The Criminal Justice (Scotland) Bill [Bill 49 of 1994/95]

Research Paper 95/24

24 February 1995

This Paper outlines and discusses some of the main provisions in the Criminal Justice (Scotland) Bill 1994/95, which has completed its passage through the House of Lords and will be debated on Second Reading in the House of Commons on February 27 1995. The Bill is mainly concerned with criminal proceedings, the investigation of offences, sentencing and other disposals such as confiscation of the proceeds of crime and other measures concerning the treatment of offenders. Most of its provisions apply only to Scotland and many are designed to implement proposals in the White Paper *Firm and Fair - Improving the delivery of justice in Scotland* [Cm 2600] which was published in June 1994.

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I Bail

The White Paper *Firm and Fair - Improving the Delivery of Justice in Scotland* summarised the current arrangements for the granting of bail in Scotland as follows:[1]

> 2.5 Legislation on bail was last passed in 1980 when the Bail etc. (Scotland) Act 1980 removed the normal requirement that a sum of money be pledged or deposited before release on bail could be granted. It established a system of conditions attached to the grant of bail to ensure that the due process of law was observed.
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> 2.6 Of the 200,000 or so criminal cases subject to court proceedings each year in Scotland, only a minority involve persons either remanded in custody or released on bail prior to their appearance in court for trial. The majority of accused are simply ordained to appear for trial.
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> 2.7 Under section 26 of the Criminal Procedure (Scotland) Act 1975 all crimes and offences in Scotland are bailable by sheriffs, except treason and murder. Courts will grant bail unless the application is opposed by the procurator fiscal, and the court considers it should be refused on the grounds of the need to protect the public and secure the course of justice. Bail conditions seek to ensure that the accused appears at court at the appropriate time, assists as necessary with inquiries or reports required by the court in dealing with his case and does not obstruct the course of justice, either by interfering with witnesses or otherwise. The 1980 Act also enables the court to impose conditions to secure that the accused does not commit an offence while on bail.

A 1994 report by the Scottish Office Central Research Unit on *Operating Bail - Decision-making under the Bail etc (Scotland) Act 1980* noted the following concerns about bail:[2]

> The purpose of the Bail Etc (Scotland) Act 1980 is to minimise the number of people held in custody for first court appearance, for trial or for sentence. The Bail Act removed the need to lodge money as a standard condition of bail. At that time it was anticipated that a reduction in the remand population would follow. However, between 1981 and 1985 annual figures for remand receptions rose by just over 40% from 13,500 to 18,985. It was during this period that the Lord Wheatley, in judging a bail appeal (Smith v McCallum, 1982), set out principles (sometimes referred to as the Wheatley guidelines) for interpreting bail legislation and which set out exceptions to the presumption in favour of bail.

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[1] Cm 2600 at p.6

[2] p.7-8

After 1985 a downward trend in remand receptions began, though historically numbers still remained high. This trend continued (there were 15,000 receptions in 1988-89) till 1992 when figures started to rise again.

In a report on custodial remand (Wozniak et al, 1988) it was argued that, compared with England and Wales, Scotland stood out as receiving a higher number of prisoners (299) on pre-trial remand per 100,000 inhabitants (the England and Wales figure was 111). For post trial receptions in Scotland the figure was 55 and for England and Wales 32 prisoners per 100,000 of the population. The high incidence of remand receptions was coupled with a comparatively short average period spent on remand.

Accompanying this there have been increases in the recorded levels of offending while on bail. This rose from 2,765 offences in 1983 to 19,853 in 1991. Police argue that such figures reflect significant levels of bail abuse and that in consequence the Bail Act has fallen into disrepute. In early 1992, fuelled by findings of police research in England and Wales (Brookes, 1991; Ennis & Nichols, 1991; Northumbria Police, 1991) that people on bail were responsible for a significant proportion of recorded crime in certain areas, considerable press attention was given both there and in Scotland **to** the threat posed to the public by those released on bail. The police, it was maintained, were being impeded in their protection of the public by an inappropriate use of bail.

An assessment of the significance of these issues raised about bail has been hampered by a lack of systematic information in Scotland. At the time of the research, statistics were not collected on the number of bail orders issued by courts each year. It was not therefore possible to assess the extent to which courts may be making greater use of bail, whether there has been a change in the proportion of bail orders breached, or whether there has been a change in the proportion of those granted bail who breach their bail conditions. On the other hand, it is known that the police have been working to improve their recording practices for these offences. In short, there was no regularly collected reliable information against which assertions about the operation of bail could be assessed'.

The Scottish Office Central Research Unit's study of current criminal practice under the *Bail (Scotland) Act 1980* found that in terms of the Act's general aim of enabling the release of untried and unsentenced prisoners, the legislation was partially effective in that it did allow the release of some who would otherwise be detained in custody and there was little evidence that their release was hindering the administration of justice or was placing the public at increased risk from people who commit serious offences. The view expressed in the report was that limits to the Acts' effectiveness were produced by the way in which the legislation was operated within different criminal justice cultures. The study had identified three such cultures, one characterised by a high use of bail, one by a high use of unconditional release

and one by a high use of remand. The report noted that:[3]

It is important to stress that the purpose of bail is to enable the release from custody of untried and unsentenced prisoners until by due process of law their innocence or guilt has been established and, if necessary, sentence has been passed - it is not intended to stop crime and it cannot stop crime. However, release on bail can accord crime committed during that release with a particular significance and ensure that those who commit crime while released on the courts' trust will ultimately receive additional penalties for breaching that trust. This research has found that in all areas those convicted of breach of bail were given significant penalties by the courts including, under some circumstances, consecutive custodial sentences. The research has also found that for all areas those with a record of bail convictions were less likely to be granted bail in the future. There was, nevertheless, a lack of agreement across the areas about the circumstances under which someone's ball record would render them unbailable. The challenge for the criminal justice system is to operate ball legislation consistently in a way which minimises the risk to which the public are put by those who commit crime; which limits the extent to which those convicted and who do not ultimately receive a custodial sentence, will have spent time in custody prior to conviction; and which minimises the likelihood that those who are accused of crime but who are not ultimately convicted will have spent time in prison.

The report summarised its arguments in relation to bail abuse as follows:[4]

In short, we are arguing that

- a high level of recorded bail abuse does not necessarily equate with a high level of recidivism

- a low level of recorded bail abuse does not necessarily equate with a low level of recidivism

Rather

- a high use of police custody + a high propensity of prosecutors to seek bail conditions + a high use of court bail -> a high level of recorded bail abuse

- a low level of police custody + a high propensity of prosecutors to oppose bail+ a high use of remand by court -> a low level of recorded bail abuse

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[3] *Operating Bail* Scottish office Central Research Unit 1994 p.xxi-xxii

[4] *Operating Bail* Scottish Office Central Research Unit 1994 p.xxvii

In England and Wales, Part II of the *Criminal Justice and Public Order Act 1994* introduced a number of provisions which were designed to restrict the availability of bail in certain circumstances, such as where a person charged with a serious offence has previously been convicted of a similar serious offence or where a person has committed an offence on bail. This followed expressions of concern by the police and others about statistics on levels of offending by individuals who were on bail. (The Background to these changes is set out in Library Paper No 94/1 on *Crime and Public Order - the Criminal Justice and Public Order Bill 1993/94)*.

The White Paper noted that:[5]

2.9 **The Government attaches considerable importance to securing the process of justice and reducing levels of bail abuse**. In the light of the report's concerns about different approaches throughout Scotland, **the Crown Office is to establish a working party comprising members of the Procurator Fiscal Service and representatives of the Association of Chief Police Officers in Scotland to review the guidelines to the police on their approach to liberation of accused persons before appearance in court**. The working party's objective will be to find means of ensuring consistency in the police approach while taking account as necessary of local and specific circumstances. This review will be reinforced by a fresh look by the Crown Office at the prosecution attitude to bail.

2.10 The Government welcomes these initiatives. However, despite evidence that the apparent growth in bail abuse recorded by the police in recent years is mainly due to increased efforts by local police forces to identify and record bail abuse accurately, the fact remains that in 1993 the police recorded 26,000 offences of offending on bail. This figure is unacceptable. The Government shares the widespread public concern at this level of offending on bail. The Government has therefore decided to take action to deal with these abuses.

2.11 Failure to observe a condition of bail disrupts the due process of law and is a breach of the trust of the court which released that individual on bail. The commission of another offence while on bail is a further breach of the court's trust. **The Government believes that present legislation does not enable the courts to treat in a sufficiently serious and visible manner those on bail who offend repeatedly, and therefore proposes the following measures:**

- where a person on bail commits an offence the courts will be given a new power to increase the sentence for that offence (an aggravated sentence);

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[5] Cm 2600 at p.6-8

- the penalties which the court may impose will be a fine of up to £1,000 and/or a period of imprisonment of up to 6 months (60 days if convicted in the district court). The proposed maximum period of imprisonment is twice as severe as the maximum that the sheriff court may at present impose in respect of an offence committed while on bail;

- where a court imposes an aggravated sentence the increase in the sentence will be spelled out separately by the court. The court may take into account the circumstances under which bail was originally granted and the nature of the original offence in determining the seriousness of the aggravating factor. The increase in the sentence would form part of the sentence for purposes of appeal; and

- if the accused is found not guilty of the original offence for which bail was granted but is convicted of a subsequent offence while on bail the court may still, in these circumstances, impose an aggravated sentence.

2.12 The Government believes these measures will enable the courts to deal more directly and more effective with those who abuse the trust placed in them by the court through the grant of bail.

2.13 In some cases it may be wholly inappropriate for bail to be granted at all. In addition to the restrictions which exist at present, the Government believes that those who are accused of a serious offence where they have been convicted previously of that or a similar serious offence should not be admitted to bail. **The Government accordingly proposes to amend section 26 of the 1975 Act to provide that bail should not be available to those facing charges of culpable homicide, attempted murder, rape or attempted rape where they have a previous conviction for any of these, involving a custodial sentence in the case of culpable homicide, or a previous conviction for murder or treason. The Government also proposes to promote specific provisions enabling the prosecution, in the light of new information, to request the court to review bail conditions which might have been imposed, or to review a decision to grant bail.**

2.14 The existing powers of the court to impose conditions on the grant of bail do not include power to impose a condition that the accused should attend an identity parade or should present himself to have a sample taken under warrant. The absence of such a power can lead to accused persons being kept in custody where they might otherwise be granted bail. This is undesirable and **the Government therefore proposes:**

- to introduce a power for courts to impose a new condition of bail to require a person to make himself available for the purposes of participating in an identification parade or to enable prints, impressions or samples to be taken under the authority of a warrant; and

- to increase the maximum fine for breaching a condition of bail from the current level of £200 to £1,000.

Part I of the Criminal Justice (Scotland) Bill sets out a number of provisions which are intended to place some restrictions on the circumstances in which bail may be granted and to increase the penalties for breaches of bail conditions and offences committed by people who are on bail. Where a person commits an offence while on bail and this fact is libelled in the indictment or specified in the complaint, the court sentencing that person for the offence committed while on bail will be able to impose a penalty increased, in the case of fines by the amount equivalent to level 3 on the standard scale of fines (currently £1,000). Where the penalty imposed is a period of imprisonment, the High Court or Sheriff court will be able to increase that period by up to 6 months and the district court by up to 60 days. These increases will apply even where the consequent maximum penalty exceeds the penalty which the court concerned would otherwise be able to impose.

Clause 3 is designed to prevent a person charged with or convicted of attempted murder, culpable homicide, rape or attempted rape being granted bail if he has previously been charged with or convicted of one of these offences by a court anywhere in the UK, and, in the case of a previous conviction for culpable homicide or manslaughter, had a custodial sentence or hospital order imposed on him.

Prosecutors currently have a right, under Section 31(2) of the *Criminal Procedure (Scotland) Act 1975*, to appeal to the High Court against a decision by any sheriff to grant bail to an accused person. Under Clause 4 of the present Bill, a prosecutor will be able to apply to a court which has granted bail to a person for a review of that decision. The prosecutor will have to put before the court information which was not available to it when bail was granted.

Clause 5 is intended to restrict the circumstances in which an appellant who has not lodged his grounds of appeal may be granted bail. Bail will only be granted in these cases unless the High Court considers there to be exceptional circumstances justifying bail.

II Evidence and Procedure

A. The Right to Silence and other matters

Changes to the law in England and Wales on the right to silence were enacted in Part III of the *Criminal Justice and Public Order Act 1994*. In the White Paper issued by the Scottish Office in June 1994 the Government made the following remarks about Scots law concerning the right to silence and judicial examination:[6]

> 8.18 The accused person's right to remain silent, to decline to incriminate himself, has for long been a feature of Scots law. However, it is not an inviolate principle. It has been accepted that the court may in certain circumstances comment on or draw adverse inferences from an accused's silence and in reviving the issue of judicial examination in their second report', the Thomson Committee on Criminal Procedure in Scotland was influenced by concerns that the accused could exercise his right to stay silent and then come forward at trial with a line of defence which might have been shown to be false if he had been examined at an early stage in the proceedings. The Thomson Committee considered there to be three objectives to judicial examination:
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> - to afford an accused an opportunity, at the earliest possible stage, of stating his position as regards the charge against him;
>
> - to enable the procurator fiscal to ask an accused questions designed to prevent the subsequent fabrication of a false line of defence, for example, alibi; and
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> - to protect the interests of an accused who has been interrogated by police officers by ensuring that any answers or statements were fairly obtained and not distorted or presented out of context,
>
> 8.19 Appropriate amendments were introduced by the Government in the Criminal justice (Scotland) Act 1980. Under these provisions the prosecutor, the judge or any co-accused may comment on an accused's silence at judicial examination where, in evidence at the trial, the accused or any witness called on his behalf gives evidence which could have been stated appropriately in answer to a question at the judicial examination stage.
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> 8.20 The Government recently commissioned research into the operation of the judicial examination procedure in Scotland. The preliminary findings of this research indicate that the use of judicial

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6 Cm 2600 p.43-4

examination has declined in recent years and that it is used in around only 15 per cent of all cases placed on petition.

8.21 The provisions in the judicial examination procedure provide a useful mechanism in some cases to avoid the fabrication of false defences and to give early notice of lines of defence which the prosecutor can then investigate. **The Government is anxious to ensure the most effective use possible of judicial examination and will consider carefully the results of the research. Once the research into judicial examination is completed the Government will consult on whether any changes to this and related matters, including the right of silence pre-trial and at trial, should be made.**

The Provisions in Part I of the Criminal Justice (Scotland) Bill concerning the right to silence, judicial examination and evidence of previous convictions are based on proposals in a subsequent consultation paper on these subjects published by the Scottish Office in September 1994.

The consultation paper explained the law on an accused person's silence before trial and the use of the judicial examination procedure as follows:

12. A person may be questioned by the police **early in an investigation** before a definite suspicion has formed. Failure to explain certain circumstances, including, for example, the possession of stolen goods, is admissible evidence which may be taken into account in a subsequent trial. This means that relevant information about the existence of an innocent explanation at that stage and the accused person's willingness to give it then will be available to the trial court to be weighed up alongside all the other evidence. There appears to be no weakness in this aspect of the law of Scotland.

13. **The Government does not propose any change to the law on this aspect of the right to silence, but would welcome views on this conclusion**.

14. When at a subsequent stage of an investigation a person becomes a suspect and is **detained** by the police under section 2 of the Criminal Justice (Scotland) Act 1980, or attends a police station voluntarily for questioning, the position is different. There is a long history of case law on admissibility of statements made by suspects to the police, founded not on detailed procedures or specific safeguards but on the premise that such statements should be obtained fairly. The suspect must be cautioned that he has the right to remain silent. He has no right to have a solicitor present. The fact that he remains silent at that stage is admissible at a subsequent trial and may be taken into account if, for example, the accused avers facts in his defence at trial which he failed to

disclose to the police.

15. The police are not permitted to question a person after he has been charged (although any response to the charge, including silence, is recorded and may be given in evidence at trial) so the question of right to silence after charge does not arise. However in cases prosecuted under solemn procedure, there is a formal procedure for asking the accused person if he has a defence to the charge and giving him an opportunity to make an early statement of his position, or to raise any complaint about the fairness or accuracy of any statement he is alleged to have made to the police. This is **judicial examination**, in which the accused is questioned by the procurator fiscal in front of a sheriff in chambers, and with his solicitor present.

16. The case for change to the judicial examination procedure is discussed in the following section of this consultation paper. Because the fact of silence when asked to account for suspicious circumstances at an early stage of investigation may already be admissible evidence in Scotland, and judicial examination provides an appropriate opportunity for seeking an early statement of the accused's defence, **the Government does not propose any other changes to the law on the right to silence before trial** .

Clause 10 of the Bill is intended to enable the questioning permitted at judicial examination to include questions aimed at eliciting admissions from the accused. The Clause as originally drafted was removed during the Bill's Report stage in the House of Lords and replaced by a new, more detailed Clause introduced by the Lord Advocate, Lord Rodger of Earlsferry.[7]

The Labour peer, Lord Macaulay of Bragar spoke against Clause 10 during the Bill's Committee stage in the House of Lords, saying that:[8]

At the moment limits are placed upon the questions which may be asked in the presence of the sheriff as to whether an accused person wishes to present a denial, an explanation, a justification or a comment. Questions may be asked about any extra-judicial confession that the accused may or may not have made to the police. So he is given an early opportunity to deal with that, which is fair enough.

However, the problem under Clause 10 is that in the proceedings the accused's solicitor has only limited rights to intervene in the judicial examination. People keep talking about the right to silence. I have always held the view that, since the judicial examination

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[7] HL Deb Vol 561 c.29-32 6.2.1995

[8] HL Deb Vol 560 c.363-4 12.1.1995

> process was brought into the law of Scotland, to say that there is a right to silence is a misnomer. In any event the Government's proposal in Clause 10 will transform the judicial examination into an inquisitorial procedure which is inappropriate to the adversarial system we have. It would give the Crown an early bite at the accused to try so get him to admit to whatever charge he might face. If that happens, then, apart from allowing the right to obtain an admission from the accused, there will have to be the right for the accused's solicitor to cross-examine.
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> There is also a major problem that if the object of the exercise is to elicit an admission from the accused, then any questions directed towards him to elicit that admission must necessarily rest on information in the possession of the prosecutor which indicates. that the accused is guilty of the offence as charged.
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> In most cases the accused will not have an opportunity to see any of the evidence against him. What may happen is that if his solicitor is doing his job properly he will object to the line of questioning on the basis that he does not have in his Possession the material on which the question which seeks to elicit an admission is based. The. solicitor will then ask for a continuation of the case. That seems an unnecessary extension of the judicial examination procedure which is not welcome anyway in Scotland, but it is there.

Speaking in the same debate, the High Cout judge Lord McCluskey said that he regarded the provisions of Clause 10 as invading no part of the right of silence, but as a technical provision designed to clarify matters in the existing law.[9] The Scottish Office minister, Lord Fraser of Carmyllie said:[10]

> What this clause will not do is transform a procedure into something radically different to what it is now. The problem, as the noble and learned Lord said, is that at present a procurator fiscal may ask at judicial examination questions directed towards eliciting any denial, explanation, justification or comment from the accused about the charge against him. While this does not explicitly exclude questions designed to establish whether the accused admits any of the accusations or facts averred, that is the way the law bas been interpreted in practice.
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> The consequence of the restriction is simply that, rather than ask an accused person a straightforward question along the lines that the noble and learned Lord indicated as to whether he did something, was present at the scene of a crime, or was in possession of a particular weapon, the procurator fiscal must frame, such questions in a negative form, for example, by asking the accused whether he denies exactly the same accusations or facts,

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[9] HL Deb Vol 560 c.364-5 12.1.1995
[10] HL Deb Vol 560 c.365-6

> While that need not prevent a 'skilled prosecutor asking the questions he considers important, it does result in those questions being asked in a stilted and unnatural form which is likely to be more difficult for an accused person to understand, and even more difficult for a jury to understand when it considers the transcript of the examination at a subsequent trial. The change proposed in this clause is simply designed to make the proceedings more straightforward and intelligible. I emphasise that there is nothing sinister or extending in the provisions that we bring forward.
>
> There are two things which this clause does not do, contrary to what has been suggested. First, it does not require the accused to break his silence if he wishes not to, or to incriminate himself. If the accused chooses not to answer questions he may do so, as very many accused persons do now. If he chooses to answer, his answers need not be any more incriminating than they would be under the current law. After all, he may refuse to admit, which may be less incriminating than a failure to deny,
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> Secondly, it will not enable procurators fiscal to engage in cross-examination or to attempt to drag confessions out of the accused. Subsection (2) of Section 20A prohibits the procurator fiscal from asking leading questions, reiterating questions the accused has refused to answer, or challenging the truth of what the accused has already said. Those restrictions will continue to apply to all questioning by the procurator fiscal as will the duty placed on the sheriff to ensure that all questions are fairly put to, and understood by, the accused.
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> On the last point, I believe it should be possible for the sheriff to discharge his duty rather more easily. It will be easier for the accused to understand what is going on.
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> I have taken a moment or two to explain this matter because there has been serious misunderstanding of what is proposed. I hope that as a result of this short debate on the clause it will now be understood exactly what limited amendment is proposed.

Lord Macaulay of Bragar went on to say that he was not convinced by the arguments put forward in support of Clause 10.[11]

As far as silence during a trial is concerned, an accused person cannot be compelled to appear as a witness at his own trial, but may do so by his own choice. Where an accused person chooses not to give evidence the prosecution is prohibited by Sections 141 and 346 of the *Criminal Procedure (Scotland) Act 1975* from commenting on his silence. However, the court may draw inferences about the prosecution case from the accused person's failure to challenge

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[11] HL Deb Vol 560 c.367 12.1.1995

it and in some cases the judge may and is indeed expected to draw attention to an accused person's failure to give evidence. A judge who is sitting alone may also take such silence into consideration in reaching a verdict. The consultation paper summarised the circumstances in which it would be appropriate for a judge to draw attention to an accused person's failure to give evidence as follows:[12]

31. lt will of course be obvious to a jury when the accused is not giving evidence. They will be reminded by the judge that it is an accused person's right not to give evidence. However judges in Scotland have drawn further attention to an accused person's silence at trial in appropriate circumstances for at least 75 years. The circumstances in which comment is appropriate were first defined, in 1918, by Lord Justice General Strathclyde as follows,

> "the judge may, and in my opinion should, in exceptional cases, comment upon the fact and bring it distinctly under the notice of the jury, who are, of course, always entitled to consider the fact that an accused - who, it may be, is the only man in possession of the full knowledge of the facts - refrains from going into the witness-box for the purpose of clearing his feet and establishing his own innocence.' (Brown v Macpherson 1918 JC 3).

32. Case law on what is permissible by way of comment on silence at trial has evolved since 1918. The most quoted statement of the law is drawn from the case of Scott v HM Advocate (1946 SLT 140):

> "Although a comment of the kind is, in my view, competent, it should be made with restraint and only when there are special circumstances which require it; and if it is made with reference to particular evidence which the panel might have explained or contradicted, care should be taken that the evidence is not distorted and that its true bearing on the defence is properly presented to the jury."

33. Examples of where judges have commented on the accused's failure to give evidence and where their comments have been judged permissible by the Appeal Court in recent years include cases where the accused has tabled special defences of alibi and incrimination, or where it has been clear that there are relevant facts which are within the knowledge of the accused alone:

> "in making up your minds upon this matter you are entitled to consider that if there was a different and innocent purpose behind these encounters, and an innocent and different version of what passed you have not heard it, and the one person who could have told you so, Stewart, has not chosen to do so"

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[12] *The Right to Silence, Judicial Examination and Evidence of Previous Convictions*, Scottish Office September 1994 p.8-9

> (Stewart & Ors v HM Advocate 1980 SLT 245)

or, where an inference of guilt can be drawn from the unanswered Crown case:

> "what they were being invited to do was to see what inference they could draw from the basic facts, taking account, as they did so, of the absence of an innocent explanation" (McLean & Canning v HM Advocate 1993 SCAR 605).

The paper went on to say that:[13]

> 34. While the case law thus suggests that in Scotland there is at present no barrier to the court drawing proper inferences from the silence of the accused at trial, it is open to differing interpretations, and the courts may be inhibited, by the apparent restriction on the judge's power to comment to special circumstances, from drawing inferences in all appropriate cases. The reported appeal cases do not reveal in how many cases comment might have been appropriate but was not made because of the strictures in Scott. A statutory provision clarifying the position would remove any uncertainty and encourage the courts to take account of the accused's silence where it appeared appropriate, while in no way compromising the accused's right to remain silent.

The Scottish Office took the view that the current common law in Scotland on the drawing of inferences from the accused's silence at trial was not inconsistent with the law in England and Wales. The Government felt, however, that a statutory provision would help clarify the position in Scotland, where the common law was open to differing interpretation.

The removal, by what is now Clause 28 of the Bill, of the statutory bar on prosecutors commenting on an accused's failure to give evidence, was criticised by some peers during the Bill's passage through the House of Lords. During the Committee stage, Lord Macaulay of Bragar unsuccessfully moved an amendment which was intended to provide that where an accused person did not give evidence that fact should be of no evidential value. He said that:[14]

> The noble Lord said: The amendment relates to the direction which a judge should give in criminal trials where the accused does not give evidence. The situation in relation to the significance of an accused person not going into the witness box to give evidence in a criminal trial, the right of a prosecutor to comment on that absence from the witness box, and indeed the right of a judge in a criminal trial to comment on such an action taken by the accused,

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[13] p.9

[14] HL Deb Vol 560 c.409 16.1.1995

> is now in a complete and utter mess. There is little point in making tinkering adjustments to the law of Scotland until a review is held on how matters stand so that positive views can be expressed about what the situation should be.
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> I have said more than once that the right to silence is the right of every accused person in the United Kingdom. People talk of the failure to give evidence. As I understand it, there is no such thing in law. There is the exercise of one's legal right in law not to give evidence. It is so often referred to in the newspapers that it has almost become, as it were, a newspaper cult. A headline in one newspaper at the weekend read: "Accused refuses to give evidence", or "Accused opts to remain silent". So what, if the accused chooses to remain silent?
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> This amendment tries to encourage the Government to do just one thing; namely, to institute a review of these important matters. At the moment we are floundering about with judges giving one direction here, one direction there; the Court of Criminal Appeal saying, "Maybe the judge shouldn't have said that but after all that does not constitute a miscarriage of justice".

Lord McCluskey, spoke in the debate on the same amendment, saying that in his view the proposal on this subject in the Bill was sound and the amendment unsound. He remarked that:[15]

> In the press and other quarters there has been considerable misunderstanding about what is happening in this Bill. I sit as a trial judge for approximately 12 to 14 weeks of the year. I have been appearing in the criminal courts for something in the order of 40 years, some 12 years as a prosecutor and other years for the defence. What commonly happens is that, if the accused does not choose to exercise his right to give evidence and chooses to exercise his right not to give evidence, his defence counsel will comment upon that matter when he addresses the jury. He will commonly say, "Ladies and gentlemen, you have heard the evidence for the Crown. The burden of proof is on the Crown. There is no burden upon my client and that is why, on my advice, he has not gone into the witness box". So comment is in fact made by the defence.
>
> Secondly, as the Committee recognised, comment can be made by the judge. From time to time judges do comment but they must do so with restraint, which is only right and proper. I do not doubt that, having regard to the fact that this clause simply removes a part of the Bill, the courts will interpret the duty of the prosecutor as a duty to comment with at least as much restraint as the judges are wont to exercise at the present time. I do not have the slightest

[15] HL Deb Vol 560 c.412-3 16.1.1995

shadow of doubt about that.

In what circumstances should the prosecutor have the right and responsibility to comment upon the accused not entering the witness box? I referred to that point at Second Reading. I want simply to make the point that almost from the first or second witness in the trial the jury is waiting to hear the accused's account of the matter. 'Rat is what the jurors want to hear. They have heard the case against him which has built up and up and they want to hear his explanation and how he will get out of accusation. Then the accused does not go into the witness box. It is deeply patronising to suppose that unless the prosecutor refers to the matter the jury will not have noticed. Of course the jury will have noticed. In my respectful view, the prosecutor has a perfect right to point out that matter if it is obvious.

In replying for the Government at the end of the debate on the amendment the Lord Advocate, Lord Rodger of Earlsferry, said:[16]

I would say, just as the noble and learned Lord, Lord McCluskey, said, that the prosecutor will comment only with restraint because of course he must have regard to the fact that as the law has been laid down it is only with restraint that this can be said to a jury, and it is only in special circumstances that it can be said. If he goes further than that, if he says something which goes beyond that, it will be the judge's duty to correct what the prosecutor has said and to give the proper direction to the jury. If he should fail to do so, or, in certain circumstances, if the appeal court thought that what was said by the prosecutor was so outrageous, then presumably the matter could be the basis for a ground of appeal. Where the law itself only allows comments with restraint, and only for inferences to be drawn in narrow circumstances, it would be a foolish prosecutor indeed who went further than that.

Why are we doing this? Where it is open to the judge in an appropriate case to give this direction to the jury, it seems proper, with respect to those who argue the reverse, that that matter should be focused in the prosecution speech so that the prosecutor can invite the jury to consider that in the circumstances they may find it easier to draw the inference of guilt. When that is said, it means that the issue is fairly in play and then it is open to the defence counsel, who, as the noble and learned Lord, Lord McCluskey, said, almost invariably in these circumstances mentions the fact that his client has not given evidence, to say to the jury that they have heard what the prosecutor has said and that it is either right or that it is not the kind of case where they would be wise to draw that inference. The matter is then fairly in play and the judge in those

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[16] HL Deb Vol 560 c.416-7 16.1.1995

circumstances can give the appropriate direction. Where the judge can give that direction, and where the defence is in no position to comment at that stage when the judge gives the direction, it seems better that the matter should be fairly in front of the jury at a proper stage when the prosecution is speaking and therefore the matter can be dealt with in the normal way, as any other issue is dealt with, between the parties in the prosecution. For that reason we think it is appropriate to deal with the issue in this way. I would add that in this issue we can claim the support of the Thomson Committee, which reported on criminal procedure in Scotland and which recommended the repeal of this statutory bar.

The noble Lord, Lord Hutchinson, said that there may be many reasons why an accused person does not give evidence. I accept that. But at present under our law in Scotland, whatever the reasons may be why someone has not given evidence, the fact of the matter is that the judge may, in an appropriate case and with restraint, invite the jury to draw the inference which. I have indicated. Therefore, we are not changing that matter in any sense. In my submission, the change which we are advocating here is a proper one. It does not go so far as some of the other changes which have been introduced elsewhere. It is entirely in accordance with the spirit of the law in Scotland.

B. Evidence of character

By virtue of Section 160 of the *Criminal Procedure (Scotland) Act 1975*, the prosecution is generally prevented from leading evidence of a previous conviction in proceedings before a jury unless the conviction is relevant to the substantive charge or the accused has led evidence of his previous good character. In certain circumstances the prosecution is able, by virtue of Sections 141 and 346 of the same Act, to lead evidence at trial of previous misconduct by the accused or his bad character. This is done through the introduction of evidence showing that an accused person has committed, been charged with or convicted of any offence other than the offence with which he is currently being tried. Such evidence may only be introduced where the accused himself gives evidence at the trial or has given evidence against any other person charged in the same proceedings and

a) proof that the accused has committed or been convicted of another offence is admissible evidence to show that he is guilty of the offence being charged; or

b) the defence has asked questions of a prosecution witness with a view to establishing the accused's good character; or

c) the accused has given evidence as to his own good character; or

d) the nature or conduct of the defence is such as to involve imputations or slurs on the character of the prosecutor or a prosecution witness.

In the consultation paper on *The Right to Silence, Judicial Examination and Evidence of Previous Convictions* the Government noted that that as such evidence was normally introduced during cross examination of the accused there was at present no opportunity to cross-examine the accused if he chose not to give evidence. This, the paper noted, left it open to the defence to seek, through the evidence of other witnesses, either to establish the accused's good character or to impugn the character of prosecution witnesses, the prosecution or both, without there being any opportunity for contradiction by the Crown. The paper went on to say that:[17]

45. **The Government would welcome views on whether an amendment should be made to the 1975 Act to enable evidence to be led as to the previous misconduct of an accused person in any case in which the defence, an behalf of an accused person who is not, himself, giving evidence, leads evidence impugning the character of the prosecutor or a prosecution witness or seeking to establish the previous good character of the accused**.

46. During the passage of the Criminal Justice and Public Order Bill through the House of Lords, the Government accepted an amendment to the Criminal Evidence Act 1898 (which makes comparable provisions on admissibility of evidence of previous misconduct for England and Wales) which will add imputations on the character of the deceased victim of a crime to the circumstances in which evidence led on behalf of the defence may justify the Prosecution introducing evidence of previous misconduct. This change is designed to prevent accused persons being able to criticise the dead victims of their crimes without risking exposure of their own previous misconduct.

47. **The Government takes the view that it would be appropriate to make a similar amendment to Scots law so that evidence led by the defence impugning the character of a deceased victim is added to the circumstances which justify the leading of evidence as to the previous misconduct of an accused person.**

Clause 20 of the present Bill is intended to enable the prosecution to lead evidence rebutting evidence led by or on behalf of an accused person as to his, the prosecutor's or another person's character or conduct. The version of this Clause which appeared in the Bill as originally drafted was replaced by a new Clause introduced by the Lord Advocate, Lord Rodger of Earlsferry, during the debate on the Bill's Third Reading in the House of Lords[18]. Under the new Clause the prosecutor will need to obtain the leave of the Court before asking such questions. The effects of the amended Clause were described by the Lord Advocate as

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[17] p.11-12

[18] HL Deb Vol 561 c.577-580 14.2.1995

follows:[19]

> The noble and learned Lord said: My Lords, at Report stage I undertook to bring forward amendments to what is now Clause 20. Amendment No. I is the fulfilment of that undertaking. Its main effects can be summarised briefly,
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> First, it extends the effect of Section 141 of the Criminal Procedure (Scotland) Act 1975 which permits questioning of an accused person as to his record and character to cover the situation where the defence attacks the character of a person who has been killed in the incident covered by the charge. That fills an obvious loophole.
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> Secondly, subsections (IA) and (IC) put on to the face of the statute the need for the prosecutor to obtain the leave of the court before asking such questions. This reflects existing practice in the light of the case of *Leggate.*
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> Thirdly, for the reasons explained in Committee and at Report, subsection (2) builds on an existing aspect of our law which is referred to in Section 160(2) of the 1975 Act. That allows the prosecutor to lead evidence about an accused's bad character or previous convictions if the defence leads evidence suggesting he is of good character. By virtue of subsections (1) (a) and (b) of the new clause, the prosecutor will be able, again with leave of the court, to lead such evidence either where the defence leads evidence of good character or where the good character of, say, a Crown witness or a deceased person is attacked. So if, for instance, the defence leads evidence to indicate that someone who was killed in an incident had previous convictions for violence and so might be expected to have been the aggressor, the prosecutor may apply to lead evidence to show that the accused also had previous convictions for violence. This would allow the jury to have a rounded picture when judging who was the aggressor. Again, the need for the prosecutor to obtain the leave of the court before leading the evidence provides the necessary safeguard against abuse.
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> Similar provisions are made for both solemn and summary cases. I do not believe that questioning or the leading of evidence under these provisions will necessarily occur frequently in our courts. But the provisions are significant in that they rationalise this area of our law.

Lord Macaulay of Bragar expressed concern that substantial amendments had been made to the Bill at a late stage in the proceedings, but took the view that the matter had been properly balanced by the inclusion of the requirement that the court's leave be obtained before evidence

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[19] HL Deb Vol 561 c.579 14.2.1995

about the previous character of an accused person was led.[20]

Clause 24 is designed to extend the protection afforded by Sections 141A and 364A of the *Criminal Procedure (Scotland) Act 1975* against questioning about the previous sexual history or character of a witness in a sexual offence trial. As originally drafted the Clause extended this protection only to incest and clandestine injury. During the Bill's Report stage in the House of Lords, the Lord Advocate, Lord Rodger of Earlsferry introduced an amendment saying that he had taken the opportunity to review whether there might be other sexual offences which might usefully be added to the list covered by this protection. The offences which were subsequently added by virtue of this amendment are unlawful sexual intercourse with a stepchild, unlawful sexual intercourse of a person in a position of trust with a child under 16 and gross indecency between males.[21]

C. Procedure

The *Criminal Justice (Scotland) Act 1980* provides for the use of intermediate trial diets in summary proceedings. Witnesses are not required to attend these proceedings, the purpose of which is to ascertain the state of preparedness of the prosecution and defence and whether the accused still intends to plead not guilty. In certain special circumstances optional pre-trial diets are available under solemn proceedings.

The White Paper Firm and Fair - *Improving the Delivery of Justice in Scotland* Cm 2600 made the following comments about problems arising under the current arrangements for pre-trial procedures:[22]

> In June 1993 the Government published a consultation paper seeking views on proposals for improving the procedures for bringing cases to trial. These proposals were set out in a report, the *Review of* Criminal Evidence and *Criminal Procedure,* which revealed that as many as four out of five trials did not take place when programmed and that the main causes were late guilty pleas and unforeseen adjournments. It was estimated that of the 350,000 or so witnesses who attended court each year, as many as 280,000 did not give evidence. Half of these witnesses were likely to be police officers. The report made proposals for reducing the waste of time and inconvenience involved in cancelled and adjourned trials by introducing mandatory intermediate diets. There were also further proposals for reducing the length of the minority of trials which do go ahead, through the agreement of uncontroversial evidence and the presentation of some evidence in written form. The ultimate success of any new system is crucially dependent on effective management of pre-trial procedures by the judiciary.
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> 2.2 Responses to the consultation paper demonstrated

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[20] HL Deb Vol 561 c.579-80 14.2.1995

[21] HL Deb Vol 561 c.46-47 6.2.1995

[22] Cm 2600 p.5

> considerable concern about the consequences of the cancellation and adjournment of trials and broad support for most of the measures set out in the consultation paper.

The *1993 Review of Criminal Evidence and Criminal Procedure* noted that:[23]

> It is possible to conduct intermediate diets routinely without obtaining significant benefit from them. The fact that most courts in Scotland stopped holding them routinely after trying them when they were introduced in 1981 suggests that at that time the benefits of intermediate diets as then practised were held not to justify the time and cost of holding them. However, the recent experiments demonstrate that they can be effective. The key determinant of success is how they are managed - when they are held, who is required to attend, what information is available, what questions are asked, how rigorous the sheriff is in seeking answers, etc. The report of the Steering and Working Groups on Court Programming' is invaluable in setting out desired practice for the conduct of intermediate diets. However, it may be desirable to go further and strengthen and make more explicit the statutory basis of intermediate diets and the duties of the court to make them work.

In the White Paper the Government announced that it intended to proceed with the proposals, set out in the 1993 review, to make intermediate diets mandatory in all summary cases prosecuted in the sheriff courts and district courts, subject to a number of provisions designed to ensure flexibility. It would, for example, the Government said, be possible for the court to dispense with an intermediate diet in an exceptional case, on the application of the prosecution and defence, if it considered that there would be no benefit in having one.[24] The Government also announced that it was proposing to introduce mandatory diets in solemn procedure, but only for sheriff and jury cases. In the High Court, which depended on a relatively small number of judges sitting as required in cities and towns around Scotland, and where the problem of cancelled and adjourned trials was considered to be somewhat less acute, the Government would seek to make use of the existing statutory provisions for preliminary diets in Section 76 of the *Criminal Procedure (Scotland) Act 1975* in those cases where it appeared beneficial to do so.[25] Under Clause 12 of the present Bill, the prosecutor and, if he is legally represented, the accused, will be required to identify facts which may be capable of agreement and to take all reasonable steps to agree them before the trial. Clause 13 is intended to create a new mandatory first diet in solemn proceedings in the sheriff court, similar to the existing intermediate diet in summary proceedings, which will itself be mandatory by virtue of Clause 14. The mandatory first diet in solemn proceedings is designed to replace the present optional preliminary diet. Clause 13 will also extend the scope of any preliminary diet held in relation to proceedings in the High Court. Both Clauses 13 and 14 make provision as to attendance at such diets, the power and duties of the court

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[23] p.27
[24] Cm 2600 p.9
[25] Cm 2600 p.10

and the powers and obligations of the prosecution and the accused. Under Clause 13 an accused person who has been given notice of a first diet in his case will be required to attend it and the court may grant a warrant to apprehend him if he does not do so. A first diet may also proceed notwithstanding the absence of the accused. The accused will also be required to state how he pleads to the indictment.

D. Sentencing

In February 1994 the Government issued a consultation paper entitled *Sentencing and Appeals* which set out a number of possible changes in the current rules governing sentencing and criminal appeals in Scotland. It also contained ideas for further developments in the use of fiscal fines. The White Paper *Firm and Fair*, published in June 1994, set out the Government's proposals following consultation on these matters. Those which require legislation are set out in the present Bill.

Clause 29 is designed to give the court powers, when determining the appropriate sentence to impose on an offender, to take into account the stage in the proceedings at which an offender indicates his intention to plead guilty and the circumstances in which that indication was given. The court will not be obliged to do this, as the exercise of these powers will be at the courts' discretion. The White Paper set out the background to this provision, and the Government's reasons for introducing a discretionary rather than a mandatory approach to sentence discounting as follows:[26]

> 4.11 Sentence discounting is practised in England and Wales and in many other jurisdictions. All share essential features of the Scottish system, such as the presumption of innocence and the absolute right of the accused to have the charges proved in court, and many provide considerable judicial diseretion in sentencing. More over many respondents asserted that in practice Scottish judges often do impose lesser sentences on those who have pled guilty than on those who go to trial. However these respondents and most others were opposed to any formal system of sentence discounting or any requirement to reduce sentences in such circumstances. This was generally on the grounds that such a system would penalise accused persons who exercised their right to go to trial. It was also argued that the weight that should be attached to a plea of guilty for sentencing purposes varies widely from case to case and that the courts should not be constrained from deciding the appropriate weight to attach to such a plea in the circumstances of each case.
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> 4.12 For most, although not all, respondents, these considerations out-weighed any benefit which might be obtained if a system of sentence discounting were to reduce the number of late pleas of guilty, and therefore reduce the waste of time and inconvenience suffered by witnesses, jurors and others involved in

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[26] *Firm and Fair* Cm 2600 p.24

criminal proceedings, who turn up expecting a trial which is then cancelled.

4.13 **Having considered the various arguments, the Government has decided at present against the introduction of a formal or mandatory approach to sentence discounting in Scotland.** Nevertheless there appears to be considerable acceptance of the principle that it may be right in many cases to reduce sentence for those who plead guilty early. At present, it is possible that some courts are inhibited from reducing sentences where they see justification for doing so by their perception of the effect of the judgment in Strawhorn v McLeod (1987) which proscribed "a declared practice of discounting". Similarly, accused persons may not realise that it is in fact open to the court to take account of an early guilty plea by imposing a reduced sentence. The Government therefore intends to introduce a statutory provision to make it clear that the courts may take into account a guilty plea, and the circumstances in which it was made, as a mitigating factor in considering the appropriate sentence.

Clause 30 is intended to create a statutory framework for the issuing of sentencing guidelines by the High Court of Justiciary, which is the final court of appeal in criminal matters in Scotland. The Government set out its intentions in introducing a specific statutory power to allow for the issuing of sentencing guidelines as follows:[27]

4.6 The Government invited views on whether sentencing guidelines should be introduced in Scotland. Many respondents pointed out that ' a substantial amount of guidance on sentencing matters was available in the reported decisions of the Appeal Court, although these do not deal with the question of the appropriate range of sentences in particular categories of case.. Considerable support was expressed for the development of such sentencing guidelines. Apart from their potential to improve consistency and provide a benchmark for decisions to appeal, respondents considered that guidelines could contribute a more logical and transparent approach to sentencing. Some district courts in particular would welcome them. The Government will discuss with the senior judiciary and the district courts the best means of meeting district courts' apparent desire for more guidance on sentencing.

4.7 The Appeal Court would obviously have a pivotal role in any system of sentencing guidelines. Since it determines all appeals against sentence, there would be little point in guidelines which did not have the support or endorsement of the Appeal Court. One possible source of guidance on the appropriate range of sentences is the decisions of the Appeal Court in individual

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[27] Cm 2600 p.22-23

cases. The Appeal Court's decisions about whether a particular sentence is inappropriate or excessive are not, however, generally perceived as having direct relevance to other cases. In view of the substantial support for the introduction of sentencing guidelines, the Government proposes to promote a specific statutory power to allow the Appeal Court to issue judgments establishing such general guidelines.

A Scottish Office consultation paper on *Fine Enforcement and Supervised Attendance Orders* published in August 1994 set out the Government's conclusion that the supervised attendance order (SAO) scheme should be expanded to become the main disposal for courts when other fine enforcement measures fail to secure payment of amounts below level 2 on the standard scale of fines (£500). The paper made the following comments about this type of order and the proposed changes:[28]

5. Experience of the SAO pilot schemes shows that the SAO is a strictly supervised disposal which offenders do not treat rightly. The revised proposals envisage that in future the offender's consent to an SAO will no longer be required and failure to attend or to complete an SAO may be treated appropriately by the courts.

6. The Government wish to ensure that those offenders for whom an SAO is made both start the SAO and comply with its conditions. To this end significant penalties for failure to start or for breach of an SAO would be available. The maximum penalty for either offence would be a term of imprisonment of 60 days in district court cases and 3 months in sheriff court cases.

7. Special proposals are suggested for young offenders aged 16 or 17. For this group it is proposed that the court should no longer be able to impose a custody alternative where a fine is considered appropriate. Instead, the primary disposal at first instance will be an SAO. However, the court may impose the alternative of a fine in the event that payment could be made by or on behalf of the offender. Default on such payment within a fixed time period of 28 days would result in the SAO being activated.

8. The Government's intention would be to introduce such a scheme on phased basis as facilities can be made available locally, in the same way that Community Service Orders were introduced. SA0s would be 100% funded by The Scottish Office and provided by either the local authority offender services themselves or by a service contract level agreement between the local authority and another provider. In all cases the local authority will have responsibility for National Standards being met.

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[28] *Fine Enforcement and Supervised Attendance Order* - Scottish Office 25.8.1994

Clause 31 is intended to extend the use of supervised attendance orders as an alternative to imprisonment for fine default, as envisaged by the consultation paper. It will also provide for the imposition of such orders on 16 and 17 year olds as an alternative to a fine or instead of imprisonment for fine default.

E. Fiscal Fines

Fiscal finds were introduced by the *Criminal Justice (Scotland) Act 1987* following recommendations in the *Second Report of the Committee on Alternatives to Prosecution* (the Stewart Committee).[29] Section 56 of the 1987 Act gave prosecutors discretion to offer a fiscal fine for "relevant offences". These are defined as those offences triable in the district court, with the exception of offences under the *Transport Act 1982* which attract a fixed penalty. The Scottish Office consultation paper on *Sentencing and Appeals* noted that:[30]

> Acceptance of a fiscal fine does not amount to a conviction and is not recorded as such. Moreover, the offer may be refused in any case. The maximum fiscal fine is limited by section 56 of the 1987 Act to the level I fine maximum (currently £200), and further specified by statutory instrument' as a fixed figure of £25. At the time it was set in 1987, the level 1 fine maximum was £50, and fines of up to £25 represented 32% of all fines imposed in the district courts. The statutory instrument further provides that fiscal fines may be paid by instalments of £5 fortnightly.
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> More recently, the Royal Commission on Criminal justice recommended 3 that a scheme on the Scottish model (with a range of fines) should be considered for England and Wales, partly because of the experience of the operation of the Scottish scheme but also because of the potentially significant savings to the magistrates courts. The Royal Commission suggested that the views of victims should be taken into account before deciding on the appropriate disposal. In Scotland, it is already prosecution policy that the factors to be considered before deciding on the disposal of a case must include the attitude of any identifiable victim and the possibility that a compensation order might be awarded if proceedings were taken.

The consultation paper noted that in the six years since their introduction, fiscal fines had succeeded in diverting a significant proportion of the most minor offences from court, thus helping to relieve the pressure on district courts. Procurators-fiscal found the fines useful and few had any concerns that they were usurping any judicial functions in generating the system. The Scottish Office did, however, take the view that given changes in the value of money and in the level of fines available to and imposed by the courts since the introduction of fiscal

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[29] [Second Report of the Committee on Alternatives to Prosecution. Keeping Offenders out of Court : Further Alternatives to Prosecution (Cmnd 8958) 1983

[30] *Sentencing and Appeals,* Scottish Office February 1994 p.8

fines the present system should be reviewed. The paper suggested that there were two broad options for extending the use of the fiscal fine. The first was to increase the range of offences for which a fiscal fine might be offered, while the second was to alter or extend the range of penalties which might be offered. Of the option of increasing the range of offences for which a fiscal might be offered the consultation paper said:[31]

Offences triable in a district court are (i) all common law offences other than those specified in Section 285 of the Criminal Procedure (Scotland) Act 1975; (ii) statutory offences in respect of which the maximum penalty which may be imposed does not exceed 60 days imprisonment or a fine of level 4 on the standard scale or both (Section 7(1) of the Criminal justice (Scotland) Act 1980); and (iii) statutory offences where it is specifically provided that the offence may be tried before any court of summary jurisdiction. The effect of this is to exclude from consideration of a fiscal fin e statutory offences, the maximum penalty for contravention of which exceeds the upper limit for a district court, even if they are, on the scale of gravity for that particular offence, at the lower end. Yet it is open to the Procurator Fiscal to take no proceedings or issue a warning letter in such cases. It would be possible to provide a discretion to the Procurator Fiscal to offer a fiscal fine in respect of all statutory offences subject to the Lord Advocate's direction that certain cases should be excluded. This could be achieved by an amendment to Section 7(1) of the Criminal justice (Scotland) Act 1980 to render it competent to prosecute all statutory cases in a district court, but preserving the upper limit of district court powers at 60 days or a fine of level 4 or both. This would be in keeping with the Crown's present ability to restrict the penalty by prosecuting certain statutory offences summarily instead of on indictment..

The alternative, which seems less attractive, would be to extend the power to offer a fiscal fine to such cases without altering the district courts' jurisdiction, by removing the restriction of fiscal fines to offences triable in a district court. This would mean that in those cases where the offer was declined, subsequent prosecution would take place in the Sheriff Court. **The Government would welcome views on whether the option of offering a fiscal fine might be extended to all statutory offences; and if so whether this should be done by making it competent to prosecute all statutory offences in the district courts, or by removing the restriction of fiscal fines to offences triable in a district court.**

The possibility of making all statutory offences triable in the district court and therefore punishable by a fiscal fine, which would not amount to a conviction or be recorded as such, led to press comment that the possession of cannabis, which is a statutory offence, was being decriminalised in Scotland. In the White Paper the Government announced that it proposed to extend the scope of fiscal fines in the manner which had been suggested. The Government

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[31] p.10-11

set out its view of how the system would operate as follows:[32]

> 8.8 The Government invited views on whether there was scope to extend the range of offences where a fiscal fine can be offered, either by making it possible to try all statutory offences in the district court, or by removing the restriction of fiscal fines to offences triable in the district court. There was considerable support for extending the scope of fiscal fines to include all statutory offences. One option would be to remove the restriction on fiscal fines to offences triable in the district courts. This would mean that if an offer.in such a case were turned down, however, the case would then be tried in the sheriff court. In effect an offence which the procurator fiscal initially considered not to merit prosecution would then have to be prosecuted in the sheriff court, without the option of prosecution in the district court. The Government therefore proposes the more straightforward option of extending the scope of fiscal fines by making all statutory offences triable in the district court.
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> 8.9 This change will not mean that all those accused of a statutory offence would be offered a fiscal fine. Nor does it mean that whole categories of offence will no longer be the subject of prosecution, or that any offence will be decriminalised. As at present, the decision on the suitable disposal of a case would be taken by the procurator fiscal, based on the known facts of the case and bearing in mind any guidance issued by the Lord Advocate. Individual examples of all offences vary widely in their seriousness; and the circumstances of offenders, including their criminal record, vary widely too. On one set of facts it may be appropriate to take no proceedings at all; on another it may be appropriate to prosecute so that the offender may face the full rigour of the law. The fiscal fine merely provides another option to deal with offences at the less serious end of the scale.

The Government also announced proposals to extend the level of fine available as a fiscal fine by introducing a scale of penalties rather than a fixed amount. The White Paper said that:[33]

> 8.10 Those responding to the consultation paper generally supported the proposal that there should be a scale of penalties available rather than a single fixed amount, as at present. The preferred option was for fixed points on a scale within an upper limit.
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> 8.11 At present section 56 of the Criminal Justice (Scotland) Act 1987 limits the penalty which may be offered to a single figure no greater than the maximum level 1 fine, which is currently £200. However the current fiscal fine is fixed by statutory instrument at

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[32] Cm 2600 p.40-41

[33] Cm 2600 p.41-2

> £25, which is half of the level 1 maximum which was in force when fiscal fines were introduced. **The Government proposes to bring forward an amendment to section 56 to provide for the setting of a number of fixed points by statutory instrument. Thereafter, using that power, it would propose to introduce four levels of penalty for procurators fiscal to choose according to the circumstances of the case. These would be £25, £50, £75 and £100**. £100 is half the level I maximum on the standard scale. These penal-ties would be reviewed whenever the level of fines on the standard scale available to the courts under section 289G of the Criminal Procedure (Scotland) Act 1975 was reviewed.

Clauses 54 and 55 of the present Bill are designed to implement these proposals. Clause 54 extends the jurisdiction of the district court to all statutory offences which are triable by summary procedure, while Clause 55 is intended to enable the Secretary of State to set a range of fixed penalties which may be offered as fiscal fines by the procurator fiscal. The range will be specified by statutory instrument. Statutory instruments made under this provision will be subject to the negative procedure.

F. Confiscation

The provisions in the Bill on confiscation of the proceeds of crime and property used in crime and the forfeiture of property used in crime are based on recommendations of the Scottish Law Commission in its *Report on Confiscation and Forfeiture*[34] published in September 1994. The Commission noted the current limitations on the powers of courts in Scotland to deprive offenders of the proceeds of crime other than drug-related or terrorist crime. It said:[35]

> 2.2 Unless an offender has been convicted of one of the recently introduced statutory offences related to drug trafficking or terrorism which we mention in the following paragraph, a Scottish court may deprive him of the proceeds of his crime only by the imposition of a fine, or by making a compensation order. Neither is a reliable method of stripping him of his gains. While the court may wish to ensure that any fine it imposes will not be less than the amount of the offender's gains, it generally has no means of obtaining reliable information on that subject. A compensation order may be made only where the acts which constituted the offence have caused personal injury, loss or damage,6 and is accordingly inappropriate where the crime is a "victimless" one, such as an offence relating to unlawful gaming or pornographic material. Further, the courts do not have any common law powers to freeze an accused person's assets before conviction or to seize them after conviction; imprisonment in default of payment of a fine or compensation order is not a satisfactory alternative to recovery of the proceeds of the crime; and an order for recovery of the

[34] Scot Law Com No. 147

[35] Scot Law Com No. 147 Vol 1 p.4-5

amount of a fine or compensation order by civil diligence is unlikely to be effective where the offender's financial affairs are complicated or his assets are difficult to identify or he has taken steps to disperse, conceal or "launder',7 them. Confiscation measures, on the other hand, aim "to *incapacitate,* by depriving a person of the physical or financial ability, power or opportunity to continue to engage in proscribed conduct; to prevent offenders from *unjustly enriching* themselves, by eliminating the advantages and benefits which the offender has gained through his or her illegality; to deter the offender and others from crime by undermining the ultimate profitability of the venture; and to *protect* the community by curbing the circulation of prohibited items".'

2.3 There are several recent statutes of the United Kingdom Parliament which deal with the confiscation of the proceeds of crime. The principal statutes are: the Drug Trafficking Offences Act 1986,2 which is concerned with the confiscation of the proceeds of drug trafficking in criminal proceedings in England and Wales; Part I of the Criminal Justice (Scotland) Act 1987,3 which makes comparable provision for Scotland; and Part VI of the Criminal Justice Act 1988' which introduces confiscation orders in relation to certain other offences in criminal proceedings in England and Wales, All these Acts have been amended: in particular, the Acts of 1986 and 1988 have recently been amended in important respects by the Criminal Justice Act 1993.5 There are three other recent statutes which should be noted, one concerned with drug trafficking and the other two with terrorism. The Criminal Justice (International Co-operation) Act 1990,6 which extends to the whole of the United Kingdom, empowers the court to forfeit any cash which has been seized while being imported into or exported from the United Kingdom if the court is satisfied that the cash directly or indirectly represents the proceeds of drug trafficking, or is intended for use in drug trafficking.' As to terrorism, the Prevention of Terrorism (Temporary Provisions) Act 1989, which also extends to the whole of the United Kingdom, makes provision for the forfeiture on conviction of money or property related to certain offences concerned with financial assistance for terrorism, and the forfeiture of money or property which was at the time of the offence in the accused's possession or control for the use or benefit of a proscribed organisations Further, Part VII of and Schedule 4 to the Northern Ireland (Emergency Provisions) Act 1991 10 are concerned with the confiscation of the proceeds of terrorist-related activities. They contain provisions, for the most part extending to Northern Ireland only, similar to the confiscation provisions in the Acts of 1986 and 1988.

Additional provisions concerning confiscation of the profits of crimes other than drug-trafficking offences in England and Wales are set out in the Proceeds of Crime Bill, a Private Member's Bill which received its Second Reading in the Commons on February 3rd.

The Scottish Law Commission recommended that where, in a case other than one related to drug trafficking or terrorism, a Scottish criminal court was satisfied that an offender had benefitted from an offence of which he had been convicted, the court should have a discretionary power to make a confiscation order requiring him to pay such sum as the court thought fit with the object of depriving him of that benefit. It went on to make further recommendations about the details of a proposed scheme to enable confiscation orders to be made in these circumstances and recommended that the provisions of the *Criminal Justice (Scotland) Act 1987* be amended so as to make arrangements for the confiscation of drug profits conform to the scheme for the confiscation of the profits of non-drug-related crime.

The Commission's recommendations were largely accepted by the Government and provisions for the confiscation of the profits of crimes other than drug trafficking are set out in Part II and Schedules 2 to 4 of the Bill, as are amendments to the existing legislation on confiscating the proceeds of drug trafficking.

The European Court of Human Rights ruled recently in the case of *Welch v. the UK* that the retrospective application of the *Drug Trafficking Offences Act 1986*, in the case before it was contrary to Article 7 of the European Convention on Human Rights, which prohibits the imposition on an offender of a heavier penalty than the one that was applicable at the time the criminal offence was committed. The Government is reported to be considering the implications of this decision, but it has been suggested that amendments to the legislation in England and Wales may be needed.[36]

[36] "Confiscation orders fall foul of Strasbourg" - *Solicitors' Journal* 17.2.1995

Appendix

Reports and Consultation Papers relating to the *Criminal Justice (Scotland) Bill 1994/95*

1. The Royal Commission on Criminal Justice Report)Cm 2263 published July 1993).

2. Review of Criminal Evidence and Criminal Procedure (Scottish Office publication, published June 1993).

3. Criminal legal Aid Review (Scottish Office publication (DEP 9872) published November 1993).

4. Juries and Verdicts (Scottish Office publication, published January 1994).

5. Sentencing and Appeals (Scottish Office publication, published February 1994).

6. White Paper "Firm and Fair" (HMSO Cm 2600, published June 1994).

7. Right to Silence (Scottish Office publication, published September 1994).

8. Fine Enforcement and Supervised Attendance Orders (Scottish Office publication (DEP 3/437) published August 1994).

9. Criminal Procedure - Unfitness to Plead and Acquittal by Reason of Insanity (Scottish Office publication, (DEP 8902) published February 1993).

10. Scottish Law Commission Report on Confiscation and Forfeiture (HMSO Cm2622, published August 1994.

11. Operating Bail (HMSO, published April 1994, ISBN 0 11 495173 X).

12. Fiscal Fines - The Operation of S56 of the *Criminal Justice (Scotland) Act 1987* (Law Faculty, Aberdeen University, not published).

13. Evidence: Report on Documentary Evidence and Proof of Undisputed Facts in Criminal Proceedings (Scottish Law Commission Report 137, published October 1992, HMSO).

14. First Report of the Steering Group and Working Group on Court Programming (Nicholson/Cox) (Scottish Courts Administration publication, published June 1993).

15. Detention and Voluntary Attendance of Suspects at Police Stations (HMSO publication).

Hansard References to the Stages of the *Criminal Justice (Scotland) Bill 1994/95 in the House of Lords*

Second Reading	HL Deb Vol 559 c.545-577 29.11.1994.
Committee	HL Deb Vol 560 c.295-346 + c.363-398 12.1.1995.
	HL Deb Vol 560 c.409-526 16.1.1995.
Report	HL Deb Vol 561 c.11-96 6.2.1995.
Third Reading	HL Deb Vol 561 c.577-594 14.2.1994

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Research Paper 95/24 **Section Code: HAS**

Title: The Criminal Justice (Scotland) Bill [Bill 49 of 1994/95]

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94/1	Crime and Public Order - the Criminal Justice and Public Order Bill [Bill 9 of 1993/94]	16.12.94
94/16	Proceeds of Crime Bill 1994/95 [Bill 10]	02.02.95