CRIMINAL PROCEDURE (AMENDMENT) (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Criminal Procedure (Amendment) (Scotland) Bill introduced in the Scottish Parliament on 7 October 2003. It has been prepared by the Scottish Executive to satisfy Rule 9.3.3(c) of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Executive and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 10–EN.

POLICY OBJECTIVES OF THE BILL

2. As stated in *A Partnership Agreement for a Better Scotland: Partnership Agreement*, the Scottish Executive is committed to reforming the courts and legal system to deal with cases more efficiently. The Executive undertook in the Partnership Agreement to legislate to reform the operation of the High Court. This Bill implements that commitment. The provisions are designed to introduce greater certainty into High Court proceedings and help develop a culture of a more managed system with emphasis on better communication between Crown and defence and earlier preparation by both parties. The provisions will assist victims and witnesses by creating greater certainty about when trials will proceed and preventing unnecessary adjournments. The provisions are complementary to those of the Vulnerable Witnesses (Scotland) Bill in securing a criminal justice system that fully supports victims and witnesses.

3. The policy objectives of the Bill are to:

- introduce a mandatory preliminary hearing in High Court proceedings so that the court may ascertain the readiness of the parties to go to trial;
- modernise the time limits for High Court proceedings to ensure adequate time for preparation so that trials proceed in a proper fashion without unnecessary disruption;
- replace the present system of trials within sittings with a system of trials on dates appointed by the court, so as to create greater certainty for all who have to attend, especially witnesses;
- remove the provision whereby an accused person may escape prosecution for all time because of a technical breach of custody time limits;
- clarify the provisions whereby the court may reduce a sentence in recognition of a plea of guilty by the accused in order to encourage earlier realistic pleas;

- give the court power to proceed with a solemn trial in the absence of the accused; and
- enable action to be taken with a view to ensuring the attendance at court of reluctant witnesses.

4. These measures are a package which together are designed to meet the objectives set out in paragraph 2 above. To remove any of the provisions would substantially weaken the effect of the whole.

BACKGROUND

5. In October 2001 the Lord Advocate laid before the Scottish Parliament the reports of two inquiries into the case surrounding the murder of Surjit Singh Chhokar. In his statement to Parliament he announced a broad review of the internal systems of the Crown Office and a wider review to include "all factors which impinge on the management and processing of High Court business in Scotland with a view to improving and modernising these".

6. On 14 December 2001 the Deputy First Minister announced the appointment of a High Court judge, Lord Bonomy, to carry out a review of the High Court of Justiciary. The remit was "To review the arrangements for High Court business at first instance in the light of the increasing demands made on the Court; to review the practices of the Court and those serving the Court and the rules of criminal procedure as they apply to the High Court; and to make recommendations with a view to making better use of Court resources in promoting the interests of justice."

7. Lord Bonomy's report *Improving Practice: 2002 Review of the practice and procedure of the High Court of Justiciary* was presented to the Executive in November 2002. It was published for consultation on 11 December 2002. The consultation period closed on 11 April 2003. The White Paper *Modernising Justice in Scotland: the Reform of the High Court of Justiciary* was published on 19 June 2003. This paper outlined the Executive's proposals for taking forward the recommendations of Lord Bonomy. A summary of the consultation responses was published on 15 July 2003.

CONSULTATION – GENERAL

8. Lord Bonomy's report, an executive summary and an online response form were published on 11 December 2002, with an invitation for comments on the recommendations, except for recommendation 24 which dealt with a matter which was reserved to the UK Government.

9. Approximately 1,080 copies of the report were sent to a wide range of organisations and individuals thought likely to have an interest in one or more of the areas covered by Lord Bonomy. This group included members of the judiciary, area and local Procurators Fiscal, professional bodies, universities and academics, local authorities, equality groups and voluntary organisations throughout Scotland. The consultation period ended on 11 April 2003 and although some responses were received after that date, all were fully considered. A summary of the report and the response form for consultation were available on the Scottish Executive web site in 6 community languages, and the consultation process advertised in the press. In total there were 28,500 successful web site page 'hits' for the report – an average of 200 per day.

10. In order to access the widest possible views a proactive consultation approach was adopted. Short consultation exercises involving small focus groups were undertaken. Specific categories of court users considered to be groups whose views are important but who are harder to reach were targeted. These groups included victims and their families, witnesses, prisoners and jurors. Permission was sought from the Lord Justice General to approach those who had recently required to attend to be considered for jury duty. A combination of focus groups and questionnaires were used to gather the views of these important groups.

11. In addition, a nationally representative survey using a random sampling framework was used to capture public views, including the views of young people, women, and older people. People from rural areas and lower socio-economic and ethnic minority groups were also included in this sample to ensure diversity in the response.

12. The Deputy First Minister, who was then also Minister for Justice, offered to meet with key stakeholders. The Commission for Racial Equality had such a meeting with the Minister.

13. There were 40 formal written responses from both professional organisations and individuals. An analysis of the consultation responses was published on 15 July 2003, a copy of which was sent to those who responded to the consultation. This analysis set out in detail the views of the various consultees on the Executive's proposals.

14. The White Paper, *Modernising Justice in Scotland: the Reform of the High Court of Justiciary*, published on 19 June 2003, set out the Executive's proposals, taking account of the consultation responses. This paper was sent to 530 individuals and organisations, but not specifically issued for consultation as there had been very full consultation on Lord Bonomy's report. However, the Executive did welcome further comments and any comments received will be made available on request provided confidentiality has not been sought.

15. All 3 documents (the consultation paper, report analysing responses and the White Paper) are available on the Scottish Executive website at www.scotland.gov.uk/publications.

THE WORK OF THE HIGH COURT OF JUSTICIARY

16. The High Court of Justiciary is one of two courts generally referred to as the Supreme Courts of Scotland. It is the Supreme Criminal Court in Scotland. The other court is the Court of Session and has responsibility for civil matters only. The High Court deals with the most serious criminal cases. There are some crimes only it can deal with, such as murder, rape and treason. In Scots law different procedure governs different types of cases. Serious cases are tried before a jury and the procedure is called "solemn procedure". All cases in the High Court are "solemn cases". High Court judges have the full range of sentences at their disposal, from an absolute discharge of an accused to life imprisonment.

17. All judges of the Supreme Court sit in both the High Court of Justiciary and the Court of Session. In addition the High Court, although based in Edinburgh, moves to different locations in Scotland to hear cases. Historically they visited places where prisons were located to deal with serious crime locally. Business is usually set down for a period of a fortnight, called a sitting. In

Glasgow these fortnightly sittings are continuous. The planning of the business of the High Court is dealt with by the Court's most senior judge, the Lord Justice General, and the Lord Advocate.

18. The Lord Advocate initiates criminal prosecutions. He, through his deputes, will decide what charges the accused will be tried on and where. If an accused is to be tried in the High Court he will be served with a document setting out the charges on which the Crown will try him or her. This legal document is called an indictment. Attached to it are lists of the witnesses the Crown will call and the items they will refer to in support of the charges. Service of an indictment on an accused usually follows an appearance by the accused before a sheriff. At that appearance the sheriff will have considered whether it is in the public interest to remand the accused in custody until his trial or to allow the accused to be released on bail. This appearance is an important step in what follows because it determines the starting point for the 12 month period within which the case must be brought to trial.

19. Where the sheriff remands an accused in custody he must receive his indictment by the 80th day of his being fully committed for trial by the sheriff. The trial of the accused must begin by the 110th day. These time limits apply to any case to be tried before a jury whether it is in the sheriff court or the High Court. The trial diet must be not less than 29 days after the service of the indictment.

20. In each case when the indictment is served at the 80th day the defence will have 29 days to prepare for trial. There is a body of evidence that supports the view that these 29 days are insufficient preparation time for those representing accused indicted in the High Court. This has caused many cases to be adjourned to another day because the defence team needs more time properly to prepare the case for the accused. For many victims, witnesses and jurors who are present in court or on stand-by to attend, this means being told to go away only to come back on some other date.

21. In a case where an accused who has appeared on petition is at liberty, the trial must start within a year of the accused's first appearance on petition, which means in practice that the Crown has until the end of 11 months to serve the indictment. Wherever possible, the Crown achieves earlier service but trials are still subject to adjournment with all the uncertainty that this entails for victims and witnesses.

22. One of the main aims of this Bill is to introduce certainty into High Court procedure for all of those involved in the trial process and to ensure that trials proceed when the parties are ready. It is recognised that the current practices of the High Court do not deliver this. Lord Bonomy identified that the trial diet has in effect become a procedural diet where preliminary legal points are canvassed and motions to adjourn the trial are frequently made. For those accused who have been remanded into custody this frequently results in the 110 days being extended beyond the initial 110 day period until such time as the defence are fully prepared and both parties ready for trial. Another difficulty leading to adjournments is the non-appearance of key witnesses or the accused himself.

DETAILED PROPOSALS

More thorough preparation of cases

Improving communication

23. The Bill introduces measures to improve the communication between the Crown and defence at an early stage and to provide an opportunity for them to exchange information to assist with the early preparation of cases and to identify those cases which are ready to go to trial. They will agree and lodge a record of the state of preparation of the case for the court to consider together with a number of other matters before the court appoints the date of the trial.

24. Pre-trial many issues are raised, the discussion of which can occur very close to the date of the trial, often after the witnesses have been cited and a period of court time for the trial has been set aside. The Bill will provide an opportunity for these pre-trial issues to be raised and where possible resolved prior to the appointment of the trial diet.

Preliminary hearing

25. This Bill provides for a new hearing to be introduced into the High Court after service of the indictment and the lodging of the record of the state of preparation of the case. This is to be called a "preliminary hearing". The purpose of the hearing is to enable the court to consider before the trial many issues that can under the present system lead to the trial being adjourned. The court will in the light of proceedings at the hearing and having ascertained the state of preparation of the case appoint an appropriate date for the trial.

26. At present there is no mandatory pre-trial hearing for cases indicted into the High Court. An indictment is served on the accused intimating the place of trial and requiring the accused to attend for trial on the first day of a two week sitting. There is normally no court appearance before then and it is the Crown who decides the place and likely date of the trial. This Bill will give the Court and not the Crown the right to decide the date and place of the trial after consideration of preliminary issues and the state of preparedness of the parties.

27. The judge will require actively to "manage" the case at the preliminary hearing. On the basis of the record of the state of preparation, the judge will question the parties on such items as what evidence has been or can be agreed and whether any changes to the existing bail conditions to meet victim or witness concerns may be required. The judge will enquire about the general state of preparedness for trial and check the availability of defence counsel for the proposed trial diet. If the accused pleads guilty, sentence will be passed or, if necessary, the judge will adjourn for pre-sentence reports. The record of the preliminary hearing will be part of the formal record of the proceedings in the case.

28. It will be the responsibility of the judge at the preliminary hearing to ensure, so far as possible, that any matter that is likely to delay the start of the trial has been resolved before the date for trial has been fixed. If this, coupled with the duty to prepare a record of the state of preparation and to agree non-contentious evidence, is dealt with in a responsible manner by those concerned, trials should be more focussed and fewer members of the public and professional witnesses, some living and working in areas remote from the High Court, will be inconvenienced unnecessarily.

29. It is also intended that the preliminary hearing should be the occasion when the Court deals with any application for special measures under the Executive's proposals in the Vulnerable Witnesses (Scotland) Bill.

30. The preliminary hearing will become the date to which other periods of notice relate. To ensure timely preparation the Crown will require to give notice of additional witnesses or other evidential material at least seven days before the preliminary hearing and will only be able to introduce such witnesses or material later on cause shown. This should assist in reducing the number of adjournments due to crucial evidence requiring defence investigation being submitted late and gives the Court a management role in determining what can be admitted late. The defence should also give notice of witnesses required or intended to be led by them, productions and special defences and similar notices on the same timescale and basis.

Consultation

31. Proposals regarding the introduction of preliminary hearings were supported by almost all consultees. Some consultees were of the view that it should be modelled on the first diet procedure in the sheriff and jury court where there exists a mandatory first diet before the sitting in which the trial is to take place. There was concern - particularly from some of the judiciary - as to the resource implications for the High Court. Others stressed that the success of the hearings would depend on a pro-active and consistent approach by the bench. Sheriffs Principal and sheriffs had some concerns about read-across to the sheriff court, although they felt that in principle solemn procedure should be the same in both courts. Organisations representing solicitors and the police were uniformly supportive of the proposals.

Alternative approaches

32. As indicated above, the proposals in the Bill are a package from which it is impossible to detach individual proposals without seriously undermining the effectiveness of the measures as a whole. The preliminary hearing is an essential part of the procedure to ensure that parties are fully prepared for trial and to avoid unnecessary last minute adjournments.

Modernised time limits

Custody time limit

33. Under the present law, the time limits for trials under solemn procedure (i.e. jury trials) are as follows:

- where the accused is remanded in custody to await trial, the trial must start within 110 days of full committal for trial. The prosecution must issue the indictment - the detailed charges which the accused has to answer - not less than 29 days before the start of the trial. The indictment must, therefore, be issued by the 80th day.
- in a non-custody case the trial must start within 12 months of the first appearance by the accused on petition in respect of the offence. Again, the prosecution must issue the indictment not less than 29 days in advance of the start of the trial.

34. The consequence of inadvertently breaching either the 110 day time limit or the 12 month time limit is that the accused will be free for all time from the charges.

35. The custody time limit can only be extended by a High Court judge, whether in a sheriff and jury or a High Court case. The 110 day or 12 month time limits can be extended by the Court on application by the Crown or the defence or both. The Crown can also apply to extend the 80 day time limit.

36. If the Crown fail to bring an accused person to trial within the time defined by statute then the person accused of the crime must be released and can never be tried again. This applies irrespective of the seriousness of the crime. It also applies where all parties were ready for the trial to commence but there has been a simple human error in the calculation of the date.

37. The 110 day time limit has sometimes been described as the "jewel in the crown" of the Scottish criminal justice system. This is because it provides a very tight time limit that ensures persons accused of serious crimes are not kept in custody for undue periods in uncertainty about their fate.

38. A long extension of the 110 days is exceptional in Scotland, and confined to highly complex cases such as the "Lockerbie" case. However, short extensions have become much more frequent in recent years, particularly in the High Court. As Lord Bonomy found, an extension was granted in only 11% of custody cases in 1995, but in 23% of cases in 2001. Bearing in mind his parallel finding that over 55% of all cases were in that year dealt with as a plea of guilty, that is a very high proportion.

39. The Crown almost invariably manages to meet the 80 day deadline for issuing the indictment, but is rarely able to issue it far in advance of that point given the scale and complexity of the investigation required in High Court cases. This means that, although the defence will have been able to precognosce (interview) witnesses on the basis of the Crown's provisional list and may have seen reports and some other case documents, the period available to the defence for much of the preparation for trial is normally the 29 days or so between around the 80th and 110th days. There are many steps to be taken during that period. The defence has to study the list of witnesses, carry out precognitions if appropriate, inspect the productions that will be shown to the jury in court, and give notice to the Crown of any special defences or procedural matters that the defence wishes to raise. In addition, the Crown may give late notice of particular aspects of evidence such as forensic reports which then require to be examined by the defence.

40. The Executive propose no change to the 80 day limit within which the Crown has to serve the indictment. This, rather than the 110 day time limit, is the key "jewel in the crown" in that it meets the requirement that an accused person should not lose his liberty for a lengthy period without knowing the charges he is to face and when he is to be tried for these crimes.

41. The Executive propose that the 110 days should run, not to the trial in the High Court, but to the preliminary hearing at which the Crown and defence would appear before a judge to discuss their readiness to go to trial. The accused would also be required to attend, and would therefore (as at present) be brought before the court within 110 days. The trial would have to start within 140 days.

42. The Bill provides a window of an additional 30 days beyond the 110 days within which the court must fix a trial diet. This will ensure there is sufficient time for the parties to complete trial preparation including the citing of witnesses, and for court programming.

The 12 month time limit

43. The current position in Scots law for solemn cases commenced on petition is that the trial must take place within 12 months of the first appearance of the accused before the sheriff. It is recognised that it is to the benefit of justice that cases are dealt with while witnesses' memories are still fresh and they are able to provide the best evidence.

44. A similar problem for defence preparation can arise at the end of the 12 month time limit as arises in relation to the 110 day time limit. The indictment must be issued at least 29 days in advance of the trial, leaving the defence with a similar period to complete its preparations for trial. While the Crown aspires to issue indictments well in advance of the 12 months, this is not always possible and in 2001, extensions of the 12 month time limit were sought in 24% of cases.

45. The Executive propose that in the High Court there should be a mandatory preliminary hearing in petition cases no later than 11 months after first appearance. This will require the Crown to serve the indictment after 10 months and allow the defence a further 30 days to complete its preparations for trial.

Consequence of breaching time limits

46. Under current provisions where for any reason a trial does not take place within 110 days and there has been no extension of the existing time limit the accused is forever free from prosecution of the crime. This rule does not take account of the type of crime or the impact on the victim when no trial can ever take place. The Bill provides for an accused to be entitled to bail if the 80, 110 or 140 day limits are breached but the Crown will still be entitled to prosecute providing the trial starts within 12 months of the first appearance on petition before the sheriff.

Extensions and variations of trial date

47. At present all custody time limits require to be extended by application to the High Court. The Bill provides for the sheriff to deal with applications to extend the time limits for cases indicted into the sheriff court.

48. It is recognised that even when trial diets are fixed a problem unforeseen at the preliminary hearing could arise. In order to minimise inconvenience to victims and witnesses by waiting until the fixed date before putting the trial off until another date the Bill provides that an application can be made to the court to discharge the trial diet and substitute another date. Where parties agree to this course, and jointly support any time limit extension which is required in parallel, the Bill provides for this procedure to be carried out administratively to avoid costly and unnecessary appearances.

49. The Bill provides a protection to accused, victims and witnesses to ensure that cases set for trial are judicially managed. Therefore where parties do not agree to the trial date being altered or

where they agree but the court is not satisfied a hearing will be fixed in the case to enable parties to explain the position more fully to the satisfaction of the court.

Consultation

50. The Faculty of Advocates and some of the judiciary were in favour of the recommendation that the 110 day limit should run to the preliminary hearing, with a further 30 days within which the Court may fix a trial. Some other consultees were not persuaded by the arguments and suggested that the recommendations for early disclosure be implemented before a decision is made on modifications to the time limits. They stressed the importance of early case preparation by both prosecution and defence. Some consultees expressed the view that the extension of any custody time limit should always be dealt with by the High Court.

Alternative approaches

51. As indicated earlier, the proposals in the Bill are a package from which it is impossible to detach individual proposals without seriously undermining the effectiveness of the measures as a whole. While it is argued that a preliminary diet is accommodated in the sheriff and jury court without extending the 110 days, that does not mean the same is readily possible in the High Court. There are additional complexities that have to be accommodated in the High Court, including the fact that the location may be remote from the place where the accused is held, and from the home base of witnesses and solicitors. In addition, the attendance of counsel will be required at the preliminary hearing. In the circumstances it is essential to provide some extension of the 110 day time limit to ensure that a meaningful preliminary hearing can take place and still allow the defence enough time to complete its preparations for a trial, should a trial be necessary. An extension of 30 days seems reasonable to ensure that the culture of adjournments is not simply recreated under the new time limit. The aim of the 30 days is to ensure that the need for adjournments is minimised in all cases.

52. There were mixed views from consultees regarding the proposal for bail to be granted when a custody time limit cannot be met, rather than the current position of an accused being forever free from prosecution in these circumstances. The Executive considered, however, that this proposal struck the right balance between the rights of the accused and the wider rights of society to see these accused of serious crimes brought to trial. Under the provisions of the Bill, if the time limits are breached the accused will gain his liberty and the victim will see the matter brought to trial providing the trial commences within the 12 month limit.

53. In petition cases, the initial proposal by Lord Bonomy was that trials should have a preliminary hearing within 9 months. For the Crown this would have involved serving the indictment at 8 months. There are a number of changes being made in the Crown Office in relation to its organisation of solemn work. The Executive consider that the Crown must have the scope to manage its limited resources in the most effective manner and that a general deadline of 9 months for a preliminary hearing is too onerous for the Crown. The Executive do see the logic in the defence having the same minimum preparation time in relation to the 12 month time limit as the custody time limit. That is why a limited change is proposed by the Bill to require a preliminary hearing at 11 months after the first petition hearing, requiring service of the indictment at 10 months.

Encouragement to early realistic pleas

54. Under the present law, there are very few fixed formulae for calculating sentences (examples being the mandatory life sentence for murder and the mandatory sentence of 7 years for a third offence of Class A drug trafficking). The Court of Criminal Appeal does, however, provide a mechanism for regulating consistency of sentencing. The convicted person may appeal against sentence and the Lord Advocate may also appeal on grounds of undue leniency. The Appeal Court may promote consistency through reducing or raising the sentence imposed by the court of first instance. The Appeal Court may express an opinion in an appeal against sentence as to the appropriate sentence for similar cases (referred to as sentencing guidelines) and the lower courts in passing sentence must have regard to any such guidelines. The courts also have a role in determining the date on which a sentence is to start to take account of time already spent on remand in custody.

55. The court may also adjust sentences to take account of a plea of guilty. Under the present law, in deciding on the appropriate sentence to pass a court may take into account the stage in proceedings that the accused indicated his intention to plead guilty and the circumstances in which that indication was given. There is no requirement to discount a sentence for an early plea of guilty.

56. It is the intention of the Bill that early and more thorough case preparation by the defence should result in more accused persons and their legal advisers being ready at the preliminary hearing stage to take a decision as to whether to plead guilty rather than pleading not guilty and proceeding to trial. The Executive recognise, however, that a decision to plead guilty will not always be taken at that stage. Faced with a reasonable prospect of acquittal the accused is likely to want to go to trial, but if faced with little or no prospect of acquittal, what the accused wants above all is an indication of what sentence is likely to be imposed. The evidence of practitioners suggested that accused persons would be more likely to plead guilty at an earlier stage if the sentence was likely to be significantly reduced as a result.

57. If the accused pleads guilty early this spares any victims and witnesses from having to listen to or give evidence and the sooner the accused does this the less time the victims and witnesses will have to wait in uncertainty. The Bill amends the current law to clarify this important aspect of sentencing. The Bill requires that the court <u>shall</u> (not "may") take into account the stage in proceeding that the accused indicated an intention to plead guilty and the circumstances in which that indication was given. Where the court elects to give no discount for a guilty plea then it must state its reasons.

58. The proposal in the Bill should signal to the sentencing judge that he must take account of the timing of the plea and the circumstance in which it was given. The Executive do not propose to remove the possibility of a discount from pleas on the day of the trial. To spare witnesses the ordeal of giving evidence even a plea of guilty on the day of the trial may merit some discount.

Consultation

59. Views were mixed. On balance the judiciary wanted the Appeal Court to give clear guidance as to what reductions in sentences should be given depending on the timing of the plea. The judges considered that any discount that was to be applied should be set down by statute but that there should be a separate element that they could impose in relation to the seriousness of the crime and

any mitigating factors. They also wanted the discretion to take the seriousness of the offence into account so that a guilty plea would not always merit a discount. Public focus groups favoured an increase in sentence for those who pled on the day of the trial. Some others wondered if it was wise to discourage sentence discounting for a plea at the trial diet because it at least spared the witnesses the ordeal of giving evidence.

Alternative approaches

60. An overt system of plea-bargaining was considered and rejected. It did not fit well with our model of jurisprudence. Restricting judicial discretion by requiring a discount to be applied was also considered but considered inappropriate. The Executive has decided to remit to a judicially led Sentencing Commission the question of whether further measures are needed to promote consistency in sentencing.

Greater certainty that trials will proceed

Trial diets appointed by the court

61. An accused person who appears on petition has no certainty about when his trial will proceed until he is served with an indictment setting out the charges he will face and the witnesses and items the Crown may rely on to prove the case against him. Under current law the date of his trial is an uncertain event and the only certain information given to the accused is the place of the trial and the sitting during which the trial will take place. The sitting is a period of time that the court will be available to hear trials set down for the sitting, which is usually a period of ten working days.

62. The Bill provides for the trial to be appointed by the judge presiding at the preliminary hearing. The date will be set by the court in the light of information from the parties as to their state of readiness. At the preliminary hearing the court can consider whether the trial is one that should be given an early trial date, for example because it involves children or vulnerable witnesses. The court will be able either to give a firm trial date on which the case must be considered by the court, or a trial date which can be continued administratively for a number of days. This is to provide adequate flexibility while enabling the court to prioritise clearly those cases which must start on a particular date.

Witnesses

63. There are other factors that can prevent trials taking place when planned. In particular it can happen that there are witnesses who are deliberately avoiding being cited to give evidence or who, having been cited, do not appear. Warrants can be issued for the arrest of a witness who either avoids citation because he wilfully evades the police, or who once cited does not appear for trial. Once arrested the witness must either find financial security for the court to ensure attendance or be remanded into custody until their evidence is given. Research conducted on behalf of Lord Bonomy indicated that witness problems were the most common cause of adjournments sought by the prosecution.

64. The Bill will provide the solemn courts with the power to grant a warrant before the trial has begun for a witness who has deliberately avoided citation and for a witness who has absconded after citation. On arrest any such witness will require to appear before the court, which will decide after

hearing the parties how best to ensure the attendance of the witness at the trial. It will be able to release the witness on bail conditions, as well as having the current options of remanding the witness in custody or liberating him or her. It will no longer, however, be able to require the witness to find financial security.

Trial in absence

65. Trials can also be delayed because of the non-attendance of reluctant accused. Where this happens on the day of the trial it means the attendance of victims and witnesses to give their evidence only to find proceedings are abandoned until the accused is arrested whenever that may be. Where an accused absconds mid-trial the trial is abandoned until the accused is arrested and then the whole trial must start again causing victims to give evidence twice in the same trial.

66. It has always been clear in England and Wales that the courts have power to continue with a trial where the accused absconds during the trial. The issue of whether the courts in England and Wales had this power in cases where the accused absconded before the trial had begun was recently considered in the House of Lords case R v Jones [2002] All ER 113. The House of Lords held that the courts in England and Wales did have that power at common law but their discretion should be exercised with the utmost care and caution and the judges required to ensure that the trial was as fair as circumstances permitted and would lead to a just outcome. In Scotland, there is no general power available to the courts to continue or proceed with a trial in absence. The 1995 Act expressly provides that the accused must be present at his trial except in certain minor summary cases for which imprisonment is not available. There are also provisions which allow solemn and summary trials to proceed in absence when, after the trial begins, the accused misbehaves such that a proper trial cannot take place in his presence and has to be removed from the court.

67. The Executive consider that it is appropriate to provide the Scottish courts with the same flexibility in solemn proceedings as the courts in England and Wales presently have. The Bill therefore provides for a solemn trial to proceed or be concluded in the absence of the accused, on the motion of the prosecutor, in circumstances where accused has been properly cited and the court considers that it is in the interests of justice to proceed. It will be for the court to weigh up the different factors and it is likely to consider it appropriate to exercise its discretion in this way only in limited and exceptional circumstances and after having made strenuous efforts to find the accused. The Bill makes provision for the court to appoint a legal representative to act in the accused's best interests. It also provides that the notice accompanying an indictment which cites an accused to appear before the court (in the High Court at a preliminary hearing, in the sheriff court at a first and trial diet) will state clearly the potential consequences of non-appearance.

Consultation

68. With the exception of trials in absence these proposals were uncontroversial. In relation to bail for reluctant witnesses some consultees asked that consideration be given to those witnesses who were in fear of the accused. In relation to trials in absence the fundamental right of an accused to be present during his trial was stressed by consultees.

Alternative approaches

69. At present the only way of dealing with uncooperative witnesses is to remand them into custody, sometimes to an uncertain date with no time limit, or to require them to find financial security. These options were considered to be too stark. Bail for reluctant witnesses enables the court to consider the individual circumstances of the witness with the full range of bail options available. This will enable the court to keep some central control without the need for the witness to be taken into custody.

70. In relation to trials in absence of the accused the Executive have considered how best to balance the rights of victims with the right of the accused. Witnesses and victims must suffer the uncertainty of when a trial will proceed when the accused has not appeared for trial and a warrant has been taken for his arrest. If the accused chooses not to appear for trial after all the evidence has been concluded then the trial has to be abandoned and on arrest the Crown must start again and the witnesses give evidence again. This would seem unjust particularly where the accused has deliberately tried to frustrate justice by his non-attendance. The Executive have therefore concluded that the provisions in the Bill, which ensure that the accused will be legally represented in any trial in absence and that the potential consequences of non-attendance will be spelled out early in the process, strike the right balance in this difficult area.

Electronic monitoring on bail

71. The policy intention is to make legislative provision to empower the court in summary and solemn proceedings to impose electronic monitoring of an accused as a condition of bail to replace custodial remand in appropriate circumstances. The provisions are intended to offer an additional bail condition in cases where the court would otherwise have remanded the accused in custody not as an additional measure in cases where the individual would, in any case, have been granted bail. It is the intention to pilot the provisions. Electronic monitoring will be used to monitor compliance of the restriction to a specified place or from a specified place. The arrangements will build on the arrangements already in place under provisions in the Criminal Procedure (Scotland) Act 1995 for the electronic monitoring of restriction of liberty orders.

Consultation

72. Restriction of liberty orders (RLOs) were piloted in Scotland from 1997. A positive evaluation of the pilot projects in 2000 was followed by a consultation on the future use of electronic monitoring in Scotland later that year. As a result, the Scottish Ministers decided to make RLOs available to courts across Scotland from May 2002. This has established a national infrastructure for electronic monitoring in Scotland which supports its further uses. Those responses which commented on the consultation paper's consideration of extending the use of electronic monitoring as a condition of bail were largely supportive but raised the issue that electronic monitoring might be used in cases where bail would normally be granted. With the infrastructure in place and experience of the use of electronic monitoring growing, the conditions now exist to proceed to make provisions for electronic monitoring as a condition of bail.

Alternative approaches

73. Research commissioned by the Justice Department into the operation of bail and remand in the context of the rising remand population in Scottish prisons, considered alternative approaches. Interviewees supported the use of electronic monitoring as a useful additional option for the courts. The main alternative would be the use of custodial remands which, if they continue to increase, would put further pressure on prison numbers.

74. Lord Bonomy suggested that the Executive should introduce electronic monitoring of reluctant witnesses. The White Paper noted that while in time electronic monitoring of witnesses might be an option, the Executive did not intend to use it in the short term. The Bill provides for electronic monitoring of persons on bail which could be used for reluctant witnesses, as and when appropriate practical arrangements are made.

Supporting victims and witnesses

75. The preliminary hearing is a key tool for improving the experience of vulnerable people who have to come to court. At this hearing the special measures required by witnesses to deliver their evidence would be considered and agreed in advance of the trial diet.

76. Witnesses and victims may become anxious at the prospect of meeting the accused within the confines of the court building. The preliminary hearing will address what additional measures may be required in relation to the terms and conditions of any bail order an accused person must comply with, which could include measures to avoid the accused meeting up with victims and witnesses.

Consultation

77. There was general support in consultation for the proposals to introduce certainty into the system particularly for vulnerable witnesses and victims and how best to deliver their evidence. There was general support also for more people management within the confines of the court to reduce the trauma of meeting the accused and his friends and family within the confines of the court.

Alternative approaches

78. Consideration was given to how best to limit the opportunity for victims and accused to meet in the court building prior to trial. It was thought that to make it a condition of bail that an accused attends 45 minutes before court to sit in a bail room for bail accused (as Lord Bonomy proposed) was unworkable. Court buildings vary in relation to accommodation. The accused would require separate accommodation and would require supervision. Accommodation for accused persons would be competing with the provision of accommodation for vulnerable witnesses and there are issues about enforcing compliance.

79. It is recognised that not every case will present with these problems and also that the circumstances surrounding the accused's bail may require further consideration at the preliminary hearing. The Bill provides that the court will at the preliminary hearing review the bail position, and

it will therefore be able to make changes to bail conditions to protect victims and witnesses. A trial diet appointed by the court should, in itself, help reduce the number of opportunities for accused and witnesses to meet. Once the trial has started then the trial judge has discretion to consider what is required on a day to day basis as the trial proceeds.

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

Impact on equal opportunities

80. The policy is designed to promote the best interests of justice and to introduce certainty into the High Court to the benefit of victims and witnesses while fully maintaining the right of the accused to a fair trial. The interests of justice require equal treatment of all those involved in the criminal justice process. Like cases should be treated alike. However it is also recognised that different groups may require special consideration to ensure that they can give their best evidence. The Bill enables special consideration to be given to the needs of different groups at a preliminary hearing so that the court is ready to meet these needs on the day of the trial. This opportunity does not exist at present in the High Court. The proposals will therefore be of benefit to victims of sexual crime, child witnesses, elderly or frail witnesses or those with a mental disorder or disability, and those whose first language is not English, as well as any other special group.

Impact on human rights

81. As a consequence of the creation of the preliminary hearing, section 4 of the Bill prevents the accused from conducting his case in person at the preliminary hearing if he is accused of certain sexual offences or the case involves vulnerable witnesses. As in relation to the existing restriction for solemn High Court cases that was introduced by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002, the Executive do not consider that these further changes infringe the accused's right to a fair trial. The underlying purposes remain greater protection to the right of witnesses to respect for their private and family lives and the provisions seek to achieve a reasonable balance between the rights of the accused and the rights of witnesses.

82. In relation to trials in absence, the provisions in the Bill in section 11 raise issues in connection with the rights of the accused under Article 6 of the ECHR. Article 6 confers a right to a fair trial, and in terms of the ECHR jurisprudence that includes a right of the accused to be present at and to take part in a hearing into his case that is adversarial in nature. The European Court of Human Rights has not found a breach of the ECHR where a defendant, fully informed of a forthcoming trial, has voluntarily chosen not to attend and the trial has continued.

83. Further there is nothing in the Strasbourg jurisprudence to suggest that a trial of a criminal defendant held in his absence is inconsistent with the ECHR (see Lord Bingham in R v Jones [2002] All ER 113). The Executive consider that the ECHR case is strengthened if it can be demonstrated that there has been an unequivocal waiver of the accused's right to appear and accordingly has made provision requiring the accused to be informed of the possibility of trial in absence when he is served with the indictment. The Executive have also considered it appropriate to require the courts to appoint a legal representative to act in the accused's best interests so that the fairness of the proceedings can be monitored.

84. The provisions that allow bail conditions to be monitored electronically where bail is granted to the accused or reluctant witnesses raise Article 8 issues. The Executive consider that the provisions are justified as necessary for the pressing social needs of prevention of disorder or crime and the protection of the rights and freedoms of others. The power to impose remote monitoring is judicially controlled and there is provision for review by the court. The proportionality of remote monitoring of bail conditions would depend upon the facts and circumstances of each particular case.

Impact on island and rural communities

85. The Executive consider that the Bill has no disproportionate effect on island or rural communities. The Bill retains the flexibility for cases to be moved to different court buildings, which may be more appropriate for certain accused who require to attend preliminary hearings in Edinburgh and Glasgow.

Impact on local government

86. The Bill will not have a significant impact on local government. More focussed trial preparation and a fixed and certain trial date should reduce the numbers of police officers attending court unnecessarily.

Impact on sustainable development

87. The Bill will have no negative impact on sustainable development.

This document relates to the Criminal Procedure (Amendment) (Scotland) Bill (SP Bill 10) as introduced in the Scottish Parliament on 7 October 2003

CRIMINAL PROCEDURE (AMENDMENT) (SCOTLAND) BILL

POLICY MEMORANDUM

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