The Scottish Government

REVITALISING JUSTICE -

Proposals To Modernise And Improve The Criminal Justice System

safer scotland
SCOTTISH GOVERNMENT

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01: FOREWORD BY THE CABINET SECRETARY FOR JUSTICE

It is critical our justice system is able to cope with the demands placed upon on it by life in modern Scotland. Since I became Cabinet Secretary for Justice in May 2007, I have implemented a range of reforms that have already helped make Scotland a safer and stronger place to live and work in. These reforms have included:

- Investing additional resources to enhance operational policing by building police capacity through increased recruitment of new police officers and improved opportunities for retention and redeployment of existing police officers **to help make Scotland's communities safer**;
- Committing funding in our ageing prison estate to provide facilities that are "fit for purpose" and **capable of holding those serious offenders the public deserve protection from**;
- Taking forward a National Drugs strategy designed **to promote recovery from drug problems as the focus of efforts to tackle drug use**;
- Taking forward the work of the National Violence Reduction Unit in **tackling the scourge of violence within Scotland's communities**; and
- Using funds confiscated from criminals to fund a host of initiatives that **help expand young people's horizons and steer them away from a life of crime.**

We also need modern, effective laws that work in tackling criminals and their criminal behaviour. **I want to ensure that the dedicated people working in our criminal justice system are equipped to deal with the impact of offending from the moment a crime is committed, through the police investigation and court process and then when the sentence is handed out to the offender.**

Further to the First Minister's legislative statement in the Scottish Parliament on 3 September 2008, I am pleased to confirm it is the intention of the Scottish Government to introduce a Criminal Justice and Licensing Bill into the Scottish Parliament in early 2009. It will be a wide ranging piece of legislation that will include measures to:

- **Assist in the detection of crime** through improvements to the law as regards when DNA and fingerprint data is able to be retained for use in detecting and prosecuting crime;
- Provide a statutory framework for the disclosure of evidence to the defence in criminal cases – **confirming the integrity as to how our courts deal with cases;**
- **Help the courts and prosecutors** through a number of sensible reforms to the criminal law and court procedures – ensuring the interests of justice are served;
- Put in place a flexible and coherent penal policy where **prison remains the right disposal for serious and violent offenders;**
- **Crack down on prisoners** who make use of advances in mobile phone technology to run their criminal empires from prison;
- **Take the fight to those involved in organised crime** through the creation of new organised crime offences;

- **Make sentences served in the community more robust, immediate and visible;** and
- Ensure our alcohol licensing laws are robust and **address the problems of criminality created by our drinking culture.**

Many of these changes are currently being consulted upon separately and where that is the case, brief details are given in this document with links to the separate consultations. If you have views to offer, I urge you to please do get involved and respond to these consultation exercises.

I look forward to taking the Criminal Justice and Licensing Bill through the Scottish Parliament and introducing the changes to the law so that our criminal justice agencies – the police, the Crown Office and Procurator Fiscal Service, the Scottish Crime and Drug Enforcement Agency, the Scottish Court Service, the Scottish Prison Service and other vital partners – can take the fight to criminals and **ensure Scotland truly is a safer and stronger place for hard working families to live and work in.**

KENNY MACASKILL
25 SEPTEMBER 2008

02: PURPOSE

The purpose of this document is to announce what measures we intend to include in the Criminal Justice and Licensing Bill. The legislation will include measures to:

- Improve criminal law;
- Take forward sensible sentencing reforms;
- Modernise criminal procedures;
- Develop licensing laws; and
- Assist victims and witnesses.

If you would like to offer any comments or require any further information in relation to the measures contained in this document, details of how to get in touch can be found at the "What Happens Next" part of this document (section 09).

03: HIGHLIGHTING THE MAJOR REFORMS

We propose to include a number of significant reforms across a range of issues in the Criminal Justice and Licensing Bill. Work is ongoing in relation to the details of a number of these proposals and where that is the case, the relevant summary of each proposal makes it clear what the current position is, including where consultation exercises are ongoing or about to commence.

USE OF DNA AND FINGERPRINT DATA
In September 2007, we asked Professor James Fraser to carry out an independent review of the operation and effectiveness of the statutory regime governing police powers regarding the acquisition, use and destruction of forensic data in relation to persons prosecuted for certain sexual or violent offences but not convicted, and persons dealt with by a children's hearing who accept that they have committed certain sexual or violent offences or are found by a sheriff to have done so. A consultation on police powers to retain DNA and fingerprint evidence was launched on 23 September 2008 and we will use the Criminal Justice and Licensing Bill to make any legislative changes that are required. Relevant weblinks Scottish Government news release announcing Professor Fraser review – September 2007 http://www.scotland.gov.uk/News/Releases/2007/09/24105858 Scottish Government consultation – September 2008 http://www.scotland.gov.uk/Consultations/Current
BENEFIT OF MAKING THE PROPOSED CHANGE Greater clarity, consistency and effectiveness in the statutory framework governing the retention of DNA samples and fingerprints.

DISCLOSURE OF EVIDENCE
In the Scottish legal system a fundamental principle is that an accused is entitled to a fair trial. To achieve this the Crown has an obligation to give the accused notice of the charge against him and to make available information/evidence which the Crown intends to bring to prove the charges. The Crown should also ensure any *exculpatory* material is identified and given/disclosed to the defence (*exculpatory*

material is any evidence which may justify or excuse an accused's actions, and which will tend to show the accused is not guilty or had no criminal intent for the offence they are being prosecuted for).

Following decisions of the Judicial Committee of the Privy Council in 2005 in the cases of Holland and Sinclair, it became clear that a review on Disclosure was required. Lord Coulsfield was commissioned to carry out a review in November 2006, by the previous Justice Minister.

Lord Coulsfield's 'Review of the Law and Practice of Disclosure in Criminal Proceedings in Scotland' was published in August 2007. The report contained 44 recommendations including proposing that there should be legislation to clarify the legal requirements of disclosure and to establish a mechanism for resolving the conflicts of interest which arise when disclosure of important material might put witnesses or security interests at risk. His report also made recommendations about the practical arrangements which should support disclosure in solemn and summary cases, and also addressed issues such as Crown precognitions, criminal history records and the prevention of misuse of disclosed material.

In November 2007, we published a consultation paper on proposals for legislation to implement the recommendations in the Coulsfield report. Following consideration of the responses received and as announced in April 2008, we propose to bring forward legislation to establish a statutory system for disclosure to include:-

- Statutory definition of disclosure;
- Provide that the Crown has a duty to disclose to the defence;
- Provide that disclosure is a continuing duty;
- Clarify that information comes in a variety of formats;
- Define how disclosure can be made and when;
- State that all material information must be disclosed and that 'materiality' should apply to statements and previous convictions;
- Legislation on disclosure will be supported by a statutory Code of Practice;
- Provide for a system of Public Interest (PI) hearings; and
- Provide for misuse of disclosed information

Relevant weblinks

Lord Coulsfield's 'Review of the Law and Practice of Disclosure in Criminal proceedings in Scotland' - August 2007

http://www.scotland.gov.uk/Publications/2007/09/11092728/0

Scottish Government consultation paper on proposals for legislation to implement the recommendations in the Coulsfield report – November 2007

http://www.scotland.gov.uk/Publications/2007/11/09145246/0

Responses received to consultation - March 2008

http://www.scotland.gov.uk/Publications/2008/03/12145347/0

Scottish Government announcement – April 2008

http://www.scotland.gov.uk/Publications/2008/04/24084456/0

BENEFIT OF MAKING THE PROPOSED CHANGE

Effective disclosure procedures are recognised as necessary to ensure trials are conducted fairly and legislation will clarify what requires to be disclosed.

SCOTTISH LAW COMMISSION'S REPORT - CROWN RIGHT OF APPEAL IN SOLEMN PROCEEDINGS

Three types of ruling can bring solemn proceedings to an end without the verdict of a jury. The first is a ruling of no case to answer, where the judge rules, at the close of Crown evidence, that the evidence led by the prosecution is insufficient in law to justify the accused being convicted. The second is a direction, in the course of the judge's charge to the jury, that the jury should not convict on a particular charge, or should consider only a reduced charge. Such a direction, made following a so-called "common-law submission", is made after all the evidence has been heard. The third is a ruling that an important item of prosecution evidence is inadmissible, leaving the Crown with no option but to abandon the prosecution. At present, the Crown has no means of appealing against any of these rulings.

The Scottish Law Commission was asked to look into whether the Crown should have a right of appeal in these cases and their report was published on 31 July 2008. The SLC's main conclusion is that the Crown should be provided with certain rights of appeal. The report makes 22 recommendations for changes to solemn criminal procedure. The principal proposed changes are:

- Extension of the grounds upon which the accused person may submit, at the close of the Crown case, that he has no case to answer – the proposal is to extend section 97 of the Criminal Procedure (Scotland) Act 1995 to permit a submission at the close of the Crown evidence that, on the evidence led by the Crown, no reasonable jury, properly directed, could convict of the offence charged. [Recommendation 1]

- The introduction of a statutory replacement for the "common-law submission" at the close of the whole evidence in the case. [Recommendation 2]

- The granting to the Crown of a right of appeal, with leave of the trial court, against rulings of no case to answer, decisions on the statutory replacement of a common law submission and certain findings relating to the admissibility of prosecution evidence. [Recommendations 3, 7, 9 and 12]

As the report was only recently published, we are considering the proposals.

Consultation on the issues identified in the report was undertaken by the SLC in the form of preliminary consultation with representatives of the Faculty of Advocates, the Law Society of Scotland and the Crown Office, followed by a SLC Discussion Paper published in March 2008. The final report outlines the various views submitted to the SLC during this process and we are currently considering how best to bring forward appropriate provisions in the Criminal Justice and Licensing Bill.

Relevant weblinks

SLC Report on Crown Appeals – July 2008

http://www.scotlawcom.gov.uk/html/cprights.htm

BENEFIT OF MAKING THE PROPOSED CHANGE

We are considering how best to clarify and improve the law in this important area.

MODERNISATION OF THE JURY SYSTEM

We have recently sought views on a range of proposals connected with the operation of the jury system in our courts. It is likely that some of the proposals for reform will require legislation and we intend that the Criminal Justice and Licensing Bill will be used to legislate for these reforms.

A consultation seeking views was launched on 18 September 2008.

Relevant weblinks

The Modern Scottish Jury in Criminal Trials consultation document – September 2008

http://www.scotland.gov.uk/News/Releases/2008/09/18102403

BENEFIT OF MAKING THE PROPOSED CHANGE

Help modernise the operation of juries in our courts.

"UNRULY" CERTIFICATES FOR CHILDREN

Under section 51 of the Criminal Procedure (Scotland) Act 1995, a child aged 14 or older who appears before a court charged with a crime or offence may, because of their "unruly" character, be detained in the prison system.

On 21 February 2008, we announced plans to repeal this law and we will do this through the Criminal Justice and Licensing Bill. Once the repeal of section 51 is in place, it will mean that where a court remands or commits a child for trial or for sentence and does not release him on bail or ordain him to appear, the court shall commit him to an appropriate local authority to be detained in secure accommodation (where necessary) or a suitable place of safety. We have consulted on the implications of this change in legislation and, using an analysis of the responses received, are currently considering the need for any alternative provision of accomodation.

Relevant weblinks

Scottish Government news release - February 2008

http://www.scotland.gov.uk/News/Releases/2008/02/21081302

BENEFIT OF MAKING THE PROPOSED CHANGE

Will ensure that the needs and welfare of young people are best addressed through the use of appropriate facilities.

WORKING TOWARDS DELIVERING A MODERN COHERENT PENAL POLICY

We support fully the principles underlying the combined sentence measures in the Custodial Sentences and Weapons (Scotland) Act 2007 ("the 2007 Act"). However, and as the independent Scottish Prisons Commission also concluded, the regime as enacted is simply not workable.

Taking into account the Prisons Commission's helpful conclusions, we intend to include in legislation modifications to the provisions in the 2007 Act that will deliver a more proportionate and effective system for the end to end sentence management of offenders and consequently end the current arbitrary system of early release. These measures are an integral part of our commitment to deliver a coherent penal policy, the plans for which will be published before the end of the year.

We propose to bring forward provision to introduce a new community supervision sentence, and we intend to fully announce our response to the recommendations contained within the Prisons Commission's report later this year. We intend to take forward any required legislative changes within the Criminal Justice and Licensing Bill.

Relevant weblinks

Scottish Government report "Reforming and Revitalising: Report of the Review of

Community Penalties" – November 2007

http://www.scotland.gov.uk/Publications/2007/11/20142739/0

Scotland's Choice: Report of the Scottish Prisons Commission – July 2008

http://www.scotland.gov.uk/Publications/2008/06/30162955/0

BENEFIT OF MAKING THE PROPOSED CHANGE

Ensuring sentences served in the community are robust, immediate and visible to the community. Will improve the system of early release as part of the delivery of a coherent penal policy, and introduce a more structured sentence management regime tailored to the risk and needs of the offender and public safety.

CREATION OF A SCOTTISH SENTENCING COUNCIL

The judicially-led Sentencing Commission, set up by the previous administration, examined the issue of consistency in sentencing in our criminal courts. The central recommendation of the Commission's 2006 report, The Scope to Improve Consistency in Sentencing, was the creation of a procedure for giving effect to sentencing guidelines. Our manifesto for the 2007 Scottish parliamentary elections also included a commitment to create a system of sentencing guidelines and a Sentencing Council to oversee that system. In addition, the Scottish Prisons Commission recommended in its recent report that we create a body to develop clear sentencing guidelines that can be applied throughout Scotland.

We propose that a Scottish Sentencing Council should be created to provide a new sentencing guidelines regime. This regime will ensure greater consistency, fairness and transparency in sentencing, and help to reassure the public that justice is being done.

A consultation paper outlining the detail of our proposals was published on 1 September 2008.

Relevant weblinks

Sentencing Commission report "The Scope to Improve Consistency in Sentencing" – August 2006

http://www.scottishsentencingcommission.gov.uk/docs/consistency/Consistency%20Report%20-%20Final.pdf

Scotland's Choice: Report of the Scottish Prisons Commission – July 2008

http://www.scotland.gov.uk/Publications/2008/06/30162955/0

Scottish Government consultation on the creation of a Scottish Sentencing Council – September 2008

http://www.scotland.gov.uk/Publications/2008/08/29100017/0

BENEFIT OF MAKING THE PROPOSED CHANGE

Greater consistency and transparency in sentencing, with a related increase in public confidence in the integrity of the Scottish criminal justice system.

STATUTORY STATEMENT OF THE PURPOSE AND PRINCIPLES OF SENTENCING

We consider that the purpose of sentencing should be laid down in statute to create a straightforward and transparent framework within which sentencers can base their decisions in individual cases. By outlining this purpose in statute we can ensure that the public has a much clearer understanding of what sentencing is actually for. By taking a similar approach to the principles of sentencing, we can help to ensure that the public is clear on the key factors that every sentencer must have regard to when making decisions in individual cases. By increasing the level of public understanding we can improve confidence in the sentencing process and the wider criminal justice system.

A consultation paper outlining the detail of our proposals was published on 1 September 2008.

Relevant weblinks

Scottish Government consultation on the creation of a Scottish Sentencing Council – September 2008

http://www.scotland.gov.uk/Publications/2008/08/29100017/0

BENEFIT OF MAKING THE PROPOSED CHANGE

Greater transparency in and understanding of the sentencing process, with a related improvement in public confidence in the integrity of the Scottish criminal justice system.

CREATION OF A NEW OFFENCE OF DIRECTING OR BEING INVOLVED IN ORGANISED CRIME

We are determined to root out the evil that is serious organised crime, to allow honest people and their businesses to prosper and to help our communities meet their full potential. It is what the people of Scotland want, what they deserve and what we must deliver. We have established the Serious Organised Crime Taskforce to help spearhead our efforts.

We want to make it easier to convict those criminals who work together in groups in criminal operations and to expose them to the provisions within the Proceeds of Crime Act 2002 so as to strip them of their stained wealth. The distinguishing feature of organised crime is that people work together in groups to maximise the profits they make from crime and at the same time maximise the misery they place on our communities.

In many cases people will be prosecuted for a range of offences such as drug trafficking, violence and intimidation. The purpose of this new offence is to recognise that these individuals do not work in isolation but work together in evolving and changing groups to wreck misery on Scottish communities.

At the moment some of those people at the top end of serious organised crime networks distance themselves from conducting criminal activity, but instruct others to do so on their behalf - we want to give the police the tools to investigate those individuals as well as their "lieutenants" who carry out the specific offences or indeed others who support those activities.

We plan to do this by creating a new offence of directing a serious organised crime group and a new substantive offence of being involved in serious organised crime.

In addition we plan a statutory aggravation offence of being involved in serious organised crime which would allow courts to take into account the activities of the offender when passing its sentence. It would be for the courts to determine whether to extend the sentence to take account of the aggravation. The court would be expected to make this clear at the time of sentencing.

In view of the serious nature of these offences we believe that the offence should have the potential to be prosecuted on indictment in the High Court or the Sheriff Court. We would also wish to have the flexibility of hearing cases under summary procedure in the Sheriff Court.

We propose that the maximum penalty should be 10 years imprisonment with or an unlimited fine if tried on indictment in the High Court, and 5 years in the Sheriff Court and any trial under summary proceedings to be set at 12 months.

<u>Failing to Report Organised Criminal Activity</u>

The Serious Organised Crime Taskforce also recommended that we provide for a related offence to make it against the law to fail to report activity relating to serious organised crime when an individual either knows or suspects it is taking place and they are benefiting from that knowledge. We would want the offence to be extended to include individuals as well as businesses and the regulated sector. The overall aim would be to capture those that are knowingly living off the wealth of organised crime

(for example spouses/relatives) even if they are not directly involved in the crime or those who are supporting it in a professional capacity (such as any dishonest lawyers and accountants).

For this offence we intend to provide for a maximum penalty of 5 years imprisonment on indictment and 12 months imprisonment under summary procedure.

BENEFIT OF MAKING THE PROPOSED CHANGE

We want these new offences to capture the "big players" who direct organised crime along with their more junior associates who ensure that criminal activity is conducted and also to capture those people who happily live off the wealth created from organised crime or who facilitate the activity in a professional capacity such as lawyers and accountants.

PROHIBITION OF THE INTRODUCTION AND USE OF PERSONAL COMMUNICATION DEVICES (INCLUDING MOBILE PHONES) IN PRISONS

Intelligence information available to Scottish Prison Service (SPS) suggests that mobile phones are commonly used within prisons for, amongst other purposes,

- the continuation of criminal activities within the prison;
- to intimidate witnesses; and
- to facilitate the supply of, and payment for, illegal drugs.

Intelligence information also suggests that prisoners who have access to a mobile phone are frequently bullied by those who do not.

The smuggling of mobile phones into prisons is becoming increasingly difficult to detect given that mobile phone technology is decreasing in size. This is particularly problematic bearing in mind that a very common method of smuggling a mobile phone is through packing in a bodily orifice. Other methods are used, however, for example throwing over the prison walls or, at times, introduction via a contractor carrying out work at the prison.

In many instances it is simply a SIM card which is introduced. A small number of handsets are shared amongst prisoners, who "take turns" at inserting their SIM cards into them. SIM cards are, of course, extremely difficult to detect.

Section 41 of the Prisons (Scotland) Act 1989 makes it an offence to bring or introduce, or attempt to introduce, certain items into a prison without reasonable excuse. The list of prohibited items includes, amongst others, drugs and offensive weapons. Section 41(1)(e) goes on to make the general provision that it is an offence to bring or introduce, or attempt to bring or introduce any article which is a prohibited article within the meaning of the Prison Rules, made under section 39 of

the Prisons (Scotland) Act 1989.

The maximum penalty which could be imposed under the 1989 Act would be for a fine not exceeding level 3 on the standard scale, or imprisonment for 30 days. In contrast following the model of sections 40C and D of the Prisons Act 1952, which were introduced by the Offender Management Act 2007, for prisons in England and Wales, the maximum penalty which may be imposed on summary conviction is imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum or both. The maximum penalty on conviction on indictment is imprisonment for a term not exceeding 2 years or an unlimited fine or both. We consider maximum penalties of this level will prove a far more effective deterrent than that which could be imposed at present.

We propose to make it a specific offence to introduce and/or use a personal communication device (including mobile phones) in a prison, along the lines of sections 40C and D of the Prisons Act 1952. We propose that the penalties available in England and Wales in respect of possession of a communication device should accompany the creation of this new offence.

Alongside the legislation, SPS also intends to introduce the use of signal blocking devices (mobile phone blockers) in prison grounds.

BENEFIT OF MAKING THE PROPOSED CHANGE

Will provide an effective deterrent against the use of mobile phones in prison and help tackle prisoners who continue their criminal activities from inside prison.

04: STRENGTHENING THE CRIMINAL LAW

We propose to take forward a number of reforms to the criminal law and these are summarised in this section.

TEST PURCHASING PROVISIONS FOR CROSSBOWS AND PROOF OF AGE FOR WEAPONS

The Crossbows Act 1987 (the "1987 Act") is the only remaining statutory provision relating to age-restricted goods for which it is not legal to operate a test purchasing scheme. A test purchasing scheme allows a child or young person to carry out the purchase of an age-restricted good to check whether the retailer is applying the age restriction in the sale of the good. Crucially, the child or young person is not committing an offence when test purchasing rules are being followed. While it is unlikely that a test purchasing scheme would be established for crossbows alone, it may be desirable to do so as part of a more general scheme relating to the test purchasing of offensive weapons.

We therefore intend to bring forward provision following the test purchasing model in section 102 of the Licensing (Scotland) Act 2005 (the "2005 Act") so that the test purchasing of crossbows is permissible.

The 1987 Act provides a defence to the offence of selling a crossbow to a person under 18 if the seller had 'reasonable ground for the belief' that the person was 18 or over. The Criminal Justice Act 1988 has a similar defence but it has a higher threshold of 'reasonable precautions' and 'due diligence' and we are bringing them into line with the standard set in the 2005 Act.

BENEFIT OF MAKING THE PROPOSED CHANGE

Will allow robust police enforcement of the law in relation to age restrictions on the sale of crossbows. Also modernise 'proof of age' provisions and bring them into line with the 2005 Act.

CLOSURE OF PREMISES ASSOCIATED WITH HUMAN TRAFFICKING OR CHILD SEXUAL EXPLOITATION

Article 23 of the Council of Europe Convention on Action Against Trafficking in Human Beings requires measures necessary to enable the temporary or permanent closing of premises used to carry out trafficking in human beings.

Article 27 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse also requires measures necessary to enable the temporary or permanent closure of establishments used to carry out the offences of

child abuse, child prostitution, child pornography, child pornographic performances, corruption of children and grooming.

The Antisocial Behaviour etc. (Scotland) Act 2004 provides for the service of closure notices and the making of closure orders in respect of premises. Section 26 of that Act which provides for closure notices requires reasonable grounds for believing that the premises are associated with antisocial behaviour and the occurrence of relevant harm. Closure orders are provided for in section 30 and require that:

- a person has engaged in antisocial behaviour on the premises;
- the use of the premises is associated with the occurrence of relevant harm; and
- an order is necessary to prevent the occurrence of such relevant harm for the period specified in the order.

Relevant harm is defined in section 40 of the Act and section 143 provides that a person engages in antisocial behaviour if he/she acts in a manner or pursues a course of conduct that causes or is likely to cause alarm or distress to at least one person who is not a member of the household.

While it may be possible to demonstrate that a person is engaging in antisocial behaviour towards a victim through causing alarm and distress it is less likely to be able to demonstrate that the premises are associated with relevant harm as neighbours and the general public may be oblivious as to the use and occupants of the premises.

We propose to make explicit provision within the Antisocial Behaviour etc. (Scotland) Act 2004 for the closure of premises used to carry out the offences specified in the Council of Europe Conventions by providing a new set of circumstances where notices and orders may be invoked for relevant offences in relation to trafficking and child sexual exploitation.

Closure notices would require senior police officers to have reasonable grounds for believing that the premises are associated with the commission of relevant offences while closure orders would require senior police officers to have reasonable grounds for believing that the use of the premises is associated with the commission of relevant offences.

BENEFIT OF MAKING THE PROPOSED CHANGE

Will assist the police in tackling the misery of human trafficking and child sexual exploitation by providing explicit powers for the closure of premises associated with the commission of offences in relation to trafficking of human beings and child sexual exploitation.

POSSESSION OF EXTREME PORNOGRAPHIC MATERIAL

The Scottish Executive issued a joint consultation in 2005 with the Home Office on issues relating to the possession of extreme pornography. This consultation ran until December 2005 and 93 Scottish responses were received.

We have decided to introduce a new offence for the possession of extreme pornographic material. We propose that this offence will criminalise the possession of pornographic images which realistically depict:

- Life-threatening acts and violence that would appear likely to cause severe injury;
- Rape and other non- consensual penetrative sexual activity, whether violent or otherwise; and
- Bestiality or necrophilia.

The maximum penalty for the proposed new offence will be 3 years imprisonment.

We intend that the new offence will be similar to that at section 63 of the Criminal Justice and Immigration Act 2008, which will apply in England, Wales and Northern Ireland. The Scottish offence will go further than that offence, however, in that it will cover all images of rape and non-consensual penetrative sexual activity, whereas the English offence only covers violent rape.

Under section 51 of the Civic Government (Scotland) Act 1982, it is already illegal to publish, sell or distribute or to possess with a view to selling or distributing the material that would be covered by this new offence. We propose to increase the maximum penalty under section 51 of the 1982 Act in respect of extreme pornographic material from 3 to 5 years.

Relevant weblinks

Consultation on the possession of extreme pornographic material – August 2005

http://www.homeoffice.gov.uk/documents/cons-extreme-porn-3008051/

Analysis of Scottish responses received to the consultation

http://www.scotland.gov.uk/Topics/Justice/criminal/17543/ExtremePornograhicMateria/AnalysisReport

BENEFIT OF MAKING THE PROPOSED CHANGE

Will help ensure society is protected from exposure to pornography that depicts horrific images of violence.

OFFENCE PROVISIONS IN THE PROTECTION OF CHILDREN AND PREVENTION OF SEXUAL OFFENCES (SCOTLAND) ACT 2005

Sections 9 to 12 of the Protection of Children and Prevention of Sexual Offences

(Scotland) Act 2005 established a number of offences relating to the sexual services of children and child pornography. The offences relate to:

- paying for sexual services of a child (section 9);
- causing or inciting provision by child of sexual services or child pornography (section 10);
- controlling a child providing sexual services or involved in pornography (section 11); and
- arranging or facilitating provision by child of sexual services or child pornography (section 12).

A minor difficulty has been identified with penalties for the offences under sections 9 to 12 of the Act when prosecuted on indictment. The penalty provisions provide that a person is liable on conviction on indictment to imprisonment for a term not exceeding 14 years, except for section 9 offences when involving the sexual services of a child over 16 in which case the maximum term is 7 years. There is no mention of a fine, in contrast to the position in summary procedure, and to most other penalty provisions which generally refer to the imposition of imprisonment, or a fine, or both. In the absence of a reference to a fine, there is no inherent power for the solemn courts in Scotland to impose a fine in place of imprisonment.

We propose to bring forward provisions so that it will be competent for the court to impose an unlimited fine following successful prosecution on indictment, instead of or as well as, imprisonment. While custodial sentences are likely to be appropriate for most offenders, the availability of a fine in solemn procedure will allow the courts to deal with corporate offenders such as companies. This will better meet our international obligations on the criminalisation of the sexual exploitation of children.

BENEFIT OF MAKING THE PROPOSED CHANGE

Regularisation of penalty provisions in sections 9 to 12 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 ensuring a robust law to deal with sexual offences.

INDECENT IMAGES OF CHILDREN

Under the provisions of sections 52 and 52A of the Civic Government (Scotland) 1982 it is an offence to make, take, distribute, publish or possess indecent photographs or pseudo-photographs of children. A pseudo–photograph is an image which, though not a photograph itself, appears to be one.

The definition of pseudo–photograph does not extend to cover images derived from actual photographs but which do not appear to be photographs themselves. Such images are increasingly easy to make using readily available image manipulation software.

We propose to extend the provisions of sections 52 and 52A of the 1982 Act to cover derivatives of indecent photographs or pseudo−photographs to include, for example, line traced and computer traced images. These derivatives will fall under the scope of sections 52 and 52A of the Act and it will therefore become an offence to make, take, distribute, publish or possess such images.

We also intend to bring forward technical amendments that will clarify certain provisions concerning indecent images of children as they apply for the purposes of Schedule 3 to the Sexual Offences Act 2003. That Schedule lists offences which trigger the notification requirements in Part 2 of that Act. The amendments will remove any doubt that the provisions contained within paragraph 44 of Schedule 3, which refers to Customs legislation about prohibited goods, covers both photographs and pseudo-photographs. Changes are also intended to be made to Schedule 3 to ensure clarity in respect of age thresholds.

BENEFIT OF MAKING THE PROPOSED CHANGE

Will help clarify the law and closes a gap in existing legislation which has developed as technology advances to circumvent the controls already in place.

TERRITORIAL EXTENT OF HUMAN TRAFFICKING OFFENCES

Trafficking for the purposes of prostitution or the making or production of obscene or indecent material is an offence under the provisions of section 22 of the Criminal Justice (Scotland) Act 2003.

Section 22(1) provides that it is an offence for a person to arrange or facilitate the arrival into or travel to the United Kingdom of an individual for the above purposes, including where it is believed that another person is likely to exercise such control or to so involve the individual. Under the provisions of section 22(4) the offence applies whether it is committed within the UK by any person, or outwith the UK by a British national or a UK incorporated body.

Following changes made in the UK Borders Act 2007, we propose to align the wording of the section 22 with that now contained in the Sexual Offences Act 2003 by:

- extending its scope so that it refers to “entry into” the UK as well as the “arrival in” the UK; and
- removing the limitation on the territorial application provided under section 22(4) so that the offence applies to anything done whether inside or outside the UK by any person, no matter whether they are in any way connected to the United Kingdom.

We also intend to make it clear that the sheriff court has jurisdiction to deal with these offences.

BENEFIT OF MAKING THE PROPOSED CHANGE

Clarify the law so that where a person outwith the UK undertakes trafficking activities and an individual is trafficked to, within or out of the UK then that will constitute an offence under Scots law. Extends the offence provision so that it covers any act of facilitation of a person into the UK following his arrival here.

CONSPIRACIES TO COMMIT CRIMINAL ACTS IN PARTS OF THE UK OTHER THAN SCOTLAND

Section 11A of the Criminal Procedure (Scotland) Act 1995 deals with conspiracies to commit offences. This section was inserted by section 7 of the Criminal Justice (Terrorism and Conspiracy) Act 1998.

In essence, it provides that conspiracy in Scotland to commit an offence outwith the United Kingdom is itself an offence, provided that the criminal purpose being conspired would constitute an offence in the place where it was intended to be carried out. For example, a conspiracy formed in Scotland to bomb airliners in the United States would be an offence in Scotland. A gap in law has been identified in that section 11A does not provide statutory coverage for conspiracies formed in Scotland to commit offences in England, Wales or Northern Ireland.

In light of the Glasgow and London bombings, the law on extraterritorial offences was reconsidered. Clause 28 of the Counter-Terrorism Bill contains provisions which allow for proceedings to be taken in any part of the United Kingdom for terrorist offences (including conspiracy) regardless of where in the United Kingdom the offence is committed.

Scottish courts can assert jurisdiction and rely on common law procedures to deal with conspiracy, for example, a conspiracy formed abroad but the prospective act, which constitutes a crime under Scots law, was intended be committed in Scotland. However, there is sufficient doubt that exists about the jurisdiction of Scottish courts to deal with conspiracies to commit offences in England, Wales and Northern Ireland.

We also propose to amend section 11A of the Criminal Procedure (Scotland) Act 1995 so that it applies to conspiracies in Scotland to commit offences in other parts of the United Kingdom, which in turn will mean section 11A can be used to deal with conspiracies to commit offences in any part of the world furth of Scotland.

BENEFIT OF MAKING THE PROPOSED CHANGE

Addresses a loophole in the law, provides clarity for Scottish courts to deal with conspiracies in Scotland to commit criminal acts elsewhere in the United Kingdom.

MISCARRIAGES OF JUSTICE WHERE CASES REFERRED BY THE SCOTTISH CRIMINAL CASES REVIEW COMMISSION: GROUNDS FOR APPEAL

The Scottish Criminal Cases Review Commission (SCCRC) was established in 1999 by section 194A of the Criminal Procedure (Scotland) Act 1995. It is an independent public body which impartially reviews cases submitted by applicants convicted of a crime in a Scottish court where there may be possible grounds for considering a miscarriage of justice has occurred. The Act enables the SCCRC, if it thinks fit, to refer any conviction or sentence passed on a person to the High Court for further consideration. This covers cases where an appeal against such conviction or sentence has been heard and determined already by the High Court, but can also include cases where no appeal has been heard.

The grounds upon which the SCCRC may refer cases is set out at section 194C of the Act and are as follows:

- That a miscarriage of justice may have occurred; and
- That it is considered in the interests of justice that a reference should be made

The SCCRC is required by section 194D(4) to provide the Court with a statement of their reasons for making the reference. The practice of the SCCRC is to consider the possible grounds for a miscarriage of justice submitted by the applicant, and any other grounds that the SCCRC may itself identify during their consideration of the case. The SCCRC's statement of reasons is submitted which sets out the grounds on which the case is being referred alongside a referral. In practice, difficulties have emerged in that the appellant, in pursuing his appeal, can depart from the grounds on which the SCCRC has made the referral. This can include seeking to make a case on grounds that have already been discounted or rejected by the SCCRC, which in turn, can potentially have a significantly negative impact with regard to the use of court time.

We therefore propose to establish a process whereby an appeal, following a reference made by the SCCRC, can only be based on the statement of reasons given in the SCCRC referral, subject to the power of the court to allow other grounds to be argued.

BENEFIT OF MAKING THE PROPOSED CHANGE

The change would bring about a more streamlined appeals procedure to assist courts in making the best use of their time in dealing with cases referred by the SCCRC.

DEALING IN TAINTED CULTURAL OBJECTS

In 2003 the UK Parliament passed the Dealing in Cultural Objects (Offences) Act (c.27) which does not extend to Scotland. This Act was introduced shortly after the UK ratified the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import and Transfer of Ownership of Cultural Property. The UK Government set up a Ministerial Advisory panel which reported on the implementation of this Convention in December 2000. Although this advisory panel indicated that no new legislation was required in the UK to ratify the Treaty, they did suggest that the creation of an offence of dealing in tainted cultural objects would complement the Treaty obligations and reinforce implementation in the UK.

The then Scottish Executive took the decision Scotland would devise its own legal solution that would be dealt with through legislation in the Scottish Parliament. The decision was taken that it would be appropriate to legislate for this issue in the proposed Culture Bill.

Upon coming to office the current Scottish Government took the decision to proceed with a shorter and more focused version of the Culture Bill which provided for the establishment of Creative Scotland from a merger of Scottish Screen and the Scottish Arts Council. Ministers stated at that time that they remained sympathetic to the purposes of the legislation relating to tainted cultural objects and we will include suitable provisions in the Criminal Justice and Licensing Bill.

The original policy was consulted on as part of the broader consultation on the previous administration's draft Culture Bill. Respondents to this section of the consultation were largely favourable to the proposal to create a new offence similar to that brought in by the 2003 Act in the rest of the UK. Following responses made to the consultation we have decided that reporting requirements shall be prescribed for findings of cultural objects and the dishonest dealing of cultural objects which are unreported is to be made an offence.

Relevant weblinks

Scottish Executive consultation on draft Culture (Scotland) Bill* - December 2006

http://www.scotland.gov.uk/Resource/Doc/160710/0043681.pdf

(* Page 12 is the relevant page that covers the issue of tainted cultural objects)

BENEFIT OF MAKING THE PROPOSED CHANGE

Creation of a clear offence of dealing in tainted cultural objects and unreported cultural objects will assist in tackling those who seek to profit from Scotland's national heritage. It would also bring Scotland into line with provisions in the rest of the UK as well as complement the UNESCO Treaty obligations.

IMPROVING CRIMINAL LAW

Overview

A major consolidation exercise of Scottish criminal law and procedure was carried out in 1995. The then existing law was consolidated by the combined effect of the Criminal Procedure (Scotland) Act 1995, the Criminal Law (Consolidation) (Scotland) Act 1995, the Criminal Procedure (Consequential Provisions)(Scotland) Act 1995, and the Proceeds of Crime (Scotland) Act 1995.

The Criminal Law (Consolidation) (Scotland) Act 1995 consolidated certain enactments creating offences and relating to the criminal law in Scotland. In essence, this was a tidying up exercise, which made no changes to existing law and covered a wide range of subject matters.

Specific changes

This consolidation exercise included consolidation of the False Oaths (Scotland) Act 1933. Consequential provisions required as a result of this exercise were provided for in the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995. It has emerged that a minor error occurred during this consolidation exercise. Schedule 5 to the Criminal Procedure (Consequential Provisions) (Scotland) Act, containing the list of repeals, should have included a reference to the False Oaths (Scotland) Act 1933. This was however omitted, and the 1933 Act remains in force alongside its intended replacement. We therefore propose to repeal the 1933 Act in full. Appropriate consequential amendments will also be made where reference is made to the 1933 Act in other pieces of legislation.

Section 16 of the Criminal Law (Consolidation) (Scotland) Act 1995 allows any parent, relative, guardian or person acting in the best interests of a woman or girl to ask for a warrant to be issued. This warrant will authorise a named constable to enter a specified place and search for that woman or girl where they believe she is unlawfully being held for immoral purposes. If the woman or girl is found she will be delivered to her parents or guardians. There is also a right afforded to the person requesting the warrant to accompany the constable when the warrant is executed. The wording of the provision has remained almost unchanged since its original enactment in 1885.

This provision is no longer of any practical value. The police already have the power to request warrants for circumstances such as this and we therefore intend to repeal section 16 of the 1995 Act.

Sections 27 to 30 of the Criminal Law (Consolidation) (Scotland) Act 1995 provide the Lord Advocate with special investigatory powers to deal with serious or complex fraud. They re-enact sections 51 to 54 of the Criminal Justice (Scotland) Act 1987, as amended by the Criminal Justice and Public Order Act 1994.

Schedule 5 to the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 lists the provisions which were repealed as part of the consolidation exercise.

The omission of sections 51 to 54 of the 1987 Act from the Schedule is an error and we intend to correct this now by repealing sections 51 to 54 and any amending enactments.
BENEFIT OF MAKING THE PROPOSED CHANGE A tidying up of the law, reducing the risk of confusion and error.

05: IMPROVING HOW OUR COURTS WORK

We propose to take forward a number of reforms to how our courts operate and these changes are summarised in this section.

ATTENDANCE AT AN ID PROCEDURE WILL BECOME A STANDARD CONDITION OF BAIL

When an accused is released on bail, section 24 of the Criminal Procedure (Scotland) Act 1995 requires that the court always imposes standard bail conditions. These conditions are a behavioural framework that the accused is required to comply with while going through the court process. The standard conditions are that the accused:

- appears at the appointed time at every diet relating to the offence with which he is charged of which he is given due notice;
- does not commit an offence while on bail;
- does not interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person;
- does not behave in a manner which causes, or is likely to cause, alarm or distress to witnesses; and
- makes himself available for the purpose of enabling enquiries or a report to be made to assist the court in dealing with him for the offence with which he is charged.

Section 24 of the 1995 Act permits the court to impose additional further conditions. A commonly imposed further condition is to require the accused to make themselves available to participate in an identification procedure.

In recent years, the use of identification procedures in criminal cases is rising. The amount of crime being prosecuted at solemn level (where identification procedures are more likely to be used) is increasing, and the roll-out of vulnerable witness legislation has also led to greater use of identification procedures to reduce the need for identification of the accused in court.

We propose to make the requirement for an accused to participate in an ID procedure a standard condition of bail.

BENEFIT OF MAKING THE PROPOSED CHANGE

Will free up court time as the procurator fiscal will no longer be required to take up court time by asking the court to impose the requirement to participate in an ID procedure as a further condition.

HOW COURTS DEAL WITH BAIL REVIEW APPLICATIONS

We propose to remove the requirement for a hearing to give consideration to an application made under section 30 of the Criminal Procedure (Scotland) Act 1995 where i) the other party consents to the application and ii) the court is minded to grant the application. An example of an application under this section would be an accused seeking to have the hours of a curfew bail condition altered (perhaps as a result of their working hours changing).

The mirror provisions, allowing applications for bail review by the Crown, are to be found in section 31 of the Criminal Procedure (Scotland) Act 1995. An example of an application being made by the Crown might be where the prosecutor has received information that the accused has breached one of his or her bail conditions or where the accused has moved to a new address and his or her representative has not sought to review the domicile of citation to make an equivalent amendment.

The proposal to amend sections 30 and 31 would allow the court to deal with applications made under this section in chambers without the need for a hearing, but only if certain circumstances exist. These circumstances are as follows:

- The other party consents to the application; and
- The court considers it appropriate to grant the application.

The removal of the requirement to hold a hearing in these circumstances seems reasonable and will benefit the court from saving valuable time in holding unnecessary court hearings.

BENEFIT OF MAKING THE PROPOSED CHANGE

Reducing the number of court hearings thus making better use of court time, minimising inconvenience to solicitors and the Crown and swifter review of bail conditions in the event of a change of circumstances.

SPOUSAL COMPELLABILITY

In criminal proceedings in Scotland, any person who has information about a crime may be cited as a witness by either the Crown or by the accused. A witness who is permitted by law to testify is known as a competent witness, and any witness who can be required to attend court to give evidence is known as a compellable witness. A competent and compellable witness who fails to give evidence may be guilty of contempt of court.

However, under section 264 of the Criminal Procedure (Scotland) Act 1995 (the "1995 Act") and section 130 of the Civil Partnership Act 2004 (the "2004 Act") there is an exception to this rule which can lead to a witness not being required to give evidence. This occurs when a witness is the spouse or civil partner of the accused, and the accused is alleged to have committed an offence other than against their

spouse or civil partner.

On 5 May 2008, we announced plans to repeal section 264 of the 1995 Act and section 130 of the 2004 Act. This followed a consultation on this issue by the previous administration published in June 2006 with an analysis of the consultation being published in November 2006.

Relevant weblinks

Consultation paper on Scottish Executive proposals for amending the law on compellability of spousal witnesses – June 2006

http://www.scotland.gov.uk/Publications/2006/06/21135942/0

Analysis of responses to the consultation on Compellability of Spousal Witnesses – November 2006

http://openscotland.gov.uk/Publications/2006/11/spousalwitnessreport/Q/Page/3

Scottish Government announcing intention to repeal law in relation to spousal compellability – May 2008

http://www.scotland.gov.uk/News/Releases/2008/05/02150833

BENEFIT OF MAKING THE PROPOSED CHANGE

Spouses who have been able to use section 264 of the 1995 Act will no longer be able to escape justice.

ANONYMITY OF WITNESSES AND VICTIMS IN CRIMINAL PROCEEDINGS

We are currently considering the implications of the recent change in the law in England and Wales that enables courts there to permit witnesses to give their evidence with a degree of anonymity where that is considered to be appropriate. This follows a recent House of Lords decision in the case of R v Davis. If it is decided to bring forward legislative provisions in Scotland, it is possible the Criminal Justice and Licensing Bill will be used.

ALLOWING WITNESSES TO SEE THEIR STATEMENTS TO REFRESH THEIR MEMORY BEFORE GIVING EVIDENCE

Lord Coulsfield's 'Review of the Law and Practice of Disclosure in Criminal Proceedings in Scotland' was published in August 2007. The report noted that,

although not strictly an issue of disclosure, there was support that witnesses should be able to refer to copies of their statements when called to give evidence in court, in all cases where these statements have been made available to the Crown and to the defence.

Most respondents to the consultation exercise on disclosure agreed that witnesses should be able to refer to copies of their statements when called to give evidence but caution was expressed regarding quality of statements.

We are proposing to bring forward provisions to:

- Provide for witnesses to see a copy of their statements, in all cases where these statements have been made available to the Crown and to the defence, in advance of a trial; and
- Define what 'statements' are.

Much of the detail of how the system will operate will be included in the Code of Practice.

Relevant weblinks

Lord Coulsfield's 'Review of the Law and Practice of Disclosure in Criminal proceedings in Scotland' - August 2007

http://www.scotland.gov.uk/Publications/2007/09/11092728/0

Scottish Government consultation paper on proposals for legislation to implement the recommendations in the Coulsfield report – November 2007

http://www.scotland.gov.uk/Publications/2007/11/09145246/0

Responses received to consultation - March 2008

http://www.scotland.gov.uk/Publications/2008/03/12145347/0

Scottish Government announcement – April 2008

http://www.scotland.gov.uk/Publications/2008/04/24084456/0

BENEFIT OF MAKING THE PROPOSED CHANGE

Reference to previous statements of witnesses enables them to be reminded of things they might otherwise have forgotten and it enables the credibility and reliability of the evidence in court to be tested by reference to statements made nearer the time of events.

JURISDICTION FOR OFFENCES UNDER PREVENTION OF CORRUPTION ACT 1906

We intend to extend the jurisdiction of district/Justice of the Peace courts so that they can deal with cases involving offences under the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Act 1906. In simple terms, the 1889 Act provides that a person in public office who is involved in any form of corrupt practice in connection with their work is guilty of an offence. The 1906 Act provides that any employee who carries out activity in a corrupt manner is guilty of an offence.

Currently, offences prosecuted under the 1889 Act and the 1906 Act can be prosecuted either in the solemn or summary courts. In the case of summary prosecution though, it is only the sheriff summary courts that are permitted to deal with cases. Renewal provisions will be brought forward to allow district/Justice of the Peace courts to be able to deal with these offences. Prosecutions will still be permitted in the sheriff summary or solemn courts for these offences. In practice, it is unlikely that significant numbers of cases will be dealt with in the district/JP court.

BENEFIT OF MAKING THE PROPOSED CHANGE

Will remove an unnecessary restriction on which courts can deal with corruption offences.

IMPROVING PROCEDURES FOR SERVICE OF INDICTMENTS AND DOCUMENTS IN SOLEMN PROCEEDINGS

The current provisions for the service of indictments and other documents in criminal proceedings are set out in section 72G of the Criminal Procedure (Scotland) Act 1995 (the "1995 Act") and Rules 2.2A and 2.3A of the Act of Adjournal (Criminal Procedure Rules) 1996.

Section 72G of the 1995 Act, as amended by paragraph 13(2) to the Criminal Proceedings etc (Reform) (Scotland) Act 2007, provides that:

"In any solemn proceedings, anything which is to be served on or given, notified or otherwise intimated to, the accused shall be taken to be so served, given, notified or intimated if it is, in such form and manner as may be prescribed by Act of Adjournal, served on or given, notified or intimated to... the solicitor [who has notified the prosecutor that he is engaged by the accused and has not informed the prosecutor that he has been dismissed by or has withdrawn from acting for, the accused..... at that solicitor's place of business"

Section 72 provision creates a practical problem relating to the mechanism of service at "...the solicitor's place of business".

A strict reading of section 72G of the 1995 Act and rule 2.32A of the Act of Adjournal requires that service of the indictment and citation on a solicitor can be effected only at the solicitor's place of business and requires that either the solicitor or his or her partner/employee is present. This means that if a solicitor has no formal place of business, the indictment cannot be served on him or her. It means also that if he or she has a place of business but is a sole practitioner with no employees and he or she is at court, at a police office or elsewhere on other business (or, if the indictment requires to be served outwith normal business hours), for the indictment to be served on him or her, both he or she and the indictment (and police officer serving it) require to travel to the place of business. This is inconvenient to both the solicitor and the police.

The same issue arises in respect of the service of other documents on solicitors in solemn proceedings with one significant difference, namely that for documents other than the indictment and citation, service need not be effected at the solicitor's place of business.

We propose to remove the requirement for the solicitor (or his partner/employee) to be at his or her place of business at the time of service. Instead, the indictment (and any other document) could be served on the solicitor in an analogous manner to service on the accused.

BENEFIT OF MAKING THE PROPOSED CHANGE

Greater certainty of lawful service of documents in cases where an accused has or may abscond and minimising inconvenience to police officers and to solicitors.

PROSECUTION OF PARTNERSHIPS

Section 70 of the Criminal Procedure (Scotland) Act 1995 deals with proceedings on indictment against corporate bodies. It provides for how the indictment is served, appearance by a representative for certain purposes, and for recovery of fines. While limited liability partnerships are covered, section 70 does not make provision about partnerships or other unincorporated associations.

In contrast, section 143 of the same Act, which deals with summary procedure, specifically provides for how proceedings may be brought against partnerships, unincorporated associations, and bodies of trustees as well as bodies corporate.

We propose to widen the provisions of section 70 to cover partnerships, associations and bodies of trustees to bring it in line with section 143.

We also intend to extend sections 70 and 143 to other entities not already covered, such as government departments.

BENEFIT OF MAKING THE PROPOSED CHANGE

Will tidy up the law, clarify how procedures against partnerships should operate, and ensure there is consistency between the provisions of sections 70 and 143.

ADDRESSING ISSUES THAT CAN OCCUR WHEN A CHANGE IN THE HOLDER OF THE OFFICE OF LORD ADVOCATE TAKES PLACE

Section 64 of the Criminal Procedure (Scotland) Act 1995 provides that all prosecutions before the High Court of Justiciary or before the Sheriff sitting with a jury shall proceed on indictment in name of Her Majesty's Advocate.

A strict reading of the provision means that that the indictment requires to run in the personal name of the Lord Advocate, rather than by her official title as "Her Majesty's Advocate". Where the Lord Advocate dies or demits office and is immediately succeeded by a new Lord Advocate, without the office of Lord Advocate being vacant for any period, the correct libelling of indictments relies on knowing the precise point at which the warrant of appointment was signed. In practice, this causes administrative difficulties for the Crown in ensuring that indictments are correctly libelled, having regard to the timing of demission and succession.

By extension, the same issue arises where the indictment may be in name of the Solicitor General (in the event of the death or demission of office of the Lord Advocate). If the Solicitor General were then to die or demit office and be succeeded while the office of Lord Advocate remained vacant the same administrative difficulties arise.

We propose to amend the current provisions to make clear that:

- Accused persons, against whom proceedings are to be raised before the High Court of Justiciary or a Sheriff sitting with a jury, should be indicted at the instance of "Her Majesty's Advocate" but that there should be no requirement for the individual Lord Advocate to be named, personally;
- Accused persons indicted at the instance of the Solicitor General, the individual Solicitor General need not be named, personally; and
- The format of an indictment does not require to be changed on demission and appointment of either the Lord Advocate or Solicitor General.

BENEFIT OF MAKING THE PROPOSED CHANGE

Improved efficiency of processes for the Crown and a reduced risk of proceedings failing due only to error as to the timing of appointment.

REPEAL SECTION 169 OF CRIMINAL PROCEDURE (SCOTLAND) ACT 1995 - DETENTION AT A COURT OR POLICE STATION
Section 169 of the Criminal Procedure (Scotland) Act 1995 permits summary courts to detain an offender at court or at a police station until 8pm in lieu of imposing imprisonment, so long as the offender can get home that day. These provisions date back many years and exist in the 1995 Act as a result of consolidation of the law. In practice, the provisions in section 169 are not currently used, have not been used for a considerable number of years and are no longer of any practical use. We propose that section 169 of the 1995 Act be repealed in its entirety.
BENEFIT OF MAKING THE PROPOSED CHANGE Will tidy up the law.

REPEAL SECTION 206(1)-(6) OF CRIMINAL PROCEDURE (SCOTLAND) ACT 1995 - INCLUDING UPPING MINIMUM CUSTODIAL SENTENCE FROM 5 DAYS TO 15 DAYS
Section 206(1) of the Criminal Procedure (Scotland) Act 1995 provides that a summary court cannot impose imprisonment for a period of less than five days. We intend that to change this minimum period from five days to fifteen days to reflect Scottish Government policy on the efficient use of custodial sentences. We also intend to repeal subsections (2) to (6) of section 206 as they are redundant. These provisions permit the summary courts to sentence an offender to be detained in a certified police cell or similar place for up to 4 days. It is our understanding that there are no such certified police cells in Scotland, and have not been any for some time. This change will not affect “legalised police cells” under the Prisons (Scotland) Act 1989, which can be used to detain prisoners before, during or after trial for up to 30 days.
BENEFIT OF MAKING THE PROPOSED CHANGE Will ensure efficient use of custodial sentences and tidy up the law.

FORFEITURE OF PRODUCTIONS
Section 254 of the Criminal Procedure (Scotland) Act 1995 implies that forfeiture

may be competent when the productions are not present in court. It permits the court to issue a search warrant in respect of forfeited property in certain circumstances. There has been doubt expressed as to whether forfeiture is competent when productions are not present in court. While section 254 of the 1995 Act implies that forfeiture may be competent there is no express provision as to the competency of doing so.

On one reading of section 254 it is implicit in the section that property can competently be forfeited notwithstanding that it is not physically in court. It is equally implicit in section 33A of the Road Traffic Offenders Act 1988 that motor vehicles may be forfeited notwithstanding their not being in court. Practice, however, seems to vary; forfeiture has taken place where the property is not in the court but the location of the property is known. If the court requires that a production is in court the diet can be adjourned until the property is brought to court. For those cases this causes some inconvenience and increases the number of ineffective court hearings.

We propose to make clear that the court, in ordering forfeiture of any article whether at common law or in exercising any statutory power, may do so notwithstanding that the article is not physically within the court.

BENEFIT OF MAKING THE PROPOSED CHANGE

Improved efficiency of court processes for the Crown and making best use of court time by avoiding unnecessary hearings.

DISCLOSURE OF POST OFFENCE CONVICTIONS TO THE COURT IN SOLEMN CASES AND DISCLOSURE OF ACCEPTED POST OFFENCE ALTERNATIVES TO PROSECUTION

The Criminal Proceedings etc. (Reform) (Scotland) Act 2007 introduced section 166A into the Criminal Procedure (Scotland) Act 1995 (the "1995 Act") as follows:

"Where a person is convicted of an offence on summary complaint, the court may, in deciding on the disposal of the case, have regard to any convictions which:

- *were imposed on the person between the date of the offence and the date of conviction in respect of the offence;*
- *are specified in a notice laid before the court by the prosecutor; and*
  - *are admitted by the person; or*
  - *proved by the prosecutor on evidence adduced then or at another diet."*

When considering the most suitable disposal for an offender, section 166A allows the court in summary proceedings to have regard to convictions acquired by the offender between the date they commit a further offence and the date they are convicted in respect of this further offence. However, this provision does not currently apply to

solemn proceedings and it is proposed that these provisions should also apply in solemn cases.

Sections 166(9) and (10) of the 1995 Act allow for certain alternatives to prosecution which have been accepted or deemed to be accepted to be disclosed to the court if they occurred within the two years preceding the date of the offence charged. These alternatives to prosecution are fiscal fines, compensation offers and work offers.

These alternatives to prosecution do not however come within the definition of section 166A and accordingly, if an alternative to prosecution was accepted or deemed to be accepted after the date of the offence charged, then this could not be disclosed to the court.

The provisions of section 166A are designed to ensure that as full a picture as possible of the accused's offending behaviour is made available in order to assist the court in sentencing. Including alternatives to prosecution accepted, or deemed to have been accepted, following the date of the offence would also be of valuable assistance to the court.

Given the increased powers now available to the Crown to deal with offences by way of alternatives to prosecution it is possible, depending upon the particular facts and circumstances of a case, that an accused person could be offered an alternative to prosecution by the Crown even if there were a pending case in which court proceedings had been taken.

In light of the fact that alternatives to prosecution accepted in the 2 years preceding an offence may now be disclosed to the court, and post offence convictions can be disclosed, we propose that post offence alternatives to prosecution should also be able to be disclosed to the court as regards offending which post-dates the offence.

BENEFIT OF MAKING THE PROPOSED CHANGE

Will allow the solemn court to have access to further relevant information when deciding the most suitable disposal for an offender and will allow the court as full a picture as possible as to the accused's circumstances to assist with sentencing decisions.

CHANGES TO THE DISCLOSURE OF PROCURATOR FISCAL "WORK ORDERS" TO THE COURT

We propose to make minor changes to the way in which alternatives to prosecution can be disclosed to the court in criminal proceedings. Work offers were introduced into the Criminal Procedure (Scotland) Act 1995 (the "1995 Act") by virtue of the Criminal Proceedings etc. (Reform) (Scotland) 2007 Act. Work offers are a type of alternative to prosecution that the procurator fiscal can offer to a person accused of an offence where a period of unpaid work is undertaken by the accused instead of a

prosecution being taken forward.

Section 303ZA(3)(e)(iii) of the 1995 Act provides that if a work offer is accepted and made but not completed, that fact may be disclosed to the court in any proceedings for the offence to which the work offer relates. It does not, however, require the alleged offender to be informed of the fact that work offers which are not accepted can be disclosed to the court in respect of proceedings relating to the offence for which the offer was made. Such a disclosure can be made under section 101(11) (solemn proceedings) or section 166(11) (summary proceedings) however. We intend to change this to bring the information given in relation to a work offer into line with other types of alternative to prosecution available to the procurator fiscal (fiscal fines and compensation offers).

In addition, section 166(10)(b) of the 1995 Act provides that a work order "completed in the two years preceding the date of the offence charged" can be disclosed to the court in relation to proceedings for a subsequent offence. However, section 303ZA(3)(e)(ii) of the 1995 Act provides that a work offer shall state that the fact that a work offer has been accepted may be disclosed to the court in any proceedings for an offence committed within the period of two years beginning on the date of acceptance of the offer. These provisions are inconsistent and it is proposed that the relevant date for the start of the 2 year period should be the date of completion of a work order which is when it becomes a final disposal. This would be consistent with the provisions relating to fiscal fines and compensation offers which can be disclosed for two years from the date of acceptance or deemed acceptance as fiscal fines and compensation orders become final at that stage. Suitable provisions will therefore be brought forward.

BENEFIT OF MAKING THE PROPOSED CHANGE

Will improve consistency in the handling of different types of alternatives to prosecution and ensure the court has more complete information before it when dealing with a case.

AMENDMENT OF SUMMARY COMPLAINT TO INCLUDE FAILURE TO APPEAR CHARGE

We propose to permit a complaint in summary proceedings to be amended, prior to trial, to include a charge of failing to appear. In solemn proceedings, section 102A of the Criminal Procedure (Scotland) Act 1995 makes provision that an indictment can be amended at any time before trial to include the offence of failing to appear. Section 27(8) of the same Act makes similar provision for including a bail offence in solemn proceedings in an amended complaint. Equivalent provisions do not exist in relation to bail offences in summary cases or failure to appear in summary cases and we intend to bring forward suitable provisions.

BENEFIT OF MAKING THE PROPOSED CHANGE

Will improve the efficiency of Scotland's courts by removing the need for additional summary complaints which require to be raised by the Procurator Fiscal and dealt with by the court.

ALTERNATIVE VERDICTS REGARDING FRAUD, EMBEZZLEMENT AND BREACH OF TRUST

Paragraph 8 of Schedule 3 to the Criminal Procedure (Scotland) Act 1995 contains provision that enables a court to convict an offender of certain offences involving dishonest appropriation of property notwithstanding the fact that the indictment or summary complaint refers to an alternative offence. These provisions apply where the evidence led would not support conviction on the basis of the offence as charged but would support conviction of the alternative offence. For example, in terms of paragraph 8(2) of Schedule 3 an accused person charged with theft may instead be convicted of reset if the evidence led would not support conviction of theft but would support conviction of reset.

We propose to amend paragraph 8 of Schedule 3 to the Criminal Procedure (Scotland) Act 1995 to provide that where an accused is charged under indictment or on complaint with "breach of trust and embezzlement" he or she may be convicted of fraud. Conversely, if charged with fraud he or she may be convicted instead of "breach of trust and embezzlement".

BENEFIT OF MAKING THE PROPOSED CHANGE

Will increase the flexibility for the court to convict an offender of a suitable alternative verdict if the evidence supports such an alternative verdict.

PROVISION FOR TRANSFER OF PROCEEDINGS BETWEEN JP COURTS

The unification of the summary courts under the administration of the Scottish Court Service is currently being rolled out on a sheriffdom-by-sheriffdom basis using provisions contained within the Criminal Proceedings etc. (Reform) (Scotland) Act 2007. The first two phases of unification are now complete with district courts managed by local authorities replaced by Justice of the Peace courts (JP courts) managed by the Scottish Court Service in the sheriffdoms of Lothian and Borders, and Grampian, Highland and Islands on 10 March 2008 and 2 June 2008 respectively.

In non-unified areas, the district court may sit at various locations in a sheriffdom. The frequency of sittings is determined by the level of business in the area. Where

the district court sits infrequently at a particular location, it is common practice to move cases which require to call before the next sitting to a different location.

Upon unification, JP courts are established by reference to a particular sheriff court district (section 59(3) of the 2007 Act) and are therefore distinct from one another.

Sections 137A – 137C of the Criminal Procedure (Scotland) Act 1995 provide for the transfer of business between sheriff courts. Section 137A provides for the transfer of proceedings to another sheriff court within the sheriffdom. Section 137B provides for the transfer of proceedings to a sheriff court in another sheriffdom either in exceptional circumstances or where proceedings are underway against the accused in the other court. Section 137C provides for the transfer of custody cases to the sheriff court in another sheriffdom where exceptional circumstances have led to an unusually high number of cases calling in the sheriffdom.

We propose that cases should be able to be transferred between JP courts in the same circumstances as specified in the section 137 provisions for sheriff courts.

BENEFIT OF MAKING THE PROPOSED CHANGE

Will make express provision for such transfers and enable more efficient court programming and allow full use to be made of the JP courts.

FAILURE OF AN ACCUSED TO APPEAR ON INDICTMENT

The failure to appear of an accused in solemn proceedings was made a statutory offence by section 102A of the Criminal Procedure (Scotland) Act 1995 (the "1995 Act"), as introduced by section 32 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007. Section 102A also makes provision for the granting of warrants to apprehend for the offence, and the procedure to be followed once an accused is apprehended.

The failure to appear in solemn proceedings usually constitutes a breach of bail conditions, an offence under section 27(7) of the 1995 Act. Section 102A(4)(b) provides that where a warrant has been granted under section 102A(2) for a failure to appear, the court may still grant a warrant on petition in respect of the same failure to appear under section 27(1)(a) or (7) of the 1995 Act. A warrant on petition could be used to commence separate solemn proceedings for the failure to appear.

As section 27(1)(a) relates only to a breach of bail by failing to appear in summary proceedings, a warrant will never be granted for that same failure to appear under section 102A. The relevant provision is section 27(7), which relates to breach of bail by failing to appear in solemn proceedings. We therefore propose that the reference to section 27(1)(a) in section 102A(4)(b) be removed.

BENEFIT OF MAKING THE PROPOSED CHANGE

Removal of an unnecessary reference will improve legislative clarity.

TIME LIMITS FOR LODGING APPEALS AGAINST DECISIONS ON CERTAIN PRELIMINARY MATTERS

Sections 74 and 174 of the Criminal Procedure (Scotland) Act 1995 make provision, in solemn and summary proceedings respectively, for appeals against a decision of the court at a preliminary hearing or first diet, as the case may be. Both sections provide that an appeal is to be lodged no later than two days after the decision.

In order to properly consider the merits of an appeal, parties require, amongst other things, to examine the exact details of the decision. It is often difficult to obtain this information within the two-day time limit. If that deadline passes, parties must use time consuming alternative procedures to ask the court to consider the matter. We therefore intend to extend the limit specified in both provisions to seven days.

BENEFIT OF MAKING THE PROPOSED CHANGE

By enabling both Crown and defence sufficient time to consider and lodge an appeal against a preliminary decision, the efficiency of the summary and solemn courts will be improved.

06: ENSURING OUR COURTS HAVE APPROPRIATE SENTENCING OPTIONS

We propose to take forward a number of reforms to sentencing law and these are summarised in this section.

RECORDING OF RACIAL AND RELIGIOUS HATE CRIME AGGRAVATIONS

Section 96 of the Crime and Disorder Act 1998 provides that when an offence is racially aggravated the court shall, on convicting a person, take the aggravation into account in determining the appropriate sentence.

Section 74 of the Criminal Justice (Scotland) Act 2003 provides that when an offence is religiously aggravated the court shall, on convicting a person, take the aggravation into account in determining the appropriate sentence.

The Offences (Aggravation by Prejudice) (Scotland) Bill (introduced into the Scottish Parliament on 19 May 2008) creates statutory aggravations for offences motivated by hostility or ill will towards a victim based on the victim's actual or perceived sexual orientation, transgender identity or disability. The provisions of the Offences (Aggravation by Prejudice) Scotland Bill require that the court must take the aggravation into account in determining sentence. Where the sentence is different as a result of the aggravation, the court must state and record the extent of, and reasons for, that difference or the reasons for there being no difference. We will provide that where an offender is found guilty of an offence to which racial and religious aggravations apply, the impact of the aggravation on the sentence is stated and recorded in the same way.

BENEFIT OF MAKING THE PROPOSED CHANGE

This will harmonise the application of hate crimes legislation across the statute book and improve the recording of racially and religiously aggravated offences and convictions. It will also ensure that it is made explicit at the point of sentence that racially and religiously aggravated crime will be punished accordingly.

MODIFICATION OF HOW COMPENSATION ORDERS OPERATE

The primary purpose of compensation orders is to give a certain amount of financial compensation back to victims of crime for any personal injury, loss or damage caused directly or indirectly; or alarm or distress caused directly to the victim resulting from that offence or any other offence which is taken into consideration by the court in determining the sentence.

We propose to widen the circumstances in which criminal courts may make

compensation orders. We propose to do this in the following ways:

- Allowing compensation orders to be made in respect of bereavement and the cost of funeral expenses and to make compensation orders available against an offender if they have a traffic accident and are uninsured, including covering the expenses of the preferential insurance rates lost by the victim, if applicable;
- Making it easier for courts to award compensation orders by decoupling them from civil proceedings (where existing legislation allows a compensation order to be discharged or reduced if there is a subsequent civil determination that the amount awarded in the criminal case was too high);
- Allowing the earnings of an offender (contingent on employment on release from custody) to be taken into account when deciding compensation; and
- Allowing courts to review an award of compensation in cases where an offender has had a substantial increase in means.

Sheriffs and stipendiary magistrates currently have powers to impose exceptionally high maximum fines for some offences, which exceed the standard limits set for summary courts. Compensation orders are however currently restricted to standard limits and we intend to remove that restriction.

BENEFIT OF MAKING THE PROPOSED CHANGE

Improving the criminal courts' flexibility to award compensation will help allow victims of crime to achieve greater satisfaction in the criminal courts.

CRIMINAL NON HARASSMENT ORDERS

Section 11 of the Protection from Harassment Act 1997 (the "1997 Act") amends the Criminal Procedure (Scotland) Act 1995, by inserting a new section (section 234A) to allow criminal courts to make Non-Harassment Orders (NHOs) after convicting a person of a criminal offence involving harassment. This section refers back to the definition of harassment contained in section 8 of the 1997 Act (which is concerned with civil NHOs).

Responses to the 2001/2002 consultation on stalking and harassment in Scotland identified a number of issues relating to the usefulness and workability of criminal NHOs. This included the need for prosecutors seeking a criminal NHO to be able to provide evidence of a course of conduct which has amounted to harassment before a judge can even consider the imposition of an NHO.

The effect of this is that there must be evidence on the basis of at least two incidents for which an offence is being prosecuted. The offence must itself involve conduct on at least two separate occasions if, following conviction, an NHO is to be considered. For example, if an offender is charged and prosecuted for one incident of breach of the peace, then proceedings for obtaining an NHO cannot even begin because the offence for which the offender has been convicted does not in itself demonstrate a

course of conduct.

We propose to remove the precondition for a course of conduct amounting to harassment in the consideration of criminal NHOs.

There is also concern at the difficulty in using previous convictions as evidence of a course of conduct or to strengthen a case for a NHO. Information about previous convictions can be invaluable in demonstrating the propensity for an offender to commit crimes of harassment in general or to target the same victim repeatedly. Either way, it would be useful if judges were able see the pertinent details of previous convictions while deliberating on NHOs, rather than simply the list of previous convictions, which is standard practice.

We propose to amend the legislation on criminal NHOs to ensure that courts should have regard to previous convictions and allow judges access to relevant information to assist in deciding whether to impose an NHO.

BENEFIT OF MAKING THE PROPOSED CHANGE

Will make it more straightforward for prosecutors to obtain criminal NHOs against offenders so that victims are protected from further harassment and repeat offending.

INCLUSION OF "SIGNIFICANT SEXUAL ELEMENT" IN CRITERIA FOR IMPOSING EXTENDED SENTENCES

Section 210A of the Criminal Procedure (Scotland) Act 1995 provides the courts with the power to impose additional post release supervision on sex and violent offenders where it considers that additional supervision is necessary to protect the public from serious harm from the offender following release. The maximum extension period is 10 years. Extended sentences may be imposed only in indictment cases and on the imposition of a determinate custodial sentence of 4 years and over for a violent offence. There is no minimum determinate custodial term for sexual offences.

We propose to extend this power to allow the courts, in appropriate circumstances, to impose an extended sentence where a person is convicted of an offence which discloses, in the court's opinion, a significant sexual aspect to the offender's behaviour but which is not otherwise covered by the current definitions of "sexual offence" and "violent offence" in section 210A of the Criminal Procedure (Scotland) Act 1995.

Sentencers are currently unable to impose an extended sentence, for example, in respect of a conviction for a breach of the peace where there was a significant sexual element to the offence. The anomaly of the present situation is also demonstrated by the requirement in section 21 of the Criminal Justice (Scotland) Act 2003, for certain reports to be produced where an offence has a significant sexual element and also by

the possibility that the court may put the person on the "sex offenders' register" by virtue of an offence with a significant sexual aspect under paragraph 60 of Schedule 3 to the Sexual Offences Act 2003.

We propose that the absence of a power to impose an extended sentence where the court considers there was a significant sexual element to the offender's behaviour requires to be remedied and we will bring forward renewal provisions.

BENEFIT OF MAKING THE PROPOSED CHANGE

Will provide an additional power to allow courts to impose an extended sentence on offences which disclose a significant sexual aspect to the offender's behaviour. This will plug a gap in existing legislation and add to public protection.

SEXUAL OFFENCES PREVENTION ORDERS (SOPOs)

A Sexual Offences Prevention Order (SOPO) is a civil preventative order designed to protect the public from serious sexual harm. They were introduced in the Sexual Offences Act 2003 (the "2003 Act") as a replacement, with some amendments, to sex offender orders.

A SOPO imposes prohibitions on a person who poses a risk of serious sexual harm. A SOPO could, for example, be used to prohibit a sex offender from being alone with children under the age of 16 and from loitering outside school playgrounds where his behaviour suggests that he is likely to re-offend. The granting of a SOPO makes the offender subject to the notification requirements set out in Part 2 of the 2003 Act. Breach of the prohibitions provided by a SOPO is punishable by a maximum of 5 years imprisonment.

Under existing arrangements, SOPOs can be imposed in the Scottish courts as set out in Part 2 of the 2003 Act. There are two ways to proceed; first, the court itself can make an order when dealing with a "defendant" for a range of specified offences. Second, the chief constable may make a summary application to the sheriff for the imposition of an order. It is proposed to widen the application process, so that in addition to the existing power of the court to make an order, a power would be given to the prosecutor to apply for a SOPO to be imposed at the point where he moves for sentence.

In reviewing the implementation of the 2003 Act, an anomaly in the law has been identified relating to the thresholds which apply in certain circumstances before a SOPO may be made. An offender who has been convicted of a sexual offence listed in Schedule 3 which is subject to age or sentence thresholds may not be made subject to a SOPO where the age or sentence thresholds are not satisfied. In contrast under paragraph 60 of Schedule 3 an offender who commits an offence which is not sexual in nature but which has a significant sexual aspect to his behaviour may be made subject to a SOPO.

We propose to disapply the age and sentence thresholds for the purposes of the making of a SOPO in respect of any person. This issue was very recently addressed for England, Wales and Northern Ireland by the Criminal Justice and Immigration Act 2008. The change will provide the court with the discretion to impose a SOPO in all cases where there is evidence of a real risk of serious sexual harm.

We intend to expand the content of the SOPO to allow for appropriate restrictions and obligations/requirements (e.g. a requirement to produce documentation or provide information) to be set. This would place greater responsibility on offenders to comply with certain conditions, as opposed to simply being subject to a particular prohibition.

Some other minor inconsistencies in the 2003 Act will also be addressed.

BENEFIT OF MAKING THE PROPOSED CHANGE

Will ensure a robust criminal law in respect of the operation of SOPOs.

ALCOHOL NOT BEING A MITIGATING FACTOR FOR OFFENDING

We are concerned that voluntary intoxication by alcohol is often presented to the courts as an excuse for offending behaviour with the aim of reducing a sentence. We know that this concerns a great many people in Scotland – particularly in relation to violent crime. The recent consultation paper, "Changing Scotland's Relationship with Alcohol" set out that in 2006-07 it cost the criminal justice and emergency services £385 million to deal with the effects of alcohol misuse. A survey by the Scottish Prison Service found that almost half of those serving a custodial sentence said that they were drunk at the time of the offence. There is also evidence from Strathclyde Police that of the 5,000 prisoners processed by one Glasgow police station in 2006-07, over 60% were under the influence of alcohol or drugs. The same study revealed that two-thirds of those detained for violence were under the influence of alcohol at the time they committed their offence.

To make clear that being under the influence of alcohol cannot be an excuse for offending behaviour, we propose to enshrine in statute that the commission of an offence while voluntarily under the influence of alcohol should not be considered as a mitigating factor by the courts when sentencing an offender.

A consultation paper outlining the detail of our proposals was published on 1 September 2008.

Relevant weblinks

Scottish Government consultation on the creation of a Scottish Sentencing Council – September 2008

http://www.scotland.gov.uk/Publications/2008/08/29100017/0

Changing Scotland's Relationship with Alcohol – June 2008

http://www.scotland.gov.uk/Publications/2008/06/16084348/0

BENEFIT OF MAKING THE PROPOSED CHANGE

Will confirm in law that voluntary intoxication cannot be presented in court as a mitigating factor in relation to sentencing. This will help send the message that the criminal justice system will not tolerate the excuse of being drunk to be used in mitigation of a sentence.

EARLY REMOVAL OF PRISONERS FROM SCOTLAND

We intend to increase the range of options for the early removal of foreign national prisoners held in Scotland.

While "domestic" prisoners can be placed on Home Detention Curfew and curfewed to their home address, foreign prisoners are often either subject to deportation on release, or have no address in Scotland to which they can be curfewed, and have to remain in prison until they reach the point at which they are automatically released. We intend to expand the range of options available by bringing forward provisions that will give Scottish Ministers discretionary powers to release early a prisoner, subject to the requirement that they are liable for removal from the UK or have the settled intention of residing permanently outside the United Kingdom once removed from prison. This will mirror a scheme that already exists in England and Wales for prisoners liable for removal from the UK, which is being expanded by the Criminal Justice & Immigration Act 2008.

BENEFIT OF MAKING THE PROPOSED CHANGE

Will remove criminals from the country who wish to leave when coming towards the end of their custodial sentence thus freeing up valuable prison resources.

07: MODERNISING OUR LICENSING LAW

We propose to take forward a number of changes to the law on licensing and these are detailed below.

SETTING OUT OUR STRATEGIC APPROACH TO TACKLING ALCOHOL MISUSE
Subject to the outcome of our alcohol strategy discussion paper, which outlines a comprehensive package of measures aimed at reducing alcohol-harm in Scotland, we may opt to include proposals in the Criminal Justice and Licensing Bill. Relevant weblinks Scottish Government's "Setting out our Strategic Approach to Tackling Alcohol Misuse" consultation paper – June 2008 http://www.scotland.gov.uk/Publications/2008/06/16084348/0
BENEFIT OF MAKING THE PROPOSED CHANGE Will support our plans to tackle alcohol misuse in Scotland.

"FIT AND PROPER PERSON" TEST - LICENSING (SCOTLAND) ACT 2005
The Licensing (Scotland) Act 2005 (the "2005 Act") will replace the Licensing (Scotland) Act 1976 in its entirety. The 2005 Act and the new licences under it come fully into force on 1 September 2009 at the end of a transition period that began in February 2008. It replaces the 1976 Act's system of separate licences for pubs, restaurants &c with a single all-purpose premises licence and a personal licence. An issue of concern that has been raised with the way the 2005 Act will work is the restricted ability of the police to comment on applications for premises and personal licences. Under the 1976 Act, various "competent objectors", including the chief constable, may object to the grant, renewal or transfer of a licence. Objections must be relevant to the grounds, as set out in section 17, on which the Board may refuse to grant a licence. These grounds include that the applicant (or connected persons) are not a "fit and proper person" to be the holder of a licence. Section 16A also permits the chief constable to submit "observations", again relevant to the grounds in section 17. The 2005 Act takes a different approach. Section 22 allows any person to object to an application for a premises licence, but subsection (2) limits the chief constable so that he can only object on the ground that he has reason to believe that the applicant

is involved in serious organised crime and that refusal of the application is necessary for the purpose of the crime prevention objective (in section 4(2)). The chief constable also has a role, under section 21, of providing antisocial behaviour reports and a notice relating to convictions for relevant or foreign offences.

We propose to amend the 2005 Act to enhance the police role. We do not propose to reintroduce a "fit and proper person" test as such, but rather to work within the existing framework of the 2005 Act to ensure that the police have appropriate powers and suitable provisions will be included in the Criminal Justice and Licensing Bill.

BENEFIT OF MAKING THE PROPOSED CHANGE

Will ensure the police are able to bring a wider range of information to the attention of the Licensing Board at the time of application.

IMPROVEMENTS TO LICENSING LAWS - CIVIC GOVERNMENT (SCOTLAND) ACT 1982

A Task Group was set up by the previous administration to review the licensing provisions contained in the Civic Government (Scotland) Act 1982 (the "1982 Act"). The Group reported in December 2004 and made a number of recommendations for reform.

The then Scottish Executive responded to the report in August 2005 agreeing with the broad thrust of the recommendations, but indicated that those requiring primary legislation would be for a new administration to introduce following the 2007 elections, in light of competing priorities. We will take forward the relevant recommendations within the Criminal Justice and Licensing Bill.

The Task Group report's recommendations cover the general licensing provisions of the 1982 Act, and include specific provisions on metal dealers, market operators, public entertainment and late hours catering, taxis and private hire cars. The amendments to the 1982 Act will be largely of a technical nature affecting procedural aspects of the current licensing regime though some of the amendments contain deregulatory measures. We will take forward the relevant recommendations made in the Task Group report by making the following changes.

<u>Standard conditions attached to deemed grants</u>

Where the authority has failed to reach a final decision on a grant application before the expiry of the statutory period under the 1982 Act, the licence is statutorily deemed to have been granted unconditionally on the date of expiry and remains in force for one year. We intend to take forward the recommendation that the existing "deemed grant" provisions should be retained, but the Act should be amended to permit the application of standard conditions to any such licence.

Right of entry and inspection for police civilian staff

We intend to take forward the recommendation that the rights of entry and inspection in relation to constables under the 1982 Act for specified purposes (such as checking compliance with the terms of the licence), should be extended to include civilian staff employed by the police under the provisions of section 9 of the Police (Scotland) Act 1967.

Display of licences

We intend to take forward the recommendation, in the interests of public safety, to amend the Act to make it a mandatory condition of a licence that the licence (or a copy) be displayed on premises, vehicles (or a plate) and vessels, and where this is not practical for the licence to be carried at all times by the day-to-day manager. In the case of other activities (such as window cleaners) it was further recommended that individuals should be required to carry the licence (or a copy) on their person unless the licensing authority, under its discretionary powers, has made it a condition of licence that an identification badge be displayed or shown on demand.

Representations, hearings and renewed applications

We intend to take forward the recommendation to make a number of amendments to Schedules to the 1982 Act, which include, extending the time allowed for making representations on any application for the grant or renewal of a licence from 21 days to 28 days, increasing the period of notice which licensing authorities must give for attendance at a hearing from 7 days to 14 days, and allow licensing authorities to consider licence renewal applications received after the expiry date as renewals rather than applications for a new licence for up to 28 days after the expiry of the previous licence.

Metal Dealers

We intend to take forward the recommendation that, given the decrease in metal dealing activity over the last 20 years, the current mandatory licensing scheme for metal dealers should be replaced with an optional licensing scheme, i.e. it would be open to local licensing authorities to determine whether or not a licence is required in its area.

Public Entertainment

We propose to implement the recommendation that the 1982 Act be amended to remove the existing exemption for free events. This recognised that it is unsatisfactory that authorities are not able to control large scale public entertainments that are free to enter. It noted that authorities may not wish to license certain types of free event, such as gala days and school fetes, but considered that the decision on whether to license these events should rest with the authority.

Late Hours Catering

We will take forward the recommendation that the part of the 1982 Act covering late hours catering should be extended to ensure that licensing authorities have the

power to license any premises selling food or drink at late hours. The report states that "the principal justification for licensing such premises related to the potential for large numbers of people leaving pubs, night clubs etc. late at night to cause a disturbance, and that this potential exists regardless of whether the food or drink being sold has been cooked or pre-prepared in any way". As such, we consider that licensing authorities should have the option of licensing all such premises if they consider it necessary to do so.

Taxi fares – notification of decision on taxi fare scales or review

Section 17(3) of the 1982 Act states:

"Before fixing any scales or carrying out any review under this section the licensing authority shall-

(a) consult with persons or organisations appearing to them to be, or be representative of, the operators of taxis operating within their area; and

(b) give notice of their intention by advertisement in a newspaper circulating in their area stating-

(i) the general effect of the proposals and the date when they propose that their decision will take effect; and

(ii) that any person may lodge representations in writing with respect to the proposals within a period of one month after the date of first publication of the notice; and

(c) consider any such representations duly lodged with them".

The intention of the 1982 Act was that a licensing authority should before (1) fixing any scales or (2) carrying out any review of scales consult with those persons or organisations referred to at section 17(3)(a) and give notice of their intention to fix scales or undertake a review in the manner prescribed at 17(3)(b). We are aware that some authorities are unclear about the provisions with regard to the need for consultation and we propose to bring forward provisions to clarify that consultation should be undertaken both when fixing any taxi scales or when undertaking a review of taxi scales.

Section 17(4) of the 1982 Act provides that where a licensing authority fix any scale or carry out any review they shall forthwith give notice in writing of their decision to such persons and organisations as were consulted under terms of subsection 17(3)(a) of the 1982 Act and informing them of the general effect of section 18(1) which advises of right to appeal.

It has been noted during consideration of the Task Group report that the wording of section 17(4) in providing for only notification to those persons and organisations consulted by an authority in terms of section 17(3)(a) results in a number of people with a legitimate interest being uninformed of a council's decision and thus their right of appeal under section 18(1).

Section 18(1) provides a right of appeal to "any person who operates a taxi in an area for which scales have been fixed or in respect of which a review has been carried out under section 17 of this Act". We therefore intend to provide that an authority should notify taxi operators in their area in addition to those representative persons or organisations consulted under section 17(3)(a).

Taxi fares –timescale for local authority review of taxi fares

Section 17(2) of the 1982 Act states:

"It shall be the duty of the licensing authority to fix from time to time scales for the fares and other charges mentioned in subsection (1) above and to review these scales at intervals not exceeding 18 months from the date on which the scales came into effect (whether proceeding upon a review under this section or not)".

The intention of the 1982 Act was that reviews under section 17(2) should be completed within the prescribed 18 month period and this was reflected in guidance issued in Scottish Development Department Circular 25/1986. Some authorities are interpreting the present legislation as providing that a fare scale review need only be commenced within the prescribed 18 month period, rather than commenced and completed within the 18 month period. In order to clarify this issue, we propose to bring forward provisions to make clear that taxi fare scale reviews should be commenced and completed within the 18 month prescribed period.

Taxi fare appeals – right of appeal

Section 18(1) of the Civic Government (Scotland) Act 1982 provides a right of appeal to "*any person who operates a taxi in an area for which scales have been fixed or in respect of which a review has been carried out under section 17 of this Act*".

The Task Group noted that the Traffic Commissioner for the Scottish Traffic Area had proposed that section 18(1) be amended to provide that "representative bodies" as well as individual taxi operators should have the right to submit an appeal in connection with taxi fare scales set by a licensing authority.

Section 17(3) as drafted provides that an authority consult with representative individuals or organisations before fixing any taxi fare scales or undertaking a review and subsequently notify these bodies under section 17(4) as to their decision and the general effect of section 18(1). In these circumstances it seems appropriate that the general appeal provisions under section 18(1) should apply to representative bodies or individuals. Consultation responses showed broad support for this amendment.

We therefore intend that provisions be brought forward to extend the right of appeal to include bodies or individuals representative of operators of taxis operating in the council area.

Taxi and private hire car driving licences – condition of eligibility

Section 13(3) of the Civic Government (Scotland) Act 1982 states that:

"a licensing authority shall not grant a licence to any person under this section unless that person has held, during any continuous period of 12 months prior to the date of his application, a licence authorising him to drive a motor car."

The Task Group took the view that the provisions as currently worded allowed a driving licence to be provided where an applicant had held a driving licence for any

continuous 12 month period prior to submission of their application for a taxi or private hire car driver's licence. The Task Group recommended that provisions be brought forward that require an applicant for a taxi or private hire car driver's licence to have held a driver's licence for the 12 month period immediately prior to their application. Consultation responses on this issue confirmed that there was confusion over interpretation of the present provisions and showed significant support for the amendment proposed. We will bring forward suitable provisions.

Taxi fares –timescale for notification of interested parties

Section 17(5) of the 1982 Act provides for notification of the council's decision on a fare scale or fare scale review to be given to interested parties not later than 5 days after the relevant decision.

During its review of this section the Task Group considered that the prescribed timetable for undertaking this procedure was unnecessarily tight, particularly if broken by a weekend and/or public holiday and suggested that the prescribed notification period be extended to 7 days. The Task Group's proposal received almost unanimous support in consultee responses and we propose to bring forward suitable provisions.

Relevant weblinks

A Report by the Task Group Set Up to Review the Licensing Provisions Contained in the Civic Government (Scotland) Act 1982 – December 2004

http://www.scotland.gov.uk/Publications/2004/12/20391/48542

Scottish Executive response to Task Group Report – August 2005

http://www.scotland.gov.uk/News/Releases/2005/08/02134157

BENEFIT OF MAKING THE PROPOSED CHANGE

Will help tidy up the law.

"CLOSURE ORDERS" - LICENSING (SCOTLAND) ACT 2005

The Licensing (Scotland) Act 2005 contains a definition of "senior police officer" as being a constable of or above the rank of superintendent.

We agree with the suggestion of ACPOS that the current definition of senior police officer will make it difficult to arrange emergency closure orders. This is as a result of the way in which town and city centre policing is normally carried out, where the most senior officer on duty may well be an Inspector or Chief Inspector. As the

essence of the emergency closure order is that closure of the premises is necessary in the interests of public safety and that the risk to public safety is such that it is necessary to do so immediately and without making an application to the Licensing Board, it would cause practical problems if a more senior officer had to be found to make the order. We therefore propose that the definition of "senior police officer" in relation to closure orders is adjusted so that it means an officer of the rank of Inspector or above. In order to ensure consistency and avoid confusion the change will apply to all closure orders.

BENEFIT OF MAKING THE PROPOSED CHANGE

While maintaining the need for a senior officer to take decisions about prohibiting the sale of alcohol these changes will accord better with the practicalities of day to day policing by making the rank of officer required to take these decisions more appropriate.

NOTIFICATION OF APPLICATIONS AND SUBMISSION OF ANTISOCIAL BEHAVIOUR REPORTS - LICENSING (SCOTLAND) ACT 2005

The Licensing (Scotland) Act 2005 (the "2005 Act") requires Licensing Boards to provide notification of an application to a wide range of interested parties. These are as follows:

- Each person having a notifiable interest in neighbouring land;
- Any community council within whose area the premises are situated;
- The council within whose area the premises are situated (except where the council is the applicant);
- The appropriate Chief Constable; and
- And the enforcing authority within the meaning of section 61 of the Fire (Scotland) Act 2005 (asp 5) in respect of the premises.

The 2005 Act also required that a copy of the application must also be sent to these parties along with notice of the application. A further requirement of the Act is that a duty was placed on Chief Constables to provide within 21 days a report detailing all cases of antisocial behaviour identified within the relevant period by constables as having taken place on, or in the vicinity of, the premises, and all complaints or other representations made within the relevant period to constables concerning antisocial behaviour on, or in the vicinity of, the premises.

As consideration was given to the implementation of the 2005 Act, it was considered these procedures were too onerous. Using regulatory powers, Scottish Ministers made transitional modifications that reduced the need to send a copy of the application to all interested parties so that only the relevant Chief Constable must be sent a copy of the application and reduced the requirement for the Chief Constable to provide a report on antisocial behaviour to only where the Board specifically requests it, or where it is a new application. Of course, the Chief Constable can make a report

where he/she considers it necessary.

Boards and police agree that this has been successful, and we therefore intend to place these modifications on a permanent statutory footing through amendments to the 2005 Act.

Relevant weblinks

The Licensing (Transitional and Savings Provisions) (Scotland) Order 2007

http://www.opsi.gov.uk/legislation/scotland/ssi2007/pdf/ssi_20070454_en.pdf

BENEFIT OF MAKING THE PROPOSED CHANGE

Gives permanent effect to useful transitional arrangements that have assisted in reducing burdensome notification and reporting requirements on the police.

APPLICATION FOR A PERSONAL LICENCE: OFFENCE TO HOLD 2 PERSONAL LICENCES - LICENSING (SCOTLAND) ACT 2005

We propose an amendment to allow the Licensing Board to refuse to process or issue a personal licence if the applicant already held a valid personal licence. It would also make it an offence to apply for a second personal licence under the Licensing (Scotland) Act 2005 if the applicant already held a personal licence.

BENEFIT OF MAKING THE PROPOSED CHANGE

Clarifies the law on applying for second licences.

MODIFICATION OF LAYOUT PLANS - LICENSING (SCOTLAND) ACT 2005

Section 20(1) of the Licensing (Scotland) Act 2005 provides that an application may be made to a Licensing Board for a premises license. Section 20(2) then provides that an application must be accompanied by (amongst other things) an operating plan for the subject premises and a layout plan, in the prescribed form, of the subject premises.

Section 23(7) then provides that where the Licensing Board considers that they would refuse the application as made, but if a modification proposed by them were made to the operating plan for the subject premises accompanying the application,

they would be able to grant the application, the Board must, if the applicant accepts the proposed modification, grant the application as modified.

The effect of section 23(7) appears to be that the Board has no power to modify the layout plan. It must therefore either grant the application as it stands or reject it.

We consider this an unnecessarily restrictive position and we therefore intend to allow the Board to propose a modification to the layout plan as one of the options open to them.

BENEFIT OF MAKING THE PROPOSED CHANGE

Improve the flexibility of the licensing system.

FAST TRACK FOR OCCASIONAL LICENCES - LICENSING (SCOTLAND) ACT 2005

When compared to the regime implemented by section 33 of the Licensing (Scotland) Act 1976 (the "1976 Act"), it has been suggested that the length of time it could take to progress an occasional licence application under the terms of the Licensing (Scotland) Act 2005 (the "2005 Act") could be excessive. The 1976 Act set no statutory time periods for determining an application, leaving such matters to local Licensing Boards and whatever arrangements they had with their local Police Forces.

We intend to make provision for a fast track occasional licence. We propose that the Licensing Board Clerk should be able, in certain circumstances to expedite an application. A Licensing Board or a delegated part of the Licensing Board should be able to decide if an occasional licence application should be fast tracked. It should then be for the Licensing Board to decide the procedures for processing the application. Licensing Boards should be required to forward a copy of the application to the Police and the Licensing Standards Officer; however they would not necessarily have the statutory 21 days within which to reply. If the Board decides not to hold a hearing the Licensing Board must nevertheless ensure the applicant is given an opportunity to "comment" on a refusal recommendation by the Chief Constable, a licensing standards officer report or an objection or representation as in section 59 of the 2005 Act.

BENEFIT OF MAKING THE PROPOSED CHANGE

Will allow the fast tracking of some occasional licences where there is very limited notice of the need for such a licence eg. a funeral.

EXTENDED HOURS APPLICATION - LICENSING (SCOTLAND) ACT 2005

Under section 68 of the Licensing (Scotland) Act 2005, an extended hours application can only be made by a person who already holds a premises licence. The Licensing Board can approve or refuse the application depending on whether they consider that the application is appropriate in accordance with the Act. Sections 68 to 70 do not make provision for the application being granted subject to conditions.

We believe there is a valid case for licensing boards to be able to attach additional conditions when granting extended hours applications. For example where a licensed premises has listed one of its activities as showing televised sport, a Licensing Board may see no reason to impose specific conditions. However if there was a request for extended hours to enable the screening of certain football matches during a major competition (for example the World Cup), the Licensing Board may wish to see additional conditions applied to the premises, e.g. extra door staff and the use of plastic glasses while those extended hours apply (and earlier in the day). We intend to bring forward amendments to permit this.

BENEFIT OF MAKING THE PROPOSED CHANGE

To allow flexibility to Licensing Boards so that they may impose additional conditions when granting extended hours applications.

08: OTHER REFORMS

We plan a number of other legislative changes and these are detailed in this section.

SHARING OF INFORMATION BY PUBLIC AUTHORITIES WITH ANTI-FRAUD ORGANISATIONS
The Serious Crime Act 2007 ("the 2007 Act") contains provisions that will enable public authorities to share information with each other and with anti-fraud organisations to help prevent and detect fraud. However, these provisions do not have effect in Scotland for those public authorities who deal with devolved matters. We will bring forward provisions that will extend the operation of the 2007 Act to cover all of Scotland's public authorities, regardless of whether they operate in a reserved or a devolved area. Relevant weblinks http://www.opsi.gov.uk/acts/acts2007/ukpga_20070027_en_6#pt3-ch1-pb1-l1g68
BENEFIT OF MAKING THE PROPOSED CHANGE
Will allow Scottish public authorities to play a leading role in tackling fraud by sharing information with each other to detect fraudulent activity.

DATA MATCHING BY AUDIT SCOTLAND AS PART OF NATIONAL FRAUD INITIATIVE
The Serious Crime Act 2007 ("the 2007 Act") contains provisions that will place the National Fraud Initiative on a statutory footing in England, Wales and Northern Ireland. The National Fraud Initiative is a data matching exercise conducted for the purpose of assisting in the prevention and detection of fraud. Section 73 (and schedule 7) of the 2007 Act contains the statutory framework within which data can be matched, but this section does not have effect in Scotland. The National Fraud Initiative already operates on a non-statutory basis and has identified around £37m of fraud and error in Scotland and led to over 75 prosecutions We propose to change this position and bring forward provisions that will broadly replicate the 2007 Act provisions for Scotland. We propose that Audit Scotland will be given the power to conduct data matching exercises on its own accord, or to arrange for such exercises to be conducted on its behalf. Relevant weblinks

Section 73 and Schedule 7 to the Serious Crime Act 2007

http://www.opsi.gov.uk/acts/acts2007/ukpga_20070027_en_6#pt3-ch1-pb2-l1g73

http://www.opsi.gov.uk/acts/acts2007/ukpga_20070027_en_14#sch7

Audit Scotland information on the National Fraud Initiative

http://www.audit-scotland.gov.uk/work/nfi.php

http://www.audit-scotland.gov.uk/docs/central/2008/nr_080515_national_fraud_initiative_pr.pdf

BENEFIT OF MAKING THE PROPOSED CHANGE

Will allow Audit Scotland to continue their efforts to match data to prevent and detect fraud in the public sector.

COMPENSATION FOR MISCARRIAGES OF JUSTICE

We operate two schemes for the payment of compensation as a result of a miscarriage of justice: the statutory scheme under section 133 of the Criminal Justice Act 1988 ("the 1988 Act") and the *ex gratia* scheme.

Section 133 of the 1988 Act requires the Scottish Ministers to pay compensation for a miscarriage of justice in certain circumstances. This statutory scheme allows compensation to be payable when a conviction has been "reversed" by the High Court on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice.

In addition to the statutory scheme, there also operates an *ex gratia* scheme. This allows compensation to be paid to individuals who have spent a period in custody following wrongful conviction or charge if that wrongful conviction or charge resulted from "serious default on the part of a member of a police force or of some other public authority". Compensation may also be paid in "exceptional circumstances that justify compensation in cases outside these categories". Compensation is not paid however merely because at the trial or on appeal the prosecution was unable to sustain the burden of proof beyond reasonable doubt.

The terms of the *ex gratia* scheme were set out in a Parliamentary statement from the then Secretary of State for Scotland, Malcolm Rifkind, on 23 January 1986. The terms of the statement were as follows:

> "I [the Secretary of State] will be prepared to pay compensation to people who .... have spent a period in custody following wrongful conviction or charge,

where I am satisfied that this has resulted from serious default on the part of a member of the police force or some other public authority; and there may be exceptional circumstances that justify compensation in these cases outside these categories. I will not, however, be prepared to pay compensation simply because at the trial or on appeal the prosecution was unable to sustain the burden of proof beyond reasonable doubt in relation to the specific charge that was brought."

No changes are planned to the terms of the *ex gratia* scheme, but we intend to place this *ex gratia* scheme on a statutory footing in the Criminal Justice and Licensing Bill.

Schedule 12 to the 1988 Act contains a reference to the Criminal Injuries Compensation Board. This is a redundant provision as the Criminal Injuries Compensation Board no longer exists and we intend to repeal this reference.

Section 133 of the 1988 Act currently allows for compensation to be paid when an individual has been convicted of a criminal offence and subsequently has had that conviction reversed or they are pardoned. The condition that has to be met is that the reversal or pardon is on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice.

However, section 188 of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") allows for a conviction and sentence or both to be set aside by way of a minute without an appeal being heard. We intend to amend section 133 of the 1988 Act in order to allow someone who has had their conviction set aside by way of section 188(1)(b) of the 1995 Act to receive compensation.

Section 133(6) of the 1988 Act states that *"...for the purposes of this section a person suffers punishment as a result of a conviction when sentence is passed on him for the offence of which he was convicted."* Section 228 and section 246 of the 1995 Act however allow the court to impose a probation order or order absolute discharge instead of a sentence.

As neither section 228 or section 246 of the 1995 Act are sentences, section 133(6) of the 1988 Act would not recognise the person as having been punished, there is still the possibility of reputational harm arising from the conviction.

We intend to include provisions that will make sure convictions resulting in a probation order or absolute discharge can be taken into account for the purpose of section 133 of the 1988 Act.

BENEFIT OF MAKING THE PROPOSED CHANGE

Establishing a simple statutory scheme that covers all possible scenarios where compensation may be paid will lead to more efficient and effective consideration of claims for compensation arising out of miscarriages of justice. The other changes will tidy the law in this area and ensure there are no gaps in the legislation.

GIVING THE SCOTTISH CRIMINAL CASES REVIEW COMMISSION (SCCRC) THE POWER TO REQUEST INTERNATIONAL CO-OPERATION

The Crime (International Co-operation) Act 2003 (the "2003 Act") enabled the United Kingdom to ratify the 2000 Convention on Mutual Assistance in Criminal Matters between member states of the European Union.

The 2003 Act was limited in scope to implementation of international obligations. It did not extend Mutual Legal Assistance powers to the Criminal Cases Review Commission, and the Scottish Criminal Cases Review Commission (SCCRC).

In the absence of such a power, the SCCRC have faced problems in securing co-operation from overseas. While it is anticipated that there can be no guarantee that outgoing requests from the SCCRC would be subsequently executed by all countries, it is the case that many have confirmed that they would be able and willing to assist on the receipt of a mutual legal assistance request.

We propose to amend section 7 of the 2003 Act to give the SCCRC a power to allow them to apply to a judicial authority to request mutual legal assistance from other Member States of the European Union.

BENEFIT OF MAKING THE PROPOSED CHANGE

Improving the powers of the SCCRC to investigate alleged miscarriages of justice.

REPEAL OF PARLIAMENTARY REPORTING REQUIREMENT IN CRIMINAL JUSTICE (TERRORISM AND CONSPIRACY) ACT 1998

The Criminal Justice (Terrorism and Conspiracy) Act 1998 (the "1998 Act") was introduced as emergency legislation following the Omagh bombing. The Act contained a package of measures designed to tackle terrorism.

Section 8 of the 1998 Act introduced the requirement for a statutory report on the working of the Act to be laid before both Houses of Parliament not less than once a year. Section 121 of the Scotland Act 1998 widened these reporting arrangements so that the requirement to lay the report became a requirement to lay the report in the Scottish Parliament also.

The UK Government considers this part of the Act to be redundant and this section will soon be repealed for England, Wales and Northern Ireland by the Criminal Justice and Immigration Act 2008. The reporting requirements to Parliament on the operation of terrorism provisions is now provided for by section 36 of the Terrorism Act 2006. The majority of provisions, including section 36, of this Act apply on a UK

wide basis.

We therefore propose to repeal section 8 of the 1998 Act as it applies to Scotland as reporting requirements are covered by section 36 of the Terrorism Act 2006.

BENEFIT OF MAKING THE PROPOSED CHANGE

A tidying up of the law, reducing the risk of confusion and error.

AMENDMENTS TO THE POLICE ACT 1997

Scottish Minsters are able to carry out criminal record checks for employment and other purposes under Part 5 of the Police Act 1997 (the "1997 Act"). In practice, this work is carried out by Disclosure Scotland. In doing these checks, Disclosure Scotland check 2 central records – the Scottish Criminal History System and the Police National Computer.

Following on from recent improvements within the EU with regard to the sharing of information about criminal convictions for criminal justice purposes, there has been pressure for access to be obtained to the same information for employment checking purposes. A draft European Union Framework Decision (EUFD) was published on 30 May 2008 that would, if agreed, lead to a European Criminal Records Information System (ECRIS) that would help deliver the electronic exchange of information sharing for criminal justice purposes which could be extended into employment checking.

We are keen to gather relevant information from as many sources as possible where that information would be helpful for an employer or for criminal justice agencies. There is a gap in that EU citizens living and working in Scotland (in both paid and/or unpaid posts) are less rigorously checked than UK citizens. This is because Disclosure Scotland does not currently have access to conviction information from other Member States about their citizens who live and work in Scotland. Though discussion of the EUFD is at a very early stage and agreement cannot be assumed at this time, preparation should be made for the potential implementation of the EUFD.

We propose that Scottish Ministers should take an order making power to amend the meaning of certain definitions in the 1997 Act that will allow Scottish Ministers to make a quicker response as and when new sources of information become available. Notwithstanding this draft EUFD, there is nothing within it that prevents bi-lateral agreements being put in place between Member States or indeed other jurisdictions around the world that are willing to share information with Scottish Ministers and therefore this order making power may be used even if the EUFD does not come to fruition.

Scottish Ministers currently charge a one-off fee for registration under section 120 of the 1997 Act and a separate one-off fee for nominees of the registered person. Both

groups will have a role once the Protection of Vulnerable Groups (Scotland) Act 2007 is commenced. Once this Act is in force, we intend to offer new services to the registered persons. The new services will come at an additional cost and we wish to ensure that there is sufficient flexibility in the 1997 Act to recoup those costs. Therefore, we propose to amend the power in section 120ZB of the Police Act 1997 to enable Scottish Ministers to make further provision about registration of registered persons, in so far as it relates to making provision regarding the payment fees to provide greater flexibility in the fee charging powers.

BENEFIT OF MAKING THE PROPOSED CHANGE

Will allow Scottish Ministers to make a quicker legislative response as and when new sources of information become available. The wider power will ensure flexibility in the fee charging structure which will assist Ministers to make the system self-funding with a more structured fee system helping ensure efficiency by providing an incentive to registered persons to keep their accounts up to date by removing nominees that are no longer needed.

OPERATION OF PUBLIC DEFENCE SOLICITORS' OFFICES (PDSOs)

The Public Defence Solicitors' Office (PDSO) was originally established in 1997 in order to test the feasibility of providing criminal legal assistance through solicitors directly employed by the Scottish Legal Aid Board. The legislation was subsequently amended to allow the feasibility study to continue after 1 October 2003.

We propose to put the PDSO on a more solid statutory footing to enable it to provide criminal legal advice, assistance and representation as a matter of course rather than for the purposes of the feasibility study.

BENEFIT OF MAKING THE PROPOSED CHANGE

To enhance public confidence in PDSO and to assist in the recruitment and retention of its staff by establishing that the PDSO is to provide criminal legal assistance in the future (and is no longer simply to provide criminal legal assistance for the purpose of a feasibility study).

PROVIDE FOR POWER TO GIVE GRANTS TO ORGANISATIONS THAT SUPPORT VICTIMS OF CRIME

At present, grants to organisations providing support to victims of crime are generally made under section 10 of the Social Work (Scotland) Act 1968. This is usually sufficient, but it does limit grants to national organisations or to innovative

projects and excludes grants to local authorities. There are occasions where more flexibility would be helpful, such as:-

- Payments to a local authority when it is providing services to victims. Victims of human trafficking often need emergency support once they are recovered. That support is sometimes provided by local authorities in the absence of any other provider, but if the victim has no recourse to public funds the local authority would not be able to support the victims unless funded by central government;

- Support for local organisations if they meet a particular need, such as support for victims of murder in areas where murder is particularly prevalent; and

- Allowing initiatives such as that being developed in England and Wales where the Ministry of Justice allows Victim Support (the equivalent in England and Wales of Victim Support Scotland) to make small payments to victims in certain circumstances.

We propose to give Scottish Ministers the power to allow grants in a wider range of circumstances than is currently possible. The examples above only show potential uses of a wider power to make grants to organisations that support victims and witnesses. Decisions to support any particular initiative would be taken on a case by case basis.

BENEFIT OF MAKING THE PROPOSED CHANGE

Will help ensure funding can be given to a range of organisations that provide different types of support to victims of crime or to witnesses.

EXTENDING PART 1 OF THE VULNERABLE WITNESSES (SCOTLAND) ACT 2004

Part 1 of the Vulnerable Witnesses (Scotland) Act 2004 (the "2004 Act") substitutes new sections 271-271M into the Criminal Procedure (Scotland) Act 1995 (the "1995 Act"). Section 271(1) details the category of people to whom the provisions apply, namely people who are to give evidence at or for the purposes of a trial. It then provides a definition of the term 'vulnerable' and lists factors to be considered in determining whether a witness is vulnerable.

Sections 271A–271M set out what the special measures are to help such people give their evidence and the procedures for applying for these.

Currently, the provisions are restricted to evidence given in trials or for the purpose of a trial. We propose to extend these provisions so that they cover all hearings where a witness could be called to give evidence. This will include hearings such as proofs in mitigation and appeal proceedings.

BENEFIT OF MAKING THE PROPOSED CHANGE

The proposed amendments to the 1995 Act should ensure that the provisions of Part 1 of the 2004 Act will benefit witnesses who are called to give evidence in criminal proceedings other than trials.

RIGHT FOR PROSECUTORS TO APPLY FOR A FINANCIAL REPORTING ORDER

Section 77 of the Serious Organised Crime and Police Act 2005 made provision in Scotland to allow the courts to impose a Financial Reporting Order when dealing with a person convicted of an offence of fraud or an offence specified in Schedule 4 to the Proceeds of Crime Act 2002, if they are satisfied there is a sufficient risk of the person committing another similar offence. This allows the police to monitor the future financial transactions of those subject to a Financial Reporting Order.

At present there is no clear application process. In addition to the power of the court to make such an order, we propose that a power be given to the prosecutor to apply for one to be imposed.

BENEFIT OF MAKING THE PROPOSED CHANGE

Will widen the application process and allow the court to both consider imposing a Financial Reporting Order at the instance of an application from the prosecutor as well on its own initiative.

COVERT AND INTRUSIVE SURVEILLANCE OPERATIONS

The Regulation of Investigatory Powers (Scotland) Act 2000 (the "2000 Act") and Part III of the Police Act 1997 (the "1997 Act") set out the legislative framework for rules for authorising different forms of surveillance in Scotland for a number of public bodies. For the purpose of this proposal, we are concerned with certain types of covert surveillance in Scottish police and SCDEA operations.

Currently, police forces require to obtain authorisation for directed and intrusive surveillance under the 2000 Act and for property interference under the 1997 Act. Forces need to obtain authorisation from their own force command to carry out these forms of surveillance. In terms of operations which involve 2 or more forces (including the SCDEA) 2 or more sets of authorisation are required (ie each force involved must seek their own authorisations).

We propose to allow a lead force to be agreed between the participating forces who can grant a single set of authorisations to be obtained for any force/SCDEA involved

in a joint operation. This authorisation would be limited jurisdictionally to the areas covered by the participating forces.
BENEFIT OF MAKING THE PROPOSED CHANGE Will allow a single force/SCDEA to take the lead in gaining the relevant authorisation, thereby reducing the bureaucracy involved in obtaining multiple authorisations.

09: WHAT HAPPENS NEXT

We will introduce the Criminal Justice and Licensing Bill into the Scottish Parliament in early 2009 and the proposals featured in this document will be included in the legislation. It is possible that other measures may also be identified as suitable for inclusion in the Bill in the coming months and therefore this document should not be viewed as the definitive list of measures to be contained in the Criminal Justice and Licensing Bill.

This document is intended to set out our plans for legislation. Although not a formal consultation, should you wish to offer any views on the proposals contained within this document, please use the following contact details:

By email (the preferred method of getting in touch) -

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If you would like any further information in relation to any of the measures contained within this document, please also use the contact details above.