



## Handy Guide to criminal justice in the Scottish Parliament

September 2008 – July 2009

Katrina Morrison<sup>1</sup>

### Summary

The SNP Government's first year was dominated by reviews and consultations. In this second year these began to be translated into policy. The Government continued to rely in many instances on 'frameworks' and 'strategies' (for example, in their approach to drugs, alcohol and anti-social behaviour) rather than opt for primary legislation. The exception lies with the important Criminal Justice and Licensing Bill, which brings together many of the ideas from the consultations and reviews of the first year including the proposals of the [Prison Commission](#). It is ambitious and in many parts controversial, and the Government have faced considerable opposition during debates about aspects of it. All the year's developments have taken place against the backdrop of a tight fiscal settlement and new and critical levels of prison overcrowding.

Although never in a strong or comfortable position, the Government have so far managed to survive and the Justice Secretary in post, despite pressure from Opposition parties over issues such as the minimum pricing for alcohol, several high profile open prison absconds, the abandonment of a community court in Glasgow, proposals to restrict short prison sentences and very recently of course, the Megrahi affair (still very much an evolving situation as we go to press)

Because of their minority status, the Government will require co-operation from at least some of the Opposition when it comes to voting on the Bill and other justice issues, and this is far from guaranteed. The Conservatives have proved fairly entrenched when it comes to issues such as sentencing, although they are more sympathetic to female offenders and are firmly behind the community court model. Labour have continued to hold onto their old policies and criminal justice ethos, calling for a 'victims commissioner' and mandatory sentences for carrying a knife. The Liberal Democrats are keeping their cards closer to their chest, and if the Government are able to win any support from Opposition benches it is likely to be from these quarters, although this is still far from guaranteed.

### Acts passed

#### [Judiciary and Courts \(Scotland\) Act 2008 \(2008 asp 6\)](#)

This Act guaranteed judicial independence, established the Scottish Court Service as a body corporate, made the administration of courts in Scotland the responsibility of the Lord President, the most senior judge in Scotland. It also makes changes to judicial appointments, training, and discipline.

---

<sup>1</sup> Katrina Morrison is a PhD student at Edinburgh University and contributes a weekly summary of criminal justice activity in the Scottish Parliament to the CjScotland web site. See: [http://www.cjscotland.org.uk/index.php/cjscotland/dynamic\\_parliament](http://www.cjscotland.org.uk/index.php/cjscotland/dynamic_parliament)

[Offences \(Aggravation By Prejudice\) \(Scotland\) Act 2009 \(2009 asp 08\)](#)

This short bill was introduced by Patrick Harvie MSP and supported by the Government. It introduces a new statutory aggravation which would be applied when sentencing, to cases of crimes which have been motivated by 'malice or ill-will' based on a persons actual or presumed sexual orientation, transgender identity or disability. Such aggravations already exist for crimes motivated by religious or race hatred. It had an easy passage through Parliament and passed Stage 3 on 3<sup>rd</sup> June, 2009.

[Sexual Offences \(Scotland\) Act 2009 \(2009 asp 9\)](#)

This Act provides a new statutory definitions of sexual offences. As well as consolidating much of the existing law on sexual offences, the Act also reforms and clarifies the law in a number of important areas, such as the definition of 'consent' and introduces 'protective offences' to protect those whose capacity to consent is diminished. Much of the Act was based on recommendations from the Scottish Law Commission, apart from two exceptions: it did not decriminalise consensual sexual activity between 13-15 year olds; and the recommendation to decriminalise consensual adult sexual violence was also excluded. It was marked by a large degree of cross party consensus on its route through Parliament, and was passed at Stage 3 on the 10<sup>th</sup> June, 2009.

[Convention Rights Proceedings \(Amendment\) \(Scotland\) Act 2009 asp 11](#)

This was an emergency Bill that passed through all stages on the 18<sup>th</sup> June. It dealt with an anomaly in the Scotland Act 1999 by preventing future claims against the Government under the ECHR other than those arising within one year of the breach alleged. The immediate justification for the Act was the potential costs of claims by prisoners in relation to stopping out (Napier) and segregation (Somerville). However, as the Law Society pointed out, this Act applies to anyone whose human rights may have been violated. In the rush to deal with the prisoner cases, other potential causes and interests may have been given insufficient attention.

## **Current Bills**

[Criminal Justice and Licensing \(Scotland\) Bill \(SP Bill 24\)](#)

The key justice Bill before the Parliament this year has been the wide ranging and ambitious Criminal Justice and Licensing Bill, which was introduced on the 5<sup>th</sup> March, 2009. Its key proposals are to:

- create a Scottish Sentencing Council to provide sentencing guidelines
- create a presumption against custodial sentences of six months or less, and replace the custody-only provisions in the Custodial Sentences and Weapons (Scotland) Act 2007 with short-term custody and community sentences.
- create a unitary Community Payback Order to replace all existing community penalties
- create new offences to tackle serious organised crime and a new offence which will criminalise the possession of extreme pornographic images
- raise the age of criminal responsibility to 12 (from 8)
- allow the retention, for at least three years, of fingerprints and other forensic data taken from persons proceeded against but not convicted of a serious sexual or violent offence and the retention for up to three years of forensic data taken where a child accepts or is found by a Sheriff to have committed certain serious or violent offences.

There are also a number of provisions relating to the Licensing trade; some changes to criminal procedure; and clarification of provisions on disclosure of evidence.

When the Bill was introduced, it contained two further measures relating to alcohol:

- to prohibit the off-sales of alcohol to people under the age of 21
- and to promote a social responsibility levy on commercial enterprises to help pay for the cost of alcohol abuse.

These were removed from this Bill and will instead be included in the 'Alcohol Misuse Bill' to be introduced in the 09-10 session.

The Justice Committee is yet to report, and the Parliament has yet to cast a vote on the Bill, although it is possible to discern possible directions from questioning in the Committee and in questions in the Chamber. Some parts of the Bill are more contentious than others, and it seems very unlikely that it will emerge intact without considerable concessions and modifications made along the way. Stage 1 is due for completion by the end of October.

#### [Draft Children's Hearings \(Scotland\) Bill](#)

Following the '[Strengthening For The Future](#)' consultation, the Government published a draft Bill to reform the Children's Hearings System in order to allow further discussions to take place before the final version is published. It aims to create a new body, the Scottish Children's Hearings Tribunal, which will bring together the existing 32 Children's Panels, and will be responsible for recruitment, support and training for all local panel members.

### **Other Justice issues**

#### Knife Crime and Mandatory Sentencing

Opposition parties called for mandatory prison sentences for knife crime, supported by a [petition by John Muir](#) whose son was murdered by an offender with previous convictions for knife crime. In response to the petition, the Petitions Committee held an unprecedented 'knife crime summit' in the Chamber at Holyrood in January which brought together relevant bodies to debate the issue. The Government have so far not made a commitment to mandatory sentencing, placing greater emphasis on strategic work with partners including the Violence Reduction Unit.

#### Prison Overcrowding

Overcrowding in Scottish prisons reached an all time high this year, a situation which formed the backdrop for related debates springing from the Prison Commission's report and the Criminal Justice and Licensing Bill. The new Chief Executive of the SPS, Mike Ewart, commented that the situation was now such that he felt unable to guarantee that he could meet his operational duties to meet the health and safety and human rights obligations for prisoners and staff. The situation has been eased by the opening of the new prison at Addiewell in December. Though no crisis is ever welcome for a Government, overcrowding helps to put arguments about sentencing and the use of imprisonment into sharper focus.

#### Alcohol Policies

The '[Changing Scotland's Relationship with Alcohol: A Framework for Action](#)' published in March, followed on from last year's discussion paper on a strategic approach to alcohol policy. Controversial proposals included making it illegal for under 21s to buy alcohol in off-licenses, a minimum pricing scheme and a 'social responsibility fee', for alcohol retailers. These proposals were subsequently included in the Criminal Justice and Licensing Bill. It became apparent that some proposals, most notably the under 21 off-sales ban, would not receive the required support from Opposition MSPs, although there was more support for other proposals including minimum pricing and controls in the way that alcohol is marketed and displayed. The Alcohol Misuse Bill will now carry forward innovation on this front.

#### Glasgow Community Court

In May, the Government was put in an awkward position by the decision not to proceed with the pilot Glasgow East End Community Court. The project was abandoned on cost grounds. However, all opposition parties were quick to highlight the inconsistency of this arising with policies promoting community penalties rather than custody, and were angered further when the [Justice Secretary refused to reverse the decision](#) following a defeat on this issue in Parliament.

#### New Direction for Anti-Social Behaviour

The Government launched, jointly with CoSLA, a new direction for anti-social behaviour policy in March this year with the publication of "[Promoting Positive Outcomes: Working Together to Prevent Antisocial Behaviour in Scotland](#)". As the title suggests, this strategy puts a greater emphasis on partnership working, with early intervention and prevention at its heart. Although not abolishing the

provisions of the 2004 Antisocial Behaviour Act, the new approach signals a new direction which relies less on legal remedies to solve problematic behaviour. Labour party were vocal in their disapproval of this new direction given that it was their legacy that was being discontinued; there was lukewarm support from the Conservatives and support from the Liberal Democrats.

### Open prison escapes

In Spring this year, a series of absconds from the Open Estate prompted calls for the Cabinet Secretary to resign. An independent enquiry later concluded that there had been failures in the SPS decision making process in this instance, but Opposition MSPs were quick to link these escapes with the competence of the Justice Secretary. It emerged that the First Minister had known about a third abscond when he was answering questions about previous escapes, and he had not informed the Parliament at the time. A subsequent inquiry carried out by former Presiding Officers vindicated him of any wrong doing.

## **Committees**

### Justice Committee

The Committee Convenor continues to be the Conservative Justice spokesperson Bill Aitken. The remaining 7 members consist of 3 Labour, 3 Nationalists, and 1 Liberal Democrat MSPs. This year business was dominated by the task of scrutinising primary legislation once again, following their first year in which they had time to conduct their own inquiries (see previous report).

Consideration of the Sexual Offences and the Offences (Aggravated by Prejudice) Bills was remarkably non-partisan. In contrast, scrutiny of the Criminal Justice and Licensing Bill has been more politicised, reflecting the more controversial nature of the proposals. The Stage 1 report, which is imminent, will be crucial to the Bill's journey and will give an indication of how it will fare in the Chamber. The Conservative and Labour members of the Committee in particular have indicated that they have not been persuaded by the arguments for several parts of the Bill, in particular those relating to a sentencing council and sentencing guidelines.

### Equal Opportunities Committee

Last December, the Equal Opportunities Committee decided in to hold an inquiry into female offenders in the Justice System with the remit to "assess the prison experience for, and background of, female offenders, particularly the extent to which prison helps to prevent women from re-offending." This is against the backdrop of a female prison population which has increased at a far higher rate than the male prison population, and the Committee's view that prison has historically been the most appropriate disposal for serious and violent offenders only. The Committee have visited Cornton Vale and questioned witnesses including the Lord Advocate, academics and practitioners. Their report is expected shortly after the summer recess.

## **Conclusion**

The current Government has adopted a more considered approach to many criminal justice issues, seeking to take the heat out of the public discussion about crime and offenders, whilst perhaps placing more emphasis on strategic approaches to violence, serious and organised crime and alcohol related offending than previous administrations. Following the [Concordat](#) and the development of Community Justice Authorities the delivery of justice related services is effectively delegated to local government to a much greater extent than hitherto. Local control over reducing budgets reduce the capacity for central government to manage performance and accountability for the delivery of any services. At the same time the extra funding promised to criminal justice social work for the development of alternatives to short prison sentences is limited and any capital savings to be made from the prisons budget following a reduction in the prison population (if this were to happen at all), may well be diverted to major commitments such as the new Forth Road Bridge.

In attempting to forge a new direction for criminal justice SNP policies have been welcomed by many academics and practitioners although not by Opposition parties and many sections of the press. The Justice Secretary has worked hard at promoting these policies, but this difficult task has been complicated by having to defend himself against various crises ending of course with the international exposure of the Megrahi decision. It will be interesting how this impacts on the progress of the Criminal Justice and Licensing Bill in the months to follow.

List of debates

## September 2008

- SG – 2008-09 [Legislative Programme](#) announced
- SG – Debate on [Children's Services](#)
- SG – Debate on the [Prison Commission's Report](#)

## October 2008

- CON – Debate on the [legal age of alcohol purchase](#)

## November 2008

- SG – Debate on the [UN Convention on the rights of the child](#)
- SG – Debate on [ID cards](#)

## December 2008

- SG – Debate on [forced marriages](#)
- PMD (SNP) – Debate on the [universal declaration of human rights](#).
- SG – Debate on the [drink drive limit](#)

## January 2009

- SG – Debate on [Offender Management](#) (on the white paper '[Protecting Scotland's Communities: Fair, Fast and Flexible Justice](#)')
- PMD (Lab) – proposed closure of the [forensic services in Aberdeen](#)
- SG – [Budget Debate](#)

## February 2009

- PMD (Con) Debate on [human trafficking](#)
- CON – Debate on [community policing](#)

## March 2009

- SG – Statement on [prisoners' compensation payments](#)
- LAB – Debate on [police numbers](#)
- CON – Debate on [alcohol strategy](#)

## April 2009

- SG - Statement about [drug and alcohol misuse](#)
- SG – Debate on new launched [Antisocial Behaviour framework](#)

## May 2009

- Con – Debate on [community courts](#)
- SG – Debate on [community courts](#)
- PMD (SNP) – Debate on the [Strathclyde Police Prolific Offender Programme](#)
- SG – Statement about [open prison escape](#)

- SG – Debate about [Cashback to communities URL](#)

JUNE 2009

- SG – [Convention Rights Proceedings \(Amendment\) \(Scotland\) Bill](#) (emergency legislation time limiting compensation claims)

#### Proposed private members bills

- [Victims' Commissioner \(Scotland\) Bill](#)
- [Proposed Criminal Sentencing \(Equity Fines\) \(Scotland\) Bill](#)
- [Workers \(Aggravated Offences\) Scotland Bill](#)

#### Consultations, Reviews And Reports

- [Revitalising Justice - Proposals To Modernise And Improve The Criminal Justice System](#) ( 25/9/08) 'A document that summarises the proposals that will be included in the Criminal Justice and Licensing Bill'
- [Protecting Scotland's Communities: Fair, Fast and Flexible Justice](#) – (17/12/08). 'The plan brings together the reforms to the Scottish criminal justice system already underway or completed; the 2007 Review of Community Penalties and the work of the Scottish Prisons Commission.'
- [Sentencing Guidelines and a Scottish Sentencing Council: Consultation and Proposals](#) [Consultation] – 1/9/08 'Delivering more consistent and transparent sentencing in Scotland - Proposals for the introduction of a new system of sentencing guidelines and a Scottish Sentencing Council to develop that system.'
  - [Consultation Responses – 26/1/09](#)
- [The Modern Scottish Jury in Criminal Trials](#) [Consultation] -18/9/08. 'A consultation on a number of issues relating to criminal juries in Scotland including: age limit; eligibility and excusal; exemption periods; compensation for jury service; jury size and trial without a jury.'
  - [Independent analysis of consultation responses – 29/1/09](#)
- [Consultation on the Acquisition and Retention of DNA and Fingerprint Data in Scotland \(CRES 1058\)](#) [Consultation] – 23/9/08
  - [Responses – 10/2/09](#)
  - [Consultation Report – 24/2/09](#)
- [Promoting Positive Outcomes: Working Together to Prevent Antisocial Behaviour in Scotland](#) – 19/3/09
- [Letting Our Communities Flourish: A Strategy for Tackling Serious Organised Crime in Scotland](#) – 2/6/09
- [Changing Scotland's Relationship with Alcohol: A Framework for Action](#) -2/3/09
- [A New Framework for Local Partnerships on Alcohol and Drugs](#) – 20/4/09 – 'This is a joint Scottish Government, CoSLA and NHS framework which clarifies the roles, responsibilities and accountability of all bodies involved in tackling alcohol and drugs problems.'