



The Scottish Parliament
Pàrlamaid na h-Alba

JUSTICE COMMITTEE

AGENDA

19th Meeting, 2009 (Session 3)

Tuesday 9 June 2009

The Committee will meet at 10.00 am in Committee Room 4.

1. **Criminal Justice and Licensing (Scotland) Bill:** The Committee will take evidence on the Bill at Stage 1 from—

Mike Ewart, Chief Executive, and Rona Sweeney, Director of Prisons, Scottish Prison Service;

and then from—

Councillor Harry McGuigan, Community Well-being and Safety Spokesperson, and Mike Callaghan, Policy Manager, COSLA;

and then from—

The Rt Hon Elish Angiolini QC, Lord Advocate, and Frank Mulholland QC, Solicitor General;

John Logue, Head of Policy Division, Crown Office and Procurator Fiscal Service.

2. **Subordinate legislation:** The Committee will take evidence on the draft Licensing (Mandatory Conditions) (Scotland) Regulations 2009 (SSI 2009/draft) from—

Kenny MacAskill MSP, Cabinet Secretary for Justice;

Gary Cox, Head of Alcohol and Knives Licensing Team, and Rachel Rayner, Solicitor, Scottish Government Legal Directorate, Scottish Government.

3. **Subordinate legislation:** Kenny MacAskill MSP (Cabinet Secretary for Justice) to move S3M-4198—

That the Justice Committee recommends that the draft Licensing (Mandatory Conditions) (Scotland) Regulations 2009 be approved.

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

the Police Pensions Amendment (Increased Pension Entitlement) (Scotland) Regulations 2009 (SSI 2009/185).

5. **Criminal Justice and Licensing (Scotland) Bill (in private):** The Committee will consider the main themes arising from the evidence session.

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The papers for this meeting are as follows—

Agenda item 1

Written submission - Scottish Prison Service	J/S3/09/19/1
Written submission - COSLA	J/S3/09/19/2
Written submission - Crown Office and Procurator Fiscal Service	J/S3/09/19/3
Supplementary written submission - James Chalmers	J/S3/09/19/4
Paper from SPICe (private paper)	J/S3/09/19/5 (P)

Agenda item 2

SSI 2009/draft cover note	J/S3/09/19/6
Written submission - Scotch Whisky Association	J/S3/09/19/7

[The Licensing \(Mandatory Conditions\) \(Scotland\) Regulations 2009 \(SSI 2009/draft\)](#)

Agenda item 4

SSI 2009/185 cover note	J/S3/09/19/8
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[The Police Pensions Amendment \(Increased Pension Entitlement\) \(Scotland\) Regulations \(SSI 2009/185\)](#)

Paper for information

Supplementary written submission - Fife and Forth Valley Community Justice Authority	J/S3/09/19/9
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Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Scottish Prison Service

The Scottish Prison Service supports the measures contained in the Bill. In particular, it welcomes the potential longer term benefits of the package of community based measures, including the presumption against short sentences, and the proposals for tough alternatives to custody. These have the potential to reduce churn and allow resources to be focussed on achieving a workable sentence management regime for those offenders who are sent to prison.

SPS is committed to working with the Scottish Government to deliver and realise the benefits of the Offender Management Strategy. We are already actively contributing to the new programme of work in addition to strengthening our approach to offender management, continuing to work at improving joint working with CJAs, local authorities, statutory and other partners.

The SPS believes that excessive use of prison and overcrowded prisons reduce public protection rather than contributing to public safety. Prison can do good for some offenders, in particular those that present a serious risk of public harm. But prison itself can do harm; and the biggest harm is to people serving short sentences.

Imprisonment impacts on the life not only of an offender but of their family, the very act of imprisonment can reduce the positive factors which would contribute to reduce re-offending in the future. An offender is removed from employment, suffers disruption to the relationships and controls offered by family and community, and can lose access to their home. It is difficult to promote inclusion from an excluding process and use of short term imprisonment is likely to take the most deprived and make them even harder to reach in the future. Indeed the pressure of numbers created by short term churn makes effective rehabilitative work with longer term prisoners more difficult because time is spent managing the population, diluting the focus of resources on rehabilitation.

It is only right to take every opportunity to find effective disposals which stop or reduce offending and re-offending at the earliest stage, diverting minor or first offenders from the “conveyor belt” of the criminal justice system and tackling offending behaviour without the added negative impact that prison produces. Research suggests that early intervention and a care based model is more effective with young people than a justice based approach, that desistance is best supported in the community and that effective community based disposals have positive impact on public protection.

We are all committed to making Scotland a safer place this can be better achieved by breaking the cycle of re-offending at the earliest possible stage.

Diverting some of these offenders into meaningful community alternatives and leaving Prisons to those whom we know can benefit from the range of interventions we have to offer, would be a very positive step in making Scotland safer and stronger.

Mike Ewart
Chief Executive

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from COSLA

Introduction

COSLA welcomes the opportunity to provide a response to the Criminal Justice and Licensing Bill. We are supportive of the principles underpinning the Bill, albeit we have highlighted the potential implications of implementation in relation to resource issues.

Our response to the Bill's provisions is set out under three sections relating to the criminal justice and the licensing sections of the Bill along with resource issues.

Cllr Harry McGuigan

COSLA Community Wellbeing and Safety Spokesperson

Criminal Justice Section of the Bill

The Scottish Sentencing Council: COSLA welcomes the establishment of the Scottish Sentencing Council. However, it is important that this new Scottish Sentencing Council works alongside Community Justice Authorities as part of the wider Local Government Family to ensure that community sentences operate in a manner that enhances their credibility with the Courts and with the general public. As such, close working between the Sentencing Council and the CJAs will add value to what both organisations can do in relation to this remit and any failure of either organisation to do so will result in potential public confusion.

Community Payback Orders: COSLA looks forward to working with the Scottish Government and other partners in implementing its proposals, in particular "Community Payback" which will provide the courts with credible alternatives to prison sentences. However, it is imperative that arrangements for Community Payback Orders are robust and reliable to allow the general public to have confidence in them.

We believe that there may be potential for confusion between the Drug Treatment and Testing Orders and Community Payback Orders with the requirement of drug treatment. As such, there is a need for clarity to define these differences. In addition, the Court will not be able to impose a Community Payback Order without "taking account of a report from an officer of a local authority". Given the possible conditions/requirements that can be imposed through a CPO the nature of the assessment undertaken by the officer of a local authority will be different to current Social Enquiry Report assessment practices of councils. As a result, staff will require additional training and guidance.

In relation to Community Payback Orders there is no guidance within the Bill regarding the qualifications/skill set etc of the “officer of the local authority”. Given the complexity of the assessment required and the potential to deprive and offender of their liberty we suggest that the author of such a report/assessment should be a qualified social worker.

The Bill also states that the “offender must attend appointment with the responsible officer” and that “the nature of the unpaid work or other activity to be undertaken by the offender is to be determined by the responsible officer”. There is no guidance offered within the Bill as to the qualification levels of the “Responsible officer”. At the moment only social workers are recognised as supervising officers or probationers. Non social work qualified staff can and do act as supervising officers for offenders on community service and supervised attendance orders. Therefore, it would be helpful to have guidance which allows for a combination of social work qualified and non social work qualified staff to be Responsible Officers for the supervision requirement of a Community Payback Order.

Further, COSLA welcomes the requirement for offenders to participate in specified programmes aimed at addressing offending behavioural needs. However, the Bill does not make reference to the availability or prioritisation of programmes.

In relation to the periodic review of Community Payback Orders we note the inclusion of reviews within the legislation but think further guidance on the purpose and practice of reviews should be issued following consultation with stakeholders. This should ensure consistency in the operation of reviews.

Presumptions Against Short Periods of Imprisonment or Detention: COSLA is disappointed that the Scottish Government did not take account of the Scottish Prisons Commission’s recommendations in full i.e. the abolition of short sentences. As such, we believe that the text within section 17 needs to be strengthened in order to endorse the title. We are also concerned that Section 17 of the Bill may have results that have not been foreseen and need further clarification, for example, the section has the potential to result in a significant rise in the number of Social Enquiry Reports requested or an increase in up-tariffing.

Custodial Sentences and Weapons (Scotland) Act 2007: COSLA broadly supports the Amendments of the Custodial Sentences and Weapons (Scotland) Act, particularly, as it extends the ability to support people in the community. However, there needs to be clarity within the Bill on ‘prescribed periods’.

Sexual Offences Prevention Orders: COSLA welcomes the move away from simply **prohibiting** the defendant from doing anything described in the order to **requiring** the defendant to do anything described in the order and believe that this will strengthen our ability to positively influence offender behaviour.

Victims: COSLA believes it is hugely important that victims should be recognised in the Bill, given victims and potential victims are customers of the criminal justice system. As such, we are of the view that they should be taken into account otherwise this will be a missed opportunity. We are aware that the accredited programmes and many other programmes address the understanding of victim issues but suggest that this could be a standard requirement of a Community Payback Order.

Young People Who Offend: The Criminal Justice and Licensing (Scotland) Bill will abolish the legislation that allows 14 and 15 year olds to be remanded to adult prisons. Nevertheless, it is recognised that some young people cannot remain in their communities as the risks they present, both to themselves and others, are too great and may need to be managed within a secure environment. COSLA is committed with the Scottish Government to ensure that secure care is provided. However, this is a very specialist and costly intervention and should be targeted at the very few young people who need it.

COSLA supports the increase in the age of criminal responsibility to 12 years of age. Also, we support in principle Section 59 of the Bill in relation to the retention of forensic samples from children charged with serious violent and sexual offences with the caveat that the criteria are specific and restricted to **serious** sexual or violent offences only.

Serious and Organised Crime: We support the proposals outlined in the Serious and Organised Crime Sections (25-28) of the Bill whilst recognising that the statutory supervision of such offenders on licence may place further demands on local authority social work services.

Licensing Section of the Bill

COSLA has general support for the proposals and the majority of the comments made through our member councils to the licensing section of the Bill. We seek either clarification or request further consideration of issues stemming from the proposals that relate to licensing of metal dealers, licensing of market operators, licensing of public entertainment, premises licence applications, premise licence applications: antisocial behaviour reports, occasional licences, extended hours applications: variations of conditions and emergency closure orders on behalf of local authorities.

Resource Issues for Local Government

COSLA is very clear that for the provisions of the Bill to be implemented effectively in relation to the criminal justice elements of the Bill there is a need for a radical shift of resources. These resources should be transferred on an incremental basis to councils and the wider Local Government family in terms of Community Justice Authorities and the Police. As a result, interim transitional financial arrangements should be established following a resource redistribution review.

As it stands the Bill has significant specific financial implications for councils. Section 14 'Community Payback Orders' and Section 17 'Protection against Short Periods of Imprisonment or Detention' are the areas with greatest implications for councils. These arise from the need to increase average unpaid work hours per offender per week by a factor of almost 100%. In addition, the need to make new Community Payback Orders available for a significant number of persons currently the subject of short sentences of imprisonment. As such, the proposed legislation on changes to sentencing has the potential to impose a significant impact on criminal justice social work resources. Examples of new costs include reports for Review Courts, community sentencing also prison sentences and release arrangements. The Financial Memorandum, issued along with the Explanatory Notes, indicates that the majority of additional costs incurred by local authorities will be met through existing Section 27A funding. However, the estimated costs of core services appear to be based on 2007/08 costs and do not take account of the cost of living resources.

Potentially the resources needed to support 'progress courts' are considerable. As such, the effective targeting of this provision will be critical to ensure best use of staff time and court time. Similarly where a court considers a Community Payback Order appropriate for an offender under the age of 18 years, the supervision requirement will become mandatory. This age group often have difficulty engaging with services and non compliance can be higher. Therefore, sufficient and age appropriate resources alongside access to universal services will be critical to break the 'cycle of offending' that results in a disproportionate number of young people being remanded or sentenced to imprisonment. This will have implications for local authority social work services including Children's Services and Criminal Justice Services.

The financial implications of implementing revisions to the Custodial Sentence and Weapons Act (S18) are significant and will require a considerable increase in staff resources. Should the Bill confirm the introduction of post release statutory supervision on all sentences of 12 months or more we would urge a gradual introduction, initially targeted at offenders assessed as presenting a high risk of harm and those sentenced to imprisonment in excess of 2 years.

Further, any resource implications relating to the implementation of the provisions of the Bill relating to the licensing should be fully taken on board to ensure the effective implementation of the aims of the Bill.

Mike Callaghan
Community Resourcing

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Crown Office and Procurator Fiscal Service

I thought it would be helpful, ahead of the Lord Advocate's appearance before the Justice Committee on 9 June, to provide some general information about the involvement of the Crown Office and Procurator Fiscal Service in the development of this important Bill and the provisions which will have a particular impact on the work of COPFS.

As part of the Scottish Government, COPFS has been fully involved in the development of the provisions in the Bill and, as is normally the case with Government Bills, would not normally provide separate written evidence to Parliamentary Committees in the way that stakeholders beyond Government are usually invited to do.

The Lord Advocate, however, regards this Bill as one of the most important pieces of criminal justice legislation to come before the Scottish Parliament. For that reason, she has asked COPFS officials to provide as much assistance and information as possible to the Justice Committee as part of its consideration of the Bill. In addition, if the Justice Committee agrees, the Lord Advocate thought it would be helpful if I were to accompany her on 9 June to answer any questions which the Justice Committee might have about the impact of the Bill on the work of COPFS.

In that connection, there are a number of different parts of the Bill which COPFS regards as particularly important to its work.

Part 6 of the Bill relates to the disclosure of evidence in criminal proceedings and enacts almost all of the recommendations of Lord Coulsfield's Review of the Law and Practice of Disclosure in Criminal Proceedings in Scotland from 2007. The Lord Advocate strongly supported the setting up of Lord Coulsfield's review and welcomed Lord Coulsfield's conclusions as a basis for bringing greater certainty and transparency to the operation of disclosure in Scotland. COPFS also seconded an experienced prosecutor to Lord Coulsfield's review team.

The Justice Committee will be aware that Lord Coulsfield's Review was initiated in response to a sudden and significant change in disclosure practice in 2005 brought about by decisions of the Judicial Committee of the Privy Council in two Scottish criminal appeals, *Holland v HMA [2005] SC(PC) 3* and *Sinclair v HMA [2005] SC(PC) 28*. Subsequent decisions of the High Court of Justiciary and the Judicial Committee contributed to the development of the law in this area after 2005 but Part 6 of the Bill offers, for the first time, a clear procedural and legal framework for disclosure within which the police, the Crown and the accused can operate with certainty.

The statutory provisions in the Bill will be supplemented by a Code of Practice which the Lord Advocate will issue in terms of section 114 in her capacity as head of the system of prosecution and investigation of deaths in Scotland. As such, in terms of the Lord Advocate's independence in carrying out these roles, the Code of Practice will not be subject to the approval of any other individual or organisation, including Scottish Ministers or the Scottish Parliament, although it will be prepared in consultation with the police and other reporting agencies and will be made public in terms of section 114(4).

The purpose of the Code of Practice is to set out publicly the procedures to be adopted by investigators and prosecutors which might be thought to be less appropriate for primary legislation such as the conduct of lines of enquiry during an investigation, the detailed responsibilities of key roles in the investigation and prosecution and the consequences for completion of reports and witness statements. It will apply to all agencies which report deaths and offences to Procurators Fiscal, including the police, as well as all prosecutors in Scotland. Work has started in preparing a draft Code of Practice and, although this will not be complete by 9 June, the Lord Advocate is happy to confirm that a copy of the first draft can be provided to the Committee as soon as it is available to help the Committee's consideration of this important area of law and practice.

There are also a number of parts of the Bill where the Scottish Government is taking the opportunity to update Scots criminal law as a result of experience in Scotland or elsewhere. Important among them is the new Witness Anonymity Order in section 66 which, following a recent decision of the House of Lords in an English criminal appeal, will give greater certainty to vulnerable witnesses or undercover law enforcement or intelligence officers whose safety would be compromised by the disclosure of their identity. Protective measures such as those referred to in section 66(4) of the Bill have been used before in Scotland and while there have been no judicial decisions in Scotland against their use following the House of Lords decision, the current position is that no guarantee can be given to witnesses that there are steps which can be taken to protect their identity. This new provision will allow that guarantee to be given, with an explanation that it is for the court to decide on the appropriate measures, which will provide a welcome degree of reassurance for witnesses who fear for their safety, particularly vulnerable members of the public giving evidence against those in their local community. While it is difficult to give a precise estimate of the number of cases in which they would be used, COPFS envisage these orders being sought, as they have been in the past, in serious cases.

Similarly, sections 54 to 57 introduce new provisions on submissions of sufficiency of evidence in solemn cases and new powers of appeal by the Crown against judicial rulings in that regard. These provisions follow a report of the Scottish Law Commission in July 2008 on a reference under section 3(1)(e) of the Law Commissions Act 1965 by Scottish Ministers. The provision in relation to expedited appeals will be helpful in ensuring that such issues can be dealt with promptly and with minimum inconvenience to jurors,

witnesses and court officials in any case where an appropriate judicial ruling is appealed in this way.

There are also a number of provisions in Part 2 of the Bill which introduce new criminal offences in response to new or changing criminal behaviour. COPFS has been fully involved in the development of the new offences and has been able to contribute recent prosecution experience to consideration of new offences, including those relating to serious and organised crime and sexual offences.

In relation to serious and organised crime, the new offences are regarded as additional tools for investigators and prosecutors to tackle more effectively the networks which are now understood to direct and support serious and organised crime. They are designed to allow easier and more effective interruption of activities which are carried out to direct or in support of wider criminal activity.

As for sexual offences, in particular the new offence of extreme pornography, COPFS recognises the compelling reasons for the introduction of the new offences. The availability and circulation of such images, it can be argued, normalises extreme and violent sexual acts including sexual crime and life threatening activities. The policy intention behind the provisions is to help to ensure that the public are protected from exposure to extreme pornography that depicts horrific images of violence. Although the offence is broad in its terms and allows for a wide latitude of discretion in determining what amounts to a prohibited image, careful consideration will be given, if it is enacted, to the development of clear guidance for police and prosecutors to ensure that it is enforced consistently and fairly.

I hope that this information is helpful ahead of the Lord Advocate's appearance on 9 June. Please let me know if there are any other issues on which the Justice Committee would like information ahead of 9 June.

John Logue

Head of Policy Division

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Supplementary written submission from James Chalmers

To the Clerk to the Justice Committee

In view of the fact that the Committee, at its meeting on Tuesday 2 June 2009, did not have time (in the final evidence session) to ask questions on any issues other than sentencing, I thought it might be helpful to let you have a note on two other issues in respect of which you indicated that the Committee had expressed particular interest.

You mentioned that the Committee “has questioned the scope of the [extreme pornography] provisions contained in the Bill and has also asked whether the definition would or should cover computer generated images”. I am not sure exactly what aspects the Committee had in mind in relation to scope, but I would be happy to provide a response to any issues raised. As for computer generated images, I would comment as follows:

First, are these covered? I think it is clear that s 34 of the Bill does cover computer generated images. The only limiting factor is that an image must be “realistic” to fall within the scope of the provisions. The Bill is not limited to particular types of image. In this respect, it is rather wider than the offence of possessing indecent photographs of children, which is restricted to “photographs or pseudo-photographs”, including photographs comprised in films. A “pseudo-photograph” is “an image, whether produced by computer-graphics or otherwise howsoever, which appears to be a photograph”. (Civic Government (Scotland) Act 1982 ss52-52A.)

Professor McGlynn and Dr Rackley, in their written evidence (CLJ8, para 3.1) have argued that “[p]aintings/drawings are not covered as they are not realistic”. There is no reason why, as a matter of fact, paintings and drawings cannot be regarded as “realistic”, and it is common to use such language to describe works of art. McGlynn and Rackley’s interpretation might imply that only photographs or pseudo-photographs are covered by s 34, but if that were the case one would expect the draftsman to adopt the language found in ss52-52A of the 1982 Act. The use of the word “image” clearly implies that materials other than photographs and pseudo-photographs are covered by s 34. Leda and the Swan, the painting to which McGlynn and Rackley refer, might be regarded as “unrealistic” purely on the basis of the size of the swan relative to Leda in the image, and not because it is a painting. Even if McGlynn and Rackley are right and I am wrong on this point, the potential “chilling effect” on freedom of expression which can be created by ambiguous statutory language will be obvious.

Secondly, should computer generated images be covered? This is a more difficult question to answer without understanding the rationale for the new offence: as I noted in my written evidence, this is unclear. One possible

(partial) justification for the offence is the likelihood of harm having been caused to those persons depicted in extreme pornography. This has little application to depictions other than photographs, although the inclusion of pseudo-photographs might be justified on the basis that it can (I assume) be difficult to establish that an image is a genuine, rather than a pseudo, photograph. The justification for the new offence (whatever that may be) is clearly stronger in respect of photographs than other material. There would be much to be said for limiting the scope of the offence to photographs and pseudo-photographs. This would be consistent with the regime governing indecent photographs of children and would help to dispel concerns about works of art falling within the scope of the offence.

You mentioned also that views on provisions on mental disorder and unfitness for trial might be sought. I note that, when representatives of the Law Society and the Faculty of Advocates gave evidence earlier this morning, there was some discussion as to whether the proposed definition of mental disorder excluding criminal responsibility (under s 117, inserting s 51A into the 1995 Act) was adequate. Reference was made to the written submission of the Law Society of Scotland, which states that (CJ86a, p 13):

“...a person who kills his or her children while suffering from a depressive illness may be able to appreciate what he/she is doing and understand that it is wrong in the eyes of the law, but nonetheless be driven to commit the crime by his or her illness. In such a case his or her illness overcomes his or her volition. The Society notes that the Bill does not allow a special defence in these circumstances.”

I think, with unfeigned respect, that this concern proceeds on a misunderstanding of the Bill's provisions. The Society may have in mind the much-criticised English legal position. In English law, no defence of insanity is available to a person who knows their actions to be legally wrong, but – due to mental disorder – does not appreciate that they are morally wrong. But that is the English legal position, not the Scottish one. Scots law has previously allowed a defence of insanity in the circumstances envisaged by the Society, where mental illness renders a person incapable of appreciating the moral wrongfulness of their actions (see *HM Advocate v Sharp* 1927 JC 66, the facts of which are very similar to the Society's example). The Bill would not change this, and a defence would similarly be available under the new s 51A, which encompasses a failure to appreciate either legal or moral wrongfulness (see para 527 of the Explanatory Notes to the Bill). (The English position has, incidentally, been rejected by other common law jurisdictions.)

The possibility of what is sometimes termed a “volitional insanity” defence was fully reviewed by the Scottish Law Commission in its 2004 Report on Insanity and Diminished Responsibility and rejected for cogent reasons which have not been challenged. The Commission had in mind the fact that those who argued for a volitional test often had in mind cases such as that envisaged by the Society, which are in fact accommodated by the defence proposed by the Commission and included in the Bill.

It should be borne in mind that a person who kills in circumstances where mental illness has substantially diminished their capacity for self-control would be able to plead diminished responsibility under the new s 51B and so be convicted of culpable homicide rather than murder.

I hope that the above is of some use. I would be happy to provide any further information which may be helpful.

James Chalmers

Senior Lecturer, School of Law, University of Edinburgh

JUSTICE COMMITTEE**19th Meeting, 2009 (Session 3), Tuesday 9 June 2009****SSI cover note**

SSI title and number: The Licensing (Mandatory Conditions) (Scotland) Regulations 2009 (**SSI 2009/draft**)

Type of Instrument: Affirmative

Date circulated to members: 4 June 2009

SSI drawn to Parliament's attention by Sub Leg Committee: Yes (please see the Annexe)

Purpose of Instrument: These Regulations amend paragraph 13 of schedule 3 to the Licensing (Scotland) Act 2005. Paragraph 13 of that Act imposes restrictions on the areas within premises in which alcohol for consumption off the premises may be displayed. Regulation 2 provides an exemption from these restrictions for visitor attractions forming part of a manufacturing site and for visitor attractions that principally provide information about and promote the history and attributes of a particular alcoholic drink or a particular category of alcoholic drink.

Affirmative Instrument – Procedure

1. The Justice Committee has been designated lead committee and is required to report to the Parliament by 15 June 2009.
2. The draft Order was laid on 13 May 2009. Under Rule 10.6.1(b), the Order is subject to affirmative resolution before it can be made. It is for the Justice Committee to recommend to the Parliament whether the Order should be approved. The Cabinet Secretary for Justice has, by motion S3M-4198 (set out in the agenda), proposed that the Committee recommends the approval of the Order. The Cabinet Secretary for Justice will attend in order to speak to and move the motion. The debate may last for up to 90 minutes.
3. At the end of the debate, the Committee must decide whether or not to agree to the motion, and then report to the Parliament accordingly. Such a report need only be a short statement of the Committee's recommendation.

Annexe

The Licensing (Mandatory Conditions) (Scotland) Regulations 2009 (SSI 2009/draft)

1. The purpose of this instrument is to provide an exemption for certain premises from the mandatory licence condition contained within paragraph 13 of schedule 3 to the Licensing (Scotland) Act 2005 ('the 2005 Act'). That condition limits the areas within premises in which alcohol for consumption off the premises may be displayed. The conditions in schedule 3 automatically apply to a premises licence by virtue of section 27(1) of the 2005 Act. This is a draft instrument which requires the approval of the Scottish Parliament before it can be made.

2. The Executive Note explains the wider background, there having been concerns about premises such as supermarkets creating several alcohol displays across each store, and the condition having therefore been aimed at ensuring that alcohol is contained in and displayed within specified areas only. Consideration of how best to comply with this requirement has raised difficulties for distillery visitor centres, and these Regulations are intended therefore to exempt them from the requirements of this condition. The difficulty is explained further in the Executive Note, and is noted to arise from such centres being part of distillery sites, many of which are open for distillery tours, although the proposed exemption has been framed so that it would also apply to breweries who operate visitor centres on a similar basis, and other such visitor attractions which are not part of a production site but which carry out a similar function.

3. There were concerns that this instrument was not within the powers granted to Ministers under the 2005 Act to amend schedule 3 or within the general implied powers set out in the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 ('the Interpretation Order'). The Scottish Government was therefore asked to clarify the basis on which it considered the instrument is within these powers. Correspondence with the Scottish Government is set out in the Appendix.

4. Having considered the Government's response the Committee considers that there are still doubts as to whether the instrument is within *vires* for the following reasons.

5. The Committee considers that the draft instrument seeks to amend an existing condition set out in paragraph 13 of schedule 3 to the 2005 Act. It restricts the operation of that existing condition by disapplying it to certain premises. The condition in paragraph 13 was not set out in the schedule as originally enacted by the Parliament. It was added under the power in section 27(2) of the 2005 Act by the Licensing (Mandatory Conditions No.2) (Scotland) Regulations 2007 (SSI 2007/546). The Committee does not however consider that this affects the status of the condition. It has been incorporated into the schedule with effect from 1st February 2008.

Section 27(2) of the 2005 Act

6. The preamble to the instrument indicates that it has been made under section 27(2) of the 2005 Act. (The instrument also cites sections 27(8) (9) and 146(2) but

these are not relevant for present purposes.) This power permits the modification of the mandatory conditions set out in schedule 3 but only as follows (our emphasis):

“The Scottish Ministers may by regulations modify schedule 3 so as—

- (a) to **add** such **further** conditions as they consider necessary or expedient for the purposes of any of the licensing objectives, or
- (b) to **extend** the application of **any condition specified in the schedule.**”

7. The Committee observes that there are important restrictions contained in this power. Modifications can be made to *add* further conditions or to *extend* the application of (existing) conditions. The restrictions on what can be done through the power in section 27(2) would seem to be clear and unambiguous. There does not appear to be any basis for removing or restricting the conditions in schedule 3 using section 27(2) regardless of whether the conditions are “original” to the 2005 Act or subsequently added by the power in section 27(2).

8. The core provision of this instrument (regulation 2) amends paragraph 13 of schedule 3 to the 2005 Act in a manner which **amends** an **existing** condition, and does so by **restricting** its application. The Committee therefore considers that there is a doubt as to whether the instrument is within the power available in section 27(2) and which the Government have cited as the enabling power for these Regulations.

Paragraph 11 of Schedule 1 of the Interpretation Order

9. Consideration has also been given to whether it may have been possible for the instrument to be made under powers set out in the Interpretation Order. This Order provides certain general powers in relation to subordinate legislation, in particular paragraph 11 of schedule 1 to that Order which states—

“Where an Act of the Scottish Parliament confers power to make—

- (a) rules, regulations or byelaws; or
- (b) Orders in Council, orders or other subordinate legislation to be made by statutory instrument,

it implies, unless the contrary intention appears, a power, exercisable in the same manner and subject to the same conditions or limitations, to revoke, amend or re-enact any instrument made under the power.”

10. In the Committee’s view there are two important qualifications to this power: firstly, it is only to be implied **unless the contrary intention appears**. Secondly, the power empowers the revocation, amendment or re-enactment of any **instrument**. The Committee considers therefore that it is not a power that permits of itself a power to amend or revoke **primary** legislation.

11. In the Committee’s view the amendment made by regulation 2 amends a provision in primary legislation. The opening sentence of regulation 2(1) itself states that the 2005 Act is amended, specifically with reference to paragraph 13 of schedule 3. The Committee notes that the draft instrument says nothing to indicate

the intention to revoke SSI 2007/546 albeit that this is the instrument that inserted paragraph 13. That would not appear to be the effect at all given that the whole of what was inserted by SSI 2007/546 is to remain in schedule 3. The desired effect appears to be that additional requirements are to be added by way of a restriction on the effect of that paragraph.

12. That being the case, the Committee considers that the draft instrument does not propose to amend an instrument but to amend primary legislation directly. This does not appear to be within the powers in paragraph 11 of Schedule 1 of the Interpretation Order.

13. For completeness the Committee also considered whether the power in paragraph 11 is available at all in the present circumstances. The power is not stand alone. It is to be available in addition to separate specific powers - in this case section 27(2) of the 2005 Act. In short, it provides a device whereby a power to do something includes a power to undo it, to do it differently or to do it again. But these additional powers are not always available. The presumption that they are available can be rebutted in any particular case.

14. In this case, given the terms of section 27(2) which we have described fully above, the Committee considers that there are arguments to support the view that the presumption has been rebutted. Given the limited power to modify set out in section 27(2), the intention of the 2005 Act appears to be to enshrine the mandatory conditions set out in schedule 3 as the minimum requirement for licences once they are incorporated in the schedule. In the Committee's view there is no contrary presumption evident that conditions inserted in the schedule by SSI are to be treated differently from the original conditions. It was considered that there are other mechanisms available to the Scottish Ministers to set conditions which are optional or to phrase mandatory conditions as only being of application to certain classes of premises when they are added to schedule 3.

15. The Committee therefore considers the arguments presented by the Government within its response unconvincing. The Committee therefore remains of the view that there is a doubt as to vires.

16. The Committee reports this instrument to the lead committee and to the Parliament on the ground that there appears to be a doubt whether it is *intra vires*, and specifically whether regulation 2 which restricts the application of an existing mandatory licence condition set out in paragraph 13 of schedule 3 to the 2005 Act is within the scope of the enabling power cited, or the implied power within paragraph 11 of schedule 1 to the Interpretation Order.

Appendix

The Licensing (Mandatory Conditions) (Scotland) Regulations 2009 (SSI 2009/draft)

On 20th May 2009 the Scottish Government was asked:

to explain the vires for regulation 2 which modifies schedule 3 of the Licensing(Scotland)Act 2005 so as to restrict the operation of an existing condition set out in paragraph 13 of that schedule given that:

(a) the enabling power cited by the Scottish Government (section 27(2) of the 2005 Act) is restricted to adding further conditions to the list in schedule 3 or extending the application of an existing condition; and

(b) paragraph 11 of Schedule 1 to SI 1999/1379 (the Interpretation Order) appears to have no application to the present exercise of the power to amend the 2005 Act given that :

(i) paragraph 11 clearly states that it only implies that the enabling power, in section 27(2), may be used to revoke, amend or re-enact any instrument made under the power, ie under section 27(2), and not as in this case to be used to amend separate primary legislation; and

(ii) paragraph 11 can only have application in the absence of a contrary intention from the terms of the enabling power itself.

The Scottish Government responds as follows:

The amendments being proposed in the Licensing (Mandatory Conditions)(Scotland) Regulations 2009 are intended to relax the conditions (specifically paragraph 13) added to schedule 3 of the Licensing (Scotland) Act 2005 by the Licensing (Mandatory Conditions)(Scotland) Regulations 2007.

The Government acknowledge that the enabling power in section 27(2) of the 2005 Act may not give Ministers the power to revoke or restrict the conditions contained in schedule 3 as originally enacted. Accordingly, Ministers propose to make use of the implied powers contained in paragraph 11 of Schedule 1 to SI 1999/1379 (the Interpretation Order) to revoke the 2007 Regulations in their entirety and re-enact them subject to the modifications currently being proposed.

To address the questions posed by SLC:

(a) The enabling power in section 27(2) allows additions to be made to the conditions contained in schedule 3 but does not allow any revocation or amendment of the conditions originally enacted. The Government's view is that there is nothing in the enabling power to restrict Ministers' power to revoke or amend any additional conditions added by Regulations made under that power.

(b)(i) The Government are of the view that any amendment to the 2005 Act is indirect. The proposed Regulations seek to revoke the 2007 Regulations and this is within the implied powers detailed in paragraph 11.

(b)(ii) The Government's view is that there is an implied power to revoke the 2007 Regulations by virtue of paragraph 11 and there is nothing in section 27(2) to indicate that this is not the case. If the contrary view is accepted then any mandatory conditions added to schedule 3 through the operation of section 27(2) would require to remain in force until the 2005 Act itself is amended either by the alteration of the enabling power or by direct alteration of schedule 3.

Justice Committee

The Licensing (Mandatory Condition) (Scotland) Regulations 2009

Written submission by the Scotch Whisky Association

Regulations which will have the effect of disapplying the display of alcohol requirements to Distillery Visitor Centres (DVCs) and similar facilities, such as those attached to breweries have recently been laid before Parliament. It is our understanding that in due course this matter will be considered by the Justice Committee.

The Scotch Whisky Association very much welcomes this development and hopes the Committee will be able to support the proposal.

Distillery Visitors Centres in Scotland offer a unique tourist experience, attracting visitors from around the world. They have an international reputation. Through DVCs and similar production and educationally focussed sites, distillers seek to explain the method of production, history and heritage of brands, and showcase the best of a range of Scottish products. They fulfil a multi-purpose role: museum, archive, staging area for tours and shop. Such attractions underpin Scotch Whisky as an iconic, global brand for Scotland and play an important community role, providing a shop window for a wide variety of other local products.

There are currently 50 DVCs operating across Scotland, which attract over 1.2 million visitors and are estimated to contribute over £22 million to the local economy a year.

The policy intention behind the display of alcohol requirements is that it will require all alcohol to be displayed together, in a particular part of the store. The customer needs to make a conscious decision to enter that area if they intend to browse or select an alcohol product. By making a decision to visit a distillery, the visitor/tourist has already made that decision. A detailed review of the impact on DVCs by the SWA highlighted practical difficulties in these requirements in the display of their brands and the co-promotion of other, often local products. The Regulations if applied would have required considerable expense in refitting visitor centres, or the removal of non-whisky products from DVCs as alcohol could not be sold next to non-alcoholic products.

The application of the legislation to such DVCs was unnecessary and ineffective in delivering on the relevant policy objectives and DVCs appeared to be unintentionally caught by these requirements.

The Scottish Government has accepted the case put forward by the Association resulting in its decision that DVCs and similar outlets should not be subject to the display of alcohol requirements. We would welcome the Committee's support for the Government's amendment to the Regulations on this matter.

Campbell Evans

Director, Government and Consumer Affairs

JUSTICE COMMITTEE**19th Meeting, 2009 (Session 3), Tuesday 9 June 2009****SSI cover note**

SSI title and number: The Police Pensions Amendment (Increased Pension Entitlement) (Scotland) Regulations 2009, **(SSI 2009/185)**

Type of Instrument: Negative

Date circulated to members: 4 June 2009

Justice Committee deadline to consider SSI: 15 June 2009

Motion for annulment lodged: No

SSI drawn to Parliament's attention by Sub Leg Committee: Yes (please see the annexe)

Purpose of Instrument: These Regulations amend the Police Pensions Regulations 1987 to authorise the payments made by police authorities between 12th November 1979 and 5th April 2009 of annual increases to certain persons who are entitled to a guaranteed minimum pension. They also introduce a new entitlement to an Increased Pension Entitlement.

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

Annexe

The Police Pensions Amendment (Increased Pension Entitlement) (Scotland) Regulations 2009 (SSI 2009/185)

This instrument amends the Police Pensions Regulations 1987 (SI 1987/257) ('the 1987 Regulations') to authorise overpayments made by the administering authorities between 12 November 1979 and 5 April 2009 in respect of annual increases to certain persons who are entitled to a guaranteed minimum pension. They also introduce a new entitlement (for those same individuals) to an Increased Pension Entitlement ('IPE').

The instrument comes into force on 26 June 2009. The amendments have retrospective effect which is permitted by section 1(5) of the Police Pensions Act 1976. Parts of the instrument came into effect from 6 April 2009.

Correspondence between legal advisers and the Scottish Government is reproduced in the Appendix. Legal advisers queried the validity of a reference in the instrument.

In its response, the Scottish Government acknowledge (in the appendix) that an error has been made. The provision wrongly referred to has been replaced by a similar provision in schedule 3 of SSI 2007/68.

The Scottish Government suggests that the error is unlikely to give rise to difficulties in practice as those responsible for administering the regulations are aware of the correct provision and the error could be drawn to their attention by means of a circular.

However, the committee considers that regulations are not made solely for those who administer the regulations and the public and others would be confused by the reference to a provision which has been revoked. The fact that the revoked provision has been replaced by a provision in similar terms would not be apparent to anyone looking at the instrument.

The Committee considers that although a mistake has been made it does not amount to defective drafting. The error has been acknowledged by the Scottish Government but it is not thought likely that the mistake will have any effect on the operation of the instrument.

The Committee draws this instrument to the attention of the Parliament on the grounds that a mistake has been made in a reference to a related statutory instrument. The Committee acknowledges that this mistake is unlikely to have any effect on the operation of this instrument. The Committee welcomes the Scottish Government's commitment to bring forward an amendment to correct the error.

Appendix

The Police Pensions Amendment (Increased Pension Entitlement) (Scotland) Regulations 2009 (SSI 2009/185)

On 21 May, the Scottish Government was asked:

Regulation 3(b) inserts paragraph (2B) in regulation E8 of the Police Pensions Regulations 1987 (SI 1987/257). The inserted paragraph (2B)(a) refers to 'an additional benefit within the meaning of paragraph 4 of Part V of Schedule B (of 1987/257). Is it intended that the reference should be to paragraph 4 of Part V of Schedule B of 1987/257 given that Part V of Schedule B appears to have been revoked by schedule 2 Part 3 para. 1 of SSI 2007/68?

The Scottish Government responds as follows:

Part V of Schedule B to the Police Pensions Regulations 1987 ("Part V") was revoked by paragraph 1 of Part 3 of Schedule 2 to the Police (Injury Benefits) (S) Regulations 2007 (SSI 2007/68). The reference in the new paragraph (2B) of regulation E8 of the Police Pensions Regulations 1987 should not have been to paragraph 4 of Part V, but to paragraph 7 of Schedule 3 to SSI 2007/68 which replaced Part V. The Scottish Government is grateful to the Subordinate Legislation Committee for bringing this error to its attention.

As to the effect of the error, it is considered that whilst reference should have been made to paragraph 7 of Schedule 3 to SSI 2007/68, the incorrect reference is unlikely to give rise to difficulties in practice as those responsible for administering the regulations are aware that Part V was replaced by Schedule 3 to SSI 2007/68 (which makes similar provision) and the error in the instant regulations can be drawn to their attention by means of a circular. In addition, it is considered that it is possible to rely on section 17(2)(a) of the Interpretation Act 1978 which provides that where an act repeals and re-enacts, with or without modification, a previous enactment, then any reference in any other enactment to the enactment so repealed shall be construed as a reference to the provision re-enacted.

The Scottish Government expects to further amend the Police Pensions Regulations 1987 before the end of the year, and intends to bring forward an amendment to cure the error in these regulations at that time.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Supplementary written submission from the Fife and Forth Valley Community Justice Authority

Please find below a paper which was for consideration by the Fife and Forth Valley Community Justice Authority Board at its meeting on 2 June 2009:

FIFE AND FORTH VALLEY COMMUNITY JUSTICE AUTHORITY	THIS REPORT RELATES TO ITEM 8 ON THE AGENDA
2 June 2009	NOT CONFIDENTIAL
COMMUNITY SERVICE VISIBILITY PROJECT: FINAL REPORT	

1 RECOMMENDATION(S)

Members of the Fife and Forth Valley Community Justice Authority Board are asked to:

- 1.1 Note the outcomes of the Community Service Visibility Project.
- 1.2 Request that a Progress Report on Community Service Developments are reported to the FFV CJA Board in six months time.

2 CONSIDERATIONS

2.1 Fife and Forth Valley Community Justice Authority was one of three CJAs who successfully bid for funding to raise the profile of community service. The project was required to:

- Increase the visibility of community service;
- Increase the numbers and quality of requests for projects from the community;
- Increase the level of public understanding and confidence in community service as a court disposal.

2.2 A Project Team was established, comprising the Community Service Managers from the four Fife and Forth Valley Local Authority Criminal Justice Services; the Fife Community Service Team Manager was Project lead.

2.3 The Project commenced in October 2008. An interim report required to be submitted to the Scottish Government in December 2008 and a final report submitted by March 2009. There has been an extension to this timescale, with the final project report being completed in May 2009. A

copy of the interim report was presented to the Fife and Forth Valley CJA Board in February 2009. A copy of the Final Report is attached as Appendix 1 to this Report.

- 2.4 The project consisted of a postal survey being sent to 3500 residents in Fife and Forth Valley in October 2008 and a further postal survey sent to the same residents in April 2009. The survey sought to measure the understanding of Community Service before and after the Community Service Visibility project commenced.
- 2.5 Links were established with the four Local Authority media departments to engage with local media, including Press and Radio. This included news and features focusing on the work undertaken by Community Service to inspire community interest and involvement.
- 2.6 A 'Payback' poster was designed by Stirling Council and is now used by all four Community Service Teams to promote the work undertaken by offenders on Community Service. The poster is customised to allow contact details to be included for each of the four Local Authority areas.
- 2.7 Community Service 'Payback' pages have also been created on each of the four Local Authority websites; these promote and illustrate the work undertaken by offenders on Community Service.
- 2.8 A more intense high visibility campaign was undertaken over a two month period. The Project Team decided to concentrate on one control target area, Fife. The intention for this was to see if the second residents survey results improved in that particular area.
- 2.9 The Fife campaign included a three week promotion of Community Service on a local radio station. Listeners were provided with details of three different environmental projects and invited to vote for one, either by text or via the Council website. The Cabinet Secretary for Justice, Mr Kenny MacAskill, came to Fife to announce the winning project.

Outcomes

- 2.10 The overall response rates from the Fife and Forth Valley Local Authorities were variable. The overall response rate from the first survey was 42.1% and 30.5% from the second survey. There were some anomalies, such as 'Had you heard of Community Service by Offenders before you received this questionnaire?' Given that all respondents had received two questionnaires, only 75% answered yes to this question for the second survey.
- 2.11 On a more positive note, 29.2% of those who responded had heard of the Community Payback campaign in Fife, with 15.3% also reporting awareness in Forth Valley.

Project Achievements

2.12 To increase awareness of Community Service projects.

- In Fife, the target area, awareness increased from 52.7% to 64.3%.

2.13 To increase referrals to Community Service projects in Fife by 5%.

- Fife received 50 referrals in the year 2007-2008. Over the two month intensive campaign, the referrals to Fife almost matched this; 45 referrals were received.

2.14 Each Fife and Forth Valley Local Authority to develop mechanisms to engage communities in relation to work carried out by Community Service.

- Each Community Service has developed Community Payback websites linked to their respective Local Authority website. The websites allow members of the public to nominate or suggest projects for offenders on Community Service to undertake.

Additional Benefits

2.15 The Residents Survey has also provided a range of valuable information that will be used to inform and develop new approaches to Community Service. Information we now have includes:
Level of knowledge about Criminal Justice Services.

- 61.8% of individuals did not know Criminal Justice Services was part of Council Social Work Services in Scotland.

Level of satisfaction that offenders receive adequate punishment.

- 73.6% of individuals are either 'not very satisfied' or 'not at all satisfied'.

What kind of work should people on Community Service do?

- 87.7% of individuals thought the work should be about help in the local community. Interestingly, 57% also thought offenders should improve their employment skills in the process.

Do you think the community should have a say in the projects helped by the CSO Scheme?

- 82% agreed with this.

2.16 A copy of some of the questions and responses, with a breakdown for each Local Authority, is attached as Appendix 2. The information from the survey will be extremely valuable in assisting Local Authority

Community Service to continue to develop community service to meet the future challenges of speed, visibility and community engagement.

3 CONSULTATION

3.1 None.

4 RESOURCE IMPLICATIONS

4.1 A sum of £13,530 was awarded by the Scottish Government for the Community Service Visibility Project. To-date, the projected spend is £11,343.22 (Appendix 3). Some additional costs for posters have still to be received. The remainder will be used to produce good quality displays of Community Service work that each of the four Local Authority Criminal Justice Services can use in their respective areas. The project will not exceed the grant allocated.

5 BACKGROUND PAPERS

5.1 Report to CJA Board: CJA Community Service Visibility Project, dated 16 September 2008.

5.2 Report to CJA Board: Community Service Visibility Project: Interim Report, dated 6 February 2009.

Anne Pinkman
Chief Officer