The Scottish Parliament

JUSTICE 2 COMMITTEE

AGENDA

33rd Meeting, 2006 (Session 2)

Tuesday 28 November 2006

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

1. **Civil Appeals (Scotland) Bill**: The Committee will consider its approach to the Bill.

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

   Ian Gunn, Governor, HMP and YOI Cornton Vale and Bill McKinlay, Governor, HMP Barlinnie;

   and then from—

   Mark Hodgkinson, Chief Officer, Northern Community Justice Authority, and Chris Hawkes, Chief Officer, Lothian and Borders Community Justice Authority;

   and then from—

   Johann Lamont MSP, Deputy Minister for Justice, Tony Cameron, Chief Executive, Scottish Prison Service, Valerie MacNiven, Head, Criminal Justice Group, and Charles Garland, Legal and Parliamentary Services, Scottish Executive.

3. **Subordinate legislation**: Johann Lamont MSP (Deputy Minister for Justice) to move the following motion—

   S2M-5210 That the Justice 2 Committee recommends that the draft Public Appointments and Public Bodies etc. (Scotland) Act 2003 (Treatment of Office or Body as Specified Authority) (Scottish Legal Complaints Commission) Order 2006 be approved.

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

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

   Tracey Hawe
   Clerk to the Committee
Papers for the meeting—

Agenda Item 1

Note by Convener (including SPICe briefing) J2/S2/06/33/1

Copy of Civil Appeals (Scotland) Bill, Explanatory Notes and Policy Memorandum

Agenda Item 2

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

Further written submissions J2/S2/06/33/2

Summary of further written submissions (PRIVATE PAPER) J2/S2/06/33/3

Regulatory Impact Assessment J2/S2/06/33/4

Briefing by SPICe and Committee advisers (PRIVATE PAPER) (to follow) J2/S2/06/33/5

Scottish Prison Services graph on ‘Design Capacity vs Average Prisoner Population (financial years)’ J2/S2/06/33/6

Lines of questioning (PRIVATE PAPER) (to follow) J2/S2/06/33/7

Subordinate Legislation Committee report (PRIVATE PAPER) J2/S2/06/33/8

Agenda Item 3

Note by Clerk J2/S2/06/33/9

Agenda Item 4

Note by Clerk J2/S2/06/33/10

Forthcoming meetings—

- Tuesday 5 December 2006, Committee Room 1, 2pm
- Tuesday 12 December 2006, Committee Room 6, 2pm
Introduction

1. The Civil Appeals (Scotland) Bill was introduced by Adam Ingram MSP on 29 September 2006. The aim of the Bill, according to its long title, is to provide for a final right of appeal to a Civil Appeals Committee within the Court of Session and to abolish the right of appeal to the House of Lords; and for connected purposes.

2. Copies of the Bill and Accompanying Documents are provided with this paper. A briefing paper from SPICe outlining the background to the Bill is also attached at Annex B.

3. The Policy Memorandum to the Bill states that the three key objectives of the Bill are as follows:
   - To abolish the requirement for appeals in Scottish civil cases to be heard by the House of Lords;
   - To reinstate the final civil appeal in Scottish cases in Scotland;
   - To create a Civil Appeals Committee within the Court of Session to hear final civil appeals.

4. The Parliamentary Bureau, at its meeting of 3 October 2006, agreed to refer the Bill to the Justice 2 Committee for consideration at Stage 1. In considering all Members' Bills, the Bureau noted the difficulties committees had in managing existing workloads and agreed not to set a deadline for completion of Stage 1 consideration.

Legislative competence

5. Rule 9.3.1 of Standing Orders states that:
   "A Bill shall on introduction be accompanied by a written statement signed by the Presiding Officer which shall—
   (a) indicate whether or not in his or her view the provisions of the Bill would be within the legislative competence of the Parliament; and
(b) if in his or her view any of the provisions would not be within legislative competence, indicate which those provisions are and the reasons for that view.”

6. On 21 September 2006 the Presiding Officer made the following statement under Rule 9.3.1 as regards the Bill:

“In my view, the following provisions are not within the competence of the Parliament—

Section 3

Section 5 insofar as it relates to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 14, 15, 16, 17, 18, 21, 24, 25, and 27 of schedule 1

Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 14, 15, 16, 17, 18, 21, 24, 25 and 27 of schedule 1

Section 6 insofar as it would confer power to make provisions relating to matters outside the competence of the Parliament

Section 8 and schedule 2

With the exception of paragraph 16 of schedule 1, the reason for this view is that in my opinion these provisions relate to the Constitution. The parliament of the United Kingdom, including the judicial functions of the House of Lords, is reserved under paragraph 1(c) of Schedule 5 to the Scotland Act 1998. Section 29(2)(b) of the Scotland Act 1998 states that a provision is outside the legislative competence of the Parliament if it relates to reserved matters.

As regards paragraph 16 of schedule 1, the reason for this view is that in my opinion the provision would be incompatible with Article 6(1) of the Convention. Section 29(2)(d) of the Scotland Act 1998 states that a provision is outside the legislative competence of the Parliament if it is incompatible with any of the Convention rights.”

7. The Parliament is able to proceed, if it wishes to do so, with consideration of a Bill even where the Presiding Officer has decided that parts of the Bill are not within legislative competence. However, if the Bill were to be passed by the Parliament, then the Advocate General, the Lord Advocate or the Attorney General could refer it to the Judicial Committee for decision on whether the Bill was competent. The Presiding Officer could not submit the Bill for Royal Assent if the Judicial Committee decided that the Bill was not within competence.

8. The Committee may decide to take evidence on the Bill and submit a Stage 1 Report in the usual way. Nevertheless, in view of the foregoing, and having regard to the workload of the Committee, members may consider that it would be inadvisable to proceed with consideration of a Bill a number of whose provisions, in the view of the Presiding Officer, are not within the competence of the Parliament.
Options

9. If the Committee is of the view that it wishes to proceed with consideration of the Bill, then it may request the clerks to prepare a further paper on handling and approach.

10. Rule 9.14.18 of Standing Orders allows a Committee to recommend to the Parliament, on a motion of the Convener, that it does not agree to the general principles of a Bill where the Bill appears to be clearly outwith the competence of the Parliament and it is unlikely to be possible to amend it at stages 2 and 3 to bring it within competence.

11. Rule 9.14.19 provides that if the Parliament agrees to a recommendation under paragraph 18, the Bill falls. Otherwise, the lead committee shall consider and report on the general principles of the Bill.

12. These Rules were introduced in consequence of the Procedures Committee’s 6th Report 2004 (Session 2) which recommended a new procedure for Members’ Bills. It is intended to avoid the need to conduct a full-scale Stage 1 inquiry if it becomes apparent that there is basic flaw in the Bill that has been introduced (such as it being unlikely to pass the test of legislative competence). The test is that the flaw is so basic or fundamental that there is no reasonable prospect of being able to amend it to the extent necessary to cure the flaw.

13. I requested that the Clerk to the Committee obtain advice from the Directorate of Legal Services on whether it is likely to be possible to amend the Bill at Stages 2 and 3 to bring it within legislative competence. The advice, which is reproduced at Annex A to this paper, indicates that, with the exception of paragraph 16 of schedule 1 to the Bill, it is unlikely to be possible to amend the provisions in the Civil Appeals (Scotland) Bill identified in the Presiding Officer’s statement as outside legislative competence at stages 2 and 3 to bring those provisions within the legislative competence of the Parliament.

14. The advice further indicates that the remaining provisions of the Bill that are within legislative competence would have the effect of creating the Civil Appeals committee, and enabling rules of procedure to be made for it. However, the Bill could not confer any jurisdiction on this committee which would be recognised in law, and so the Committee would not have any actual functions to perform. Therefore what remains of the Bill is rendered nugatory.

15. In these circumstances, the advice concludes that it would be open to the committee to reach the view that the flaw in this Bill is so fundamental that the requirements of Rule 9.14.18(b) have been met. The Committee may therefore wish to recommend to the Parliament that the general principles of the Bill be not agreed to for that reason.

Conclusion and Recommendation

16. In my view, it would not be advisable for the Committee to proceed to consider the Bill at Stage 1 in the normal way, because
• it appears to be outwith the legislative competence of the Parliament;
• it appears to be unlikely that it can be brought back within legislative competence; and
• if the Judicial Committee were to decide that the Bill was not competent, then the Presiding Officer could not submit the Bill for Royal Assent.

17. On the basis of the paper set out above, I recommend:

(a) that the Committee recommends to the Parliament that the general principles of the Bill not be agreed to on the grounds that, in the opinion of the Committee, having regard to the terms of the Presiding Officer’s statement on legislative competence under Rule 9.3.1, the Bill appears to be clearly outwith the legislative competence of the Parliament and it is unlikely to be possible to amend it at Stages 2 and 3 to bring it within legislative competence; and

(b) that the Committee agrees that I should lodge the appropriate motion under Rule 9.14.18.

David Davidson
Convener
Justice 2 Committee
CIVIL APPEALS (SCOTLAND) BILL - STANDING ORDER 9.14.18(b)

Introduction

1 The Civil Appeals (Scotland) Bill was introduced on 29th September 2006. It is a member's Bill sponsored by Adam Ingram MSP. On 21st September 2006 the Presiding Officer made the following statement as regards the Bill-

"In my view, the following provisions are not within the competence of the Scottish Parliament-

Section 3

Section 5, in so far as it relates to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 14, 15, 16, 17, 18, 19, 21, 24, 25 and 27 of schedule 1

Section 6 in so far as it would confer power to make provisions relating to matters outside the competence of the Parliament

Section 8 and schedule 2

With the exception of paragraph 16 of schedule 1, the reason for this view is that in my opinion these provisions relate to the Constitution. The Parliament of the United Kingdom, including the judicial functions of the House of Lords, is reserved under paragraph 1(c) of Schedule 5 to the Scotland Act 1998. Section 29(2)(b) of the Scotland Act 1998 states that a provision is outside the legislative competence of the Parliament if it relates to reserved matters.

As regards paragraph 16 of schedule 1, the reason for this view is that in my opinion the provision would be incompatible with Article 6(1) of the Convention. Section 29(2)(d) of the Scotland Act 1998 states that a provision is outside the legislative competence of the Parliament if it is incompatible with any of the Convention rights."

2 Rule 9.14 of the Standing Orders makes specific provision for Members’ Bills. Rule 9.14.18 makes provision for the circumstances in which, at Stage 1 of a Members’ Bill, the lead committee may recommend to the Parliament that the general principles of the Bill not be agreed to. In particular, Rule 9.14.18(b) enables the Committee to make such a recommendation, if in its opinion –

“(b) having regard to the terms of the Presiding Officer’s statement on legislative competence under Rule 9.3.1, the Bill appears to be clearly out with the legislative competence of the Parliament and it is unlikely to be possible to amend it at Stages 2 and 3 to bring it within legislative competence;………”

3 Rule 9.14.18 was introduced in consequence of the Procedures Committee’s 6th Report 2004 (Session 2) on a new procedure for Members’ Bills. Paragraphs 89 to 91 of the Report explain the circumstances that the Rule is intended to cover. It is
intended to avoid the need to conduct a full-scale Stage 1 inquiry... if it is apparent that there is basic flaw in the Bill that has been introduced. This is to be applied in cases where the policy basis of the bill is unsound, it is unlikely ever to pass the test of legislative competence, or that it has major drafting deficiencies. The test is that the flaw is so basic or fundamental that there is no reasonable prospect of being able to amend it to the extent necessary [to cure the flaw]. In those circumstances, Committees (and the Parliament) should be able to reject the Bill just on the basis of that flaw, without also having to undertake the general scrutiny of the Bill's policy that would otherwise be necessary.

Advice requested - likely to be possible to amend?

4 You have asked for advice on whether it is likely to be possible to amend the Bill at Stages 2 and 3 to bring it within legislative competence. This request for advice has both legal and practical aspects, which are so intermingled that it is thought best that the advice be given jointly by the Directorate of Legal services and the Legislation Clerks. It has been prepared on that basis. Ultimately, the decision as to the admissibility of an amendment is made by the Convener, or as the case may be, the Presiding Officer.

5 Rule 9.10.5 deals with the admissibility of amendments to Bill. The relevant parts of that Rule provide that an amendment is not admissible when-

   "(b) it is not relevant to the Bill or the provisions of the Bill which it would amend; and
   (c) it is inconsistent with the general principles of the Bill as agreed by the Parliament"

6 The requirements in Rule 9.10.5(b) and (c) that an amendment be relevant to the Bill or the provisions of the Bill, and not inconsistent with the general provisions of the Bill, are determinative of what can, or cannot, be done to bring the Bill within competence. The Guidance on Public Bills offers advice on these rules at paragraphs 4.11 to 4.20. Whilst the long title of a bill can give an indication of whether a particular amendment would be likely to be relevant, it is the purpose (or purposes) of the Bill that will be considered by the Legislation Clerks when they advise whether an amendment is relevant. The purpose of the Bill is also central to deciding what will be considered inconsistent with the general principles of the Bill.

7 In this instance, it is considered that the purpose of the Bill is to replace the House of Lords as the final court of appeal in civil matters in Scotland with a new tribunal to be known as the Civil Appeals Committee. In the terms of the Presiding Officer's statement on legislative competence, all but one of the provisions of the Bill that are outside competence relate to the judicial functions of the House of Lords, part of the Constitution reserved under paragraph 1 of Schedule 5 to the Scotland Act 1998 ("the Act"). Removing these provisions, and leaving the remaining provisions of the Bill (which are within legislative competence) in place, would not be relevant to the Bill or consistent with its principles within the meaning of Rule 9.10.5(b) and (c). If section 3(1) (which would transfer jurisdiction in appeals which currently lie with the House of Lords to the Civil Appeals Committee) were amended
to confer a different appeal jurisdiction on the Committee, that, also, would not be
relevant to the purposes of the Bill or consistent with its principles.

8 The Presiding Officer’s statement indicates that paragraph 16 of schedule 1 to
the Bill (which would remove legal aid for civil appeals to the House of Lords) is
incompatible with Article 6(1) of the Convention. An amendment to delete that
provision from the Bill would be admissible under Rule 9.10.5(b) and (c).

9 We conclude that, with the exception of paragraph 16 of schedule 1 to the Bill,
for the purposes of that Rule 9.10.5(b) and (c), it is unlikely to be possible to amend
the provisions in the Civil Appeals (Scotland) Bill identified in the Presiding Officer’s
statement as outside legislative competence to bring any of them within legislative
competence.

The remaining provisions

10 The remaining provisions of the Bill are within legislative competence, and
would have the effect of creating the Civil Appeals committee, and enabling rules of
procedure to be made for it. But the Committee would not have any jurisdiction (at
least not any jurisdiction conferred, or able to be conferred, by this Bill) which would
be recognised in law, and so would not have any actual functions to perform.
Because section 3, in particular, is outside the legislative competence of the
Parliament and so would have no effect in law, what remains of the Bill is rendered
nugatory.

11 In these circumstances, it would be open to the committee to reach the view
that the flaw in this Bill is so fundamental that the requirements of Rule 9.14.18(b)
have been met, and they may wish to recommend to the Parliament that the general
principles of the Bill be not agreed to for that reason.

Conclusions

12 (1) With the exception of paragraph 16 of schedule 1 to the Bill, it is
unlikely to be possible to amend the provisions in the Civil Appeals (Scotland)
Bill identified in the Presiding Officer’s statement as outside legislative
competence at stages 2 and 3 to bring those provisions within the legislative
competence of the Parliament.

(2) It would be open to the committee to reach the view that the flaw in this Bill
is so fundamental that the requirements of Rule 9.14.18(b) have been met, and
they may wish to recommend to the Parliament that the general principles of
the Bill be not agreed to for that reason.

Directorate of Legal Services and Legislation Clerks
17 November 2006
The Civil Appeals (Scotland) Bill was introduced in the Parliament, on 29 September 2006, by Adam Ingram MSP (SNP Member for South of Scotland). The Parliament’s Justice 2 Committee has been designated as lead committee in relation to the Bill.

The Bill seeks to end the current possibility of appeal to the House of Lords in relation to Scottish civil cases. In doing so it would also prevent that possibility of appeal being transferred to the new Supreme Court of the United Kingdom (once that court is open for business). The Bill also seeks to establish an additional level of appeal within Scotland for Scottish civil cases.

In his statement on legislative competence, the Parliament’s Presiding Officer refers to a significant number of provisions in the Bill which he considers to be outwith the legislative competence of the Parliament.

This briefing includes consideration of:

- current arrangements for appeals in Scottish cases and changes which will take place once the Supreme Court of the United Kingdom starts dealing with appeals
- the provisions of the Bill and issues of legislative competence
- arguments relevant to the debate on whether a Scottish court should be the final court of appeal in Scottish civil cases

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KEY POINTS OF THIS BRIEFING

Current arrangements for Scottish appeals:

- sheriff court decisions in civil cases may be appealed to the sheriff principal of the relevant sheriffdom and to the Inner House of the Court of Session
- decisions of the Outer House of the Court of Session in civil cases may be appealed to the Inner House
- decisions of the Inner House of the Court of Session in civil cases may be appealed to the House of Lords
- decisions in criminal cases may be appealed to the High Court of Justiciary (there is no right of appeal to the House of Lords)
- the Judicial Committee of the Privy Council (‘the Judicial Committee’) deals with appeals from a number of sources including ‘devolution issues’ under the Scotland Act 1998 (ie issues relating to whether the relevant executives and legislatures have acted outwith their powers – these may impact on both civil and criminal justice matters)

Supreme Court of the United Kingdom:

- the Constitutional Reform Act 2005 includes provisions for the creation of a new Supreme Court which will, once it is open for business, take over the appellate jurisdiction of the House of Lords and the devolution jurisdiction of the Judicial Committee

The Civil Appeals (Scotland) Bill:

- the Bill seeks to end the current possibility of appeal to the House of Lords in relation to Scottish civil cases and, as a result, also prevent that possibility of appeal being transferred to the new Supreme Court of the United Kingdom
- the Bill also seeks to establish an additional level of appeal within Scotland for Scottish civil cases
- the Bill does not seek to alter arrangements for dealing with appeals which raise devolution issues or appeals in criminal cases
- in his statement on legislative competence, the Parliament’s Presiding Officer refers to a significant number of provisions in the Bill which he considers to be outwith the legislative competence of the Parliament
INTRODUCTION

The Civil Appeals (Scotland) Bill (‘the Bill’) was, together with Explanatory Notes (and other accompanying documents) and a Policy Memorandum, introduced in the Parliament on 29 September 2006.

The Bill seeks to end the current possibility of appeal to the House of Lords in relation to Scottish civil cases. In doing so it would also prevent that possibility of appeal being transferred to the new Supreme Court of the United Kingdom (once that court is open for business).

The Bill also seeks to establish an additional level of appeal within Scotland for Scottish civil cases. The new possibility of appeal would be to a ‘Civil Appeals Committee’, comprising judges appointed from existing judges of the Court of Session, and would exist where there was formerly a right of appeal to the House of Lords.

The Bill does not seek to alter current arrangements under which the Judicial Committee of the Privy Council can deal with Scottish appeals which raise ‘devolution issues’ under the Scotland Act 1998. Nor would it prevent that possibility of appeal being transferred to the new Supreme Court of the United Kingdom.

In his statement on legislative competence, the Parliament’s Presiding Officer refers to a significant number of provisions in the Bill which he considers to be outwith the legislative competence of the Parliament. The provisions considered to be outwith competence include ones ending the possibility of appeal to the House of Lords in relation to Scottish civil appeals. The reason given for the Presiding Officer’s view in this area is that these provisions, in seeking to amend the judicial functions of the House of Lords are, in effect, seeking to amend the functions of the United Kingdom Parliament – a reserved matter under paragraph 1(c) of Schedule 5 to the Scotland Act 1998.

BACKGROUND

CURRENT ARRANGEMENTS FOR APPEALS

This section of the briefing focuses on the current arrangements for civil appeals relating to Scottish cases. The briefing is not generally concerned with arrangements for dealing with Scottish criminal cases, in relation to which the ultimate court of appeal (other than in relation to devolution issues) is the High Court of Justiciary. The briefing does, however, include information on the role of the Judicial Committee of the Privy Council in relation to devolution issues under the Scotland Act 1998. Such issues may relate to both civil and criminal justice matters.

Following discussion of current arrangements, the briefing sets out background information on measures within the Constitutional Reform Act 2005 which provide for the establishment of a

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1 It may be noted that legal arrangements for dealing with devolution issues are reserved to the United Kingdom Parliament.
2 The High Court always sits in Edinburgh when dealing with appeals. For further information on criminal cases see The Scottish Criminal Justice System: the Criminal Courts (Oag et al 2003).
Supreme Court of the United Kingdom and changes to some of the current arrangements for appeals in Scottish cases.

**Scottish civil court system**

Civil cases may be initiated in the sheriff courts (in towns and cities across Scotland) and in the Outer House of the Court of Session (in Edinburgh). Sheriff court decisions may be appealed to the sheriff principal of the relevant sheriffdom and to the Inner House of the Court of Session (which is primarily a court of appeal). Outer House decisions may be appealed to the Inner House of the Court of Session. Inner House decisions may be appealed to the House of Lords in London.

The Inner House of the Court of Session is for practical reasons divided into First and Second Divisions. They are of equal authority, with one presided over by the Lord President and the other by the Lord Justice Clerk. Normally three judges deal with an appeal. Five or more judges may hear an appeal where the case is particularly important or difficult, or where it might be necessary to overrule a previous ruling of the Inner House on a point of law.

In addition to dealing with appeals from the Outer House and the sheriff courts (immediately following the decision of a sheriff or after an initial appeal to the sheriff principal), the Inner House of the Court of Session also deals with appeals from certain statutory authorities and tribunals. The following table sets out figures for appeals disposed of by the Court of Session.

<table>
<thead>
<tr>
<th>Source of appeal</th>
<th>2000</th>
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<th>2002</th>
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<th>2004</th>
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<td>Outer House</td>
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<td>36</td>
<td>83</td>
<td>53</td>
<td>47</td>
</tr>
<tr>
<td>Sheriff courts</td>
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<td>76</td>
<td>59</td>
<td>90</td>
<td>40</td>
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<td>Elsewhere</td>
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<td>58</td>
<td>50</td>
<td>62</td>
<td>21</td>
<td>63</td>
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<td><strong>Total</strong></td>
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<td>190</td>
<td>145</td>
<td>235</td>
<td>114</td>
<td>158</td>
</tr>
</tbody>
</table>

Source: Scottish Executive 2004a, table 4.1 plus updated figures from Scottish Executive officials

Further information about the Scottish court system is available on the [Scottish Courts](http://www.scottishcourts.gov.uk) website. Appeals to the House of Lords are considered in more detail below.

**Appeals to the House of Lords**

With the exception of Scottish criminal cases, the House of Lords is currently the ultimate court of appeal in the United Kingdom. In relation to England & Wales and Northern Ireland, it hears appeals in relation to both civil and criminal cases. However, in relation to Scotland it only deals with civil cases on appeal from the Court of Session.

The power of the House of Lords to deal with Scottish appeals in civil cases was effectively established following the Act of Union in 1707. It has been noted that there "was a dispute as to whether the new House could hear appeals from Scottish courts, but it quickly assumed jurisdiction" (White and Willock 2003, p 95). Despite practical difficulties associated with the journey from Scotland, the number of Scottish appeals came to exceed other appeals. However, various reforms led to a growth in the number of English appeals and from the time further reforms came into force in 1877 "the House of Lords became primarily an English court; the number of English appeals regularly exceeded a far smaller number of Scottish appeals" (Dymond 2006, p 9).
The following table sets out figures for appeals disposed of by the House of Lords.

**House of Lords appeals disposed of, 2000 – 2005**

<table>
<thead>
<tr>
<th>Source of appeal</th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
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<tr>
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<td>2</td>
<td>3</td>
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</tr>
<tr>
<td><strong>Total</strong></td>
<td>83</td>
<td>85</td>
<td>91</td>
<td>71</td>
<td>77</td>
<td>102</td>
</tr>
</tbody>
</table>

Source: United Kingdom Parliament – Judicial Work web pages

As already noted, in relation to England & Wales and Northern Ireland the House of Lords can deal with both civil and criminal appeals. However, most appeals relate to civil cases. For example, in 2005 the House of Lords disposed of 82 civil appeals and 20 criminal appeals.

Appeals from England & Wales and Northern Ireland require leave to appeal. This may be granted by the court whose decision is being appealed or by the House of Lords itself. Leave to appeal is not normally required for Scottish appeals.

The judicial work of the House of Lords is dealt with by an ‘Appellate Committee’ and is mainly carried out by professional Lords of Appeal in Ordinary (‘Law Lords’). At present the maximum number of Law Lords is set at 12 with, by convention, at least two normally being appointed from Scotland. Other members of the House of Lords who have held high judicial office may also qualify to take part in the judicial work of the House. This allows the court to call on the assistance of retired Law Lords and other senior judges who are also members of the House. Panels of five or more Law Lords (or other qualified judges) deal with cases. There is no requirement for Scottish appeals to be considered by a majority of judges trained in Scots law, although this does sometimes happen in practice (using the Scottish Law Lords plus other Scottish trained judges who are members of the House of Lords).

Further information on the work of the House of Lords as a court of appeal (both historical and current) is set out in ‘The Appellate Jurisdiction of the House of Lords’ (Dymond 2006) and ‘The Judicial Work of the House of Lords’ (House of Lords 2005).

**Appeals to the Judicial Committee of the Privy Council**

The Judicial Committee of the Privy Council (‘the Judicial Committee’) in London deals with appeals from a number of sources, including:

- appeals from some independent Commonwealth states, British Overseas Territories, the Channel Islands and the Isle of Man
- ‘devolution issues’ under the Scotland Act 1998, the Government of Wales Act 1998 and the Northern Ireland Act 1998 (ie issues relating to whether the relevant executives and legislatures have acted outwith their powers – these may impact on both civil and criminal justice matters). This gives the Judicial Committee a role similar to that of a constitutional court on devolution matters

The following table sets out figures for appeals disposed of by the Judicial Committee.

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3 Includes appeals disposed of without a judgement.
Judicial Committee appeals disposed of, 2000 – 2005

<table>
<thead>
<tr>
<th>Type of appeal</th>
<th>2000</th>
<th>2001</th>
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<td>85</td>
<td>89</td>
<td>99</td>
<td>68</td>
<td>57</td>
</tr>
</tbody>
</table>

Sources: Privy Council Office website

In relation to the above figures:

- all of the cases involving devolution issues were cases under the Scotland Act 1998
- the main sources of appeals disposed of during 2005 were Trinidad & Tobago (18), Jamaica (8) and New Zealand (8)
- it has been noted that “looking ahead, there is likely to be a decline in the Judicial Committee’s volume of work” (Department for Constitutional Affairs 2005, p 8). A number of factors are identified in this respect, including the fact that New Zealand has legislated to abolish appeals to the Privy Council

The Judicial Committee and House of Lords are separate institutions. However, the same 12 Law Lords form the core of both. In relation to the Judicial Committee, other judges may be appointed as Privy Counsellors to assist the Law Lords. Such appointments may be made from a number of sources including judges of the Court of Appeal in England & Wales, and senior judges in Scotland, Northern Ireland and various Commonwealth countries. Most appeals are heard by boards of five members of the Judicial Committee.

Further information about the Judicial Committee can be found on the website of the Privy Council Office.

SUPREME COURT OF THE UNITED KINGDOM

Main provisions

The Constitutional Reform Act 2005 (‘the 2005 Act’) includes provision for the creation of a new Supreme Court:

“The appellate jurisdiction of the House of Lords, together with the devolution jurisdiction of the Judicial Committee of the Privy Council, will be transferred to a separate Supreme Court of the United Kingdom, which will be established when the relevant provisions of the Constitutional Reform Act 2005 are brought into force. The Act also modifies the office of the Lord Chancellor and provides for the establishment of a Judicial Appointments Commission responsible for recommending judicial appointments in England and Wales.” (Dymond 2006, p 29)

Thus, in relation to Scotland, the Supreme Court will take over the role of the House of Lords in considering appeals in civil cases and of the Judicial Committee of the Privy Council in relation to devolution issues under the Scotland Act 1998. The role of the Supreme Court will not impact on the current role of the High Court of Justiciary as the ultimate court of appeal for Scottish criminal cases in which devolution issues do not arise.

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4 Includes appeals disposed of without a hearing.
The 2005 Act provides that the Supreme Court will comprise 12 permanent judges. A minimum of three judges must deal with any case; although cases will normally be considered by a bench of five (and sometimes more) judges. The first judges to be appointed will be the 12 Law Lords in office when the relevant provisions of the 2005 Act come into effect – they will then be disqualified from sitting and voting in the House of Lords for as long as they are judges of the Supreme Court. Apart from this one-off provision, eligibility for appointment as a full time judge of the Supreme Court will be the same as current eligibility for appointment as a Law Lord. A commission will be tasked with identifying the best candidate for a vacant post. The selection must be made on merit. However, it has been noted that:

“the commission must, when making selections for the appointment of judges, also take into account the need for the Court to have among its judges those with knowledge and experience of practice in the law in every part of the United Kingdom. This is intended to maintain the convention that currently applies to the House of Lords that there should generally be at least two Scottish judges and usually one from Northern Ireland. The Lord Chancellor (…) may issue non-binding guidance to the commission about the vacancy that has arisen, for example on the jurisdictional requirements of the Court, which the commission must have regard to.” (‘Explanatory Notes to Constitutional Reform Act 2005’, para 103)

In order to supplement its permanent membership, certain senior judges of other courts within the United Kingdom (eg Inner House judges of the Court of Session in Scotland) may, together with certain retired senior judges, be asked to sit as acting judges of the Supreme Court.

The 2005 Act also contains provision clarifying the impact which a decision of the Supreme Court in relation to an appeal from the courts of one part of the United Kingdom (eg England & Wales) will have on the law of other parts of the United Kingdom (eg Scotland):

“The essence of the provision is that a decision made by the Supreme Court under particular jurisdiction should have the same effect as a decision of the body in which the jurisdiction is currently vested (whether that is the House of Lords or the Judicial Committee of the Privy Council). So in the case of jurisdiction transferred from the House of Lords, a decision of the Supreme Court on an appeal from one jurisdiction within the United Kingdom will not have effect as a binding precedent in any other such jurisdiction, or in a subsequent appeal before the Supreme Court from another such jurisdiction. In the case of the devolution jurisdiction transferred from the Judicial Committee of the Privy Council, a decision of the Supreme Court will be binding in all legal proceedings except for subsequent proceedings before the Supreme Court itself.” (‘Explanatory Notes to Constitutional Reform Act 2005’, para 162)

In March 2006 the Lord Chancellor announced that current plans involve the Supreme Court opening for business in October 2009 (United Kingdom Parliament 2006, col WS30).

Further information on the Supreme Court is set out in ‘The Appellate Jurisdiction of the House of Lords’ (Dymond 2006, pp 29-31) and in the ‘Explanatory Notes to Constitutional Reform Act 2005’.

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5 See section 27(8) and (9) of the 2005 Act.
6 See section 41 of the 2005 Act.
**Consideration of proposals for a Supreme Court**

Arguments in favour of establishing a Supreme Court include the desire to maintain a clearer distinction between judicial and legislative functions:

“From a separation of powers viewpoint, there is a very strong case for making a clear distinction between the judicial work of the House of Lords and its legislative work. Certainly, there has long been an important distinction in practice between the two functions of the House, but openness and transparency have often been lacking. The greater the emphasis placed on judicial independence and the rule of law, the more difficult it is to justify the presence of senior judges in the legislature.” (House of Lords Select Committee on the Constitution 2005, para 48)

Not all commentators have agreed that this separation of powers argument is particularly strong. For example, Professor Hector MacQueen of Edinburgh University stated in evidence to the Parliament’s Justice 2 Committee on the Constitutional Reform Bill:

“The proposals in the Bill are generally very conservative, for the most part, simply shifting the present furniture into another room not in the Palace of Westminster, to avoid largely theoretical problems of separation of powers. (Why, after all, has this issue not already been raised during the forty years or so since we became subject to the jurisdiction of the European Court of Human Rights?)” (Scottish Parliament Justice 2 Committee 2004, p 11)

The 2005 Act is an act of the United Kingdom Parliament. However, the Constitutional Reform Bill (which became the 2005 Act following Royal Assent on 24 March 2005) was the subject of a Sewel Motion in the Scottish Parliament. The motion stated:

“That the Parliament agrees the principle of having a clear and transparent separation between the judiciary and the legislature and agrees that provisions in the Constitutional Reform Bill establishing a Supreme Court, and provisions consequential thereto, so far as they relate to matters within the legislative competence of the Parliament, should be considered by the UK Parliament.” (Scottish Executive 2004b)

The Scottish Executive published a memorandum, ‘Constitutional Reform Bill – Supreme Court’ (2005), in support of the above motion. The motion was debated and agreed by the Scottish Parliament on 19 January 2005 – 63 members voting in favour (Labour and Liberal Democrat MSPs) and 56 voting against (SNP, Conservative, Green, SSP, SSCUP and Independent MSPs). Reasons for voting against the motion differed, with arguments advanced in opposition including:

1. It would be better to create a supreme court in Scotland to provide a final court of appeal for Scottish civil cases and ensure that such cases are only dealt with by judges trained in Scots law.

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7 A Sewel Motion seeks the agreement of the Scottish Parliament for the United Kingdom Parliament to legislate on the devolved matters specified in the motion. Since 30 November 2005, Sewel Motions have been known as Legislative Consent Motions. Further information about such motions is set out in Scottish Executive web pages dealing with the ‘Sewel Convention’. 
2. Insufficient evidence has been produced to indicate that current arrangements (ie with appeals to the House of Lords and the Judicial Committee of the Privy Council) are unsatisfactory and thus require the changes envisaged in the bill.

Prior to this, the matter was considered by the Parliament’s Justice 2 Committee on a number of occasions, leading to the publication of a Committee Report on 12 January 2005. The Committee agreed, by majority, with the case for including devolved matters in the Constitutional Reform Bill. Issues raised in the Committee’s report included:

1. Would the role of a United Kingdom Supreme Court in determining civil appeals in Scottish cases dilute the separate identity of Scots law? The Committee welcomed an amendment to the bill clarifying the impact which a decision of the Supreme Court in relation to an appeal from the courts of one part of the United Kingdom would have on the law of other parts of the United Kingdom.

2. Should a majority of judges dealing with Scottish appeals in the Supreme Court have expertise in Scots law? The Committee had previously recommended that it would be desirable to have a majority of Scottish judges dealing with all such cases and that this should be a requirement in Scottish cases relating to devolution issues. The Committee noted that an amendment to the bill was intended to give recognition to the current practice under which two of the 12 Law Lords in the House of Lords are appointed from Scotland. The Committee welcomed this amendment but highlighted continuing concerns expressed by some witnesses that the change would not ensure sufficient Scottish trained full time judges of the Supreme Court for any appeal where it was thought desirable to have a majority of Scottish judges. In evidence to the Committee, the then Lord Advocate predicted that a majority of Scottish cases before the Supreme Court would be considered by benches of judges with Scottish judges in the majority (using a mix of full time and acting Supreme Court judges). He was, however, of the view that the legislation should not impose inflexible quotas of Scottish judges for Scottish appeals.

THE BILL

This part of the briefing looks at the Civil Appeals (Scotland) Bill (‘the Bill’), including consideration of its development, the provisions of the Bill as introduced and issues of legislative competence. It concludes by looking at arguments which have been advanced for and against having a Scottish court as the ultimate court of appeal in Scottish civil cases (in particular those cases which do not involve devolution issues under the Scotland Act 1998).

DEVELOPMENT OF THE BILL

The proposal for a Members’ Bill was initially lodged by Adam Ingram MSP (SNP Member for South of Scotland) in September 2003. In 2004, Mr Ingram published a consultation paper providing research and information services to the Scottish Parliament.
seeking views on his proposal, with responses sought by 30 September 2004. Further work on the proposal took place following this consultation. Thus, the development of the Bill took place during a period when the UK Government's proposals for a United Kingdom Supreme Court were being considered. Mr Ingram notes that he took account of relevant issues raised during consideration of proposals for a Supreme Court whilst developing his proposals for the Bill. Mr Ingram has also published a summary of responses to his consultation.

The central proposal in the consultation paper was to abolish the right of appeal to the House of Lords in relation to Scottish civil cases and create an additional level of appeal within the Court of Session. However, the paper also sought views on two other options: (a) abolish the right of appeal to the House of Lords without any replacement; and (b) abolish the right of appeal to the House of Lords and create a Scottish Supreme Court which could act as a final court of appeal for both civil and criminal cases (thus also creating an additional level of appeal in criminal cases).

Issues highlighted in relation to the consultation proposals, and more generally in relation to the idea of transferring the ultimate right of appeal in Scottish civil cases to a Scottish court, are considered below (following consideration of the Bill itself).

**PROVISIONS OF THE BILL**

**Main reforms**

The Bill seeks to end the current possibility of appeal to the House of Lords in relation to Scottish civil cases. In doing so it would also prevent that possibility of appeal being transferred to the new Supreme Court of the United Kingdom (once that court is open for business).

The Bill also seeks to establish an additional level of appeal within Scotland for Scottish civil cases. The new possibility of appeal would be to a 'Civil Appeals Committee', comprising of at least five judges, and would exist where there was formerly a right of appeal to the House of Lords. The Bill provides for the Lord President of the Court of Session to appoint judges of the Civil Appeals Committee, with such appointments being made from existing judges of the Court of Session. It also provides that there would be no possibility of appeal from the Civil Appeals Committee to the House of Lords.

The Financial Memorandum (attached to the Explanatory Notes) published along with the Bill suggests that the proposed Civil Appeals Committee could, in the main, be housed within existing accommodation and administered using existing resources available to the Court of Session.

As a consequence of the above provisions the Bill would generally provide for a newly created Civil Appeals Committee to be the ultimate court of appeal in relation to Scottish civil cases. It should, however, be noted that the Bill does not seek to change the current arrangements under which devolution issues under the Scotland Act 1998 are considered by the Judicial Committee of the Privy Council. Nor does it seek to alter the provisions of the 2005 Act which will transfer the jurisdiction of the Judicial Committee in such matters to the Supreme Court. The

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12 See Schedule 2 to the Bill which seeks to amend the Appellate Jurisdiction Act 1876.
involvement of particular courts in relation to devolution issues is set out in the Scotland Act 1998 and cannot be changed by an act of the Scottish Parliament.\(^\text{13}\)

**Legislative competence**

As noted earlier, the Presiding Officer’s statement on legislative competence refers to a significant number of provisions in the Bill which he has decided would not be within the legislative competence of the Parliament. These include provisions which end the possibility of appeal to the House of Lords in relation to Scottish civil appeals. Provisions which would be within competence include ones seeking to create a Civil Appeals Committee. However, the provisions of the Bill seeking to establish the jurisdiction of the Civil Appeals Committee are amongst those the Presiding Officer has decided would not be within the legislative competence of the Parliament. Thus the Bill as introduced would not competently end the possibility of appeal to the House of Lords.

The primary reason advanced by the Presiding Officer for his view on legislative competence relates to the fact that the Bill seeks to amend the judicial functions of the House of Lords. It does this by seeking to end the power of the House of Lords to deal with Scottish appeals. Thus, it is argued that the Bill is effectively seeking to amend some of the functions of the United Kingdom Parliament. Paragraph 1(c) of Schedule 5 to the Scotland Act 1998 provides that the United Kingdom Parliament is a reserved matter and thus would not be within the legislative competence of the Scottish Parliament.

When the relevant provisions of the Constitutional Reform Act 2005 are in force, the jurisdiction of the House of Lords in Scottish civil appeals will transfer to the new Supreme Court. The Supreme Court will not be part of the United Kingdom Parliament. Any future proposal in a bill which sought to remove the possibility of an appeal to the Supreme Court would have to be closely scrutinised as regards legislative competence.

**ISSUES**

This section looks at arguments relevant to the debate on whether there should be a Scottish court as the ultimate court of appeal in Scottish civil cases (in particular those cases which do not involve devolution issues).

**Influence of non-Scottish judges in Scottish appeals**

It should be noted that the terms ‘Scottish judge’ and ‘non-Scottish judge’ are used below to differentiate between: (a) judges who are trained in Scots law and have gained expertise working within the Scottish legal system; and (b) judges whose main expertise relates to another legal system (eg that of England & Wales).

Concerns were raised during consideration of the Constitutional Reform Bill that proposals for a Supreme Court of the United Kingdom could lead to a lessening of the distinctive nature of Scots law. Some of these concerns may have been addressed by a provision, now set out in section 41 of Constitutional Reform Act 2005 (‘the 2005 Act’), indicating that decisions of the

\(^{13}\) See para 4(1) of Schedule 4 to the Scotland Act 1998. See also Scottish Parliament Justice 2 Committee 2005, para 2.
Central to the debate in this area are the following questions:

- what influence do non-Scottish judges in the House of Lords currently have in relation to decisions in Scottish civil appeals and what influence will they have in the Supreme Court?
- is any impact on Scots law as a result of such non-Scottish influence beneficial or harmful?

One criticism levelled against the presence of non-Scottish House of Lords judges in relation to Scottish appeals is that they can introduce alien concepts to Scots law, and that this can be to the detriment of Scots law. Another criticism is that they may realise that they are less qualified to comment on particular areas of Scots law and thus leave any Scottish judges on the bench to take the lead – thereby reducing the level of judicial input in such cases. Counter arguments include the view that, in practice, non-Scottish judges do not have undue influence in Scottish appeals. It is also argued that the influence which they do have can, by exposing Scots law to different ideas, assist in the development of the law.

As noted above, the Bill does not seek to change the current arrangements under which devolution issues under the Scotland Act 1998 are considered by the Judicial Committee of the Privy Council. Nor does it seek to alter the provisions of the 2005 Act which will transfer the jurisdiction of the Judicial Committee in such matters to the Supreme Court. Thus, the Bill does not seek to remove the involvement of non-Scottish judges in relation to such matters. The appropriate number of full time Scottish judges in the Supreme Court might, however, be questioned if only the devolution issues aspect of the court’s Scottish jurisdiction were to remain (ie if non-devolution Scottish civil appeals were removed from the Supreme Court). Any reduction in the number of full time Scottish judges would, if one wanted to retain the same potential for Scottish input in Scottish devolution issues cases, presumably require greater use of acting judges from Scotland.

**Level of involvement of non-Scottish judges**

Neither current arrangements in the House of Lords, nor provisions for the Supreme Court, require a majority of Scottish judges when dealing with appeals from Scotland. Scottish judges have formed a majority in some House of Lords appeals, but this need not be the case. As noted earlier in this briefing, in relation to consideration of proposals for a Supreme Court, the former Lord Advocate has predicted that a majority of Scottish cases before that court will be considered by benches of judges with Scottish judges in the majority (using a mix of full time and acting Supreme Court judges). He added, however, that he was not in favour of legislation imposing inflexible quotas of Scottish judges for Scottish appeals.\(^\text{14}\) In written evidence to the Justice 2 Committee on the Constitutional Reform Bill, the Scottish Executive stated that:

\[\text{“the Executive believes that it would be inappropriate to have a rule requiring that Scottish cases always had a majority of Scottish judges. First the Executive recognises that this has not been the rule to date. Secondly it would, in effect, divide the court with the possibility that different approaches were}\]

\[^{14}\text{See Scottish Parliament Justice 2 Committee 2005, p 11.}\]
taken by different majorities of Scottish and English judges. Thirdly it would be very difficult to arrange where the court sat in larger panels of seven, nine or even 11 judges.” (Scottish Parliament Justice 2 Committee 2004, p 20)

However, other commentators have argued for more certainty in relation to the level of input from Scottish judges in future appeals to the Supreme Court. For example, the Dean of the Faculty of Advocates stated in evidence to the Justice 2 Committee on the Constitutional Reform Bill that:

“The Faculty remains concerned that the Bill will not result in a statutory provision which will ensure that there are sufficient permanent judges from Scotland so as to provide a majority of a panel in any case to be decided under Scots law. (…) It seems to me that it is not appropriate to rely upon ad hoc or temporary appointments to provide a sufficient establishment in Scottish cases.” (Scottish Parliament Justice 2 Committee 2005, p 18)

Some analysis of the level of involvement of Scottish and non-Scottish House of Lords judges in Scottish appeals is contained in a fairly recent academic article (Chalmers 2004). It looked at the practice of the House of Lords in dealing with Scottish appeals during the period 1993-2002. During this period the author found a total of 48 Scottish appeals where the House of Lords had delivered a judgement. In relation to these, the number of Scottish judges sitting in each case was as follows:  

- one Scottish judge = 15 cases
- two Scottish judges = 23 cases
- three Scottish judges = 10 cases

Thus, Scottish judges were outnumbered by non-Scottish judges in a majority of Scottish appeals dealt with by the House of Lords during the period in question (panels of five or more judges deal with appeals). However, Scottish judges tend to play a greater role in Scottish appeals. The author of the above article found that a total of 87 speeches were delivered in the 48 Scottish appeals referred to above (excluding brief concurring remarks which simply endorse the reasoning of another judge). Of these 87 speeches, 62 were delivered by Scottish judges and 25 by non-Scottish judges. In addition, non-Scottish judges are more likely to deliver speeches in particular types of Scottish cases (eg cases involving the interpretation of statutory provisions which are identical or very similar to provisions applying in England & Wales). The author does note that the above analysis cannot take account of what may happen during discussions between the judges dealing with an appeal prior to the delivery of reasoned speeches (eg the contribution of those judges who do not go on to deliver a speech to the reasoning of those who do).

In relation to the possible reluctance of non-Scottish judges to play a full role in some Scottish appeals, the Justice 2 Committee reported during its consideration of the Constitutional Reform Bill that:

“The Committee wondered whether it would continue to be the case that English judges relatively rarely delivered speeches in Scottish cases. Lord Cullen felt that existing practice was likely to continue, without needing to be provided for expressly, ‘because the reluctance of English judges to discharge opinions declaratory of Scots common law will be the same’. The Lord

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Advocate agreed that ‘it is for the good sense of the judges on the panel to decide whether they can contribute appropriately on an issue.’” (Scottish Parliament Justice 2 Committee 2004, para 20)

Some commentators have expressed concerns about the implications of this reluctance. For example:

“In short, non-Scottish law lords simply do not in current practice deliver speeches on questions of Scots common law, with the special exception of liability for negligence. This means, in effect, that such issues are largely left in the hands of the small number of Scottish law lords (sometimes only one) sitting to hear the appeal. The end result is that such appeals may well be disposed of with only a single reasoned speech being delivered – a practice which has been heavily criticised elsewhere.” (Chalmers 2004, p 9)

Impact of non-Scottish judges on Scots law

Assuming that non-Scottish judges have, at least in some cases, played a significant role in determining the outcome of Scottish civil appeals to the House of Lords, has this been to the benefit of Scots law? Again, different views have been expressed. For example, in its response to Adam Ingram’s consultation paper (2004) the Scottish Human Rights Centre (‘SHRC’) stated that:

“The SHRC considers that, for a court to be competent to hear appeals in Scottish cases, all the judges hearing the appeal should be Scottish judges, with the necessary knowledge and expertise of Scots law. (...) We consider that recent cases such as Sharp v Thomson bring into sharp focus the problems created by non-Scottish judges trained within a different legal system deciding Scottish cases.

In Sharp v Thomson, confusion and inconsistencies were created in an area of Scots property law by Law Lords applying a concept of English law that was foreign to Scots law, that could not have been reasonably foreseen by parties to the case, and which had repercussions that the House of Lords did not appear to understand.” (pp 2-3)

Others, however, have argued that the case of Sharp v Thomson is not an example of Scots law being harmed by non-Scottish judges introducing English law concepts (eg as argued by the Scottish Legal Action Group in its response to Adam Ingram’s consultation).

Need for a level of appeal beyond the Court of Session

In evidence to the Justice 2 Committee, the Scottish Executive has stated that:

“the right of appeal to the House of Lords on civil matters which exists at present has served the Scottish justice system well, building up a tradition of high quality and durable decisions ensuring valued and valuable consistency throughout the UK.” (Scottish Parliament Justice 2 Committee 2004, p 18)

In its response to Adam Ingram’s consultation paper (2004) the Scottish Legal Action Group stated in relation to the current role of the Court of Session:

“Existing appeals are frequently heard by a bench of judges composed of both appeal court (Inner House) and Outer House judges. The collegiate nature of the Court has historical origins and is much valued. The existing arrangements do however mean that there is a lack of clear distinction between the appellate level and the lower level. The Group does not think that the quality of judicial thinking in the Court of Session is improved by this. It does not believe that this compares favourably with the Court of Appeal in England. The Group is also aware that concern has been expressed that the closeness between the Outer House and Inner House judges subconsciously encourages Inner House judges to be less critical of the ‘lower’ Outer House judge. This is not to suggest that the appeal court level does not operate properly as a generality, but it is a system where a perception of a lack of rigour does not assist the administration of justice. (…) Scotland is already something of a backwater in many areas of litigation. Removing a right to appeal to London would not do anything to help, and there is concern that it might have the effect of increasing the problem.” (p 2)

However, other commentators have questioned the need for an appeal in civil cases beyond the Court of Session. For example, a response to Adam Ingram’s consultation from a number of academics at the School of Law, University of Aberdeen argued that:

“The primary advantage of this appeal route [ie the appeal of Scottish civil cases to the House of Lords] is that it allows issue to be considered at a UK-wide level. That may be of some benefit where the courts have to consider issues of statutory interpretation (where the statute is a UK statute), but it is not essential. A number of UK-wide statutes apply in criminal matters, but the lack of a right of appeal ‘to London’ does not appear to have caused any difficulties for the courts in applying such legislation. There is little, if any, benefit in such an appeal route where the issues under consideration are distinctively Scottish, as is often the case.” (p 1)

It has also been stated that “it is difficult to think of any significant errors of law which have been corrected by the House of Lords in a Scottish appeal in recent years” (Chalmers 2004, p 13). If accepted, this point may also be used to argue against the need for a new level of civil appeal within Scotland.

In addition, it may be noted that the Inner House of the Court of Session has the ability to convene larger benches of judges to review decisions which it made in earlier cases – thus having the ability to correct any past mistakes where the same point of law arises in a later case. This does not, of course, reverse the impact any mistake will have had on the parties to the original case.

**Volume of appeals**

Closely related to the above issue, are arguments relating to the current volume of appeals. Some commentators have argued that the relatively low volume of Scottish civil appeals considered by the House of Lords suggests that there is no need for the continuation of such appeals to the House of Lords or the transfer of such appeals to a Supreme Court. The same
issue has been used to question the need for any new level of appeal within Scotland. For example, the response to Adam Ingram’s consultation from academics at the School of Law, University of Aberdeen stated that:

“It is difficult to identify any particular value for a second right of appeal [following appeal to the Inner House of the Court of Session], especially as so few second appeals are taken to the House of Lords at present.” (p 2)

**Comparisons with arrangements for criminal appeals**

As indicated earlier in this briefing, the final court of appeal for Scottish criminal cases (where devolution issues do not arise) is the High Court of Justiciary sitting in Edinburgh. There is no right of appeal to the House of Lords and no plans to include such a right of appeal to the Supreme Court of the United Kingdom. It has, therefore, been argued that there is no logical basis for retaining a right of appeal to the House of Lords in relation to Scottish civil cases and/or introducing a right of appeal in such cases to the Supreme Court.

Using the same comparison, it might also be argued that the possibility of appeal to the House of Lords or Supreme Court in Scottish civil cases should be abolished without any replacement (ie without the possibility of an additional level of appeal within Scotland). On the other hand, it may be argued that an additional level of appeal should be introduced in relation to Scottish criminal cases.

Professor Hector MacQueen has stated (in evidence to the Parliament’s Justice 2 Committee) that:

“The Scottish criminal legal system works fairly well without an appeal to London; would any more serious problems arise if there was no civil appeal either? The ability of the Court of Session, like that of the High Court of Justiciary, to convene a larger than usual panel of judges to reconsider difficult issues, should be kept in mind here by those worried about the possible stultification of the law.” (Scottish Parliament Justice 2 Committee 2004, p 13)

During its consideration of the Constitutional Reform Bill, the Justice 2 Committee reported that:

“The Lord Advocate felt that it would be difficult to remove rights of appeal which had existed for a long time and which had, he suggested, been of distinct benefit to Scotland, Scottish litigants and Scottish jurisprudence. While he accepted that the difference between civil and criminal appeals could be seen as an anomaly, he saw no case for changing an anomaly which has existed for 300 years without creating difficulties.” (Scottish Parliament Justice 2 Committee 2004, para 9)

**Speed and accessibility of the appeal process**

In its response to Adam Ingram’s consultation, the Scottish Human Rights Centre suggested that transferring to a Scottish court the current right of appeal to the House of Lords would, assuming adequate resources are provided, lead to a more accessible route of appeal within a shorter timescale. However, in response to the same consultation, the Scottish Legal Action Group stated that:
“The House of Lords can give dates for important cases far quicker than the Inner House of the Court of Session. (...) Based on the experience of the current arrangements the Group does not believe that a Scottish Appeal Court would be faster than going to London without compromising the integrity of a separate appellate court, properly staffed with its own discrete complement of judicial appointment.” (p 5)

Need for a United Kingdom court

Is there a need for a United Kingdom court and, if so, what types of cases should it deal with? It may be argued that a court with United Kingdom wide jurisdiction can play an important role bringing unity, especially where possible constitutional issues arise. However, the current differences applying to civil and criminal appeals in Scottish cases may be thought to undermine this argument to some degree. It is, of course, true that devolution issues arising in relation to both civil and criminal cases may be appealed to the Judicial Committee of the Privy Council, and that the intention is that such cases will in the future be dealt with by the United Kingdom Supreme Court. However, even if it is accepted that a United Kingdom court should have jurisdiction in such cases, this does not necessarily mean that it should have wider jurisdiction to deal with civil appeals in all Scottish cases.

It should be noted that Scottish courts can, and do, take account of legal thinking in other parts of the United Kingdom and may, in particular cases, be persuaded to take a similar approach to that taken by a court in another jurisdiction. It has been stated that:

“It is open to the courts (...) to adopt a common approach (where possible within the context of existing law) without having resort to a UK-wide court. The nub of this argument, therefore, is that it holds that it is appropriate to have a UK-wide court with the power to impose uniformity where lower courts are unwilling to adopt such an approach of their own accord.” (Chalmers 2004, p 24)

The author of the above comments questions whether this is appropriate given that the Scottish Parliament has, in relation to a very wide range of issues, been given the power to legislate in a way which may depart from the approach taken in other parts of the United Kingdom.

SOURCES


Custodial Sentences and Weapons (Scotland) Bill: further written submissions

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

- The Sheriffs Association
- Andrew Coyle
- SACRO
- Cyrus Tata
- COSLA and ADSW

Clerk to the Justice 2 Committee
23 November 2006
The Council of the Sheriffs’ Association does not consider that the provisions of this Bill will achieve the objective of delivering clarity and transparency in sentencing.

The Council recognises that the policy and policy objectives of the proposed legislation are for the Executive and Parliament and not for the Association. However, the Council has serious concerns about aspects of the proposals for the implementation of the policy and policy objectives.

The Council has no difficulty with the proposal that sentencing judges will have a role in setting the custody part of sentences of imprisonment ("custody and community sentences") and recognises that this role may, to a certain extent, make the process more transparent. However, in relation to transparency, clarity and certainty the Council has concerns about the role of the Executive and the Parole Board in reviewing and altering the custody part, as well as determining the conditions of community licence. The Council also has concerns about the operation of the Bill's provisions in relation to the judicial decision-making process.

So far as the judicial decision-making process is concerned, we note that in deciding on the appropriate custody part the sentencing judge will not be permitted to take into account a factor that has customarily figured commonly in the judicial sentencing process. Clause 6 (5) requires the sentencing judge in specifying a custody part “to ignore any period of confinement which may be necessary for the protection of the public”. That appears to suggest that risk of re-offending is not a factor that may be taken into consideration. Indeed the Explanatory Notes (Para.16) state in relation to subsection (5) – “The question of risk (or the protection of the public) will be assessed during the custody part and, if necessary, will be decided by the Parole Board.”

The Policy Memorandum states that “Public protection is of paramount importance” (Para.7). The protection of the public is a factor to which sentencing judges have customarily attributed high importance in determining the appropriate sentence to impose. The question arises of whether it is the intention of this proposed legislation to remove that factor from the judicial sentencing process.

It is not clear how the provision of clause 6(5) would affect the sentencing process so far as concerns the selection of a custodial sentence, rather than an alternative to custody, or as regards the setting of the overall “headline” sentence of “imprisonment”. Nor – in relation to the setting of the “custody part” - is it clear how the provision sits with the requirement in clause 6(2) to set the custody part as the appropriate period to satisfy the requirement of deterrence. Assuming this to be a reference to individual and not general deterrence (although this is not made clear), it might be thought that the sentencing aim of deterrence involves protection of the public (from further offending by the offender) and that the sentencing judge’s assessment of the period of custody appropriate to deter the particular offender from re-offending may require to involve assessment of risk of re-offending as a factor in that calculation.

There may be a further difficulty for sentencing judges in calculating the appropriate sentence, created by clause 6(4)(c). If the intention is that the provisions of section 196(1) (a) and (b) of the 1995 Act, in conjunction with the case law from the case of Du Plooy v HM Advocate, should operate in such a way that any proposed increase in the custody part (in terms of clause 6(3)) is to be reduced in recognition of an early plea of guilty, does this mean that the sentencing judge in such circumstances is to give an offender the benefit of a double discount, with both the overall “headline” sentence and the custody part being reduced ?

The point about double application of the same factors would also seem to apply to the other matters relevant to the imposition of a higher custody part in terms of the proposed section 6(3) and (4). The seriousness of the crime and the accused’s record are likely to be taken into account in setting the overall “headline” sentence as well as being matters relevant to specifying a custody part that is greater than half of the overall sentence.
As we have said, the policy of the proposed legislation is a matter for the Executive and not for this Association. In fact we have no difficulty with what is stated in the Policy Memorandum about creating a transparent sentencing regime that will improve public confidence and provide transparency and certainty for victims. However, we do not believe the proposed legislation will achieve that and we think it appropriate to offer comment because we believe this will create difficulties for the judiciary, as well perhaps as for victims and the public. Although the custody part of a sentence of imprisonment will be imposed and announced at the public sentencing hearing, it will not be possible to predict or state at that time what the duration of the period that will actually be spent in prison will turn out to be or what the conditions of licence during the community part of the sentence will be. The only part of the sentencing process that will be in public will be this hearing. This situation would not appear to be conducive to or consistent with a policy of clarity, certainty and transparency, and it will create a difficult situation for the sentencing judge at the time of sentencing.

Although there is no specific provision to this effect in the Bill the Policy Memorandum states that "the court will explain the consequences of the combined structure when imposing sentence." (Para. 11) Is not clear how that is to be achieved, in the absence of specific statutory provision. However, such an explanation may present a difficult task, so far as clarity and certainty are concerned.

An example of the sort of explanation that may require to be given follows. It supposes a sentence imposed by a sheriff on indictment in respect of a crime of assault to severe injury and permanent disfigurement in a case where a plea of guilty has been tendered at the First Diet.

Sheriff – “The sentence of the court is a sentence of imprisonment - that is a custody and community sentence - of three years. The sentence takes account of your early plea of guilty, in accordance with the requirements of the law. It would otherwise have been a sentence of four years, but a discount of one quarter has been given.

The custody part of your sentence will be one half - that is eighteen months - in accordance with the relevant statutory provision. I consider that to represent an appropriate period to satisfy the requirements for retribution and deterrence. In specifying the custody part I have been required by statute to ignore any period of confinement which may be necessary for the protection of the public, and I have not therefore taken into account the risk of you endangering members of the public by re-offending.

I cannot tell you (or your victim or the public) at this stage whether you will in fact actually spend 18 months in prison. It is open to the government to release you from prison on curfew licence before you have served 18 months. It is also open to the government and the Parole Board to delay your release from prison beyond the expiry of 18 months. The period of imprisonment may be extended up to a maximum of 27 months if the government and the Parole Board consider that you would, if not confined, be likely to cause serious harm to members of the public.

Part of your sentence will be served on community licence. In terms of the sentence I have imposed the period in the community on licence will be for one half of your sentence – namely 18 months. However, you will appreciate from what I have just said that it may turn out to be for more or less than that. I cannot at this stage tell you what the conditions of your licence will be when you are serving the community part of your sentence. These conditions will be set by the government or the Parole Board. If you breach the conditions of licence your licence may be revoked and you may be re-imprisoned, although you will not be further detained if the Parole Board determines that you would not, if not confined, be likely to cause serious harm to members of the public.

This is the only public hearing at which your sentence will be announced. I hope the consequences of the combined structure of your sentence are clear to you.”
As regards early release on Curfew Licence, we note that the Policy Memorandum makes clear (in Para.36) that the Bill re-enacts the arrangements introduced through the Management of Offenders etc (Scotland) Act 2005, known as Home Detention Curfew. These measures are seen as providing “a useful incentive in appropriate cases”, but would be subject to strict controls, prescribed in the Bill, such as the exclusion of high risk offenders and sex offenders. Clarification of clause 36(1)(b) would be helpful, as regards its meaning and the Executive’s intentions.

The Council would also wish to comment on the question of reports by sentencing judges, which has been raised in comments submitted by Sheriff Reith QC, who is a member of the Parole Board. The need for such reports is very limited at present, particularly so far as sheriffs are concerned. Reports are mainly required in cases where a custodial sentence of 4 years or more is imposed. (They are also required where a consecutive sentence is imposed which takes the accused into the category of a long-term prisoner or where a supervised release order or extended sentence takes the overall sentence into the 4 years or over category.) It is unclear what implications the proposed new statutory provisions may have for the provision of reports by sentencing judges. The Council would strongly oppose any suggestion that sentence reports should routinely require to be provided by sentencing sheriffs as a result of this proposed legislation. Any such requirement would add an unacceptable additional burden to the work of sheriffs and would be quite disproportionate to what would be likely to be the actual need for reports. We would expect that the number of cases in which the Executive thinks it appropriate to refer the sentence to the Parole Board would be only a small proportion of the total number of cases in which a custody and community sentence is imposed. In any case, as noted above, the matters to be taken into account by the sentencing judge in deciding whether it is appropriate to set a longer custody part are not to include any period which may be necessary for the protection of the public (clause 6 (5)). The test for consideration of denial of release at the end of a custody part that is less than the maximum will be the protection of the public (from serious harm). There should therefore be no need for any reports from sentencing judges, as the criterion for consideration of refusal of release at the end of the original custody part will be one that the sentencing court will not have considered (or indeed been permitted to consider).

The Council would also associate itself generally with the other comments submitted by Sheriff Reith, so far as relevant to the interests of sheriffs, including those relating to the abolition of the power of the court to decide to require an early-released re-offender to serve the unexpired portion of the sentence.
I am Professor of Prison Studies in King’s College, University of London. Between 1973 and 1991 I was a Governor in the Scottish Prison Service, where I governed Greenock, Peterhead and Shotts Prisons. Between 1991 and 1997 I was Governor of Brixton Prison in London. From 1997 until 2005 I was Director of the International Centre for Prison Studies in the School of Law in King’s College London. I am a member of the National Advisory Body on Offender Management.

I have been asked to provide a short written submission on the custodial sentences aspects of the Custodial Sentences and Weapons (Scotland) Bill to assist the Justice 2 Committee in its scrutiny of the Bill. Specifically, I have been asked to comment on the extent to which I consider that the provisions in this Bill will achieve their expressed purposes, particularly in connection with reducing re-offending and better protecting the public.

**Imprisonment and public safety**

Official records show that crime rates in Scotland have been falling consistently for a number of years. These include serious crimes, such as murder, non-sexual violence and house-breaking. The rate of ‘offences’ has shown an increase in recent years. The term ‘offences’ is applied to illegal actions connected with motoring, low-level assaults and breaches of the peace. This increase can be explained mainly by a significant increase (by two thirds in the year 2003) in the number of detected offences of speeding, due to the installation of speed cameras.

In general terms Scotland is a much safer place in 2006 than it has been for many years. The question as to whether the public feels safer is another matter and is beyond the scope of this short paper.

Despite the clear fall in crime rates the number of persons in prison in Scotland has risen inexorably in recent years. It now stands at almost 8,000, 20% higher than it was ten years ago and the highest it has ever been. The Scottish Executive predicts a continuing rise in the number of people in prison and has plans to provide two new prisons, with around 1,400 places within the next few years. As in other countries, there is little research evidence to suggest any link between crime rates and imprisonment rates.

In international terms, Scotland has the third highest rate of imprisonment in Western Europe. If the predicted increases occur, it will have the highest rate. Rates of imprisonment are usually quoted per 100,000 of the total population. It has been suggested that they should instead be quoted per rate of crime and that, if this were done, Scotland would have a relatively low rate of imprisonment. This suggestion does not bear scrutiny. It is notoriously difficult to compare rates of crime across countries because of different legal definitions of crime and different methods of collecting data. The most reliable international data in this field is provided by the International Crime Victims Survey. The latest available figures for this indicate that Scotland is in 8th place out of 17 countries for burglary and attempted burglary and 4th out of 17 for violent crime.

The high rate of imprisonment in Scotland comes at a cost. The annual cost to the tax payer of the Scottish Prison Service (SPS) for year 2005-06 was £280 million. In response to a recent Parliamentary question the Minister for Justice reported that the Chief executive of the SPS estimated that the contract value of the new prison at Addiewell would be “£369 million in Net Present Value terms”. I am advised that in real terms this will mean a cost to the public purse of around £1 billion over 25 years.

None of the above figures take any account of the implications of the likely outcome of the proposals in the Custodial Sentences and Weapons (Scotland) Bill. One estimate is that the provisions in the Bill may lead to an increase in the daily prison population of about 1,000. This will be in addition to any other projected increase.

If it could be shown that an increase of this size might result in Scotland being an even safer country than it is today, then it might be possible to make an argument for such a way forward,
whatever its cost in financial and social terms. It is for the Justice 2 Committee to decide whether any evidence to this effect has been provided.

**The aim of the Custodial Sentences and Weapons (Scotland) Bill**

The Scottish Parliament Information Centre’s briefing for this Bill indicates that it “aims to deliver the Scottish Executive’s commitments to end automatic and unconditional early release of offenders and to achieve greater clarity in sentencing”.

For many years only a minority of prisoners have served the full sentence of imprisonment passed on them by the court. In the UK there are three main grounds for release before the end of sentence. They are automatic release, generally known as remission, discretionary or conditional release, usually known as parole, and home detention curfew, a relatively recent innovation.

The practice of remitting part of a sentence of imprisonment dates from the time of transportation, when convicts who had been of good behaviour were given a ticket of leave from their sentence. Good behaviour was calculated by a system of marks, which entitled a convict to a set number of days of remission according to his behaviour. This system was in due course applied to those convicts who served their sentences in the United Kingdom and by the end of the 19th century it was applied to all sentenced prisoners. Throughout the course of the 20th century there were several increases in the proportion of sentence that was remitted, from one sixth to one quarter, to one third and currently to one half for all sentences of less than four years.

The parole system, conditional or discretionary release under supervision, came into operation in 1968 and applied to all prisoners serving determinate sentences who became eligible for release on licence after serving one third of their sentence or twelve months, whichever was the longer. In practice, this meant that parole applied to prisoners serving over 18 months. In 1991 the threshold for parole was raised to include prisoners serving sentences of four years or more. These prisoners became eligible to apply for conditional release on licence for the period between half and two thirds of their sentence.

For the last fifty or so years there has been a presumption that all prisoners would be given remission unless their bad behaviour in prison warranted that some of it should be removed. The increases in the rate of remission were usually a response to concern about the increasing prison population. Similarly, the introduction of parole was largely a pragmatic response by government to the need to manage the size of the prison population, although it was also related to a belief that the rehabilitation of prisoners could be aided by early release, coupled with support in the period immediately thereafter.

The system which exists today is complex and difficult to understand, even by “experts” in the system, be they judges, prisoners or those who operate the system. Above all, the public, including victims, find it very confusing. The aim of the present Bill “to achieve greater clarity in sentencing” is admirable. However, it is not immediately apparent that the Bill will achieve its aim. Even when approaching it in a positive manner one needs a calculator and a great deal of patience to unravel the arithmetic of what a prison sentence will mean in the future. In the world of criminal justice, experience teaches one to be wary when words are given a new meaning. The current Bill introduces one such innovation with the term “community prisoner” (Section 4). This is not a term which will be easily understood by the public.

Everyone, the public, victims, judges and offenders, will be better served if there is greater clarity in sentencing. Currently, if a sheriff passes a sentence of six months imprisonment, he or she is well aware that this means that the guilty person will spend three months in custody. It is sometimes suggested that if the sheriff decides that a particular offence merits three months in prison then he or she will pass a sentence of six months. Judges should not do this and all will deny that this ever happens. However, common sense suggests otherwise. None of this is clear to the victim or the person in the public gallery. He or she will expect that a sentence of six months in prison means just that and, therefore, is likely to be surprised to see the guilty person walking the streets after six months. An important consideration when discussing clarity in sentencing is whether, for the offence described above, the clear sentence passed by the judge should be three months or six months. If it is to be three months, there will have to be a process of public education to explain
that this does not imply greater leniency on the part of the court (also allowing for the fact that prison sentences in Scotland are generally longer than those for similar offences in comparable European countries). If, on the other hand, it is in future to be six months, this will mean in crude terms a doubling of the already high number of persons in prison in Scotland. The current Bill tries to deal with this dilemma by a process of realignment of the amount of sentence to be spent in prison. History does not suggest that this will be successful. There are sentencing models currently operating in other Northern European countries which would be well worthy of study.

Reducing re-offending and protecting the public

This short paper is not the place to embark on a long discussion about the purposes of imprisonment. Suffice to note that the main consideration for the judge dealing with an offender in the dock, conscious of the victim who may be in the public gallery, should be to ensure that the sentence he or she passes is commensurate with the crime that has been committed and that, if a prison sentence has to be imposed, its length should be proportionate.

The reality is that the likelihood that a guilty person will not re-offend in the future is reduced when he or she is sent to prison. Levels of recidivism of released prisoners around the world demonstrate this fact. That is not to say that the prison authorities and other agencies should not do every possible to minimise the damage done by imprisonment and to increase the possibility that after release from prison formerly incarcerated persons should lead a useful and law abiding life. In order to achieve this, there has to be close collaboration between the Prison Service and the agencies which will have dealings with the offender after release. These latter will include the Social Work Department Criminal Justice workers, as well as those responsible for housing, for employment, for health and other community agencies. The Scottish Executive has recognised this reality by setting up Community Justice Authorities under the Management of Offenders legislation recently enacted by Parliament. This legislation places Scotland at the cutting edge of dealing with the problem of crime as it affects communities. It would be a pity if the work of these new authorities were to be made more difficult by some of the provisions in this Bill. Not least among these, as explained by a number of those who have already provided submissions to the Committee, is the fact that the total number of released prisoners to be dealt with by criminal justice social workers and others will increase significantly.

One of the aims of the Bill is to ensure proper supervision of those offenders who present a serious threat to public safety and security. This is also an objective of the recently established Risk Management Authority. An unforeseen and unfortunate consequence of the Bill may be that by widening the net of supervision to include many low level offenders the supervision given to the relatively small number of released persons who will continue to be a serious threat to public safety will be reduced and the danger that they may re-offend will be increased.
Supervision in the Community

We consider that it is vital that the value of supervision and support of offenders in the community be recognised as a major contributor to community safety. At the same time it has to be appreciated that there are resource implications in providing supervision and support and that they should therefore be targeted on those offenders who require them.

These functions can be summarised as follows:

**Supervision**
- Ensure compliance with licence conditions
- Provide opportunities for the supervisee to address issues related to offending
- Monitor and take action in relation to identified risk of re-offending and risk of harm.
- Observe, note and report significant aspects of the resident’s attitudes, behaviour, mental and physical health, response to support, family and social relationships.
- Take appropriate action if there are suspicions of illegal activities.
- Provide written progress reports on the above when required.
- Initiate breach of licence process when circumstances warrant it.

**Support**
- Community safety is enhanced through the provision of support, which is likely to increase the effectiveness of monitoring and supervision activities. It is designed to assist the resettlement of the offender to a stable lifestyle in the community, and in doing this, help to reduce the risk of offending. It is likely to include some or all of the following:
  - Advice, guidance and assistance to obtain benefit entitlements, supported accommodation, access to training and employment opportunities, access to health services.
  - Life skills work designed to help with budgeting, healthy eating, basic health information and household skills.
  - Encouragement and assistance to pursue legitimate and constructive leisure interests.
  - Advice and guidance about relationships, e.g. with family, friends.
  - Support to sustain efforts in regard to the above activities.

There is an abundance of evidence that offenders’ prospects of avoiding future offending are greatly increased if they see themselves as having a stake in society through opportunities to succeed. Suitable accommodation, employment and moving away from substance abuse are three of the most crucial factors.

The voluntary sector plays a major part in the provision of a wide range of services that complement the supervision which is the responsibility of the statutory services.

**Voluntary Throughcare**

We take the view that much of the support that ex-prisoners need to adopt a law-abiding lifestyle can be provided on a voluntary basis if offenders are encouraged and motivated to receive it. Our evidence is based on Sacro’s experience of providing a Community Links Centre. A paper describing this service is attached for reference, as is a short case study to illustrate an immediate post release service.

The great majority of prisoners do not require statutory supervision but many will benefit from this kind of support.

We recommend that the Scottish Executive invest more resources to make sure that the best of the current models of service delivery be rolled out across Scotland to make them readily accessible.
We further recommend that statutory supervision be reserved for those serving sentences of 12 months or more.

Fit of this Bill with the Management of Offenders (Scotland) Act

The major aim of the Act is to ensure that all the relevant agencies work jointly to reduce re-offending. The creation of the Community Justice Authorities and the duty on agencies to co-operate will underpin achieving this objective. We welcomed these initiatives.

We are concerned, however, that implementation of concomitant desirable processes such as Integrated Case Management and joint risk assessment would be undermined by placing unrealistic expectations on police, on social workers and on prison officers, not to mention the voluntary sector, the courts and the Parole Board. We refer, of course, to the huge numbers that would have to be unnecessarily risk-assessed and supervised and to the increased number of recalls and longer sentences.

The new demands, would in all likelihood, reduce the quality of the input of all the agencies to those cases and offenders that need it most. This, in turn, would threaten public safety and thus the confidence in the new joint working arrangements and also adversely affect the morale of all the staff concerned.

THE COMMUNITY LINKS CENTRE - Putting The Jigsaw Together


Quote from a service user of the Community Links Centre:
One day at benefits I was told to go to Castle Terrace. When I got there, there was a note on the door telling us to go to High Riggs job centre, and when I got there, they told me I had to get my housing form stamped. This was still in my B&B, so I had to go back to collect it. I returned to High Riggs only to be told I would also need ID. I returned once more to the bed and breakfast and then back to High Riggs only to be told they were very sorry that they had made a mistake and I wouldn’t get payment until the next day. If my Sacro worker hadn’t been there to take me back and forwards I know I would have lost it and probably ended up back inside.

This is an example of how the Community Links Centre helps prevent people going back inside.

Introduction

One of the purposes of this conference is to consider how interagency working and partnerships can help to meet the learning and skills needs of offenders. What I aim to do in the next 15 minutes is to

- highlight some of the challenges, facing prisoners returning to the community from prison, that form barriers to employability
- and tell you about the Community Links Centre initiative in Edinburgh and its potential to overcome obstacles to employability through a co-ordinated, interagency approach to resettlement in the community.

There’s widespread acceptance of the Scottish Executive’s aims to reduce re-offending – to make communities safer. We know that 60% of discharged prisoners are reconvicted within two years and that 43% return to prison within the same time period. The work of the Community Links Centre has an important part to play in reducing those figures, by addressing the barriers to employability.

Barriers to Employability

We also know that “research consistently identifies sustained employment as the biggest single determining factoring affecting ex-prisoner recidivism rates.” (Adams and Smart – see report details below)
However, there can be immense obstacles in the way of prisoners taking up opportunities that may be offered to improve their training and employment prospects. These have been well documented in a report of a study carried out here in Edinburgh last year. It was commissioned by the Capital City Partnership and I commend it to you because its analysis and conclusions about employability and offenders will also be relevant to other parts of Scotland.

**[Employability Support in Edinburgh For People Leaving Prison]**

Eddy Adams and David Smart (November 2005) Google the Capital City Partnership website, publications section.

The report points out the range of potential barriers that may have to be overcome:
- Lack of suitable accommodation
- Lack of education and employment
- Drug and alcohol abuse
- Mental and physical health issues
- Poverty, debt and homelessness
- Poor family networks
- Mistrust of mainstream agencies
- Poor life-skills as a result of institutionalisation
- The deterioration of personal circumstances as a direct result of imprisonment.

Other potential barriers pinpointed by the Adams and Smart study include:
- Short sentences making pre-release work difficult
- Kaleidoscopic patchwork of un-co-ordinated community-based services – which is best for the prisoner?
- Some prisoners simply not being appropriate for joining the labour market, either for economic reasons or because they know they are nowhere near ready!

Just how significant these barriers are becomes clear when we look at information about the 2000 people released from prison to Edinburgh in 2003.

- Around 1750 were drug users, almost 90%
- 800 had mental and physical health problems, 40%
- 570 were homeless. Between 25-30% (Capital City Partnership research, 2005).

Research from England and Wales (Social Exclusion Unit Report, 2002) tells us some interesting statistics about offenders and accommodation:

- 1 in 3 NOT in permanent accommodation prior to prison
- 1 in 3 lose housing on coming into prison
- 1 in 2 are homeless on release!

The research also points out how this lack of accommodation can affect resettlement:
- Suitable accommodation can reduce recidivism by 20%
- Ex-prisoners with an address are three times more likely to be in paid employment.

So, the picture is a complex one and, as usual, there is no one panacea or solution. Sacro certainly does not have all the answers but we do think the Community Links Centre model, now in its early days of operation in Edinburgh, can go some way to addressing some of the issues. This is especially because the "throughcare service agreements" between the Sacro service worker and the prisoner/ex-prisoner will take a holistic approach to tackling the kinds of problems that constitute the barriers to utilising employability services.

Sacro is not an employability specialist and has no ambitions to set up a stall in this market. However, employability and employment will undoubtedly be crucial factors for many of our service users. The Adams and Smart report suggests the potential for the Centre to act as a "partnership vehicle" should be explored further by all concerned. In other words, as employability is unlikely to be the only issue for the service user, our role is to support the employability specialists by
assisting the service users to put the other elements of the jigsaw in place and to sustain their motivation.

Let me now tell you about the Community Links Centre.

In summary:
- A Sacro worker gets to know the prisoner through at least three visits while still inside and together they plan and prepare for release.
- The same worker then supports the prisoner on the outside to get the services he or she needs from other agencies or perhaps by providing some modular interventions themselves; and by motivating them to stick to the plans they've made.

Sources of referrals-slide. CLC works closely with the Enhanced Casework Addiction Service (ECAS) provided in the prisons by Phoenix House-- Throughcare Addiction Service referrals.

The Centre is the City of Edinburgh Council's way of implementing the Scottish Executive's Throughcare initiative for voluntary assistance for prisoners sentenced to less than four years. These referrals come from SPS, Community agencies, prisoners/ex-prisoners and their families. The priority target groups are offenders with additions issues and offenders who pose high risk of harm to the community.

In Sacro, work with the Throughcare Addiction Service priority group is an integral part of the Community Links Centre service and the same model is used, whatever the issue for, as with employment, drugs are rarely the only issue for a service user.

The CLC provides proactive encouragement and access to a range of supports for prisoners discharged to Edinburgh, the majority coming from Polmont, Comiston Vale and Saughton. It is intended to mirror the interagency work carried out in the LINKS Centres in the prisons, and provide the continuity of service that will increase the likelihood of successfully keeping the service user engaged in the activities and relationships that will break the cycle of offending.

The Sacro staff work from a city centre base, which will have some space to enable other agencies to provide their services for Centre users.

Outreach work will complement the in-reach work in prisons and the work carried out within the Centre, so Sacro staff will also meet service users in their local communities. It is envisaged that community agencies working in partnership with Sacro will let us use their premises for this work. Home visits will be made when appropriate.

Since the service was introduced late last year, the Centre staff have been in dialogue with a number of key statutory and voluntary agencies in Edinburgh to discuss the best ways to collaborate to meet the service users identified needs, share information and get feedback on outcomes and for tracking (important for evaluation). Protocols between the agencies are being drawn up as necessary.

The services offered to Centre users will include a combination of the following as appropriate to each individual:
- Advice, guidance and practical assistance. This covers a wide range of issues including accommodation/housing, securing full benefit entitlement (particularly difficult in Edinburgh at present as offices are being closed and replaced by call centre lines), access to education, training and employment as well as access to health services/GP.
- Assisting access to drug treatment services (support can be accessed quickly but the wait for a prescribing services can be as long as six months) and helping to sustain ongoing treatment
- Life skills work designed to help the service user with budgeting, healthy eating, basic health information and household management.
- Encouragement and assistance to pursue appropriate, legitimate and constructive leisure interests.
- Advice and guidance about relationships with family and friends and direct contact with family as required both pre- and post release.
• Support and encouragement to service users to attend programmes that are intended to reduce their risk of re-offending
• Brief modular interventions designed to address criminogenic need and thus reduce the risk of re-offending, e.g. anger management, alcohol education and relapse prevention and, where appropriate, addressing the harm offenders cause to their victims.

Service users are assessed for where they are on a line between “in crisis” and “thriving”. At one end people will need to have their basic needs worked on before they can take up any opportunities provided by the employability services. Others further along the road may be able to take up opportunities if they are given a measure of support on their basic needs alongside the employability preparation, training, learning or employment.

CONCLUSION

Key factors for success include:

The professional relationship developed by the worker meeting and planning with the service user in the prison and the same worker building on that relationship to motivate the offender once he is in the community.

Also crucial to the success of the service are the partnership agencies and excellent interagency working with- The Council, SPS, Phoenix House, and a wide range of community-based agencies in Edinburgh.

A third factor crucial to the success of the service and outwith Sacro’s control, is the capacity of these community-based agencies. Already we are experiencing a shortage of available accommodation and difficulties in accessing drug rehabilitation places.

The systems and supports are in place but joint strategic decisions and the political will to ensure all the pieces of the jigsaw are in place, will be essential for CLC to add its potentially significant contribution to reducing re-offending. We hope this will be achieved through the inter-agency Advisory Group, which has been established for CLC.

CASE NOTES

Date: 21-10-05  Name: G

G was picked up from the prison at 9.15 am, and we confirmed the “plan of action” for the morning. G informed me that he was nervous about being “free” and stated that he was grateful that Sacro staff were willing to collect him from jail, as he felt that he would not make it past the first off licence.

As agreed, we went to the Benefits office at Wester Hailes, where G completed the necessary forms to begin his claim for benefits. There was confusion about his status as being medically unfit to work, but I informed the benefits officer that we intended to arrange a doctor’s appointment for the following Monday, to confirm his medical status. G felt that it was good that this had been completed, as it was one less worry that he now had to deal with.

Then we went to the Post office to cash his Community Care Grant Cheque. However, as G did not have any ID the cashier refused to cash his cheque. Upon querying how he could verify his ID we were informed that the Benefits office had the capability to do this. We returned to the Benefits office and after discussions with the officer there we managed to get a letter from the benefits office confirming G’s identity. Again G was grateful that I was there as he stated that he would have “lost the plot”, and “walked out, without getting anything sorted”.

Upon returning to the post office G was able to cash his Cheque. I made a passing comment to G about giving the money to his girlfriend to look after, but he stated that he was the one who would look after the money, and he felt that he would not spend it on drugs or alcohol. However, on
passing an off licence on the way out from the post office G said “Thank god you are here, or else I would be straight in there”.

We then went to the doctor’s surgery, where G arranged an appointment for the following Tuesday. Although the surgery was on the way to his girlfriend’s, again he stated that he would not have got round to making the appointment if I had not been there to insist he did it. G realised that it was another issue that he would not have to deal or worry with in the future and again was grateful.

G then directed me to his girlfriend’s house, and he introduced me to her. Whilst G was putting away his belongings and having a quick wash, his girlfriend informed me that she was extremely pleased that I had taken the time to accompany G to and helped him with the various agencies. She acknowledged that she had not expected to see G straight away, as she thought he would end up buying drugs or alcohol as soon as he was released from prison. She stated “At least you are giving him a better chance than he has had before, by helping him like this”.

After having a cup of coffee and informing G’s girlfriend of the times of the appointments that had been arranged, we left to go to the CDPS office on Spittal Street. G then informed me that he had to go back to the house as he had forgotten to take money, as he had given it to his girlfriend. G stated that he had thought about my advice and realised that it was a good idea, otherwise he would have spent it all on alcohol or drugs in a short period of time. On the way to the CDPS office G could not emphasis enough how grateful he was for me taking the time to help him. He stated that this was the longest period of time, after being released from any sentence, that he had remained drug and alcohol free. He said that if I had not been there he would not have made it to his girlfriend’s house nor attended all the appointments that had to be attended that day.

I took G into the CDPS office and when taken in for his appointment, I then returned to the office. We have arranged for another appointment for Wednesday 26th October, as this will allow G time to attend the doctor’s on Tuesday before coming to see me.

G was informed that if he had any worries or concerns before the appointment he should call the office. G agreed to this and once again thanked me for all the help that he had received so far.
SUPPLEMENTARY SUBMISSION FROM CYRUS TATA ON CUSTODIAL SENTENCES AND WEAPONS (SCOTLAND) BILL

THE BILL IGNORES THE KEY TO ACHIEVING CLARITY IN SENTENCING

The Bill deals with the management of sentences without tackling sentencing itself – once again changing exit points without looking at entry. The Bill has shied away from looking at sentencing policy. While it is accepted that the allocation of punishment in individual cases is a matter for the courts, the overall objectives and shape of sentencing policy is a matter for Parliament. The Bill will not achieve greater transparency because ultimately, in and large part, the 'disjuncture' between time announced and time served is a practical consequence of not tackling the question of who goes into prison and for what. By ignoring that question of who we should send to prison (i.e.: especially where persons are not a danger to the public) and for what, governments will continue to find that they have to manipulate release arrangements so as to relieve pressure on prisons caused by the throughput of huge numbers of very short term prisoners.

ISSUES ARISING FROM THE 15 DAY CUT OFF.

ANY period in custody is extremely serious and has damaging effects leaves one in two homeless; breaks social and familial ties etc which are so vital to desistance.

There are also serious equal treatment considerations:
1. The perverse effects of the 15-day rule. This means that a person sentenced to custody for 21 days will serve less than a person sentenced to custody for an apparently less period (eg 14 days). This is plainly absurd and undermines the objective of clarity and intelligibility.
2. In addition to the perverse effects of the 15 day cut off, some sentencers may feel it is a matter of justice (comparative proportionality) that someone who would have been sentenced to 21 days imprisonment would serve less than someone who is sentenced to 14 days. It will be tempting (and in some respects understandable) for individual sentencers to inflate their sentence to try to avoid this comparative injustice. Other individual sentencers may feel that they cannot do this.
3. Given that the Scottish Executive acknowledges that between 15 days and 6 months the licence will be nominal, why have the 15 day cut off point at all?

UNINTENDED INFLATIONARY PRESSURES ON SENTENCING

Many (though not all) individual sentencers will feel that supervision after release from custody (i.e. combined sentence) is desirable in many cases. The policy memorandum tells us that only those serving 6 months or more will be expected to be in supervision (and it may well be that in time 6 months comes to be seen as too low to provide meaningful supervision). Consequently, many individual sentencers will choose to add the extra time necessary in order that the person before them will definitely get the supervision and support. With the new summary sentencing powers being increased to 12 months1, this will be very tempting. It would have been more sensible to have kept the 12 month cut off recommended by the Sentencing Commission since this would coincide with maximum summary powers. Alternatively, the maximum summary powers should be kept at 6 months.

NOMINAL LICENCE PRACTICE WILL DAMAGE PUBLIC CONFIDENCE IN COMMUNITY SENTENCING IN GENERAL

The Policy Memorandum concedes that those sentenced to custody for six months or less (and we suggest probably more than 6 months in practice) will be subject to only a nominal licence. This will set the reputation of community punishment up for failure. Inevitably, it will not be long before one or more persons on a nominal licence commits a serious offence, which attracts considerable public attention. When it is discovered that in such cases s/he was ‘on licence’, the reputation not only of licence but (by association) community punishment more generally will be damaged. While this ‘failure’ would, of course, not be a failing of community punishment or criminal justice social work per se, it will be portrayed as such in the inevitable media furore, which will point the finger at criminal justice social work. Public confidence in punishment in the community will, as a result, be undermined by its association with the nominal licence. In other words, by making licensing so

1 Criminal Proceedings (Scotland) Bill s33
wide, universal and nominal, it and all community sentencing is being set up for repeated public relations failures.

SETTING OF THE ‘CUSTODY PART’ IN THE PROPOSED COMBINED STRUCTURE (SECTION 6)

Section 6 of the Bill is one of the most unclear and contradictory parts of the Bill.

A. Section 6 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.

B. S6 creates less clarity in sentencing – not more
Section 6(4) provides that an individual sentencer may increase the custody element to 75% in view of: the seriousness of the offence; 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.

C. S6 will create exacerbate disparities in sentencing
The policy memorandum supposes that 50% will be the normal ‘punishment part’ set by the court. This appears to amount to wishful thinking: there is nothing in the Bill which will ensure that this is likely to be the case. Indeed, individual sentencers are likely to deal with very similar cases in dissimilar ways (disparity).

D. S6 means that the aim of long-term public protection will be undermined
“Public protection is of paramount importance.” 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 the very efforts to increase public protection, through a supported and supervised transition back into the community. 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”.

Square Peg in a Round Hole. The Bill has attempted to apply the logic of indeterminate sentence arrangements (e.g. for life sentence prisoners) to all 15 day-plus determinate sentence prisoners. The Bill appears to rely on the rationales used for indeterminate sentence prisoners and apply this to all determinate sentence prisoners sentenced to 15 days or more. The key difference is that determinate sentence prisoners must be released from all restrictions after the completion of 100% of their sentence.

E. Artificial distinction between ‘seriousness’ and ‘protection of the public’ leads to more confusion not less.

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2 Policy Memorandum, p2 paragraph 7.
S6(5) provides that in setting the custody part, the court "must ignore any period of confinement which is necessary for the protection of public". Background documentation indicates that this is supposed to require sentencers only to include the 'punishment part' of sentencing and thereby subtract the 'risk part' from the sentence. In practice I cannot see that this will work. In practice, the categories of 'risk' and 'seriousness' will continue to be very difficult to distinguish in determinate sentence cases. The Bill's attempt to draw this distinction will be seen to be artificial and un-transparent.

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 overall headline sentence.

IF S6 IS RETAINED THEN THERE WILL NEED TO BE A REQUIREMENT FOR SENTENCE RECALIBRATION

In its report, the judicially-led Sentencing Commission explicitly recommended that to take account of increases in real time served in prison, there should be recalibration of sentencing:

“We therefore recommend that, in any new statutory regime, Parliament expressly provides that a sentencer, when having regard to sentences imposed under the previous regime, must also have regard to the right to early release under that previous regime. Accordingly, it will be appropriate for sentencers acting under the new regime…to recalibrate and reduce them by the extent necessary…”[paragraph 5.8, sic]

Currently, it is understood that the sentenced person would be released after 9 months of an 18 month sentence. (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.

For reasons not explained by the background policy documentation, the recommendation by the Sentencing Commission that “Parliament expressly provides” for recalibration has been completely omitted from the Bill.

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3 The Sentencing Commission for Scotland (December 2005) Early Release from Prison and Supervision of Prisoners on their Release
SUPPLEMENTARY SUBMISSION FROM COSLA AND ADSW ON CUSTODIAL SENTENCES AND WEAPONS (SCOTLAND) BILL

The Convention of Scottish Local Authorities (COSLA) and the Association of Directors of Social Work (ADSW) welcome the opportunity given by the Scottish Parliament Justice 2 Committee to contribute additional information to the scrutiny of the Custodial Sentences and Weapons (Scotland) Bill.

This supplementary submission is in response to the request from the Justice 2 Committee for further information on:

- Statistics that demonstrate the difference between the reconviction rates of those who have served a custodial sentence followed by some community intervention and those who have served a custodial sentence only.
- What alternatives might there be to simply returning to custody for those who breach their license.
- What conditions local authorities would be likely to impose in relation to licensing schemes for knife sales.

Custodial Sentences

ADSW can advise that the Scottish Executive does not publish reconviction figures related to whether or not the individual has been on supervision. The Scottish Executive Analytical Services has been contacted by ADSW to discuss whether this data was available for ad hoc analysis and have been advised it is not.

ADSW has been advised that these figures are on their forthcoming agenda and have requested that the Scottish Executive Analytical Service clarify this. ADSW believe it would be more effective if Justice 2 Committee makes the enquiry direct to the Analytical Services Unit of the Scottish Executive. The bulletin in which the most recent reconviction figures appear is Reconvictions of Offenders Discharged from Custody or Given Non-Custodial Sentences 2002/03.

In answer to the Committees question regarding what alternatives might there be to those returning to custody after breach in their license ADSW has the following comments:

The Courts have a range of options available to them depending on what order is being breached including extensions of hours, additional conditions etc. Also for failure to pay a fine there is Supervised Attendance Orders.

Options at breach might include being able to pay the original fine for breach of SAO; the imposition of a fine for breaches of probation, CS, DTTO etc. - perhaps with the attachment of earnings or benefits; restriction of liberty orders or tagging.

It is of course important that breaches are dealt with quickly - many are outstanding for 6 months or more after the breach report is submitted. It is suggested long delays significantly reduce the impact of the breach process.

Resentence for the original offence - especially for breach of Community Sentence which is meant to be an alternative to custody.

Weapons

In the COSLA and ADSW submission to the Justice 2 committee on 7th November 2006 in the section entitled Knife dealers’ licence conditions it stated that:

COSLA recommends that the Bill should be amended to place a condition on dealers to display a notice stating the offences in the Criminal Justice Act 1988 as amended regarding the sale of knives etc. to persons under 18 years.

Additional conditions that could be placed on knife/sword dealers include:
The license must be displayed at all times stating:
- Specific times and place where knives/swords etc can be sold
- What types of weapons the license covers

The License Holder agrees to:
- Keeping the weapons in a secure place
- Criminal record check
- Staff training
- Annual registration which requires administration and site visits by local authority officers
- Give permission for the local authority responsible for issuing the license to notify the Police of all license holders in their area.

Fee Level

A cost recovery model is the suggested form of financing the licensing scheme. However, it must be recognised that over the years, a number of small-scale, supposedly “cost neutral” schemes have been implemented by local authorities. Being small-scale, they do not individually warrant a dedicated member of staff. However, cumulatively, they represent a growing burden on local authorities. There are a relatively small number of businesses that sell knives and the cost recovery model suggested has potential to move the cost of the scheme on to local authorities through additional administration and regulation in ways which will not be “cost neutral”.

In response to the question asked at the evidence session COSLA undertook an appraisal of local authorities’ current licence schemes. Some examples given are as follows:
- If a retailer wants to sell fireworks all year round the cost of the licence is £500.00
- If a retailer wants to sell fireworks in November only a registration fee is paid of £72.00
- A petrol filling station would pay £110.00 for a licence (depending on tank capacity)

Whilst the new legislation gives local authorities the ability to set their own fees it is anticipated to an extent that fees will be set within a similar range, as appropriate.

Conclusion

As stated in first submission COSLA and ADSW welcome the general direction of the Custodial Sentences and Weapons (Scotland) Bill. However, we propose that the potential it has for impacting on both community safety and reduced offending, will be very much dependent on its comprehensiveness, its integration with the wider community justice and community safety agendas, and the level of resourcing made available to implement it effectively.
REGULATORY IMPACT ASSESSMENT

Title of proposal

1. This Regulatory Impact Assessment relates to the weapons provisions of the Custodial Sentences and Weapons (Scotland) Bill\(^1\).

Purpose and intended effect of the measure

Objective

2. The weapons provisions of the Bill are intended to enable Scottish Ministers to place restrictions on the sale of dangerous weapons by:
   - establishing a licensing scheme for the sale of non-domestic knives; and
   - banning the sale of swords, other than for legitimate religious, cultural and sporting purposes.

Background

3. These measures are part of the Executive’s reform of knife crime law and are a vital component of a wider package of measures intended to tackle knife crime and violence more generally. They implement the final two parts of First Minister’s Five Point Plan on Knife Crime, announced in November 2004 and, together with the wider package of measures, they fulfil the Executive’s commitment in *A Partnership for A Better Scotland*\(^2\) to “review the law and enforcement on knife crime”.

4. Further background information on the measures taken forward by the Bill, the reform of knife crime law and associated measures is set out in Annex A. Further details are contained in the Policy Memorandum and Financial Memorandum published to accompany the Bill\(^3\).

Rationale for Government Intervention

5. In Scotland, around 50% of all homicides involve the use of bladed weapons\(^4\). Knife-carrying is all too prevalent in some communities and has cut short and scarred too many young lives. Police, doctors and law-abiding citizens have seen the damaging effects of knives and swords, including samurai swords, being wielded on the streets.

6. In 2005 there were 1301 knife attacks in Strathclyde alone, with 1100 of these occurring in a public place and involving non-domestic knives. It is clear that controls need to focus on these types and availability of knives.

7. It is simply far too easy at present for these dangerous weapons to be bought and sold. That is why we will make it an offence for anyone in Scotland to sell a sword, subject to a number of exemptions, and require businesses selling swords and non-domestic knives to be licensed.

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\(^{1}\) [http://www.scottish.parliament.uk/business/bills/billInProgress/index.htm](http://www.scottish.parliament.uk/business/bills/billInProgress/index.htm)

\(^{2}\) [http://www.scotland.gov.uk/Publications/2003/05/17150/21952](http://www.scotland.gov.uk/Publications/2003/05/17150/21952)


Consultation

Within government

8. The new measures have been consulted on internally within the Scottish Executive. They do not impact significantly on the work of other Government Departments.

Public consultation

9. In June 2005 the Scottish Executive published *Tackling Knife Crime: A Consultation*[^5], which sought views on options for restricting the availability of swords and knives.

10. *Tackling Knife Crime* set out a range of options for banning the general sale of swords and introducing a licensing scheme for the sale of non-domestic knives. It asked 15 specific questions under the headings of: banning the sale of swords; banning the sale of samurai swords; licensing individual purchasers of swords; licensing the sale of swords; licensing the sale of non-domestic knives and banning the purchase of non-domestic knives from unlicensed sellers.

11. A total of 181 responses were finally received and the 178 responses received before the end of 2005 were included in the Analysis of Responses published in March 2006[^6]. Responses were published at the same time. 110 responses were from individuals and 68 from groups (including local authorities, community safety partnerships, legal representatives, and the police). A large number of respondents were individuals and groups with a special interest in owning and using bladed implements, representing a wide range of sporting, cultural, religious and trade interests (including antique collecting, fencing, highland dancing, historical re-enactment, martial arts and import, export and manufacture).

12. Four petitions were also received with 4,303 signatures in total. Three were MSP-sponsored petitions to ‘Back Action on Knife Crime’ and supported the First Minister’s Five Point Plan. The other was submitted to the Public Petitions Committee of the Scottish Parliament by the ‘Save Our Swords’ campaign and opposed “the introduction of any ban on the sale or possession of swords in Scotland which are used for legitimate historical, cultural, artistic, sporting, economic and religious purposes”. The MSP-sponsored petitions had a total of 2,284 signatures while the ‘Save Our Swords’ petition had 2,019 signatures.

13. Of those respondents who gave specific answers to the consultation questions, a narrow majority were in favour of a licensing scheme to control the sale of non-domestic knives. The suggested licence conditions and consequent costs for businesses were generally thought to be reasonable.

[^5]: http://www.scotland.gov.uk/Publications/2005/06/27110147/01518
14. Respondents were strongly opposed to a general ban on the sale of swords and a specific ban on the sale of ‘samurai’ swords. However, there was support for the alternative option of controlling the availability of swords through a licensing scheme. A large majority of responses were in favour of a wide range of people and purposes being exempted from any ban on swords.

15. A narrow majority of respondents were against individual licences for the purchasers of swords and there was a clear preference for the alternative option of licensing sword sellers. The clear consensus was that the onus of a licensing scheme should be placed on retailers rather than individual purchasers. There was also a consensus that unlicensed retailers should be prevented from selling non-domestic knives or swords.

16. The need for and the usefulness of an accompanying Regulatory Impact Assessment (RIA) was considered when the consultation document was being drafted and released. It was our view that the nature of the consultation, which posed a range of questions on possible ways forward on new controls for the sale of knives and swords could be implemented rather than seeking comments on the introduction of specific measures on licensing, did not justify a RIA at that time when future policy intentions were not firm. The consultation offered a number of different solutions on the control of bladed items which included licensing scheme for businesses or for individuals, a general ban of sales or a ban with exemptions for specified users. The consultation questions did however seek views on the costs of the proposals to businesses, responses to which have informed the preparation of this RIA.

Options

17. **Option 1** – Do nothing. Unrestricted access to non-domestic knives and swords, with no controls on the sale of such items, could undermine other measures to tackle knife-related crime. In the context of current levels of knife crime violence and homicides (see above) the Scottish Executive does not consider this to be a viable option.

18. **Option 2** – Build on measures already being implemented to address other aspects of knife crime to place new restrictions on access to these weapons.

19. *Tackling Knife Crime – A Consultation* considered a range of options for restricting the availability of swords and non-domestic knives. As well as the options represented by the provisions in the Bill, *Tackling Knife Crime* considered the options of: a complete ban on the sale of swords (with no exceptions); a ban on specified types of swords, such as ‘samurai’ swords – with and without exceptions; a licensing scheme for those wishing to purchase swords (along similar lines to the firearms licensing scheme), banning the purchase of swords by anyone who was not a member of an approved organisation (effectively a licensing scheme for groups whose members wished to purchase swords); and making it a criminal offence to purchase a non-domestic knife or sword from an unlicensed seller.
20. The Executive gave careful consideration to all the options and the responses to our consultation, including those who argued that there was no need to legislate on this matter. However, we cannot and will not ignore the fact that these weapons, in the wrong hands, can be lethal. The Executive therefore remains convinced that legislation is required to introduce new controls on the sale of non-domestic knives and swords.

21. The Executive has opted for a licensing regime for sword and knife sellers instead of alternatives which may have been more expensive for those buying these items and those businesses supplying that demand. If licensing is not as effective as anticipated in restricting the supply of dangerous weapons to those who will misuse them then further steps may be considered.

**Costs & Benefits**

**Sectors and Groups affected**

22. The Bill's proposals will impact on retailers of swords and knives, other than knives designed for domestic use. So cutlery and DIY knives, for example, will not be affected, only non-domestic knives.

23. A number of types of businesses have been identified as potential vendors or suppliers of swords and non-domestic knives including: antique dealers; army surplus stores; camping/outdoor equipment suppliers; fishing equipment suppliers; and martial arts suppliers. Estimates are difficult because the routine purchase of knives has not heretofore been the subject of any regulations and no comprehensive register of knife sellers is available and identification of those retailing non-domestic knives is also proven problematic. However, an initial estimate of the number of knife selling businesses provided by the Scottish Retail Consortium indicates that the total is around 3,100. The Executive estimates that the vast majority – approximately 90% - of these knife selling businesses will not be affected by the licensing regime, as they sell domestic knives, are trade suppliers or will be affected by the proposed exceptions for small penknives etc. This suggests that around 300 retailers would require a licence to continue the sale of non-domestic knives or swords. This estimate has been discussed with the Scottish Retail Consortium who are content that it is broadly accurate.

24. This estimate does not include business to business trade sales, for example in agricultural suppliers, as the licensing scheme will not apply to such sales.
**Benefits**

25. **Option 1** - Do Nothing: There are no benefits to this option.

26. **Option 2** – The proposals set out in the Bill will provide new checks and safeguards on the sale of swords and non-domestic knives. For both swords and non-domestic knives retailers will be required to provide more secure storage and keep a written record of purchasers. Sale of swords will be permitted only to those with a legitimate religious, cultural or sporting purpose. These measures will limit access to these weapons for those who have no legitimate reason for purchasing them and thereby support our other efforts to tackle knife crime.

27. The licensing scheme would have a social benefit by deterring people from gaining access to non-domestic knives and reducing the availability of these weapons. It would also seek to ensure that dealers in these weapons comply with conditions of sale or to cease trade in knives altogether. – this should be moved to the benefits section

**Costs**

Option 1 –

28. Do Nothing: Under this option there would be no costs to business.

Option 2 –

29. Retailers affected by the licensing scheme could face a number of costs both to ensure compliance with the conditions of licence and for the actual application and renewal of licence. Some of the costs may include: secure storage and display facilities for products; information systems to maintain records of sales and purchasers; costs in “marking” their merchandise for unique identification; and internal compliance procedures. A licence to sell knives would be an additional cost to retailers, as would renewal of the licence. By way of example a second-hand dealer’s licence costs do vary from one local authority to another but generally sit around an average £130 for three years. Individual purchasers of knives could also face an increase in the cost of products as retailers seek to pass on the costs of licences to their customers. COSLA’s initial estimate is that the cost of a licence will be from £50 upwards. As indicated above, the cost is likely to vary between local authorities. Also, the initial cost of granting a licence is likely to be higher (due to the costs of initial registration and any associated checks etc) than subsequent renewal.

30. The licensing scheme could impose costs on: the authority with responsibility for establishing, maintaining, enforcing and monitoring a licensing scheme; the business sectors involved in the sale of knives; and purchasers of knives through any increase in cost passed on from the retailer.
31. The main financial burden will therefore fall on businesses who continue to sell non-domestic knives. Businesses which sell knives should already have established procedures in place to ensure that they comply with the current minimum purchase age. Although a licensing scheme will necessarily place some additional demands on legitimate retailers in respect of record keeping of sales and possibly additional secure storage of items, we believe that this is a small price to pay for preventing non-domestic knives from getting into the wrong hands, and the resulting reduction in knife crime that would achieve.

32. If businesses that do not generate much income from the sale of non-domestic knives and swords are deterred from selling them by the introduction of a licensing scheme, then that will help achieve the objective of restricting the sale of non-domestic knives and swords and make it easier for inspection agencies to detect any breach of licence conditions.

33. There should be minimal impact on costs for individuals who wish to purchase knives for legitimate purposes. Potential customers will require to demonstrate that they are eligible to make such purchases but the impact of this requirement will be largely administrative rather than financial.

**Small Firms’ Impact Test**

34. The main burden on implementing the licensing scheme will fall on local authorities although there will be a cost to businesses of obtaining a licence to sell knives and swords. The cost impact for such businesses is likely to be minimal as the expectation is that they will seek to cover any additional costs through purchase prices.

35. The Executive has maintained close contact with key stakeholders on these proposals. Prior to the issue of the consultation we met a number of interested parties and discussed by phone with others what we planned to include in the paper. We have also arranged a number of meetings with stakeholders, who will have particular and specific interests in the licensing scheme (e.g. local authorities and the Scottish Retail Consortium) following the publication of the draft Bill to help explain our proposals; seek comments on these and encourage stakeholders to engage with Parliament’s perusal of the Bill.

36. The Scottish Retail Consortium, which represents many of the shops which sell knives, had initial concerns about the possible introduction of a licensing scheme but has welcomed the clarification provided by our discussions on the coverage of the scheme. The Scottish Retail Consortium welcomed in particular confirmation that the measure will not apply to the sale of knives designed for domestic purposes, and the exceptions to be provided for trade sales and for smaller penknives, skian dhus and kirpans.

37. COSLA have expressed their broad support for these proposals and The Society of Chief Officers of Trading Standards in Scotland, whose members would be largely responsible for enforcing a licensing scheme, have also indicated support.
Competition Assessment

38. It is not envisaged that the introduction of a knife licensing scheme would adversely impact on competition within the retail sector. It is proposed that the scheme will apply only to those shops who currently sell knives and swords and the additional restrictions on current sales practices which will be specified in licence conditions by Ministers will apply to all shops who decide to continue to sell such items. Shops who sell primarily knives designed for domestic use (e.g. cutlery and DIY) and for whom other knives are of lesser importance will be able to choose to discontinue selling those items and avoid any extra expense arising from the licensing scheme. The Bill is aimed at controlling access to knives and swords and a reduction in sales outlets as a result of some not wishing to abide by the stricter sales condition which will be imposed through the licensing scheme may assist in this aim.

Enforcement, sanctions and monitoring

39. In common with existing licensing provision, enforcement of a licensing scheme for the sale of non-domestic knives and the ban of sale of swords would fall on Trading Standard Officers employed by local authorities. Failure to abide by the terms of a licence by retailers may result in the licence being revoked or a fine of up to £5,000. Sales by unlicensed businesses will also be a criminal offence.

Implementation and Delivery Plan

40. See Annex B.

Post Implementation Review

41. The effectiveness of the introduction of the licensing scheme will be reviewed alongside initiatives on reducing knife crime being implemented by the Violence Reduction Unit and other measures, such as educational programmes, being undertaken by the Executive and stakeholders on this issue. The expectation is that, over a period of time, this measure and the others will lead to a marked reduction in the level of knife-related assaults and homicides. The collection and publication of violent crime statistics will aid this review as such information can offer information on the level of crime and detect trends and changes over time periods.

42. The Executive, in common with all new legislative measures, is committed to reviewing the effectiveness and impact of the licensing scheme in reducing crimes involving bladed weapons. National statistics on these offences will be kept under review, although it may take some time after the measures come into force and licences are issued before any trends in knife crime statistics will be clear. As indicated earlier, a review of the legislation’s effectiveness may result in the Executive considering further options for controlling the sale of swords and non-domestic knives. Such a review will be undertaken within 10 years, in accordance with the Executive’s commitments.
Summary and recommendation

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<thead>
<tr>
<th>Option</th>
<th>Costs</th>
<th>Effect</th>
</tr>
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<tbody>
<tr>
<td>Option 1</td>
<td>None</td>
<td>Would not deliver improved measures to address the continuing problem of knife crime in Scotland.</td>
</tr>
<tr>
<td>Option 2</td>
<td>Unknown</td>
<td>Would deliver reduced level of knife-related crime in Scotland.</td>
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43. The Executive favours Option 2, as this option would assist along with other measures already taken and planned to deliver on the commitment in the Partnership Agreement to reduce knife crime in Scotland.

Declaration

I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs

Signed

Date

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REGULATORY IMPACT ASSESSMENT: Custodial Sentences and Knives (Scotland) Bill

Background

1. Every year in Scotland, far too many people are scarred, injured and killed by knives and swords. Murder statistics show that knives and other sharp items continue to be the most common method of killing in this country. The latest figures show that 72 of 137 homicides in 2004/05 involved the use of knives. These weapons consistently account for around half of all murders each year. In these statistics, ‘knives’ includes the use of other sharp or pointed weapons but more detailed information on weapon type is not collected so a breakdown of weapon types cannot be provided.

2. National statistics report on knife carrying offences but do not contain information on weapon use for other offences, which can involve the use of knives (for instance ‘assault’). However, an analysis of data for Strathclyde indicates that there were 1,301 knife attacks in 2004/05. Of these, 1,100 were in a public place and involved the use of a non-domestic knife.

3. As national statistics do not collect information on weapon types, the available data does not identify sword use. However, swords are designed as deadly weapons, are likely to result in serious injury if used, and reports from the police and from hospitals make clear that swords are being used to commit crimes and to inflict injury. Indeed, advice from the police is that the use of swords is becoming more common, with ‘samurai’ swords in particular becoming a weapon of choice for growing numbers of young men with criminal intentions.

4. Other available information indicates that the incidence of knife crime is actually higher than that shown in reported crime statistics. A recent survey undertaken in the Accident & Emergency department of Glasgow Royal Infirmary indicates that only around half of all knife attacks are reported to the Police. Over the period February to August 2006 use of a knife or other sharp weapon was recorded in 19% of 758 A&E attendances, of which only 49% had been reported to police. This is a similar picture to that presented by a previous study at Glasgow A&E units, which indicated that 23% of A&E attendances involved assault with a knife, with approximately one murder for every 30 incidents involving a knife.

5. While comparisons are not straightforward, figures for the rest of the UK indicate that knife crime is much more common in Scotland than elsewhere. Evidence presented to the Justice 2 Committee, during their consideration of the Police, Public Order and Criminal Justice (Scotland) Bill, showed that the murder rate involving knives is three and a half times higher in Strathclyde than anywhere else in the UK. International comparisons are more difficult still as data definition, collection and interpretation is subject to wide variation, but the comparative figures available indicate that the incidence of knife crime is much higher in Scotland than in other comparable countries.

7 http://www.scottish.parliament.uk/business/committees/justice2/or-05/j205-3202.htm#Col1829 (Col 1846)
6. Further information can be found in ‘Homicide in Scotland 2004/05’\(^8\) (which also provides details of UK and international comparisons) and ‘Criminal Proceedings in Scottish Courts 2004/05’\(^9\).

**Legal Background**

7. Scots law has always regarded an attack with an offensive weapon as a serious aggravation of the common law crime of assault. Successive legislation has also introduced tighter and more specific controls to tackle the carrying and sale of knives and target the prevention of crime. A wide range of powers is now in force and there is a range of penalties available to the court, including fines and imprisonment. These powers and penalties are set out in a number of pieces of legislation. The short summary here concentrates on offences relating to sale, with further offences relating to possession and carrying of weapons being contained in the Criminal Law (Consolidation) (Scotland) Act 1995.

8. The **Restriction of Offensive Weapons Act 1959** prohibits the manufacture, sale or hire, the exposure or possession for the purposes of sale or hire, or the lending or giving to another person, of a flick knife or gravity knife. The maximum penalty on summary conviction is imprisonment for a term not exceeding 6 months, or a fine not exceeding level 4 on the standard scale (currently £2,500), or both.

9. The **Criminal Justice Act 1988** (Section 141) makes it an offence to manufacture, sell or hire, expose or possess for the purposes of sale or hire, or lend or give to another person any specified offensive weapon. The importation of these weapons is also prohibited. Seventeen weapons have been specified as offensive weapons for the purposes of this Act; including sword sticks, push daggers, death stars and butterfly knives. The maximum penalty on summary conviction is six months imprisonment, or a fine not exceeding level 5 on the standard scale (currently £5,000), or both.

10. The **Criminal Justice Act 1988** (section 141A) as amended recently by the **Police, Public Order and Criminal Justice (Scotland) Act 2006** also prohibits the sale of swords and non-domestic knives (also any blade, razor blade, axe, any bladed or sharply pointed article or any item made or adapted for causing personal injury) to a person under 18 (16 for knives or blades designed for domestic use). The maximum penalty on summary conviction is imprisonment for a term not exceeding 6 months, or a fine not exceeding level 5 on the standard scale (currently £5,000), or both.

11. The **Knives Act 1997** makes it an offence to market a knife in a way which indicates that it is suitable for combat. The maximum penalty on summary conviction is imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum (currently £5,000) or both. The maximum penalty on conviction on indictment is imprisonment for a term not exceeding 2 years, or a fine, or both. Section 35 of the Criminal Proceedings etc. (Reform) (Scotland) Bill (as introduced) would have the effect of raising the maximum term of imprisonment on summary conviction to 12 months.

\(^8\) [http://www.scotland.gov.uk/Publications/2005/12/13133031/30316](http://www.scotland.gov.uk/Publications/2005/12/13133031/30316)

\(^9\) [http://www.scotland.gov.uk/Publications/2006/04/25104019/0](http://www.scotland.gov.uk/Publications/2006/04/25104019/0)
A Partnership for a Better Scotland – Review of Knife Crime

12. Tackling knife crime is a priority for the Executive. As part of the commitment in the Partnership Agreement (‘A Partnership for a Better Scotland’) to supporting stronger, safer communities, the Executive undertook to ‘review the law and enforcement on knife crime’. The objectives of the Review were to ensure that the law in Scotland is clear, to ensure it protects innocent victims and to provide a stimulus for a positive change in the culture of Scotland in relation to knives and violent crime through strengthening knife crime law.

13. The Review therefore set out to examine the current law on knife crime to identify any gaps in the legislation and any aspects which had become outdated or required strengthening. As will be clear from even the brief summary above, existing law on knife crime is generally clear, strong and comprehensive. However, the Review identified improvements which could be made to powers of arrest and sentencing for knife crime offences and highlighted a significant gap in the comparative lack of controls on the sale of knives and swords.

First Minister’s Five Point Plan on Knife Crime

14. The outcome of the Review was announced in November 2004, when the First Minister set out a Five Point Plan on knife crime. In doing so, he made clear that his strong view, and that of the Executive, was that far too many young men in Scotland viewed the carrying of knives or offensive weapons as an acceptable practice when it is not.

15. The Five Point Plan set out to reinforce the message that the carrying and use of knives is not, cannot, and will never be, acceptable. The Plan involved:

- Doubling the maximum sentence for possessing a knife from two years to four years;
- Strengthening police powers of arrest for the carrying of knives or offensive weapons and ensuring that the police make more use of stop and search powers;
- Increasing the minimum purchasing age for non-domestic knives from 16 to 18;
- Introducing a licensing scheme for the sale of non-domestic knives and similar objects; and
- Banning the sale of swords.

\(^{10}\) [Link](http://www.scotland.gov.uk/Publications/2003/05/17150/21952)
16. The first three points of the Plan were implemented in the Police, Public Order and Criminal Justice (Scotland) Act 2006\textsuperscript{11} and came into effect on 1 September 2006.

17. The 2006 Act::

- increased the maximum sentence for carrying a knife in public or in a school from two years to four years (bringing it into line with the penalty for carrying offensive weapons);
- removed limitations on police powers of arrest for such offences (previously the power of arrest was limited to circumstances in which the police were not satisfied as to the person’s identity or place of residence, or where arrest was considered necessary to prevent the commission of a further offence involving a knife or offensive weapon); and
- increased the minimum age of persons to whom non-domestic knives may be sold from 16 to 18 (bringing the age limit into line with those for alcohol and fireworks).

18. This part of the Bill takes forward the final two points of the Plan concerning the introduction of restrictions on the sale of non-domestic knives and swords. These provisions have been developed following consideration of the responses to the Executive’s proposals set out in \textit{Tackling Knife Crime - a Consultation’}.

**Other Action on Knife Crime**

19. It should be clear that the Bill’s provisions on knife crime are as a result of the Executive’s Review of the law on knife crime. However, it would be wrong to view the reform of the law on knife crime in isolation.

20. In considering the Bill’s provisions on knives and swords it is essential to see them in the context of the Executive’s wider programme of actions to tackle knife crime and violence more generally. It must be emphasised that the Bill does not represent the only action which the Executive is taking on knife crime but instead is just one component, albeit a vital one, of that wider package of measures.

21. The package includes shorter-term measures (such as the recent knife amnesty, which resulted in over 12,500 weapons being surrendered)\textsuperscript{12} and longer-term measures (such as the educational initiative launched by the Minister for Justice on 24 August\textsuperscript{13}, recognising that such a deep-seated problem cannot be solved overnight and demands a mixture of approaches.

\textsuperscript{11} [http://www.opsi.gov.uk/legislation/scotland/acts2006/60010--g.htm](http://www.opsi.gov.uk/legislation/scotland/acts2006/60010--g.htm)

\textsuperscript{12} [http://www.scotland.gov.uk/News/Releases/2006/02/08090745](http://www.scotland.gov.uk/News/Releases/2006/02/08090745)

22. An essential element of the package is the Lord Advocate’s new guidelines on the prosecution of knife crime, which came into effect at the end of the knife amnesty. These guidelines will ensure that knife crime is dealt with both quickly and effectively, with the prospect of more severe punishment for re-offenders. Under the guidelines, those caught carrying or using a knife will normally be kept in police custody until they appear in court. Where they have previous convictions for a similar offence the Crown will oppose bail and will normally prosecute the case before a judge and jury and, therefore, before a court with higher sentencing powers.

23. Enforcement action on knife crime also forms a central part of the package of measures. This is a key part of the work of the Violence Reduction Unit (VRU), which has been established by the Police, with the assistance of the Executive, to oversee a year-long Safer Scotland initiative to address knife crime and violence more generally. These enforcement initiatives include: the use of new hand-held metal detectors funded by the Executive; a crackdown on knife carrying following the end of the amnesty which removed a further 1,000 weapons from the streets in 5 weeks; utilising stop and search powers to target knife crime hot-spots; and the deployment of airport style metal detectors at railway stations. Further information on the VRU and its work can be found on the ‘Action on Violence’ website 14.

24. Part 3 of the Bill therefore sets out to address that need and fill the gap in current legislation by ensuring that the Scottish Ministers will have appropriate powers to ban the sale of swords and requiring businesses who wish to sell swords or non-domestic knives to be licensed. The ban on the sale of swords will be implemented by using the powers in existing legislation, modified by the Bill, to make it an offence for anyone to sell swords (subject to certain defences, which will allow swords to be sold for specified approved purposes). The mandatory licensing scheme for the commercial sale of swords and non-domestic knives is to be reinforced by making it a criminal offence for businesses to sell such articles without a licence. The terms of the licensing scheme are intended to further reinforce the limited defences to a ban on the sale of swords by requiring licensed swords sellers to make appropriate checks on the bona fides of potential purchasers.

**Banning the Sale of Swords**

25. The Bill provides for the introduction of a ban on the sale of swords by enhancing Ministers’ existing powers to enable them to make an order prohibiting the sale of swords subject to specified defences. It is intended that these defences will relate to legitimate religious, cultural and sporting purposes.

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26. The ban on sale of swords builds on the model of the existing statutory ban on offensive weapons in section 141 of the Criminal Justice Act 1998. Section 141 provides that any person who manufactures, sells or hires, or offers for sale or hire, exposes or has in his or her possession for the purpose of sale or hire, or lends or gives to any other person a designated offensive weapon shall be guilty of an offence. The import of any such weapon is prohibited by section 141(4) of the 1988 Act. The power provided by this section has been used in the past to ban a wide range of offensive weapons, including swordsticks and push daggers, as specified in the Criminal Justice Act 1988 (Offensive Weapons) (Scotland) Order 2005.\footnote{http://www.opsi.gov.uk/legislation/scotland/ssi2005/20050483.htm}

27. This power could have been used to introduce a blanket ban on swords. However we recognise that, unlike the items prohibited by section 141 at present, there are legitimate uses for swords that should continue to be permitted. The approach adopted is therefore to build on the provisions of section 141, but allow them to be adapted in their application to swords to allow for legitimate uses.

28. The Bill’s provisions reflect this approach. It is intended that the order made under the Bill’s provisions will provide that it shall be an offence to sell, hire, lend or give a sword – to avoid creating loopholes and enhance enforceability. Unlike other orders made under section 141, it is envisaged that the order relating to swords will not make it an offence to expose or offer for sale a sword. This avoids making sellers guilty of an offence before they have had an opportunity to check the purchaser’s intended use and confirm that it is for a permitted purpose.

29. There are defences under section 141 in respect of weapons which are made available to a museum or gallery or used for cultural, artistic or educational purposes if lent or hired from a museum or gallery, and in respect of weapons used for the purposes of the Crown or of a visiting force. These defences will also apply to the prohibition on the sale of swords.

30. In addition, the Bill allows defences for other purposes to be specified by Order and Ministers will use this power to provide exceptions to the ban on sale for specified purposes including: religion, culture (highland dancing, theatre, film, television, antique collecting, re-enactment and living history) and sport (fencing and those martial arts organised on a recognised sporting basis).

31. An exception to section 141 is currently made for antique weapons, which are defined as weapons over 100 years old at the time of the alleged offence. It is intended to use the powers provided by the Bill to except a wider range of antique swords. This reflects the approach adopted in firearms legislation (specifically section 58(2) of the Firearms Act 1968) and will cover antique swords “sold, transferred, purchased, acquired or possessed as a curiosity or ornament”. This will mean that additional historic swords (for example from the Second World War), would also be included within the exception for antiques.
32. These additions to the existing defences under section 141, and the other modifications of those powers in respect of swords, will address the issue of the legitimate uses of swords such as:

- Antique Collecting – the preservation of the past by many individual collectors in this country is often to the benefit of our museums and national heritage bodies.
- Fencing – fencing swords are used in organised events across the UK and internationally;
- Film, television and theatre – swords are frequently used as props in period dramas;
- Manufacture – sword-smiths in Scotland manufacture swords, in some cases to extremely high specifications, involving traditional techniques and attracting international interest and renown;
- Martial arts – swords are used in many martial arts organised on a national and international basis;
- History to life, using quality reproduction weapons;
- Religion – the sword is of particular religious significance to Sikhs; and
- Scottish Highland dancing – the traditional Scottish sword dance, when authentically performed, inevitably involves swords.

33. For swords, there will also be a defence for activities carried out with the authority of the Scottish Ministers. Such authority would require to be applied for in writing and, if granted, would be subject to appropriate conditions. This will permit individual applications to be made to Ministers where exceptional cases arise outwith the permitted purposes otherwise provided for.

**Licensing the Sale of Swords and Non-Domestic Knives**

34. The Bill provides for the introduction of a new mandatory licensing scheme for the commercial sale of swords and non-domestic knives. The scheme will apply to those persons who carry on the business of a dealer in swords, non-domestic knives and similar items. The licence will be known as a knife dealer’s licence.

35. The Civic Government (Scotland) Act 1982 provides a framework for this legislation. The Bill’s provisions build on the current provisions of this Act, applying those provisions and also modifying and extending them where necessary to adapt them to the licensing of the sale of swords and non-domestic knives. Local authorities will act as licensing authorities in same way as with other licensing schemes under the 1982 Act.

36. It will be a criminal offence for a business to sell swords or non-domestic knives to the public without a licence. The maximum penalty for such an offence on indictment will be two years imprisonment and/or a fine (with a maximum of 12 months imprisonment and/or a fine not exceeding the statutory maximum under summary procedure).
37. The licensing scheme will apply to swords and non-domestic knives and knife blades (i.e. knives and knife blades other than those designed for domestic use). This means that dealers selling only domestic knives, such as cutlery and DIY products, will not require a licence. This draws the same distinction between domestic and non-domestic knives as section 75 of the Police, Public Order and Criminal Justice (Scotland) Act 2006 which amends Section 141A of the Criminal Justice Act 1988 to increase the minimum age of sale for non-domestic knives from 16 to 18.

38. The Bill also gives powers to Ministers to provide that a licence will not be required in order to sell designated articles. It is intended that this power will be used to provide that a licence will not be required to sell folding pocketknives, _sgian dubhs_ or _kirpans_ where the blade is less than 7.62 centimetres (3 inches). This would reflect the current law on carrying knives in public (section 49 of the Criminal Law (Consolidation) (Scotland) Act 1995), which provides a specific exception for penknives of this size and provides defences in law for knives (such as _kirpans_ and _sgian dubhs_) carried for religious reasons or as part of a national costume. Dealers who wish to sell larger versions of these knives will however require a licence.

39. In addition to swords and non-domestic knives (and non-domestic knife blades), a licence will be required to sell any other articles which have a blade or are sharply pointed and which are made or adapted for use for causing injury to the person (for instance, arrows or crossbow bolts).

40. A licence will also be required for businesses hiring, lending, giving, offering or exposing for sale swords, non-domestic knives and similar items to avoid creating an enforcement loophole. While any business selling swords or non-domestic knives to the public will require a licence, businesses who sell exclusively to other businesses or professions will not require to be licensed. Any businesses selling swords or non-domestic knives by auction will require a licence, but auction houses selling such items on behalf of others will not require to be licensed (unless they wish to sell such items on their own behalf). The requirement for a licence will not apply to those who are only engaged in private transactions that do not take place in the course of business.

41. The requirement for a licence will apply to persons with retail outlets or other places in a local authority’s area where transactions take place in the course of business; for example, those who trade from market stalls or from vehicles. A licence will be required even where the dealing in such knives is incidental to the dealer’s primary business. The Bill provides that anyone also licensed as a ‘second-hand dealer’ under the 1982 Act shall have their licence conditions adjusted appropriately, if required, to ensure that they do not conflict with the terms of their knife dealer’s licence.

42. The legislation will also apply to Scottish businesses who sell over the internet or by mail order. Those with retail premises will apply to their local authority in the normal way. Internet-only dealers, who distribute goods from premises in Scotland and wish to continue to sell swords or non-domestic knives, will need to apply to the local authority where their distribution premises are located for a licence.
43. The Bill provides powers which the Scottish Ministers intend to use to set strict licence conditions and specify types of licence conditions which must be attached to all knife dealer’s licences. Local authorities will be able to determine the details of any conditions not specified by Ministers and will be able to impose additional licence conditions suitable for their locality or appropriate to individual businesses. The Bill provides for different conditions to apply to different types of item.

44. The Scottish Ministers will use the power to set minimum conditions for both sword and non-domestic knife dealers. These conditions will include:

- requiring retailers to record a description of swords or non-domestic knives sold;
- requiring retailers to keep records of those to whom they sell swords or non-domestic knives;
- restricting the display of swords or non-domestic knives on the licensed premises to ensure that they are not visible from the street or any entrance to a dealer’s premises;
- enabling local authorities to specify such further conditions relating to storage as are appropriate to the locality or individual premises, e.g. storage in locked cases or preventing visible display within the shop itself;
- enabling local authorities to specify the means by which identity should be established, e.g. by photographic means or utility bills.
- enabling local authorities to require other security measures appropriate to the premises, e.g. overnight storage of swords and non-domestic knives, or use of CCTV; and
- enabling local authorities to specify the packaging requirements for swords and non-domestic knives sold by mail or otherwise.

45. In respect of swords, the Scottish Ministers will use the power conferred by the Bill to require that dealers record full details of the intended use of any sword, take reasonable steps to confirm that it is for an authorised purpose, and record the steps they took to do so.

46. The Bill provides that it will be an offence for the licence holder to break any of the conditions of their licence. It will also be an offence for a person knowingly to provide false information to a seller in connection with the purchase of a sword or knife, where the seller is required to collect that information by a condition of their licence. The maximum penalty for these offences on summary conviction will be a fine not exceeding level 5 and level 3 on the standard scale, respectively (currently £5,000 and £1,000).

47. The Bill will confer powers on local authority trading standard officers and the police to enter premises where unlicensed dealing in knives is suspected of taking place, or where a dealer is suspected of breaching conditions of his licence. In the case of unlicensed premises, the powers allow documents and records to be inspected and copied. The Bill will also allow articles to be seized, with the prospect that the dealer would forfeit all swords or knives seized or in stock should he or she be convicted of the offence. Similar forfeiture powers are contained in the Knives Act 1997 in relation to the sale of combat knives and material likely to stimulate or encourage violent behaviour involving knives. Part II of the Proceeds of Crime (Scotland) Act 1995 already contains provisions on forfeiture, but these apply only to property which has been used for the purpose of committing, or facilitating the commission of, an offence, or was intended to be used for that purpose.
1. The weapons provisions of the Custodial Sentences and Weapons Bill are intended to enable Scottish Ministers to place restrictions on the sale of dangerous weapons by:
   - establishing a licensing scheme for the sale of non-domestic knives; and
   - banning the sale of swords, other than for legitimate religious, cultural and sporting purposes.

2. Based on the timetable for the process of Bill through Parliament the Bill should receive Royal Assent in June 2007. Thereafter the Executive will be required to draft regulations to implement the provision of the legislation.

3. The Bill provides for the introduction of a ban on the sale of swords by enhancing Ministers’ existing powers to enable them to make an order prohibiting the sale of swords subject to specified defences. It is intended that these defences will relate to legitimate religious, cultural and sporting purposes. The ban on sale of swords builds on the model of the existing statutory ban on offensive weapons in section 141 of the Criminal Justice Act 1998. Section 141 provides that any person who manufactures, sells or hires, or offers for sale or hire, exposes or has in his or her possession for the purpose of sale or hire, or lends or gives to any other person a designated offensive weapon shall be guilty of an offence.

4. This power could have been used to introduce a blanket ban on swords. However we recognise that, unlike the items prohibited by section 141 at present, there are legitimate uses for swords that should continue to be permitted. The approach adopted is therefore to build on the provisions of section 141, but allow them to be adapted in their application to swords to allow for legitimate uses.

5. The Bill’s provisions reflect this approach. It is intended that the order made under the Bill’s provisions will provide that it shall be an offence to sell, hire, lend or give a sword – to avoid creating loopholes and enhance enforceability. Unlike other orders made under section 141, it is envisaged that the order relating to swords will not make it an offence to expose or offer for sale a sword. This avoids making sellers guilty of an offence before they have had an opportunity to check the purchaser’s intended use and confirm that it is for a permitted purpose.

6. There are defences under section 141 in respect of weapons which are made available to a museum or gallery or used for cultural, artistic or educational purposes if lent or hired from a museum or gallery, and in respect of weapons used for the purposes of the Crown or of a visiting force. These defences will also apply to the prohibition on the sale of swords. In addition, the Bill allows defences for other purposes to be specified by Order and Ministers will use this power to provide exceptions to the ban on sale for specified purposes including: religion, culture (highland dancing, theatre, film, television, antique collecting, re-enactment and living history) and sport (fencing and those martial arts organised on a recognised sporting basis).
7. The Bill also provides for the introduction of a new mandatory licensing scheme for the commercial sale of swords and non-domestic knives. The scheme will apply to those persons who carry on the business of a dealer in swords, non-domestic knives and similar items. The licence will be known as a knife dealer’s licence. The Civic Government (Scotland) Act 1982 provides a framework for this legislation.

8. The Bill’s provisions build on the current provisions of this Act, applying those provisions and also modifying and extending them where necessary to adapt them to the licensing of the sale of swords and non-domestic knives. Local authorities will act as licensing authorities in same way as with other licensing schemes under the 1982 Act.

9. The licensing scheme will apply to swords and non-domestic knives and knife blades (i.e. knives and knife blades other than those designed for domestic use). This means that dealers selling only domestic knives, such as cutlery and DIY products, will not require a licence.

10. The Bill also gives powers to Ministers to provide that a licence will not be required in order to sell designated articles. It is intended that this power will be used to provide that a licence will not be required to sell folding pocketknives, *sgian dubhs* or *kirpans* where the blade is less than 7.62 centimetres (3 inches). In addition to swords and non-domestic knives (and non-domestic knife blades), a licence will be required to sell any other articles which have a blade or are sharply pointed and which are made or adapted for use for causing injury to the person (for instance, arrows or crossbow bolts).

11. The requirement for a licence will apply to persons with retail outlets or other places in a local authority’s area where transactions take place in the course of business; for example, those who trade from market stalls or from vehicles. A licence will be required even where the dealing in such knives is incidental to the dealer’s primary business.

12. The Executive will undertake a consultation with stakeholders, e.g. local authorities, cultural and sporting organisations and others, on the content of the regulations to introduce the framework to control and regulate the general sale of swords and non-domestic knives. The Executive will also consult on the appropriate conditions on storage and display which should apply to licences. As indicated above, the Bill should receive Royal Assent in June 2007 so consultation is likely to take place in autumn 2007.

13. Thereafter the draft regulations will be presented to Parliament for scrutiny and approval before these would come into force. The timing of that will depend on responses to the consultation but is likely to be late in 2007 at earliest.
Design Capacity vs Average Prisoner Popula

- Design Capacity
- SPS model with current breach level
- SPS model with an additional 15% breaches for 1-4 years
- November 2005 prison population projections

-415 places
-719 places
-654 places
-154 places
Population (financial years)

-4 years

-410 places -710 places -910 places

2009-10 2010-11 2011-12
JUSTICE 2 COMMITTEE

33rd Meeting 2006 (Session 2)

Tuesday 28 November 2006

SSI title and number: The draft Public Appointments and Public Bodies etc. (Scotland) Act 2003 (Treatment of Office or Body as Specified Authority) (Scottish Legal Complaints Commission) Order 2006

Type of Instrument: Affirmative

Meeting: 28 November

Date circulated to members: 23 November 2006

Justice 2 Committee deadline to consider SSI: 11 December 2006

Deputy Minister for Justice to attend Justice 2 Committee meeting? Yes

SSI drawn to Parliament's attention by Sub Leg Committee: No

1. The Subordinate Legislation Committee considered this instrument at its meeting on 14 November 2006. No points arose in relation to the instrument.

2. The Deputy Minister for Justice will attend this Committee meeting. The discussion will begin with an opportunity for members to ask any factual questions or ask for clarification whilst officials are seated at the table with the Minister. The Deputy Minister will then be asked to move the motion to open the debate. The Committee will then formally debate the motion. Officials cannot take part in that debate. The debate is limited to a maximum of 90 minutes (Rule 10.6.3), but may be much shorter. At the end of the debate, the Committee must decide whether or not to agree the motion and report to the Parliament accordingly.

3. If members have any queries or points of clarification on the instrument which they wish to raise with the Scottish Executive in advance of the meeting, please could these be passed to the Clerk to the Committee as soon as possible.

Clerk to the Committee
23 November 2006
JUSTICE 2 COMMITTEE

33rd Meeting 2006 (Session 2)

Tuesday 28 November 2006

SI title and number: The Police Act 1997 (Criminal Records) (Scotland) Amendment Regulations 2006 (SSI 2006/521)

Type of Instrument: Negative

Meeting: 28 November 2006

Date circulated to members: 23 November 2006

Justice 2 Committee deadline to consider SSI: 4 December 2006

Motion for annulment lodged No

SSI drawn to Parliament’s attention by Sub Leg Committee: No

1. The Subordinate Legislation Committee considered this instrument at its meeting on 7 November 2006. No points arose in relation the instrument.

2. If members have any queries or points of clarification on the instrument which they wish to raise with the Scottish Executive in advance of the meeting, please could these be passed to the Clerk of the Committee as soon as possible, to allow for sufficient time for a response to be received in advance of the Committee meeting.

Clerk to the Committee
23 November 2006