

CRIMINAL PROCEEDINGS ETC. (REFORM) (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Criminal Proceedings etc. (Reform) (Scotland) Bill introduced in the Scottish Parliament on 27 February 2006. It has been prepared by the Scottish Executive to satisfy Rule 9.3.3(c) of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Executive and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 55–EN.

POLICY OBJECTIVES OF THE BILL

2. A *Partnership for a Better Scotland: Partnership Agreement* published in May 2003 included a commitment from the Scottish Executive to continue with the review of the operation of the summary justice system. The Scottish Ministers established an independent committee chaired by Sheriff Principal John McInnes (known formally as the Summary Justice Review Committee) in November 2001. The report of the 'McInnes Committee' was published on 16 March 2004 and recommended a number of reforms to the summary justice system. Following extensive consultation on those recommendations the Executive published its plans for summary justice reform in *Smarter Justice, Safer Communities – Summary Justice Reform Next Steps*, in March 2005. The '*Smarter Justice Paper*' made a commitment to bring forward legislation where that was necessary to realise the reforms in the lifetime of the second term of the Scottish Parliament. This Bill meets that commitment.

3. Summary justice can be defined as all criminal prosecutions in Scotland not heard by a court involving a jury. Such cases account for 96% of all criminal prosecutions in Scotland (over 130,000 cases per year) including all minor offences that are prosecuted but also some more serious cases such as assault and almost all road traffic cases. It is vital that this level of the system deals with cases quickly and effectively in order to demonstrate that offending is taken seriously at every level and to prevent reoffending wherever possible. Reducing reoffending is a key goal of the Executive's programme of criminal justice reform, which was re-emphasised in *Supporting Safer, Stronger Communities – Scotland's Criminal Justice Plan*¹, published in December 2004.

¹ Scottish Executive, *Supporting Safer, Stronger Communities – Scotland's Criminal Justice Plan*, is available at: <http://www.scotland.gov.uk/library5/justice/scjp-00.asp>

4. Summary justice reform is the next stage of the Executive's comprehensive programme of improvement of the criminal justice system, aimed at improving the operation of Scotland's summary criminal courts. The practices and procedures of the High Court have already been reformed by way of the Criminal Procedure (Amendment) (Scotland) Act 2004. A wide range of measures aimed at tackling minor crime and antisocial behaviour were introduced by virtue of the Antisocial Behaviour (Scotland) Act 2004. And steps have been taken to improve the regime for the management of sentenced offenders through the Management of Offenders etc. (Scotland) Act 2005. Taken together these measures represent the most radical reform programme of the Scottish criminal justice system for a generation.

5. This Bill also brings forward reform to the operation of the bail and remand system in Scotland, based on the commitments made in the Executive's *Bail and Remand Action Plan* and the report of the Sentencing Commission for Scotland on the use of bail and remand. The Bill's provisions on bail and remand seek to address the actions of those individuals who do not take the responsibility of being given bail seriously and will play a significant part in reducing offending rates on bail – in turn contributing to the key goal of reducing offending and reoffending.

6. The Bill makes provision in 8 main policy areas:

- reforms to the system of bail and remand based on the commitments made in the Executive's bail and remand action plan (paragraphs 20 – 56);
- changes in the law relating to criminal proceedings which will ensure that cases are dealt with as quickly and effectively as possible in court – these changes mainly relate to procedure in summary cases although some minor changes are also made to solemn procedure (paragraphs 57 – 205: a more detailed breakdown of the topics covered in this area can be found at paragraph 59);
- increases in the criminal sentencing powers of the summary courts, ensuring that those courts can deal with an appropriate range of cases in terms of both severity and caseload, and do so more quickly than is currently the case (paragraphs 206 – 218);
- extending the range of alternatives to prosecution that can be offered to an alleged offender and the manner in which those alternatives can be enforced and disclosed – ensuring that alternatives are robust and can be used in circumstances where a court appearance may not be the most effective way of dealing with the case (paragraphs 219 – 247);
- reform of the way in which fines and other financial penalties imposed in respect of a criminal offence can be collected and enforced – in particular the creation of the new role of fines enforcement officer – ensuring that penalties are collected as efficiently and effectively as possible in future, minimising unnecessary court involvement; (paragraphs 248 – 266)
- the establishment of justice of the peace courts (JP courts) in place of district courts – delivering the commitment to create a unified courts administration under the control of the Scottish Court Service (paragraphs 267 – 281);
- reform of the procedures by which justices of the peace (JPs) are appointed and trained – including the introduction of periodic appraisal for JPs – fulfilling the

commitment to retain JPs and invest in them to ensure that they provide consistently high standards of justice in courts throughout Scotland (paragraphs 282 – 315); and

- placing the existing Inspectorate of Prosecution in Scotland on a statutory footing (paragraphs 316-320).

7. More detail relating to the changes proposed in each of these areas is provided in the sections of this Memorandum which follow. All references to “the 1995 Act” in this Memorandum relate to the Criminal Procedure (Scotland) Act 1995 (c.46) unless otherwise stated. References to “the 1975 Act” relate to the District Courts (Scotland) Act 1975 (c.20).

CONSULTATION – GENERAL

Bail and Remand

8. The Scottish Executive considers reform of the law on bail and remand to be a priority. These reforms are intended to strengthen public confidence in the system and they form part of the Scottish Executive’s wider reform of the criminal justice system as a whole.

9. Bail and Remand is a complex area requiring careful consideration to strike the right balance between the rights of an alleged offender and society as a whole. The Sentencing Commission for Scotland, established in 2003 to give Ministers advice on further improvements which could be made in some areas of the criminal justice system, was therefore asked to examine the use of bail and remand as its first priority. The Commission consists of experts in the legal field and people who are involved with managing offenders and supporting victims.

10. The Commission issued a consultation paper on the use of bail and remand² in June 2004 and held a 2 month period of open consultation before producing its *Report on the Use of Bail and Remand*³ in April 2005.

11. The Executive carefully considered both the Commission’s report and the views of consultees and other interested stakeholders before making any decisions. Following that process the Scottish Executive *Bail and Remand Action Plan*⁴ was published in September 2005. The Plan contained a number of commitments to reform the law of bail which are taken forward as part of this Bill.

Summary Justice Reform

12. The Bill’s provisions in relation to reform to the summary justice system have been the subject of extensive consultation. The Executive established the independent Summary Justice Review Committee in November 2001 under the chairmanship of Sheriff Principal John McInnes. The ‘McInnes Committee’s’ remit was:

² Sentencing Commission for Scotland, *Consultation Paper on the use of Bail and Remand*, available at: <http://www.scottishsentencingcommission.gov.uk/docs/consultationPaper.pdf>

³ Sentencing Commission for Scotland *Report on the Use of Bail and Remand*, available at: <http://www.scottishsentencingcommission.gov.uk/docs/scorubr.pdf>

⁴ Scottish Executive, *Bail and Remand Action Plan*, available at: <http://www.scotland.gov.uk/Resource/Doc/69582/0017987.pdf>

‘to review the provision of summary justice in Scotland, including the structures and procedures of the sheriff courts and district courts as they relate to summary business and the inter-relation between the two levels of court, and to make recommendations for the more efficient and effective delivery of summary justice in Scotland.’

13. Consultation was a key feature of the Committee’s approach. In 2002, the Committee examined the high-level issues in a paper-based consultation exercise. In 2003 it held a series of events at which summary justice practitioners discussed a number of technical proposals considered by the Committee. The Committee also commissioned a large-scale public survey that was conducted in January and February 2003 and continued to develop its proposals through a series of bilateral meetings with interested groups throughout 2003.

14. The Committee’s report was published on 16 March 2004 (reference to the report is made throughout this Memorandum and it is referred to as ‘the McInnes report’). It made recommendations on a number of significant issues, including the structure of the summary justice system, judges in the summary courts and the procedures to be followed in court cases. Before reaching any decisions on the recommendations made in the report a period of open consultation was held by the Executive to obtain the views of organisations with an involvement or interest in the criminal justice system, as well as the public generally. The McInnes report was sent to over 1,000 stakeholders for views during a four month period of open consultation that followed publication. A total of 240 responses were received and analysed and a wealth of information provided. An analysis of the consultation responses⁵ was carried out by independent consultants on behalf of the Executive and published in February 2005.

15. On 25 March 2004, the recommendations of the McInnes report were debated by the Scottish Parliament. Clear messages emerged from that debate in a number of areas, particularly that a practical focus on better structures, processes and outcomes was vital. That approach is reflected by the provisions in this Bill.

16. In order to ensure a wide range of views from all groups the Executive proactively sought views on a number of key issues in addition to inviting responses to consultation. The topics of community involvement in the justice system and the use of alternatives to prosecution were the subject of research carried out in the second half of 2004⁶. In arriving at the provisions contained in this Bill the Executive has therefore had the benefit of views from an expert committee, interested consultees and an objective and representative sample of public opinion.

17. On 22 March 2005, the Executive published *Smarter Justice, Safer Communities – Summary Justice Reform – Next Steps*⁷ (also referred to in this Memorandum as the *Smarter Justice Paper*). This document sets out the Executive’s vision for a reformed summary justice system, drawing on the McInnes report recommendations and the views expressed in response to consultation. This approach has allowed detailed consideration to be given to the proposals

⁵ MRUK Ltd, *Report of the Summary Justice Review Committee - summary of responses to the written consultation*, available at: <http://www.scotland.gov.uk/library5/justice/sjrscr-00.asp>

⁶ MRUK Ltd, *Research on Community Involvement and Alternatives to Prosecution*, available at: <http://www.scotland.gov.uk/Topics/Justice/19008/MRUKreport>

⁷ Scottish Executive, *Smarter Justice, Safer Communities – Summary Justice Reform – Next Steps*, available at: <http://www.scotland.gov.uk/Publications/2005/03/20888/55016>.

which are the subject of this Bill. By way of example the McInnes report recommended that the practice of lay justice be abolished in the summary courts and that an all professional judiciary be introduced. It was clear from the consultation that a considerable weight of opinion felt the case for abolition of lay justice had not been made and that the value of the contribution lay justices make to the criminal justice system should not be underestimated. The Executive listened to these views and decided to invest in the lay judiciary rather than abolish it, to ensure that communities across Scotland maintain an important link with their local justice system.

18. The *Smarter Justice Paper* was sent to over 1,000 stakeholders across the justice system and the general public to ensure that all those with an interest had the opportunity to consider the proposed reforms. Further meetings were held with stakeholders, including a key stakeholders' event shortly after publication in May 2005, to discuss how the proposed reforms would be taken forward.

19. The McInnes report, the research carried out as part of the McInnes committee's deliberations, the analysis of the responses received to the McInnes report consultation exercise and the Executive's *Smarter Justice* paper are all available through the Executive's summary justice reform website.⁸

BILL PROVISIONS - BAIL AND REMAND

Policy Objectives

20. The proposals in the Bill reflect the Scottish Executive's commitment in the Bail and Remand Action Plan to a framework which is fair, transparent and helps to deter reoffending.

21. The courts must continue to take the bail decision in each case based on a consideration of the facts. The Scottish Executive's role is to set out a clear legislative framework for bail decisions.

22. As already noted, in November 2003 the Executive established the judicially led Sentencing Commission for Scotland, and asked it to consider the use of bail and remand as a priority. The Commission's report on the use of Bail and Remand was published at the beginning of April 2005.⁹ The Commission made 38 recommendations designed to meet the key deliverables which it identified:

- a reduction in offending on bail;
- a reduction in failures to appear in court;
- a reduction in the remand population, without compromising public safety;
- a general improvement in the consistency of decision making on bail and remand;
and
- greater public awareness of the way in which the bail system works.

⁸ The summary justice reform website can be found at: <http://www.scotland.gov.uk/Topics/Justice/19008/16628>

⁹ Note 3, *supra*.

23. The Commission also stressed the importance of improving the overall speed and efficiency of the system, along the lines recommended by the McInnes report.

24. The report placed considerable emphasis on re-establishing respect for the law and for tougher, more consistent handling of bail breaches and failures to appear. Many proposals reflect an attempt to change the prevailing court culture by shifting the assumptions of those involved in the process - namely the court, the prosecutor and the accused – towards viewing breaches of bail as much more serious and ensuring tougher handling of bail breach. Emphasis was also placed on the need for consistent implementation of existing rules as well as a need for new provision.

25. The Executive's Bail and Remand Action Plan took forward many of the Commission's recommendations. It also set out a number of specific sets of circumstances – where someone on a serious sexual, violent or drug trafficking charge has a track record of conviction for related serious offences – which will count against the grant of bail. And it highlighted the strong links between reform of bail and remand and the wider reforms of the summary justice system also reflected in this Bill.

26. Where legislation is required to give effect to the commitments in the Action Plan it is included in the current Bill.

Key Information

27. The Bill makes a number of changes to the current system of bail and remand, which are dealt with in turn below. These changes apply both to solemn and summary procedure generally, with the exception of the restrictions on bail in certain solemn cases, discussed at paragraph 31 below.

Codification of factors relevant to grant of bail and conditions in which bail should be granted only where exceptional circumstances apply.

28. The Bill sets out for the court a clear framework of criteria for the consideration of bail within which to operate in every case. These reflect the reasons which the European Court on Human Rights has recognised for refusing bail. It makes clear that a decision to refuse bail must be based on a substantial risk that the individual would, if bailed:

- Abscond or fail to appear for trial;
- Commit further offences; or
- Take action to prejudice the administration of justice.

Regard must also be had to the public interest. Broader considerations of public safety are covered by those specific criteria. If there is a substantial risk that the accused may commit further offences and detention is the appropriate way to deal with that risk, then clearly detention of the accused directly contributes to public safety.

29. The Bill also sets out in a general and non-exhaustive way material considerations which may be relevant to the court's assessment of whether bail should be granted or not.

30. The Bill sets out the general propositions that are at present reflected in Scots common law and Strasbourg case law, namely that the court must grant bail “unless in the exercise of its discretionary right of refusal and looking to the public interest and to securing the ends of justice, there is good reason why bail should not be granted”¹⁰. Public interest includes ensuring that the interests of justice are taken account of. Ministers believe that the provisions of this Bill relating to bail will ensure that proper regard for public safety is made as part of the bail decision.

31. The Bill sets out restrictions on bail in certain solemn cases. An accused who is charged under solemn procedure with a violent or sexual offence (excluding prostitution) and has any previous solemn conviction for a violent or sexual offence; or is charged under solemn procedure with an offence of drug trafficking and has any previous solemn conviction for drug trafficking, may only be bailed where exceptional circumstances justifying grant of bail exist.

The Role of the Court

32. The Bill places beyond doubt the right of the court, as an independent and impartial tribunal exercising its own discretion, to take a decision to grant or refuse bail, or to impose bail with special conditions, irrespective of whether the Crown has exercised its right to be heard. The court may ask the prosecutor or the accused person’s solicitor for information which may assist it in reaching a decision.

Reasons for the bail decision

33. The Bill provides that judges must always give reasons for bail decisions. The Scottish Executive has accepted the Sentencing Commission’s view that this would improve public awareness of the law and the arrangements governing the grant and refusal of bail. ECHR precedent recognises that in order to show whether a decision to detain is justifiable in ECHR terms, it will be necessary for the national judicial authorities to set out in full their reasons (*Vehbi Sulcuk V Turkey*, Application no 00021768/02, 11 January 2006).

34. In order to achieve this policy objective the Bill makes provision to the effect that in any case where the court has admitted or refused a person bail, it is required to state the reasons for that decision. Reasons must also be given for decisions made when an earlier bail order is reviewed or a bail appeal is heard. And the Bill also applies the changes made in this respect to bail decisions made and reviewed in relation to witnesses who deliberately obstruct the course of justice by failing to appear. For more details of that latter provision, see paragraphs 116-125 below.

Bail Conditions

35. Certain standard conditions are currently imposed upon an accused person when bail is granted. These are covered in section 24 of the 1995 Act and require 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 or at which he is required by the Act to appear;
- does not commit an offence while on bail;

¹⁰ Renton and Brown, *Criminal Procedure*, 6th edition, (1996) paragraph 10-05.

- does not interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person;
- 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; and
- where the (or an) offence in respect of which he is admitted to bail is one to which section 288C of the Act applies, does not seek to obtain, otherwise than by way of a solicitor, any precognition of or statement by the complainer in relation to the subject matter of the offence.

36. The Bill makes a number of changes to these conditions, specifically:

- *Obligation on court to advise accused of consequences of breach* - so the accused is in no doubt as to what is being required of them on being admitted to bail, the bail order given to the accused will set out the consequences of breach and the court will, at the time the order is granted, explain the effect of the conditions and the consequences of breach to the accused;
- *Interference with witnesses* the standard condition of bail prohibiting interference with witnesses is supplemented by a further condition which makes clear that any behaviour causing or likely to cause alarm or distress to witnesses is also prohibited
- *Change of address as condition of bail* - where the accused's 'domicile of citation' (the address to which all documents relevant to the case are sent) is their normal place of residence, and they move house, the Bill places a duty on them to apply to the court to change the domicile of citation accordingly. Failure to do so will, in future, constitute an offence. Under this provision the accused has a clear duty to ensure that the court always has an up to date point of contact.

Bail Offences

37. The Bail and Remand Action Plan underlined the fact that a decision to grant bail places an individual in a position of trust which must not be abused. It is clear that many offenders do not take their obligations under a bail order seriously enough – in particular, failure to appear at court while on bail is entirely unacceptable, but happens frequently. Courts and prosecutors should have robust means of dealing with accused people who fail to appear and the penalties for breach of bail conditions should be more serious to reflect the abuse of trust involved.

38. Where an accused on bail fails to appear, or breaches a condition of bail, this is prosecuted as a separate offence under the 1995 Act. The Bill increases the maximum custodial penalty which may be imposed in the sheriff summary court for failure to appear/breach of bail from 3 – 12 months. It also makes a corresponding increase in the maximum custodial penalty for failure to appear/breach of bail in solemn cases from 2 to 5 years.

39. In order to ensure that prosecutions in respect of a charge of failure to appear or for bail breach take place as effectively as possible the Bill makes provision, in both summary and solemn procedure, that unless a preliminary objection is made by the accused to such a fact it will be held as admitted that an accused was: on bail; was subject to a particular bail condition; failed to appear at a diet; or was not given due notice of a diet.

40. Where an accused reoffends on bail, the 1995 Act provides that the court sentencing them for that offence may impose an aggravated sentence to reflect the breach of trust involved. That sentence may already be higher than the maximum sentence for the offence in itself, where a maximum sentence is prescribed. At present a court which imposes an aggravated sentence must explain the reasons for and extent of the additional element imposed, but is not obliged to state why an aggravated sentence has **not** been imposed. The Bill changes that position, providing that the court is required to explain why a sentence has *not* been increased in respect of a particular offence if that offence has been committed whilst the offender was on bail. It will still be open to courts to decline to increase a sentence for an offence committed on bail, but the court will be obliged to provide reasons for so doing.

Bail Reviews

41. The wording of the accused's right to seek a review of bail has been revised to improve clarity and understanding of the law. The accused will have the right to seek a review of the decision on bail in circumstances broadly similar to the Crown – where the circumstances of the accused have changed, or where the accused is able to put before the court material which would not have been available at the time of the original decision on bail. This definition will allow bail reviews to be considered for substantive reasons, while avoiding a situation where sheriffs are effectively sitting as appellate courts on the bail decisions of their colleagues.

Power of arrest without warrant

42. The Bill also gives the police more flexible powers where they arrest without warrant someone in circumstances where there are reasonable grounds to suppose that the accused has breached, is breaking or is likely to break a bail condition. In all such cases the police will be able to detain the accused in custody pending a court review of the terms of the bail order.

Bail Appeals

43. To assist the appellate court, and to lead to greater consistency in decision making, the Bill provides that the court at first instance should provide to the appellate court written reasons for the decision which is under appeal. Strasbourg jurisprudence indicates that although a failure to give reasons is not necessarily a violation of the convention, it can cause difficulties in establishing that the court had sound reasons to detain the accused. There will not be a statutory form for this. It will be competent for the Lord Justice General to issue guidelines in respect of this matter if it transpires that this is necessary. As noted above and in line with the policy on bail decisions generally, the Bill will also oblige the court to state its reasons for granting or refusing any bail appeal.

Bail – extradition proceedings

44. The changes made to the operation of bail and remand by this Bill will automatically apply to extradition proceedings in view of the operation of sections 9 and 77 of the Extradition Act 2003. These sections of the Extradition Act have the effect that when the Scottish Parliament makes changes to the law of bail those changes will automatically apply to extradition proceedings.

Amendment of the time period for consideration of bail

45. The Bill makes provision obliging the court to determine a bail application by the end of the court day after the day of the accused's first appearance or application. Currently the law states that this determination must be made within 24 hours of the accused's first appearance or application.

46. This gives some useful flexibility while not unduly prejudicing the accused. The determination must be made no later than the day after the initial appearance or application and additional time to be spent in custody will therefore at most be a few hours.

Consultation

47. As detailed in the 'policy objectives' section above, the Sentencing Commission for Scotland published their report in April 2005 on Bail and Remand. As part of their work the Commission held a consultation on the use of bail and remand between 28 June and 30 September 2004. A consultation paper was issued to which 48 responses were received from a range of individuals and organisations with an interest in the use of bail and remand in Scotland. The findings of that consultation informed the Sentencing Commission's report and its recommendations to the Scottish Executive.

48. Respondents could opt to address some or all of the questions that the Commission posed in its paper. A number of overarching themes emerged from responses.

49. Consultees felt that bail is not respected by alleged offenders and that the system appears to be too lenient. In detailed responses they underlined their support for impressing on bailees the seriousness of breaching conditions. They argued that bail and remand issues cannot be tackled in isolation from improvement to the criminal justice system as a whole; for example, the need to reduce the length of time between a case being called and trial/sentence was identified as of major importance in reducing bail offending. Appropriate support for those on bail was felt to be important, and there was general concern that the numbers of people remanded to custody should not increase as a result of any changes made.

50. Greater openness and transparency about the basis for bail decisions was widely held to be important. Provision by the court of reasons for bail decisions was strongly supported in the consultation - 84% of those who commented on this issue were in favour.

European Convention of Human Rights (ECHR)

51. ECHR consideration of the proposed policy is discussed in more detail in the section of this Memorandum relating to human rights.

Alternative approaches

52. The status quo was not considered as an option given the concern that has been widely expressed in relation to the operation of the system of bail and remand in recent years. It was for that very reason that the Sentencing Commission was asked to consider the operation of bail and

remand as an early priority – and in so doing it considered a number of approaches before making its recommendations to the Executive in its report.

53. Ministers have accepted the majority of the recommendations which were made by the Sentencing Commission in April 2005, as reflected in the Bail and Remand Action Plan. Commitments in the Plan which require legislation are reflected in the provisions in this Bill.

54. In particular, they have accepted the Sentencing Commission’s recommendation that the current factors to which a court may have regard in deciding whether or not to grant an accused bail should be included in statute, on the grounds that this was consistent with their responsibility to set out a clear legislative framework for bail and their desire to improve transparency in bail decision making. As noted above, they have also added to the recommendations of the Sentencing Commission by setting out a number of specific sets of circumstances – where someone on a serious sexual, violent or drug trafficking charge has a track record for related serious offences – which will count against the grant of bail.

55. They have not, however accepted the recommendation that the law should be clarified to place beyond doubt that if the procurator fiscal does not oppose bail the court should be obliged to grant it. A majority of consultees also rejected this suggestion, pointing out (for example) that the court holds ultimate authority for the bail decision, and that as a public authority in terms of ECHR legislation the court must be able to satisfy itself that it is discharging its responsibilities appropriately. Ministers agree that the court’s discretion should not be fettered in this way, and the Bill therefore makes provision for the court to seek information from those appearing before it, even if the Crown has not exercised its right to be heard.

56. This wide-ranging set of proposals is linked to the Executive’s wider strategies for reform of summary justice and reducing re-offending. Some of the Commission’s recommendations were for the judiciary to consider independently and it must be borne in mind that the role of the judge in a particular case remains the core element of the process of granting or refusing bail in Scotland. That must continue to be the case, whilst that process will be supported by the provisions of this Bill. The Executive will continue to work with all organisations involved in the operation of bail and remand in developing this policy and will ensure that its effectiveness is reviewed.

CHANGES TO THE LAW RELATING TO CRIMINAL PROCEEDINGS

57. Chapter 4 of *Smarter Justice, Safer Communities* set out the importance of effective procedures governing the operation of criminal cases. Of principal importance is the issue of speed – the quicker ‘the system’ deals with offending behaviour the more likely the intervention will be effective in deterring further offending. Speedy case disposal also benefits victims and witnesses by resolving the case as soon as possible and allowing them to get on with their lives. However, both the McInnes Committee and the *Smarter Justice* paper also stressed the importance of using the time and expertise of those involved in the system as effectively as possible, to ensure that cases are managed effectively. As the McInnes Committee pointed out:

“speed of processing without adequate quality control simply passes a problem to the next partner in the system” (para 33.15).

58. This Bill introduces a number of changes to the law relating to criminal proceedings which, taken together, will improve the speed with which cases can be processed, allow those responsible for managing cases to deal with them flexibly and effectively and contribute to the overall goal of a system which deters offending and reoffending through every phase of its operation. The majority of the Bill's provisions in this area stem from the McInnes report and were announced in the *Smarter Justice* paper – although some additional technical provisions which will supplement the goals outlined above are also included.

59. A summary of the provisions relating to criminal proceedings is provided in the list below – a detailed entry in respect of each of the bulleted points follows, in sequence, immediately after the list. Paragraph references for each detailed section are also provided. The Bill will make provision to:

- increase flexibility in the use by police of a liberation on an undertaking to appear in court (paragraphs 60 – 73);
- allow the electronic version of the complaint which is transmitted from the procurator fiscal to be regarded as the principal version and facilitate the greater use of electronic communications (paragraphs 74 – 78);
- extend the range of ways in which accused persons and witnesses can be cited to attend court (paragraphs 79 – 83);
- allow clerks of court to deal with scheduling future court diets when an alleged offender intimates in writing a plea of not guilty and to continue a case at first calling when the accused is not present (paragraphs 84 – 88);
- amend the definition of circumstances in which an extension may be granted to the pre-trial time limit in summary custody cases to make it consistent with the definition in solemn procedure (paragraphs 89 – 93);
- change the manner in which previous convictions can be considered by the court (paragraphs 94 – 98);
- extend the range of circumstances in which multiple outstanding cases against an alleged offender can be 'rolled-up' into one complaint to be tried at the same time; (paragraphs 99 – 105)
- allow proceedings to take place in the absence of the accused in a wider range of summary cases where the court considers that it is in the interests of justice to proceed (paragraphs 106 – 115);
- change the law relating to proof of whether an alleged offender was given due notice of a court hearing when being prosecuted for failing to appear at that hearing (paragraphs 116 – 120);
- amend the provisions relating to apprehension of witnesses who fail to appear for a court diet in summary proceedings to make them consistent with the provisions under solemn procedure (paragraphs 121 – 125);
- give the court greater discretion when determining whether to proceed to trial at an intermediate diet and require the defence to intimate any intention to rely on a special defence at the intermediate diet (paragraphs 126 – 131);

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- give the court a greater discretion to require both the prosecution and defence to agree uncontroversial evidence in advance of the trial (paragraphs 132 – 137);
- in summary cases, ensure that the solicitor engaged by an accused informs the court and prosecutor of the fact that he or she is instructed and provides for documents to be served on an accused's solicitor. This is with the exception of the initial citation for the commencement of criminal proceedings (paragraphs 138 – 143);
- increase the discretion of the court in relation to the circumstances in which a new social enquiry report must be obtained when a recent report is already available (paragraphs 144 – 148);
- give the sheriff principal the power to grant an extension to the time limit for the lodging of summary appeals, on cause shown (paragraphs 149 – 154);
- allow the sheriff, to extend the 11 month time limit for commencement of the preliminary hearing in the High Court where an indictment has not been served (paragraphs 155 – 161);
- allow, in exceptional circumstances, a high volume of custody cases that would normally call for their first hearing in a particular sheriffdom to be dealt with in another sheriff court outwith that sheriffdom (paragraphs 162 – 166);
- amend the law relating to the special measure of taking evidence by a commissioner in relation to vulnerable witnesses, ensuring that such evidence is subject to protections provided by the Sexual Offences (Procedure and Evidence) (S) Act 2002 (paragraphs 167 – 174);
- amend the law relating to the general procedure governing taking of evidence by a commissioner, to ensure that such evidence is also subject to protections provided by the Sexual Offences (Procedure and Evidence) (S) Act 2002 (paragraphs 175 – 179);
- allow a sheriff to grant commission and diligence for the recovery of documents or an order for the production of documents in appropriate criminal cases. Currently, this power is only enjoyed by the High Court of Justiciary (paragraphs 180 – 185);
- introduce a power allowing the court to excuse procedural irregularities, ensuring that the interests of justice are best served by the law of criminal procedure (paragraphs 186 – 195);
- allow the evidence of one witness to be sufficient as proof of breach of a restriction of liberty order (paragraphs 196 – 200); and
- create a requirement for documentation detailing the nature of an alleged breach of a probation or community service order to be served on an offender (paragraphs 201 – 205).

CRIMINAL PROCEEDINGS – EXTENDING THE USE OF LIBERATION ON AN UNDERTAKING TO APPEAR

Policy Objectives

60. In *Smarter Justice, Safer Communities* Ministers recognised the scope for extended use of police undertakings to contribute to the aim of improving speed in the summary justice system.

Undertakings are issued by the police and state that the accused must appear at court on a specified date and time in respect of the alleged offence, unless they hear otherwise from the prosecutor in advance. The advantage of this procedure over standard citation to court following a report being sent to the prosecutor is that the first calling of the case in court tends to take place sooner when an undertaking is issued – maintaining the link between the offence and the court appearance.

Key Information

61. The extent to which cases formally enter the system by way of an undertaking or by way of a report to the procurator fiscal followed by citation of the accused is essentially an administrative matter between the police, Crown and the courts. The Bill makes provision in two areas that will facilitate a more flexible use of undertakings to be developed. These changes relate to summary criminal proceedings only.

62. At present only the officer in charge of a police station may liberate an accused on an undertaking. In practice this means that the accused is arrested and taken to the police station prior to being liberated. The Bill provides that any constable may release an alleged offender on a written undertaking without the necessity of arresting the alleged offender or obtaining the authority of the officer in charge of the police station.

63. When the police arrest an individual having executed a warrant they do not currently have the power to release that accused on an undertaking to answer the warrant at a later date. The accused must, wherever practicable, be brought before the court on the next court day. There are situations in which offering an accused person the opportunity of answering a warrant by means of undertaking would be appropriate. For example, an accused may become ill after execution of a warrant and remain in hospital for several days or longer. The case cannot call in the accused's absence, but to ensure attendance at court when fit to do so the accused may require to be guarded in hospital by police. Further difficulties arise in relation to accused persons arrested on warrant granted by a court not scheduled to sit on the next court day. In such situations an additional court requires to be convened specifically to deal with that case.

64. Where the police have apprehended an accused in execution of a warrant but do not consider it necessary to keep him in custody until the next court day, the Bill makes it possible for the police to liberate the accused on an undertaking to attend at court to answer the warrant at a later date. This is in keeping with the goals of greater flexibility in the justice system and the increased use of undertakings. This will give the police the same flexibility as is available to them in respect of new arrests. In situations where an accused person has become ill following execution of a warrant this will allow the prosecutor to call the case in court the next lawful day notwithstanding the absence of the accused and the complaint will remain live. When a complaint calls in court, and the court is advised of the circumstances, it will be competent for the court to continue the case to another date to secure the accused's attendance and, at any subsequent diet, to grant a further warrant should the accused fail to appear.

65. Most significantly, section 22 of the 1995 Act is amended to allow the police, when releasing a person on an undertaking, to impose conditions on that undertaking to which he or she must adhere. Breach of these conditions is an offence. This reflects the recommendation of

the Sentencing Commission in its report on bail and remand that police should have power to impose conditions on undertakings analogous to those which a court may impose when granting bail. The Commission argued that this would both help to ensure compliance with the undertaking and (because offences committed in breach of the undertaking conditions would be recorded in the same way as bail offences) would help the police and the court in future cases when considering whether the accused was likely to comply with further undertaking/bail conditions.

66. The conditions which may be imposed include some which reflect standard bail conditions, notably: prohibition of commission of further offences and of interference with witnesses. Special conditions may also be applied where this is necessary to ensure that the standard ones are met. For instance, someone liberated to appear on court in relation to an allegation of shoplifting might be banned from entering the shop or shops concerned.

67. Provision is inserted into the 1995 Act for regulations to be made specifying the rank of police officer who may approve the imposition of special conditions on an undertaking. The Lord Advocate will also issue guidance to the police on the exercise of these new powers.

Consultation

68. The proposal to make greater use of undertakings was recommended in Chapter 13 of the McInnes report, which was subject to full and open public consultation in 2004. Several respondents offered views on this proposal, most notably police forces. These tended to be in favour of the general approach outlined, but stressed that careful consideration would need to be given to the practical implications of such a move before it was implemented. For example Fife Constabulary argued that there needed to be a balance struck to ensure appropriate cases were dealt with quickly, without front loading the system to an extent where delays were simply moved from one part of the system to another. Several police forces noted that, should the offence be considered serious enough to warrant liberation on an undertaking, then this procedure should take place within a police station so as to accommodate the taking of fingerprints, and other information. Other respondents, whilst not commenting on this proposal specifically, indicated that they were in favour of procedural changes that would lead to improved speed and efficiency in the system.

69. The *Smarter Justice* paper (paragraph 4.58) made clear that Ministers were attracted to the proposal for extended use of undertakings. But they recognised the need to model the impact of that proposal, to ensure that it did not create its own difficulties (for example, by creating excessive pressure at the front end of the system on police and prosecutors in having to report and mark cases in a reduced timescale).

70. In order to test the feasibility of the proposals, Ministers asked the system improvement project, being carried out by the Grampian Local Criminal Justice Board, to provide an analysis of the impact that an extended use of undertakings (both in terms of the range and number of cases that are called to appear in court by this method) would have on the operation of the criminal justice system. The initial evaluation from that project indicates that the changes proposed by this Bill would introduce useful flexibility into the operation of the system and ensure that there are no legislative barriers to the wider use of undertakings. Careful

consideration and joint work between the agencies involved will be necessary before any significant change to the way in which cases are currently called to court takes place. The Crown, the Police and the courts will work together to develop proposals for a systemic approach to the increased use of undertakings.

71. The provisions giving the police power to impose conditions upon undertakings were consulted upon by the Sentencing Commission in the course of its work on bail and remand (for details, see paragraphs 22-25) above.

Alternative Approaches

72. There are limited ways in which to achieve this policy objective. The nature of the problem requires a solution by legislative amendment to allow flexibility within current criminal procedure. This is in the interests of all parties to the proceedings and supports the aim of maximising efficiency and making the best use of system resources. The alternative would be to continue with the current policy, maintaining a procedure which leads to inefficiencies and unnecessary use of police and court resources.

73. In terms of the new power for police to impose conditions analogous to some of those imposed by a court when granting bail the alternative would have been not to make the change leaving the police with a less useful and flexible power. The Scottish Executive recognises the importance of striking the right balance here between flexibility for the police and ensuring that the conditions imposed on the accused are limited both in extent and in duration, with due regard to guidance from the Lord Advocate. In addition to the scope to make regulations specifying the seniority of the officer who must approve special conditions, the provision ensures that the conditions cease to apply on the date of the scheduled court appearance, with the court thereafter responsible for taking a decision on bail conditions or (in the event of failure to appear) the issue of a warrant.

CRIMINAL PROCEEDINGS – USE OF ELECTRONIC COMPLAINTS

Policy Objectives

74. To maximise the efficiency of court proceedings and modernise court practice.

Key Information

75. Proceedings under summary procedure are commenced by complaint at the instance of the procurator fiscal. Under the current law the complaint requires to be signed by the procurator fiscal or a depute. The signed complaint is lodged with the clerk of court and is the principal record of the proceedings. In the sheriff court complaints are also transmitted electronically from the procurator fiscal to the sheriff clerk. Proceedings which are transferred from one court to another require certified paper copies of the complaint to be sent from the originating court to the receiving court.

76. The Bill provides that the electronic version of the complaint (which, in practice, is already transmitted by the procurator fiscal to the court) will in future be regarded as the

principal complaint. This change applies to summary proceedings. The Bill further provides that the signature of the procurator fiscal or depute may be made by electronic means. The record of the proceedings will in future be completed and stored electronically and if proceedings require to be transferred from one court to another then it is the electronic version which is to be regarded as the principal. Any alteration to the complaint will require to be authenticated by the electronic signature of the clerk of court, retaining a form of authentication for any changes which are made.

Consultation

77. These provisions were recommended in Chapter 15 of the McInnes report, which was subject to full and open public consultation in 2004. Very few respondents offered any comment on this proposal – although a number of individual respondents agreed that further appropriate use of electronic communication was desirable, provided that adequate controls were in place to ensure that the system was properly used. More detailed consultative work with the Crown Office and Scottish Court Service has established that this change would be achievable and would be a welcome development in modernising court procedures without prejudicing the operation of the system. The Executive committed, in the *Smarter Justice* paper, to give effect to procedural changes where it was clear that these would deliver benefit. No further representations have been made on this subject following publication of the *Smarter Justice* paper.

Alternative Approaches

78. The alternative in this case would be to maintain the status quo. Whilst the current system operates satisfactorily it places an additional burden on the Crown and the Courts by requiring hard copy communication. The provisions will allow the law to catch up with practice and obviate the need for that additional administrative step which currently has to be carried out in respect of every complaint commenced and every case transferred.

CRIMINAL PROCEEDINGS – EXTENDING THE RANGE OF WAYS IN WHICH ACCUSED PERSONS AND WITNESSES CAN BE CITED TO ATTEND COURT

Policy Objectives

79. These provisions will increase the range of options available to inform an accused person or witnesses to a case of the date and place of court hearings. The policy objectives are to facilitate more effective communication, improve efficiency through use of more cost effective methods of communication where appropriate and ensure that a wide range of options are available for citation, making it more likely that everyone will appear in court for the trial, avoiding the need for adjournments and delays and the impact they have on the speed of the case.

Key Information

80. Under the current law citation of the accused and witnesses is achieved either by personal service, by leaving the citation at the person's dwelling house or by postal citation. Personal service is effected by an officer of law. The Bill provides for a greater range of methods of

service on both accused and witnesses. Postal citation of accused persons presently requires to be by first class recorded delivery or registered post. The Bill introduces service by first class post and by email to either the individual's work or home e-mail address. The Bill also provides that witnesses may be cited by email at either their home or work address. These provisions, which apply to summary procedure, will improve the flexibility of citation allowing, for example, police officers acting as witnesses in a case to be cited by e-mail rather than post. There will still be an obligation on the Crown to demonstrate that service of the citation has been properly executed and it is envisaged that traditional methods of citation will continue to be used in the majority of such cases.

81. Many witnesses require to be recited to a subsequent court appearance as a result of a trial not proceeding. The Bill makes provision extending the range of persons who may serve such citations at court to include "other persons". This will allow service by, for instance, staff of the procurator fiscal or those responsible for the custody of offenders.

Consultation

82. These provisions, amongst others were recommended in Chapter 19 of the McInnes report, which was subject to full and open public consultation in 2004. Amongst those who commented, the majority believed that the recommendations concerning witness citation would be best addressed by the agencies most involved, namely the Police and the Crown Office and Procurator Fiscal Service. There was support for the proposal to introduce e-mail citation from organisations such as the British Transport Police. The Law Society of Scotland added that consideration could be given to the use of text messages in the citation process, particularly if e-mail citation were successful – but that appropriate safeguards would need to be developed. Some consultees observed that new forms of citation or greater use of postal citation may only be of limited effectiveness as it would be difficult to establish whether citation had effectively taken place by those means. Others, whilst agreeing with that point, felt that these provided a useful addition to the range of methods of citation available. The Executive committed, in the *Smarter Justice* paper, to give effect to procedural changes where it was clear that these would deliver benefit. No further representations have been made on this subject following publication of the *Smarter Justice* paper.

Alternative Approaches

83. The alternative would be to maintain the status quo. Whilst the current system of citation operates satisfactorily in the majority of cases there are a number of cases where the accused or witnesses do not turn up – and failure to cite the individual plays a part in that problem. Increasing the range of ways in which citation can be effected will increase the likelihood that all the necessary individuals will appear in court avoiding the need for further adjournments.

CRIMINAL PROCEEDINGS – ADMINISTRATION OF PLEAS OF NOT GUILTY TENDERED IN WRITING

Policy Objectives

84. To ensure that court resources are being used as effectively as possible in order to deal with criminal cases speedily and appropriately.

Key Information

85. Under the current law where an accused person enters a plea of not guilty to a charge by way of a letter the court must satisfy itself as to the authenticity of that letter. This procedure must be dealt with in open court. The sheriff, magistrate or justice must be present while dates for intermediate and trial diets are fixed in respect of each case. The process is administrative in nature and occupies a substantial period of time in some diet courts (courts where a number of cited cases are heard together – sometimes in excess of 100). It is essentially a matter of court programming and is in practice carried out by the clerk of court with the date of the trial being agreed with the prosecutor to ensure the availability of court time and of witnesses. The accused would not suffer any prejudice if these pleas were to be dealt with outwith the courtroom and if court dates were assigned upon receipt of the letter or at any time up to the time assigned for the first calling of the case.

86. The Bill therefore makes provision allowing pleas of not guilty which are intimated in writing to be dealt with outwith the court setting. This will achieve a saving in court time. The clerk of court will be able to fix a diet for trial where written intimation of a plea of not guilty is submitted to the satisfaction of both the prosecutor and the clerk of court. The clerk of court will be required to intimate these diets to the accused. It will not be necessary for the complaint to call formally in court or for the sheriff, magistrate or justice to be present. In the event of there being any doubt as to whether the intimation constitutes a plea of not guilty the letter could be referred to the presiding judge in chambers for judicial opinion. If the presiding judge was satisfied that it constituted a plea of not guilty a trial diet would be fixed. Where doubt remained the case could be continued without plea without the case requiring to call in court. This would allow further inquiries to be made of the accused without the necessity of a formal court hearing. The Bill extends to the clerk of court the power to continue a case at first calling when the accused is not present and there is doubt as to whether or not citation has been effected (a power currently set out in section 145A of the 1995 Act). These changes apply to summary proceedings only.

Consultation

87. This policy was developed in consultation with the Crown Office and Procurator Fiscal Service (COPFS) who identified this as an amendment to current procedure that would further the aims of summary justice reform. Although not a specific recommendation of the McInnes report (and not therefore considered as part of the consultation process) it is in keeping with the policy objective of ensuring that court resources are used as effectively as possible.

Alternative Approaches

88. The alternative approach would be to continue to require a judge to be present whilst the administrative process of allocating court slots is carried out. The nature of this change requires a solution by legislative amendment. The proposed approach would not prejudice any of the parties to the case and allows the best use of court resources as outlined above.

CRIMINAL PROCEEDINGS – EXTENSION OF PRE-TRIAL TIME LIMIT IN SUMMARY CUSTODY CASES

Policy Objectives

89. The Criminal Procedure (Scotland) Act 1995 ('the 1995 Act') currently provides that summary trials must commence within 40 days of the accused having been remanded in custody. This time limit can be extended on various specified grounds, on application made to the sheriff for this purpose. These grounds are different to those specified in the 1995 Act for extension of comparable time limits in solemn procedure. The policy objective is to achieve consistency in the grounds for extension of time limits for the commencement of trials where an accused is remanded in custody in both summary and solemn cases.

KEY INFORMATION

90. This policy objective requires an amendment to section 147(2) of the Act. Currently under this section the 40 day time limit by which the trial must commence when an accused person is remanded in custody can be extended on the following grounds:

- the illness of the accused or of a judge;
- the absence or illness of any necessary witness; or
- any other sufficient cause which is not attributable to any fault on the part of the prosecutor.

91. In solemn cases, the trial must commence within 110 or 140 days and section 65(5) of the 1995 Act provides that the sheriff or judge may extend these periods 'on cause shown'. This is the only basis for the extension of these time limits. The Bill amends section 147(2) to remove reference to the current grounds for an extension and to make provision for an extension in summary cases to be granted 'on cause shown'. Provision will also be made to allow the parties to a case to be heard on any application for an extension of the 40 day time limit as currently provided for in respect of the equivalent solemn time limits and for the court to determine the application for extension without hearing the parties where all of the parties join in the application as currently provided for in solemn procedure by section 65(5B).

Consultation

92. This policy was developed in consultation with the Crown Office and Procurator Fiscal Service (referred to as COPFS elsewhere in this Memorandum) who identified this as an amendment to current procedure that would further the aims of summary justice reform. It was not a specific recommendation of the McInnes report and, as such, was not considered as part of the McInnes consultation process.

Alternative approaches

93. There are limited ways in which to achieve this objective. A relatively minor legislative amendment achieves the desired consistency between summary and solemn procedure and ensures that the law is sufficiently flexible to allow all circumstances meriting an extension of time to be considered. The alternative would be to do nothing, maintaining a procedure which is

unnecessarily prescriptive based on the level of proceedings rather than the circumstances of a particular case.

CRIMINAL PROCEEDINGS - DISCLOSURE OF PREVIOUS CONVICTIONS

Policy Objectives

94. In reaching decisions as to what sentence an offender should be given it is considered that the court should have access to as much relevant information in respect of the offender as possible – enabling the sentence imposed to reflect the characteristics and previous record of the offender as known to the court. It is also considered that, wherever possible, all charges arising out of one incident of criminal conduct should be dealt with in a single complaint – so that they can be disposed of collectively in a single trial. This makes best use of court time and that of victims, witnesses and the accused.

Key Information

95. Under the existing law any convictions imposed upon an offender subsequent to the commencement of other court proceedings in respect of that offender cannot be laid before the court to aid the sentencing decision in those proceedings, even where the offences predate those in the current proceedings. This means that the court is expected to take a decision on sentencing in circumstances where it is not fully aware of the offending record of the individual. The Bill makes provision to rectify that position. It provides that it will be possible for the prosecutor, in summary proceedings, to produce a notice of all convictions relating to the accused regardless of whether any of them were incurred subsequent to the offence before the court. This issue was raised in Chapter 16 of the McInnes report and Ministers agree that the current position should be changed.

96. The existing law also requires that where there are several charges against an accused and one charge discloses that the accused has been previously convicted, the charge which discloses that conviction must be made on a separate complaint. If the cases proceed to trial two trials will be necessary. The most common example of this relates to road traffic offences where the accused is charged with driving whilst disqualified and other road traffic offences. The charge of driving whilst disqualified must be heard on one complaint as it reveals the fact of the previous disqualification, whilst the other charges are on a separate complaint. This adds to the volume of cases in court and takes place in spite of the fact that there is authority to the effect that a judge, in considering the guilt of an accused in relation to a particular offence, should be able to put the existence of any previous conviction(s) out of his or her mind if it is appropriate to do so. The Bill provides that in instances such as this all charges may be contained on a single complaint and, in the event of those charges proceeding to trial, only a single trial will be necessary. This issue was the subject of Chapter 17 of the McInnes report and Ministers agree that the current position should be changed.

Consultation

97. These proposals were recommended in the McInnes report as mentioned above, which was subject to full and open public consultation in 2004. A number of consultees were in favour of the proposals made by the Committee – particularly police forces and justices of the peace.

They were generally of the view that, when sentencing an individual, the court should be able to take into account all previous criminal conduct of the offender. The court has to make its sentencing decision based on the information provided, so that information should be as comprehensive as possible, particularly in relation to other instances of criminal behaviour. The Executive committed, in the *Smarter Justice* paper, to give effect to procedural changes where it was clear that these would deliver benefit. No further representations have been made on this subject following publication of the *Smarter Justice* paper.

Alternative Approaches

98. There are limited ways in which to achieve this policy objective. The nature of the problem requires a solution by legislative amendment to realise the goals of improving court efficiency and allowing the sentencing judge to be aware of the full criminal record of an offender before passing sentence. The alternative would be to continue with the current policy, maintaining a procedure which leads to unnecessary additional court hearings and the provision of incomplete information to the court.

CRIMINAL PROCEEDINGS – COMBINING MULTIPLE PROCEEDINGS OUTSTANDING AGAINST AN ACCUSED

Policy Objectives

99. In order to make best use of court time it is considered that, wherever possible, all outstanding charges against an accused should be dealt with in a single court location and on a single complaint. This will enable all charges to be disposed of collectively in a single trial, as opposed to there being multiple cases outstanding against an accused calling at different times and in different places. The policy reflects the recommendation of the McInnes Committee. The Committee concluded that the court should have power to direct that charges against an accused be ‘rolled-up’, so that there is only one complaint and one set of court appearances for all the outstanding offences with which the accused is charged.

Key Information

100. Prosecutions against an accused person normally take place in the court district where the alleged offence took place, although proceedings in the sheriff courts may take place in any sheriff court within that sheriffdom. Under the current law, offences which are alleged to have taken place outwith one sheriffdom may be taken against the accused in another sheriffdom providing there is at least one offence on the complaint which is alleged to have been committed within the sheriffdom in which the complaint is raised.

101. The Bill provides that summary complaints against an offender may be raised in another sheriffdom where there are charges outstanding against the accused, even if these charges are unrelated and are not on the same complaint. The Bill further provides that the prosecutor may ask the court to transfer proceedings which have been commenced from one court to another where there are already outstanding charges against the accused in the other court. The Bill also provides that the sheriff court may sentence an offender in respect of an offence of which s/he has been convicted in the JP court provided that court is within the jurisdiction of the sheriff court. Further provision is made allowing the prosecutor to request that matters on separate

complaints which call for trial in the same court on the same day may be dealt with in a single trial where the accused pleads not guilty, in spite of the fact that the offences are on separate complaints. All these changes will allow outstanding cases to be ‘rolled-up’ against an accused in a wider range of circumstances than is currently the case.

102. The Crown already ‘rolls-up’ complaints where possible – these changes will provide greater flexibility in the operation of that practice. There are a number of circumstances in which ‘roll-ups’ would be competent but the prosecutor decides not to take that course of action as it would be unduly disruptive to witnesses and victims who may be involved in the case. For that reason the option of combining outstanding cases against an accused is provided rather than a compulsion to do so.

Consultation

103. These provisions were recommended in Chapter 16 of the McInnes report, which was subject to full and open public consultation in 2004. A large number of respondents, whilst not commenting on this aspect of the report in detail, indicated that they were in favour of procedural changes that would lead to improved speed and efficiency in the system. The minority of respondents who did comment on this recommendation tended to be professionals who were concerned that, if cases commenced separately, separate preparation would still be required for each particular case. Payment for work carried out in individual cases would therefore still be needed. Some practitioners felt that the proposal, whilst good in theory, would not always prove efficient in practice because of the frequency with which repeat offenders move address. Others noted that, if an accused were persistently offending and had complaints in progress before different courts, there may be confusion or further delay as efforts were made to bring them together. Careful use of additional powers to combine outstanding cases would be necessary if this measure were to be beneficial. The Executive committed, in the *Smarter Justice* paper, to give effect to procedural changes where it was clear that these would deliver benefit. No further representations have been made on this subject following publication of the *Smarter Justice* paper.

104. In order to test the feasibility of a wider use of roll-ups, the Executive asked the system improvement project, being carried out by the Grampian Local Criminal Justice Board, to provide an analysis of the impact of an increased use of roll-ups on the operation of the criminal justice system. The initial phase of that project has only been able to consider a limited number of appropriate cases and further evaluation of the approach will be necessary before any major change in practice could be made. That work will be taken forward between the agencies involved. However, the results from the initial evaluation indicate that the changes proposed by this Bill would introduce a useful degree of flexibility into the system and should therefore be implemented.

Alternative Approaches

105. There are limited ways in which to achieve this policy objective. The change to the rules of procedure sought can only be achieved by way of a legislative amendment. The alternative would be to continue with the current policy. Given the recommendations made by the McInnes committee and the initial findings from the Grampian pilot the provisions to change the law have been included in this Bill.

CRIMINAL PROCEEDINGS – PROCEEDINGS IN ABSENCE

Policy Objectives

106. Addressing the problem of the failure of accused persons to appear at hearings in the summary courts is a priority. At present a number of accused persons attempt to defeat the ends of justice by simply choosing not to appear at their trial or other hearings. In 2002-03 over 4000 hearings resulted in a warrant being issued for an accused as a result of their failure to attend. Whilst measures are then taken to apprehend the accused and ensure attendance, this leads to delay in the system, waste of resources and considerable inconvenience for the victim, witnesses and the professionals involved in prosecuting, defending and hearing the case. In order to tackle this problem Ministers announced in the *Smarter Justice* paper that; where an accused is aware of the date fixed for trial and chooses not to attend, a trial in their absence will be made competent. The required changes to the law are contained in this Bill and are consistent with the requirements of the European Convention on Human Rights.

Key Information

107. Proceedings in absence are already competent in respect of a number of summary cases where the offence is statutory and a sentence of imprisonment is not an option available to the judge on a finding of guilt. The Bill's provisions allow intermediate diets, trial diets and diets allocated for sentencing to take place in the absence of the accused in all types of summary case. The court will only proceed to deal with the diet in the accused's absence:

- if it is satisfied that the accused has been properly cited; and
- it considers it to be in the interests of justice to proceed.

108. The Bill also makes provision allowing the accused's solicitor, if present, to represent the interests of the absent accused. Further provision is made allowing the court to appoint a solicitor to represent the interests of the absent accused if it appears that the accused is unrepresented and the court considers that it is in the interests of justice to do so.

109. The court will be able to proceed with a trial in the absence of the accused, reach its verdict and pass sentence. However, the court will not be able to impose a sentence of imprisonment or a sentence requiring the consent of the accused, such as a community service order or probation, in the absence of the of accused. In these cases the accused will need to be brought to court for a further sentencing hearing, but the victim and witnesses need not attend that hearing as the evidence will have already been heard in the case.

110. Care has been taken to ensure that the provisions are in accordance with the European Convention on Human Rights – an analysis is provided in the section of this Memorandum relating to human rights implications of the Bill.

111. The Executive recognises that the recommendations made in the McInnes report on trials in absence were controversial. Since those recommendations were made, provisions relating to trials in absence in solemn procedure have been passed as part of the Criminal Procedure (Amendment) (Scotland) Act 2004. Careful consideration has been given to this issue, including the concerns raised by consultees. On balance Ministers believe that these powers are necessary

in order to tackle the problem of the failure of accused persons to appear for their trial. Courts are frustrated when accused persons fail to appear. Inconvenience is caused to the victim and witnesses who are present at court and require to return on another day. Further delay in bringing the case to trial can have implications for the quality of evidence that can be presented by virtue of the fact that witnesses memories begin to fade.

112. In view of the lower sentencing maxima in the summary courts the potential consequences of proceedings in absence for an accused in a summary cases fall far short of those in solemn cases. It is hoped that the existence of these provisions will act as a strong deterrent to those accused who consider trying to defeat the ends of justice by failing to appear – and that they will only need to be used occasionally. The powers must be available to the court to demonstrate that it takes failure to appear at trial very seriously indeed.

113. The provisions allowing for trials in absence will also apply to proceedings against bodies corporate. The Bill includes provisions which clarify who may represent a body corporate in a criminal case, how that representative establishes their right to represent the company or other concern. For the sake of consistency similar changes are made in relation to solemn proceedings by virtue of section 27 of the Bill. The Bill specifies the circumstances in which a trial in absence against such an ‘accused’ may take place. Amendments are made to section 143 of the 1995 Act which details proceedings on summary complaint against bodies corporate.

Consultation

114. The proposal to extend the use of trial in absence in summary cases was initially recommended in Chapter 25 of the McInnes report which was subject to full and open public consultation in 2004. Of the small proportion of respondents who made their views known on this matter, the majority expressed concerns. Some fundamental concerns relating to the fairness of trying an accused in his or her absence and ECHR issues were raised. The majority of responses in this area were made by professional interests expressing concern over the detailed operation of the system. In particular issues were raised as to how an accused would be represented in his or her absence. Several respondents, while supporting the principle of a trial in absence being available in the system, stated that these proposals should be restricted to exceptional cases of accused persons who had a history of failing to appear in court. . Ministers announced the proposal to make provision in the *Smarter Justice* paper for an extended use of trial in absence. No further representations have been made on this subject following publication of the *Smarter Justice* paper.

Alternative Approaches

115. The McInnes report considered the current position and recommended an increase in the use of trial in absence. The alternative would be to remain with the existing provisions which, for the reasons given above, Ministers do not consider to be acceptable. Consideration was given to whether a sentence of imprisonment could be handed down in the absence of an accused following trial in absence – but this was considered to be excessive.

CRIMINAL PROCEEDINGS – CHANGES TO PROSECUTION OF THOSE WHO FAIL TO APPEAR

Policy Objectives

116. The policy objectives behind these provisions are similar to those for proposals on trial in absence (outlined immediately above). Many of the delays in the court system are caused by accused persons simply failing to attend court without good reason. This causes inconvenience to courts and to witnesses, increases the length of time taken to deal with the case in question, and contributes to the clogging up of the courts. These delays also contribute to a culture in which the accused thinks there is an incentive to ‘play the system’. Failing to attend at court is in itself an offence – one which the Executive believes should be dealt with swiftly and appropriately.

Key Information

117. The Bill makes provision to establish that, where an accused person appears to answer a complaint of failing to appear at court, the fact that the accused failed to appear and that they had due notice of the court date are to be taken to be admitted unless challenged at the time of entering a plea. This provision applies to summary proceedings only. It will make it simpler for prosecutors to prove the offence of failing to appear at court, but leaves it open to the accused either to deny that he or she failed to appear or to argue that proper notice of the court date was not provided. It also reserves the accused’s right to lead evidence that he or she had good reason for failing to appear.

118. The bail and remand provisions of this Bill contain proposals to increase the maximum sentence available to courts for those who fail to attend from 3 to 12 months in summary cases and from 2 years to 5 years in solemn cases. More information on those provisions can be found in the section of this Memorandum on bail and remand.

Consultation

119. This provision was not a specific recommendation of the McInnes report and, as such, was not consulted on as part of the consultation process. It is closely linked with the stated objective in the McInnes report to tackle the problem faced when accused persons fail to attend court without good reason. Ministers undertook in the *Smarter Justice* paper to make procedural changes to the summary justice system where these would improve speed without compromising quality. This change falls into that category.

Alternative approaches

120. There are limited ways in which to achieve this policy objective. The change to the rules of procedure sought can only be achieved by way of a legislative amendment. The alternative would be to continue with the current policy. This provision, allied with other provisions in the Bill, will ensure that failure to appear is taken more seriously in the summary courts which, in turn, should lead to more cases going ahead on the scheduled date, improved efficiency, less inconvenience for victims and witnesses and swifter resolution for the accused.

CRIMINAL PROCEEDINGS – APPREHENSION OF WITNESSES

Policy Objectives

121. To achieve consistency between summary and solemn procedure and, in so doing, assist in reducing the number of court cases which cannot proceed due to the failure of witnesses to attend court.

Key Information

122. Section 156 of the 1995 Act makes provision for the apprehension of witnesses who fail to appear for a court diet in summary proceedings. These provisions differ to the analogous provisions under solemn procedure. Currently section 156 of the Act allows a court to grant a warrant for the apprehension of witnesses who, having been duly cited, have failed to appear at a particular court diet. The court can also grant a warrant when satisfied by evidence on oath that a witness is not likely to attend to give evidence without being compelled to do so. The current provisions also provide that, in these circumstances, the witness must, wherever practicable, be brought immediately before the court and that the court will fix an appropriate sum as security to ensure the witness attends the relevant court diets. In practice, security is rarely required and the witness is simply ordered to appear on a certain date.

123. The Bill will amend section 156 to remove the existing requirement to fix security and then release the witness, and replace this provision with broadly the same powers that the court has when dealing with witnesses under solemn procedure (contained in sections 90A to 90E of the 1995 Act.). This will include provision for witnesses, when arrested on warrant in connection with a failure to appear at court to be:

- remanded in custody until the conclusion of the diet at which their attendance is required; or
- for the court simply to liberate the witness; or
- to release the witness on bail.

It will also make it an offence for a witness to breach the terms of any bail order to which the witness is subject.

Consultation

124. This policy was developed in consultation with COPFS who identified this as an amendment to current procedure that would further the aims of summary justice reform. Although not a specific recommendation of the McInnes report (and not, therefore, part of the consultation process on that report) it is in keeping with the policy objectives of ensuring consistency across the system and seeking to minimise the number of court cases that are cancelled as a result of non-attendance of witnesses or the accused.

Alternative approaches

125. There are limited ways in which to achieve this policy objective. A relatively minor legislative amendment achieves the desired consistency between solemn and summary procedure

for dealing with the apprehension of witnesses in order to minimise delay in trials stemming from non-attendance by witnesses. The alternative would be to retain current procedure in this regard, which may lead to unnecessary inefficiencies.

CRIMINAL PROCEEDINGS – CHANGES TO THE INTERMEDIATE DIET PROCEDURE

Policy Objectives

126. To ensure that court resources are used as effectively as possible in order to deal with criminal cases speedily and appropriately.

Key Information

127. Under the existing law if, at the intermediate diet, the court concludes that it is unlikely that the trial will be able to take place on the date originally assigned for it the court must postpone the trial diet. The McInnes report considered the subject of intermediate diets in some detail and considered this compulsion upon the court to postpone the trial diet to be unduly restrictive.

128. The Bill provides that the court no longer has to postpone the trial diet but may if it considers it appropriate to do so. This will allow the court to make further enquiries of the parties and, where appropriate, the existing trial diet could be maintained. In some instances this should allow the intermediate diet to be used to get preparation for the case back on track, rather than a further delay by way of postponing the trial becoming inevitable.

129. The Bill also provides that an accused intending to rely on a special defence will, in future, have to intimate the intention to do so at, or, before the intermediate diet. Special defences include those of self-defence, alibi, coercion and incrimination of a co-accused. Currently the accused is only required to give advance intimation of the special defence of alibi and that notice can be given up until the point at which the first witness is sworn at the trial. Last minute notification of special defences often leads to the case being adjourned (at the request of the prosecutor who needs to address the defence). The adjournment results in the trial not proceeding in the scheduled court slot and the victim and witnesses must be sent away and cited to a further court hearing at a later date. Under the proposed provisions failure to lodge a notice of the intention to rely on a special defence will preclude the accused from relying on such a defence, unless the court, on cause shown, allows it. This will ensure that special defences are intimated in advance of the trial wherever possible whilst preserving the right of the accused to lodge such a defence at a late stage if it would not have been possible to lodge it any sooner.

Consultation

130. Recommendations in relation to intermediate diets were made in Chapter 20 of the McInnes report, which was subject to full and open public consultation in 2004. A large number of respondents, whilst not commenting on this aspect of the report specifically, indicated that they were in favour of procedural changes that would lead to improved speed and efficiency in the system. Of the minority of respondents who made specific comments on these recommendations, most represented the legal profession and expressed some concern that the

provisions would require defence agents to carry out more work earlier in the case process. The Executive committed, in the *Smarter Justice* paper, to give effect to procedural changes where it was clear that these would deliver benefit. These provisions implement some of the statutory amendments proposed by the McInnes Committee which should ensure that trials take place on the date assigned for them wherever possible, without placing undue stress on the system in order to achieve that objective.

Alternative Approaches

131. There are limited ways in which to achieve this policy objective. The changes to the rules of procedure can only be achieved by way of a legislative amendment and the alternative in that respect would be to continue with the current policy.

CRIMINAL PROCEEDINGS – PROOF OF UNCONTROVERSIAL MATTERS

Policy Objectives

132. To allow court cases to run as efficiently as possible and ensure that witnesses are not unnecessarily inconvenienced as a result of the procedures of the criminal justice system

Key Information

133. The McInnes report highlighted the importance of making the intermediate diet more effective. In particular (in chapter 20 of its report) it made recommendations in relation to the way in which uncontroversial evidence given by witnesses should be handled in future. The Executive is firmly of the view that, where a case is to proceed to trial, so far as possible, only those witnesses whose evidence is expected to be contested should have to attend.

134. There are already measures in place (section 258 of the 1995 Act) which permit the agreement of uncontroversial evidence. The Criminal Procedure (Amendment) (Scotland) Act 2004 further enhanced those measures in respect of solemn cases. The relevant provisions in this Bill extend the application of those enhanced measures to summary proceedings. They provide that, where a party to a case has served a notice of uncontroversial evidence (in an effort to avoid having witnesses present at the case) and that notice has been challenged, the party that served the notice will be able to ask the court to direct that the challenge is unjustified and that the notice should be admitted as evidence. It is intended that this will encourage those involved in summary cases to make greater use of the provisions and that spurious challenges to notices will be discouraged and dismissed by courts. If these powers are used where appropriate the outcome should be a reduction in the number of witnesses required to come to court to give evidence which is not in dispute.

Consultation

135. Recommendations in relation to agreement of uncontroversial evidence were made in Chapter 20 of the McInnes report, which was subject to full and open public consultation in 2004. Only a minority of consultees offered a view on these recommendations. Of those who did express a view the majority agreed that if the only witnesses required to attend the trial were those whose evidence was disputed, this would help to speed up court process and keep delays to

a minimum. For example, the Association of Scottish Police Superintendents felt that accepting witness evidence prior to trial would reduce the stress on victims and witnesses alike. Several respondents were of the view that only simple or formal evidence should be agreed in advance and that the defence should retain the option of calling a witness to challenge or question statements previously made, or to test the credibility and reliability of the witness. The Executive committed, in the *Smarter Justice* paper, to give effect to procedural changes where it was clear that these would deliver benefit. These provisions implement some of the statutory amendments proposed by the McInnes Committee and seek to ensure that witnesses need only attend court if their evidence is genuinely in dispute.

Alternative approaches

136. The McInnes committee recommended the use of signed full witness statements in this connection. It further recommended that the court should have the power to direct that a signed witness statement could be admitted in evidence. Whilst the Executive understands why this suggestion was made it is of the view that there are a number of issues around provision of signed statements which would make this proposal difficult to implement – such as the workload implications for the Police of producing full signed witness statements at an early stage in a high number of cases, many of which would result in a plea before the case called in court.

137. The *Smarter Justice* paper outlined the work which is ongoing between the Crown and the police to improve the quality of police witness statements. If the quality of information available to Crown and defence is further improved all parties to a case will be more able to identify those witnesses whose evidence is (and is not) in contention. The quality and authenticity of statements provided is of paramount importance rather than the means of authentication. The proposed reforms will enable further improvement to be made in terms of early disclosure of case information which in turn will lead to savings in court and witness time. The court will retain its power to direct that a notice containing uncontroversial evidence – which could attach a copy of the relevant witness statement – should be admitted into evidence.

CRIMINAL PROCEEDINGS – SERVICE OF DOCUMENTS ON SOLICITORS

Policy Objectives

138. To increase the range of ways in which documents in criminal proceedings can be served on the defence in summary proceedings, improving the likelihood that an accused person will attend court hearings, and allowing criminal cases to progress as quickly as possible, with the minimum of inconvenience for victims and witnesses.

Key Information

139. The 1995 Act provides that, in summary cases, documents must be served on the accused only, albeit they may be served in variety of ways. In solemn cases, documents can also be served on an accused's solicitor.

140. The Bill makes provision for the service of documents on solicitors in summary cases. It places a duty on solicitors, in certain circumstances, to notify the court and the relevant procurator fiscal that they represent an accused person in a particular criminal case.

141. However this provision does not extend to service of the citation initiating proceedings, which contains details of the charges brought against the accused. This still must be served on the accused personally.

Consultation

142. This policy was developed in consultation with COPFS who identified this as an amendment to current procedure that would further the aims of summary justice reform. Although not a specific recommendation of the McInnes report (and not, therefore, part of the consultation process on that report) it is in keeping with the policy objective of ensuring that criminal business can be managed as effectively as possible and will improve consistency between the current summary and solemn procedures.

Alternative approaches

143. There are limited ways in which to achieve this policy objective. The proposed change will promote consistency between the procedure followed in solemn and summary cases. Unlike solemn proceedings, where the solicitor tends to be engaged from an early stage, the accused in summary proceedings is unlikely to instruct a solicitor until the compliant containing the charge(s) against him or her has been served. It would therefore be inappropriate to seek total consistency between solemn and summary procedure, which is why it will remain competent to serve the complaint on the accused only under summary procedure. The alternative to the proposed approach would be to do nothing, and, in doing so, miss an opportunity to increase the efficiency of summary justice system by creating an additional route for service of documents in cases where an accused person is legally represented.

CRIMINAL PROCEEDINGS – INCREASING FLEXIBILITY AS TO WHEN SOCIAL ENQUIRY REPORTS MAY BE OBTAINED

Policy Objectives

144. To ensure the most effective use of resources in the criminal justice system and reduce the need for unnecessary hearings and adjournments in court cases.

Key Information

145. Under the existing law the court is required to obtain a report from a local authority (a social enquiry report) in certain cases before it can sentence an offender. The court must order a report where the accused is under some form of statutory supervision such as probation or community service. Often the court is aware that a recent report has been provided in respect of the accused. Nonetheless the court is required to request a further report and continue the case even if it is of the opinion that the report will not assist in the matter of sentencing. This can lead to a waste of resources and delay.

146. The Bill provides that there should not be an absolute requirement on the court to obtain a new social enquiry report where a report has been previously obtained within the past three months. This flexibility will allow the court to move immediately to sentence in cases where a recent report is available and there have been no material changes in the circumstances of the

accused since the production of that report. However, the court will be able to obtain an updated report, if, after hearing representations, it considers it appropriate to do so. The Bill further provides that it will not be necessary for the court to obtain a social enquiry report where, having regard to the sentence likely to be imposed, the obtaining of such a report would serve no useful purpose (for example, where the court is minded to dispose of the case by way of a small fine).

Consultation

147. These changes were recommended by the McInnes committee in Chapter 29 of its report. A relatively low number of consultees responded to these recommendations – but all those who did so were in favour of implementing the changes set out above. A number of local authorities in particular were in favour of these changes, as they would reduce the need to produce social enquiry reports in cases where these are clearly not required, or where a relevant report is already available.

Alternative Approaches

148. No alternative approaches to this provision were considered in any detail. The recommendations of the McInnes report were supported by all those consultees who commented on the recommendation regarding social enquiry reports and the Executive agrees that these changes should be made.

CRIMINAL PROCEEDINGS – TIME LIMITS RELATING TO LODGING OF SUMMARY APPEALS.

Policy Objectives

149. To ensure greater consistency between summary and solemn procedure and provide flexibility in the management of appeal cases.

Key Information

150. The 1995 Act sets out a range of time limits that apply to the production of notes of appeal by the judge at first instance in a summary case. It also makes limited provision for the extension of some of those time limits and provides that they may be extended by the sheriff principal of the sheriffdom in which judgement was pronounced, but only where the sentencing judge is temporarily absent or is a part-time sheriff or a justice of the peace. The Bill removes this limited range of circumstances in which time limits can be extended. Instead a power is conferred on the sheriff principal allowing an extension to be made to these time limits for such period as he considers reasonable, on ‘cause shown’. The time limits themselves will remain in place, but the Bill provides greater flexibility for the sheriff principal to extend these time limits where this is justified in the circumstances of the case.

151. Where leave to appeal is refused by a single judge of the High Court in a summary case the appellant may lodge a further appeal against that decision within 14 days of the intimation of the refusal. Under solemn procedure the same 14 day period for an appeal against refusal exists, but the High Court may, on cause shown, grant an application to extend that period. There is

currently no such provision for summary appeals. The Bill introduces an identical power in respect of summary appeals.

Summary Appeal Court

152. It should be noted that the Bill does not provide for the creation of a summary appeal court, which was recommended in Chapter 31 of the McInnes report. Ministers committed to discuss with the judiciary how best to make use of the skills of judges at all levels to achieve improvement in the processing of summary appeals. Since publication of the McInnes report significant improvements have been made in the processing of appeals and significant changes in the practice of the High Court have also taken place by virtue of the High Court Reform programme and the provisions of the Criminal Procedure (Amendment) (Scotland) Act 2004. Following discussion with the judiciary the view has been taken that the High Court should continue to process all criminal appeals in Scotland; the priority should be to focus on the creation of a unified court administration rather than creating a new court. The Scottish Executive will review the position once court unification is complete.

Consultation

153. These changes to the time limits in relation to the preparation of notes in summary appeals were proposed by the sheriffs principal and have been accepted on the basis that it can be difficult to contact part-time sheriffs and justices of the peace within the time limits that are currently specified. The introduction of an application to extend the time limit where leave to appeal has been refused is to ensure consistency between summary and solemn procedure. Of those who responded to the McInnes report consultation on the question as to whether there should be a summary appeal court only a small number were in favour, and some of those in favour expressed reservations about the composition of the court and the consistency of decision making that might be achieved by it.

Alternative Approaches

154. No alternative approaches to this provision were considered in any detail – it provides additional flexibility in respect of the appeal process and is not considered to be controversial.

CRIMINAL PROCEEDINGS – EXTENSION OF PRE-TRIAL TIME LIMITS IN SOLEMN CASES

Policy Objectives

155. To ensure consistency between the procedures allowing extension of pre-trial time limits in sheriff court solemn and High Court cases.

Key Information

156. Section 65(1) of the 1995 Act provides that an accused shall not be tried on indictment for any offence unless, where an indictment has been served on the accused in High Court cases, a preliminary hearing is commenced within the period of 11 months. It also provides that, in any solemn case, the trial must be commenced within the period of 12 months of the first appearance

of the accused on petition in respect of the offence. Section 65(3) details the circumstances in which the court may extend these time limits.

157. Section 65(3)(a) provides that, in High Court cases where the indictment has been served on the accused, a single judge of that court can, on cause shown, extend both the 11 and 12 month periods. In terms of section 65(3)(b), in any other case, the sheriff may, on cause shown, extend *only* the period of 12 months.

158. The wording of section 65(3) has proved problematic, in practice. The prosecutor can apply for an extension of the 12 month period prior to serving an indictment on the accused, but cannot apply for an extension of the 11 month period until an indictment has actually been served. This leads to an anomaly requiring the prosecution to indict the case in the High Court before being able to move for an extension of the 11 month period, whereas the 12 month period may be extended in the sheriff court prior to service of the indictment.

159. The Bill makes provision allowing a sheriff to extend the 11 month time limit for commencement of the preliminary hearing prior to service of the indictment in High Court cases.

Consultation

160. This policy was developed in consultation with COPFS who identified this as a useful amendment to current solemn criminal procedure in terms of efficient management of cases to be tried in the High Court. As this change relates to solemn procedure it was not a specific recommendation of the McInnes report (and not, therefore, part of the consultation process on that report). It is however in keeping with the policy objective of ensuring consistency between procedures in different levels of criminal court where possible.

Alternative approaches

161. There are limited ways in which to achieve this policy objective. The alternative would be to do nothing, and maintain a procedure which does not achieve the most efficient use of court time and prosecution resources in that the Crown cannot apply for extension of the 11 month time period until after service of the indictment.

CRIMINAL PROCEEDINGS – DEALING WITH HIGH VOLUMES OF CUSTODY CASES IN ANOTHER SHERIFFDOM IN EXCEPTIONAL CIRCUMSTANCES

Policy Objectives

162. To ensure that courts can continue to deal effectively with custody cases in circumstances where an unusually high level of business is faced by a particular sheriffdom.

Key Information

163. Under the existing law, if a large number of people were arrested in one area and detained in custody pending a court appearance, the first calling of every custody case would need to take place on the next court day in a court in that sheriffdom. This may place the courts in that

sheriffdom under particular strain if, for example, there had been a large or high profile event in a particular area that led to a number of arrests at one time.

164. The Bill provides (by insertion of new sections 34A and 137C into the 1995 Act) that, where it is anticipated there will be large numbers of custody cases, the prosecutor may apply to the sheriff principal for an order which, if granted, would allow some or all of those custody cases to be taken at a sheriff court outwith the sheriffdom, spreading the temporary high volume of cases more evenly. Once raised the proceedings could continue in that court or may be transferred back to the original sheriff court in whose jurisdiction the alleged offence occurred.

Consultation

165. This change was developed in consultation with the sheriffs principal at their suggestion. Although not a specific recommendation of the McInnes report (and not, therefore, part of the consultation process on that report) it will provide a useful degree of additional flexibility to ensure that the courts continue to operate effectively even when faced with particularly challenging situations.

Alternative Approaches

166. The alternative approach would be to maintain the position whereby all custody cases must be dealt with in the sheriffdom where the alleged offence took place. In the vast majority of cases this will continue to be the sensible approach hence the fact that this provision makes an exception to deal only with particular instances where the prosecutor requests that an order be made and the sheriffs principal concerned agree. This balances the desire to deal with criminal business in the locality it affects with the importance of effectively managing court business where there is an unusually high level of business.

CRIMINAL PROCEEDINGS – SPECIAL MEASURE OF TAKING EVIDENCE BY A COMMISSIONER IN RELATION TO VULNERABLE WITNESSES

Policy Objectives

167. To amend the law relating to the special measure of taking evidence by a commissioner in relation to vulnerable witnesses to ensure that such evidence can be treated appropriately in any court hearing.

Key Information

168. Section 271I of the 1995 Act, as inserted by section 1 of the Vulnerable Witnesses (Scotland) Act 2004, provides for the special measure of taking evidence by a commissioner. This measure was commenced for certain limited purposes, in respect of child witnesses in High Court and sheriff court solemn cases from 30 November 2005 and in Children's Hearings court proceedings. It is one of several special measures designed to help vulnerable witnesses give their evidence. Certain of these measures are automatically available if a witness is under 16, and others, such as taking evidence by a commissioner, are also available at the discretion of the court in certain other circumstances prescribed by the Act. It is intended that the availability of the special measures will be extended to adult vulnerable witnesses in High Court and sheriff

court solemn cases from 1 April 2006 and in Children's Hearings court proceedings and to all vulnerable witnesses in sheriff court summary cases in 2007. Evidence taken by a commissioner as a special measure involves proceedings being conducted before a commissioner, normally prior to the start of a trial. The evidence of the vulnerable witness is taken in full (covering examination, cross-examination and re-examination).

169. In outline, the legislation requires that, if the use of this special measure is granted:

- the court shall appoint a commissioner;
- the commission proceedings shall be video-recorded;
- the accused shall not routinely be present;
- but the accused will be entitled to watch and hear the commission proceedings as they are taking place;
- the recorded evidence shall be received in evidence without the need to be sworn to by the witness at any subsequent proceedings.

170. A difficulty with the operation of this special measure, in certain circumstances, has been identified. Currently, there are prohibitions on an accused person conducting their own defence (in sections 288C to 288F of the 1995 Act) and restrictions on evidence relating to a witness' sexual history and character (at section 274 of the 1995 Act). Both apply during the trial. The intention is that these should also apply to commissioner proceedings. However, in the course of implementing section 271I advice has been received to the effect that the process of taking evidence by a commissioner does not form part of a trial, with the result that none of the protections under sections 288C to 288F or 274 of the 1995 Act apply to the provisions under section 271I.

171. As a result the vulnerable witness could be more traumatised by the experience of giving evidence using this special measure than they would be if they were to give evidence in the normal way at a trial. This would be contrary to the intention of the legislation.

172. The Bill makes provision to clarify that a witness can give evidence to a commissioner by way of a live TV link. It also ensures that the following protections, currently available in a trial, are also available when the special measure of taking evidence by a commissioner is used:

- restrictions on evidence and questioning in certain cases involving sexual offences as provided for by section 274 of the 1995 Act;
- prohibition on the accused from personally conducting his own defence in certain sexual offence cases as provided for in section 288C (2) and (4) of the 1995 Act;
- the requirement of the court to appoint a solicitor under section 288D of the 1995 Act where the court is not satisfied that the accused intends to instruct a solicitor himself in sexual offence cases as set out in section 288C;
- prohibition on the accused from personally conducting their own defence in certain cases involving child witnesses under 12 as provided for in section 288E of the 1995 Act;

- prohibition on the accused from personally conducting their own defence in other cases involving vulnerable witnesses as provided for in section 288F of the 1995 Act.

Consultation

173. There has been no public consultation on the proposed change. This is because the original policy intention in the Vulnerable Witnesses (Scotland) Act 2004 was that witnesses using this special measure should be entitled to the protections discussed above as they would be if they were giving evidence at the trial. However, the Crown Office and Procurator Fiscal Service, the Scottish Children's Reporters Administration, the Scottish Court Service, the Law Society of Scotland, the Lord President's Private Office and a number of voluntary organisations have all been involved in assisting with the development of the policy in this regard.

Alternative Approaches

174. Other than a change to the legislation no alternative approach to remedy this situation is available.

CRIMINAL PROCEEDINGS – TAKING EVIDENCE BY A COMMISSIONER GENERALLY

Policy Objectives

175. To amend the law relating to the procedure governing the taking of evidence by a commissioner, to ensure that such evidence can be treated appropriately in any court hearing

Key Information

176. The taking of evidence by commission in criminal proceedings is provided for generally under section 272(1)(b) of the 1995 Act, which allows the prosecutor or defence in any proceedings in the High Court or sheriff court to apply to take the evidence of a witness by a commissioner. Such an application is competent where, by reason of being ill or infirm, the witness is unable to attend the trial, or where a witness who is not ordinarily resident in the UK, Channel Islands or Isle of Man is unlikely to be present in any of these places at the time of the trial. This provision is entirely separate and distinct from that provided by Section 271I of the 1995 Act for the special measure of taking evidence by a commissioner.

177. On a strict interpretation of the 1995 Act, the view has been taken that certain protections in the Act relating to sexual offence charges will not apply to proceedings where evidence is taken by a commissioner under section 272. Notably, the prohibitions on an accused person conducting his own case or defence at the trial (in section 288C), the requirement of the court to appoint a solicitor (in section 288D) and the restrictions on evidence relating to sexual offences (in section 274) are considered not to apply. The Bill makes provision to reverse that position, ensuring that the protections mentioned above apply when evidence is taken by a commissioner.

Consultation

178. There has been no public consultation on the proposed change. This is because the original intention of the Act was that witnesses making use of this provision should be entitled to the same protections discussed in this Memorandum as they would be if they were giving their evidence in a trial.

Alternative Approaches

179. Other than a change to the legislation no alternative approach to remedy the situation is possible.

CRIMINAL PROCEEDINGS – RECOVERY OF DOCUMENTS IN CRIMINAL CASES

Policy Objectives

180. In criminal cases documents may be recovered by a procedure known as “commission and diligence” and by the granting of a production order. Currently it is only competent for orders for commission and diligence to be granted by the High Court of Justiciary. The existence and extent of a sheriff’s power to grant a production order is unclear. It is intended that sheriffs should have the power to grant such orders. This will make better use of judicial resources and will clarify the law in this regard. These new powers will apply in respect of all solemn criminal proceedings in the sheriff court and summary criminal proceedings.

Key Information

181. At present, when documents which an accused requires for his defence are in the hands of third parties the accused is entitled to ask the High Court to order their recovery. The process is referred to as an application for “commission and diligence” in criminal proceedings. The only court which has the power to grant this application is the High Court. This applies irrespective of whether the accused is being tried under solemn procedure in the sheriff court or under summary procedure in the sheriff or district court. Authority for this proposition comes from the High Court cases of *HMA v. Hasson* 1971 S.L.T. 199; 1971 J.C. 35 and *HMA v. Ashrif* 1988 S.L.T. 567. In practice, this involves the raising of separate proceedings in the High Court to recover evidence required for criminal proceedings in the sheriff and district courts. Of the applications made for a commission and diligence in recent years it is estimated that some 44% in 2003 and 52% in 2004 emanated from courts other than the High Court

182. In addition, where documents which an accused requires are in the hands of the Crown, it appears that under the common law these can be recovered by means of a production order (*McLeod, Petitioner* 1998 J.C. 67 refers). There is doubt as to whether sheriffs have the power to grant production orders. Indeed, it is often the case that recovery of documents sought from the Crown will, in fact, be sought by way of application for a commission and diligence to the High Court.

183. The Bill provides that the sheriff court will have the power to grant orders for commission and diligence and production orders. This power will apply in respect of all solemn proceedings that have been commenced before that court; and, all summary proceedings that

have been commenced before that court and any JP court in that sheriff court district. The Bill also provides a right of appeal to the High Court against the decision of the sheriff in respect of such orders. The High Court may quash, vary or uphold the sheriff's decision on appeal. Under the general power to make Acts of Adjournal, the High Court of Justiciary will be able to prescribe the procedure to be followed in the sheriff court in any application for a commission and diligence or a production order and in any appeal against the sheriff's decision in that regard.

Consultation

184. This proposal was suggested by the former Lord Justice General and was the subject of consultation with the Crown Office and Scottish Court Service. All those involved in this process to date are of the view that allowing sheriffs to exercise this power would be a sensible change that would avoid the need for all such orders to be granted by judges in the High Court. Further consultation with the judiciary will be carried out in order to develop the detailed implementation of this proposal.

Alternative approaches

185. An alternative approach would be to retain the *status quo*. The Scottish Ministers were not in favour of this option as they had noted that sheriffs currently have the power to deal with applications for a commission and diligence in civil proceedings before them and appear to deal with such applications satisfactorily.

CRIMINAL PROCEEDINGS – POWER TO EXCUSE PROCEDURAL IRREGULARITIES AND TO MODIFY PROCEDURAL RULES

Policy Objectives

186. There has been concern for some time about the fact that procedural errors in the handling of criminal cases can have disproportionate consequences for one or more of the parties in the case. It is considered that there is a need for a provision entitling the court to relieve any party to a criminal case from the consequences of failure to comply with rules of criminal procedure when this is in the interests of justice in the view of the court. The rules of criminal procedure may be set out expressly in statute or may form part of common law. The court, the prosecutor or the defence can make inadvertent errors in the application of these procedural rules.

187. A well known rule of common law is the peremptory nature of trial diets and the fact that, unless a diet is expressly called, adjourned or continued on the date of citation then the instance falls. Non-observance of the rule is treated as involving a fundamental nullity requiring that any conviction that follows thereon should be quashed. A recent case in which this rule was discussed is *Reynolds v Dyer*¹¹. In that case, the High Court held that failure to discharge a trial diet meant that the instance fell, even where the accused had failed to appear at a preliminary diet and a warrant for his arrest had been granted.

¹¹ 2002 SLT 295

188. This decision led to emergency legislation in the form of the Criminal Procedure Amendment (Scotland) Act 2002 (“the 2002 Act”), in which section 150 of the 1995 Act was amended on a retrospective basis to provide that the grant of a warrant to apprehend at an intermediate diet would have the effect of discharging the trial diet, subject to any order to different effect made by the court.

189. The policy objective is to give the courts discretion to excuse a procedural irregularity by any party to a case where they consider it in the interests of justice to do so.

Key Information

190. Currently there is no general, overarching provision in the 1995 Act that allows the court to relieve any party to a criminal case from failure to comply with the procedural requirements of the 1995 Act, or the requirements of common law.

191. The Bill gives the court a discretionary power to excuse any party to a criminal case from the consequences of a procedural irregularity in both solemn and summary proceedings. The court will have to consider the circumstances of the case and whether excusal would be in the interests of justice - there will be no automatic excusal when a mistake is made. The effect of this power will be limited to cases where there has been a mistake or oversight. It will apply only to rules of criminal procedure, not to rules relating to the obtaining, admissibility and sufficiency of evidence.

192. In addition, the proposed provision will specifically exclude from its scope the power to excuse failure to commence proceedings within a statutory time limit or to comply with a custodial time limit. There is already statute and case law which details the circumstances in which such time limits may be extended.

Consultation

193. During the debate on the 2002 Act, a number of MSPs called for a change to the system to ensure that flaws in the application of the technical, procedural law are not allowed to overturn the manifest purpose of the substantive criminal law. In response to this, the Solicitor General expressed the view that, in the future there should be provision that will not allow technicalities, which the public cannot understand, to result in an acquittal in a criminal case.

194. The current policy was developed in consultation with COPFS who identified this as an amendment to current procedure that would further the aims of summary justice reform. This was not a specific recommendation of the McInnes report (and not, therefore, part of the consultation process on that report). However the proposed change is in keeping with the policy objective of ensuring that courts can deal effectively with business in the interests of justice.-

Alternative approaches

195. There are limited ways in which to achieve this policy objective and the proposed provision in the 1995 Act will give the courts the power to excuse procedural irregularities. The alternative is to leave the law as it currently stands and maintain a situation where procedural

technicalities can result in acquittals which are seemingly disproportionate in light of the whole circumstances of a criminal case.

CRIMINAL PROCEEDINGS – BREACH OF A RESTRICTION OF LIBERTY ORDER

Policy Objectives

196. To ensure consistency in the evidential provisions concerning proof of breach of a post conviction order.

Key Information

197. The 1995 Act sets out the procedure to be followed in respect of alleged breaches of restriction of liberty orders (“ROLOs”). Section 245H(2) provides that where a certificated statement detailing the presence or absence of an offender at a particular place and time is produced at a hearing for a breach of a ROLO, this is deemed to be sufficient evidence to prove that fact and therefore corroboration is not necessary. Where a certificated statement is not produced at a breach of ROLO hearing, it appears that the normal rules of evidence apply when establishing the breach and corroboration is required. In addition, certified statements can only be used in connection with the remote monitoring of an offender. Other types of monitoring can take place in terms of the provisions at section 245B of the 1995 Act - proof of breach of any those requirements would also require corroboration.

198. Analogous provisions in the 1995 Act relating to probation orders, community service orders and drug treatment and testing orders allow proof of breach of these orders to be established by the evidence of one witness. The Bill amends the provisions of the 1995 Act to bring ROLOs into line with other post conviction orders – allowing the evidence of one witness to be sufficient as proof of breach of ROLOs in circumstances where a certified statement is not produced to the court.

Consultation

199. This policy was developed in consultation with COPFS. Although not a specific recommendation of the McInnes report (and not, therefore, part of the consultation process on that report) it is in keeping with the policy objective of improving consistency in the law as it relates to post conviction orders.

Alternative approaches

200. There are limited ways in which to achieve this policy objective. A relatively minor legislative amendment achieves the desired consistency with other similar procedures in the 1995 Act. The alternative would be to do nothing, and maintain an unnecessary requirement that breach of a ROLO must be established by corroborated evidence, in light of the fact that breach of a ROLO is not a criminal offence. This does not achieve the most efficient use of court or witness time, or prosecution resources.

CRIMINAL PROCEEDINGS – BREACH OF PROBATION AND COMMUNITY SERVICE ORDERS

Policy Objectives

201. To ensure that offenders are given due notice of any alleged breach of a probation or community service order.

Key Information

202. Under the current legislation (Sections 232 and 239 of the 1995 Act) the court may issue a warrant to either apprehend or cite an offender to a court hearing where it appears that the offender is in breach of a probation or community service order. When it appears that an offender is in breach, a report will be produced as the means of providing the necessary information to enable the court to assess whether or not the offender has failed to comply with any requirement of the order. At present there is no requirement to serve this report on the offender.

203. The Bill makes provision establishing that (firstly) a written report will be prepared detailing the basis of the alleged breach and that (secondly) at the same time as the report is sent to the court, it will also be served on the offender subject to the order. It is proposed that service of the report should be effected in the same manner as that for a summary complaint under section 141 of the 1995 Act.

Consultation

204. This policy was developed in consultation with COPFS who identified this as an amendment to current procedure that would ensure that the offender is better informed of the circumstances of any alleged breach. In some cases this may lead to earlier acceptance of the breach by the offender, resulting in a consequent saving in court and witness time. This was not a specific recommendation of the McInnes report (and not, therefore, part of the consultation process on that report).

Alternative approaches

205. There are limited ways in which to achieve this policy objective. A relatively minor legislative amendment achieves the objective of service of the alleged basis of breach on the offender. The alternative would be to do nothing, and maintain a procedure which does not achieve the most efficient process for dealing with apparent breaches of these orders, or use of court and witness time.

CHANGES TO THE SENTENCING POWERS OF THE SUMMARY COURTS

Policy Objectives

206. The Executive believes that professional sheriffs should be able to deal with a wider range of cases under summary procedure than they are currently entitled to, including some that would attract a higher penalty. An increase in the maximum sentence that can be imposed in

summary cases will allow more cases to be dealt with under summary procedure. The most serious matters will, however, continue to be dealt with under solemn procedure in the sheriff courts and the High Court.

Key Information

207. The ordinary sentencing power of the sheriff, in common law cases, when sitting as a court of summary jurisdiction is currently limited to three months imprisonment or detention. Where the accused is convicted of a second or subsequent offence inferring dishonest appropriation of property (or an attempt thereat) or a second or subsequent offence inferring personal violence the court may sentence the accused to a custodial sentence not exceeding six months. The maximum fine which may be imposed for a common law offence and certain statutory offences, “the prescribed sum” is currently set at £5000.

208. The Bill provides that the sentencing power of the sheriff when sitting summarily is increased to a maximum custodial sentence of twelve months, irrespective of whether the offence is a first or second/subsequent conviction. The Bill also increases the prescribed sum to £10,000. The maximum amount of compensation that a sheriff can grant in respect of a summary offence will also be increased to £10,000.

209. Statutory offences which are triable ‘either way’, that is summarily or on indictment, and which have a maximum sentence on summary conviction of less than 12 months imprisonment, will have that maximum increased to 12 months. The maximum penalty available in respect of such offences when tried on indictment will remain unchanged. The Bill also makes provision to increase the maximum custodial penalty available to the court in respect of 3 categories of statutory offence which are triable summarily only, where the current maximum period of imprisonment is less than 12 months imprisonment. These are:

- section 6 of the Emergency Workers (Scotland) Act 2005 (relating to assaulting an emergency worker – 9 month maximum at present);
- the Police (Scotland) Act 1967 (assaulting a policeman – 9 month maximum at present); and
- s37(4)(b) of the Antisocial Behaviour (Scotland) Act 2004 (entering premises in contravention of a closure order – at present, 3 month maximum for a first offence, 9 months for a second or subsequent offence).

The maximum penalty on summary conviction in respect of these offences will be increased to 12 months imprisonment to reflect the new common law maximum. Other than the provisions mentioned above the maximum sentences for statutory offences that are triable only summarily are unchanged.

210. The Bill also makes provision allowing the sentencing powers of the new JP court to be increased by way of affirmative order. There are no immediate plans to increase the sentencing powers of the JP court – but this power will allow such an increase to be effected quickly if it subsequently proves to be desirable. This is in line with the Executive’s policy of creating flexible court capacity to ensure that cases can be dealt with quickly and at the appropriate level. The extent to which increases to the jurisdiction of the JP court can be made by order is limited by the Bill to a period of 6 months imprisonment or a fine at level 5 on the standard scale

(currently £5,000). Such an increase in sentencing powers could also be made for any district court which had not yet come under the administration of the Scottish Court Service as part of the phased process of court unification.

211. The Bill also extends the scope of situations in which the courts can grant a compensation order in criminal cases. The present position is that courts can only impose compensation orders – financial penalties which, when paid, are passed on to the victim – when there has been personal injury, loss or damage caused by the offence. The McInnes committee recommended that it should be competent for compensation to be awarded where the victim of offending behaviour had been subjected to behaviour which was frightening, distressing or annoying or had caused nuisance or anxiety.

212. The 1995 Act will be amended to provide that the court will be able to impose compensation both where there has been personal injury, loss, or damage caused by the offending behaviour, or where the behaviour has caused alarm or distress to the person at whom, or at whose property, the offending behaviour was targeted. Prosecutors will be able to make compensation offers as an alternative to prosecution in the same circumstances.

213. The Executive takes the view that an extension to the range of situations in which compensation is payable reinforces the commitment to address the needs and concerns of victims. In particular, by permitting compensation to be awarded where the victim of offending behaviour has suffered upset, it will be possible for the court to order that a victim of criminal behaviour is to be compensated by the offender for that upset.

Consultation

214. Chapter 7 of the McInnes report considered the sentencing powers of the sheriff under summary procedure and recommended that these be increased. Those proposals were subject to full and open public consultation in 2004. The majority of respondents to chapter 7 of the report submitted views on only the wider issue of lay justice as opposed to the issue of sentencing powers. However the view was expressed by a minority of respondents that an increase in the maximum sentencing power of the sheriff sitting summarily would be acceptable for the reasons given in the report. The Executive committed, in the *Smarter Justice* paper, to increase the jurisdiction of the sheriff in summary cases as outlined above. The recommendation to extend the scope of situations in which the courts can grant a compensation order in criminal cases was made in chapter 11 of the McInnes report and was also accepted by Ministers in the *Smarter Justice* paper.

215. The provision allowing increases to be made to the jurisdiction of the JP court in future was not recommended in the McInnes report as it recommended abolition of justices of the peace. However paragraph 48 of note of dissent to the report (which argued in favour of the retention of JPs) suggested increasing JPs jurisdiction to 3 months imprisonment or a maximum £5,000 fine. A large number of consultees supported the note of dissent and the provisions outlined above providing a flexible power to increase the jurisdiction of the JP court reflect those views. A number of consultees also suggested that justices of the peace should be given the power to disqualify offenders from driving in all cases (rather than in ‘totting-up’ cases only, as is currently the case). The Executive is attracted to that recommendation, but it will involve

amendment of reserved legislation. Discussions will be taken forward with the UK Government on this matter with a view to achieving this change.

Alternative Approaches

216. The McInnes Committee considered a number of different levels of maximum sentence for the sheriff sitting in summary cases before concluding that a 12 month custodial maximum and a £20,000 fine would be most suitable. The Bill provides for a £10,000 maximum as opposed to the McInnes recommendation. Ministers acknowledged, in the *Smarter Justice* paper, that an increase in the maximum fine level was necessary, but noted that the Sentencing Commission for Scotland has been tasked with reviewing ‘the basis on which fines are set’. The increase to a maximum of £10,000 represents an interim measure that may be subject to further review following the report of the Sentencing Commission.

217. The scope of compensation orders could have been left untouched, even after the introduction of compensation offers as an alternative to prosecution. This, however, would have meant that those who are alarmed or distressed by offending behaviour could not be made the beneficiaries of compensation.

218. The Executive carefully considered the recommendation of the McInnes committee that compensation should be available to those who had been the victims of behaviour which caused nuisance or annoyance, in addition to alarm or distress. The view was taken, however, that use of the term “alarm or distress” adequately covered the types of offending behaviour that should be targeted through an extended use of compensation orders and would further enhance the range of disposals available to the courts and prosecutors to deal effectively with antisocial behaviour.

EXTENDING THE RANGE OF ALTERNATIVES TO PROSECUTION

Policy Objectives

219. It is important that the penalty imposed in respect of an offence is proportionate. It is also important that court time is used effectively. A court intervention, which is a resource intensive and often lengthy process, should only be used in cases where the severity of the offence clearly requires it, the accusation is genuinely in dispute or where there are circumstances relating to the offender (such as their previous record) that make a court disposal appropriate. In cases of minor offending a quick, rigorously enforced and proportionate non-court penalty is likely to be more effective in deterring reoffending. Such a penalty can also be administered more efficiently ensuring that those cases requiring a court hearing can themselves reach court with the minimum of delay.

220. In order to realise this policy the Executive intends to make alternatives to prosecution more widely available, more flexible, and more robust. This should result in the removal from courts of a further tranche of low-level offending. This in turn will ensure that court time is focused on those matters which can only be dealt with by way of prosecution and those which are in dispute. Delivering such an approach is a key element of the vision set out in the *Smarter Justice* paper. That vision is of a summary justice system which is truly summary – in which the courts are not spending valuable time dealing with business which need not be there, and in which offending behaviour will be dealt with swiftly at the appropriate level.

221. This section of the Memorandum covers changes that the Bill will make to alternatives to prosecution. The main changes that will be introduced are:

- An increase in the maximum level of fixed penalty that may be offered and the range of offences for which such a penalty may be offered (previously this was limited to offences triable in the district court but it will be extended to cover all offences triable summarily)
- Changes to the enforcement regime for outstanding conditional offers of fixed penalty notices and the manner in which their acceptance can be disclosed in subsequent proceedings involving the same accused; and
- The introduction of two new forms of alternative to prosecution – the compensation offer and the work order.

Further detail on each of these is provided below.

ALTERNATIVES TO PROSECUTION – INCREASE IN THE MAXIMUM LEVEL OF CONDITIONAL OFFER OF A FIXED PENALTY (‘FISCAL FINE’)

Key Information

222. The current position is that procurators fiscal have the option of offering conditional offer of a fixed penalty of up to £100 to an alleged offender in respect of any offence that may be tried under summary procedure. Where these are accepted – by making payment of at least the first instalment – the accused cannot be prosecuted, and no conviction is recorded. Where they are not accepted, prosecution will generally ensue. This has the benefit of keeping low level offending out of court where the alleged offender is willing to accept the offer of a fixed penalty.

223. The maximum level of fixed penalty has remained unchanged since 1996. The Bill increases that maximum level to £500. This will mean that some matters which are currently deemed appropriate for court prosecution only can now be the subject of alternatives where appropriate. It is anticipated that, in the main, prosecutors will offer penalties of up to £200, but the higher limit gives prosecutors greater flexibility to deal with offences which should attract a higher penalty but may not require a court proceedings.

224. Currently, where a fixed penalty is offered, the recipient must take positive action to accept it. If the recipient takes no action the offer is treated as if it had been rejected, and the case is returned to the prosecutor for further action. This will generally result in prosecution. However, many of these cases will result in a plea of guilty at the first stage and the imposition of a fine as the penalty. This wastes court time, as well as that of the offender, and suggests that many of those who take no action on receipt of a fixed penalty do so out of apathy, as opposed to there being a significant dispute about the facts, or about guilt.

225. The Bill makes changes to the system of offering and accepting fixed penalties. Now, where no action is taken in respect of the offer it will be treated as having been accepted. Appropriate safeguards are maintained for those who do not wish to accept the offer. Under the provisions, the recipient of an offer will take positive action if he or she wishes a hearing on the case. Where the recipient does nothing, and the fixed penalty is deemed to have been accepted, the penalty will then be treated as if it had been imposed by a court, enforceable and recoverable

in largely the same way. It is, of course, essential that those who wish to exercise their right to reject the offer and request a trial should be able to do that, and the offer document will make that clear. Safeguards are also introduced to ensure that those who did not receive the offer are able to have the penalty recalled.

226. Whilst the extension in use of alternatives to prosecution will deliver greater efficiency in courts, these alternatives will not be a “soft option”. Swifter punishment will ensure that there is less of a gap between the commission of an offence and the imposition of the penalty. In deciding to make an offer of an alternative to prosecution the Procurator Fiscal will have received a report of a crime, and will have decided that it is appropriate to take action in relation to that report.

227. To reinforce the position of these alternatives in the criminal justice system the Bill introduces an important change to the way in which accepted conditional offers of fixed penalties are treated if the individual who accepted the fine is subsequently convicted of a further offence. Although they will still not be regarded as convictions, the Procurator Fiscal will be able to make known to the court that the offender has previously accepted a conditional offer of a fixed penalty notice in respect of an alleged offence. This is in the same manner as previous convictions are laid before a court before it determines sentence. Only fixed penalty offers accepted within a period of two years of the date of a subsequent conviction could be laid before the court in this manner – after that time they would be ‘spent’.

228. These provisions mean that, in the event of a further conviction, the sentencing court will be able to select the appropriate sentence with all potentially relevant information about the offender’s previous conduct at its disposal, further integrating conditional offers of a fixed penalty notice into the summary justice system as a speedy and effective penalty that will play a part in reducing reoffending.

229. Provision is also made in the Bill to the effect that, where an individual refuses the offer of a fixed penalty and is subsequently convicted for the offence which was the subject of the offer, the court can be made aware of the fact that a fixed penalty was initially offered but refused.

230. The operation of time-bar can operate as a potential disincentive to the use of fixed penalties for some statutory offences – by the time the offer has been made, considered, and rejected, it can sometimes be difficult to bring a prosecution within the time limits. As a result the prosecutor often chooses to call the case in court rather than offering a fixed penalty in order to ensure that the case is disposed of in the available time limits. This results in a number of cases making it to court that could otherwise have been effectively disposed of by way of a fixed penalty. Many statutory offences are crimes at the lower end of the scale which are otherwise appropriate for the use of fixed penalties. To deal with this the Bill provides that the period while a fixed penalty offer is outstanding should be disregarded for the purposes of reckoning whether a case is time-barred.

231. These major changes to the level and operation of conditional offers of a fixed penalty notice will need to be understood and effectively implemented by Procurators Fiscal across Scotland. Work is already under way within the Crown Office and Procurator Fiscal Service to

ensure that all prosecutors are made aware of these important changes and are fully equipped to use the new provisions consistently and effectively. The Lord Advocate will produce revised guidelines for prosecutors to take account of the proposed changes.

Consultation

232. Chapter 11 of the McInnes report made a series of recommendations relating to fixed penalties. Those proposals were subject to full and open public consultation in 2004. A number of consultees expressed concern in relation to these recommendations – some of those concerns are considered further below. The Executive committed, in the *Smarter Justice* paper, to implement the recommendations in relation to conditional offers of fixed penalty notices as outlined above.

233. It was considered important to test the assumptions made in the McInnes report about the amount of business which could be taken out of court by a change in the level of a conditional offer of a fixed penalty, and by the introduction of other alternatives to prosecution. The Crown Office has carried out modelling exercises which confirmed that there was considerable scope to extend the use of alternatives to prosecution, and that this in turn would ease the burden on the court system, allowing it to deal with cases more quickly.

Alternative approaches

234. In relation to the maximum level of the conditional offer of a fixed penalty notice, it would have been possible to leave the limit unchanged. However, the limit has not been raised, even to take account of inflation, since 1996. The view was taken that an increase would reflect the passage of time since then and would give prosecutors increased flexibility to offer alternatives in an increased number of appropriate cases. And appropriate use of alternatives is an essential part of the overarching aims of improving efficiency and imposing appropriate penalties in the summary justice system – taking out of courts cases which need not be there, freeing up courts to deal with cases which require judicial attention.

235. Having decided that an increase in the fixed penalty level was appropriate, the next issue to be decided was what the maximum limit should be. An increase to £200 was considered, but the view was taken that an increase to £500 would allow prosecutors more flexibility. Although it is unlikely that the £500 level will be frequently used it allows, for example, straightforward regulatory breaches by companies where guilt is admitted and the matter is not in dispute, to be disposed of without occupying the courts.

236. It would also have been possible to change the maximum fine level whilst leaving the present system of enforcement unchanged. However, this would have had a limited impact as one of the existing difficulties with enforcement of fixed penalties is the lack of enforcement remedies available if the first instalment of the fine is paid and subsequent payments are not. Also, in a number of cases where the offer is not taken up and the case calls in court as a result, often a plea of guilty will be given. This is an inefficient process to deal with cases which are not in dispute. The Executive is of the view that a change to the system will help to relieve the burden on summary courts.

237. It would also be possible to increase the use of alternatives to prosecution by the means outlined above, whilst maintaining the current position permitting disclosure of previous convictions *only* to courts on a subsequent conviction for another offence. However, allowing conditional offers of a fixed penalty notice to be considered in subsequent court cases will dispel the notion that they are a soft option, or exist apart from the rest of the criminal justice system. It will also ensure that the courts have as much information as possible before them regarding past conduct when reaching a decision in respect of a subsequent conviction.

238. A number of respondents to the McInnes report expressed concern that disclosure of accepted conditional offer of a fixed penalty notice following conviction for a subsequent offence might remove an important incentive to the offender to accept the offer. The perception might arise that accepted alternatives to prosecution will be seen as equivalent to convictions. The view of the Executive is that disclosure of accepted alternatives in these circumstances should be competent but proportionate, and should balance recognition of offending behaviour against the fact that prosecution in court was not deemed necessary and that the accused has not in fact been convicted. That is why prosecutors will be allowed to refer to accepted alternatives, but the period during which they can do so will be limited to two years following acceptance. This is considered to be a fair and proportionate position.

ALTERNATIVES TO PROSECUTION – INTRODUCTION OF COMPENSATION OFFERS AND WORK ORDERS

Key Information

239. As part of the package of strengthening the options available to prosecutors to deal with appropriate cases out of court the Bill will introduce two new alternatives to prosecution.

240. The McInnes report noted that many cases which were otherwise suitable for the offer of an alternative to prosecution were prosecuted in court because of the possibility of a compensation order being made by the court. Prosecutors do not presently have the power to make or offer such orders. The report proposed the introduction of a procurator fiscal “compensation offer” (referred to as a ‘fiscal compensation order’ in the report). The Executive has accepted this suggestion. It is intended that the ‘FCO’ can be offered instead of or in combination with a fixed penalty, and will operate in the same way. However, on payment the money would be remitted to the victim of the offence, in the same way as a court-imposed compensation order. Prosecutors would have the option of offering a FCO in any circumstance where a case could competently be tried summarily and the court might impose a compensation order on conviction. The maximum FCO will be £5000. This will give prosecutors considerable flexibility in the use of this alternative.

241. The second new alternative to be introduced is the Work Order (WO). The prosecutor will be given the option of offering an alleged offender a period of community-based reparatory work as an alternative to prosecution. Completion of the order would discharge the right to prosecute the accused for the offence, in like manner to acceptance of a financial alternative to prosecution. No conviction would be recorded against the accused. This alternative will, for the first time, give the prosecutor the power to offer an alternative to prosecution where a court hearing does not appear to be necessary and a financial penalty would not be appropriate. In this respect it will contribute further to the goal that only cases genuinely requiring a court

appearance should call in court. It will also allow the prosecutor to suggest a community based penalty where the nature of the alleged offence in question makes such a disposal more appropriate than a financial penalty.

242. As the introduction of the WO represents a new addition to the powers of the prosecutor Ministers intend to pilot its operation in one or more areas and evaluate that pilot fully in advance of any decision being taken on a wider roll-out. Pilot sites are yet to be identified and the Executive will consult further with appropriate organisations on how best to develop the Work Order.

243. The provisions in relation to disclosure of an alternative to prosecution in subsequent proceedings against an individual and the suspension of the period of time-bar in relation to a statutory offences whilst the offer of an alternative is outstanding (described in the section on fixed penalties above) will also apply to FCO and WO. The provisions applying to work orders in this regard are tailored to reflect the fact that the work order must be completed before prosecution for the alleged offence will be prevented.

Consultation

244. Chapter 11 of the McInnes report recommended the creation of FCOs. Those proposals were subject to full and open public consultation in 2004. Most consultees who made their opinion known on this issue were in favour of their introduction, subject to a number of caveats. In particular a number of consultees felt that a maximum limit should be placed on the value of compensation offer that a prosecutor could make (the McInnes report recommended no such limit). On the basis of those comments a £5,000 limit is provided for in the Bill.

245. The Executive announced the proposal to pilot the WO (referred to at that point as the 'Community Fiscal Fine' in the *Smarter Justice* paper). Further consultation with the appropriate organisations will take place as part of the process of developing the WO.

Alternative approaches

246. These provisions will allow prosecutors to take early action in respect of appropriate cases in a wider range of circumstances. The alternative would be to maintain the status quo – but this would not build the flexibility into the system that these options do, which should be of benefit to victims (speedy and appropriate resolution of cases); the court system (cases which do not need to be taken to court are removed from that process – reducing the backlog of serious cases faced by the court and saving public resources); and even the accused – speedy resolution maintains the link between an offence and the penalty and this wider range of penalties should ensure that the punishment imposed reflects the nature of the crime. These options contribute to the overall goal of criminal penalties – to deter offending in the first place and reoffending where an individual needs to be punished.

247. Having decided to introduce the FCO, the main issue to be considered was the upper limit. The McInnes report proposed introducing an unlimited FCO but, for the reasons given above, that option was ruled out. The upper limit could have been pegged more closely to the fixed penalty. That was considered to be unduly restrictive. It is recognised that minor

offending can sometimes cause significant damage, and where the alleged offender is willing to make good that damage without the need for court intervention that may be the best result for all parties. The limit provides prosecutors with the flexibility to deal with cases by the offer of a relatively high level of compensation, where it is considered that this would result in a just outcome.

COLLECTION AND ENFORCEMENT OF CRIMINAL FINES AND PENALTIES

Policy Objectives

248. The fine is the most widely used disposal in the criminal justice system in Scotland, with over 60% of convictions involving the imposition of a fine following sentence. It is often the most appropriate penalty to use in minor cases – as it is quick, simple to administer and penalises the offender appropriately without unduly disrupting those aspects of his or her daily life (such as family connections and employment) which are most likely to prevent further offending. Provided it is effectively collected and, where default occurs, enforced, it is one of the most appropriate disposals for summary cases.

249. Scotland's record on fine enforcement in recent years compares well with that across the rest of the UK. In 2002/03, the fines enforcement function of sheriff courts - which has the responsibility of collecting financial penalties imposed in sheriff courts and the High Court - successfully collected £11.610m in financial penalties. In 2003/04, they successfully collected £14.534m in financial penalties. Only £220,000 in sheriff and High Court fines were written off in 2003/04 – representing only 1.5% of the amount successfully collected. But further improvement in collection and, particularly, enforcement is possible – this Bill makes provision in that regard.

250. Plans for more effective arrangements for the enforcement of fines and financial penalties (including court imposed fines, compensation orders, conditional offers and fixed penalty notices) were announced in March 2005 in the *Smarter Justice* paper. These proposals build on the work of the McInnes Committee, and subsequent consultation on its recommendations. The overarching policy objective of this package of reform is to maintain the credibility of fines and financial penalties, and to make it clear to those who play the system that they will be actively pursued if they do not pay.

251. The McInnes report concluded that the present enforcement system:

‘while successful in collecting and accounting for payments which are made, fails to secure prompt payment of sums which those fined are unwilling to pay and does not cope well with those who genuinely cannot pay.’

252. The Committee noted that the current system placed responsibility for enforcement largely in the hands of the police and the courts. They concluded that the fines enforcement process should be redesigned to free up police officers to keep our communities safer. They also took the view that the enforcement process should, wherever possible, be dealt with administratively and thus reduce the involvement of the judiciary with consequential savings of court time. The Committee were also of the view that where a court determined that a fine was the most appropriate punishment, rigorous steps should be taken to ensure that the fine itself is

enforced. It was recognised that in the existing system fine defaulters are often called back to court to explain why they have not paid and are often given more time to pay, but no further incentive to pay or enforcement mechanism is applied. The Committee examined enforcement in other jurisdictions and noted that a common feature had been to shift the balance between what has to be done judicially and what could be done administratively.

253. It was also clear to the Committee that the operation of different collection and enforcement policies by local authorities and the Scottish Court Service (referred to below as “SCS”) resulted in widely varying methods of payment and enforcement nationally. They were clear in their view that a new approach to fines enforcement was required and that the most significant change that would pave the way for improved consistency of collection and enforcement would be unification of the administration of summary criminal courts.

254. The main drivers behind the Committee’s proposals were:

- to ensure that the fine remains a credible penalty in the summary justice system;
- to reduce the amount of police and court time engaged in enforcement proceedings;
- to ensure consistency of enforcement - crucial if the credibility of the fine as a penalty was to be maintained; and
- to make effective use of a range of possible administrative methods of collection - equipping those charged with collecting fines with the tools to do the job.

255. The *Smarter Justice* paper emphasised the importance, as part of the commitment to reduce reoffending, of developing a collection and enforcement regime that maintains and builds credibility in the fine. This will be achieved by changes to the structure and the processes for collection and enforcement of fines and financial penalties, and by extending the enforcement options available for use against those who do not pay.

Key Information

256. As unification of the administration of the summary criminal courts proceeds on a sheriffdom by sheriffdom basis, SCS will become responsible for collection and enforcement of all court fines, conditional offers of fixed penalty notices and registered fines in that sheriffdom. This will ensure that enforcement remains within the overall control of the courts whilst providing the centralised consistency sought by the McInnes Committee coupled with local management and payment facilities.

257. Local authorities will not have a role in the collection and enforcement of fines imposed by the JP court. This reflects the fact that local authorities will no longer be responsible for administering those courts. District court clerks will retain their current role in the collection and enforcement of district court fines and other financial penalties until unification is phased in, at which point the responsibility will transfer to SCS.

258. The Bill makes provision for the creation of a new officer known as a Fines Enforcement Officer (FEO) who will have specified powers in respect of court-imposed fines as well as conditional offers of a fixed penalty notice, compensation orders and other fixed penalties which

are enforced by the court. SCS will determine the number of such officers required depending on the workload of a particular court and the FEO will be an officer of SCS, fully trained for that role.

259. The principal role of the FEO will be to collect and enforce fines more effectively through active management of outstanding fines – considering the full circumstances of both the offender and the fine in question. They will support those who want to pay or are struggling to pay, providing information and advice to offenders as regards payment of relevant penalties, but will have statutory powers to enforce payment against those who could pay but choose not to. Their involvement is intended to minimise the use of prison sentences as a punishment for fine default by ensuring that defaulters do not end up in prison merely as a result of their inactivity.

260. In future when a court grants time to pay for a fine in an area where FEOs have been appointed, it will also make an ‘enforcement order’ in respect of that fine. This effectively transfers responsibility for collection of the fine to the FEO and at the same time enables the FEO to take certain forms of enforcement action in appropriate circumstances. While an enforcement order is in effect the court will not be able to imprison an offender for fine default. Through communication with the offender and regular updates as to outstanding balances and the level of payment due, the FEO will seek payment of the fine without using any further powers. S/he will have the power, at the request of the offender, to increase the time to pay in respect of a fine or to lower the level of regular instalments to be paid – and would use these powers where there had been a change in the circumstances of the offender or if it was felt that such a change would ultimately facilitate repayment. Many cases currently calling in means courts result in such a variation in the level of instalments to be paid, which is, essentially, a function which could be carried out administratively.

261. Offenders would be made aware of the powers of the FEO from the outset, in order to encourage payment without the necessity of enforcement action. If an offender was persistently uncooperative the FEO would be entitled to exercise one or more enforcement powers in an attempt to collect the outstanding income:

- power to make a request to the court which imposed the fine for a deduction to be made from the offender’s benefits;
- power to arrest earnings if the offender is employed or to arrest monies from the offender’s bank or building society account for the specific purpose of recovering the fine;
- power to make a seizure a vehicle belonging to the offender. The vehicle could ultimately be sold to discharge the outstanding fine (although that would require an order of the court);
- if none of the above options proves to be appropriate or effective the FEO can refer the case back to the court, with a report as to the circumstances of the case. The court will take account of the FEOs recommendations but is not obliged to follow them. The court would be able to take whatever action it saw fit – including imposing a supervised attendance order or imprisonment in default of the fine, although it is hoped that will be a last resort.

262. The offender will be able to seek a review of the actions of the FEO by the court if such actions are deemed to be unreasonable. This is a necessary safeguard which will mean that some fines cases do come back to court – but the number will be much lower than under the current system where every variation or piece of enforcement action follows upon appearance at a means court.

263. The provisions of the Bill will allow FEOs to be appointed and give them the powers outlined above. Detailed introduction of FEOs across the country will be a major task, led by SCS. The introduction of some of the FEOs functions may be piloted in the first instance, in order to ensure they can be effectively implemented across the country. The Bill also makes provision for regulations to be made in relation to further functions for the FEO, ensuring flexibility should their role or function need to be changed in the future. FEOs will not be introduced in the JP court (currently district court) until unification of the summary courts has taken place in a particular sheriffdom and, as a result, the SCS is responsible for the collection and enforcement of all fines in that area.

Consultation

264. Chapter 32 of the McInnes report made a series of recommendations relating to fines enforcement. Those proposals were subject to full and open public consultation in 2004. One-hundred-and-thirty-three respondents to the consultation offered comments on one or more aspect of fines enforcement. The majority of respondents felt that the current system of enforcement lacked credibility amongst the general public and offenders. Consequently they agreed that reform was necessary. The majority welcomed the Committee's aim of reducing the resources devoted by the judiciary and the police to fines enforcement and agreed with the Committee that, once a fine had been imposed, there was little need for the court to have a continuing role in its enforcement. There was also strong support for the proposition that collection and enforcement should properly lie with local court staff, rather than being transferred to a separate agency (one of the recommendations made by the McInnes Committee). There was a clear message that fines should, as far as possible, be enforced administratively rather than judicially.

265. Views were mixed regarding the Committee's recommendation that imprisonment be abolished as the ultimate sanction for non-payment of a fine, with many believing that the majority of offenders only paid their fines in the end because of this threat. Others disagreed, arguing that some offenders preferred the short spell in prison to payment and knew how to 'play the system'. The Executive committed, in the *Smarter Justice* paper, to develop enhanced administrative arrangements for the enforcement of fines – the provisions of this Bill deliver this Commitment.

Alternative approaches

266. An alternative approach considered was to create a separate agency to enforce payment of fines and financial penalties, as recommended by the McInnes Committee. There was considerable opposition to this recommendation, with respondents favouring an approach which builds on and improves existing arrangements, by, for example, use of dedicated fines enforcement staff. Ministers concluded in the *Smarter Justice* paper that there was no clear

business need for a separate agency as the benefits attributed to such an organisation could be realised within a unified courts administration.

A UNIFIED COURTS ADMINISTRATION

Policy Objectives

267. The effective operation of Scotland's courts is essential if they are to play their part in reducing reoffending. A number of the detailed procedural provisions covered earlier in this Memorandum will improve the *process* by which court cases are handled. The provisions in relation to unifying the courts administration will deliver improvements in the *structure* of the court system, allowing cases to be handled as effectively as possible in future. Unification of the administration of the summary criminal courts, which deal with 96% of all criminal court cases, is an important step in delivering an efficient and effective summary justice system. It will be achieved by giving the Scottish Court Service (referred to below as "SCS"), an Executive Agency of the Scottish Executive Justice Department, responsibility for the administration of all courts.

Key Information

268. Unification will ensure there is a consistent approach to courts management by an agency which has that task as its top priority. It will create a single, clearly identifiable agency responsible for the administration of all courts - making it easier for criminal justice agencies to work effectively together in local criminal justice boards to deliver improvements in the handling of summary cases. This approach will facilitate the delivery of change in partnership with the other main criminal justice agencies - change that will ultimately deliver improvements in speed, efficiency and the effectiveness of justice delivered at the local level and central to realising the goals set out in the Criminal Justice Plan.

269. The potential benefits of unification are:

- consistent planning and delivery of good quality court services across Scotland by a single service provider – SCS;
- a single set of procedures and a single IT system;
- a system whose organisation is more transparent and more accountable;
- increased flexibility in the use of court resources, including court buildings and staff;
- scope to implement improvements in practice quickly and effectively; and
- facilitating more effective fine enforcement – less waste of police and court time.

270. Unification will bring the entire summary judiciary (sheriffs and justices of the peace) within each sheriffdom under the responsibility of one individual - the sheriff principal. This will allow the sheriff principal to apply the available judicial resources flexibly to meet need, and provide the opportunity for a more consistent approach to be taken to the management of summary business in each area.

271. As stated in chapter 2 of the *Smarter Justice* paper the intention is to phase in unification across Scotland, on a sheriffdom by sheriffdom basis. The responsibility for administering district courts (currently administered by local authorities) will transfer to SCS on a phased basis as unification takes place in each sheriffdom. This approach is being adopted to allow change to be managed more effectively; lessons to be learned and applied as unification is rolled out; and local initiatives and solutions to be implemented to fit the needs of individual communities.

272. Unification of the first sheriffdom will not take place until the 2007/08 financial year. In November 2005 Ministers announced, in principle, that the first sheriffdom to be unified would be Lothian and Borders, to be followed by Grampian Highlands and Islands. This announcement, which is subject to the passage of the provisions in this Bill, was made to enable more detailed planning, consultation and joint work with stakeholders and others involved in the court system to commence. That work is being taken forward by a SCS-led project team. Planning and implementation teams have been established in both sheriffdoms. In drawing up a timetable for unification in Scotland's other four sheriffdoms, account will be taken of the experience and lessons learned from the first two.

273. The Bill facilitates the creation of a unified summary court system with two tiers of jurisdiction – the sheriff summary court and a lower tier summary court to be known as the “justice of the peace court” or “JP court” (currently the district court). Once unification is complete, all summary courts will be administered by SCS and the role of local authorities in court administration will come to an end. The Bill imposes a general duty on the Scottish Ministers to secure the adequate and efficient provision of the summary courts, and to provide suitable and sufficient premises for the lower tier summary court. The territorial jurisdiction of the JP court, following unification, will be based on the sheriff court district in which the court is located. The Bill will make clear that a justice of the peace should be able to sit in any lower tier summary court in the sheriffdom for which he/she holds a commission, although in practice they will tend to sit in a particular local court.

274. Following unification, Scottish Ministers will also assume responsibility for the appointment of legally qualified clerks for lower tier summary courts. The clerk of court will be an employee of the SCS. The Bill makes provision to regulate the transfer of district court staff from local authorities to SCS. The detailed arrangements relating to staffing, including staff transfers, will require discussion and joint work between SCS, the local authorities concerned and the trade unions – these discussions are already under way.

275. The general duties of the sheriff principal will be extended to include supervision of the lower tier summary courts. Furthermore, the power of the sheriff principal to give directions relating to the administration of summary court business will be extended to cover to lay justices and officers engaged in the administration of the lower tier summary courts within the sheriffdom.

276. The Bill will enable the Scottish Ministers to take ownership of district court buildings (together with ancillary buildings necessary for the purposes of the court) where they consider this appropriate for the purpose of administering the summary courts. The Scottish Ministers will also be entitled to take ownership of a part or parts of a larger property currently used for district court business, along with the necessary ancillary rights of use. The provisions will also

entitle the Scottish Ministers to lease or license court accommodation from local authorities where that would be appropriate. Detailed arrangements relating to court premises will be developed as part of the phased unification process by local implementation teams.

Consultation

277. Chapter 5 of the McInnes report recommended the unification of summary criminal courts. That recommendation was subject to full and open public consultation. One-hundred-and-thirty-seven respondents to the consultation offered a view on this issue. Over two-thirds of them were in favour of the creation of a unified court administration (subject to qualifications in some cases). Some respondents simply agreed with the points made by the Committee whilst others gave additional reasons as to why the court system should be unified, along the lines of those outlined above. Some consultees were opposed to unification as they associated the proposal with the proposal to abolish lay justice.

278. Plans to proceed with unification of the administration of the summary criminal courts were announced in March 2005 in the *Smarter Justice* paper, which also announced that lay justice would be retained and, as a result, the unified summary court would have two tiers – the ‘JP court’ and the sheriff court.

Alternative approaches

279. Consultees who opposed unification generally did not do so on the basis that the Summary Justice Review Committee had wrongly diagnosed the problems. Many of these responses acknowledged significant variations in the level of service provided by district courts across Scotland, but they felt that another means of achieving common standards should be sought rather than unification. One suggested alternative approach to achieve common standards was the introduction of central guidelines and good practice guides within the existing district court structure.

280. An efficient courts service is a prerequisite for an efficient summary justice system. Each individual case needs to be managed as effectively as possible - but if we are serious about improving the operation of the system we need to look at the structure of summary justice and ask the basic question: ‘could this be done in a better way’? At present the administration of Scotland’s summary courts is split between thirty of Scotland’s thirty-two local authorities (responsible for district courts) and the SCS (responsible for sheriff courts).

281. Ministers are of the view that consistency and efficiency can best be increased by providing unitary management of this specialised function and estate. Local authorities are key partners in the reduction of anti-social behaviour. In the criminal justice context they play a vital role as partners in reducing reoffending. Administering courts is not local authorities’ core role and could be beneficially transferred, realising the benefits of a unified system whilst allowing local authorities to concentrate on their core criminal justice priorities. Whilst there will always be a degree of variation in court administration across Scotland (reflecting differing local circumstances and levels of business) a single point of oversight will provide a more consistent approach to court management and a single clear point of accountability for the results delivered.

REFORM OF ARRANGEMENTS FOR JUSTICES OF THE PEACE

Policy Objectives

282. The proposed changes are intended to ensure that lay justices (justices of the peace or 'JPs') are openly and fairly recruited in all parts of the country; fully trained for the job that they have to do; and appraised regularly, with performance issues addressed. Public confidence in lay justice should be reinforced as a result of these changes. The changes are intended to enhance the capacity of justices of the peace to act as skilled, proactive judges in relation to less serious crimes, managing cases effectively and selecting the right disposals for individual offenders.

Key Information

283. These policy objectives will be achieved by provisions in a number of separate but interconnected areas. These are listed below.

Recruitment

284. The Bill allows Ministers, by order, to regulate the procedure for the appointment of lay justices. Ministers' policy intention, in making orders about the appointment of lay justices, is to ensure that recruitment is carried out in a transparent, fair and consistent manner in all parts of the country. In order to achieve this aim, orders will set out how justice of the peace advisory committees (JPACs) will be established, and how the new JPACs will work with the Judicial Appointments Board (JAB) to ensure that lay justice appointments are transparent and fair.

285. At present, there is one JPAC for each local authority area. Each JPAC is chaired by a Lord Lieutenant. The recruitment methods used by each JPAC have in the past varied markedly in different parts of the country. In future, there will be one JPAC for each sheriffdom, chaired by the sheriff principal, who has overall responsibility for the speedy and efficient disposal of business in the sheriffdom. Of the other members of the JPAC, it is likely that at least 50% of them will be justices of the peace, and that there will be a requirement for there to be a minimum number of members to who do not hold judicial office of any kind, and are not practicing solicitors or advocates.

286. JPACs will agree protocols with the JAB setting out how they will recruit JPs in their area. The protocols are likely to set out requirements for recruitment processes; these may relate to public advertisement and a structured interview process, among other things. It is likely that an assessor from the JAB will attend each part of the JPAC's recruitment process, and will submit a report on the recruitment process to the JAB. Final decisions on who will be appointed as a JP, however, will be taken by the locally constituted JPACs in each sheriffdom chaired by the sheriff principal.

Appointment

287. The Bill makes significant changes to the terms of appointment for JPs. At present, JPs are appointed until the age of 70 (at which point they join the supplemental list and become signing justices). They are appointed to a commission area which is their local authority area. In future, JPs will be appointed to a sheriffdom-wide area for a period five years. A JP will be eligible for reappointment at the end of each 5 year term until he/she reaches the age of 70.

288. The change to JPs' commission areas is intended to take account of the forthcoming change to summary court administration as a result of the unification of the courts administration. Scottish Court Service's management structure is based around sheriffdoms, and it is the sheriff principal in each sheriffdom who will have the ultimate responsibility for ensuring the efficient disposal of business. The changes to JPs' commission areas recognise the fact that they will be managed within a structure based ultimately upon sheriffdoms. The practical implications of this change are likely to be limited. Most JPs are likely to continue to sit in the same local court as at present. In some areas, however, the change to a sheriffdom wide commission area may allow for greater flexibility in how JPs are deployed.

289. JPs will in future receive five year appointments which are similar to those which apply to part-time sheriffs. This is intended to ensure that there is an obvious and appropriate "break point" at which JPs can leave office if they decide that they are no longer willing or able to continue to perform their duties. The system also means that sheriffs principal can, in extreme cases, recommend against the reappointment of a JP. There is, however, a presumption that JPs will be reappointed if they so desire. As is the case with part-time sheriffs, this presumption underpins judicial independence. There is no limit to the number of times that a JP can be reappointed – they will, however, stop being a JP once they reach the age of 70.

290. At present, JPs are required to live within fifteen miles of the local authority area to which they are appointed, although Scottish Ministers can waive this requirement if they see it as being in the public interest to do so. In future, it will not be possible to appoint new JPs who do not live in or within 15 miles of their sheriffdom. If a JP moves more than 15 miles outside the sheriffdom to which they have been appointed during their term of appointment, then the sheriff principal will have discretion as to whether to recommend against their reappointment at the end of their five year appointment.

291. When JPs receive their new appointments, they will be asked to agree to certain terms of appointment. These will be a commitment to undergo training; a commitment to meet the business needs of their area; and a commitment to undergo appraisal. Failure to meet these terms of appointment will be one of the grounds on which the sheriff principal can recommend against their reappointment.

292. Provision is also made to allow a JP to be removed during their five year term of appointment in extreme circumstances. A tribunal can be established, at the request of the local sheriff principal, to investigate whether a JP is unfit for office on the grounds of inability, neglect of duty, misbehaviour, inadequately performing the functions of a JP, or a failure to meet the conditions of appointment. Any such tribunal will be appointed by the Lord President, and chaired by a sheriff principal from outside the sheriffdom where the JP serves. This tribunal differs from the existing provisions on the removal of JPs (in section 9(1) of the District Courts (Scotland) 1975 Act – "the 1975 Act") in two key respects. Firstly, the tribunal will in future be requested by the local sheriff principal, rather than by Scottish Ministers. This reinforces the separation between the judiciary and the Executive, and is consistent with the sheriff principal's overall responsibility for the management of the courts within their sheriffdom. Secondly, the tribunal will be chaired by a sheriff principal from *outside* the JP's sheriffdom (at present any tribunal will usually be chaired by the local sheriff principal). The second of these changes is a consequence of the first. Since tribunals come about at the request of the local sheriff principal, it

seems inappropriate for the same sheriff principal to serve on the tribunal; there is a danger that the sheriff principal may in those circumstances be seen as being both accuser and judge.

293. It is worth noting that the local sheriff principal will be able to request the establishment of a tribunal on the grounds of the failure of a JP to meet their conditions of appointment, and also on the grounds that they have inadequately performed the functions of a JP. The provision on “inadequate performance” allows the sheriff principal to take action if, for example, appraisals suggest that a JP may be performing so poorly as to make their continuance in office clearly undesirable. In practice, such a state of affairs should only arise in exceptional circumstances.

Training

294. The Bill includes provision for Ministers to make an order relating to the training of JPs. It is anticipated that such an order will require JPs to undergo induction, refresher and ongoing training which has been approved by the Lord President. The order cannot be made without the prior approval of the Lord President.

295. The policy intention behind this order is to ensure that all JPs across the country are fully trained for the job that they have to do, and that they maintain their skills with ongoing training. The requirement that the training is approved by the Lord President will, in practice, ensure the involvement of the Judicial Studies Committee (JSC), which oversees the training of other branches of the judiciary.

296. The order will stipulate that all new JPs, prior to their appointment, must undertake a training scheme approved by the Lord President. More detail on what such a scheme will involve is to be developed in the first half of 2006. However it may, for example, involve a residential training course and a requirement that prospective JPs sit as observers in the district court for at least three sessions.

297. All existing JPs who are reappointed for five year terms will be expected to undertake refresher training within two years of taking up their new appointment. This will ensure greater consistency in the training that has been provided to all JPs. The refresher training may well consist of a residential course of a similar nature to that provided for new JPs, although the existing competence level of serving JPs would need to be taken into account.

298. The Lord President/JSC will also be able to prescribe a minimum amount of ongoing training for JPs. Again, further information of what this scheme will involve will be developed in the first half of 2006.

Appraisal

299. Ministers will have the power to make an order relating to the appraisal of justices of the peace. However, the order cannot be made without the Lord President’s prior approval. It is intended that the order will establish committees in each sheriffdom, run by justices of the peace, which will have responsibility for ensuring that JPs are appraised. We see this as being the best means of ensuring that appraisal improves the quality of lay justice, without compromising the independence of the judiciary.

300. We anticipate that each JP will undergo an appraisal every three years, and newly recruited JPs will be appraised within 18 months of their appointment. The main purpose of appraisal is to ensure that JPs are fulfilling their duties to the requisite standard. Appraisals may also identify areas in which training can help individual JPs to improve. If a JP has a significant development need, they may be required to undergo training to address this need, and then appraised again shortly after they have completed their training.

301. In cases where a JP has a significant development need, and does not improve after training, their case may be referred to the sheriff principal (we envisage that this would only happen in exceptional circumstances). The sheriff principal will have the authority to recommend that a tribunal be established to investigate the JP's fitness for office.

302. The details of how appraisal and training will be delivered will be spelt out more fully in the order. The Executive is currently discussing with the Judicial Studies Committee and the District Courts Association some key elements of the appraisal program – such as establishing a competence framework for JPs. We are also considering the best structures for delivering training and appraising. These will be set out in more detail in the order, which should be available for consideration during stage 1 of the Bill process.

Stipendiary Magistrates

303. Stipendiary magistrates are professional members of the judiciary. In summary criminal cases, they have the same jurisdiction as a sheriff, meaning that they can impose fines of up to £5,000 and custodial sentences of up to three months (or six or nine months in certain cases). However, stipendiary magistrates have no jurisdiction with regard to solemn procedure, and only have a very limited civil jurisdiction. Stipendiary magistrates currently only operate in Glasgow where they were appointed to ease the burden on the courts in that area. Section 5 of the 1975 Act, however, allows any local authority to employ stipendiary magistrates if the Scottish Ministers approve the establishment of the office of stipendiary magistrate in the relevant district court. Stipendiary magistrates are only able to sit on the bench within the local authority area to which they have been appointed.

304. The Bill will allow stipendiary magistrates to be employed on a sheriffdom basis in future, if the creation of such an office is requested by the relevant sheriff principal, and approved by the Scottish Ministers. Stipendiary magistrates will be appointed by Ministers, rather than by local authorities. The jurisdiction of stipendiary magistrates will continue to be the same as that of a sheriff sitting summarily – which means that their maximum sentencing powers will increase in line with those of sheriffs once the provisions of this Bill come into force.

305. Stipendiary magistrates will retire at the age of 70 in future – as opposed to being subject to the same retirement age as local authority employees as at present. This brings stipendiary magistrates into line with other members of the judiciary.

306. Stipendiary magistrates will also be subject to five year renewable appointments, along similar lines to those for part time sheriffs and justices of the peace. They will not be subject to the same residential requirement as justices of the peace, or the same requirements for appraisal and training. They are, however, subject to a requirement that they must have been professionally qualified as solicitors or advocates for at least five years. In addition, the Scottish

Executive has proposed to the Judicial Appointments Board that future appointments of stipendiary magistrates should come within the remit of the Board.

Signing Magistrates

307. At present, all justices of the peace are placed on the “supplemental list” when they reach the age of 70. In addition, some JPs who are not yet 70 are also placed on the supplemental list. For example, local authorities are allowed to nominate up to a quarter of their councillors to the supplemental list and to use the title ‘JP’. The consequence of this is that there are currently more than 1900 JPs on the supplemental list. Of these, nearly 1400 are over the age of 70.

308. JPs on the supplemental list are known as “signing justices”. Although they have no judicial functions (they cannot sit on the bench or sign warrants) they are allowed to sign a very limited range of documents. Section 15(9) of the 1975 Act limits the functions of a signing justice to the following:

- Signing any document for the purpose of authenticating another person’s signature;
- Taking and authenticating by the JP’s signature any written declaration; and
- Giving a certificate of facts within the JP’s knowledge, or giving the JP’s opinion on any matter.

309. Whilst Ministers accept that there is value in having publicly available figures who are able to sign a limited range of documents for members of the public without charging for doing so they are not convinced that the current arrangements are the most appropriate way of achieving this objective. Under the current supplemental list, 70% of all signing JPs are over the age of 70, and there is a need for clerks of court and the Executive to maintain a set of records for a large number of people who are not obliged to perform any public duties. In addition, the title of “signing justice” creates unnecessary confusion. There is a wide range of documents (most notably warrants) that signing justices *cannot* sign, and it seems inappropriate to call people “justices” when they do not in fact perform any judicial functions.

310. For these reasons, Ministers have decided that the supplemental list will no longer exist. Instead, JPs who reach the age of 70 will not have the signing powers currently conferred by section 15(9) of the 1975 Act. All councillors, however, will be given the signing powers that signing JPs currently have. This will ensure that a sufficient pool of publicly available people with signing powers is accessible to local communities throughout Scotland. In addition, any JPs or stipendiary magistrates who become a member of the House of Commons, House of Lords, Scottish Parliament or a local authority will cease to exercise judicial functions for the period of their appointment but may continue to exercise signing functions.

Records and Expenses

311. The Bill makes provision for Ministers to make schemes relating to the reimbursement of JPs. The proposed scheme will essentially continue the current arrangements, by making reimbursement for loss of earnings available to JPs for performing their duties (including undergoing training and conducting appraisals). The level of reimbursement provided for JPs per day is likely to be equal to the national average daily income. JPs will also be able to claim reimbursement for travel and subsistence expenses. The Bill also requires the Scottish Ministers

to keep a record of all JPs; for this record to be made available to each sheriffdom; and for the sheriff clerk in each sheriff court to make the record available for public inspection.

Consultation

312. The McInnes committee's recommendation to abolish lay justice was subject to widespread consultation during the summer of 2004. 91% of respondents who commented on this recommendation disagreed with it. Respondents' views were reflected in Ministers' decision to retain lay justice, which was announced in the *Smarter Justice* paper.

313. Since that announcement, a process of consultation with key stakeholders about particular aspects of lay justice reform has taken place. Bilateral meetings have taken place between the Executive and the District Courts Association, the Judicial Studies Committee and the Judicial Appointments Board. In addition, a lay justice and courts unification reference group has been established. The reference group includes a sheriff principal, a representative of the Sheriffs' Association, a representative of the Convention of Scottish Local Authorities, two members of the District Courts Association, a Lord-Lieutenant, a representative of the Scottish Court Service, a representative of the Judicial Appointments Board, a representative of the Judicial Studies Committee and a representative of Victim Support Scotland.

Alternative approaches

314. As a result of the recommendations made by the McInnes Committee, Ministers considered whether to abolish lay justice, and replace justices of the peace with a wholly professional judiciary. This proposal was rejected for the following reasons:

- Ministers felt that justices of the peace were a powerful expression of community involvement within the criminal justice system, and that their role should therefore be enhanced, rather than abolished; and
- They also recognised the considerable weight of public opinion reflected in the consultation process that the McInnes report had not made a sufficiently compelling case for abolition and that where there were shortcomings they could be dealt with by investing in the lay judiciary.

315. Consideration was also given to leaving the current system of lay justice largely unchanged, without making any reforms to recruitment, appointment, training and appraisal. This option was also rejected. It was notable that many consultees (including justices of the peace) indicated in their responses that they would welcome a greater emphasis being placed on the training of JPs.

CROWN OFFICE INSPECTORATE

Policy Objectives

316. The creation of an Inspectorate for the Crown Office and Procurator Fiscal Service was the first recommendation of the Jandoo report¹² into the liaison arrangements between the Crown Office and Procurator Fiscal Service and the family of the deceased Surjit Singh Chhokar. This report was laid before Parliament in October 2001 and its recommendations accepted by the Lord Advocate. Dr Jandoo had said in his report that for too long the Crown Office had been perceived as a faceless organisation, accountable to no-one. The creation of an Inspectorate would be a means of introducing a measure of accountability which is essential for public confidence. Previously a Quality and Practice Review Unit had been set up in Crown Office in 1999 with inspection duties but this was an in-house unit and its reports were not routinely published.

317. The creation of an independent statutory Inspectorate would place the Inspectorate on a similar footing to other public sector inspectorates such as Her Majesty's Inspectorate of Constabulary and Her Majesty's Crown Prosecution Service Inspectorate. This would enhance the independence and status of the Inspectorate and others' perception of it. It would also help to reinforce the separation of the Inspectorate from both the Lord Advocate and the Department.

Key Information

318. The statutory provisions will give the Inspectorate power to inspect the operation of the Crown Office and Procurator Fiscal Service and provide reports to the Lord Advocate on any matter connected with the operation of the Crown Office and Procurator Fiscal Service which the Lord Advocate may refer to it. It will also provide for an annual report to be submitted to Parliament. The Chief Inspector will report directly to the Lord Advocate bypassing the normal management structure of Crown Office and Procurator Fiscal Service. All reports will be published.

Consultation

319. A project team produced a scoping paper for the Law Officers on the establishment of an Inspectorate, including a recommendation that the Inspectorate should be placed on a statutory footing. A consultation paper was issued in September 2003 and contained a number of specific proposals for the Inspectorate including – that the Inspectorate should be put on a statutory basis, setting it apart from the management structure of the Crown Office and Procurator Fiscal Service and providing an additional safeguard to the independence of the Inspectorate. Additionally the Chief Inspector would report directly to and be accountable to the Lord Advocate bypassing the internal management structure of the Crown Office and Procurator Fiscal Service and all reports would be published. The work of the Inspectorate would be in line with current thinking on inspection processes generally based on risk assessment and focussing on outcomes for users/customers. Responses were generally favourable and the Inspectorate became operational

¹² Dr Raj Jandoo, *Report of the Inquiry into the Liaison Arrangements Between the Police, the Procurator Fiscal Service and the Crown Office and the Family Of the Deceased Surjit Singh Chhokar in Connection with the Murder Of Surjit Singh Chhokar and the Related Prosecutions* by SP Paper 424, October 2001.

in December 2003. Following public advertisements and an open competition the first Chief Inspector was appointed in August 2004.

Alternative approaches

320. The alternative would be to continue with a non-statutory Inspectorate which would diminish its powers, independence and status and divorce it from the statutory arrangements in existence for other inspectorates.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

321. This part of the Policy Memorandum has been prepared by the Scottish Executive to assist consideration by the Scottish Parliament of the impact on equal opportunities by the Criminal Proceedings etc (Reform) (Scotland) Bill. It responds to the six equalities questions as endorsed by the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission in 1999 and used by both the Equal Opportunities Committee and the Scottish Executive. Each of the policies is discussed in more detail above in the Policy Objectives section of this Memorandum.

What is the policy for? Who is the policy for? What are the desired and anticipated outcomes?

322. The policies contained in the Bill are intended to benefit the people of Scotland through reforms to the criminal justice system that will make the system quicker and more effective at dealing with offending behaviour. The desired and anticipated outcomes of each of the main policy areas are discussed below.

Reforms to the system of bail and remand

323. This part of the Bill sets out more fully than at present the legislative framework under which bail decisions should be made. It seeks to improve the initial targeting of bail and remand, to make bail decisions more transparent and consistent and to spell out to the accused that bail must not be abused. It also seeks to ensure that adequate penalties are available for breach of bail. None of its provisions detract from the role of the court. On the contrary, it underlines the role of the court as sole decision maker in every bail decision.

324. The Bill sets out on the face of legislation the criteria which ECHR case law has recognised as relevant to the bail decision, and illustrates the factors which the court may take into account. It also sets out certain limited circumstances (where an accused is on a serious charge and has any previous serious conviction for similar offences) in which bail may only be granted in exceptional circumstances. The intention of these provisions is to help the public and the court by setting out clearly the basis on which decisions must be made.

325. Provisions for reasons to be given by the court for every bail decision will help the public and accused persons to understand why bail is being granted or denied. It should also lead to

greater consistency. And the court will also have to set out in each case the conditions of bail and the consequences of breach, to underline the fact that bail is a position of trust which must be taken seriously. Accused will have to keep the court in closer touch with their movements.

326. To ensure that the police and courts have all the necessary tools at their disposal where bail is breached, the Bill gives police more flexible powers to bring accused back to court and gives the court an enhanced range of penalties where accused persons fail to appear or breach a bail condition.

327. None of the provisions relating to bail will have a direct impact on tackling discrimination although it should lead to more alleged offenders appearing at their trials and therefore less resultant disruption for victims and witnesses in attending court for trials that do not take place.

Procedural reforms

328. This part of the Bill is intended to speed up the operation of the summary justice system by improving court procedures and creating flexibility to deal with cases in the most appropriate way. The Bill makes a number of changes to the laws of summary criminal procedure aimed at improving speed, reducing waste and maximising flexibility in case handling. The majority of these provisions are of a technical nature and are explained in detail elsewhere in this Memorandum and the Explanatory notes to the Bill. The bullet point list at paragraph 59 provides a summary of the main provisions.

329. None of the procedural changes will have a direct impact on tackling discrimination although they should lead to more effective case handling for all and it is intended that some of the changes (such as provisions extending the range of cases in which a trial can proceed in the absence of the accused) will tackle those offenders who attempt to frustrate the interests of justice by failing to attend court for their trials to the considerable inconvenience of victims and all the witnesses in a case.

Sentencing powers

330. This part of the Bill will increase the maximum level of “fiscal fine” (conditional offer of a fixed penalty) that procurators fiscal can offer to an alleged offender from £100 to £500. This will increase the flexibility available to prosecutors and ensure that they can deal with cases in the most appropriate way – allowing cases which do not require a court appearance to be diverted from court whilst ensuring that more serious cases and persistent offenders face court quickly.

Alternatives to prosecution

331. These provisions will give procurators fiscal new options to deal with minor offences appropriately and effectively. The compensation offer will allow the prosecutor to make an offer to the alleged offender that they pay compensation to their alleged victim as an alternative to facing prosecution. The work order will allow the prosecutor to offer an alleged offender the opportunity to put something back into the community they have offended against by way of a period of unpaid work within the community as an alternative to prosecution. This measure will be piloted before any decision is taken on a national roll-out.

Enforcement of fines

332. These provisions are intended to maintain and enhance the credibility of the fine and other financial penalties as disposals in the summary justice system by providing advice and support to those who are having difficulties in paying a fine whilst making clear to those who do not pay penalties that they will be actively pursued for the outstanding amount, using various sanctions for payment. This will include transferring the responsibility for collection and enforcement of district court fines, procurator fiscal offers of fixed penalties and fixed penalties enforced by the criminal courts from local authorities to the Scottish Courts Service (“SCS”) as court unification is phased-in. It also involves making the system of collection and enforcement more administrative in nature – reducing unnecessary judicial and police involvement and leading to a simpler and more effective system as result.

Establishing JP courts

333. This part of the Bill is intended to bring Scotland’s district courts, currently under local authority control, under the management of SCS. This will allow for more efficient use of the courts estate; greater consistency in case handling and management of all courts by a single specialised agency.

Appointment of JPs etc

334. These provisions are intended to improve the quality of lay justice in Scotland by ensuring that lay justices are openly and fairly recruited in all parts of the country; fully trained for the job that they have to do; and appraised regularly, with performance issues addressed. The policy intention behind the changes to recruitment is to ensure that recruitment is carried out in a transparent and fair manner in all parts of the country, ensuring that all those who may be interested in becoming a lay justice are aware of the opportunity and the process of application. This will ensure that the most suitable candidates are appointed. Once appointed, the changes to training and appraisal will also serve to ensure that JPs are given the opportunity to maintain the required level of performance through support in terms of training and a quality check by way of appraisal, whilst also introducing provision to remove any JPs who are not found to be of a sufficient standard to sit on the bench.

Statutory establishment of the Inspectorate of Prosecution in Scotland

335. This part of the Bill is intended to provide a statutory footing for the Inspectorate of the Prosecution Service in Scotland which has existed on a non-statutory basis since its inception in August 2004. The purpose of the Inspectorate is to inspect the operation of the Crown Office and Procurator Fiscal Service (COPFS) and provide reports to the Lord Advocate on any matter connected with the operation of COPFS referred to it by the Lord Advocate. It also provides an annual report to parliament.

Do we have full information and analyses about the impact of the policy upon all equalities groups? If not, why not?

336. The effects of the Bill have been carefully considered in relation to their potential impacts on different equality groups. The policies to be implemented through the Bill will apply across all of Scotland and there is no intention that the Bill’s provisions will have a differential or discriminatory impact on equality groups. It is the Executive’s view that the Bill does not impact

in any differential or discriminatory sense upon groups which are defined by personal attributes or characteristics such as gender, marital status, age, race, disability, religion, sexual orientation, language, social origin or political belief. The law relating to criminal procedure and criminal penalties (the main areas covered by this Bill) applies consistently to all suspected of and/or prosecuted in relation to an alleged offence.

337. Although an individual can currently apply to become a justice of the peace from the age of 18, relatively few young people apply for this position, with the result that nearly half of existing sitting JPs in Scotland are aged 60-69. The reforms that will be introduced by this Bill will ensure open and consistent recruitment processes and rigorous training and appraisal for JPs. This should lead to increased awareness of the role of JP and should encourage younger people to apply to become JPs in future.

Has the full range of options and their differential impacts on all equality groups been presented?

338. The policies being pursued in the Bill have been the subject of full and comprehensive consultation with a wide range of stakeholders. This Memorandum discusses various alternative approaches that were considered in relation to a number of the policies, though it should be noted (as detailed elsewhere in this Memorandum) that there was often only one specific means of achieving the policy objective. A wide range of equalities groups as well as groups representative of equality interests (such as the Commission for Racial Equality, Capability Scotland, Scottish Disability Forum and the Scottish Council for Voluntary Organisations) were included in the consultation process.

339. Throughout the policy development process that led to the production of this Bill, the views of minority and special interest groups have been actively sought to ensure that policies take account of their views.

340. The McInnes committee initiated a survey on summary justice issues in January 2003, using a national questionnaire approach and focus group discussions. It was considered that the national survey would be unlikely to capture many voices from Scotland's minority ethnic population and a focus group devoted to people from this sector was established. Along with this focus group, other groups were established involving younger people, older people, rural dwellers, people from a lower socio-economic group and victims and witnesses. The views expressed both in response to the questionnaire and the discussions in each focus group were detailed in the research report, 'Summary Justice Review – Public Views on Key Issues'¹³. This report highlighted to the McInnes Committee the views of members of the public and specific sectors of the population on the summary justice system and assisted the Committee in the formulation of its recommendations.

341. During the period of open consultation the McInnes report following its publication in March 2004, a supplementary research study was carried out to ensure that public and community views on key aspects of the recommendations were obtained and fed into the overall consultation through methods in addition to written consultation alone. As part of this

¹³ George Street Research Ltd *Summary Justice Review – Public Views on Key Issues*, available at: <http://www.scotland.gov.uk/Resource/Doc/925/0008782.pdf>

supplementary research, a number of in-depth qualitative interviews were conducted with individuals from ethnic minority communities to ensure their views were included in the overall consultation process. Interviews were also held with individuals with physical disabilities to ensure their perspective on proposed reforms was included. The final report¹⁴ of that research project was published in autumn 2004. This report supplemented the Executive's consideration of the issues in advance of the publication of the *Smarter Justice* paper.

What are the outcomes and consequences of the proposals? Have the indirect, as well as the direct, effects of the proposals been taken into account?

342. The outcomes and consequences of each of the policy proposals are as outlined in the answer to the first of these six questions on equal opportunities. Both the direct and indirect effects of the proposals have been taken into account. Taken as a whole the provisions of this Bill should provide for a more effective and flexible summary justice system which will be of benefit to all those who become involved with it, all those who work in it and, ultimately, the wider community through the reduction in offending and reoffending that a more effective system will facilitate.

How have the policy-makers demonstrated that they have mainstreamed equality?

343. As discussed elsewhere in this Policy Memorandum, the policy provisions in the Bill have been the subject of extensive consultation. Throughout the policy development process, the Executive has been vigilant for the possibility of discriminatory or significantly differential impacts. It should be noted that the Summary Justice Review Committee (from whose report a large number of the provisions in this Bill flow) had a member from the Commission for Racial Equality and Victim Support Scotland amongst its membership throughout its entire review process.

344. The Executive has received no representations in response to the *Smarter Justice* paper or the Bail and Remand Action Plan to suggest that the provisions of this Bill will impact negatively upon equality interests.

How will the policy be monitored and evaluated? How will improved awareness of equality implications be demonstrated?

345. The Scottish Executive is committed to monitoring the outcome of the Bill's proposals to reform the summary justice system. A range of approaches will be used, to provide a balanced view of the changes, with a strong focus on changes which alter the law and process in clearly defined areas - such as our proposals on bail and on an enhanced range of options for procurator fiscals to deal with crime.

346. In relation to court unification, where implementation will be phased, it will be important to build evaluation into the phased rolling programme, so that lessons can be learned quickly and applied effectively. This will be done as part of the post project review which will be carried out

¹⁴ MRUK Ltd, *Research on Community Involvement and Alternatives to Prosecution*, available at: <http://www.scotland.gov.uk/Topics/Justice/19008/MRUKreport>

sheriffdom by sheriffdom as unification is rolled out. Similar arrangements for evaluating changes to collection and enforcement of fines and financial penalties will be put in place.

347. Many of the changes in the Bill will contribute to improved handling of cases end to end and thus to the Scottish Executive's wider goals in terms of the prosecution and court process. These were summarised in the Criminal Justice Plan¹⁵ in the following terms:

- Dealing with accused people fairly, always respecting their human rights
- Taking the interests of victims and witnesses into account;
- Dealing with cases as quickly as possible to reduce the opportunity for reoffending before the original offence has been dealt with and to maintain the link between offending behaviour and punishment;
- Disposing of cases effectively - so that justice is seen to be done;
- Using resources efficiently – ensuring value for every public pound; and
- In touch with the needs and views of local communities and local people.

348. The Scottish Executive will use a range of tools to assess progress towards these goals including improved management information, information derived from customer surveys such as that carried on out a sample basis by SCS, and information derived from the Scottish Crime and Victimisation Survey. Any assessment of the impact of the procedural changes on the attitudes of victims and witnesses will complement work already underway which is evaluating the impact of the Vulnerable Witnesses (Scotland) Act 2004 on child and vulnerable adult witnesses. It will examine the impact of the reforms on equality groups to ensure that the criminal justice system is open and accessible to all and support is available for those who need it.

Human Rights

349. It is considered that the provisions of this Bill are ECHR compatible. Some specific issues considered in respect of this statement are discussed below:

Reforms to the system of bail and remand

350. The Scottish Executive has considered carefully the ECHR compatibility of the reforms to the system of bail and remand in this Bill, and is content that they are compatible with the provisions of the European Convention on Human Rights.

351. Under Article 5(3) of the ECHR everyone arrested or detained requires to be brought promptly before a judge and is entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial. The case law of the ECHR has determined that in article 5(3) there is both a substantive and procedural requirement. The procedural requirement concerns the obligation to hear the individual, while the substantive requirement refers to the obligation to review the circumstances for or against detention to

¹⁵ Scottish Executive, *Supporting Safer, Stronger Communities – Scotland's Criminal Justice Plan*, is available at: <http://www.scotland.gov.uk/library5/justice/scjp-00.asp>

decide whether there are reasons that justify detention. In accordance with the provisions of Article 5(3) of ECHR, the Bill sets out the general entitlement to bail unless there is good reason to justify refusal. The circumstances which may lead to bail being refused which are set out in Section 23C are those in which have been recognised by ECHR case law. The Bill makes clear that detention is only to be ordered when necessary and where the public interest cannot be secured by the imposition of bail conditions.

352. ECHR case law makes clear that there can be a range of different factors which may be relevant to the court's assessment of bail, depending on the circumstances of the individual case. It is therefore important not to limit judicial discretion in this area by setting out an exhaustive list of factors, since it is vital to ECHR compliance that the courts have unfettered discretion to give individual consideration to each case. The Bill therefore sets out an illustrative and non – exhaustive list of factors which may be relevant, without in any way limiting the discretion of the court to consider the circumstances which seem to it material in any particular case.

353. The Bill also sets out a limited range of circumstances involving an accused on a serious charge who has a track record of analogous serious offences in which bail may only be granted if exceptional circumstances apply. The offences listed in section 23D(3) are serious and the Executive considers that the previous similar conviction is seen as a legitimately strong indicator of the potential for grave offending while on bail, while still allowing the accused to be released when he or she does not present a serious risk.

354. Article 5(3) would usually justify detention when someone with a previous conviction for a grave offence is charged with a second such crime on the basis that this demonstrates a need to prevent further offences while on bail. It would therefore only be exceptionally that detention was not justified in terms of the Convention and the wording of section 23D reflects this and ensures that the courts exercise special care about releasing people in this situation.

Modifying the procedures governing trial in absence of the accused

355. The Bill provides that where an accused person does not appear at an intermediate diet, trial diet or a diet fixed for sentencing, the court may allow the hearing to proceed and to be disposed of in his or her absence. The court may only do this where it is clear that the accused has been duly informed of the diet and that it is in the interests of justice to proceed.

356. The Scottish Executive has considered carefully the compatibility of this provision with the provisions of Article 6 of the European Convention on Human Rights, which confers the right to a fair trial.

357. The Executive considers that the provisions in relation to trial in absence do comply with article 6. The European Court of Human Rights has not found a breach of the ECHR where an accused, fully informed of a forthcoming trial, has voluntarily chosen not to attend and the trial has continued; further, there is nothing in the Strasbourg jurisprudence to suggest that a trial in absence is inconsistent with the ECHR (see discussion of the ECHR jurisprudence in *R v Jones* [2002] All ER 113). In such circumstances the right of an accused to attend the trial has not been withdrawn; the accused has simply chosen to waive that right.

358. Appropriate safeguards have been built into the provisions to ensure protection of the accused's right to a fair trial. Provision is made requiring the court to intimate the dates for the accused's trial diet and, where appropriate, intermediate diet. Coupled with this is confirmation that *any* future hearing may proceed in his or her absence if the accused fails to attend (section 10 of the Bill refers). This means that should the accused fail to attend a future diet he or she will do so in the full knowledge of the consequences; an unequivocal waiver of his or her right to appear. A further safeguard is provided by virtue of the fact that an instructed solicitor can continue to act on behalf of an absent accused if the court is satisfied that he or she has sufficient authority. Where there is no such solicitor the court shall appoint one to act if it considers that it is in the interests of justice to do so.

Reappointment of JPs on a 5 year fixed term appointment

359. The Executive has carefully considered the ECHR implications of introducing a new system of appointment and reappointment for JPs and stipendiary magistrates and has ensured that the system proposed is compliant with the ECHR. Proper security of tenure is of critical importance in ensuring ECHR incompatibility.

360. As outlined earlier in this Policy Memorandum, JPs will be appointed to a sheriffdom-wide commission area for 5 years. They will be appointed by a process overseen by the independent Judicial Appointments Board which will involve public advertisement, and the completion of a standard application form. The selection process will be carried out by a sheriffdom wide Justice of the Peace Advisory Committee (JPAC) involving judicial and independent lay members, with a JAB assessor. While, therefore, Ministers will formally appoint JPs on behalf of the Queen, they will have no role in the selection of candidates.

361. JPs will be eligible for reappointment at the end of each 5 year period until they reach the age of 70. At the end of the 5 year period of appointment, a JP who seeks reappointment and who is not already 69 or disqualified by reason of sequestration or bankruptcy will be reappointed unless the sheriff principal recommends otherwise on a number of limited grounds clearly set out on the face of the legislation. This exercise of judicial management by the sheriff principal will not be influenced in any way by the Executive.

362. By creating a system with a strong presumption of reappointment and clarity about the limited grounds on which a senior member of the judiciary can recommend against reappointment, the Executive has sought to ensure that JPs will be able to work with confidence that their appointment will be renewed, subject to meeting the conditions of appointment to which they have formally agreed as part of the original appointment process.

363. The provisions in the Bill allow for the removal of a JP during their five year term of appointment. The circumstances in which proceedings for removal can be initiated are limited and are clearly set out in the Bill. If they are met, the local sheriff principal can request that a tribunal be established to assess whether a JP should be removed. The tribunal will be appointed by the Lord President and chaired by a sheriff principal from outside the JP's sheriffdom. Under this system there is no Ministerial discretion in the process at any stage; the tribunal may order the removal of a JP, and Ministers are simply obliged to comply with this order. These

provisions ensure that it is for the judiciary, not the Executive, to determine whether a particular JP should continue to serve where a serious problem has arisen during a 5 year term of office.

Impact on island communities

364. This Bill has no differential effect on island communities.

Impact on local government

365. Three of the changes that the Bill will introduce will have an impact upon local government. The main change relates to the unification of the administration of the summary courts under the control of the SCS. Local government will also be affected by reforms to the practice of lay justice and the introduction of a pilot of the work order.

366. Following unification of the administration of the summary courts, local authorities will no longer be responsible for administering district courts. The functions of the district court will transfer to the SCS. As unification will be taken forward on a phased basis, sheriffdom by sheriffdom, this process will affect different local authorities at different times. No individual local authority will be subject to a partial transfer of its court administration responsibilities however – the entire responsibility for each authority will transfer in a single phase of court unification. The Executive has already announced that (subject to the passage of the Bill) the first sheriffdom which will transfer will be Lothian and Borders in 2007/08, to be followed by Grampian, Highlands and Islands. Decisions on the timing and sequencing of further phases of unification will be made in the light of the process in these first two sheriffdoms. The phased process will allow the transfer of resources, staff and systems to be managed effectively and will also allow lessons to be learned from each phase, ensuring that subsequent transfers are based on an established approach.

367. Careful preparation and established joint working between those currently responsible for administering the district courts and those who will take on the role in a unified system will be essential to ensure that the unification process is a success. A project team has already been established within the SCS to take forward this work. Productive early discussions have taken place with COSLA and with the trade unions representing those staff who may transfer from local authority to SCS employment as a result of the unification process. Detailed implementation working groups will be established in both Lothian and Borders and Grampian, Highlands and Islands – these will involve all the relevant interests and will ensure that the process is clearly agreed and established, effectively managed and that lessons are learned from each phase before the next phase of unification takes place.

368. In view of the fact that local authorities will no longer be responsible for the administration of district courts following unification an appropriate amount of local government resources will be transferred to central government in order to take account of the transfer of responsibility for administering the courts following unification. The Bill's Financial Memorandum provides more detail on the costs of unification and the level of transfer. This process will be subject to negotiations with COSLA and detailed implementation work with individual local authorities to ensure that an appropriate level of funds is transferred.

369. This Bill's provisions in relation to lay justice will result in local authorities no longer having responsibility for the recruitment and training of justices of the peace or the provision of secretarial support to Justices' Committees and JPACs, which were discussed in more detail in the section of this Memorandum relating to the future arrangements for recruitment, training and appraisal of justices of the peace.

370. The proposal to pilot the introduction of the work order will have an impact on local authorities within the pilot areas. Briefly, this order will allow the prosecutor to make an offer to an alleged offender to carry out a period of unpaid work in the community, the successful completion of which will result in no further action being taken by the prosecutor in respect of the alleged offence. It will be necessary to develop suitable programmes of community work for alleged offenders to undertake in advance of prosecutors using this disposal. It is envisaged that the work order will be piloted in two areas and fully evaluated in advance of any decision being taken to roll out its use more widely. Criminal justice social work services managed by local authorities will be involved in the development and management of work programmes in the pilot areas. Local authorities will only be involved in the pilot after full discussion and will be funded for any additional costs arising as a result of the pilot. More information on the financial implications of the pilot can be found in the Financial Memorandum for this Bill.

Impact on sustainable development

371. This Bill has no impact on sustainable development.

This document relates to the Criminal Proceedings etc. (Reform) (Scotland) Bill (SP Bill 55) as introduced in the Scottish Parliament on 27 February 2006

CRIMINAL PROCEEDINGS ETC. (REFORM) (SCOTLAND) BILL

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Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by Astron.

ISBN 1-4061-1847-8

