

scottish churches parliamentary office

Criminal Justice and Licensing (Scotland) Bill SCPO Briefing 12/6

The Criminal Justice and Licensing (Scotland) Bill was introduced to the Scottish Parliament by Kenny MacAskill, Cabinet Secretary for Justice, on 5 March 2009, and passed Stage 3 of the parliamentary process on 30 June 2010. The Bill is now awaiting Royal Assent before becoming law. This SCPO Briefing Paper is intended to give an overview of the key provisions in the bill. However, as the final Bill contained over 200 sections, with almost 700 proposed amendments at Stage 2 and a further 200 at Stage 3, this briefing paper is, by necessity, non-exhaustive. The Briefing will, however, lay out the provisions of interest or importance to Scotland's churches which were agreed to by Parliament, as well as noting some significant proposals which were amended or removed at various points throughout the Bill's passage through Parliament. As ever, further information is available from SCPO; contact us through our website, or using any of the contact details below.

The Bill, as agreed after Stage 3, is available to view on the Parliament website at this address:
<http://www.scottish.parliament.uk/s3/bills/24-CrimJustLc/b24bs3-aspassed.pdf>

Scottish Parliament Bill Process: a quick reminder

Stage 1: Scottish Parliament Committee considers the Bill, prepares a report, and the whole Parliament debates the general principles of the Bill.

Stage 2: MSPs can lodge amendments on the specifics of the Bill. These amendments are considered by the Committee and can be accepted, rejected, or withdrawn. The Committee Convener holds significant power in this context, as he or she is allowed to use their casting vote in the event of a tie in the 8-member committee (and unlike the Presiding Officer in the Parliament is not obliged to vote to retain the status quo).

Stage 3: MSPs can lodge amendments at this stage too, but the amendments are considered in front of the whole Parliament, and all MSPs can vote on these amendments. Following Stage 3 amendments, a motion to pass the legislation as a whole is then put to the Parliament and MSPs vote on this too.

Sentencing

Scottish Sentencing Council

The Bill establishes a Scottish Sentencing Council which is intended to ensure consistency in sentencing, and raise awareness of sentencing policy and practice. Following extensive amendments at earlier stages of the Bill to recalibrate the ratio of judicial to non-judicial members, the Council will be constituted of six judges and six non-judges including a representative defence lawyer, prosecution lawyer and a lay member, and will be chaired by the Lord Justice Clerk. The powers of the Council were also reined in following recommendations made by the Justice Committee in their Stage 1 report which suggested that guidelines produced by the Council should only take effect after ratification by the High Court. This altered the role of the Council to an

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advisory one. The Joint Faiths Advisory Board on Criminal Justice, an interfaith board with representatives from the Church of Scotland, Scottish Episcopal Church, Catholic Church, ACTS and the Scottish Interfaith Council, had responded to the initial proposals in the Bill supporting the establishment of a Scottish Sentencing Council, but had urged greater lay representation on the Council, saying they "would particularly welcome additional lay members from the Scottish Prison Service, criminal justice social work teams and Community Justice Authorities."

Sentencing Guidelines

The Bill as first introduced contained provisions to outline the "purposes and principles of sentencing", and would require the courts to give regard to these guidelines. At Stage 2 of the Bill process, the Justice Committee decided to accept the amendment proposed by Robert Brown (Lib Dem) to delete the entirety of section 1, as it was argued to be unnecessary that sentencing guidelines be established in statute.

Aileen Campbell (SNP) sought to amend these guidelines to require courts to take account of "any responsibilities the offender has for the care of children or dependent adults" when making a decision on the sentencing of offenders. Based on estimates that around 16500 children in Scotland are affected every year by a parent in prison (more than are affected per year by parental divorce), her amendment was supported by Scotland's Commissioner for Children and Young People and the Government, but was defeated in a vote in the Justice Committee. All members other than SNP voted against the proposal, with a suggestion that it may lead to an inconsistency of treatment depending on whether offenders have children or not; but also a suggestion that the amendment was simply unnecessary since social inquiry reports exist already for a court to make a decision on appropriate sentences.

However, unlike other amendments which fell at Stage 2 in the Committee and were reintroduced at Stage 3, Ms Campbell was unable to reintroduce her amendment as the relevant section of the bill relating to sentencing guidelines had been removed from the Bill.

Short sentences

The Bill as first introduced included a number of recommendations made by the Scottish Prisons Commission, an independent commission chaired by former First Minister Henry McLeish. One of the recommendations was a presumption against short sentences of imprisonment of six months or less, preferring instead community-based sentences as the default unless there are exceptional reasons to require a custodial sentence of six months or less. This was one of the most high-profile and contentious aspects of the Bill, with Labour and Conservative members of the Justice Committee voting to remove the provision relating to the presumption entirely from the Bill at Stage 2 of the process. However, the Government reintroduced the provision for Stage 3 when the whole Parliament would have the opportunity to vote on the Bill. Kenny MacAskill originally tabled a Stage 3 amendment reintroducing a presumption against sentences of 6 months or less, but later lodged another amendment lowering the sentence length from 6 to 3 months. Evidence was cited during the debate about the significantly higher levels of reoffending by those given short custodial sentences compared to community sentences, whilst a letter to MSPs from the Moderator of the General Assembly of the Church of Scotland was quoted in the debate: "All the available evidence affirms that short periods of imprisonment do not work. They damage family relationships leaving 16,500 children separated from a parent; they separate offenders from their communities and they damage employment prospects". The Joint Faiths Advisory Board on Criminal Justice also urged MSPs to support the presumption against short sentences.

This amendment to introduce a presumption against short sentences of 3 months or less was supported in the Parliament by Lib Dem, Green and Independent MSPs, and therefore garnered sufficient support to be included in the Bill. Labour and Conservative MSPs both opposed this amendment, with Labour members quoting a Women's Aid briefing which had been circulated to all MSPs ahead of the debate saying that 68% of custodial sentences for domestic abuse are under 3

months, and this is often just enough time for the victims of domestic abuse to seek help away from their aggressor. In response to these concerns the Justice Secretary highlighted that this is a presumption, rather than a mandatory end to short sentences.

Community Payback Orders

The Bill seeks to streamline all community sentences into a single Community Payback Order, which is intended to replace existing community sentences and supervised attendance orders. CPOs can comprise of work orders, supervision requirements, drug or alcohol treatment orders and testing, mental health treatment requirements or residency requirements. The underpinning theme of this new Order is, however, the more explicit reference to the offender 'paying back' to the community. The Community Payback Order has proved controversial, but this is predominantly due to the fact that CPOs are intended to be used in place of short custodial sentencing. The financial implications of increasing the capacity for local authority criminal justice social work departments to deliver community sentencing was of considerable concern throughout the passage of the Bill, with the [Finance Committee querying the Government's cost estimates for the implementation of the policy in the financial memorandum accompanying the Bill](#). Lib Dem member on the Justice Committee, Robert Brown, also tabled an amendment at Stage 2 to delay the implementation of the provisions in the Bill regarding the presumption against short sentencing until the Government had provided a full report detailing the expected numbers of community payback orders, the expected decrease in short custodial sentences, and the cost implications of these changes. This amendment fell, however, as Robert Brown was unable to win support from any of the other members of the Committee.

On the practicalities of delivering community payback orders, there were a few amendments at Stage 2 which are significant. On the issue of travelling expenses for those carrying out a community payback order, a Government amendment which sought to establish in law what already happens in practice, where travelling expenses are considered on a case-by-case basis for those who have to travel to carry out community sentences, was passed. Labour members on the Committee abstained from the vote, citing the financial implications for the public purse for their abstention.

An amendment at Stage 2 by Angela Constance (SNP) to include a provision whereby the type of community payback order must be one which the criminal justice social work officer responsible for assigning the order considers will offer "significant benefits in the area in which the work or activity is undertaken" was withdrawn. This was agreed after the Cabinet Secretary and Committee Convener both suggested that although this is ultimately the intention of community payback orders, it may be difficult to immediately justify "significant benefits" of requiring an offender to attend alcohol counselling sessions or accessing literacy programmes, although these may have long term benefits for the community in terms of reducing reoffending.

The Joint Faiths Advisory Board strongly welcomed the provisions in the Bill relating to Community Payback Orders, especially the potential for restorative justice principles to play a more significant role in the criminal justice system.

Alcohol and sentencing

Following its deletion at Stage 2, the Government lodged an amendment at Stage 3 to reintroduce a section which will provide that at the point of sentencing, a court must not consider voluntary intoxication a mitigating factor. Kenny MacAskill argued this point saying "the issue is changing the culture that exists in Scotland that somebody is actually quite a nice fellow, but it was the drink that did it." The amendment carried, although it was taken to a vote, which went as follows: For 47 (SNP, Independent), Against 33 (Conservatives, Lib Dem, Green), Abstentions 45 (Labour).

Sentencing on Offences aggravated by Prejudice

Relating to aggravations of race or religion, the Bill amends existing legislation to require the court to explain how the aggravation has affected (or not affected) the sentence administered. The Bill also introduces a provision which provides that the aggravation can apply even if prejudice relating to religion is not the sole motivation for the offence. This is already the case for racial aggravations and therefore brings religiously motivated offences into line with these aggravations.

Double Jeopardy

An amendment put forward by Committee Convener Bill Aitken (Conservative) relating to double jeopardy, the ability to be tried for the same crime twice, was withdrawn after receiving assurances from the Cabinet Secretary that this issue will be consulted on and separate legislation brought forward in due course.

Mandatory minimum custodial sentencing for carrying a knife.

Labour and Conservative amendments were lodged at Stage 2 of the Bill process to attempt to add a section into the Bill which would require that anyone caught carrying a knife would be subject to a mandatory custodial sentence: the Labour amendment proposed a minimum jail term of 6 months, while the Conservative amendment sought to extend this to 2 years. Whilst the Conservative amendment was unsuccessful, the Labour and Conservative Committee members (on the Conservative Convener's casting vote) succeeded in adding the 6 month minimum to the Bill. The Church and Society Council of the Church of Scotland had submitted evidence to the Justice Committee opposing the proposals, saying that "...such a rigid response is at odds with the real need of society which is to address the underlying reasons for people choosing to carry knives". However, an amendment to delete the section was proposed at Stage 3, which was supported by SNP, Lib Dem, Green and Independent MSPs, and so this section does not appear in the final version of the Bill.

Criminal Offences

Stalking

Labour MSP Rhoda Grant had introduced amendments to the Bill at Stage 2 to create a criminal offence of stalking - previously a common law offence - but had withdrawn these, in order to lodge new amendments in conjunction with the Government who were seeking to tighten up the law in relation to breach of the peace, in particular "threatening, alarming or distressing behaviour". The reworked Stage 3 amendments were agreed to, therefore establishing stalking as a statutory offence, alongside clarification on the law on breach of the peace, which can occur in a non-public place, for example in the domestic context. Following some concern within sections of the Christian community that the Government's proposed Stage 2 amendments were wide enough to threaten freedom of speech (in particular, religious expression), the Justice Secretary assured Parliament that the concerns about infringing individuals' freedom of expression had been dealt with by narrowing the scope of the offence, and the intention behind the amendments was "to deal with stalking and with breach of the peace offences in domestic violence situations or against police officers. We continue to guarantee that those who have Christian views can express their views without coming before the courts."

Prostitution

Several new provisions were proposed by MSPs at Stage 2 relating to prostitution, notably an amendment lodged by Labour MSP Trish Godman to outlaw prostitution: criminalising the user rather than the provider of sexual services. This amendment fell at both Stage 2 and Stage 3 of the process; however, Ms Godman has already signalled her intention to launch a fuller consultation on the issue with the intention of pushing for legislation to provide better protection for those working in prostitution (consultation expected in September).

People Trafficking

The Bill extends the scope of offences, by including the facilitation of "entry into" as well as "arrival in" the UK as offences liable for prosecution. The changes contained in the Bill will mean that facilitating the arrival in or entry into the UK of a person for the purposes of exploitation, regardless of where the facilitation took place and irrespective of the nationality of the facilitator, will be an offence under Scots law.

Related to this, a new offence of holding a person in "slavery, servitude and forced or compulsory labour" has also been included in the Bill, applying Article 4 of the European Convention of Human Rights which prohibits this exploitative behaviour into Scots Law.

Criminal Proceedings

Changes to Jury Service

David McLetchie (Conservative), supported by Age Scotland (formerly Age Concern Scotland and Help the Aged in Scotland) successfully added a section to the Bill removing the upper age limit for exemption from jury service. The bill, as introduced, proposed raising the upper age limit from 65 to 70, but the intervention by Mr McLetchie means that there will be no upper age limit, although the Bill allows an opt-out for people over 70 who do not wish to serve.

Age of Criminal Prosecution of Children

The age at which a child can be prosecuted for an offence will be raised from 8 to 12. However, despite attempts by Robert Brown at Stages 2 and 3, the age of criminal responsibility remains at 8. This means that children can accept liability for a criminal offence between the ages of 8 and 12, but it will be through the welfare-based Children's Hearings system.

However, in its Stage 1 Report on the Children's Hearings (Scotland) Bill, the Education, Lifelong Learning and Culture Committee stated its concern that children are still carrying criminal records even when they have accepted liability for offences through the welfare-based Children's Hearings system. The age of criminal responsibility and the implications of that age threshold, therefore, will continue to be debated in the Parliament as the Children's Hearings Bill moves to Stage 2 after the Parliamentary summer recess.

Critics of this anomalous situation are particularly concerned that children who admit committing an offence within the context of this welfare-based system may still be liable to have a criminal record which will impact on future opportunities.

Remand of children in adult prisons

The Bill will repeal provisions existing in legislation which currently allows for children aged 14 and 15 to be detained on remand in prison. This section in the Bill therefore means that where a child under the age of 16 years is not released on bail or ordained to appear he or she should be remanded to the local authority to be detained either in secure accommodation or a suitable place of safety.

Retention of Samples

(a) Children

Related to the implications of behaviour classed as 'criminal' amongst children are the provisions pertaining to the retention of DNA samples of children - even if they go through the Children's Hearings system rather than the criminal courts. If a child (and their 'relevant person' - parent or guardian) accepts the grounds with which they have been referred to the Children's Hearings system - specifically for 'violent crime or sexual offences', their DNA data can be retained for a minimum of 3 years, with scope for extension of this time limit.

Although an attempt at Stage 2 had been made by Labour member James Kelly to extend the duration of retention of samples to an infinite time period for children who had been found to have committed a violent or sexual offence, this was disagreed to. The Committee (and, subsequently, the Parliament at Stage 3) rejected Lib Dem Robert Brown's attempts to require that DNA of children could be kept only if there were an application by the chief constable to the sheriff, who would have to be satisfied that the child continued to pose a risk to public safety that justified DNA retention.

(b) Adults

In Scotland, samples must be destroyed once a decision not to prosecute is taken or if proceedings end without a conviction.

For individuals who have had criminal proceedings begun against them, but which have not resulted in conviction, the destruction of data which currently applies contains an exemption for DNA data on those accused of certain serious violent or sexual offences, which can be retained for 3 years, and can be subsequently extended by a further 2 years by a sheriff, on a rolling basis.

Attempts to increase this limit for initial retention of samples from 3 to 6 years would have brought Scotland into line with English law; but the amendment fell amidst concern that the extension of time was in contravention of European human rights guidance on the subject.

The Bill extends the type of samples which can be retained under this exemption, and therefore will enable fingerprints, palm prints and other "relevant physical data" to also be retained.

The Bill also includes a new provision into existing legislation which allows for the retention of samples of individuals who accept a fixed penalty notice, provided the individual was arrested for a fixed penalty offence. This data can be retained for 2 years, but in this case, there is no option to extend this period of retention.

Licensing

Market Operators Licence

Section 125 which would have allowed local authorities to remove the voluntary sector exemption from market operator licence fees for the operators of private markets (ie markets at which goods are offered by more than one seller for sale to the public). Following representations to MSPs from the voluntary sector, including the Church of Scotland Guild, the whole section was removed from the bill at Stage 2. This, therefore, leaves the law at the status quo: charity and community groups will remain exempt from having to pay licence fees at private market events, such as car boot sales etc.

Alcohol

When the Criminal Justice & Licensing Bill was first introduced in March 2009, it included sections relating to alcohol licensing, particularly sections proposing a social responsibility levy on licensed premises, and raising the minimum age for the purchase of alcohol. These provisions were removed by the Government with the agreement of the Justice Committee at Stage 2, and introduced (alongside other measures to tackle Scotland's relationship with alcohol) in the Alcohol Etc. (Scotland) Bill.

Licensing of adult entertainment venues

Sandra White (SNP) reintroduced a group of amendments at Stage 3 which she had also taken to the Committee during Stage 2 concerning the licensing of adult entertainment venues. Her original amendment sought to add new provisions to the Bill giving local authorities the power to apply a specific licensing regime to lap-dancing and other adult entertainment venues which would give local authorities the power to say that no licences should be granted for venues in a particular locality. These amendments had proved controversial as the definition was too wide, and thus

attracted opposition from the performing arts sector in relation to the provisions about nudity. Ms White said her new amendment was a refinement on the previous one, and she reiterated that it was not about banning lap-dancing clubs, rather it was about giving local people the power to control what takes place in their communities. She was supported by her SNP colleagues, but could attract no further support and the amendment was defeated 45 – 76. Opponents said that the amendments were not clear enough on how this would affect existing establishments, and would create an extra level of bureaucracy for local authorities in addition to their existing licensing procedures.

Conclusion

With over 90 responses to the original call for evidence, a further 134 responses to a call for evidence on the new provisions at Stage 2 (carrying a knife, prostitution and adult entertainment licensing), and oral evidence from over 40 witnesses representing the Government, law enforcement bodies, Scottish Courts, the Prison Service, local authorities, voluntary organisations and academics; this Bill was a significant piece of work for the Scottish Parliament's Justice Committee. Described by Kenny MacAskill as "a comprehensive piece of legislation that takes forward the Government's priorities to reform our justice system by providing measures that strengthen, simplify and modernise it"; the hard work of implementing these reforms now begins. However, with obvious points of disagreement amongst the parties on many of the issues arising in this Bill, (Labour spokesman on Justice, Richard Baker said in his summing up: "what divides us on the Bill is far more significant than what unites us") it is clear that criminal justice continues to be a contentious policy issue, and looks set to be a battleground area in the forthcoming 2011 Scottish Parliament elections.