Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Scottish Government response to the Stage 1 Report

Please find in Annexe A of this letter our responses to the various recommendations contained in the Justice Committee’s Stage 1 report on the Criminal Justice and Licensing (Scotland) Bill.

The Committee may find it helpful to receive details of some new topics that we plan to seek to introduce into the Bill through Stage 2 amendments. Annexe B contains a summary of these new topics. I consider it is necessary to seek to add in the new topics into the Bill as there is an almost continual need for Scots criminal law to respond to developments in Scotland and at a UK and European level. Since preparation of the Bill for introduction was being completed in late 2008 and early 2009, there have been a number of developments within Scotland (eg. court judgement relating to the common law powers of sheriffs to grant warrants), at a UK level (eg. genocide offence changes) and at a European level (eg. European Union Framework Decisions) where I consider that changes to Scots law are needed to be taken forward in this Parliamentary session. I am pleased this Bill represents an opportunity for quick and efficient Scottish Government action in response to issues that need addressing through primary legislative change.

I hope this is helpful.

Kenny MacAskill MSP
Cabinet Secretary for Justice
29 January 2010
Sections 1-2
The Committee believes that the purposes or principles of sentencing, as established by common law, are already well understood by the courts. The common law has the advantage that it can more easily evolve and develop in response to changes in social attitudes; fixing this common-law understanding in statute carries a risk of unintended consequences, and may also lose some of the nuances of case-law jurisprudence.

What is more, it is generally understood to be a principle of legislative drafting to make provision only where it is necessary to do so – and, indeed, this has often been articulated by Ministers (both of the current and previous administrations) as a reason to resist backbench amendments.

Considering section 1 in isolation, therefore, we are not convinced that a sufficiently good case has been made for its inclusion. However, we recognise the Scottish Government’s view that an opening section setting out in broad terms what sentencing is for may be a useful preliminary to the creation of a Scottish Sentencing Council. Accordingly, we invite the Scottish Government both to justify the necessity for setting out the purposes and principles of sentencing in the Bill and to provide assurance that the provisions in sections 1 and 2 do not inadvertently change the law. Without adequate justification and assurance, we are liable to conclude that retaining these sections in the Bill may be problematic.

We acknowledge that all the purposes listed in subsection (1), and the “other matters” to which the courts must have regard listed in subsections (3) and (4), have a part to play in sentencing decisions. We believe it is important that, if these are to be listed in statute, they are regarded as non-exhaustive and unranked lists, with the order not implying any general priority of earlier items over later ones. We also note that, while the section title refers both to “purposes” and “principles”, only purposes are actually listed. In our view, principles of fairness, justice and proportionality are at least as important as the purposes already included, and we therefore invite the Scottish Government to consider including these principles within the section (or removing reference to “principles” from the section title).

The Committee is also uncertain as to why subsections (2) and (3) of section 1 are disapplied in relation to persons under the age of 18. Our presumption would be that the matters listed in subsection (3) are still
relevant in that context, albeit in a context where the offender's age is also a significant factor.

We are also unclear what status subsection (1) is meant to have in relation to a young offender – it is not disapplyed, but the court is under no obligation to have regard to it in sentencing that offender. We would invite the Scottish Government either to provide a better justification for its drafting approach here, or to bring forward amendments to clarify the application of section 1 to under-18 offenders.

The Committee has also found difficulty with the relationship between the purposes of sentencing in section 1 and the sentencing guidelines to be issued by the Scottish Sentencing Council (SSC). Specifically, the SSC does not appear to be required to reflect the purposes in preparing guidelines, but the courts are obliged to give precedence to the guidelines should they and the purposes of sentencing come into conflict (section 2(2)).

We do not see the logic of creating a statutory Sentencing Council and, at the same time, setting out the purposes of sentencing in statutory form if that Council is not itself made subject to those purposes in carrying out its work. That way, there should be no question of the council issuing guidelines that are inconsistent with the purposes of sentencing.

We recognise that the Scottish Sentencing Council is likely, in practice, to follow the purposes in any event, and there may also be reasons for not having this as a statutory obligation on the Council. Nevertheless, we believe the Scottish Government needs to do more to explain its thinking on these matters, so that the Committee can either satisfy itself that the relationship is an appropriate one, or consider how it might be amended at Stage 2.

Scottish Government response

Although it may well be the case that the courts understand the purposes and principles of sentencing, we do not consider they are well understood by the public, by those caught up in the criminal justice system as victims, witnesses or even offenders.

The judicially-led Sentencing Commission, which examined the issue of consistency in sentencing in Scotland, considered that a useful step towards the elimination of unwarranted disparity in sentencing would be to enshrine the purposes of sentencing in statute.

Public perception of justice and the sentencing process remains poor and if we are to improve confidence in the criminal justice system and promote consistency and transparency, we consider it necessary to set out clearly in statute the function and rationale of sentencing.
The provisions in the Bill require the sentencer to ‘have regard to’ the purposes of sentencing and the matters set out in section 1(3). We do not consider that this impacts on the ability of the sentencer to consider each case on its individual merits. The Bill provides that in the case of any conflict between the common law and the duties on the court under section 1, then the duties on the court under section 1 should prevail.

Section 1(1) has no application to young offenders as the duty on the court to have regard to the matters in section 1(1) is disapplied in respect of young offenders. The matters referred to in section 1(1) and 1(3) are still relevant to a young offender, but there are further principles that also need to be considered in relation to young offenders which we have not sought to set out in this Bill at this time.

It is likely that any Sentencing Council guidelines would be issued within the context of the purposes of sentencing and the matters referred to in section 1(3). Sentencing Council guidelines on specific offences may be more detailed than the matters referred to in section 1 of the Bill.

There is nothing in the text of the Bill to suggest that the purposes and principles are in any way ranked in order of importance. The list of purposes in section 1(1) is exhaustive whereas the matters that the court must have regard to under section 1(3) is non-exhaustive.

We plan to lodge amendments at Stage 2 to clarify that the matters that the court must have regard to under section 1(3) are to referred to as the principles of sentencing. The principles of fairness, justice and proportionality are the basis for the provisions we have made in the Bill.

Sections 3-13 and Schedule 1

The Committee recognises that some degree of inconsistency in sentencing is probably inevitable in any system that respects the independence both of the judiciary as a whole and of individual sentencers. We also accept that there is a perception, both among people working in the justice system and among the wider public as well, of at least a degree of inconsistency in the sentences given out by different judges or in different locations for similar offences. We have not been convinced that there is clear objective evidence – as opposed to anecdotal and circumstantial evidence – to substantiate this perception, no doubt partly because of the inherent difficulties involved in comparing individual sentencing decisions on a like-for-like basis.

We regard any actual – or indeed perceived – inconsistency as a problem, in that it runs counter to the principle of fairness that must be central to any justice system. We therefore support the aim of minimising inconsistency in sentencing. However, that aim cannot be an over-riding one, and must clearly be balanced against other considerations – including cost, and the potential for compromising other principles of justice.
A majority of the Committee is not yet convinced that a Scottish Sentencing Council, as proposed in the Bill, can be justified in terms of its capacity to reduce inconsistency beyond what might be achieved using existing mechanisms (such as the existing power of the Appeal Court to issue guideline judgments).

On the other hand, we are also conscious that there are other aims for the Council, including the consideration of wider sentencing issues, and the promotion of relevant research.

We accept that there may be a case for the setting of guidelines for sentencers, but recognise that there are issues as to how such guidelines are approved and promulgated. Overall, taking account of the other aims that it may serve, which we support, we recognise that there could be merit in a Sentencing Council. A Sentencing Council will inevitably have some influence on judicial discretion (indeed, there would be little point in having it if it did not), and there is a tension between that and the principle of separation of powers.

There was no consensus view in the Committee on how that tension is best addressed. A majority of members would prefer a structure in which sentencing guidelines developed by any Sentencing Council would take effect only after formal endorsement by the Appeal Court. These members argue that such endorsement would no doubt be forthcoming in the large majority of cases, but such a structure would also enable there to be a constructive dialogue in cases where the Court questioned some aspect of the guidelines proposed. These members also believe that having any guidelines issued with the authority of the Court itself is the best means of resolving the constitutional concerns about the role of the Sentencing Council that some witnesses have raised.

An alternative view within the Committee is that, to the extent that any adjustment to the provisions of the Bill is needed to address those concerns, it would be preferable to adjust the composition of the Council to provide a judicial majority. On this view, any structure that leaves the courts with the final say on sentencing guidelines would not represent a sufficient advance over the present arrangements. In that context we regard the safeguard in the Bill – that any court can decide not to follow a sentencing guideline so long as it states its reason for doing so – as essential, and the minimum necessary to preserve judicial independence. We will keep an open mind during Stage 2 as to whether further such safeguards are necessary, particularly whether the Council’s composition should be adjusted to ensure there is a judicial majority.

On other aspects of the Council’s composition, we can be more definite. We do not believe that a constable should be included among the “legal members” (although it will of course be important for the police to have a proper input in other ways to the Council’s deliberations). We also
think there is at least a question whether a prosecutor should be included.

We do not support any of the various suggestions made to us for additional members (such as a representative of the Scottish Prisons Service, or of local authorities). We do, however, have sympathy with concerns made in evidence that the Bill would allow – at least in principle – the appointment of two sheriff principals but no sheriff, or two stipendiary magistrates but no JP – thus unbalancing the judicial composition of the Council. This may be unlikely in practice, but we suggest that some redrafting would address these concerns – perhaps by amalgamating what are currently separate requirements into a single requirement for three judicial members holding (any of) the offices of sheriff, sheriff principal, JP or stipendiary magistrate, of whom at least one must be a sheriff and at least one a JP.

We note the concerns of some witnesses as to the costs of establishing a Sentencing Council, and ask the Scottish Government to consider further whether this cost is still a priority for the use of scarce Justice Department resources at a time of financial stringency.

Scottish Government response
We are pleased that the Committee has indicated its support of our aim of improving consistency in sentencing and has recognised the need to tackle the current poor public perception of sentencing. We are also pleased to see that the Committee has recognised the merit in the creation of a Scottish Sentencing Council.

The Committee’s report set out the concerns from some quarters about the impact of the Sentencing Council on judicial independence. We see the Council and its guidelines as a resource for the courts and we will be giving further consideration to the thoughts of the Committee on how best to achieve our aims while maintaining judicial independence.

We have noted the Committee’s objection to the inclusion of a constable among the ‘legal members’ of the Sentencing Council and plan to lodge Stage 2 amendments to address this. We also plan to lodge Stage 2 amendments to address the Committee’s point about the possibility of unbalancing the judicial composition of the Council. The recommendation to include representation from the prosecuting authorities was included in the Sentencing Commission report on improving consistency and we continue to believe that there is merit in their inclusion.

We do still believe that the cost of the establishment of the Sentencing Council is justified. Compared to the overall cost of sentencing decisions, the cost of the proposed Council is minimal. Of course we will take every opportunity to minimise costs where practicable and will work closely with the Scottish Court Service to do so.
Section 14
The Committee broadly supports the creation of community payback orders (CPOs) on the grounds that they should simplify and strengthen the current range of community sentences, allowing more focus on offenders’ needs. However, we are also convinced that CPOs will not deliver the benefits envisaged for them unless they are adequately resourced – and we find it difficult or impossible to be sure at this stage whether sufficient funds have been or will be made available.

We are conscious that the level of take-up of CPOs will be closely linked to the views of sentencers on their effectiveness and the impact of any new statutory presumption against short-term custodial sentences, and that the Scottish Government itself cannot forecast with any confidence how many CPOs are likely to be made. What does seem clear is that there is very little prospect of any significant savings being made, in the short to medium term, in the largely fixed costs of running Scotland’s prisons even if the Bill succeeds in its aim of diverting a substantial number of offenders from custodial to community disposals.

Therefore, even though community sentences are generally cheaper than imprisonment, there will be a need for additional resources to make this approach work. (We also recognise, however, that if nothing is done to address rising prison populations, it will at some point become necessary to increase prison capacity, and that this will also have significant resource implications.)

We strongly believe that, if CPOs are to gain credibility with the public, and with the victims of crime in particular, they must begin (and be seen to begin) very shortly after sentence is declared – either on the day of sentence or (where this is not practicable, as we accept will sometimes be the case) as soon as possible thereafter. This is on the same principle that judgment should be given as soon as possible after an offence is committed – namely that justice delayed is justice denied.

The Cabinet Secretary has already announced some additional resources for existing community sentences, but until we know what the level of take-up will be, it is difficult or impossible to say whether current budgets will be sufficient. It is clear that many witnesses are concerned about this issue, and equally clear that an increased take up of CPOs of 10% or 20% (as postulated by the Scottish Government in the Financial Memorandum) will require additional resources.

We welcome the additional resources already committed, but note that they require to be used both to eliminate barriers to the speedy commencement of the orders, and to address issues of quality. There may also be issues about the adequacy of the unit cost calculation used in this context. Further, it is evident that the programme, residence, mental health treatment, drug treatment or alcohol treatment requirements that may be applied to the new orders will require additional resourcing.
The Committee asks the Scottish Government to provide further assurance as to how such costs are to be met. Thereafter we need a commitment by Ministers to keep the level of take-up under review, and to bring forward additional funding as required.

In this connection, we are conscious that, while the main impact will be felt by criminal justice social work services, there will be resource implications for other areas. For example, there will be additional costs for the Scottish Court Service as a consequence of the progress reviews, and for voluntary sector bodies involved in the delivery of the new CPOs. Appropriate consideration must be given to these wider resource implications.

We do not agree with those witnesses who argued that progress courts should have been established as specialist courts, as the Prisons Commission recommended. We believe this should be a matter for individual sheriffs principal to consider in the light of local circumstances. We also believe the Bill gets it right in making progress reviews optional, so that the resources involved in them can be targeted to where they are most needed.

The Committee also recommends that the Scottish Government reconsider some of the terminology used in the Bill, specifically whether an alternative name might be considered to avoid confusion over the term “supervision requirement”. We also invite the Scottish Government to consider making the rehabilitative element in community payback orders clearer.

Scottish Government response
We are pleased that the Committee has broadly supported the introduction of the Community Payback Order.

The Community Payback Order will ensure that sentences served in the community are robust, immediate and visible to the community. We have already issued revised guidance to speed up the start of community service orders. From 1 June 2009, placements should begin within 7 working days of sentence being passed rather than 21 working days as in the past. We are also looking at opportunities to trial same-day starts, as the Committee is calling for. In addition to rapid starts, the Bill will support quicker completion of orders as the court will be able to specify that the unpaid work element of sentences will be completed in 6 months rather than 12. We believe these measures will help maintain and increase public confidence in community sentences.

We share the Committee's conclusion that the new sentence must be adequately resourced. That is why along with our partners, we will be monitoring the level of take-up of the CPO closely. As for the additional funding, we have set out our budget for 2010/11: we have announced extra resources and have said it will be baselined thereafter. We have announced a total of £9.5m additional funding into community service: £3.5m for 2009/10
and £6m for 2010/11. The extra £6m for 2010/11 will come from elsewhere in the Justice budget – areas not critical to community sentences. For example, the ending of the mandatory drug testing pilot will make available £1.8m a year. There will also be transfers from other parts of the justice budget, primarily from the centrally-held budget established to address reductions in reoffending. Once the new CPO provisions have been implemented we will monitor its use as a key input to future resourcing decisions.

The costs associated with the provision of the requirements under the CPO will be met from within the existing baseline for criminal justice social work. While it is difficult to predict the size of any increase in the imposition of these requirements, experience in England & Wales since the introduction of the community order is that the average number of requirements per order has remained broadly constant. In Scotland, the average number of additional conditions per probation order is estimated at 1.2 per order. However, we will of course keep the level of take up under review.

In relation to the use of the term ‘supervision requirement’, we are aware that there are proposals contained in the draft Children’s Hearings Bill (published on 26 June 2009) to change the term in that context to ‘Compulsory Supervision Order’. Subject to the parliamentary process, if the draft changes in that Bill are enacted, we believe that any potential confusion should be eliminated.

The name ‘community payback order’ was based on the definition of ‘payback’ provided by the Prisons Commission in its report ‘Scotland’s Choice’ which was clear that payback to the community should be the focus of our criminal justice system. We have deliberately adopted this broader interpretation rather than the narrower definitions assumed by some. We remain convinced that public understanding of the purpose of the new community sentence, and confidence in it, will be supported by the name ‘community payback order’. We do not therefore propose to amend it.

Section 16
There is clearly uncertainty from the evidence about whether there are, in fact, any police cells in remote parts of Scotland that are certified for use for short-term detention. The Committee invites the Scottish Government to provide clarification on this point, and also to explain more fully how the process of certification operates. We would also suggest that further consideration be given to whether, even if no police cells are currently certified, this is a sufficient basis to repeal the provision that enables them to be so certified. We can envisage circumstances in which the facility to detain people in such cells, as an alternative to a long journey to the nearest prison, could continue to be useful.

Scottish Government response
The operation of ‘certified’ police cells is provided for within sections 206(2)-(6) of the Criminal Procedure (Scotland) Act 1995 (‘the 1995 Act’) as follows:
SECTION 206 - MINIMUM PERIODS OF IMPRISONMENT

(2) Where a court of summary jurisdiction has power to impose imprisonment on an offender, it may, if any suitable place provided and certified as mentioned in subsection (4) below is available for the purpose, sentence the offender to be detained therein, for such period not exceeding four days as the court thinks fit, and an extract of the finding and sentence shall be delivered with the offender to the person in charge of the place where the offender is to be detained and shall be a sufficient authority for his detention in that place in accordance with the sentence.

(3) The expenses of the maintenance of offenders detained under this section shall be defrayed in like manner as the expenses of the maintenance of prisoners under the Prisons (Scotland) Act 1989.

(4) The Scottish Ministers may, on the application of any police authority, certify any police cells or other similar places provided by the authority to be suitable places for the detention of persons sentenced to detention under this section, and may by statutory instrument make regulations for the inspection of places so provided, the treatment of persons detained therein and generally for carrying this section into effect.

(5) No place certified under this section shall be used for the detention of females unless provision is made for their supervision by female officers.

(6) In this section the expression “police authority” has the same meaning as in the Police (Scotland) Act 1967.

The operation of ‘legalised’ police cells is provided for within section 14 of the Prisons (Scotland) Act 1989 (‘the 1989 Act’) as follows:

SECTION 14 – LEGALISED POLICE CELLS

1) The Scottish Ministers, on the application of a police authority, may from time to time by rules under section 39 of this Act declare that any police cells or other premises in the possession of the police authority shall be a legal prison for the detention of prisoners before, during or after trial for any period not exceeding 30 days. Any such police cells or other premises are hereinafter referred to as legalised police cells.

2) Any person charged with or convicted of any crime or offence committed within the area of a council who might have been lawfully confined in a prison situated therein may be lawfully confined in any legalised police cells situated in that area for such period as aforesaid.

3) The maintenance of prisoners confined in any legalised police cells shall be deemed to be the maintenance of prisoners under this Act:
Provided that the police authority shall not be entitled to any payment for the use of the legalised police cells or for services rendered by any of their officers in connection with the detention or removal of the prisoners so confined.

4) The police authority, notwithstanding anything in this section, shall at all times have a prior claim to the uninterrupted use of any legalised police cells in their area.

5) For the purposes of this section the police authority of the area of a council in which there are any legalised police cells and all persons in their employment shall be subject to the provisions of this Act and any rules made thereunder.

6) It shall be the duty of the Scottish Ministers to make any arrangements required for the removal of any prisoners confined in legalised police cells in the areas of the councils for Orkney Islands and Shetland Islands.

7) In this section the expression “police authority” means a council, except that where there is an amalgamation scheme in force under the Police (Scotland) Act 1967 it means a joint police board.

8) For the purposes of sections 8 and 39 of this Act, legalised police cells shall be deemed to be prisons.

9) In this section, “council” means a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994.

There are currently Legalised Police Cells in 9 locations:
As a result of the operation of ‘legalised’ police cells, there have been no ‘certified’ police cells used for many years and we can confirm that, notwithstanding the evidence received by the Committee suggesting the contrary, Kirkwall (Orkney), Lerwick (Shetland) and Stornoway (the Western Isles) all have ‘legalised’ police cells rather than ‘certified’ police cells.

In conclusion, should any police authority wish to have available facilities to hold prisoners pending transfer to the nearest prison, then the powers under section 14 of the Prisons (Scotland) Act 1989 are sufficient and should be utilised in applying to the Scottish Ministers for police cells (or other police premises) to be designated as ‘legalised police cells’.

Section 17
The Committee agrees that there is a need to strike a proper balance between the imposition of short custodial sentences and effective community disposals. Additionally, the Committee agrees that there is a need to develop a range of community sentences in which the public can have confidence and which present the best chance of long-term rehabilitation of offenders. However, members were unable to agree on whether it was either necessary or desirable to create a statutory presumption against custodial sentences of six months or less in order to achieve that balance.

All Committee members recognise that the priority is to imprison offenders who (as the Prisons Commission said) commit offences so serious that no other form of punishment will do or who pose a threat of serious harm to the public. Committee members also recognise that those who have persistently failed to respond to non-custodial disposals may also have to be imprisoned. We acknowledge that this is, to a significant extent at least, what sentencers already aim to do, and that they do not lightly send people to prison if this is unlikely to benefit either them or those affected by their offending behaviour.

We accept that short prison sentences do not normally achieve much by way of rehabilitation, that while they provide respite for victims and communities, this is only for a limited period, and that high re-offending rates tend to demonstrate that they have limited effect as a deterrent. Finally, we all recognise that the Bill, although undoubtedly intended to shift sentencing behaviour, leaves the final decision in any individual case to the court, thus allowing a short-term prison sentence still to be
given where the court is convinced that that is the best option in the circumstances.
Where Committee members do not agree is on how far short-term custodial sentences should continue to be regarded as an appropriate disposal (other than in exceptional circumstances), and on whether they are currently being overused, or inappropriately used.

Some members point to the weight of evidence, particularly from academics, suggesting that short sentences involve only “warehousing” of offenders and provide no real opportunity to engage them in programmes to tackle their offending behaviour or address their other problems – and indeed that imprisonment itself may make those problems worse. These members also cite Scotland’s high incarceration rate, and the re-offending statistics, in support of the view that current sentencing policy is not working.

However, other members question that evidence, pointing out in particular that, since the people the courts imprison are likely to be the more persistent or serious offenders, it is hardly surprising that their re-offending rates are higher than those given community disposals. These members also cite examples referred to by witnesses, where a short prison sentence has had a salutary effect in persuading an offender to change his or her behaviour, even where previous community disposals had failed to do so. They also question the assumption that short-term sentences are currently given out where better alternatives exist, and hence doubt that a statutory presumption will make any real difference.

At least one member of the Committee questions whether, in the context of a provision aimed at discouraging sentencers from imposing short custodial sentences, a six-month threshold is the right one to use. On this view, reducing this to (say) three months, at least initially, would focus the provision on those cases where there is the least chance of rehabilitation in prison and which are least likely to involve serious or violent offences.

Overall, the Committee did not agree with the proposal in the Bill to create a statutory presumption against short-term custodial sentences.

Scottish Government response
We note the Committee’s detailed consideration of this issue, and its agreement on the limited effectiveness of short prison sentences as a deterrent, for rehabilitation and in providing respite to communities.

The difference in reoffending rates is very marked: 74% of those released from short custodial sentences go on to reoffend within two years of getting out. Only 42% of people sentenced to community service orders go on to reoffend in the same period. Moreover, the average time spent in prison, after conviction, on a sentence of 6 months or less is only 3 weeks. That is not enough time to address reoffending.
We note the salutary effect that a short prison sentence can have in some cases, where community disposals have not worked. We recognise this and the bill allows for it. Judges will still be able to use short custodial sentences where they think it is the only option. And if an offender breaches a community payback order, the judge will be able to impose a custodial sentence where needed in almost all cases. On the doubt that a statutory presumption will make any real difference, we note the comments by Sheriff Michael Fletcher (Honorary President of the Sheriffs’ Association) who told the Committee on 12 May:

‘…all sheriffs and justices would have regard to that rule, because we are bound to do so. It would cause us to hesitate, because we would have to think about whether we can truly justify giving such a sentence.’

Most sentences of 6 months or less are given for a small group of offences of which the largest are shoplifting, breach of the peace, breaches of bail or social work orders, petty assault and handling of an offensive weapon. These are also the most common crimes in the list of offences receiving sentences of 3 months or less. In particular, 7% of sentenced receptions to prison for 6 months or less and 6% of sentenced receptions of 3 months or less are for handling offensive weapons. As the First Minister has said, people who commit serious offences should receive long jail sentences, not short sentences which the Committee has acknowledged do too little to deter and to prevent reoffending.

Section 18
The Committee has found this a particularly difficult provision to assess, because of the complex interface between the current law, the regime that would be introduced by commencing relevant provisions of the 2007 Act as it was enacted, and the version of that Act that would result from the amendments made by the Bill. We are grateful to Scottish Government officials and to SPICe for providing the Committee with additional briefing on this section at a late stage in our Stage 1 consideration.

We understand the general intention of the 2007 Act to move away from a system of automatic and unconditional early release to a system that allows appropriate conditions to be imposed. However, we also recognise the serious concerns that have been raised about the complexity and cost involved in implementing that Act unamended, given the number of prisoners who would be subject to supervision and assessment requirements.

We therefore agree that the Bill represents some improvement on the current law, as it will result in more prisoners being subject to statutory supervision on release and fewer to automatic unconditional early release, while avoiding the more onerous requirements of the 2007 Act.
We understand that the intention is to set the threshold at sentences of one or two years' duration, and we note the significant difference in the resource implications according to which of these is chosen. We also note the Subordinate Legislation Committee’s concerns about the unlimited nature of the power delegated by this provision, and welcome the Scottish Government’s commitment (in response to that Committee) to consider whether appropriate parameters might be specified in the Bill.

Scottish Government response
The proposed amendments to Custodial Sentences and Weapons (Scotland) Act 2007 reflect the recommendations in the Prisons Commission’s report about what would be required to make the custodial sentences measures in the 2007 Act viable and, in due course, enable the Scottish Government to replace the current system of early release.

When implemented, the measures in the 2007 Act (as amended by section 18 of the Bill) will remove the current custody-only provision in the 2007 Act and provide for a two tier custody and community regime determined by the length of the sentence. This will see all offenders sentenced to imprisonment provided with statutory supports during the community part of the sentence. This will include mandatory supervision for all but those sentenced to short periods of imprisonment although, even in these cases, supervision could be imposed as a licence condition if considered appropriate in any particular case.

Concerns have been raised about the current proposal to provide an order making power that will allow the Scottish Ministers to ‘set the bar’ at which the lower tier custody and community arrangements give over to the more intensive arrangements. We have considered whether appropriate parameters might be specified in the Bill but remain of the view that it would not be appropriate to set it now. Although we are committed to implementing the new measures as soon as practicable, this work is incorporated within the wider Reducing Reoffending Programme. This will enable the impact that the new measures will have on the SPS and local authority criminal justice services to be properly assessed and taken into account within the implementation pathway. As the Scottish Prisons Commission noted, the size of the prisoner population will be the critical factor in determining when the new arrangements can be brought on stream.

We need to assess the evidence in ‘real time’ to ensure that the period set provides for a modern and flexible offender management regime for those sentenced to imprisonment. We therefore believe that the proposal to provide an order making power to allow us to ‘set the bar’ between the proposed two tiers of sentence management is the best way to ensure that we can deliver the new measures in the 2007 Act (as amended by section 18 of the Bill) as quickly and effectively as possible taking account of future developments around the prison service, prisoner numbers and the local authorities’ resources. It may also prove, on the basis of future data (and in the light of the benefits of the investment in the prisons estate and the
community payback strategy), that custody and community sentences are more effective for sentences of a certain length. Setting a limit in primary legislation beyond which the line could not be moved may impede that development.

**Section 24**

The Committee fully supports the principle that voluntary intoxication by alcohol should not be regarded as a mitigating factor in sentencing, but most members are less convinced of the case for codifying this principle in statute. The evidence suggests the principle is already well understood by sentencers, and there may be a risk that a statutory provision will confuse the legal position instead of clarifying it. This is partly because of uncertainty about the meaning of “voluntary” intoxication, and about the distinction between the intoxication itself and any underlying circumstances which might properly be regarded as mitigating.

It could also be inferred from the fact that the provision mentions only alcohol in the context of what is not to be regarded as a mitigating factor, that the position in respect of other forms of intoxication must be intended to be different. It would be unfortunate if one of the consequences of this well-intentioned provision was to make it easier to advance an argument for mitigation in the context of voluntary intoxication by drugs. We would therefore be grateful for further explanation from the Scottish Government about the rationale for this provision and its response to these concerns.

**Scottish Government response**

This provision forms part of our comprehensive framework for action to rebalance Scotland’s relationship with alcohol. There is a very strong link between alcohol misuse and offending – in particular violent offending.

In spite of the understanding of the courts, there is evidence that time and time again voluntary intoxication is being put before them as a mitigating factor. In her evidence to the Committee, the Lord Advocate said:

‘…day in, day out, notwithstanding the understanding that it does not mitigate, solicitors continue to put it before the courts in mitigation that their client would not have carried out the crime if sober. That is particularly prevalent as an excuse or as a form of mitigation in domestic abuse cases.’

We do not accept that the provision in the Bill prevents the court from considering the underlying reason for an offender’s intoxication as a mitigating factor (e.g. a bereavement) even though the intoxication itself cannot be a mitigating factor.

We also do not accept that the provision implies that the position in respect of other forms of intoxication must be intended to be different. The key issue here is the high level of offending associated with alcohol.
**Sections 25-28**

We strongly support the underlying intention of these sections of the Bill to provide additional tools for the police and the courts to tackle those involved in serious organised crime. We are less certain, however, that the Bill gets the detail right.

While there was contradictory evidence and most members are not entirely clear on what sections 25 and 27 add to the existing common law on conspiracy and incitement, and while we have some concern that the key terms of “involvement” and “direction” are insufficiently clear, on balance we support the creation of these new offences. We also support the new aggravation provided for in section 26, although we are not wholly convinced of the case for removing the normal requirement for corroborating evidence. We would therefore welcome a clearer justification for this element of the provision from Ministers.

We have considered carefully the evidence we have received about the definitions underpinning these new offences, namely the definitions of “serious organised crime” and “serious offence”. The main concern is that they are too widely drawn, and in this context we note that there is some dispute about whether offences need to be widely drawn in statute to ensure that the courts can apply them as intended. The Lord Advocate advanced this view, suggesting that ECHR case-law has made it increasingly difficult for the courts to “expand” on a narrowly-drawn statutory definition in deciding what constitutes an offence.

However, the Committee’s criminal justice adviser (Professor Peter Duff) has suggested that the European Court of Human Rights extends a considerable “margin of appreciation” to domestic courts, and that if the serious organised crime offences were more tightly defined, the Court “would grant the Scottish courts considerable leeway in interpreting the legislation creatively to extend to all the types of mischief it was intended to cover”. Accordingly, we invite the Scottish Government to re-examine the extent to which it may be possible to tighten the definitions in the light of the evidence we have received.

Of the provisions on serious organised crime, the one that has given us most difficulty is the section 28 offence of failure to report serious organised crime. It would clearly aid the fight against serious organised crime if people who come into contact with it, even quite innocently or inadvertently, were more prepared to report their suspicions to the police – but it is much less clear that a criminal sanction for not doing so is a fair or indeed effective way of encouraging this. People may be reluctant to report suspicions to the police for quite understandable reasons.

We also think more allowance should be made for the nature of a person’s role if they are to be held liable for not reporting suspicions arising from information gained in the course of their business or
employment. For example, if unusually large amounts of cash are banked by a small business and this prompts suspicion among bank staff, it is one thing to hold liable for not reporting this a senior manager or trained professional, but another to hold liable a junior cashier. Similar concerns may arise about information gained through a “close personal relationships” from which a “material benefit” is derived, as this could apply to the teenage child of a gangster who has begun to understand where the family income comes from.

While we do not agree with Sir Gerald Gordon that section 28 has “totalitarian overtones”, we do agree with his view that the provision could certainly be improved. For the time being, we invite the Scottish Government either to provide a better justification for this provision, or to bring forward amendments that will address the concerns raised.

Scottish Government response

- What do these offences add to conspiracy etc.

The Scottish Government supported by the Serious Organised Crime Taskforce want to provide a range of statutory offences to help tackle serious organised crime. We recognise there is some overlap between section 25 and the offence of conspiracy but we consider it necessary to take specific action to give law enforcement more powers to deal with serious organised crime. We consider this offence will give them additional flexibility to tackle these people as well as putting on the public record that these offences have taken place in connection with serious organised crime.

- Terms of involvement and direction are insufficiently unclear

The offences are deliberately widely framed but we feel they need to be in order to catch the very wide ranging and evolving types of activity that serious organised crime involves itself in. Defining more closely would potentially restrict the effect of the offences and limit the kinds of acts we are trying to capture now and in the future. We do not want to be in a position where we have to repeatedly come back to Parliament to modify this section as and when future types of behaviour around serious organised crime become apparent to the authorities. The flexibility around these offences should allow law enforcement to stay ahead of the crime groups and to take prompt action not place them on the back foot as offending behaviour changes.

- Aggravation – removing corroborating evidence

We welcome the Committee’s support for the new aggravation around serious organised crime. The Committee are concerned though about the removal of normal requirement for corroborating evidence. Although in this section evidence from a single source is sufficient to establish the aggravation, it is important to emphasise that at least 2 sources of evidence will of course still be required to establish the accused’s guilt in relation to the offence charged. This does nothing to change that general principle of Scots criminal law. The aggravation does nothing to alter a finding of guilt established by corroborated evidence; it simply allows the sheriff/judge to take account of the serious organised crime context of the offence when sentencing and obliges them to record that aggravation. This is not a novel provision in statutory
aggravations (sections 1(4) and 2(4) of the Offences (Aggravation by Prejudice) Act 2009 being one example). We hope this is enough to satisfy Committee but happy to engage further if necessary.

• Serious organised crime and serious offence definitions - too wide
  We are continuing to work in looking at these definitions. However we remain to be convinced that significant changes are required. Both the Lord Advocate and the Chief Constable of Strathclyde Police, Stephen House, made clear in their evidence to the Committee the need for wide ranging definitions and we need to ensure we give law enforcement and the prosecution the tools they require to be as flexible as possible. We want to capture all forms of serious organised crime, to get at its heart and provide flexibility. We are continuing to look at the definitions to ensure they are sufficiently tight but at the same time ensure that the wide variety and changing conduct involved is still effectively captured.

• Failing to report criminal sanction is not fair for not reporting
  Our intention is to penalise people who have benefited from not reporting serious organised crime. We do not want to capture people who have inadvertently become aware of or suspect criminality from going about their normal business. However where somebody has benefited from not reporting it, then they should be penalised. We intend to bring forward amendments at Stage 2 that we hope will satisfy Committee to ensure that a person would not unwittingly be caught by these provisions.

• Junior member
  We note the comments made and do accept the points made. We intend to address the issue as we do not intend to capture with this offence those junior members of staff who carry out a task at the instruction of an employer who knows or suspects that it relates to serious organised crime. We intend to lodge amendments to require a direct link between an individual's knowledge, the service they provide and the benefit they receive from serious organised crime.

• Close personal relationships and material benefit- better justification required
  We have thought more around the 'material benefit' which can be wide ranging and we intend to bring forward amendments that will more accurately reflect the forms of benefits we are aiming to capture such as being linked to certain property.

Section 34
The Committee shares the Scottish Government’s aim to protect the public from extreme pornography, but has noted a range of concerns raised in evidence about the parameters of the new offence proposed. There are various points on which we would seek further clarification from the Scottish Government. The first is why the definition of “extreme image” includes a much broader reference to depictions of rape than was suggested in consultation and is provided for in the equivalent England and Wales legislation.
Secondly, we would be grateful for further explanation about why that definition refers to “realistic” depictions of sexual acts, and how that relates to cartoons or other images that have been distorted or have a fantasy element.

Thirdly, we would seek clarification on the rationale for using the term “obscene” as part of the definition of extreme pornography, when that term is itself undefined in the Bill, and whether any consideration was given to alternative definitions in terms of the cultural harm that pornography can cause.

Finally, we would be grateful for clarification of what is meant by “possession” of extreme pornography, and whether, in the absence of any definition in the Bill, what understanding of that term would be relied on by the courts (particularly where images come into someone’s possession through electronic transmission).

The Committee accepts the rationale for excluding from the offence of possessing extreme pornography images that form all or part of a classified work, such as a film granted a certificate by the British Board of Film Classification. However, we are uncertain about some of the practical implications, for example whether it offers protection from prosecution to the film-maker who is in possession of a film that the BBFC has not yet been able to consider for certification.

We are satisfied with the defences that are provided in inserted section 51C. In particular, while we note the concerns raised in evidence, we agree that the Bill is right to distinguish between the possession of an image by those who participated in the sexual activity depicted and the onward transmission of that image to third parties.

Scottish Government response

- Definition of ‘extreme image’

We believe that the specific inclusion of images of rape within the definition of extreme pornography sends out a clear message about the unacceptability of any pornographic depiction of rape.

We note that the majority of respondents to the Justice Committee’s consultation on the draft Bill who commented on this section were supportive of the inclusion of all pornographic images of rape. Rape Crisis Scotland, for example, commented:

‘Rape Crisis Scotland supports the inclusion in the bill of specific reference to rape and other non-consensual penetrative sexual activity within the definition of extreme pornography. Unlike similar legislation in England & Wales, the bill does not make a distinction between ‘violent’ rape, and rape in general, a distinction which is extremely unhelpful.’
The offence is based on that proposed by the short-life working group established by the then Scottish Executive to consider how an offence of possession of extreme pornography might be framed in Scots law. That group proposed a wider definition of ‘extreme pornography’ which would encompass all images of rape and non-consensual penetrative sexual activity.

- Definition refers to ‘realistic’ depictions of sexual acts
  The definition of an extreme image is intended to be restricted to images, whether moving or still, which appear to a reasonable person to depict an act which is real. Our view is that there is a risk that such images normalise sexual violence and that the risk is greatest where such activities are depicted in a realistic manner. Where the image is realistic, the person possessing it may have no way of knowing that it does not depict a real image of a serious sexual offence. Although there is no requirement that it is actually real, the offence does not apply to cartoons or other animations which clearly do not depict real people carrying out real acts. On the other hand, a computer generated image of sufficient sophistication as to appear to a reasonable person to be depicting a real act would be caught.

- Use of the term ‘obscene’
  Under section 51 of the Civic Government (Scotland) Act 1982, it is an offence for any person to publish, sell, distribute, or to possess with a view to its eventual sale or distribution, any obscene material. An offence under section 51 will have been committed by someone in order for others to possess obscene material, but it can be difficult to take action to prevent its distribution as, where a person is found to be in possession of such material, the police require to find evidence of publication, sale or distribution of the material or an intention to sell or distribute it. The offence of possession of extreme pornographic material is intended to ensure that where this obscene material is extreme and pornographic, simple possession will be an offence, which will enable the police to seize the material and, if appropriate, submit a report to the procurator fiscal.

By providing that images must be obscene, in addition to being extreme and pornographic, we ensure that the possession of material which it is not currently illegal to sell or distribute is not inadvertently criminalised.

As to the absence of definition of obscene, it is not defined as we are of the view that obscenity is a relative concept which may vary according to time, circumstances and locality. The advantage of this approach is that the proper meaning of the term is left to the interpretation of the courts in the light of the prevailing moral consensus and the full facts and circumstances of each individual case. This is consistent with the approach in the 1982 Act which does not define obscene for the purposes of the section 51 offence. Therefore, obscenity is a concept with which the courts are already familiar by virtue of the 1982 Act.

- What is meant by ‘possession’ of extreme pornography
  The term ‘possession’ is used in equivalent legislation concerning indecent images of children at section 52A of the Civic Government (Scotland) Act
1982. The police and the COPFS have confirmed that they are content with its use. Case law has defined possession in terms of a person having knowledge and control of the item in question. In normal circumstances, deleting images held on a computer is sufficient to divest possession of them. An exception would be where a person is shown to have intended to remain in control of the image even though he has apparently deleted it. For example, where the use of software can retrieve the image.

In the context of images which come into someone’s possession through electronic transmission, section 51C(2)(c) provides that it shall be a defence for a person to prove that he was sent the image concerned without any prior request having been made and did not keep it for an unreasonable time, or that he had not seen the image concerned and did not know, nor had any cause to suspect, it to be an extreme pornographic image. These defences are in line with those which apply in relation to the offence of possession of indecent images of children.

- Practical implications relating to ‘classified works’
  The specific exemption for BBFC-certificated films has been included within the provisions for the avoidance of doubt, so as to reassure members of the public in possession of BBFC-certificated films that they will not be prosecuted for possession of extreme pornography.

We do not consider that any BBFC-certificated film would meet the definition of extreme pornography as the BBFC are clear that they would not give a certificate to a pornographic film containing depictions of rape, serious sexual violence, bestiality or sexual activity with a corpse. As such it is appropriate that there should be no exemption for films which have not yet received BBFC certification, as any film which would fall within the offence provisions would not, in any case, receive BBFC certification. It is up to film makers to ensure that their films would not constitute extreme pornography.

- Defences
  We note the Committee’s comments.

**Section 35**

The Committee has no difficulties with this provision as far as it goes, but it would be useful to get a clearer indication of what else the Scottish Government is doing to tackle trafficking issues, particularly in view of the absence so far of convictions for sexual exploitation under the 2003 Act (notwithstanding suggestions that Glasgow has the highest number of trafficked persons outside London). We are sympathetic to the concerns expressed by ACPOS that the legislation should be sufficiently broad to cover all forms of trafficking.

We are particularly concerned that the problem may be exacerbated during the Commonwealth Games in 2014. We would therefore welcome assurances from the Cabinet Secretary that the changes made by the Bill will contribute meaningfully to addressing this problem.
Scottish Government response
We are grateful for the support of the Committee regarding these provisions.

- Other action to tackle Human Trafficking
A comprehensive range of measures designed to tackle all aspects of trafficking is set out in the UK Action Plan on Tackling Human Trafficking which is published jointly with UK Government. The Plan outlines our strategy in relation to trafficking in human beings and sets out work that is underway across the UK to address trafficking related issues.

- Coverage of Legislation
In relation to the concerns expressed by ACPOS, we would reassure the Committee that the current legislation already deals with the trafficking of human beings for labour exploitation, domestic servitude and organ harvesting and, in each case, covers trafficking into, within or outwith the UK. The provisions relating to trafficking of a human being for the purposes of forced labour etc. are contained in sections 4 and 5 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. This is additional to section 22 of the Criminal Justice (Scotland) Act 2003, which makes provision relating to trafficking of a human being for the purposes of prostitution etc. As these provisions make it clear that it is an offence to arrange or facilitate the trafficking of a human being for exploitation then the activity around the transit process is already caught.

- Commonwealth Games 2014
Our aim is to ensure that any risk of human trafficking associated with the Commonwealth Games is assessed and addressed. That is why the Commonwealth Games features as a specific issue in the UK Action Plan on Human Trafficking. The Commonwealth Games Security Planning team, a multi-agency group, has a remit to identify and address potential security measures which includes trafficking in human beings. The legislative measures currently in place and those proposed in this Bill will help in tackling the potential threat around the Commonwealth Games.

We would draw the attention of the Committee in particular to the provisions relating to closure notices and orders contained in section 72 of the Bill. If approved by Parliament, these provisions will provide the police with specific powers to close premises associated with human trafficking and other forms of exploitation. For the purposes of the closure powers a list of ‘exploitation offences’ is contained in the provisions which ensures that premises used for certain immigration offences such as falsification of documents and the trafficking in human beings for forced labour, slavery, servitude, organ transplant or for the purposes of prostitution etc. will be covered. We believe that this new power will help police address the misery caused by all forms of trafficking in human beings, including any threats identified in relation to the Commonwealth Games.

Section 38
The Committee recognises that there are various ways of addressing concerns about the fact that Scots law allows children as young as eight
to be regarded as criminally liable and prosecuted through the courts, when a minimum age of 12 is recommended by the UN Committee. However, we remain unclear why the Scottish Government has opted for raising the minimum age at which a child may be prosecuted, rather than also abolishing the rule of law on the age at which children cannot be guilty of an offence (as the Scottish Law Commission recommended).

An alternative, suggested by SCCYP, would have been to raise that age from eight to 12, and then to provide for a new “non-offence” ground to enable children below 12 to be referred to a Children’s Hearing in cases where other grounds for referral do not apply. We find it difficult to assess whether the approach adopted in the Bill is the best available option without a fuller explanation of the Scottish Government’s reasoning.

While we recognise that the difference between the various approaches may be mostly theoretical, it would be useful to know how far the Scottish Government’s choice of approach was based on practical considerations, such as whether it would permit retention of children’s forensic data, or how offences committed by children would be recorded (and what implications this might have for their future prospects).

We recognise that children under 12 can sometimes do terrible things, and if there is to be a statutory ban on criminal prosecution in all such cases, it would be useful to have an assurance from the Cabinet Secretary that there is a sufficient range of disposals available within the children’s hearings system.

We note that the Bill does not change the existing situation in which the option of referring children to a Children’s Hearing on the ground that they have committed an offence is unavailable for a child under the age of eight. We note that the Scottish Government intends to bring forward a Children’s Hearings Bill in the near future and we trust that this issue will be properly and fully considered in that context.

On the question of whether 12 is the appropriate age threshold (either for being deemed capable of committing a crime, or for being liable to prosecution), we have no settled view. We recognise that any age is, to some extent, arbitrary, but there may be merit in having some consistency with age-limits in other relevant statutory contexts. We are conscious, in particular, that the new Sexual Offences (Scotland) Act 2009 sets an age threshold of 13 for the definition of various sexual offences against young children, and we suggest that the Scottish Government could do more to explain why the same age was not adopted in the current context.

Scottish Government response
We believe section 38 moves Scots law towards the expectations of the UN Committee on the Rights of the Child (UNCRC). The UNCRC requires State Parties to set a minimum age below which children shall be presumed not to
have the capacity to infringe the penal law and that age should be at least 12. We believe that setting 12 as the age under which children cannot be prosecuted draws in line civil and criminal practice. Children under the age of 12 are not considered to be sufficiently mature to instruct a solicitor in civil proceedings and as a consequence to have the capacity to pursue and defend civil proceedings themselves. It should be noted that 12 was the age recommended by the Scottish Law Commission in their ‘Report on Age of Criminal Responsibility’ published in January 2002.

The Scottish Law Commission recommended abolishing any rule on the age at which children can be found guilty of an offence. This recommendation was not implemented as, if it were, it would mean that children under the age of eight could be charged with any offence as adult offenders, albeit they would be immune from prosecution. Given that it is widely appreciated that children under age 8 do not have the mental capacity (mens rea) to commit criminal acts, the approach above has not been adopted. Instead, new grounds of referral are being included in the Children’s Hearings Bill to cover all situations where a child is in need of compulsory measures of supervision through the hearing, including behaviour that might be considered criminal if committed by an adult.

Children between the ages of 8 and 12 who commit serious offences will continue to have information retained on the Criminal History System and may have forensic samples (including DNA) retained (under provisions in section 59 of the Bill). These measures ensure that communities will continue to be protected despite a change in practice. In certain circumstances it is appropriate to retain conviction information in order to protect the public from harm. There is a balance to be struck between the rights of children and the rights of communities to be protected. Work is ongoing with ACPOS, the Scottish Police Services Authority and Disclosure Scotland to ensure we can strike the right balance and only retain and disclose conviction information when it is appropriate to do so.

We believe that Scotland has an internationally renowned and envied Children’s Hearings system which already deals with the vast majority of offending behaviour, including very serious behaviour, committed by children under the age of 16. Children’s Hearings consider both the child’s behaviour and the measures that need to be put in place to change that behaviour. Improving the child’s circumstances is paramount so that they can become positive contributors to society once adults. Children’s Hearings have many disposals available to them, including placing children in secure care up to their 18 birthday if that is required. A Panel can also place a child on intensive support which can include an electronic tag. The Panel decides on the most appropriate intervention based on the needs of the child, the support required to change their behaviour and the measures needed to protect the public.

**Sections 58-60**
The Committee agrees with the Scottish Government that it is sensible to enable fingerprint data and other forensic data to be subject to the same ECHR-compatible retention regime as DNA data.
We are less certain about whether the current provisions in the Bill should be extended to cover forensic data taken from people who are then offered alternatives to prosecution. We certainly would not support any change that would result in the police being required or expected routinely to take samples in situations where, at present, fixed penalties or fiscal fines can be imposed with minimal time and bureaucracy.

However, we also recognise the logic of saying that, where a sample has already been taken from an individual in connection with an offence, the decision to offer an alternative to prosecution rather than institute criminal proceedings should not be sufficient to determine whether the forensic data can subsequently be retained. We would therefore look forward to a Stage 2 amendment that would allow for the retention of data in such circumstances. However, in considering the terms of any such amendment, particularly the duration of retention provided for, we would wish to ensure that an appropriate balance was struck between considerations of consistency and proportionality.

In relation to the retention of forensic data taken from children referred to a Children’s Hearing, we are sympathetic to the broad outline of what is proposed, but uncomfortable with the fact that the Bill leaves unspecified the sexual or violent offences that would enable the retention of data in such cases. We take the view that retention of DNA and other data from children would be required only in a small proportion of cases, probably involving serious violent or sexual crimes.

We note both the evident difficulties the Scottish Government has in defining the list of relevant offences satisfactorily and concerns that the children's hearing system is not equipped to determine such questions. It would be helpful if the Scottish Government would provide us with its view of the suggestion by SCCYP that retention should only be on application to a sheriff.

The Committee is conscious that the retention of DNA and other evidence, particularly from children and from persons not convicted of significant crimes, can raise issues under Article 8 of ECHR and requires a proportional approach. We note both the suggestion by the Nuffield Council on Bioethics that there should be a presumption in favour of the removal of all records, fingerprints and DNA profiles, and the argument by GeneWatch that DNA samples should be destroyed once DNA profiles have been obtained, and would seek the comments of the Scottish Government on these matters.

We would therefore expect the Scottish Government to report in the Stage 1 debate on its position on these matters and on progress with the forensic data working group and, ideally, commit to providing us with a draft list of proposed relevant offences before Stage 2.
Scottish Government response
When we published our retention proposals for DNA and fingerprints in February 2009, we undertook to consider further the issue of retention in relation to fiscal disposals and police Fixed Penalty Notices (FPNs) issued under the Antisocial Behaviour (Scotland) Act 2004. Since then Stewart Maxwell has made public his intention to lodge a stage 2 amendment that would allow for the retention of data in relation to police FPNs. We understand that he also intends to lodge a similar amendment to ensure that DNA and fingerprints can also be retained in relation to disposals issued by Procurators Fiscal.

We note the terms of the suggestion by the Scotland’s Commissioner for Children and Young People (SCCYP) that forensic data taken from children should only be retained on application to a sheriff. Whilst we are sympathetic to these concerns, we are also clear about what we hope to achieve with these provisions. We have a unique Children’s Hearings system in Scotland where the needs of the child are put first. We do not want to detract from that, but we do want to ensure that those children who have committed a sexual or violent offence and who are at risk of committing further serious offences can be identified as early as possible, to enable the right interventions for the child and the right protection for the public.

While we can understand the principle behind the suggestion made by the office of the SCCYP, we have some concerns about this proposal - in particular, that we would be subjecting vulnerable and troubled children going through the Children’s Hearing system to a judicial process. We believe that establishing a separate procedure following the Children’s Hearing to decide whether a child’s DNA and fingerprints should be kept would be stigmatising for the child. It would place this aspect of their case in the court system - the very environment that the Children’s Hearings system is designed to remove them from.

Section 59 of the Bill currently provides that forensic data which is taken from child upon their arrest or detention, who is subsequently referred to a children’s hearing, will only be retained if (a) that child is referred on grounds of having committed a relevant sexual or violent offence, and (b) accepts that such an offence has been committed or a sheriff finds this to be the case. If a child commits no further serious offence, records will be destroyed after 3 years, unless an application is made to extend the retention period and a sheriff decides that the child poses a continuing risk to the public. We believe that what we are proposing focuses on the welfare of the child and the protection of the public. The automatic and initial 3 year retention period we are proposing strikes the right balance. It does not require the Children’s Hearings system to make the decision to retain DNA and fingerprints and it does not subject the child to another process in a court setting. It is the right approach.

The list of relevant sexual and violent offences will be specified in an order subject to affirmative procedure. At present, the Bill provides that the order can only specify sexual and violent offences which are contained in section
19A(6) of the Criminal Procedure (Scotland) Act 1995. The forensic data working group, on which the SCCYP is represented, has made good progress with developing a list of relevant sexual and violent offences that will trigger retention. Although agreement has been reached on most of the offences to be included, the inclusion of a small number of offences is still under discussion. If the full draft list is not finalised prior to stage 2, we will provide details to the Committee of those offences which the group has agreed should be included.

Moving on to the argument put forward by GeneWatch that DNA samples should be destroyed once DNA profiles have been obtained – this issue will also be looked at by the Forensic Data Working Group. It is technical in nature and we must be clear that there would be no unintended consequences in doing so. We can assure the Committee, and GeneWatch, that we are determined to strike a balance between the rights of individual citizens and keeping the people who live in our communities safe, so the working group will give this proposal full consideration.

Section 62
The Committee was unable to reach consensus on the merits of this provision. On the one hand, we can understand why it seems anomalous that a witness, almost alone among those taking part in a trial, does not have access to the statement he or she made at the time the offence was investigated (which may have been months or even years previously). On the other hand, we understand the concerns expressed in evidence about the accuracy of these statements, and the risk of exacerbating a difference of treatment between prosecution and defence witness statements.

We would therefore appreciate clarification from the Scottish Government on its justification for this provision, particularly in view of the strong reservations expressed in evidence from the legal profession and the judiciary.

Scottish Government response
We note that there has been some debate over whether this provision is needed, and the strong reservations expressed in evidence by the legal profession and the judiciary.

Notwithstanding those reservations, we would draw the Committee’s attention to the fact that Lord Coulsfield considered that the provision was necessary after a thorough and detailed consideration of the law as a whole. The Solicitor General also gave evidence in support of the provision.

We are of the view that proper testing of witnesses is valid and important but witness’s evidence should not be reduced to a one-sided memory test, where every minor discrepancy is put under the microscope. This could have an inadvertent, detrimental effect on a witnesses ability to give evidence. The provisions in section 62 will avoid those problems, and in turn, may help to
reduce the length of trials by reducing time spent on questioning witnesses on minor discrepancies and allow all concerned to focus on the issues at trial.

We recognise that this provision depends on statements accurately reflecting what witnesses have said. We accept that this is vital and a significant amount of training and guidance for police officers is in place to ensure that happens. In addition to that, by virtue of section 40 of the Bill, witnesses will have seen their own statements at an earlier stage and will have had the opportunity to correct any inaccuracies. These measures should ensure the accuracy of the witness’s statement.

It is not clear to us why the provision would exacerbate a difference of treatment between prosecution and defence witness statements. It is important to remember that, as was alluded to in evidence to the Committee, there are existing measures for the use of these statements, albeit in much more restrictive circumstances than we propose. Those apply equally to defence witnesses as to witnesses for the prosecution. Section 62 will apply to all witnesses, whether prosecution or defence, provided a statement has been taken from the witness. In many cases, the defence witness will have given a statement and, if that is the case, he or she will be able to refer to it. We understand the concern that, in some cases, the defence witness may come forward at a later stage and the police may not have taken a statement at the time of the incident. In such cases, however, prosecutors, when notified by the defence of the details of their witnesses, will attempt to make arrangements for a statement to be noted from the defence witness.

As such, we cannot see that defence witnesses will be placed at any more of a disadvantage at present and that any perceived disadvantage is greatly outweighed by the benefits to witnesses and to the delivery of justice.

Section 63
The Committee understands the underlying rationale for this provision, but acknowledges the concerns raised in evidence that removing entirely the current limits on compellability, and hence making persons who refuse to give evidence against their spouses or partners liable to a charge of contempt of court, risks putting them in an invidious position in certain circumstances. We therefore invite the Scottish Government to explain further its approach in the light of the evidence received.

Scottish Government response
A spouse is already a compellable witness where the accused is charged with an offence against him or her. The Law Society of Scotland pointed out that spouses who are compellable under the present rules nevertheless seldom give evidence. It is clear, therefore, that compellability is an issue dealt with sensitively by the courts, and there is no reason to believe that widening the grounds of compellability will mean this ceases to be the case. Even if extended compellability allows evidence to be obtained only in rare circumstances, however, it will still be worthwhile. Moreover, in today’s modern society, it is not clear why unmarried partners, even those who have co-habited for decades, should be compellable in circumstances where a
spouse who had married the accused the day before proceedings got under way would not.

**Section 66**
The Committee accepts the rationale for this provision, but would invite the Scottish Government to reflect on the drafting in the light of the points raised by witnesses.

**Scottish Government response**
We are pleased the Committee accepts the rationale for these provisions but has asked us to reflect on the drafting of it in light of points raised by witnesses, specifically High Court Judges (HCJs) and the Scottish Crime and Drug Enforcement Agency (SCDEA).

Both the HCJs and SCDEA have expressed concern about ‘willingness’ in relation to the orders. The HCJs felt that condition D in section 271Q(6)(a) should be amended to read that ‘...the witness would not willingly testify if the proposed order were not made’ since any witness validly cited was obliged to do so. The SCDEA felt that the way condition D was framed suggested that witnesses may be denied anonymity because they would be willing to testify.

While we understand the point made by the HCJs, we do not wish to add the issue of compellability in this context. The policy intention is that a witness anonymity order would be available to witnesses who would ultimately comply and testify rather than restrict anonymity to situations where a witness says he/she will not co-operate. In relation to the SCDEA’s point, condition D comprises two tests – set out in subsections 271Q(6)(a) and (b) - either one of which will satisfy the condition if met. Further discussion with the SCDEA established that their concerns would be met by condition D(b), that is there would be real harm to the public interest if the witness were to testify without the proposed order being made.

We therefore plan to make no changes to this provision which remains consistent with the relevant provisions covering the rest of the UK in the Coroners and Justice Act 2009 (which itself updated the Criminal Evidence (Witness Anonymity) Act 2008). We are, however, considering what changes we might make to the explanatory and policy notes to make these issues clearer.

We have also reviewed all comments made about section 66 by witnesses, including the HCJs, the SCDEA and Scottish Women’s Aid. As a result, we plan to lodge amendments at Stage 2 as follows:-

- in section 271N(5)(a)(i) (who is required to see the anonymous witness during proceedings) deleting reference to ‘or other members of the court’;
- deleting section 271N(5)(a)(iii) because of fears that interpreters might be intimidated or compromised;
- amending section 271P(4) (Applications) to make clear that any relevant information which is disclosed by or on behalf of the party...
before determination of the application must be disclosed in such a way as to prevent the witness’ identity being disclosed;

- in section 271R(2)(b) (relevant considerations), deleting reference to the notion of ‘weight’ in relation to the anonymous witness’s evidence;
- in section 271R(2)(c), removing the words ‘sole and decisive’ in relation to an anonymous witness’s evidence, and replacing these with the word ‘material’, to take account of the doctrine of corroboration; and
- in section 271(S)(2) replacing ‘warning’ with ‘direction’ to reflect modern practice.
- considering what changes we might make to the explanatory and policy notes to clarify other issues such as fears on the part of the witness about injury or serious harm to property.

We also plan to lodge a Stage 2 amendment to Paragraph 2 of Schedule 3 to the Bill (appeals against convictions) in order to remove references to ‘unsafe conviction’, which is not a concept in Scots law and replace it with a more appropriate reference referring simply to a miscarriage of justice having occurred.

**Section 68**

We endorse this provision, so far as it goes, but note that it will create an inconsistency in terms of the upper age limit for jurors in criminal and civil trials. While we recognise that this cannot be addressed through the present Bill, we recommend that the Scottish Government address this through separate legislation at the earliest practical opportunity.

**Scottish Government response**

We are aware of this inconsistency but, as the Committee noted, it cannot be dealt within the scope of this Bill. We will certainly consider addressing this anomaly as and when a suitable legislative opportunity arises in the future.

**Section 82**

The Subordinate Legislation Committee (SLC), in its report on the Bill, questioned why the *ex gratia* scheme was to be provided for in subordinate legislation, when the existing scheme was provided for directly in the 1988 Act. It also questioned the scope of the delegated power, which in its view went beyond what was required to achieve the Scottish Government’s stated purpose for the provision.

Although we explained to the SLC that the order making power was necessary in order to have flexibility in relation to how it gave statutory effect to the *ex gratia* scheme, the SLC concluded that “no adequate justification had been given by the Scottish Government for the power to extend the scheme beyond that currently operating”.

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The Committee notes and endorses the concerns expressed by the Subordinate Legislation Committee about the scope of the delegated power proposed.

We therefore invite the Scottish Government either to justify that scope by reference to any changes of substance it might wish to make to the existing ex gratia scheme in the course of putting it on a statutory basis, or to limit the scope of the delegated power to what is required to replicate the existing scheme without substantial change.

Scottish Government response
It is not clear to us why concerns have been expressed about the scope of the delegated power proposed. We believe we provided adequate justification in our written response to the Subordinate Legislation Committee on 14 May 2009 as to why we wish to use delegated powers to provide a statutory basis for the ex gratia scheme. That is, the order-making power will allow that ex gratia scheme, which was set out in a Parliamentary written answer, to be expressed in appropriate statutory terms. This proposal will therefore introduce an element of Parliamentary control which is currently absent. We are not proposing to change the scope of the ex gratia scheme. However, the order making power would permit the expansion or narrowing of the scheme in future, if that were desired. Ministers may in future wish to recognise further circumstances in which compensation should be available, and without some flexibility in the power, the only way to do so would be through the creation of another ex gratia scheme. It is simply not necessary to make the power so narrow and intricate.

Sections 86-88
We support the general policy of clarifying the rules of disclosure, and accept that these provisions are motivated by good intentions. However, we agree with Lord Coulsfield that the way in which his recommendations have been given effect in the Bill is too complex and detailed, and risks losing sight of the underlying principle. We would prefer to see the basic duty of disclosure elevated to greater prominence. The Committee invites the Scottish Government to review, in the light of Lord Coulsfield’s comments, where the line has been drawn between what is set out in the Bill (including provision about schedules of information in solemn cases) and what is to be included the proposed code of practice (or in guidance). We welcome the Crown Office’s commitment to provide a copy of the draft code, and look forward to being given sight of it in advance of Stage 2.

We also note the evidence by the Sheriffs’ Association questioning the need for a distinction between “sensitive” and “highly sensitive” information, particularly when the latter is not separately defined. It would be helpful if the Scottish Government could provide a fuller justification for why this distinction is considered necessary and how it is to be applied.
Scottish Government response
When framing the provisions in Part 6 of the Bill, our thoughts were to set the provisions out in a chronological order, beginning with the definition of what information is, what the early steps in disclosure are (in provision of schedules) and then the duty itself. That said we can see the sense in a different approach which would afford the duty greater prominence and we are considering how best to achieve this and will bring forward any appropriate amendments at stage 2.

On the question of complexity of the provisions, we accept the concerns made and we will seek to amend the Bill at stage 2 to simplify the provisions. While we want provisions that provided certainty and clarity for practitioners, it is not our intention to increase burden or create an inflexible system. So we have looked again at the provisions and we will lodge amendments at Stage 2 which, if approved, will not only simplify the provisions on schedules of information in solemn cases but will also remove the detail on the precise form in which the information is provided. We accept the concerns expressed that such administrative detail would be best left for the Code of Practice or in guidance for prosecutors and the police.

Having said this, as the Solicitor General explained in his evidence to the Committee, disclosure is a complex matter. While we can attempt to simplify how it is presented, the underlying complexity will remain. We are continuing to look at the remaining provisions and, if we are able to identify provisions which could be included in the Code of Practice, in secondary legislation or in guidance rather than on the face of the Bill, we will bring forward any appropriate amendments at stage 2.

We can appreciate the concerns at the absence of a definition of ‘highly sensitive’ within the Bill. The reason for making provision on sensitivity of information was that certain duties follow from the designation of information that is ‘sensitive’. No duties follow, however, from the designation of information as being ‘highly sensitive’. Designation of information into categories such as ‘sensitive’ or ‘highly sensitive’ is an administrative exercise, concerned with the handling of information by the police and prosecutors which would be better specified in the Code of Practice. Decisions regarding materiality will be governed by the information itself and not the degree of sensitivity. The degree of sensitivity however will determine the appropriate level of security clearance required by the person who will view and consider this information within the COPFS. Accordingly it is intended that the Code will include a definition of ‘highly sensitive’.

We consider, also, that defining ‘sensitive’ sets the bar, above which information must be considered ‘highly sensitive’. If the information does not meet the definition then it is ‘non-sensitive’ and results in the crystallisation of the prosecutor’s duty to disclose details of that information, provided it is material and relevant.

We consider therefore that there is no need to define ‘highly sensitive’ or ‘non-sensitive’ in primary legislation.
We have drawn to the Crown’s attention the Committee’s comments in respect of seeing the Code of Practice in advance of Stage 2 proceedings. The Code is a matter for the Lord Advocate but we are advised that it is under development and a copy will be shared with the Committee as soon as it is finalised.

**Sections 94-95**

This is another provision on which the Committee has not been able to reach an agreed and settled view. We understand the rationale presented by the Scottish Government, but we also recognise the concerns expressed by some witnesses.

However, the Committee is not currently persuaded that there is merit in the proposal to make defence statements compulsory in solemn cases, as it appears that the timing of their production may risk jeopardising important principles of justice. Some further explanation of the Scottish Government’s thinking would therefore be appreciated, including on its reasons for departing from Lord Coulsfield’s recommendations on this issue.

**Scottish Government response**

The provisions in Part 6 of the Bill as a whole are concerned with making certain that the accused has a fair trial and, to ensure that, everything which the accused is entitled to have disclosed to him, is disclosed. The provision of defence statements by the accused to the Crown helps to ensure that, a view firmly supported by the Lord Advocate when she gave evidence. The Committee will recall, also, the practical examples presented by the Solicitor General in his evidence which we believe reinforce the need for this provision.

The nature and scale of solemn cases are such that the prosecutor’s task in assessing what information requires to be disclosed would be extremely difficult without knowing some information about the accused’s line of defence. Not having mandatory defence statements would risk essential information not being disclosed inadvertently and through no fault of the prosecutor or the accused. A fair trial hinges on disclosure and the decision as to what should be disclosed should not depend on the prosecutor’s best guess, however well informed, as to what the accused’s position might be. As the Lord Advocate explained to the Committee:

‘...in many cases, especially High Court cases, there may be more than 3,000 statements, thousands of productions, and information that is very broad. To understand what might be relevant or of interest to the defence, it is of considerable help—in establishing the rights of the accused to a fair trial under article 6 of the ECHR—to be able to anticipate in what the defence might be interested. It is not just about assisting the prosecution; it is also about assisting the accused.’
Requiring defence statements in solemn cases is the best way to confidently secure disclosure to the accused of all of the information which needs to be disclosed to him and, as a result, a fair trial.

It is also a more efficient and effective way for justice to be delivered. This is not the first time a requirement has been placed on the defence. The accused must, already, provide details of any special defence they intend to rely on. They must, also, notify the prosecutor of any witnesses they intend to lead. We do not think these requirements go far enough, however as they leave significant gaps which require to be filled. The requirement to provide a defence statement in solemn proceedings will supplement existing measures and will help to focus trials on the issues, something which was highlighted by the Solicitor General in his evidence to the Committee. Moreover, revealing the accused’s position to the prosecutor may result in the prosecutor taking a view as to whether proceedings should continue in the public interest. As the Lord Advocate explained to the committee:

‘...we should not waste the resources of the criminal justice system when a defence can clearly be made out. It is in the public interest for us to be aware of that at an early stage. Information that might assist the defence should be made known.’

Sections 102-106
The Committee accepts the case made by the Scottish Government, following Lord Coulsfield, for having a statutory process to allow non-disclosure of information in certain circumstances. However, we also recognise the inherent difficulties in achieving this objective while continuing to secure adequate protection for the rights of the accused. We are also concerned about the amount of detail set out in these sections of the Bill, and agree with witnesses that some of this provision would be better dealt with in subordinate legislation (subject to appropriate Parliamentary control) to allow them to be refined and developed over time.

Scottish Government response
We understand the Committee’s concern at the amount of detail in the Bill in relation to the non-disclosure of information in certain circumstances provisions and can see that dealing with some of the provisions in subordinate legislation has some attraction.

It is vital, however, that the disclosure scheme sets out fully both the procedure and considerations taken into account in these decisions so that there are sufficient judicial safeguards in place to ensure that information is not withheld on the grounds of public interest unless it is strictly necessary. To leave important details to subordinate legislation means ECHR compatibility is only achieved at a later date when Rules are brought forward. We need to be able to demonstrate to Parliament that the scheme made as a whole is compatible. If a bit of the scheme was contained elsewhere this may not be achieved. That said, we are looking again at the provisions ahead of Stage 2 and, if it is possible to reconcile the desires of the Committee with the
need for a compatible scheme in primary legislation, we will bring forward any appropriate amendments.

**Section 107**  
The Committee is satisfied that the provision for special counsel in this Bill do not fall foul of the human rights objections raised by the House of Lords in relation to control orders, and are appropriate in the context of a non-disclosure regime. However, we would be grateful for clarification about how special counsel would be paid for, and in particular whether any changes to legal aid regulations will be required.

**Scottish Government response**  
The final details on how the scheme of appointment of special counsel has still to be finalised, including the question of payments. These are administrative details and are not in the Bill. However we can advise that the intention is that the costs of special counsel will fall to the state, not the accused and will not therefore be a charge on the funds available for legal aid.

**Section 115**  
The Committee notes the concerns of the Subordinate Legislation Committee, and invites the Scottish Government to provide a fuller justification of the scope of the proposed power, and indeed why it is considered necessary in addition to existing powers to make Acts of Adjournal.

**Scottish Government response**  
This is the first time that disclosure has been put on a statutory footing. In looking at how the scheme should operate, it was considered that section 305 of the Criminal Procedure (Scotland) Act 1995 on Acts of Adjournal wasn’t sufficient for our purposes. What was needed was flexibility to enable the High Court to do everything we think it is likely require to do and more to ensure that the scheme works efficiently. What is proposed in the Bill is limited only to those aspects required to give full effect to the Part 6 provisions on disclosure of information in criminal proceedings. We therefore disagree with the Subordinate Legislation Committee that section 115 is an entirely open power – it is not as it relates only to the disclosure provisions in the Bill.

**Sections 117-120**  
The Committee broadly supports this provision insofar as it implements the Scottish Law Commission’s recommendations. However, we are not yet confident that the proposed special defence of mental disorder has been appropriately defined, given the concerns raised in evidence and the differences of interpretation between Mr Chalmers and other witnesses about whether the special defence would be available to people who know their conduct is wrong, but are driven by their mental illness to do it anyway. We therefore invite the Scottish Government to consider carefully and respond to the points raised. We support the suggestion by James Chalmers that it should be open to the Crown as well as the accused to advance the special defence. We also invite the Scottish Government to comment on the issues raised by the Mental
Welfare Commission relating to people with learning disability or cognitive impairment.

Scottish Government response
The provisions in sections 117-120 implement the Scottish Law Commission’s recommendations contained in their 2004 report on Insanity and Diminished Responsibility in Criminal Proceedings. Part 2 of the SLC’s report laid out their recommendations for reform of the law relating to insanity as a defence.

The recommendations, as laid out in Part 2 of the SLC’s report and contained within the Bill, are as follows:

- The common law test for insanity as a defence should be abolished;
- The defence of insanity should be retained as part of Scots criminal law;
- The defence dealing with criminal responsibility of persons with mental disorder should no longer be known as the ‘insanity’ defence;
- The test for the defence should require that at the time of the alleged offence the accused had a mental disorder. The term ‘mental disorder’ should be defined as meaning (a) mental illness; (b) personality disorder; or (c) learning disability;
- The defence should be defined in terms of a specific effect on the accused’s state of mind which has been brought about by his mental disorder;
- The defence should be defined in terms of the accused’s inability at the time of the offence to appreciate either the nature or the wrongfulness of his conduct;
- The definition of the defence should not contain any reference to volitional incapacities or disabilities of the accused; and
- The condition of psychopathic personality disorder should be excluded from the scope of the defence.

Section 117 of the Bill seeks to insert new section 51A into the Criminal Procedure (Scotland) Act 1995. New section 51A(1) lays out the test to be applied as follows:

New section 51A(1)
A person is not criminally responsible for conduct constituting an offence, and is to be acquitted of the offence, if the person was at the time of the conduct unable by reason of mental disorder to appreciate the nature or wrongfulness of the conduct.

As can be seen, the test does not include reference to a volitional element. In other words, the test cannot be met simply by individuals claiming they were unable to control their conduct at the time of the offence. The test can only be met by individuals demonstrating they were unable to appreciate at the time of the offence either the nature or the wrongfulness of their conduct. Individuals who were able to appreciate the nature or wrongfulness of their conduct, but who were unable to control their conduct would not be able to meet the test.
The SLC took the view this was the correct approach. Paragraphs 2.54-2.55 of their report outlines their thinking:

‘...In the Discussion Paper we were inclined to adopt the position that the test for the defence should not contain a volitional element but we did not reach a concluded view on this point. We presented the issue in the form of a question whether the definition of the defence should contain any reference to volitional incapacities or disabilities. Consultees were divided on this question. However most agreed that the wider cognitive criterion of appreciation would cover any relevant volitional failing. About half of the consultees who responded on this issue accepted that there was no need for any volitional element. Two consultees gave clear support for it. It was of some significance that none of the consultees could provide any example where a person might fail the test for the defence on the appreciation criterion but satisfy it purely on a volitional one. It is also worth noting that the mental health experts whom we met were virtually unanimous in rejecting a category of mental disorder which was purely volitional in nature and which had no impact on cognitive functions.

Some consultees pointed out that a volitional element exists in the current test for the defence in some legal systems (including possibly Scots law). However the existence of a volitional element in the current law can be explained chiefly by the narrowness of the cognitive criteria used in many of the definitions of the defence. We take the view that if the ‘appreciation’ criterion is to be understood in a wide sense, as we argue that it should, then there is no need for any volitional element. Indeed, there might be dangers in adding on a volitional part to the defence as doing so might give rise to narrow interpretations of the scope of the appreciation element.’

For the reasons outlined in Part 2 of the SLC’s report, and in particular the reasons noted in paragraphs 2.54-2.55, we are content the test is appropriately defined as laid out in the Bill.

We note the comments made by James Chalmers, supported by the Committee, regarding the Crown being able to raise the new special defence. The Crown have advised that they are not persuaded of the need for a power to raise the new special defence as they do not envisage circumstances where they would make use of the power. The Crown have indicated though they will consider any further justification for providing them with this power if that can be provided.

More generally, we note the comments made by the Mental Welfare Commission for Scotland in respect of individuals appearing in court who have a learning disability or cognitive impairment but who do not meet the terms of the mental disorder test. We would expect the defence to draw to the attention of the court any issues of this sort to ensure the court has full disclosure of all relevant information relating to the accused prior to any
decision regarding imposition of a suitable disposal in the case e.g. a community sentence.

In addition in the majority of cases where a court is considering either custody or a community disposal, it will ask for a Social Enquiry Report to be prepared to provide information to assist in deciding on the most appropriate way to deal with an offender. The Social Enquiry Report will include information on the circumstances of the offence and the offender's personal circumstances which may include, where appropriate, details of any medical or psychological treatment they are receiving and any underlying health conditions or issues such as an identified learning disability.

We consider therefore that appropriate procedures are already in place and are not convinced of the need to alter legislation in this area. We are however currently reviewing the National Standards for Criminal Justice Social Work and will explore where improvements can be made to the information for the courts in this context.

Section 123
The Committee notes the concerns raised by some witnesses about theft of metals and the implication that a mandatory system of licensing may have a role to play in tackling this problem. We recognise that tackling criminality is only one factor to be taken into account in deciding on an appropriate licensing regime, but we are also uncertain about the Scottish Government's rationale for proposing moving to an optional system of licensing in this area. We therefore invite the Cabinet Secretary to provide a fuller justification of this aspect of its policy intention.

Scottish Government response
Metal dealers were originally licensed due to the concern that their businesses could become involved in criminal activities. It would be fair to state that this concern tends to increase in line with the market price for metal (recently before the economic downturn there had been a significant rise in prices paid). We believe this justifies the need for a licensing system. The flexibility provided by an optional licensing regime has the advantage that as the position of the metal markets changes, it may be appropriate for Local Authorities to remove the burden of a mandatory licensing system on business if they consider it appropriate. We would only expect such action to be taken after a local authority had consulted with the relevant bodies in their area, in particular the Police.

Section 124
The Committee supports the proposal to require all applicants for taxi licences to have held a driving licence for the year immediately prior to their applications. We agree with the Cabinet Secretary that discretion for licensing authorities would not be appropriate in this context.

We also agree with the Cabinet Secretary that provision for sanctions against authorities that fail to review fares within the set period is
unnecessary, given existing mechanisms to enable authorities to be held accountable.

While we would not wish to undermine the distinction between taxis that are entitled to ply for trade and private hire cars that are not, we accept that there may be a case for allowing local authorities to limit the number of private hire cars operating in their areas, just as they can limit the number of taxis. However, we agree that this is not a matter for the current Bill, not least because of the shortage of evidence we have taken on this issue and the fact that the Task Group did not address the point in its report.

Finally, we are surprised that the Scottish Government is unaware of concerns about the ability of licensing authorities to carry out appropriate checks on non-UK residents applying for a taxi or private hire car driver's licence. Members of the Committee have, individually, heard such concerns expressed, and we would encourage the Scottish Government to adopt a more active approach to establishing whether this anecdotal impression is borne out by the evidence.

Scottish Government response
We are pleased that the Committee supports the various amendments included in section 124 of the Bill. These amendments seek to modernise the provisions within the 1982 Act and reflect recommendations of the Task Group that reviewed the licensing provisions of the 1982 Act.

We note that Committee members expressed some surprise that the Scottish Government are, save for the approach from City of Edinburgh Council, unsighted about the difficulties experienced by authorities over assessing the ‘fit and proper’ status of non-UK applicants for taxi and private hire car drivers’ licences. We would merely confirm that it is not an issue that has been raised with us by any other licensing authorities. We can advise though that we will however keep in touch with the Chair of Edinburgh’s Licensing board on this matter (and any other licensing authorities who express concerns) and we are proposing to conduct some research among licensing authorities to assess the extent of the problem.

Sections 125-126
The Committee shares concerns raised in evidence that the potential costs for non-commercial groups to obtain a market operator’s or public entertainment licence might prove prohibitive. We recognise that the Bill gives local authorities discretion over whether to charge for such licenses, but we can also understand concerns that where the power to charge exists, it may in practice be used.

The Committee also recognises the public safety concerns surrounding large-scale events that are free to enter, and hence currently do not require a public entertainment licence. We believe that it is important that community and charitable groups are able to hold small-scale
events easily while also ensuring that licensing authorities have the power to control these large-scale events.

The Committee therefore invites the Scottish Government to consider the alternative of basing the requirement for a public entertainment licence on the scale of the event (recognising that this will require authorities that choose to impose a licensing regime also to exercise discretion in relation to the size of events that would then require to be licensed).

In relation to lap-dancing clubs, the Committee is strongly in favour of local authorities having sufficient powers under licensing legislation to be able to control the numbers of such venues in their area – including to the extent of setting zero as the appropriate number of such venues.

We would be grateful for an assessment by the Scottish Government of whether it considers those powers to be sufficient for this purpose. Subject to that, we are not convinced that re-categorising these venues for licensing purposes would necessarily be beneficial.

Scottish Government response

We have considered the argument put forward by the Third Sector and the Committee and, as I announced on 17 December 2009 in Ministerial Question Time¹, we are happy to continue the exemption for charities with regards to market operators’ licences and will bring forward suitable amendments to section 125 of the Bill at Stage 2 in this regard.

In relation to lap dancing clubs, our position remains as it was at the start of transition to the new licensing regime of the Licensing (Scotland) Act 2005. It is possible for Licensing Boards to justify through the licensing objectives a policy of only allowing this on a limited number of licensed premises to provide adult entertainment or even to justify a ban on such entertainment on licensed premises.

Such a policy could be set out in a Board’s licensing policy statement (which has to be consulted on with certain parties). Such a policy could continue to be applied as long as the justification for the policy remained. Boards can also set out what conditions such licensed premises must meet should they wish to provide such entertainment. As licensing policy statements are required to be revisited every three years, and as Licensing Boards are able to issue supplementary licensing policy statements at any time (for example at the suggestion of the local licensing forum), there are opportunities to revisit whether such policies need strengthening locally.

Section 127

The Committee considers that there is a case for broadening the definition for late night catering but supports local authorities retaining discretion in determining which types of premises require a licence.

¹ http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-09/sor1217-02.htm#Col22314
Scottish Government response

Local Authorities will continue to be able to apply a discretion not only in determining which types of premises but in which geographical location will require a licence. This will be achieved through the section 9 resolution required under the Civic Government (Scotland) Act 1982 required to enact the licensing scheme.

Section 128

(Please note this issue was not covered in the Stage 1 report)

Following my evidence session in front of the Justice Committee on 1 September 2009, a letter was sent by the Convenor asking some further questions that were not able to be raised during the 1 September session.

One of the further questions raised was as follows:

‘…Section 128 of the Bill requires applicants to provide additional personal details to licensing authorities when submitting an application. There was concern that these details might be placed in the public domain, rather than only being used by applicable statutory bodies. What assurances can you give on this issue?’.

In our response of 7 September 2009, we indicated that we would expect local authorities to use the additional information provided in the application (the applicant’s date of birth and place of birth) only for the purpose of assisting relevant authorities such as the police in looking into the background of the applicant.

This response correctly summarises the policy intention as to how this additional information should be used. We went on to suggest in our response that no changes were required to the Civic Government (Scotland) Act 1982 (‘the 1982 Act’) in order to ensure this policy intention was met.

However, upon further consideration of the relevant provisions within the 1982 Act, it has become clear that this statement was incorrect. Amendments are required to Schedule 1 to the 1982 Act to ensure that an applicant’s date of birth and place of birth are not included within the notices required for the purposes of a licence application under Part 2 of the 1982 Act.

An applicant for a licence under Part 2 of the 1982 Act is required to display a notice detailing various pieces of information about the licence application. In certain circumstances, a licensing authority must, following receipt of the licence application, publish a notice detailing various pieces of information about the licence application. We intend to lodge Stage 2 amendments to paragraphs 2(3) and 2(8) of Schedule 1 to the 1982 Act to ensure an applicant’s date of birth and place of birth should not be included in either of these notices.
Section 130
The Committee believes that a balance must be struck between the cost and burdens of notification and providing appropriate information. The Committee therefore recommends that the minimum notification required should consist of a summary of what is being proposed along with information on how to view the application in full.

Scottish Government response
We are happy to include the Committee's recommendation of the minimum requirement in the statutory guidance issued under section 142 of the Licensing (Scotland) Act 2005 which all Licensing Boards are required to have regard to.

Section 131
While acknowledging the concerns raised in evidence about giving licensing boards the power to suggest modifications to layout plans, the Committee is not convinced that this would be a problem in practice. The Committee nevertheless welcomes the Cabinet Secretary's commitment to discuss the matter further with the licensed trade.

Scottish Government response
We note the comments made.

Section 132
The Committee was unable to reach consensus on the merits of this provision. Some members of the Committee considered the current measures within the 2005 Act requiring chief constables to provide an antisocial behaviour report to licensing boards for all applications still to be appropriate.

Other members felt that such reports should only be provided by chief constables if requested to do so by the licensing board or if they choose to provide one, so as to target resources more effectively. The Committee specifically notes that, now that all premises licences are subject to the requirements of the 2005 Act, antisocial behaviour reports are required only in respect of applications for new licences. We also note that the provisions in the 2005 Act allowing a premises licence to be reviewed provide an opportunity for a licensing board to consider any evidence on antisocial behaviour associated with a particular licensed premises, or indeed to request an antisocial behaviour report itself.

While we note the evidence suggesting that antisocial behaviour reports are often not specific enough to aid a licensing board's consideration of an individual application, we do not consider this to demonstrate a problem with the legislation, and is something that should be addressed by better communication between boards and the police on the information required.

Scottish Government response
We note the comments made.
**Section 134**
While the Committee acknowledges the need for fast-tracking of some occasional licence applications, in light of points raised by witnesses it has some concerns that the procedure might be open to abuse. The Committee therefore seeks assurances from the Scottish Government that the procedure will minimise the scope for such abuse and notes the Cabinet Secretary’s willingness to look again at the provision.

The Committee also recommends that the power to approve such applications should be capable of being delegated to licensing authority officials.

**Scottish Government response**
In implementing a fast track procedure for occasional licences, we expect Licensing Boards will amend their licensing policy statements (required under the 2005 Act) to set out the circumstances under which they will accept such fast track applications. We will also adjust the statutory guidance (which all Licensing Boards must have regard to) setting out the importance of having such policies in place to avoid fast track procedures being abused.

We notes the Committee’s recommendation that the power to approve should be delegated to licensing officials. However we believe as an ordinary occasional licence can only be delegated to the Clerk of the Board, it would seem odd to extend a power to reduce the level of authorisation for a process where less scrutiny will have taken place and are therefore not in agreement with this recommendation.

**Section 135**
While generally content with the provision, the Committee notes that extended hours applications might increase the potential for irresponsible drinking.

The Committee therefore seeks clarification from the Scottish Government as to how it envisages licensing boards ensuring they take health and public order concerns into account when considering such applications.

**Scottish Government response**
Licensing Boards are already able to grant extended hours applications and in doing we would expect them to refer to the licensing objectives set out in section 4 of the Licensing (Scotland) Act 2005 of preventing crime and disorder, securing public safety, preventing public nuisance, protecting and implementing public health, and protecting children from harm. The provisions in section 135 further enhances Licensing Boards ability to take health and public order concerns into consideration by attaching additional conditions to how a licence may operate during these extended hours.

**Section 136**
The Committee supports these provisions for tightening the rules on applications for personal licences. We recognise the importance of the
national database to make the provision effective, and accept the Cabinet Secretary's assurances about the practical measures being taken in this connection. We also support ACPOS's suggestion that chief constables should have wider powers to make representations to licensing boards in relation to personal licence applications, and would invite the Scottish Government to give this serious consideration.

Scottish Government response
The provisions within the Bill will enable the Police to object to a personal licence on a much wider basis than before but widens the circumstances in which they are able to call for a licensing board to hold a hearing into a personal licence holder in relation to their conduct. We can see no advantage in enabling the Police to comment on a personal licence application if it is not to object to the Licence as the Licensing Boards only course of action in relation to an application is to reject or pass an application.

Wider issues – Licensing (Scotland) Act 2005
The Committee acknowledges that concerns raised on the structure of alcohol licence fees, as defined in the 2005 Act, are outwith the scope of the current Bill. However, the Committee is of the view that there are some inequalities in the present system, including the difference in fees paid by different sized outlets, on-sales and off-sales premises and discrepancies across licensing boards.

The Committee therefore welcomes the Scottish Government’s decision to ask the Accounts Commission to consider these issues and would encourage the Commission to look in particular at the cost implications for smaller outlets in rural areas. The Committee looks forward to receiving the Scottish Government’s response to the Commission’s recommendations in due course.

Appeals - The Committee welcomes the Cabinet Secretary’s commitment to lodge amendments at Stage 2 to reinstate the summary appeals procedure.

The Committee shares the concerns raised in evidence about the procedures for obtaining a provisional premises licence under section 45 of the 2005 Act, and believes that there is a case for modifying these procedures within the current Bill. We therefore invite the Scottish Government to consider bringing forward suitable amendments at Stage 2. These amendments might re-introduce something similar to the site-only application procedure under the 1976 Act while also extending the current two-year time limit for provisional licences.

Transfer of licences - The Law Society of Scotland highlighted a potential difficulty with the 2005 Act regarding transferring licences to court-appointed administrators. The Law Society wrote — “In terms of the 1976 Act [Licensing (Scotland) Act 1976], there was no requirement for the licence to be transferred. The position now is that the administrator would be required to become the premises licence holder in his own right as opposed to as an agent of the insolvent company.
(and apply within 28 days of their appointment) and may be reluctant to do so.” Asked to comment on this, the Cabinet Secretary said he was unaware of the details, but was prepared to consider it further.

The Committee welcomes the Cabinet Secretary’s willingness to address this potential difficulty and trusts that an appropriate solution can be found.

Scottish Government response
We note the Committee’s comments on the some of the wider issues concerning the Licensing (Scotland) Act 2005. As the Committee has noted previously, the 2005 Act must operate in a way that balances the needs of the Trade and protecting the community. The 1976 Act offered seven types of licence so there was an indication for Licensing Boards, the Police and the local community of what was being proposed and the statutory restrictions that would be automatically in place. That is not the case with the 2005 Act where there is a single generic premises licence and it is the application form together with the operating plan and layout plan that enable all to know what is being proposed and decide whether they would welcome or oppose such an operation.

Once a provisional licence is granted the holder has a premises licence in all but name, it cannot be revoked unless when completed it is significantly different from what was originally proposed. We believe this is the correct approach for it would be incorrect for a licence to be removed before a premises began to trade after the investment had been made. Similarly we believe it would be wrong to simply grant a licence or a number of licences (for example to a leisure/retail complex) without knowing what was being proposed as the end result could lead to a rise in public disorder and public nuisance which could blight the local community and place additional burdens on policing. We therefore believe the present balance is the correct one.

On transfers of licences, we believe it is important that there is always somebody responsible for a premises. This ensures that both the Police and the Licensing Board are able to hold those who control the premises to account for its operation. If people are not prepared to take such responsibility or appoint others to do so, then the premises must close. The option is always available for a new licence to be applied for should the business wish to reopen. We believe that local communities deserve and require that protection and we therefore do not propose to introduce any amendments in this area.

Non invasive post mortems
The Committee acknowledges the importance of this issue to the Jewish community and potentially other faith groups in Scotland. However, we are unclear whether an amendment of the sort sought by the Scottish Council of Jewish Communities is necessary to enable MRI to be used where appropriate. It must also be doubtful whether such an amendment would be within the scope of the current Bill, given that the
issue of post-mortem examination is not directly a matter of criminal justice.

Nevertheless, since the matter has been raised with us, it would be helpful if the Scottish Government or the Crown Office could give us a more definitive view on whether it supports SCoJeC’s case for a change to the system of post-mortems in Scotland, whether legislative change would be required and, if so, when that legislation might be forthcoming.

We would certainly wish to ensure that a full range of techniques for the conduct of post-mortems is available in Scotland, so that non-invasive methods can be considered in appropriate circumstances. We accept that many relatives will understandably prefer such non-invasive methods where possible, but accept that this must always be a decision for the procurator fiscal, acting in the public interest.

Scottish Government response
We note the comments made.

We would firstly advise that primary legislative change is not necessary to enable non-invasive post mortems to take place in Scotland. Such a change can be done through guidance issued from the Crown Office and the Procurator Fiscal Service (COPFS) to forensic healthcare professionals/doctors undertaking forensic work for the COFPS.

Since the representations were made to the Justice Committee in May 2009, we are aware the Lord Advocate has met with faith groups, including the Scottish Council of Jewish Communities, to discuss their concerns and to explain death investigation procedures.

It should be recognised that non-invasive procedures, such as 'View and Grant' external examination, in association with medical records, are already used extensively in Scotland, which are not available in other countries in the UK such as England. Procurators Fiscal do currently specify in instructions to pathologists the nature of the examination to be carried out. Following the discussions mentioned above, the COPFS are considering the possibility of other forms of non-invasive post mortem examination such as Magnetic Resonance Imaging scans (MRI scans).

The Scottish Council of Jewish Communities have also raised this issue at meetings with First Minister. The Crown Office and Scottish Government Health officials are actively discussing the practical issues surrounding the use of MRI scans for non-invasive post mortems and relevant officials have undertaken to revert back to the Scottish Council of Jewish Communities with the outcome of these discussions.

In conclusion, we agree with the Committee in recognising there is a balance to be struck between meeting the wishes of relatives in respect of the carrying out of non-invasive post mortems in some cases and ensuring that the
COPFS are able to properly investigate the circumstances and cause of a person's death.
## SCOTTISH GOVERNMENT STAGE 2 AMENDMENTS: NEW TOPICS

<table>
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<tr>
<th>DESCRIPTION OF TOPIC</th>
<th>BENEFITS AND ANY ADDITIONAL RELEVANT INFORMATION</th>
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| **EUFD on mutual recognition to judgements and probation decisions**  
Taking an enabling power to implement the European Union Framework Decision on the application of the principle of mutual recognition to judgements and probation decisions with a view to the supervision of probation measures and alternative sanctions. | We are responding with taking a power to ensure changes to Scots law can be made to comply with the European Union Framework Decision. This will help ensure individuals who move between member states will be required to still undertake any outstanding probation or other alternative sanctions and therefore will not be able to defeat the ends of justice. |
| **Genocide offences**  
Altering the current law in respect of offences of genocide, crimes against humanity and war crimes in Part 1 of the International Criminal Court (Scotland) Act 2001 so that offences committed since 1991 can be tried (and not 2001 as currently is the case) and clarifying how courts should decide whether an individual meets the ‘residence’ test within the 2001 Act. | We are responding to changes made to the International Criminal Court Act 2001 by the UK Government in section 70 of the Coroners and Justice Act 2009. This will help ensure those who have committed such atrocious crimes since 1991 can be brought to justice. |
| **Knife possession offences**  
Clarifying the law in relation to the definition of a ‘public place’ for the purposes of prosecution of knife possession offences (especially whether a ‘common close’ in a tenement is a ‘public place’). | We are responding to the (unreported) case of Templeton v HM Advocate (August 2008). This will help ensure clarity of the law in this important area. |
| **Voyeurism offences**  
Extend the statutory offences of voyeurism (as contained in the yet to be commenced Sexual Offences (Scotland) Act 2009) to include also the use of equipment to record or observe a person’s genitals, buttocks or breasts either through or beneath a person’s outer clothing, without that person’s consent or any reasonable belief that the person consents, where the perpetrator acts for the purpose of obtaining sexual gratification (whether for his own or a third party’s benefit) or to cause humiliation, alarm or distress to the victim. Also minor changes to correct drafting errors in the 2009 Act. | We are ensuring Sexual Offences (Scotland) Act 2009 operates effectively. This issue was raised too late to be included in the Sexual Offences Bill and this is the next suitable legislative vehicle. |
| **Procedures for libelling of charges**  
Provide that in a single charge in an indictment or complaint it is competent to libel one or more statutory offences under the Sexual Offences (Scotland) Act 2009 cumulatively with each other and with offences at common law as is possible with multiple common law offences. | We are ensuring Sexual Offences (Scotland) Act 2009 operates effectively. We are ensuring that, following commencement of the Sexual Offences (Scotland) Act 2009, prosecutors retain the flexibility they currently have under common law to libel two or more offences together in a single charge so that the ability to prosecute a course of conduct |
<table>
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<tr>
<th>Human trafficking</th>
<th>Fraud offences</th>
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<td>A series of changes relating to human trafficking law:</td>
<td>Creation of two new statutory offences in relation to a) possession or control of articles intended to be used for fraudulent purposes; and b) the making/adaptation/supply or offering to supply an article which has either been designed or adapted for fraudulent purposes, or where the person intends that the article is to be used for the purposes of fraud. Where an individual is found with, say, a card skimming machine in their possession, but no proof they have attempted to undertake a fraud, no offence has been committed though it is clear the article is to be used for fraudulent purposes.</td>
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<td>- Extending the definition of trafficking to include the exploitation of children and vulnerable adults whose involvement in their trafficking is entirely passive in nature;</td>
<td>These two new offences will help close current gaps in the law. Following publication of <em>Her Majesty’s Inspectorate of Constabulary for Scotland: Thematic Inspection Serious Fraud</em> in May 2008, an ACPOS led short life working group looked at whether changes to fraud law were needed. They recommended the creation of two new offences based on similar new offences contained in sections 6 and 7 of the Fraud Act 2006 (which does not extend to Scotland). This will help ensure a comprehensive law in relation to fraud operates in Scotland.</td>
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<td>- Increasing the age of automatic entitlement to special measures under the Vulnerable Witnesses (Scotland) Act 2004 from under age 16 to under age 18 for cases involving human trafficking;</td>
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<td>- Section 4(2) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 makes it an offence for a person to arrange or facilitate travel within the UK of an individual, whom he believes has been trafficked into the UK for exploitation, where the person intends to exploit that individual in the UK or elsewhere, or where he believes that the individual is to be so exploited by another person. In order to make it easier to prosecute this conduct in internal trafficking cases, an amendment to section 4(2) is being made so as to remove the requirement that the person has a belief that the individual has been trafficked into the UK;</td>
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<td>- Creating a new offence to ensure that UK nationals and certain UK residents are subject to criminal sanctions where they traffic a human being into, within or out of any country other than the UK and to ensure that Scottish courts have jurisdiction to deal with these offences; and</td>
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<td>- Creating a new offence of holding another person in slavery or servitude or requiring a person to perform forced or compulsory labour.</td>
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<td>All of these amendments are either in response to legislation taken forward by the UK Government and/or in response to an European Commission proposal for a Framework Decision on preventing and combating trafficking in human beings and protecting victims. As the Lisbon Treaty came into effect on 1 December 2009 this instrument will be re-tabled as a Directive. These amendments will help ensure we have a comprehensive criminal law to tackle those who undertake human trafficking.</td>
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<td><strong>Abolition of common law offence of sedition and leasing-making</strong></td>
<td>We are legislating to remove redundant provisions from statute, following similar provisions included by the UK Government in section 73 of the Coroners and Justice Act 2009. This will help reduce the risk of error and confusion.</td>
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<td>Abolishing common law offence of sedition which consists in wilfully, unlawfully and mischievously, and in violation of the party’s allegiance, and in breach of the peace, and to the public danger, uttering language calculated to produce popular disaffection, disloyalty, resistance to lawful authority, or, in more aggravated cases, violence and insurrection. Abolishing common law offence of leasing-making which consists of maliciously making untruthful statements with the intention of damaging the Queen’s reputation.</td>
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<td><strong>Granting of common law warrants</strong></td>
<td>We are responding to doubts that have been expressed so as to clarify the law in this area to help ensure the operation of an efficient justice system.</td>
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<td>Changes to Police, Public Order and Criminal Justice (Scotland) Act 2006 to clarify the right of sheriffs and justices of the peace to grant warrants to Scottish Crime and Drug Enforcement Agency constables. An issue has arisen in a recent judgement which cast doubt on the ability of sheriffs and JPs to grant warrants under common law to SCDEA constables (consideration also being given to whether a wider issue exists with granting of warrants to non SCDEA constables which may be included in the amendments).</td>
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<td><strong>Repeal of redundant provisions</strong></td>
<td>We are tidying up the law to reduce the risk of error and confusion.</td>
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<td>Repeal of redundant provisions in section 24 of the Criminal Procedure (Scotland) Act 1995 relating to remote monitoring of restrictions while on bail. Also repeal of redundant provisions contained in the Incest and Related Offences (Scotland) Act 1986.</td>
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<td><strong>Minor change to Vulnerable Witnesses (Scotland) Act 2004</strong></td>
<td>We are correcting a small gap in legislation to ensure the law operates effectively in this important area.</td>
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<td>Amendments to section 288C, 288D and 288E of the Criminal Procedure (Scotland) Act 1995 (as inserted by the Vulnerable Witnesses Act) so that an accused person is prevented from conducting his defence in person at any relevant hearing in criminal proceedings, not just trials, preliminary hearings, and victim statement proofs.</td>
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<td><strong>European Union Framework Decision on previous convictions</strong></td>
<td>We are responding with changes to ensure Scots law complies with the European Union Framework Decision. This will help ensure courts are able to make decisions based on full information.</td>
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<td>Changes to ensure compliance with the European Union Framework Decision on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings.</td>
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<td><strong>Retention of forensic data</strong></td>
<td>We are taking forward further improvements to the system of retention of forensic data so as to ensure our criminal law is up-to-date and</td>
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<td>Procedural Changes</td>
<td>Summary</td>
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<td><strong>Procedures for giving of evidence in sexual offence trials</strong>&lt;br&gt;Provide a basis in law for complainers in sexual offence trials to be able to give their evidence in full in circumstances in which aspects of the assault are not charged owing to a lack of corroboration. This may occur where, for example, a complainer alleges rape, but only indecent assault (or sexual assault under the Sexual Offences (Scotland) Act 2009) can be corroborated.</td>
<td>We are responding to the HMA vs. Geddes case (May 2008) which called into question the current common law practice in this area. This will help ensure the law operates <strong>upholding the interests of fairness</strong>.</td>
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<td><strong>Establishing the competence of witnesses</strong>&lt;br&gt;Clarify that in relation to a prior statement made by a witness, the requirement in section 260(2)(c) of the Criminal Procedure (Scotland) Act 1995 to establish the competence of a witness is not a requirement to establish that a witness could understand the difference between truth and lies at the time they made their statement.</td>
<td>We are responding to difficulties that have been encountered in cases where the courts have interpreted the requirement in section 260(2)(c) in opposition to what the policy intent is. This will help <strong>clarify the law</strong> in this important area.</td>
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<td><strong>European Union Framework Decision on the European evidence warrant</strong>&lt;br&gt;Taking an enabling power to implement the European Union Framework Decision on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.</td>
<td>We are responding with taking a power to ensure changes to Scots law can be made to comply with the European Union Framework Decision. This will help ensure the <strong>efficient and efficient operation of the justice system across Europe</strong>.</td>
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<td><strong>Sex offender notification requirements relating to homeless offenders</strong>&lt;br&gt;Amendments to sections 85 and 138 of the Sexual Offences Act 2003 to tighten up the application of the sex offender notification requirements (SONR) in relation to homeless sex offenders who have no fixed</td>
<td>This will help ensure a <strong>more robust system</strong> for monitoring homeless sex offenders. This will also ensure consistency with the rest of the UK.</td>
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<td><strong>abode.</strong> A regulation making power will be taken to prescribe how often homeless sex offenders who are subject to SONR will require to report to the police. Under present law, it will be a year before a homeless sex offender subject to SONR is required to report to the police and the regulation making power will be used to reduce this.</td>
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| **Minor changes to operation of system for Risk of Sexual Harm Orders**  
Changes to allow evidence of previous convictions which are spent for the purposes of the Rehabilitation of Offenders Act 1974 to be led in proceedings for Risk of Sexual Harm Orders (RSHOs) in Scotland. |
| We are making these changes to help ensure the court has all relevant information before it. This will ensure consistency with the rest of the UK. |
| **Prison healthcare**  
Providing a statutory framework for shifting responsibility for providing prison healthcare from SPS to the Health Boards. |
| We are providing the necessary statutory framework for the transfer of responsibility to take place. This follows work of the Prison Healthcare Advisory Board which recommended the shift in responsibility to the NHS so as to bring about the following benefits:  
- Help reduce health inequalities;  
- Provide better continuity of care;  
- Bring about long term sustainable and high quality healthcare services with appropriate clinical governance arrangements; and  
- Scotland can meet accepted international standards for the treatment of people in prison. |
| **‘Vicarious responsibility’ for licensing offences**  
Introduce the concept of ‘vicarious responsibility’ to certain offences under the Licensing (Scotland) Act 2005. |
| This will ensure premises licence holders can be held liable for the actions of frontline staff. This is included at the request of ACPOS and will help ensure robust operation of licencing law. |
| **Licensing appeals**  
Reforms to some of the appeal processes in the Licensing (Scotland) Act 2005. |
| A number of changes improving the operation of the 2005 Act. |