



**JUSTICE 2 COMMITTEE**

**AGENDA**

**26th Meeting, 2006 (Session 2)**

**Tuesday 24 October 2006**

The Committee will meet at 1.30 pm in Committee Room 2.

1. **Decision on taking business in private:** The Committee will consider whether to take item 4 in private.
2. **Legal Profession and Legal Aid (Scotland) Bill:** The Committee will consider the Bill at Stage 2 (Day 3).
3. **Custodial Sentences and Weapons (Scotland) Bill:** The Committee will take evidence from—

Jane Richardson, Rachel Gwyon, Annette Sharp, Brian Cole and Charles Garland, Justice Department, Scottish Executive

and then from—

Gery McLaughlin, Paul Johnston and Andrea Summers, Justice Department, Scottish Executive

4. **Custodial Sentences and Weapons (Scotland) Bill – appointment of adviser:** The Committee will consider a list of candidates for the post of adviser.
5. **Christmas Day and New Year's Day Trading (Scotland) Bill (in private):** The Committee will consider a draft Stage 1 report.

Tracey Hawe/Alison Walker  
Clerks to the Committee

## **Papers for the meeting—**

### Agenda Item 2

3rd Marshalled List of Amendments for Stage 2

3rd Groupings of Amendments for Stage 2

Members are reminded to bring with them copies of the Bill, Explanatory Notes and Policy Memorandum, available from Document Supply or from the Parliament's website (<http://www.scottish.parliament.uk/business/bills/56-legalProfession/index.htm>) together with any papers from the Stage 1 process that are considered relevant (such as the Committee's Stage 1 Report).

### Agenda Item 3

Lines of questioning (PRIVATE PAPER) J2/S2/06/26/1

Correspondence from SE including flowcharts showing custodial sentences processes J2/S2/06/26/2

SPICe briefing on Custodial Sentences J2/S2/06/26/3

SPICe briefing on Weapons J2/S2/06/26/4

### Agenda Item 4

Note by SPICe (PRIVATE PAPER) J2/S2/06/26/5

### Agenda Item 5

Draft report (PRIVATE PAPER) J2/S2/06/26/6

Supplementary evidence J2/S2/06/26/7

## **Documents circulated for information only—**

Letter from Deputy Minister for Justice on prescribed categories for the extension of advice and assistance payments

Letter from Minister for Justice on secure facilities for female mentally disordered offenders, (including original letter from Justice 2 Committee Convener)

Letter from Minister for Justice on the re-appointment of the Director of the SDEA

Scottish Executive news release on Risk Management Authority appointments

## **Forthcoming meetings—**

- Tuesday 31 October 2006, Committee Room 1, 1.30pm (joint meeting with Justice 1 Committee, then followed by Justice 2 Committee meeting)



# SCOTTISH EXECUTIVE

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Your ref:  
Our ref:

13 October 2006

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Dear Anne

## **CUSTODIAL SENTENCES AND WEAPONS (SCOTLAND) BILL 2006 – FLOWCHARTS SHOWING CUSTODIAL SENTENCES PROCESSES**

Please find attached flowcharts that depict the processes for:

- custody and community prisoners;
- section 12 (arrangements for Parole Board to set further review); and
- life prisoners.

These have been prepared in advance of Stage 1 proceedings in order to aid the Committee's understanding of the legislative arrangements for custodial sentences set out in the Bill. I would be grateful if you could ensure that copies of these are provided to the Committee's members.

Yours sincerely

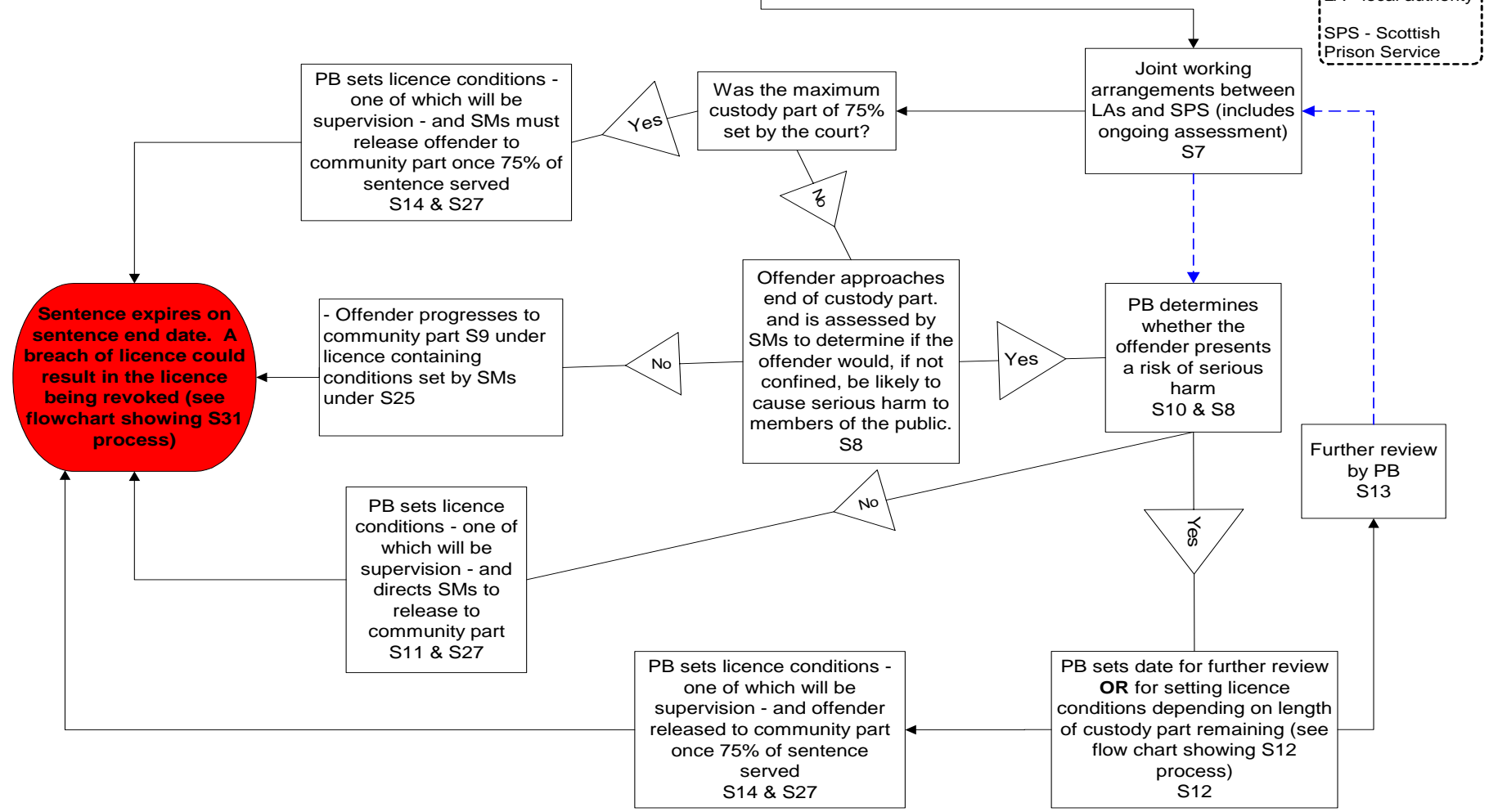
**GRAEME WAUGH**  
**Parole and Life Sentence Review Division**



# Process for custody and community prisoner

Sentence imposed by court = 15 days or more; court makes order specifying custody part: minimum 50%; maximum 75% for deterrence and retribution S6

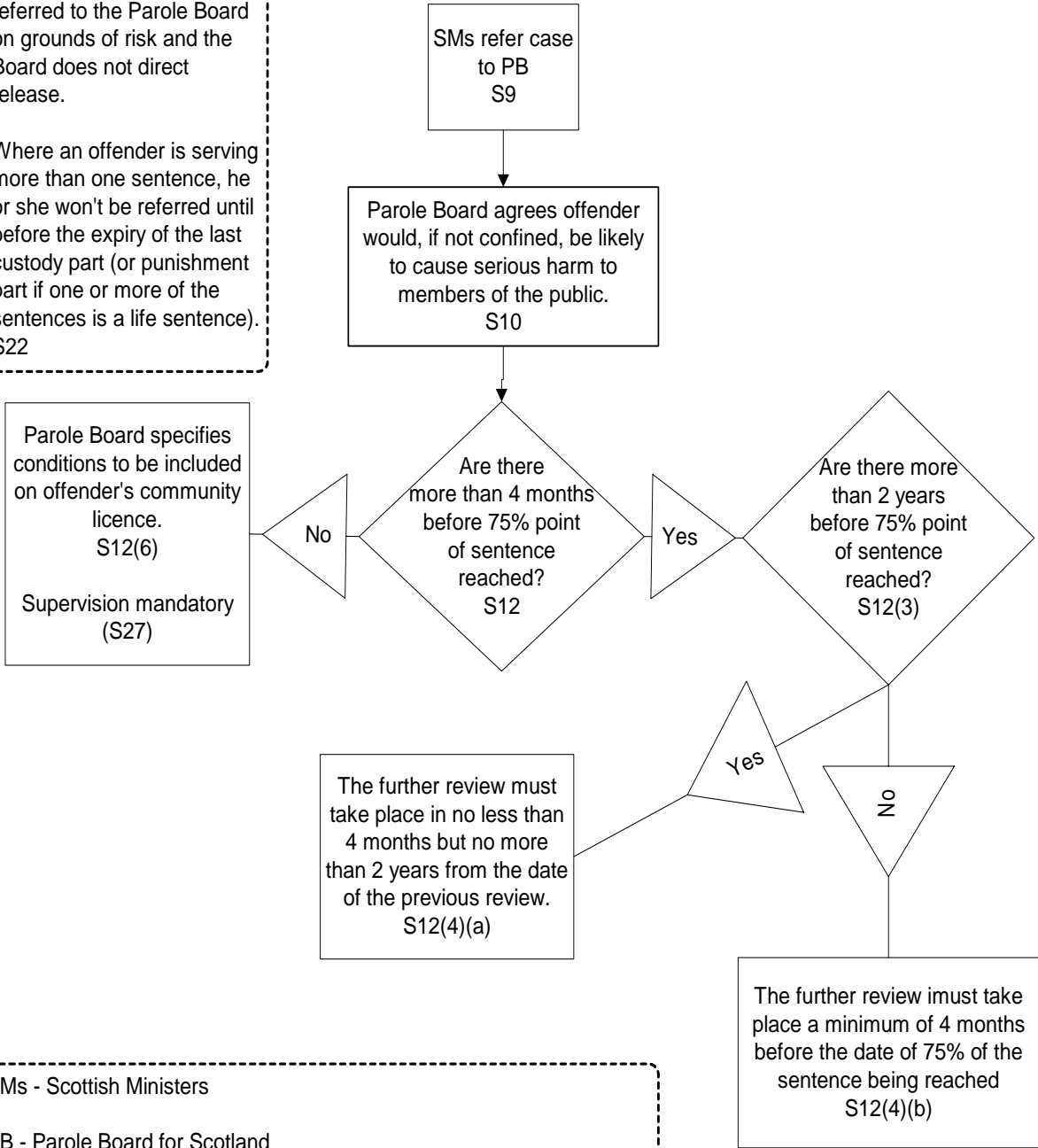
- SMs - Scottish Ministers
- PB - Parole Board for Scotland
- LA - local authority
- SPS - Scottish Prison Service



# Section 12

This explains the process where an offender has been referred to the Parole Board on grounds of risk and the Board does not direct release.

Where an offender is serving more than one sentence, he or she won't be referred until before the expiry of the last custody part (or punishment part if one or more of the sentences is a life sentence). S22



SMs - Scottish Ministers  
 PB - Parole Board for Scotland  
 75% - the maximum period of time that a custody and community prisoner can spend in custody  
 4 months - the minimum amount of time during which it is considered a meaningful change in risk status can take place

# Process for life prisoner

**Court sets punishment part of life sentence S15**

SMs refer case to PB before punishment part expires S16

PB determines if the offender would, if not confined, be likely to cause serious harm to members of the public. S17

- PB directs SMs to release prisoner on life licence and specifies licence conditions: S18, S26 and S27

**Licence in force for remainder of offender's life (S28). A breach of licence could result in the licence being revoked (see flowchart showing section 31 process).**

Prisoner (not released) informed of reasons in writing and a date fixed (within a 2 year period) for a further review S19

SMs must refer prisoner's case to PB before date fixed by PB S20

SMs - Scottish Ministers  
PB - Parole Board for Scotland  
Punishment part - the period of a life sentence the court decides the offender needs to serve for the purposes of retribution and deterrence.

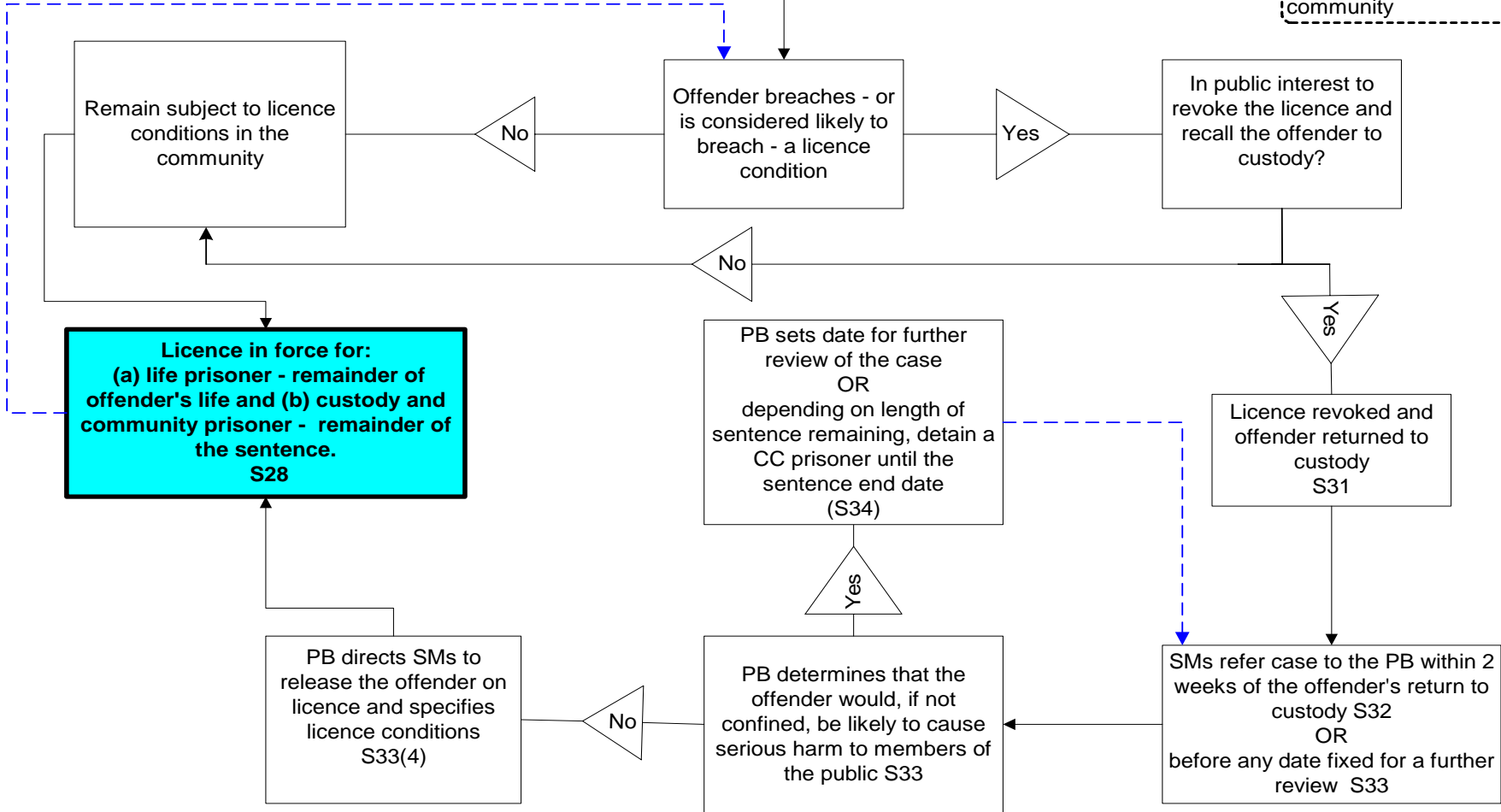
No

Yes

# Process for breach of licence

**Offender subject to licence conditions in the community S24, 25 &26**

SMs - Scottish Ministers  
 PB - Parole Board for Scotland  
 CC - custody and community



## CUSTODIAL SENTENCES AND WEAPONS (SCOTLAND) BILL: CUSTODIAL SENTENCES

GRAHAM ROSS

The Scottish Executive's Minister for Justice introduced the Custodial Sentences and Weapons (Scotland) Bill in the Parliament on 2 October 2006. The Parliament's Justice 2 Committee has been designated as lead committee for parliamentary consideration of the Bill.

This briefing considers the provisions on custodial sentences set out in Parts 1 and 2 of the Bill. It also sets out the existing arrangements for the release of prisoners in Scotland; responses to the Sentencing Commission for Scotland's consultation; and the provisions in the Bill which deliver on the policy set out in the Executive 'White Paper' [Release and Post Custody Management of Offenders](#) published in June 2006. A separate SPICe briefing looks at the provisions on weapons set out in Part 3 of the Bill.

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## KEY POINTS OF THIS BRIEFING

- The Custodial Sentences and Weapons (Scotland) Bill contains provisions on two broad policy areas: provisions on custodial sentences and provisions relating to knives and swords
- Parts 1 and 2 of the Bill contain provisions relating to custodial sentences. These provisions aim to deliver the Scottish Executive's commitments to end automatic and unconditional early release of offenders and to achieve greater clarity in sentencing
- The Bill provides for the continuation of the Parole Board for Scotland as a Tribunal Non-Departmental Public Body. It will continue to discharge its functions under the Prisoners and Criminal Proceedings (Scotland) Act 1993. Provision is made for the Board to carry out other functions given to it in other provisions of the Bill (in effect the new arrangements for custodial sentences) or in any other legislation
- The current system of automatic and sometimes unconditional early release will be replaced by a new sentence management regime for custodial sentences of 15 days or more comprising a custody part and a community part
- The custody part of the sentence will be imposed by the court for the purposes of punishment and deterrence. It will always be a minimum 50% of the sentence although this can be increased to a maximum of 75% if the court considers it appropriate for the purposes of punishment and deterrence
- The court will explain the consequences of the sentence at the time it is imposed
- The risk the offender poses will be continuously reviewed during the custody part. If there are indications that, at the end of the court imposed custody part, the offender still poses a risk of serious harm to the public (and the custody part is less than 75%), the case will be referred to the Parole Board for Scotland to consider whether or not the offender should continue to be detained in custody on grounds of risk. If the Board concludes that the offender presents a risk of serious harm to the public, it can direct that the offender is kept in custody up to a maximum of 75% of the sentence
- The community part of a sentence will be a minimum of 25% and offenders will be on licence throughout the duration of the community part
- Serious breaches of licence conditions, whilst serving the community part, which show that an offender is an unacceptable risk to public safety will result in a recall to custody
- Offenders sentenced to less than 15 days will spend the full period in custody and be released unconditionally
- Fine defaulters and those held in contempt of court will serve any custodial sentence in full, regardless of the length of the period of custody imposed
- The existing arrangements for dealing with life sentence prisoners will not change and are being re-enacted in the Bill

## INTRODUCTION

The Custodial Sentences and Weapons (Scotland) Bill (“the Bill”) was, together with Explanatory Notes (and other accompanying documents) (all references in this briefing are to the “Explanatory Notes”) and a Policy Memorandum, introduced in the Parliament on 2 October 2006.

On 15 May 2003 the Scottish Executive published “[A Partnership for a Better Scotland: Partnership Agreement](#)” (Scottish Executive 2003). The document set out the principles by which the Labour Party and the Liberal Democrats in Scotland would develop and implement their policies in Scotland over the next four years. As part of the Agreement, the Executive stated that they would set up a judicially-led [Sentencing Commission for Scotland](#) (“the Commission”). The Commission, which is independent of the Scottish Executive, was launched in November 2003, and was given the remit to review and make recommendations to the Scottish Executive on:

- the use of bail and remand
- the basis on which fines are determined
- the effectiveness of sentences in reducing re-offending
- the scope to improve consistency of sentencing
- the arrangements for early release from prison, and supervision of prisoners on their release

The Scottish Executive indicated that, in the context of the arrangements for early release from prison and supervision of prisoners on release, it wanted the Commission to review and make recommendations on early release and supervision for all classes of prisoner. On 21 June 2005, the Commission published its consultation paper “[Early Release from Prison and Supervision of Prisoners on their Release](#)” (Sentencing Commission for Scotland 2005). The Commission pointed out that their review did not seek to cover the administrative arrangements for the temporary release of prisoners (as governed by the Prison (Scotland) Rules 1994) nor the detailed arrangements relating to the throughcare of prisoners, that is, the strategy relating to the transition of offenders from prison into the community.

This briefing sets out current arrangements for the release of prisoners in Scotland (pages 4 - 7); the Sentencing Commission for Scotland’s consultation and responses to the consultation (pages 8 -17); and the legislative proposals set out in the Scottish Executive’s ‘White Paper’ [Release and Post Custody Management of Offenders](#) published in June 2006 (page 18). The briefing then goes on to consider the provisions on custodial sentences set out in Parts 1 and 2 of the Bill (pages 19 – 27). A separate SPICe briefing looks at the provisions on weapons set out in Part 3 of the Bill.

## CURRENT ARRANGEMENTS FOR THE RELEASE OF PRISONERS

Discretionary early release on licence (parole) has operated in Scotland since 1967. The existing statutory regime is contained in the Prisoners and Criminal Proceedings (Scotland) Act 1993 (“the 1993 Act”). The 1993 Act has been frequently amended since it came into force on 1 October 1993, most recently by the Management of Offenders etc. (Scotland) Act 2005 (“the 2005 Act”) which received Royal Assent on 8 December 2005. The 2005 Act ended

unconditional early release for sex offenders serving sentences of six months or more<sup>1</sup> and also introduced a scheme of Home Detention Curfew (HDC). With the exception of these recent changes, early release from prison is governed by sentence length. The current arrangements are as follows.

## **SHORT-TERM PRISONERS**

Once short-term offenders (i.e. offenders sentenced to a term of less than four years) have served one-half of their sentence the Scottish Ministers are under a duty to release them unconditionally (i.e. not on licence). The offender may be returned to custody if convicted of a further “imprisonable offence” before the original sentence has expired if the court orders this in terms of section 16 of the 1993 Act. The period of renewed custody may be up to the balance of the original sentence (from the date of the new offence to the sentence end date of the original sentence). Statistics are not kept on how frequently the power in section 16 of the 1993 Act is used by sentencers although it is not thought to be often (Sentencing Commission for Scotland 2006, para 3.3).

As noted above, the Management of Offenders (Scotland) Act 2005 introduced new provisions for sex offenders sentenced to a period of imprisonment of between 6 months and 4 years. These offenders are now released on licence, rather than released unconditionally, at the half-way stage of their sentence. Licence conditions for this group of offenders are explained later in this briefing.

## **LONG-TERM PRISONERS**

Once long-term offenders (i.e. those sentenced to a term of four years or more) have served one-half of their sentence they may be released on licence. The decision to release rests with the Parole Board for Scotland. Where the Parole Board recommends release the Scottish Ministers are under a duty to release the offender. The Parole Board also decides on licence conditions. The licence, unless previously revoked, expires at the sentence end date (i.e. the date on which the full sentence imposed by the court expires).

If not released at the halfway stage, once long-term offenders have served two-thirds of their sentence the Scottish Ministers are under a duty to release them on licence. Again, the Parole Board decides the licence conditions. The licence, unless previously revoked, expires at the sentence end date. A long-term offender (in the same way as a short-term offender) may be returned to custody by the courts under section 16 of the 1993 Act if he commits another imprisonable offence before the sentence end date.

## **EXTENDED SENTENCE PRISONERS**

Extended sentences allow courts to impose additional post-release supervision on a licence if a court considers that the normal sentence would not provide a period of supervision of sufficient length to protect the public from serious harm. An extended sentence may be imposed on offenders convicted of certain sexual or violent offences. All offenders subject to an extended sentence are released on licence. Where the “custodial term” is less than 4 years the offender is released automatically at the half-way stage of the custodial term. The licence, unless previously revoked, does not expire until the end of the full extended sentence imposed by the court i.e. the custody part and the extension period.

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<sup>1</sup> Prior to the 2005 Act, all prisoners serving sentences of four or more years were released on licence after having served two-thirds of their sentence.

As for other long-term prisoners where the “custodial term” is 4 years or more the offender may be released after serving half of this term if the Parole Board recommends (in effect, directs) early release. If the Board does not recommend release, the offender will be released after serving two-thirds of the “custodial term”. In either case the licence, unless previously revoked, does not expire until the end of the full extended sentence imposed by the court (i.e. the custody part and the extension period).

## **LIFE PRISONERS**

The law covering the treatment of offenders sentenced to life imprisonment was changed by the Convention Rights (Compliance) (Scotland) Act 2001. A life prisoner is one sentenced to life imprisonment for murder (mandatory) or for a crime other than murder (discretionary) and has a “punishment part” set by the court. This is the period that the court considers appropriate to satisfy the requirements for retribution and deterrence, ignoring the period of confinement, if any, which may be necessary for the protection of the public. A life prisoner is reviewed for release by the Parole Board after serving the punishment part in full and will continue to be confined for the protection of the public, if this is deemed necessary by a tribunal of the Parole Board. Further reviews of a life prisoner’s case are undertaken on a date determined by the Parole Board, subject to each review taking place at not more than two-yearly intervals.

Under the new arrangements now in operation, life prisoners who breach the terms of their licence (which exists to the end of the person’s natural life) will be liable to be recalled to custody by the Scottish Ministers. On return to custody the grounds for the (recalled) offender’s detention will continue to be reviewed by a tribunal of the Parole Board. The Executive has stated that there is now substantial jurisprudence to suggest that these arrangements remain fit for purpose and, consequently, there will be no change to the current law (Scottish Executive 2006).

## **LICENCES**

Where an offender released on licence breaches a condition or conditions of that licence, he is liable to be recalled to custody. Having been informed of a possible breach of licence, either by local authority social workers or the police, the Scottish Ministers can:

- issue a warning letter to the offender (for “minor” breaches)
- refer the matter to the Parole Board for it to take a decision on whether or not the offender should be recalled to custody
- if the nature of the breach suggests significant risk, recall the offender to custody without referring the matter to the Parole Board in the first instance

Where an offender’s licence is revoked, his case, unless he receives another custodial sentence, will be referred to the Parole Board to consider whether or not they should be re-released. (If the Parole Board was involved in recommending that the licence be revoked then different members of the Parole Board will consider this reference). If the Parole Board is satisfied that the offender does not require to continue to be detained it will direct immediate re-release. The Scottish Ministers are under a duty to release the offender, on licence, as soon as is reasonably practicable. Where the Parole Board does not direct immediate re-release the offender is liable to be detained until the end of the sentence imposed by the court (plus any period during which the offender was unlawfully at large) but may subsequently be further reviewed by the Parole Board for release on licence, normally on an annual basis, depending upon how much of the original sentence remains to be served.

## **LICENCE CONDITIONS**

Section 12 of the 1993 Act deals with licence conditions. The standard conditions of a licence, and also any conditions applying in particular cases, are a matter for the Scottish Ministers. However, Ministers must consult the Parole Board about the standard conditions, and also about any specific or additional conditions to be applied in a particular case.

Section 12(2) of the 1993 Act stipulates that all licences shall include from the outset a condition requiring the person subject to the licence:

- to be under the supervision of a relevant officer of such local authority as may be specified in the licence and
- to comply with such requirements as that officer may specify for the purposes of supervision

## **LICENCE CONDITIONS FOR SEX OFFENDERS**

Section 15 of the 2005 Act amends the 1993 Act to provide that short term sex offenders (those sentenced to 6 months or more but less than 4 years) shall, on release at the half-way point of sentence, be subject to licence conditions – including electronic monitoring if considered appropriate – and supervision for the remainder of their sentence. The provisions in the 1993 Act dealing with licence conditions, supervision, revocation of licence and recall to custody still apply to these offenders and Scottish Ministers will set the licence conditions.

Local authorities will be responsible for supervising these offenders in the same way as is provided currently for all prisoners who are sentenced to imprisonment for 4 years or more, prisoners receiving extended sentences and life sentence prisoners released on life licence. Failure to comply with licence conditions will result in recall to custody by Scottish Ministers in cases of urgency or on the recommendation of the Parole Board for Scotland. The Board will also determine suitability for re-release on licence. In practice this means that this group of prisoners will no longer be released unconditionally.

## **HOME DETENTION CURFEW**

The 2005 Act also introduced a new discretionary power to release prisoners on what is commonly known as “Home Detention Curfew” (HDC). This allows the Scottish Prison Service, on behalf of the Scottish Ministers, to release prisoners on licence a short time before they would be eligible for automatic release or, in the case of long term prisoners, for release on licence on the direction of the Parole Board. The length of the HDC period varies according to the sentence length, but cannot be less than 14 days or more than 135 days. The prisoner must be serving a sentence of at least 3 months, and must spend at least 4 weeks in custody. Certain classes of prisoner are excluded entirely. The exclusions cover situations where the prisoner may be considered as a high risk, where special post-release arrangements are already in place or where the prisoner has failed to comply with a previous licence.

Home Detention Curfew is not a sentencing option for the courts. It is distinct from other uses of electronic monitoring, such as Restriction of Liberty Orders, in being an option for the management of those sentenced to imprisonment. The decision making therefore lies in the hands of Ministers rather than the courts though in practice this decision will be taken by officials in the Scottish Prison Service and local authority Criminal Justice Social Work.

Consideration will only be given to the release of long term prisoners on HDC following a recommendation from the Parole Board at the half-way stage of such a prisoner's sentence. As risk does not correlate to sentence length, the intention behind HDC is to consider it as an option for both short term and long term prisoners whom the Parole Board have assessed as eligible for release on parole licence at the half-way stage of their sentence.

## **SENTENCING COMMISSION CONSULTATION**

The consultation on the early release from prison and supervision of prisoners on their release was launched by the Sentencing Commission for Scotland on 21 June 2005. Over 800 copies of the consultation paper were distributed to a wide range of individuals and organisations in the public, private, voluntary and academic sectors. The consultation paper contained 32 questions that the Commission considered to be key to its deliberations on early release. These questions focussed on five areas:

- the principle of the early release of prisoners
- the scope of schemes for the early release of prisoners
- the administration of schemes for the early release of prisoners
- the role of the sentencing judge in the early release of prisoners and
- sanctions for re-offending or breach of conditions of licence during the period before expiry of the original sentence

In its Report following the consultation, the Commission felt obliged to record its disappointment with the modest number of responses received, especially from the judiciary. Less than 10% of those to whom the consultation paper was issued replied. The following paragraphs provide a summary of the Sentencing Commission's commentary on the responses to the consultation received on the five areas outlined above.

### **THE PRINCIPLE OF EARLY RELEASE OF PRISONERS**

The consultation asked whether the law should require every prisoner to serve the whole period specified in a sentence of imprisonment in custody, or whether it should continue to provide that part of the sentence should be served in the community. The vast majority of respondents (92.5%) were of the view that the law should continue to allow prisoners to serve part of their sentence in the community. However, a number of respondents qualified this view by stating that early release should not be automatic, that the decision should be based on an assessment of risk to the public and that only those who had shown remorse for their actions and a 'suitable attitude' to change should be considered for early release.

Only three respondents did not think that prisoners should be able to serve part of their sentence in the community, arguing that it would be more effective if the whole period specified was served in prison. They also argued that early release works against the principle of clarity in sentencing as victims and the public legitimately expect that the offender will serve the full sentence imposed in custody.

Four main themes emerged from those respondents who were in favour of early release:

- early release provides an incentive to good behaviour in prison and therefore aids prison management
- early release provides an incentive to prisoners to tackle their offending behaviour
- early release provides an opportunity for prisoners to be “tested” in the community under conditions in which they are provided with support
- early release reduces prison overcrowding

COSLA commented that:

*“...early release schemes provide clear incentives for adhering to prison rules making prisons much less demanding to manage. In addition, it is also clear that early release schemes can have an impact on reducing the prison population. While this is not in isolation a reason for implementing such schemes, any attempts to restrict the prison population to manageable levels has benefits for prisoners, prison staff and the public purse” (COSLA 2006).*

Three main themes emerged from those respondents who argued against schemes for the early release of prisoners:

- early release schemes are perceived negatively by victims and the general public
- early release puts the public at risk from re-offending by releasing offenders before the end of their sentence
- automatic early release provides no incentive to prisoners to behave within prison or to address their offending behaviour

Several respondents also suggested that current methods of risk assessment are not sufficiently robust to ensure that high risk offenders are identified as such.

The consultation asked whether the overall size of the prison population should have any significance in determining the existence and nature of schemes for the early release of prisoners. Sixty three per cent of those who responded to this question felt that the size of the prison population should be of no significance in determining the existence and nature of schemes for early release. Several respondents argued that the size of the prison population is distinct from, and should always be distinct from, consideration of the appropriate punishment for the crime.

## **THE SCOPE OF SCHEMES FOR THE EARLY RELEASE OF PRISONERS**

### ***Criteria for early release***

The consultation asked what the criteria should be for early release. A wide variety of responses were received on this issue with respondents representing particular perspectives tending to advance criteria reflecting those perspectives. For example, those representing victims’ organisations felt that the acknowledgement of the offence, empathy for the victim and recognition by the offender of the impact of the crime on victims should be prerequisites for early release.

A number of respondents on this issue identified risk of harm to the public or the community as being an important factor when making decisions on early release, with some suggesting that this should be the sole determining factor on whether to release an offender. Good behaviour whilst in prison and compliance with the prison regime was also identified as being a factor which should be taken into consideration indicating a view that early release should be earned

rather than being automatic. The seriousness of the offence was also put forward as being a factor that should be taken into consideration. The Commission pointed out that the very mixed range of responses to this particular question indicated that the decision on whether to grant early release is regarded as being based on a wide variety of considerations and is potentially complex:

*“The majority of respondents felt that a range of factors should be taken into account but the basis on which decisions to grant prisoners early release are currently made does not appear to be widely understood” (Sentencing Commission for Scotland 2006, Annex A, page xi).*

Respondents were also asked to comment on whether there should be the same or separate schemes for short-term and long-term prisoners. The majority of those who commented on this issue felt that there should be separate schemes for short-term and long-term prisoners as the practical realities of resource constraints meant that it would be unrealistic to expect that all prisoners could be supervised on release. A number of respondents stated that a ‘one size fits all’ approach would be inappropriate as short-term prisoners generally do not pose the same level of risk and therefore do not require the same level of supervision on release.

### ***Discretionary/Automatic early release***

The consultation asked for comments on the justification for discretionary and automatic early release. From the responses received on discretionary release, four themes emerged. It was argued that discretionary release could be justified because it allowed for the possibility that people can change and it was not possible to predict at the time of sentencing how each prisoner would progress. Discretionary early release therefore allowed a prisoner’s progress or lack of it to be recognised. Discretionary early release also enables prisoners to be supported and supervised in the community, allowing progress to be monitored, and the possibility of recall to custody provides a safety net for the community. It also allows release decisions to be taken on the basis of an assessment of risk and therefore allows low risk prisoners and those whose risk can be managed in the community to be released early. Finally, discretionary early release provides prisoners with an incentive to co-operate with the sentence management regime and to participate in addressing offending behaviour programmes. Only two respondents to this question indicated that there was no real justification for discretionary early release.

With regard to automatic early release, 18 respondents addressed this issue with six respondents indicating that there was no justification for automatic early release. The remainder felt that automatic early release could be justified for the following reasons:

- it limits the amount of time lower risk offenders spend in prison
- it is a pragmatic response to managing the size of the prison population
- it provides an incentive for good behaviour within prison and
- it allows prisoners to be “tested” in the community while they are subject to licence conditions

With regard to the nature of the offence having a bearing on the timing of release, the overall response showed strong support for maintaining separate regimes for short and long term prisoners, although in many instances, this support was based on practical considerations and a view that it is simply not possible to provide the same regime for all prisoners. The view was expressed that the nature of the offence is given adequate consideration at the time of

sentencing and that this is the correct point for differentiating between different crimes. Many respondents indicated that the primary factors in determining whether a prisoner should be released early should be risk of re-offending and risk to the public, rather than the nature of the offence.

However, some respondents felt that there should be different schemes of early release for certain “types” of offender. Amongst the offender types who were thought to require different treatment were sex offenders, serious violent offenders and life sentence prisoners. It was also suggested that first offenders and persistent offenders should be treated differently.

Respondents were asked whether they thought that all early release should be on a discretionary basis. A small majority indicated that they did not think that all early release should be discretionary and argued that for prisoners who present little or no risk to the public then automatic and/or unconditional release should continue.

Another view was that existing procedures for the early release of long-term prisoners should be retained on the basis that it is more sensible to have high risk offenders re-integrated into the community on supervision rather than releasing them at the end of the sentence with no supervision.

Those respondents who felt that all early release of prisoners should be discretionary argued that automatic early release should be discontinued since it results in the true length of prison sentences bearing little resemblance to the sentence imposed by the court. They also argued that automatic early release has no value in terms of prison management since prisoners are released early irrespective of their behaviour while in custody.

### ***Stage of early release***

Respondents were asked to comment on the point at which prisoners should be considered for early release. There was a wide variety of responses on this issue and these are summarised below:

- there should be a move to system of sentencing whereby sentencers specify minimum custodial terms after which offenders would be eligible to apply for early release
- the point of early release should be determined by assessments of risk
- there should be no change to the present system as the impact on the prison population would be detrimental
- there should be no change to the present system in terms of the point of sentence when prisoners become eligible but all early release should be discretionary
- the earliest point of release should be increased (various suggestions were put forward as to when the earliest point of release should be, ranging from 66% of the sentence to 80% of the sentence)

### ***Determinate and life sentence prisoners***

Respondents were asked how the early release arrangements for determinate prisoners should compare with the statutory arrangements governing the release of prisoners sentenced to life imprisonment. Some argued that the two groups of prisoners are distinct and that it would be

“unrealistic and draconian” to apply life licence rules to individuals who were neither serious nor persistent offenders.

A similar number of respondents were of the view that the same system of early release should apply to both groups of prisoners with a number indicating a preference for applying the system under which life sentence prisoners are released to all determinate sentence prisoners i.e. consideration for release by the Parole Board after serving a minimum period in custody.

## **THE ADMINISTRATION OF SCHEMES FOR THE EARLY RELEASE OF PRISONERS**

### ***Decisions on early release***

Respondents were asked who should be responsible for deciding, under a discretionary system, whether prisoners should be granted early release. A large majority (70%) of respondents indicated that the Parole Board would be the most appropriate body to make such decisions. A small number of respondents suggested that decisions should be taken by the Parole Board in consultation with other agencies which have responsibility for the management and supervision of offenders (such as the Risk Management Authority and the Scottish Prison Service).

Respondents were also asked to comment on the role to be played in the early release of prisoners by the Scottish Executive, the Scottish Parliament, the Scottish Prison Service (SPS), the Risk Management Authority (RMA) and social work agencies. It was suggested that the Executive should be responsible for the provision of the general framework within which early release schemes operate and should also be responsible for the provision of resources including the funding of early release support programmes. One respondent suggested that it is desirable to avoid penal policy becoming overtly political and as such, the primary roles in the provision of early release scheme should be undertaken by operational agencies.

The majority of respondents who commented on the Parliament's role felt that it should be limited to passing the necessary legislation and beyond that should have no role in determining other aspects of early release schemes.

Some respondents identified the role of the SPS as being specifically about providing information to the Parole Board to enable them to make decisions on early release, whilst others felt that the role of the SPS went beyond this and should include risk and needs assessments which would feed into reports that are taken into consideration in the early release decision-making process.

With regard to the RMA, some respondents did not demonstrate a great deal of knowledge of its precise remit. Some suggested that it would be important to clarify exactly what the RMA's role is in relation to the other agencies involved in the early release process. It was also suggested that the RMA should be responsible for providing national guidance and advice on methods of assessing risk and managing high risk offenders in the community.

Respondents indicated that the primary role of social work agencies is (and should continue to be) the provision of advice and information on prisoners to the Parole Board, enabling the Board to make decisions on early release. It was also noted that the role of the social work agencies includes the provision of supervision, support and management in relation to released prisoners.

### ***Conditions applying on early release***

The consultation went on to ask what conditions should be applied to those released early on licence and who should be responsible for deciding what those conditions should be. Perhaps

understandably, responses on what conditions should be applied to those released early varied considerably. Some respondents were concerned with particular types of offences and identified specific conditions which should be attached to release licences for different types of offence. However, the majority of respondents expressed views about the purpose of release conditions rather than identifying specific conditions that should be applied to those prisoners who are released.

It was suggested that conditions should aim to address offending behaviour and its underlying causes and should always be intended to reduce the risk posed by offenders. It was argued that standard conditions, such as being of good behaviour and keeping the peace, as well as individual conditions specific to an offender's circumstances should be applied. However some concern was expressed that the imposition of additional conditions could result in larger numbers of offenders being recalled to custody.

The vast majority (79%) of respondents who addressed the question of who should be responsible for deciding what the conditions should be, regarded the Parole Board as being the most appropriate body to decide on the conditions of early release. It was noted, however, that while the Parole Board was the most appropriate body, it must take decisions on the basis of advice and information from other agencies involved in the management and assessment of prisoners, in particular, the Scottish Prison Service and the Risk Management Authority.

### ***Supervision following release from custody***

The consultation asked a number of questions regarding the supervision arrangements for prisoners who are granted early release. Respondents were asked whether all prisoners granted early release should be under supervision. The majority of those who responded indicated that they did not think that all prisoners granted early release should be under supervision and argued that the pressure on resources which would result from supervising all prisoners granted early release made such an approach unrealistic. It was also stated that as many prisoners are low-risk and serving relatively short sentences, that it would be a waste of resources to impose unnecessary supervision on this group.

However, a number of respondents stated that all prisoners released early should be supervised. They argued that the transition from prison to reintegration into the community would be enhanced by supervision and that this would aid to reduce re-offending. It was also stated that the supervision of all prisoners on release may prove to be beneficial to victims.

Respondents were asked to comment on who should be responsible for supervising prisoners granted early release and a large majority (83%) indicated that criminal justice social work services would be the most appropriate body to supervise those prisoners granted early release. Very few respondents offered any reasons as to why they took this view.

The consultation asked respondents to comment on what form and level of supervision should be operated in respect of prisoners granted early release. The responses to this question varied widely with the most common view being that the form and level of supervision should be based on an assessment of the risk posed by the prisoner and should be tailored to minimise that risk. A number of respondents stated that appropriate forms and levels of supervision are already contained in the [National Standards for Throughcare](#) (Scottish Executive 2004) which provide a framework for minimum levels of supervision.

Several respondents stated that supervision should take whatever form and level is necessary to ensure that the licence conditions imposed by the Parole Board can be adhered to. They

argued that this would also ensure that the public are protected from any risk posed by the prisoner.

A number of respondents indicated that they did not think it was possible to specify generic forms and/or levels of supervision as every prisoner and their circumstances are different and therefore supervision should take whatever level and form is most appropriate for each case. However, some respondents did identify specific forms of supervision which should be applied, ranging from electronic tagging, regular attendance at social work services and attendance at group work sessions to address various issues such as anger, low self-esteem, etc.

## **THE ROLE OF THE SENTENCING JUDGE IN THE EARLY RELEASE OF PRISONERS**

Respondents were asked to consider whether a sentencing judge should be required to take account of the terms of schemes for the early release of prisoners when determining what sentence to impose on offenders. The responses received to this question were almost evenly divided with just over half of the respondents believing that the sentencing judge should be required to take account of early release schemes in deciding on sentence.

The consultation went on to ask whether judges should be required to explain in open court what the sentence being imposed will mean in terms of when an accused may or will be released from prison. The majority of respondents to this question felt that sentencing judges should explain the details of sentences in open court and felt that this would go some way towards ensuring transparency and openness in sentencing which, in turn, would increase public confidence and understanding of sentencing.

A number of respondents were not in favour of sentencing judges explaining sentences in open court and argued that:

- the decision on point of release should be determined by behaviour in custody and the offender's attitude and, therefore, the sentencing judge would not be able to say precisely how long the offender would spend in custody
- the judiciary should not have to explain the effect of policy decisions
- it would be more constructive for sentencers to explain why a custodial sentence is necessary and what it is intended to achieve
- having to explain the sentence would have the effect of weakening the authority of the court
- the parole system may attract adverse media and victim attention if it had to be explained in open court

Respondents were also asked to consider the role of the sentencing judge in determining whether a prisoner should be released early. The majority of respondents to this question felt that the sentencing judge should either have no role in the decision to release a prisoner early, or that their role should be limited to the current one of providing the Parole Board with a report on the circumstances of the case in all cases resulting in a sentence of four years or more. It was argued that since a sentencing judge would have no knowledge of a prisoner's progress and circumstances in the period between sentence and consideration for release, that there would be no value in extending the judge's role.

Of those respondents who felt that the sentencing judge should have a role to play in the decision to release a prisoner early, a number indicated that the sentencer's role should take the form of specifying the minimum period to be served in custody. It was also suggested that the sentencing judge should have a major role to play in the release decision at the point when the prisoner is considered for early release.

## **SANCTIONS FOR RE-OFFENDING OR BREACH OF CONDITIONS OF LICENCE**

Respondents were asked to comment on a number of questions relating to the issue of sanctions for re-offending or breach of conditions of licence. They were asked to consider what should happen to a prisoner granted early release who commits a breach of licence conditions before the expiry of the original sentence. A number of respondents felt that any sanctions imposed should depend on the specific nature of the breach. They also argued that rather than having a fixed sanction, the court or the Parole Board should have discretion to determine what sanction is most appropriate in light of the nature of the breach and also the risk the prisoner poses to the public. Some respondents also emphasised that there should not necessarily be a presumption that a breach of licence conditions will result in a recall to custody.

Several respondents argued that any breach of licence conditions represents a breach of trust and that this should be regarded as being sufficiently serious to merit a return to custody. It was also suggested that prisoners who breach their licence conditions should both be returned to custody and have an additional sentence imposed on them. With regard to prisoners who commit further offences while released on licence, it was suggested that re-offending while on licence should be an aggravation so that the offender receives a more severe penalty for the offence because it is aggravated by the fact that he or she was on licence at the time.

Respondents were asked to consider whether there should be other statutory sanctions for breach of licence other than recall to custody. It was suggested that the court and/or the Parole Board should be able to exercise discretion over the nature of the sanction for breach and a number of less severe sanctions were put forward including, electronic monitoring, weekend detention, more stringent reporting requirements, fines and an extension of the supervision period. However, a number of respondents suggested that recall to custody is the only effective sanction that released prisoners are likely to pay attention to.

## **KEY RECOMMENDATIONS**

The Commission outlined a number of deficiencies in, and criticisms of, the current statutory regime for the early release of prisoners:

- a lack of clarity in how the regime operates
- a regime which is too complicated
- sentences which do not mean what they say
- early release is in many instances automatic and takes place irrespective of the risk to the public from the prisoner re-offending or the prisoner's behaviour in custody
- the regime focuses on offenders to the exclusion of victims
- no explanation of the practical effect of the sentence is given by the sentencer at the point of sentencing

- there is a lack of clarity about how the regime contributes to the wider agenda of reducing re-offending

In order to address these deficiencies, the Commission made a number of recommendations and these are summarised below.

### **General**

The Commission recommended that when a custodial sentence is imposed the sentencer should explain the effect of the sentence. This would serve to ensure that the offender, the victim, the public, and the media would be in no doubt as to the effect of the sentence. It would be clear what the sentence means in terms of the time to be served in custody and the amount of time which may be served in the community.

Where a court does impose a sentence which has a custody part and a community part or the imposition of a period of supervision, the overall sentence should be proportionate to the gravity of the offending.

It should be made explicit by statute or otherwise that the term of the custody part imposed by the sentencer should be the minimum period that requires to be served to satisfy the criminal justice requirements of punishment and deterrence and the protection of the public.

Any legislation governing a new statutory regime should expressly provide that a sentencer, when having regard to sentences imposed under the previous regime, must also have regard to the rights to early release under that previous regime. There should also be a separate regime for those sentenced to terms of 12 months or less and those sentenced to terms of more than 12 months.

### **Prisoners sentenced to 12 months or less**

For prisoners sentenced to 12 months or less, the Commission recommended that they should normally serve, in custody, the full term ordered by the court, but that they should be eligible for conditional release on Home Detention Curfew (“HDC”) after serving not less than one-half of the term. For offenders sentenced to 12 months or less but for whom more robust supervision measures than HDC are required, the Commission recommended that the courts should be given the power to order a period of supervision in addition to the term in custody. This power would be invoked where the court was satisfied that the offender presented a substantial risk of re-offending and causing harm to the public. The Commission recommended that, in assessing that risk, regard should be had to whether the offender:

- is a persistent minor offender with a chaotic lifestyle
- is especially vulnerable and would benefit from the support of a supervising officer in order to lead a law-abiding life
- is a young offender (i.e. a person aged between 16 and 21 years) who requires supervision on release

### **Prisoners sentenced to more than 12 months**

For prisoners sentenced to more than 12 months, the Commission recommended that sentences should be in two parts: a custodial part and a community part. With regard to the custodial part, the court should be required to impose the minimum term that it considers the prisoner requires to serve in custody for the purposes of punishment, deterrence and protection of the public. The community part should normally bear a fixed proportionate relationship to the

custodial part. The Commission also recommended that the court should be given the power to order at the time of sentence a longer community part (subject to a maximum which should be set by statute) in those cases where it considers that there is likely to be, at the end of the normal custodial part, an ongoing risk of re-offending.

The Commission went on to say that the court should also have the power to order that there should be no community part or that it should be shorter than the fixed proportion of the custodial part. This would be to accommodate those cases where no period on licence is deemed to be necessary either for the purpose of public protection or for providing support to the offender in his or her resettlement in the community, and those in which only a short period on licence, with or without supervision, is judged to be necessary. The prisoner would only be released on licence at the end of the custodial term if the risk of re-offending and any consequent risk to the public was judged to be acceptable.

For those offenders sentenced for a statutory offence, the Commission recommended that the aggregate term of the custodial and community parts of the sentence should not exceed the maximum terms of imprisonment provided for in statute in respect of that offence.

### ***Sheriff's sentencing powers***

The Commission recommended that a sheriff's sentencing powers should be revised so that the maximum custodial part that a sheriff should be able to order when dealing with cases on indictment should be three and a half years. The Commission stated that the maximum community part that a sheriff should be able to impose could be limited to five years.

### ***Recall to custody for breach of licence or Home Detention Curfew***

The Commission recommended that the power to recall a person to custody for breach of licence or a Home Detention Curfew order should be vested solely in the Scottish Ministers. The Commission went on to recommend that the Parole Board's function in recall cases should be confined to one of reviewing the justification for the decision to recall and to decide whether or not the person should be immediately re-released.

### ***Return to custody by the courts***

The Commission argued that there should be no power mirroring that contained in section 16 of the 1993 Act (whereby a court can return a prisoner to custody if they are convicted of another imprisonable offence). The Commission did, however, state that a court could take into account the fact that an offence had been committed during service of the community part of a previous sentence as a factor that justified increasing any custodial sentence for the new offence.

### ***Single terming of sentences***

The Commission noted that a complication arises in the operation of early release where a prisoner is serving more than one sentence. Section 27(5) of the 1993 Act provides that for sentences imposed on or after 30 September 1998, consecutive terms of imprisonment and terms which are wholly or partly concurrent shall be treated as a "single term" of imprisonment if, in essence:

- the sentences were passed at the same time
- where the sentences were passed at different times, the person has not been released from an earlier sentence

This can sometimes have the effect, referred to as “single terming”, that a second sentence imposed during a period of imprisonment for an earlier offence can be entirely absorbed in the first sentence which may not have been the court’s intention.

The Commission recommended that the single terming of sentences should be abolished. The Commission recommended that concurrent and part-concurrent sentences should run in parallel with each other and have their own sentence end dates.

## **SCOTTISH EXECUTIVE PROPOSALS**

On 20 June 2006, the Scottish Executive published ‘[Release and Post Custody Management of Offenders](#)’ (Scottish Executive 2006) which contained proposals for legislation which would end automatic unconditional early release for prisoners in Scotland and aimed to bring about greater clarity to the sentencing process. The Executive proposed to legislate for the following framework:

- apart from offenders who are sentenced to 15 days or more, a combined structure for managing sentences comprising a period in custody (“the custody part”) and a period on licence in the community (“the community part”). The custody part to be a minimum of 50% of the sentence
- it would be made clear at the time of the sentence that the minimum custody part will be 50% of the total sentence. This will be for the purposes of punishment and deterrence. However, the court would have the power to increase the custody part if required in any particular case up to a maximum of 75% of the total sentence
- offenders would be subject to continuous review during the custody part. Where Scottish Ministers consider that an offender should not be released at the end of the custody part on grounds of risk, they would refer such cases to the Parole Board with a recommendation that the offender should be kept in custody for longer
- at the end of the custody part, the offender would be on licence for the entire community part of the sentence. The licence conditions would enable provision for a variable and flexible package of measures including supervision if required and would detail what obligations the offender has to meet. Breach of a licence condition would be taken very seriously and could result in a return to custody. For the first time all offenders would be under some form of restriction for the full sentence

The Executive has stated that the combined sentence is not a new disposal and is a structure which would enable offender management to be tailored to the risk and needs of individual offenders to optimise the chances of enhancing public protection and reducing re-offending. Under the proposals, courts would still retain the same range of punishments at their disposal as they have currently, including community disposals such as community service orders, probation and drug treatment and testing orders.

It is proposed that once in prison, offenders will undergo risk assessment and review as part of the sentence management process. Offenders who present as a high risk of re-offending and/or who pose an unacceptable threat to public safety will be referred to the Parole Board by the Scottish Ministers with a recommendation that the custody part of the offender’s sentence should be extended beyond the minimum term set down by the court at time of sentence. The Executive has stated that this process will apply regardless of whether the custody part is the statutory minimum or whether it was increased beyond the 50% minimum at the time of sentence. If the Parole Board supports the recommendation made by the Scottish Ministers, the

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offender will be detained in custody beyond the custody part set at the time of sentence. The final decision about release will be taken by the Parole Board.

## **PROVISIONS OF THE BILL**

Parts 1 and 2 of the Bill contain provisions relating to custodial sentences. The Policy Memorandum states that these provisions deliver the Scottish Executive's commitments to end automatic and unconditional early release of offenders and to achieve greater clarity in sentencing. Part 1 of the Bill deals with the Parole Board for Scotland and Part 2 with the confinement, review and release of prisoners, the key elements of which are outlined below.

### **PART 1: THE PAROLE BOARD FOR SCOTLAND**

The Parole Board for Scotland ("the Board") exists under the provisions of the Prisons (Scotland) Act 1989 and the Prisoners and Criminal Proceedings (Scotland) Act 1993. Currently the Board's main duties are to:

- recommend to Scottish Ministers the time at which determinate sentence prisoners serving 4 years or more should be released on licence. This may occur from the half-way point of sentence until the two thirds point (when they must be released automatically on licence). The Board also imposes conditions on the release licence
- direct that Scottish Ministers release, on life licence, at a point after the expiry of the court imposed punishment part, a life sentence prisoner if satisfied that it is no longer necessary for the protection of the public to detain the prisoner. The Board also imposes licence conditions
- recommend that Scottish Ministers revoke the licence of any offender and recall him to custody eg where a licence condition is breached
- direct where continued detention is no longer necessary Scottish Ministers to re-release any offender who has been recalled to custody
- recommend the inclusion, subsequent insertion, variation or cancellation of licence conditions

Under the provisions contained in the Bill, the Board will remain as a Tribunal Non-Departmental Public Body and will continue to discharge its functions under the 1993 Act. However, the Board will also take on some additional functions, with the result that its main duties will be to:

- consider the case of any offender who meets the statutory criteria to be considered for detention beyond the court imposed custody part on grounds of risk of serious harm to the public and direct either that Scottish Ministers continue to detain the offender (on grounds of risk) up to a maximum of 75% of the total sentence or move the offender to the community if the Board considers that the risk test is not met and direct that Scottish Ministers include conditions on the community licence
- as at present, direct that Scottish Ministers release on life licence (with conditions) at a point after the expiry of the court imposed punishment part, a life sentence prisoner if satisfied that it is no longer necessary for the protection of the public to detain the prisoner

- as at present, consider the case for re-release of a recalled offender and, direct that Scottish Ministers return such offenders to the community on the appropriate terms if the Board considers that continued detention is not necessary for the protection of the public
- as at present, direct that Scottish Ministers set, vary or remove licence conditions in cases referred to them
- as at present, consider the case of an offender who makes an appeal against a recall a recall to custody following a breach of Home Detention Curfew condition(s)

Section 1(4) of the Bill requires the Board to have regard to the risk management plan when considering the case of a person for whom one has been prepared under section 6(1) of the Criminal Justice (Scotland) Act 2003. Section 6(1) of the 2003 Act requires that a Risk Management Plan be prepared for an offender who is made the subject of an Order for Lifelong Restriction (OLR). OLRs became available to the courts in Scotland in June 2006. The OLR is a sentence for serious sexual and violent offenders and is broadly equivalent to a life sentence insofar as the offender remains on licence for the remainder of his life.

### ***Parole Board Rules***

Section 2(1) of the Bill provides that the Scottish Ministers may make rules to regulate the Parole Board's proceedings. Subsection (2) details some of the particular types of provisions which may be included in the rules. Amongst other things there is the power to

- authorise cases to be dealt with, in whole or in part, by a specified number of members of the Board
- enable the Board to require persons, other than the prisoner whose case the Board is dealing with, to attend a Board hearing, give evidence to the Board or produce documents
- prescribe time limits for the determination of cases and for the performance of other actions
- specify the matters which may be taken into account by the Board when dealing with cases

With regard to Scottish Ministers having the power to specify the number of members who will deal with cases, the Financial Memorandum to the Bill states that under the new arrangements continued detention will be considered by a Tribunal (similar to current arrangements for life prisoners.) The Parole Board rules will be amended to require the Tribunal to reach a unanimous decision in every case. This effectively means that in future Tribunals will comprise of two members rather than the present situation where Tribunals consist of three members.

Section 2(3) of the Bill allows the Parole Board rules to apply the terms of subsections (4) and (5) of section 210 of the Local Government (Scotland) Act 1973. Subsection 210(4) of that Act provides the power to request a person to attend a Board hearing provided that any expenses incurred are paid and provided that the person is entitled to refuse to produce documents or answer questions, on grounds of privilege or confidentiality, if this could have been done were the matter to have been raised in proceedings in a court of law. Subsection 210(5) of the 1973 Act provides that any person who refuses or wilfully alters, suppresses, conceals, destroys or refuses to produce any book or other document which he is required or is liable to be required to produce shall be liable on summary conviction to a fine not exceeding level 1 on the standard

scale (this may be raised to level 2 in the rules). The Bill also provides for a penalty of imprisonment for a term not exceeding three months but this penalty cannot apply when section 210(5) is applied to hearings before the Parole Board by virtue of the Parole Board rules.

Schedule 1 of the Bill makes provision for the membership of the Parole Board for Scotland. The Board must consist of no fewer than five members (including a convener) and the membership of the Board must include:

- a lord Commissioner of Justiciary
- a registered medical practitioner who is a psychiatrist
- a person who the Scottish Ministers consider has knowledge and experience of the supervision or aftercare of prisoners
- a person who the Scottish Ministers consider has knowledge and experience of the assessment of the likelihood of offenders causing serious harm to members of the public
- a person who the Scottish Ministers consider has knowledge and experience of the way in which and the degree to which offences perpetrated against members of the public affect those persons

## **PART 2: CONFINEMENT AND RELEASE OF PRISONERS**

### ***Combined structure – Custody Part***

This part of the Bill deals (as appropriate) with the confinement, review and release of prisoners sentenced to:

- less than 15 days
- 15 days or more
- a life sentence

For sentences of less than 15 days, the Bill provides that the offender will spend the full period in custody and will be released unconditionally.

For sentences of 15 days or more, the Bill makes provision for a combined sentence management approach comprising a period in custody (the custody part) and a period on licence in the community (the community part). The custody part is that part of the sentence which represents an appropriate period to satisfy the requirements for retribution and deterrence. In specifying a custody part the court must ignore any period of confinement which may be necessary for the protection of the public.

The courts will set the custody part when passing sentence and the implications of the sentence will be explained fully at the time it is imposed. The statutory minimum for the custody part will be 50% but this can be increased up to a maximum of 75% by the court for “punishment” purposes. (The custody part may also be increased at a later stage following review by the Parole Board on grounds that the offender still poses a risk of serious harm to the public). The custody part can be appealed by both the offender and the Crown (for unduly lenient sentences). The Bill also provides that Scottish Ministers may, by order, vary the minimum sentence length to which the combined structure applies.

Matters which the court must take into account prior to increasing the custody part beyond the statutory 50% minimum are:

- the seriousness of the offence, or the offence combined with other offences of which the person is convicted on the same indictment or complaint as that offence
- any previous convictions of the person
- the timing and nature of a guilty plea

During the custody part, the risk of serious harm to the public that an offender may pose will be assessed regularly. The Bill provides that the Scottish Ministers and each local authority must jointly establish arrangements for the assessment and management of the risks posed in the local authority's area by custody and community prisoners. Risk will be assessed on the basis of up-to-date sentence management information compiled with input from the relevant bodies with responsibility for managing the offender and the sentence.

Section 8(1) and (2) of the Bill provides that, before the expiry of the custody part of a prisoner's sentence, the Scottish Ministers must determine whether a prisoner would, if not confined, be likely to cause serious harm to members of the public. If the assessment shows that there is a likelihood that the offender, if placed in the community at the end of the court imposed custody part, would cause serious harm to the public, the case will be referred to the Parole Board for it to consider the case for continued detention. Section 9 provides that where the Scottish Ministers have assessed that a prisoner need not be referred to the Parole Board under section 8, then he must be released on community licence. (This is subject to section 22 of the Bill which deals with the effect of multiple sentences and which is discussed below.)

Where the Scottish Ministers do refer a case, the Parole Board may, in effect, either direct that the offender continues to be kept in custody or direct that the offender moves to the community part of the sentence. If the offender moves to the community part, Scottish Ministers must place the offender on licence for the full period. The Parole Board will direct Scottish Ministers to attach conditions to the offender's licence that it considers appropriate to the circumstances of the offence and the offender including (where appropriate) supervision by a local authority criminal justice social worker until the end of the sentence.

If the Parole Board considers that the offender would be a risk of serious harm, it will not direct that he progresses to the community part and the offender will remain in custody.

If there are still more than four months remaining before the maximum 75% of the custody period is reached, the Board will look at the case again. Four months is the minimum period of time in which it is considered that an offender can make a meaningful change to the status of his or her risk. The maximum period between reviews will be two years. Where the offender has less than four months remaining before 75% of the custody part elapses, the Parole Board will not look at the case again, but instead will specify conditions to be attached to the community licence. In these cases, the licences must include a requirement that the offender is supervised by a local authority criminal justice social worker until the end of the sentence.

Multiple sentence prisoners are those who are serving, or liable to serve, two or more sentences of imprisonment. Section 22(2) of the Bill provides that a multiple sentence prisoner must not be released before having served any custody only sentence, the custody part of any custody and community sentence, and the punishment part of any life sentence. In other words, all of the compulsory periods of confinement imposed on the prisoner have to be served before the prisoner can be released. Where a multiple sentence prisoner is released on licence, the licence

will be a community one where he is not subject to a life sentence, and otherwise he will be released on a life licence.

The Policy Memorandum states that there will be no equivalent of section 16 of the 1993 Act, which provides that where a person commits an imprisonable offence before the expiry of a custodial sentence previously imposed, a court may order the person to serve the balance of the original sentence before beginning to serve any sentence for the new offence. This is because the prisoners concerned will serve the whole of the minimum custodial term (in other words the punitive part of the sentence) in prison and any return to prison thereafter will be because the person has seriously breached the conditions of their licence and in doing so represents an unacceptable risk. However, the Memorandum states that there would be nothing to prevent a court from taking into account the fact that an offence had been committed during service of the community part of a previous sentence when imposing any sentence for the offence under consideration.

### **Community Part**

All sentences of 15 days or more will have a community part of at least 25% of the sentence and offenders will be on licence for the entire community part. If an offender moves to the community part at the end of the court imposed custody part, Scottish Ministers will set the licence conditions. If the offender's case is referred to the Parole Board, it will set the licence conditions. In practice, all offenders with a sentence of six months or more will be subject to a supervision condition attached to their licence and all offenders referred to the Parole Board for it to consider the case for continued detention will also be given a supervision condition when they move to the community part.

Licence conditions can be varied during the community part to take account of changes in an offender's circumstances. The Executive has stated that:

*“For large numbers of offenders (particularly those with shorter sentences) it may be enough to require the offender “to be of good behaviour”. At the other end of the spectrum a full package of conditions will be available, such as attending drug or alcohol counselling, restrictions on visiting certain places/locations and undertaking intensive supervision where necessary” (Scottish Executive 2006, page 6, para 25).*

### **Life prisoners**

As previously mentioned, the provisions for the imprisonment and release on life licence for offenders who are given a life sentence are presently set out in the Prisoners and Criminal Proceedings (Scotland) Act 1993. The Executive does not propose to amend the law as respects the treatment of life sentence prisoners and the provisions are simply re-enacted in the Bill. The measures in the Bill will apply to those given a life sentence for an offence for which the punishment is fixed by law (murder), to those on whom the court imposes a “discretionary” life sentence (for an offence other than murder), to those given an Order for Lifelong Restriction and to children sentenced to detention without limit of time.

Section 15 of the Bill sets out the provisions for setting the punishment part of a life sentence. Section 15(2) defines the punishment part as being that part of the sentence which, taking into account certain specified matters, the court considers appropriate to satisfy the requirements for retribution and deterrence. It is only once this period has been served in full that the offender can be released on life licence, but this will only happen following a direction from the Parole Board. Subsection (3) deals with matters which the court must take into account when setting a punishment part for someone with a mandatory life sentence, namely:

- the seriousness of the offence, or the offence combined with other offences of which the person is convicted on the same indictment
- any previous convictions
- where appropriate, the timing of any guilty plea

Subsection (4) deals with relevant matters for those with a discretionary life sentence or an order for lifelong restriction. These are

- The determinate period of imprisonment the court considers would have been appropriate had the court not imposed a discretionary life sentence or an order for lifelong restriction
- the seriousness of the offence, or the offence combined with other offences of which the person is convicted on the same indictment or complaint as that offence
- any previous conviction of the person
- the timing of a guilty plea

On expiry of the court imposed punishment part, the life sentence prisoner will have the right to have his case for continued detention reviewed by the Parole Board. The Board will either direct the Scottish Ministers to release the prisoner on life licence or order his continued detention. Where the Board does not direct release, the case must be reviewed no later than two years after the date of the last review. Life sentence prisoners who are released will remain on licence for their lifetime. The conditions attached to a life licence may be varied to take account of changes in the offender's circumstances. All life prisoners will be supervised by a local authority criminal justice social worker.

### ***Children convicted on indictment and sentenced to detention***

Section 208 of the Criminal Procedure (Scotland) Act 1995 provides that where a court sentences a child to detention, Scottish Ministers will direct where the child is to be detained and prescribe the conditions of that detention. The Executive has stated that, wherever possible, children will not be detained in a prison or a Young Offenders Institution. In practice children normally serve the period of detention, up to them reaching 18 years of age, in secure accommodation.

Section 41 of the Bill deals with the application of the provisions of Part 2 of the Bill to young offenders and children. Where the sentence on a young person or child is of less than 15 days, Part 2 applies to them as if they were a custody-only prisoner. Where a sentence is of 15 days or more, it applies as if they were a custody and community prisoner. Where the sentence is indeterminate, Part 2 applies as if they were a life prisoner. Section 41(7) provides that references to "imprisonment" in Part 2 are to be read as references to detention. This is because young offenders and children are sentenced to detention and not to imprisonment.

### ***Fine defaulters and persons in contempt of court***

Section 42 of the Bill provides that those offenders sentenced for non-payment of fines or for contempt of court (known as non-offence terms) will serve the full sentence in custody regardless of the length of the period of custody imposed on such a person. Subsection (3) states that this section will only apply where the relevant act which leads to imprisonment or detention occurs after the coming into force of Part 2 of the Bill.

### ***Community licences***

Section 24 of the Bill provides that where an offender has been released on a community licence on the Parole Board's direction, the Parole Board will specify the conditions which are to be included on the licence and the Scottish Ministers must include these conditions (and no others) in the community licence. The Scottish Ministers may vary or cancel the conditions or include further conditions if so directed by the Parole Board, but not otherwise.

Section 25 of the Bill provides that the Scottish Ministers can include such conditions as they consider appropriate in the case of a prisoner being released on community licence either on the expiry of the custody part (in a case where the Scottish Ministers released the prisoner without referring the case to the Parole Board) or as a result of being granted compassionate release. They may also vary or cancel conditions or include such further conditions as they consider appropriate. The Bill provides that when exercising such powers the Scottish Ministers must co-operate with the appropriate local authority.

### ***Breaches of community licence***

Under the 1993 Act, Scottish Ministers and the Parole Board can revoke an offender's licence and order a return to custody for breaches of condition(s) if satisfied that this is necessary for the protection of the public. The Bill separates this function by giving Scottish Ministers alone this power. The Executive has stated that this measure, which was supported by the Sentencing Commission for Scotland, will result in a more transparent, effective and swifter recall system. An offender will be told the reasons for their recall and Scottish Ministers must refer the case to the Parole Board for it to consider the case for an offender's continued detention. Before directing an offender's return to the community on licence, the Board must be satisfied that it is no longer necessary for the purpose of public protection to continue to detain the offender.

If the Parole Board considers it is not necessary to detain the recalled offender it will direct Scottish Ministers to return the offender to the community, on licence, immediately. Unless revoked again, the offender's licence will be in place until the end of the sentence. When directing that an offender be returned to the community, the Parole Board will direct the conditions to be attached to the offender's licence.

### ***Life licences***

Where the Parole Board specifies the conditions to be included in a prisoner's life licence, the Scottish Ministers must include these conditions (and no others) in the life licence. If so directed by the Parole Board, the Scottish Ministers may vary or cancel the conditions or include further conditions, but not otherwise.

### ***Single licence***

The Bill makes provision at section 35 for multiple licences to be replaced by a single licence. Subsection (1) provides that this section applies to offenders who have been released on licence under Part 2 of the Bill and who have received another sentence of imprisonment while that licence remains in force. Section 35(2) provides that, if the original licence is still in force at the time when the prisoner is to be released on licence from the subsequent sentence, then he is to be released on a single licence covering both sentences. Subsection (3) provides that the single licence replaces the original one while subsection (4) requires that the single licence is to include all the conditions from the previous licence.

Subsection (5) provides that the new single licence will remain in force, unless revoked, until all licences which would otherwise have been imposed would have expired. Subsection (6) provides that in the case of a prisoner being released unconditionally from a subsequent sentence the licence from the original sentence will remain in place, unless revoked, in the same way as it would have done had the subsequent sentence not been imposed.

### ***Curfew licences***

The Bill makes provision for Scottish Ministers to release, on licence, a custody and community prisoner during the custody part. This power may be used in relation to a prisoner who is serving a sentence of three months or more and is of a description to be specified by order by the Ministers. Section 36(3) provides that the licence must contain a curfew condition which requires a person to remain at the place specified in the condition for the periods which are specified. Section 37(2) provides that it may require the person not to be in a particular place, or class of place at a specified time or during a specified period. Scottish Ministers may include in a curfew licence any other conditions that they consider to be appropriate. The curfew licence will remain in force until the expiry of the custody part of the sentence.

In determining whether to release a prisoner on a curfew licence Scottish Ministers must have regard to the need to protect the public, prevent re-offending and secure the successful reintegration of the prisoner into the community.

### ***Compassionate release on licence***

Section 23 of the Bill provides that where Scottish Ministers are satisfied that there are compassionate grounds justifying the release on licence of a person, the Scottish Ministers may release the person on licence. Before releasing a custody and community prisoner or a life prisoner on compassionate grounds the Scottish Ministers must consult the Parole Board.

### ***Persons detained under mental health provisions***

Section 40 provides that Part 2 of the Bill applies to the following categories of prisoner as if they had continued to serve their sentence in prison rather than in a hospital:

- those transferred to hospital under a transfer direction made in accordance with section 136(2) of the Mental Health (Care and Treatment) (Scotland) Act 2003 and
- those conveyed to and detained in a hospital for treatment of a mental disorder in accordance with section 59A of the Criminal Procedure (Scotland) Act 1995

### ***Supervision***

Section 27 of the Bill provides that where a prisoner (other than a person liable to removal from the United Kingdom) is

- a life prisoner
- a custody and community prisoner with a sentence of six months or more
- a prisoner who is detained in custody beyond the court imposed custody part
- a prisoner released on compassionate grounds
- an extended sentence prisoner
- a sex offender
- a child

the Scottish Ministers must include a supervision condition on the licence. Section 27(3) states that a supervision condition is a condition requiring the offender to be supervised by an officer of the local authority specified in the licence, and to comply with any of that officer's requirements in relation to supervision.

## **COSTS**

The Financial Memorandum states that the changes which the Bill makes with regard to the confinement, review and release of prisoners in Scotland will have cost implications for the Scottish Prison Service (SPS), local authorities (in terms of criminal justice social work), the police, the courts and the Parole Board for Scotland. A brief analysis of some of the cost implications is set out below.

With regard to sentencing, it is envisaged that the new arrangements could potentially lead to an increase in the number of appeals against sentences. Any increase is likely to include those offenders who are given more than the 50% minimum custody part. The Scottish Court Service has indicated that it is confident that a small increase in numbers should be capable of being absorbed within existing resources although it is not possible to predict how many appeals against sentence will arise as a result of the new procedures. (Scottish Executive 2006)

The Financial Memorandum also points out that the Bill requires assessment of risk of harm to apply to all those offenders sentenced to 15 days or more and that the Integrated Case Management (ICM) system developed by the SPS would need to be adapted to apply to all those offenders whose sentence will be managed through custody and community. The ICM currently applies only to offenders subject to post-release supervision, i.e. those sentenced to four years or more, sex offenders sentenced to six months or more, offenders on extended sentences and offenders serving life sentences – in total around 3,000 a year.

The system provides for the compilation of information relating to offending track record, risk and needs of each offender, assessment, initial interviews with each prisoner, social work input and integrated case conferences for each offender. The proposals in the Bill will require a similar system to apply to all those whose sentence will be managed through custody and community. An analysis of the current ICM costs shows that each 1,000 extra offenders receiving ICM requires 18-19 staff and associated costs. The cost per 1,000 prisoners is estimated at £560,000 a year. SPS estimate the costs from these proposals to be £5-6million a year. (Scottish Executive 2006)

The Financial Memorandum states that no additional costs will have to be met by local authorities. While criminal justice social work is delivered by local authorities, they would not require to incur any additional costs from within their overall budgets since the Scottish Executive will fully reimburse the community justice authorities the cost of the community component of the new arrangements.

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## CUSTODIAL SENTENCES AND WEAPONS (SCOTLAND) BILL: WEAPONS

FRAZER MCCALLUM

The Scottish Executive's Minister for Justice introduced the Custodial Sentences and Weapons (Scotland) Bill in the Parliament on 2 October 2006. The Parliament's Justice 2 Committee has been designated as lead committee for parliamentary consideration of the Bill.

This briefing considers the provisions on weapons set out in Part 3 of the Bill. It also sets out background information on crimes involving knives and offensive weapons, the current law in this area and the development of proposals for changes to the law.

A separate SPICe briefing looks at the provisions on custodial sentences set out in Parts 1 and 2 of the Bill.

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## KEY POINTS OF THIS BRIEFING

- In November 2004, the First Minister announced a five-point plan to help tackle the problem of knife crime. The plan involved:
  1. doubling the sentence for possession of a knife in a public place from two to four years
  2. ensuring that the police make more use of stop and search powers and that they have the power of arrest on suspicion of carrying knives or offensive weapons
  3. increasing the minimum age for the purchase of knives from 16 to 18
  4. a licensing scheme for the sale of non-domestic knives
  5. banning the sale of swords
- Legislative provisions relating to the first three elements of the five-point plan are now set out in sections 73 to 75 of the Police, Public Order and Criminal Justice (Scotland) Act 2006 (and came into force on 1 September 2006)
- Options in relation to the final two elements of the five-point plan were set out in the Scottish Executive consultation paper 'Tackling Knife Crime: a Consultation' (published June 2005)
- Provisions taking forward some of the options in the above consultation are set out in Part 3 of the Custodial Sentences and Weapons (Scotland) Bill ('the Bill')
- Licensing scheme for the sale of non-domestic knives and swords – the Bill would require retailers in Scotland to obtain a knife dealer's licence from a local authority if they want to sell such items. A private individual selling a non-domestic knife or sword would not require a licence where the sale is not part of any business carried on by that individual
- Various conditions would be attached to any knife dealer's licence. The Scottish Executive has indicated that it will set (by statutory instrument) a number of minimum conditions for any knife dealer's licence and that these may be added to by local authorities
- Further restrictions on the sale of swords – the Bill would allow the Scottish Ministers (by statutory instrument) to modify existing legislation to set out exceptions for specified legitimate purposes when adding swords to lists of weapons which cannot be sold
- The Scottish Executive has indicated that legitimate uses for swords (in relation to which sale would be allowed under the Executive's proposals) include:
  1. antique collecting
  2. fencing
  3. film, television and theatre
  4. martial arts
  5. re-enactment
  6. religion
  7. highland dancing

## INTRODUCTION

The [Custodial Sentences and Weapons \(Scotland\) Bill](#) ('the Bill') was, together with [Explanatory Notes \(and other accompanying documents\)](#) (references in this briefing are to the 'Explanatory Notes') and a [Policy Memorandum](#), introduced in the Parliament on 2 October 2006.

This briefing considers the provisions on weapons, dealing mainly with non-domestic knives and swords, set out in Part 3 of the Bill. The Policy Memorandum states that:

*"The objective of this part of the Bill is to put in place safeguards which will help to prevent these potentially dangerous weapons falling into the wrong hands. The Bill therefore provides for the introduction of new restrictions on the sale of non-domestic knives and swords. These provisions are part of the Executive's reform of knife crime law and are a vital component of a wider package of measures designed to tackle knife crime and violence more generally."* (para 4)

This briefing also sets out background information on crimes involving knives and offensive weapons, the current law in this area and the development of proposals for changes to the law

A separate SPICe briefing looks at the provisions on custodial sentences set out in Parts 1 and 2 of the Bill.

## BACKGROUND

### CRIMES INVOLVING KNIVES AND OFFENSIVE WEAPONS

Concern about the level of knife crime in Scotland (including concern about particularly high levels of knife crime in some parts of the country) has been a feature of much of the debate in this area and a driver behind various legislative and non-legislative initiatives. However, as with much crime, the actual incidence of offences is not always straightforward to measure. This section considers some of the figures relating to knife crime.

The Scottish Executive stated in 2005 that:

*"Every year in Scotland, far too many people are badly injured and killed by knives. In 2004, Scotland had the 4<sup>th</sup> highest incidence of death by violence in the European Union. Year upon year, murder statistics show that knives and other sharp items continue to be the most common method of killing in this country, consistently accounting for around half of all murders each year.*

*These continuing high levels of knife crime represent an ugly and destructive aspect of our society and are totally unacceptable. The statistics reflect a far too common view amongst some, that carrying and using knives is a way of displaying strength and gaining respect. And increasingly, the police are reporting the carrying and concealment of fixed blades, lock knives, and other bladed weapons, mainly by young men, particularly in Glasgow and the west of Scotland."* (Scottish Executive 2005a, paras 1-2)

Knives (and other weapons) may be used in a variety of offences including robbery and assault. It has not been general practice to collate and publish statistics for all such offences which

separately identify the use of a knife in the offence. The Policy Memorandum published along with the Bill does, however, include some information relating to Strathclyde:

*“an analysis of data for Strathclyde indicates that there were 1,301 knife attacks in 2004/05. Of these, 1,100 were in a public place and involved the use of a non-domestic knife.”* (para 61)

In relation to the use of swords, the Policy Memorandum states that:

*“As national statistics do not collect information on weapon types, the available data does not identify sword use. However, swords are designed as deadly weapons, are likely to result in serious injury if used, and reports from the police and from hospitals make clear that swords are being used to commit crimes and to inflict injury. Indeed, advice from the police is that the use of swords is becoming more common, with ‘samurai’ swords in particular becoming a weapon of choice for growing numbers of young men with criminal intentions.”* (para 62)

Statistical information is published on offences concerned with the possession of an offensive weapon or possession of a knife (or similar) in a public place or on school premises (see sections 47, 49 and 49A of the Criminal Law (Consolidation) (Scotland) Act 1995).<sup>1</sup> Relevant figures are set out in Tables 1a and 1b below (the figures only record those cases where one of the stated offences was the main offence).

**Table 1a: Persons with a charge proved by police force area, 2004/2005**

Police Force Area	Possession of an Offensive Weapon <sup>2</sup>	Possession of a Knife <sup>3</sup>	Total
Central	55	40	95
Dumfries & Galloway	20	28	48
Fife	21	23	44
Grampian	86	59	145
Lothian & Borders	140	201	341
Northern	34	22	56
Strathclyde	1,294	1,256	2,550
Tayside	90	74	164
Scotland	1,740	1,703	3,443

**Source: Scottish Executive answer to parliamentary question S2W-26699 (Scottish Parliament 2006)**

**Table 1b: Persons with a charge proved by year, 1999/2000 – 2004/2005**

Year	Possession of an Offensive Weapon	Possession of a Knife	Total
1999/2000	1,103	1,015	2,118
2000/2001	1,208	1,132	2,340
2001/2002	1,385	1,247	2,632
2002/2003	1,405	1,365	2,770
2003/2004	1,468	1,404	2,872
2004/2005	1,740	1,703	3,443

**Source: Scottish Executive answer to parliamentary question S2W-26699 (Scottish Parliament 2006)**

<sup>1</sup> For the purposes of these provisions, an offensive weapon is defined as “any article made or adapted for use for causing injury to the person, or intended by the person having it with him for such use by him or by some other person” (section 47(4) of the Criminal Law (Consolidation) (Scotland) Act 1995). Although a knife could, depending on the particular circumstances, fall within the definition of an offensive weapon, separate provision is made for knives.

<sup>2</sup> Offences under section 47 of the Criminal Law (Consolidation) (Scotland) Act 1995.

<sup>3</sup> Offences under sections 49 and 49A of the Criminal Law (Consolidation) (Scotland) Act 1995.

Information is also available on homicide convictions broken down by the method of homicide (eg 'shooting', 'sharp instrument' or 'hitting and kicking'). Tables 2a and 2b set out some figures for homicides involving sharp instruments.

**Table 2a: Convictions by police force area, 2004/2005**

Homicides involving sharp instruments	
Police Force Area	Persons Convicted
Central	3
Dumfries & Galloway	2
Fife	2
Grampian	3
Lothian & Borders	5
Northern	0
Strathclyde	47
Tayside	0
Scotland	62

**Table 2b: Convictions by year, 1999/2000 – 2004/2005**

Homicides involving sharp instruments	
Year	Persons Convicted
1999/2000	65
2000/2001	43
2001/2002	56
2002/2003	62
2003/2004	56
2004/2005	62

**Source: Scottish Executive answer to parliamentary question S2W-26699 (Scottish Parliament 2006)**

The above figures provide only a limited picture of the scale of the problem. Firstly, because the offences for which national figures are available do not cover the full range of criminal activities where a knife or other weapon might be involved. Secondly, because offences occur without police knowledge and/or without successful prosecutions.

In relation to the second point, it should be noted that significant levels of certain types of offending (eg possession of a knife in a public place) are likely to take place without coming to the attention of the police. As a result, both police recorded crime figures and prosecution figures are limited in relation to the actual levels of such offending. Changes over time in recorded crime and prosecution figures may reflect changes in the real level of offending. However, they may also reflect other factors such as changes in policing priorities or changes in the willingness of people to report offending behaviour. In evidence to the Justice 2 Committee (during consideration of the Police, Public Order and Criminal Justice (Scotland) Bill) Detective Chief Superintendent Carnochan stated that:

*"I have been talking about recorded crime, but others may speak about the phenomenal difference between recorded crime, particularly violence, and actual crime or violence. (...) There is little incentive to report violence if a person lives in an area in which it has become the norm or is legitimised. As a result, it is not reported. Young men do not report it because reporting it is not the thing to do and women do not report it because it has happened at home. Therefore, the level of violence will be much higher than the level that we have recorded."* (Scottish Parliament Justice 2 Committee 2005, col 1847)

He went on to note (at col 1851) that the police estimate that they record just over a third of the violent incidents that turn up in accident and emergency departments.

Research published in the 'Journal of Public Health' (Leyland 2006) highlights a large increase, principally in the 1980s and early 1990s, in the homicide rates in Scotland for male victims aged between 15 and 34. It states that this increase was attributable to a 213% increase in homicides involving a knife. It goes on to state that:

*"Homicide rates in Scotland have increased considerably over the past 20 years, particularly amongst young men, with the increase largely attributable to*

*homicides involving knives. Although homicide rates in Glasgow have increased at a slower pace than in the rest of Scotland, this increase has been from a higher base and in 2002 rates in Glasgow (14.01 per 100,000) were nearly three times those in Scotland as a whole (5.38). This phenomenon is not a feature of cities; Aberdeen, Dundee and Edinburgh all have below average homicide rates. It is likely that the higher rate in Glasgow is linked to the deprivation of the city, although the slower increase in homicide in Glasgow is contrary to recent findings for deprived areas in Britain.” (Leyland 2006, p 146)*

Further statistical information on homicides is set out in the Scottish Executive statistical bulletin [‘Homicide in Scotland, 2004/05’](#) (2005b). For an analysis of available evidence on the level of knife crime, focussing on the position in England and Wales, see [‘Knife Crime: Ineffective Reactions to a Distracting Problem? – A Review of Evidence and Policy’](#) (Eades 2006).

## CURRENT LAW AND PROPOSALS FOR CHANGE

The use of a knife or offensive weapon in an attack is, for example, treated as a serious aggravation of the common law offence of assault. In addition to the common law, various pieces of legislation place restrictions on knives and offensive weapons. For example:<sup>4</sup>

- the Restriction of Offensive Weapons Act 1959 – includes a prohibition on the sale of flick-knives
- the Criminal Justice Act 1988 – includes a prohibition on the sale of specified offensive weapons (eg butterfly knives)
- the Criminal Law (Consolidation) (Scotland) Act 1995 – prohibits the carrying of knives (excluding folding pocket knives where the cutting edge of the blade does not exceed three inches/7.62 centimetres) and offensive weapons in a public place or in schools without lawful authority or good reason/reasonable excuse
- the Offensive Weapons Act 1996 – amended the 1988 Act to prohibit the sale of knives to anyone under 16 (further amended by the Police, Public Order and Criminal Justice (Scotland) Act 2006 – see below)<sup>5</sup>
- the Knives Act 1997 – prohibits the marketing of a knife in a way which indicates that it is suitable for combat

The partnership agreement published by the Scottish Labour Party and Scottish Liberal Democrats in May 2003 ([‘A Partnership for a Better Scotland’](#)) included a commitment to review the law relating to knife crime and its enforcement. Subsequent to this review, the Executive has stated that the law in this area is “generally comprehensive, robust and flexible” (Scottish Executive 2005c, para 3.11). However, it went on to note that the review had identified a number of areas for improvement.

In November 2004, the First Minister announced a **five-point plan** to help tackle the problem of knife crime (Scottish Executive 2004). The plan involved:

1. doubling the sentence for possession of a knife in a public place from two to four years
2. ensuring that the police make more use of stop and search powers and that they have the power of arrest on suspicion of carrying knives or offensive weapons

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<sup>4</sup> Further information is set out in Scottish Executive 2005a, Annex A.

<sup>5</sup> For information, collected by trading standards services in England and Wales, on shops selling knives illegally to children under 16 see [‘Children Still Sold Knives’](#) (Trading Standards Institute 2006).

3. increasing the minimum age for the purchase of knives from 16 to 18
4. a licensing scheme for the sale of non-domestic knives
5. banning the sale of swords

The Scottish Executive's consultation paper '[Supporting Police, Protecting Communities: Proposals for Legislation](#)' (2005c) noted that all of these measures, apart from the increased use of stop and search powers, would require legislation. The consultation paper sought views on legislative proposals aimed at implementing the **first three elements** of the five-point plan. Following this consultation, relevant provisions were included in the Police, Public Order and Criminal Justice (Scotland) Bill. This Bill was introduced in the Parliament in September 2005 and passed in May 2006. It received Royal Assent on 4 July 2006, becoming the Police, Public Order and Criminal Justice (Scotland) Act 2006. Sections 73 to 75 of the Act (which were brought into force on 1 September 2006):<sup>6</sup>

- increase various maximum penalties for carrying a knife (under both summary and solemn procedures)
- remove certain limitations on statutory powers, relating to offences of carrying a knife or offensive weapon, which allow a police officer to arrest a person without a warrant
- amend provisions which previously prohibited the sale of knives (and certain other sharp instruments such as axes) to anyone under the age of 16 – still allowing the sale of any knife or knife blade designed for domestic use to a person aged 16 or over but increasing the age to 18 for all other knives and making it clear that swords are included in the prohibition

The Scottish Executive's proposals in relation to the **final two elements** of the five-point plan were set out in a second consultation paper '[Tackling Knife Crime: a Consultation](#)' (2005a) (considered later in this briefing). Provisions taking forward some of these proposals are set out in Part 3 of the current Bill.

## **OTHER INITIATIVES TO DEAL WITH KNIFE CRIME**

It is clear that legal changes cannot by themselves adequately deal with the problem of knife crime and that social problems associated with violence must also be tackled. The Ministerial Foreword to 'Tackling Knife Crime: a Consultation' (Scottish Executive 2005a) stated, in relation to knife crime, that:

*“Of course, criminal laws are just one way of addressing this problem – and will never provide us with the whole solution. That is why (...) we are working with the police and other agencies, to explore the root causes of this behaviour; to identify preventative measures which can reduce the likelihood of violence; and to develop early interventions, which can help to break cycles of violence and brutality.”*

Others have gone somewhat further in emphasising the importance of the context as opposed to the potential weapon itself. For example:

*“The knife is merely an implement used in crime. Without dealing with the underlying causes of violent crime, initiatives to reduce knife usage will have*

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<sup>6</sup> See the [Police, Public Order and Criminal Justice Scotland Act 2006 \(Commencement No 1\) Order 2006](#) for information on all provisions brought into force on 1 September 2006.

*only a limited impact. Knives – like guns, baseball bats, screwdrivers and poison – make an expression of violence potentially more damaging or lethal, even if unintended to cause death, but ultimately, stabbings are not caused merely by the presence of a knife. More essential is the context within which the resort to extreme acts of violence unfolds.” (Eades 2006, p 34)*

Non-legislative initiatives in Scotland aimed at tackling problems associated with knives, and with violent crime more generally, include:

- [Action on Violence in Scotland](#) – intended to provide a resource for people working on violence reduction, with information on initiatives, key documents, etc
- [Violence Reduction Unit](#) – established in 2005 and based at Strathclyde Police Force Headquarters. Although the unit was set up to deal with all forms of violence, tackling the problem of knife crime was identified as a priority. The Unit is headed by Detective Chief Superintendent John Carnochan and works with relevant people in various fields, including social workers, health experts and academics. The publication [‘Reducing Violence: An Alliance for a Safer Future’](#) (Violence Reduction Unit 2006) includes information on the work carried out by the Unit
- knife amnesty – a national amnesty aimed at encouraging people to surrender knives and offensive weapons ran from late May to the end of June 2006. Information about the amnesty is set out in the following press releases: [‘Knife amnesty to get blades off the streets’](#) (Scottish Executive 2006a); and [‘Amnesty Ends – Final Tally’](#) (Action on Violence in Scotland 2006)<sup>7</sup>
- prosecution policy in relation to knife crime – the Lord Advocate has issued new guidance to the police and prosecutors, effective from the conclusion of the above mentioned knife amnesty, in relation to the prosecution of knife crime. It covers matters such as the prosecution’s position on bail (eg that the prosecution will oppose bail where an accused has one or more previous convictions involving possession or use of a knife) and whether or not cases should be prosecuted under summary or solemn procedures. Further information is set out in the Scottish Executive press release [‘New guidelines on knife crime’](#) (2006b)

## **‘TACKLING KNIFE CRIME: A CONSULTATION’**

In its consultation paper [‘Tackling Knife Crime: a Consultation’](#) (‘the Consultation Paper’) the Scottish Executive (2005a) sought views on proposals relating to: (a) a licensing scheme for the sale of non-domestic knives; and (b) restricting the sale of swords.<sup>8</sup>

Information about the responses, together with the responses themselves, was published by the Scottish Executive (2006c) earlier this year in [‘Tackling Knife Crime: a Consultation – responses from organisations and individuals and analysis of responses’](#) (‘the Consultation Analysis’). Although responses to the consultation were originally sought by 30 September 2005, this deadline was formally extended by four weeks and the Consultation Analysis includes all responses received before the end of 2005. A total of 178 responses were received by this

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<sup>7</sup> Evidence for the effectiveness of knife amnesties is questioned in [‘Knife Crime: Ineffective Reactions to a Distracting Problem? – A Review of Evidence and Policy’](#) (Eades 2006, pp 27-28).

<sup>8</sup> The Consultation Paper (para 20) makes it clear that references to ‘knives’ should be taken to include similar articles with a blade or point.

time.<sup>9</sup> Of these, 110 responses were from individuals and 68 from groups (including local authorities and organisations representing the police and lawyers). Many of the responses were from individuals or groups with a particular interest in selling or using knives or swords (sporting, cultural, religious and trade interests).

The Consultation Analysis noted that:

- the Scottish Executive also received three MSP sponsored petitions, with a total of 2,284 signatures, supporting the full implementation of the five-point plan to help tackle the problem of knife crime as announced by the First Minister in November 2004 – the plan included proposals to introduce a licensing scheme for the sale of non-domestic knives and ban the sale of swords
- the Scottish Parliament’s Public Petitions Committee received a petition ([PE 893](#)) with 2,019 signatures calling upon the Parliament “to oppose the introduction of any ban on the sale or possession of swords in Scotland which are used for legitimate historical, cultural, artistic, sporting, economic and religious purposes”

The Scottish Executive’s consultation proposals and responses to those proposals, other than the above petitions, are considered below.

## LICENSING SCHEME FOR THE SALE OF NON-DOMESTIC KNIVES

### *Proposals*

The Scottish Executive proposed that any retailer wishing to sell non-domestic knives should be required to obtain, from the local authority, a licence authorising such sales. Sale without a licence, or in breach of the terms of a licence, would be a criminal offence.

The Consultation Paper (para 26) included for discussion some possible terms of any licence:

- requiring retailers to keep records of those to whom they sell non-domestic knives
- requiring retailers to obtain photographic evidence of a purchaser’s identity
- regulating the display of knives on licensed premises (eg blacked out windows and locked cases)
- requiring a ‘cooling off’ period between any initial approach to purchase and the completion of a sale
- requiring retailers to obtain a statement from, for example, a Justice of the Peace, Member of Parliament or other professional person, confirming the purchaser’s identity
- requiring retailers to record transactions on CCTV
- requiring retailers to record descriptions of knives sold
- requiring means to identify merchandise sold by particular retailers (eg identification numbers on knives)

Any sales in breach of the licensing scheme described above would expose the retailer to the possibility of criminal sanctions. A further proposal contained in the Consultation Paper would make it an offence to buy a non-domestic knife from an unlicensed seller – thus exposing the

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<sup>9</sup> The 178 responses do not include three nil responses. Not all consultation questions were (clearly) addressed by every respondent.

purchaser to the possibility of criminal sanctions. The Consultation Paper stated that this additional proposal might be best considered following the introduction of a licensing scheme.

The proposals for a licensing scheme are directed at 'non-domestic' knives. The Consultation Paper noted that most people regularly use knives in the home in a responsible manner, and stated that the licensing scheme proposals are only intended to apply to knives which do not have a clear and unambiguous domestic purpose (eg for the preparation or consumption of food or for DIY tasks). The following definition of a non-domestic knife was put forward in the Consultation Paper:

*“a knife which has a blade or sharp point, and which is not designed only for domestic use, or only for use in the processing, preparation or consumption of food”.* (Scottish Executive 2005a, para 18)

The inclusion of the word 'only' in the definition suggests that any knives which may be said to be designed for both domestic and non-domestic use (eg for a sport or trade) might be covered by the proposed restrictions.

### ***Responses – requiring sellers to hold a licence***

The Consultation Analysis noted that the proposal to require a licence to sell non-domestic knives met with a mixed response. It stated that, out of 110 clear responses to the question, 57 generally agreed and 53 disagreed with the proposal. Responses generally in favour of the proposal included ones from the Association of Chief Police Officers in Scotland (ACPOS) and the Association of Scottish Police Superintendents (ASPS). Responses generally opposed to the proposal included ones from COSLA, the Faculty of Advocates and the Scottish Retail Consortium.

Issues highlighted in relation to the proposal included:

- the need to minimise any negative impact on legitimate sellers and purchasers of non-domestic knives (eg some respondents argued that non-domestic knives used for legitimate commercial purposes should be exempt)
- the effectiveness of any controls which only apply to the sale of non-domestic knives. Although some respondents thought that the proposed licensing scheme could have an impact on knife crime, others questioned whether there is evidence to show that non-domestic knives are any more dangerous than domestic knives
- the practicality of producing a definition which adequately distinguishes between domestic and non-domestic knives. It may be noted that section 75 of the Police, Public Order and Criminal Justice (Scotland) Act 2006 contains provisions which apply differently to knives designed for domestic and non-domestic use, but does not seek to provide the courts with further guidance on how they should distinguish between the two
- the different circumstances under which knives are sold. Questions were raised in relation to how a licensing scheme would apply to different circumstances under which knives might be sold or acquired (eg how it would apply to internet sales where the retailer is based outwith Scotland and whether it would apply to individuals seeking to sell knives where this is not part of a business)

As noted above, responses broadly in favour of the proposal for a licensing scheme included one from ACPOS:































