*, p2 paragraph 7.
Can the proposed combined structure of punishment and community licence be sustained in cases of shorter-sentenced persons?

The Bill has attempted to import the rationale behind indeterminate life sentenced prisoners to all prisoners serving custodial sentences of 15 days or more. However, the crucial difference is that this Bill is dealing with prisoners sentenced to determinate terms, the vast bulk of whom are sentenced by the summary courts to short periods of custody.

However, the tough, ‘tailored’ individual community provisions which are trumpeted by advocates of this proposal are simply unsustainable in the vast bulk of sentenced cases. There will be enormous practical difficulties in carrying out meaningful community work for individuals sentenced to custody of short-terms. In any case, because most convicted persons sentenced to short terms of imprisonment do not represent a serious danger to the public (often having been sent to prison to short terms partly of repeat offending at summary level) close supervision may not always be necessary. Indeed, the accompanying policy documentation appears to recognise that the Executive’s grander rhetoric will not be achievable. For example, we learn that the “concept of ‘supervision’ as it is currently understood, with intensive intervention by qualified social workers, will be reserved for those whose risk requires such intervention.” Similarly, although risk assessment is trumpeted as a key change, meaningful risk assessment will not be practicable for shorter sentenced prisoners. Therefore, the Bill, as presently constituted, will not achieve the goal of sentences “managed in a tailored way to the risk of harm posed by individual offenders and to the scope of rehabilitating all offenders.” In truth, as officials appear to have quietly recognised, this will not be possible for most short-sentenced prisoners. While this realism is welcome, it gives rise to a serious problem of clarity and transparency.

Will licence conditions for most short-sentenced convicted persons come to be seen, in most cases, as another example of a lack of transparency in sentencing?

A central aim of the Bill is a “transparent sentencing regime which will improve public confidence…” This appears to have long been a key driver behind the proposed changes. However, (as explained above) at least in the case of most short-sentenced prisoners, licence conditions will not provide for substantive work with individual offenders. Licences for short-term sentenced persons may well develop a reputation as technical, even meaningless. By setting unrealistic expectations that all 15 day plus-sentenced persons will be ‘on licence’, is the Bill only going to create further cynicism when it becomes apparent that (in most cases) being on licence does not fulfil the promise to address offending behaviour?

The Consequences on the size of the Prison Population will undermine the overall aim of enhancing long term public safety

The overall consequences on the prison population of this Bill (and when combined with other proposals to increase maximum sentences which can be passed by the Summary Sheriff Courts) should be expected to be very large. Over-crowding in prisons and especially the high influx of persons sentenced to relatively short sentences are two of the most important factors which undermine rehabilitative work in prisons. Furthermore, even if one could imagine a day when prison over-crowding is eradicated, we should recall that incarceration is supposed to be a last resort for the purposes of protecting the public, not as an (extremely expensive) way of accessing social and educational services. Such services can be provided much more effectively (and less expensively) in the community, and without breaking social and familial ties which is a normal consequence of incarceration.

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3 Scottish Executive (2006) Release and post Custody Management of Offenders (June), p8, paragraph 18
4 Policy Memorandum, p2 paragraph 7.
5 Policy Memorandum, p2, paragraph 8
6 Criminal Proceedings (Scotland) Bill section 33
Given the foreseeable impact of the Bill, is there a need for sentencing practices to be adjusted (‘recalibration’)?

The Sentencing Commission’s Report had proposed that, given the net effect of its proposals on custodial sentencing levels, sentences will need to be “recalibrated”. Section 6 of the Bill will allow individual sentencers to set the same headline/official sentence (for example 18 months) as they would have before the Bill. Currently, it is understood that the sentenced person would be released after 9 months (50%). However, section 6 will allow the individual sentencer to pass the same headline/official sentence (18 months) for the same case, but to increase the effective period in custody to 75% (in this example 12 months). Thus, the effective (or real) custodial sentence will be 3 months longer, although the official/headline sentence remains the same. As well as issues of proportionality, this change in effective custodial terms will undoubtedly lead to a very significant rise in the prison population. The Sentencing Commission recommended that sentencers should be expected to adjust their sentencing practices accordingly, but the Bill omits any such provision. What is the rationale for omitting recalibration?

The 15 Day Rule will lead to Anomalies and Proportionality issues

The new scheme is proposed to apply to persons sentenced to custody for 15 days or more. This will, in effect, lead to inequality of treatment and perverse results. An individual sentencer may pass a sentence of 14 days which will mean that the whole of that time must be served in custody. On the other hand, if a sentence of 15 days is passed it will, in effect, mean only 50%–75% (8–11 days) is to be served in custody. Likewise a person sentenced to 14 days in custody will often serve more time in custody than a person given a supposedly “longer” headline sentence of 21 days. One could imagine that such a person sentenced to 14 days will feel aggrieved and regard this as unequal and disproportionate treatment.