

A Report for AUDIT SCOTLAND

Changes to Scotland's Criminal Justice System Post-Devolution: Main legislative developments, major reviews of policy and procedure, and the introduction of 'new' bodies

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Scope of Work

This Report collates and describes the key legislation and policies and major procedural reviews introduced since Devolution, which have led to changes in Scotland's criminal justice system and/or the introduction of 'new' bodies. The focus is on adult criminal justice systems and processes, and does not include youth justice.

Main Legislative Changes to Scotland's Criminal Justice System since Devolution

Introduction

The **Scotland Act 1998** brought about constitutional Devolution and is to be considered as the most important legal change in Scotland of the last two decades (Scott, 2011). The Scottish Parliament in Holyrood gained independent empowerment by having 'full legislative powers in domestic policy', which 'has created a significantly different constitutional and political landscape from that which preceded it' (ibid. 121). Post-Devolution, Scotland has certainly seen a plethora of legislation which has been both wide-ranging in its objectives and far-reaching in its effects on Scottish criminal justice. As discussed below, much of the legislation passed since 1999 has been managerialist in its objectives, and, arguably, punitive in its effects.

In this section, we list major criminal justice legislation passed since Devolution, set out in five major themes of focus, namely on:

- 1) Offenders
- 2) Victims
- 3) Procedures and courts
- 4) Policing and control
- 5) Mixed legislation

Where appropriate, the goals to be achieved by the individual legislative changes will be discussed. Where available, some indication of the impact of the legislation is provided to try to give a comprehensive overview of the nature and scale of legislative change in Scotland.

Offenders

The most recent Scottish criminal justice legislation post-Devolution focusing on offenders is the **Double Jeopardy (Scotland) Act 2011 (DJSA)**¹. The double jeopardy rule defends the individual and his/her rights against the power of the government (SCOLAG, 2010a):

'Equality of arms is an aim of the system but within the criminal justice process the individual is at an undeniable disadvantage against the might of the State. The rule against double jeopardy gives the certainty of finality to criminal proceedings and protects the citizen from the persecution of repeated prosecution'

(ibid: 2)

Having received Royal Assent on 27 April 2011, the DJSA's main goal is to 'make provision as to the circumstances in which a person convicted or acquitted of an offence may be prosecuted anew for connected purposes'.² This legislation is focused on the benefits of victims of crime as opposed to the original legal subject, the legal rights of the offender on trial. In practice, the DJSA entails a citizen's liberty is permitted to be put in double jeopardy and thus allows the criminal justice system 'to have a second go when it makes a mess of the first trial' (SCOLAG, 2010b: 206). Clearly, there are several complexities involved with new legal conditions provided in the DJSA, as they could lead to impoverishment of the protection against 'the possibility of continual malicious prosecution by agents of the State' and 'possible incompetence of the State' (ibid.). Also, when an exception is being made once for a specific crime, more offences and other grounds will be included against the rule of double jeopardy to the point that no more prohibition remains. Indeed, the Act then ends 'the centuries-long protection Scots have enjoyed against being prosecuted more than once for the same offence' (ibid.). In short, the DJSA 2011 indeed regulates, or actually manages offenders and their rights, but in doing so diminishes their influence against the State and the increasingly growing influence of those victimised.

The managerial approach is most clearly exemplified in the **Management of Offenders etc. (Scotland) Act 2005 (MOSA)** that assented on 8 December 2005.³ The MOSA established Community Justice Authorities (CJAs) and advanced supervision and care of persons on probation and released from prison. It amended Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 to deal with the release of prisoners on licence. Amongst other aspects, it also made further

¹ http://www.legislation.gov.uk/asp/2011/16/pdfs/asp_20110016_en.pdf

² http://www.legislation.gov.uk/asp/2011/16/pdfs/asp_20110016_en.pdf:

³ http://www.legislation.gov.uk/asp/2005/14/pdfs/asp_20050014_en.pdf

provisions for drugs-testing of prisoners. By MOSA's establishment of the CJAs, all agencies are brought together, 'to create a more coherent and flexible system of offender management, which builds services round the offender' (Scottish Executive, 2006: 3).

The National Advisory Body (NAB) was established to shape long-term national strategies in order to reduce reoffending. One of the main priorities of the Act is to protect the 'public from the most serious harm', and thus agencies must prioritise 'the management of the most serious sexual and violent offenders' (ibid. 10). Despite these offenders' (re)offending rates being relatively low, MOSA reflects a concern about serious sexual and violent offenders. As with much post-Devolution criminal justice legislation, MOSA has been controversial (McSherry and Keyzer, 2010): *'It alters the traditional limited role of the prosecutor in the criminal justice system. In the past, sentencing was entirely a matter for the court. Now, prosecutors must identify which individuals should be subject to an initial application for a risk assessment order'* (ibid. 100). Allowing the consideration of risk assessments 'enables [the court] to gauge the 'true risk' that a person represents to the community if released' (ibid.); at the same yet the culpability of a person become less and less significant. These are signs of the 'new penology' according to Nugent and Loucks (2011). The CJAs especially 'mark an important development as they are tasked with facilitating strategic planning between a broad range of partners... to address offending and the reasons behind it in a genuinely holistic manner' (ibid. 1). In it,

'[we] are witnessing a marked departure away from the pursuit of rehabilitation as an intrinsic good, and end in itself, towards rehabilitation as an instrument of risk management, as a means to the end of public protection'

(Nash and Williams, 2010: 283)

Reasons for the focus on public protection 'might reside in criminal justice social work's adoption of a more victim-centred approach', lacking any moral justification' (ibid. 284). All in all, the impact of MOSA is reflective of 'the continued dominance of a 'risk' or 'protection' discourse surrounding the management of high risk violent and sex offenders... likely to frustrate its own purposes if it identifies offenders with the worst aspects of themselves, if it leads practitioners to the neglect of offenders' needs, strengths, goals and aspirations and if it reinforces a social climate that creates practical and attitudinal barriers to ex-offenders' prospects of social integration and of living differently' (ibid. 288).

The **Prostitution (Public Places) (Scotland) Act 2007 (PPPSA)**, having received Royal Assent 5 April 2007, set out to revise legislation on prostitution, especially in relation

to loitering or soliciting in public spaces, which has become an arrestable offence.⁴ The Act provides that it shall be an offence for a person to solicit or loiter in a “relevant place” for the purpose of obtaining the services of someone engaged in prostitution. Scotland’s version of criminalising of kerb-crawling through the PPPSA is supposed to have the ‘rationale of a gender neutral law in the war to eradicate prostitution from the streets, continuing to criminalize sex workers for soliciting and nuisance [pursuing] a zero tolerance approach to street prostitution’ (Sanders, 2009: 79).

Victims

The **Domestic Abuse (Scotland) Act 2011 (DASA)**⁵ was passed in March 2011 and received Royal Assent on 20th April 2011, It was drafted to ‘amend the Protection from Harassment Act 1997 by making provision in relation to harassment amounting to domestic abuse’ and also ‘to make breach of an interdict relating to domestic abuse with a power of arrest attached an offence’ (ibid. 1).

The **Sexual Offences (Scotland) Act 2009 (SOSA)** received Royal Assent 14 July 2009, with the aim of renewing sexual offences legislation.⁶ The legislation is based on the recommendations and draft Bill contained in the Scottish Law Commission's *Report on Rape and other Sexual Offences* (report 209) which was published in December 2007 and the outcome of the Scottish Government's consultation on the Report's findings, which took place between December 2007 and March 2008.

The Act was designed to calm the ‘widespread public, professional and academic concern that Scots law on rape and other sexual offences is out-dated and derives from a time when sexual attitudes were very different from those of contemporary society’ (Rape Crisis Scotland, 2010: 1). The Act reformed the law on rape and created a range of new statutory sexual offences, including sexual assault by penetration, sexual assault, sexual coercion, coercing a person to be present during sexual activity, coercing a person to look at an image of sexual activity, communicating indecently, sexual exposure, voyeurism and administering a substance for a sexual purpose. The Act also introduced a statutory definition of consent as “free agreement”, supplemented with a non-exhaustive list of circumstances in which consent can never be present. It provides that consent to conduct does not in and of itself constitute consent to any other conduct, and that

⁴ <http://www.legislation.gov.uk/asp/2007/11/contents>

⁵ http://www.legislation.gov.uk/asp/2011/13/pdfs/asp_20110013_en.pdf

http://www.legislation.gov.uk/asp/2011/13/pdfs/asp_20110013_en.pdf

consent may be withdrawn at any time. The Act also provides for "protective offences" which address predatory sexual behaviour towards children.

The **Offences (Aggravation by Prejudice) (Scotland) Act (OSA) 2009** aimed to shed light on 'the aggravation of offences by prejudice relating to disability or to sexual orientation or transgender identity'.⁷ Whereas the existing legislation on hate crime had focused particularly on racially or religiously aggravated offences, the OSA 'seeks to extend hate crime legislation, providing for new statutory aggravations which may be applied in cases where there is evidence that a crime has been motivated by malice and ill-will based on a victim's actual or presumed sexual orientation, transgender identity or disability' (Ross, 2008: 3). That motivation has to be taken into account when the court determines a sentence, probably leading to longer custodial sentences or higher fines. Moreover, the aggravations extend to 'situations where an offender in committing an offence demonstrates malice or ill-will towards a particular group as a whole without the need for an individual victim to be identified' (ibid. 12). In short, the OSA focuses on the offender's motivation rather than on the identity of the victim: 'where an offence is found to be motivated by racial, religious, disability-related, or homophobic or trans-phobic malice, regardless of the actual identity of the victim' (Burman et al., 2010: 28).

Legislation with a more specified group of victims in mind to protect is the **Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (PCPSOSA)** assented 12 July 2005.⁸ The PCPSOSA provides the opportunity to arrest a person when (s)he 'arranges to meet a child who is under 16, having communicated with them on at least one previous occasion (in person, via the Internet or via other technologies), with the intention of performing sexual activity on the child ['grooming']' (Davidson and Gottschalk, 2011: 3). The Act aims to guarantee the protection of children 'from abuse in the creation of [indecent] images [of them] in order to curb circulation' (ibid. 13). Also, the age has been raised from 16 to 18 year in the Act. It should be noted that the Scotland, compared with England and Wales, 'differs in that the sexual grooming offence applies both to cyberspace and to the 'real world'; legislation in other countries addresses only electronic grooming via the Internet and mobile phones' (Davidson and Martellozzo, 2008: 339). It is very difficult to control and find evidence of grooming in reality. Unsurprisingly, few cases have been tried under the PCPSOSA (ibid.). The controversy surrounding the act lies in how grooming is already a crime, despite the perpetrator having never met the child, even hypothetically (e.g. an undercover agent making the initial contact with a suspected offender by pretending to be a child) (Mathew, 2009).

⁷ http://www.legislation.gov.uk/asp/2009/8/pdfs/asp_20090008_en.pdf

⁸ http://www.legislation.gov.uk/asp/2005/9/pdfs/asp_20050009_en.pdf

The **Prohibition of Female Genital Mutilation (Scotland) Act 2005 (PFGMSA)** also focuses on a specific group of victims.⁹ Assented on 1 July 2005, Parliament wished to 'restate and amend the law relating to female genital mutilation and to provide for extra-territorial effect' (ibid. 1). The Act criminalises the act 'to carry out FGM abroad, or to aid, abet counsel or procure the carrying out of FGM abroad, even in countries where the practice is legal', by both UK nationals as permanent residents (Momoh, 2010: 14). FMG is considered gender-based violence, alongside domestic abuse, and 'honour killing' (Burman et al., 2010). This connects to the idea that gender-based violence exposes 'the dichotomy of the private home and the public sphere, giving it 'a very complex dynamic of such offending and particular vulnerabilities on the part of the victim that mark this sort of crime out from other forms of hate crime that are motivated by hatred towards a particular group of people' (ibid. 29). Infibulation (the practice of strategic surgical modification of specific areas of the genitals) is governed by the PFGMSA providing for up to 14 years' imprisonment.

An important piece of legislation that encapsulated the general group of victims is the **Vulnerable Witnesses (Scotland) Act) 2004 (VWSA)** which assented in March 2004.¹⁰ The VWSA 2004 prohibits 'persons charged with certain offences... seeking to precognose personally a child under the age of 12' (ibid. 1). Child witness notices (CWNs) were introduced to guarantee better provision of children in cases. Also a new definition of adult vulnerable witness (VW) was created, 'including persons affected by fear and distress, subject to a test on the effect of vulnerability on their ability to give evidence in open court' (Richards, Morris and Richards, 2008: 1). The controversial witness competence test was abolished. The Scottish Government, following the Act, has provided 'practitioners with information about the use of special measures for vulnerable adult and child witnesses' (Memon et al., 2011: 16). Critics argued the VWSA 'introduced exactly the same safeguards for child defendants as for child witnesses and pointed out that the YJCEA 1999 did not specifically prevent special measures being used in the case of a child defendant' (Lyon, 2007: 112). It is 'often the most disadvantaged and the least able to give a good account of themselves', and to solve this is to find out what 'the court needs to do to ensure that the defendant is not at a substantial disadvantage compared to the Prosecution and any other defendants' (Baroness Hale quoted ibid.). As for impact on evidence given by children and adult vulnerable witnesses, the Act 'is likely to have been a major factor, along with changing court cultures' and has contributed 'to an increasing awareness of the needs of vulnerable witnesses' (ibid. 7). Nevertheless, research indicates that the new legislated measures are not the only means to improve witnesses' positions, as these 'could [also] be addressed by simple

⁹ http://www.legislation.gov.uk/asp/2005/8/pdfs/asp_20050008_en.pdf

¹⁰ http://www.legislation.gov.uk/asp/2004/3/pdfs/asp_20040003_en.pdf

actions, especially provision of information before coming to court, while waiting to give evidence and afterwards' (ibid.). Moreover, concerns are there 'about the identification of vulnerable adults, especially since many vulnerabilities are not visible, and many examples were given of adults who may well have been vulnerable witnesses but received no offer of special measures' (ibid. 157).

The **Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 (SOPESA)** received Royal Assent in April 2002, and came into effect in Scotland in November 2002, replacing the earlier "rape shield" legislation, which had been in operation for the previous 16 years.¹¹ The Act had two purposes. The first, to prevent the accused from personally cross-examining the complainer, was to be achieved by requiring the accused to be legally represented throughout the trial. The second purpose, to strengthen the existing provisions restricting the extent to which evidence can be led regarding the character and sexual history of the complainer, was to be achieved by replacing sections s.274 and s.275 of the existing legislation, which deal with sexual history and sexual character evidence. The substitute sections are aimed at discouraging the use of evidence of limited relevance where the primary purpose of such evidence is to undermine the credibility of the complainer or divert attention away from the issues under determination. In addition, where the Defence does succeed in convincing the court that character or sexual history evidence should be introduced, SOPESA introduces provisions to allow the court to take into account any previous sexual offence convictions which the accused person has, in order to ensure equity in the possibility of deploying past history. These provisions for the disclosure of previous convictions are unique to Scotland, and are not found in rape shield legislation in other jurisdictions (Burman et al 2007).

The **Protection from Abuse (Scotland) Act 2011 (PASA)**¹² followed after widespread public concerns about domestic violence as 'the hidden "private" sanctioned atrocity' (McCarry, 2009: 325). With the PASA, directing against domestic abuse as well as other forms of violent offences, the clandestine nature of such acts has been revealed. Because of its specificity, the PASA is the first of its kind post-Devolution, meaning, it is 'the first Act to be initiated by a parliamentary committee using the devolved parliament's enhanced powers' (Mackay, 2010: 373). Despite its modesty, its aim was to plug 'an important gap by extending the legal protection and access to powers of arrest available to victims of domestic abuse' (ibid.).

¹¹ http://www.legislation.gov.uk/asp/2002/9/pdfs/asp_20020009_en.pdf

¹² http://www.legislation.gov.uk/asp/2001/14/pdfs/asp_20010014_en.pdf

Procedures and Courts

Much of the legislation to amend pre-Devolution legislation was brought forward in the area of procedures and court-related regulation. On 29th October 2010 the **Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 (CPSA)** received Royal Assent.¹³ The Act, being emergency legislation (Carloway Review, 2011), was introduced to deal with the problems caused by the Cadder decision.¹⁴ The CPSA consisted of several amendments to pre-Devolution Scottish legislation, in particular the Criminal Procedure (Scotland) Act 1995. Specifically, it makes provisions in respect of persons being questioned by the police on suspicion of having committed an offence. The amendments and new stand alone provisions within the Act affect the period of detention and the right of access to legal assistance before and during questioning. The Act also makes provision to provide a right to make representations in relation to applications for extension of time limits for making appeals, and creates a time limit for lodging bills of suspension and advocacy. It also makes provision about the grounds for references made to the High Court by the Scottish Criminal Cases Review Commission and enables the High Court to reject references in certain circumstances. The Act emphasises the protection of people questioned by the police by smoothing access to legal assistance and to make available advice and assistance to questioned persons. These and the Act's other provisions (e.g. extension of time limits) reflect a focus on the suspect's rights. However, regarding detention, the Act is unclear whether 'the extension to the period of detention from six to 12 hours is required in all cases. Also problematic is CPSA's section 8, subsection (3), which states that 'in the interest of the investigation or the prevention of crime or the apprehension of offenders that the questioning of the suspect by a constable begins or continues without the suspect having had a private consultation with a solicitor'¹⁵.

The **Judiciary and Courts (Scotland) Act 2008 (JCSA)** received Royal Assent on 29 October, 2008.¹⁶ The Act makes substantive provision in relation to four main policy areas: judicial independence, the judiciary including the provision of a statutory basis for the Judicial Appointments Board, the courts and new arrangements for the governance of the Scottish Court Service (SCS). However the overarching objective for the Act is to modernise and improve the court system through strengthening the role of Scotland's judiciary. It is seen as an important innovation (Aitken, 2010): 'it was an important piece of legislation placing the Lord President for the first time in charge of the day-to-day running of the Courts and including a statutory guarantee

¹³ http://www.legislation.gov.uk/asp/2010/15/pdfs/asp_20100015_en.pdf

¹⁴ Peter Cadder, who was convicted for assault based on evidence obtained before he spoke to his lawyer, made an appeal based on European human rights law which was upheld. The decision of the UK Supreme Court in the Cadder case led to the Scottish Government introducing this emergency legislation to ensure that a suspect has the right to legal advice before being questioned by the police.

¹⁵ Glasgow Bar Association, 2010: <http://www.journalonline.co.uk/Referendum/1008849.aspx>.

¹⁶ http://www.legislation.gov.uk/asp/2008/6/pdfs/asp_20080006_en.pdf

of judicial independence’ (ibid. 260). Although rather heavily drawn on the UK Constitutional Reform Act 2005, the JCSA has its own unique features (Himsworth, 2009). Moreover, it also provides the statutory guarantee of the Judicial Appointments Board and has ratified new rules of judicial conduct and dismissals. Next to that, it re-establishes the Scottish Court Service, headed by the Lord President, as a non-ministerial office within the Scottish Administration.

The **Criminal Proceedings etc. (Reform) (Scotland) Act 2007 (CPRSA)** received Royal Assent on 22 February 2007.¹⁷ Provisions pertained to bail in criminal proceedings; to the reform of certain aspects of criminal procedure; to maximum penalties in the summary criminal courts; for the purpose of compensation orders in favour of victims of offences; for and in relation to alternatives to prosecution; for the enforcement of financial penalties for offences; for establishing the Justice of the Peace (JP) courts and for disestablishing the District Court; and for the inspection of the Crown Office and Procurator Fiscal Service. These changes aimed to fulfil the expectation ‘that cases would be dealt with as quickly and effectively as possible’ (SACRO, 2008: 1). The sentencing power of courts, for example, has been increased, including increasing ‘the maximum sentence for “common law” offences from three to two months; a two month maximum sentence to first offenders, and an increase in the maximum fine which can be imposed – from £5,000 to £10,000. Moreover, courts can now carry on cases while the accused is absent; the court can appoint a solicitor in those cases, yet custodial sentences cannot be imposed without the presence of the accused. Also the police have retrieved more authority in regard to the use of bail undertakings. Installing the Justice of the Peace Courts (JP) to replace the District Courts, operated by local authorities, had the purpose of unifying the Sheriff and District Courts’ administration.¹⁸

The **Custodial Sentences and Weapons (Scotland) Act 2007 (CSWA)** assented 19 April 2007, was introduced in order to restate and amend the law relating to the confinement and release of prisoners and to make provision relating to the control of weapons.¹⁹ The Act consists of a

‘radical, and extremely complex, new form of sentence calculation for the vast majority of prisoners. With effect from the coming into force of the new Act, the former distinction between short-term and long-term prisoners will be swept away’

(Thomson, 2007: 190).

¹⁷ http://www.legislation.gov.uk/asp/2007/6/pdfs/asp_20070006_en.pdf

¹⁸ <http://www.scotcourts.gov.uk/jp/index.asp>

¹⁹ http://www.legislation.gov.uk/asp/2007/17/pdfs/asp_20070017_en.pdf

Unfortunately, 'it might be argued that this Act, intended to introduce clarity in sentencing, has in fact rendered sentencing practice more opaque than it was before' (Thomson, 2007). The Act is a good example of detrimentally enthusiastic adoption of technical reforms without countenancing the cultural interpretations beyond the judiciary. What is most controversial about the CSWA is Scottish Minister's proposal 'to take back certain powers currently in the hands of the Parole Board for Scotland', leading to the restoration of a political element to the sentencing process. In relation to efficiency driven motivations behind the CSWA, it becomes doubtful whether any utilitarian goal is achieved at all: 'the measures contained in the Custodial Sentences and Weapons (Scotland) Act 2007' potentially increase significantly 'the prison population, the numbers of prisoners subject to risk assessment procedures in custody and the numbers of ex-prisoners under supervision', and 'public protection will not be achieved in practice' (McNeill and Whyte, 2007: 139).

On 4 June 2004, the Scottish Parliament gave the **Criminal Procedure (Amendment) (Scotland) Act 2004 (CPSA)** Royal Assent.²⁰ This Act consists of four parts, all of which proposed to amend the Criminal Procedure (Scotland) Act 1995. The first part:

'deals with court procedures as they relate to the High Court of Justiciary [providing] for a mandatory preliminary hearing in High Court cases and the procedure for these hearings [and introducing] a new procedure whereby the court will appoint an appropriate trial date at the preliminary hearing after having dealt with preliminary matters and having regard to the state of preparation of the case'

(Scottish Parliament, 2004: 2)

The second part deals with trials under solemn procedure in the High Court and sheriff court, amending time limits and citation provisions, particularly amending 'the 110 day custody time limit for High Court cases to provide that a preliminary hearing must be held within that time'. Moreover, the CPSA 2004 extends the 1995 Act provision and allows trials *in absentia*. The third part changes the bail regulation of the 1995 Act, by requiring 'the remote monitoring of a condition of bail restricting a person's movements' (ibid.). Lastly, the fourth part amends the 1995 Act provision to sentence after a guilty plea 'to impose a requirement on the court to take into account the stage at which an accused intimates his intention to plead guilty, and imposes an obligation on the court, having done so, to state whether or not a different sentence has been imposed' (ibid.). The sheriff's powers are also increased 'to impose extended sentences in certain cases from 3 to 5 years' (ibid. 3). Crucial to all these changes is streamlining the High Court's operation, ensuring there is 'as little disruption and inconvenience to court users as possible' (Fyffe and Finlayson,

²⁰ http://www.legislation.gov.uk/asp/2004/5/pdfs/asp_20040005_en.pdf

2005). Some key features of the reforms to guarantee inconvenient trial procedures consist of practices in which '[defence] solicitors must advise the Crown, and court, that they are acting, and if they cease to act' (ibid.). Also, the 'Crown will provide defence with copies of witness statements (excluding precognitions) within 28 days of first appearance, unless exceptional circumstances exist... Indictments must still be served within 80 days of full committal [and] new preliminary hearing must take place in custody cases within 110 days, and trial commence within 140 days, or accused entitled to release on bail' (ibid.). After being evaluated, statistics indicate High Court reforms are successful for almost all parties, including jurors, courts, victims and witnesses. On the whole, the reforms, 'together with legal aid reforms and sentence discounting provisions, have contributed to a trebling in accelerated pre-trial guilty pleas from 10% to 31% in the post-reform sample' (Journal Online, 2007). For example, in regard to an improved position of the witness, the evaluation showed there was an observed '92% fall in the number of Crown witnesses inconvenienced by trial adjournments, down from 16,795 to 1,295 in the post-reform sample' (ibid.). Although not mentioned in the evaluation as benefitting from the reforms, the offender's position has improved as well, 'through the insertion of s196 to provide for a reduction in sentence where the offender pleads guilty' (Hothersall and Bolger, 2010: 375). Nevertheless, there are some stricter regulations put forward by the Act, as being a condition of bail, a person's movement is restricted by electronic monitoring (Donnelly and Scott, 2005: 213-214). One of the benefits of the amendments for victims is that during the trial procedure they receive 'more certainty about when they will give evidence in court' (Council of Europe, 2006: 246).

The **Criminal Procedure (Amendment) (Scotland) Act 2000 (CPASA)** was enacted by Parliament on 8 March 2000.²¹ The CPASA 2000 can be considered one of the 'Holyrood Acts with no Westminster Counterpart' (Keating et al., 2003: 134), meaning, it is specifically connected to the Scottish situation. It is also a piece of legislation that characteristically comes forward from case-ruling, in this occurrence of the Appeal Court ruling in the case of *Reynolds v Procurator Fiscal* (Hough, 2009). The crucial point in this case was focused on 'law relating to summary criminal procedure in cases where an arrest warrant was granted following the failure of an accused to appear at an intermediate diet' (ibid.). In *Reynolds v Procurator Fiscal*, the court ruled 'that the granting of a warrant, in such circumstances, did not automatically result in the discharge of the trial diet set in the case' (ibid.). The CPASA 2000 limits the regular practices previous to the appeal ruling.

Enacted on 24 September 2001, the **International Criminal Court (Scotland) Act 2001 (ICCSA)** aimed to capture 'offences under the law of Scotland corresponding to offences within the jurisdiction of the International Criminal Court' and to assist the

²¹ http://www.legislation.gov.uk/asp/2002/4/pdfs/asp_20020004_en.pdf

ICC in its investigations and prosecutions, plus regulating ‘the enforcement of sentences and orders of that court’.²² Through this legislation, Scotland as part of the UK, was enabled ‘to ratify the Rome Statute of the International Criminal Court 1998 (Statute)’ (Arnell, 2002: 281). The Scottish version is more concise than the Westminster one, ‘but the implementation of the core crimes follows a generally identical pattern’ (McGoldrick, Rowe and Donnelly, 2004: 344). The noteworthy aspect of the ICCSA is the point of enactment, which is slightly deferred and could be considered ‘as evidence of an emerging methodology for law-making where the subject matter lies at the margins of the legislative competence of the Scottish Parliament’ (Arnell, 2002: 282). In regard to Scotland, its methodology is evidence of a regrettable one, especially in regard to the Anti-Terrorism, Crime and Security Act, as ‘political allegiance, simplicity, convenience and the pre-emption of possible gaps in the legislation all conspired to leave the question of Scottish legislative competence in areas at the margins of criminal law and procedure unanswered’ (Arnell, 2002: 290).

Policing and control

The Police, Public Order and Criminal Justice (Scotland) Act 2006 (PPOCJSA) received Royal Assent 4 July in said year.²³ The PPOCJSA ‘is arguably the first parliamentary Act since 1967 to deal in a fundamental way with various aspects of the Scottish police’ (Scott, 2011: 125). Its aims were to set up ‘a new central service agency, the Scottish Police Services Authority (SPSA) to bring together in a more coordinated way than before the existing common support services. The SPSA provides: ‘crime scene to court’ forensic services; ICT support; police information and intelligence systems to over 50 agencies throughout the UK, and; national training to police officers through the Scottish Police College. In addition, it maintains frontline officers and intelligence staff for the Scottish Crime and Drug Enforcement Agency (SCDEA) (see section *The Introduction of ‘New’ Criminal Justice Bodies in Scotland*, p. 32).

The Act also addresses the much debated procedure for dealing with complaints by members of the public against police officers in which the Police Complaints Commissioner for Scotland (PCCS) acts as an independent reviewer of how the police handle complaints made against them by members of the public, not as the actual investigator of complaints. Besides a clear centralisation and focus on cooperation of different policing and criminal enforcement bodies, the Act also extended ‘police powers in relation to arrests for the carrying of offensive weapons and for offences involving the possession of fireworks, as well as clarifying police powers in relation to the taking of samples, including DNA, and the procedures pertaining to the retention of such samples especially in relation to those charged with serious violent and sexual offences’ (Scott, 2011:127). The Scottish Parliament has clearly made a

²² http://www.legislation.gov.uk/asp/2001/13/pdfs/asp_20010013_en.pdf 1

²³ http://www.legislation.gov.uk/asp/2006/10/pdfs/asp_20060010_en.pdf

significant impact on Scottish policing, and paradoxically enough, '[compared] to the previous relationship with UK parliamentarians, Scottish policing is much more in the political spotlight than it has ever been' (ibid. 128).

The **Antisocial Behaviour etc. (Scotland) Act 2004 (ASBSA)** (assented on 26 July 2004) has the purpose to make provisions for antisocial behaviour (AB) related to criminal justice and to child welfare.²⁴ The ASB concept stems from Scottish housing legislation, "transferred" into child welfare and youth justice, creating 'new offences, new pathways to punishment and/or services and new relationships between the children, parents and the state' (Cleland and Tisdall, 2005: 396). The interpretation of the concept of 'antisocial behaviour' in the ASBSA s. 143 (1) defines that 'a person ("A") engages in antisocial behaviour if (a) acts in a manner that causes or is likely to cause alarm or distress; or (b) pursues a course of conduct that causes or is likely to cause alarm or distress, to at least one person who is not of the same household as A; and "antisocial behaviour" shall be construed accordingly'. What should be understood here, is how the legislative terminology of the concept has a strikingly generalised nature (Donoghue, 2006), and is thus most likely unable to 'reflect the subtleties and variations in local contexts; hence the use of wriggle room to customise policy and to enable [local authorities] to provide for a proportionate approach to the enforcement of antisocial behaviour policy' (ibid. 11). Antisocial behaviour orders (ASBOs) are 'preventative orders to protect people affected by antisocial behaviour from further acts or conduct that would cause them alarm or distress. Breach of an order is a criminal offence' (Scottish Parliament, 2004: 1). The ASBSA gives courts 'powers to refer such children to the Children's Hearing System and where appropriate make a parenting order' (ibid.). These courts can give out the ASBOs, as Parenting Order (POs), of which the orders 'can require parents to comply with specified requirements including attendance at counselling or guidance sessions' (Cleland and Tisdall, 2005: 396-397). In having created ASBOs and POs, Scotland seems 'to be following rapidly in the footsteps of England and Wales, incorporating and extending the concept of antisocial behaviour and moving it from housing and community policy into child and youth policy – and particularly youth justice' (ibid.). However, Scotland's ASBO is more stringent than that of England and Wales stemming from, historically speaking, 'a substantially different system of child protection and juvenile justice' (ibid.)

The **Police and Fire Services (Finance) (Scotland) Act 2001 (PFSFSA)**, enacted 5 December 2001, aims to provide in financial regulation of the police authorities, the joint police boards and the joint fire boards, in particular focused on 'unspent balances from one financial year to the next'.²⁵ Under this Act, the parties 'are

²⁴ http://www.legislation.gov.uk/asp/2004/3/pdfs/asp_20040003_en.pdf

²⁵ http://www.legislation.gov.uk/asp/2001/15/pdfs/asp_20010015_en.pdf

allowed to carry forward any money received and remaining unspent at the end of the year up to an annual limit of 3% of funding from police grant and a total limit of 5% when added to existing accumulated reserves of unspent police grant' (Fife Council, 2010: 16).

The **Regulation of Investigatory Powers (Scotland) Act 2000 (RIPSA) 2000**, having received Royal Assent on 28 September 2000, the RIPSA 2000 was enacted 'to regulate surveillance and the use of covert human intelligence sources'.²⁶ It was the first post-Devolution Scottish criminal justice legislation, a fairly controversial one as well. Under the Act, investigators received more powers, such as requesting 'information on the allergies of a casualty, and of a casualty's relatives, from any institution that they suspect may have this data, and such institutions may lawfully disclose the suspects, based on the same reasoning' (Remenyi, 2008: 120). Therefore, security services may act in compliance with the law, yet the privacy rights of the person under their scrutiny can be very well impinged. In such circumstances

'a case could be made out that there has been a breach of Article 8 of the Council of Europe's Convention on Human Rights [but this] would be difficult [due] to ... the practical difficulty of knowing that there has been a breach of rights, how the breach has come about, who is responsible and how to prove it (what might be called "evidential difficulties"), there is also the question of the extent to which those responsible might be able to claim exemption from responsibility (which might be called "substantive difficulties")'

(Remenyi. 2008:120).

Mixed themed legislation

In this section, we review the body of so-called 'portmanteau' legislation, in other words that with diverse and multiple aims, cutting across a range of areas of Scottish criminal justice.

The Criminal Justice and Licensing (Scotland) Act 2010 (CJLSA) is a very wide-ranging piece of legislation, which received Royal Assent on 6th August 2010. This Act makes a number of changes to the law, including in the area of sentencing (through the creation of the Community Payback Order (CPO) and the introduction of a presumption against short prison sentences of 3 months or less), and in the creation of a Scottish Sentencing Council to ensure greater transparency and consistency in the sentencing process. It also makes provisions in relation to organised crime

²⁶ http://www.legislation.gov.uk/asp/2000/11/pdfs/asp_20000011_en.pdf

through the creation of new serious organised crime offences; it raises the age at which a child can be prosecuted in adult criminal courts from eight to 12 years; introduces a set of reforms to the criminal law and court procedures; provides a statutory framework for the disclosure of evidence to the defence in criminal cases; makes provisions in relation to the retention of DNA and fingerprint data, and; the licensing of activities by local authorities and the sale of alcohol.²⁷

Two key impacts of the CJLSA were the establishment of CPOs, bringing ‘together elements of restorative justice and rehabilitation as well as more punitive elements’ (Nugent and Loucks, 2011: 9), and; a reorientation of the limits of disclosure in Scots law (Raitt, 2011). Detailed measures in the Act extend the duty of disclosure, which critics have identified as potentially leading to a negative impact on witnesses, and raising ‘particular concerns for complainers in cases of rape and other serious sexual assaults. In such cases it is predictable that there will be an increase in the disclosure of medical and other personal records of complainers for any potential they have to cast doubt on the credibility and reliability of complainers’ (ibid.: 34).

Arguably, the biggest legislative changes in post-Devolution Scottish criminal justice were brought about by the very wide-ranging **Criminal Justice (Scotland) Act 2003 (CJSA)**.²⁸ The CJSA had major symbolical and practical impact for Scotland, incorporating elements that ‘follow or prefigure English practices’ (Keating, Stevenson, Cairney and Taylor, 2003: 115). Specifically, the Act makes provision in relation to criminal justice, criminal procedure and evidence in criminal proceedings; to the arrest, sentencing, custody and release of offenders and the obtaining of reports in relation to offenders; to the provision of assistance by local authorities to persons who are arrested and are in police custody or who are subject to a deferred sentence and for the making of grants to local authorities exercising jointly certain functions in relation to offenders and other persons; the protection of the public at large from persons with a propensity to commit certain offences and for the establishment of the Risk Management Authority (RMA) (*see section The Introduction of ‘New’ Criminal Justice Bodies in Scotland, p. 32*); the granting of certain rights to victims; the jurisdiction of courts and the designation of drugs courts; it makes provisions in relation to the physical punishment of children; it create offences in connection with trafficking in prostitution or for purposes connected with pornography; it amends the criminal law as it relates to bribery and the acceptance of bribes; it makes provision in relation to criminal legal assistance; it requires that the aggravation of an offence by religious prejudice be taken into account in sentencing; it makes provision as respects police ranks and the powers and duties of civilians employed by police authorities; the disqualification of convicted persons from jury service in both criminal and civil proceedings and for the

²⁷ http://www.legislation.gov.uk/asp/2010/13/pdfs/asp_20100013_en.pdf

²⁸ <http://www.legislation.gov.uk/asp/2003/7>

separation of juries after retrial; the use of live television links between prisons and courts; in relation to warrants to search; in relation to the prohibition of certain matters in respect of cases referred to the Principal Reporter, and; in relation to penalties for wildlife offences.

Major Reviews and Reforms

Modernising justice in Scotland has been a major theme in the wake of devolution. Transparency and efficacy have been promoted in much legislation and has formed the crux of a series of major Reviews. In this section we outline some of the major reviews of criminal justice carried out since devolution, paying particular attention to that which has influenced procedural justice through legislative intervention or policy change.

Summary Justice Reform (McInnes Review)

Scottish Ministers established the independent Summary Justice Review Committee, chaired by Sheriff Principal John McInnes, in late 2001, to look at the operation of summary justice in Scotland. Summary justice can be defined as all non-jury criminal prosecutions, which account for 96% of those taking place in Scotland, over 130,000 cases every year (Scottish Executive, 2005, i). The formal remit of the Committee describes the processes under investigation:

“To review the provision of summary justice in Scotland, including the structures and procedures of the sheriff courts and district courts as they relate to summary business and the inter-relation between the two levels of court, and to make recommendations for the more efficient and effective delivery of summary justice in Scotland.”

(Scottish Executive, 2004, 1)

The McInnes Committee's Report, published in March 2004, made a number of far-reaching recommendations aimed at reforming the criminal courts, increasing the speed and efficiency of court processes and improving all aspects of the criminal justice system dealing with less serious offences.²⁹ Following the Report, Scottish Ministers published *Smarter Justice, Safer Communities: Summary Justice Reform Next Steps* in March 2005, outlining the government's proposals for Summary Justice Reform, with a *Summary Justice System Model Paper*, published in September 2007 providing further details. Some noteworthy but not overwhelming dissent emerged, such as the proposed unification of summary courts; two-thirds responded in favour,

²⁹ <http://www.scotland.gov.uk/Resource/Doc/47171/0031637.pdf>

subject to a number of qualifications in some cases. Other dissenting voices questioned the need for such fundamental changes to reduce system inefficiencies. (Scottish Executive, 2005, viii). A summary of the core responses follows:

- Firstly, the Committee had admitted that it did not find a system in crisis, and that there were few voices demanding revolutionary change – however the Report still recommended the abolition of lay justice and unification of the summary courts;
- Secondly, that the Report relied too heavily on anecdotal and qualitative evidence for many of its recommendations; and
- Thirdly, that some of the key proposals relating to the costs of the judiciary had been based on data from a costing exercise that had now been discredited.

(Scottish Executive, 2005, viii)

The reforms that required legislation formed the basis of the Criminal **Proceedings etc (Reform) (Scotland) Act 2007** (see Legislative Developments), and these are summarised below:

- *Bail* - Reforms to the system of bail and remand based on the commitments made in the Scottish Executive's bail and remand action plan.
- *Changes in the law relating to criminal proceedings* - To facilitate the quick, effective progress of cases through court.
- *Court unification* - The establishment of justice of the peace courts (JP courts) linked to sheriffdoms in place of district courts, delivering the commitment to create a unified courts administration under the control of the Scottish Court Service (SCS).
- *Direct measures* - Extending the range of alternatives to prosecution that can be offered to an alleged offender by the police and procurators fiscal and the manner in which those alternatives can be enforced and disclosed - ensuring that alternatives are robust and can be used in circumstances where a court appearance may not be the most effective way of dealing with the case.
- *Fines enforcement* - Reform of the way in which fines and other financial penalties imposed in respect of a criminal offence can be collected and enforced, in particular the creation of the new role of Fines Enforcement Officer, ensuring that penalties are collected as efficiently and effectively as possible in future, minimising unnecessary court involvement.
- *Increases in the criminal sentencing powers of the summary courts* - Ensuring that those courts can deal with an appropriate range of cases

in terms of both severity and caseload, and do so more quickly than is currently the case.

- *Placing the existing Inspectorate of Prosecution in Scotland on a statutory footing.*
- *Lay justice* - Reform of the procedures by which justices of the peace (JPs) are appointed and trained, including the introduction of periodic appraisal for JPs, fulfilling the commitment to retain JPs and invest in them to ensure that they provide consistently high standards of justice in courts throughout Scotland.
- *Summary criminal legal assistance* - In order to encourage early investigation, and where appropriate, early resolution of cases, reforms to summary criminal legal assistance include introduction of a case disposal fee payable for cases in the summary courts disposed of before trial; enhanced duty solicitor payments; and new arrangements for appointed solicitors to act in custody cases.
- *Summary disclosure* - Provision of a summary of evidence to the accused with the summary complaint in order to: allow for earlier investigation of the case by the defence, reduce possible duplication of evidence-gathering, facilitate early decision-making between lawyers and clients, and encourage earlier identification of the agreed evidence by the defence and prosecution.
- *Undertakings* - Increased use of undertakings, including giving the police the power to impose conditions when releasing an accused on an undertaking.

The overall aim of Summary Justice Reform is: “to create a more efficient and effective justice system which dispenses justice fairly and reduces reoffending”³⁰ and its overarching objectives are a summary justice system which is to be:

- Fair to the accused, victims and witnesses
- Effective in deterring and punishing offenders
- Efficient in the use of time and resources
- Quick and simple in delivery

As discussed in the *Legislative Developments* section, the Act has been brought into operation in stages, with the changes to bail, lay justice, sentencing powers, and certain procedural reforms coming into effect in December 2007; and the remaining changes relating to alternatives to prosecution and fines enforcement coming into effect in March 2008. The first phase of court unification occurred in Lothian and Borders in March 2008, with unification staggered across the remaining Sheriffdoms

³⁰ http://www.scotcourts.gov.uk/summary_justice_reform/index.asp

during 2008-2009. The changes to the payment of summary criminal legal assistance were implemented via regulations which came into force on 30 June 2008.

These changes aimed to ensure 'cases would be dealt with as quickly and effectively as possible' (SACRO, 2008, 1). The sentencing power of courts, for example, has been increased, including increasing the maximum sentence for "common law" offences from three to 2 months; a 2 month maximum sentence to first offenders, and an increase in the maximum fine which can be imposed – from £5,000 to £10,000. Moreover, courts can now carry on cases while the accused is absent; the court can appoint a solicitor in those cases, yet custodial sentences cannot be imposed without the presence of the accused.

On the 15th of March, 2011, Scotland's Chief Statistician and the contributing criminal justice organisations jointly released official statistics on the performance of the criminal justice system as part of the Summary Justice Reform Monitoring & Evaluation project. The national impacts of the reforms, for the period October to December 2010, follow:

- the percentage of accused whose cases are dealt with within 26 weeks (caution and charge to verdict) was 75.2 per cent
- the percentage of cases received by Crown Office & Procurator Fiscal Service (COPFS) within 28 days of earliest caution and charge was 88.3 per cent
- percentage of cases of individual accused persons in which a prosecution decision was taken and implemented within four weeks of the date of receipt of the report was 83.5 per cent
- the percentage of accused whose summary criminal cases were disposed of within 20 weeks (first calling to sentence) was 78.8 per cent
- 55,990 police reports were submitted to COPFS compared with 60,162 in October - December 2009, a decrease of around seven per cent
- 26,885 cases were dealt with by direct measures by Procurators Fiscal compared with 27,832 in October - December 2009, a decrease of around three per cent.³¹

Review of the High Court (Bonomy Review)

In December 2001, the Deputy First Minister announced the appointment of Lord Bonomy to:

³¹ <http://www.scotland.gov.uk/News/Releases/2011/03/15102147>

“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”.

(Bonomy, 2002, 1)

The Review followed a period that saw a significant increase in High Court activity, with an increase of 23% in new indictments registered between 1995 and 2001 (Bonomy, 2002, 11). This increase was accompanied by a phenomenon referred to as the ‘churning of cases’:

“[Where] cases were regularly listed for trial but the trial did not go ahead and the case was instead listed for a future trial date, a process that might recur a number of times before the case was finally disposed of. In 2001, 33% of cases involved at least one adjournment and only around 14% of cases actually went to trial at the sitting to which they were first indicted”.

(Scottish Executive Social Research, 2007, 7)

The Bonomy Review recommended far reaching changes designed to modernise High Court procedures, reduce inconvenience to court users and provide a better environment for witnesses and other interested parties involved in court proceedings. The four key recommendations, accepted by the Scottish Executive were as follows:

- Mandatory “preliminary diets” for judicial management of cases, between the service of the indictment and the trial;
- Amendments to section 196(1) of the 1995 Act to strengthen the practice of ‘discounting’ sentences for pleas of guilty, particularly early pleas;
- Amending the 110-day rule – which required that, where a person was remanded in custody pending trial, their trial should commence within 110 days – to a 140-day rule in the High Court;
- Implementing section 13(1) of the Crime and Punishment (Scotland) Act 1997, which would increase the sentencing power of the sheriff to five years’ imprisonment, allowing some business to be dealt with in the sheriff court rather than in the High Court.

(Scottish Executive Social Research, 2007, 7- 8)

The Scottish Executive accepted not just the technical but also the cultural ramifications of Bonomy's report.

"...we recognise we ... cannot simply solve all the problems in the High Court by introducing legislation. We need to create the context for change, by reducing overload and streamlining procedures. We shall begin the process very quickly, introducing amending legislation in Autumn 2003 and implementing the proposal that more cases should be heard in the sheriff court from Spring 2004. We recognise, however, that change will be achieved through partnership with all the stakeholders who work in and manage the Court, and critically with the judiciary."

(Scottish Executive, 2003, 41)

The legislative vehicle introducing many of these reforms was the **Criminal Procedure (Amendment) (Scotland) 2004** (see *Legislative Developments*). The amendments to section 196(1) of the 1995 Act to strengthen the practice of 'discounting' sentences for guilty pleas were given effect by the 2004 Act, but this was preceded in October 2003 by the decision of the High Court in *Du Plooy v HM Advocate* which gave clear approval to a more explicit scheme of sentence discounting than had earlier been the case.

The Bonomy report's initial impact was to result in an increase in early guilty pleas and more trials going ahead on the due date:

"Figures for 2005-06 record a 144% rise in early guilty pleas, with a 70% saving in witness citations, and 96% of trials proceeding on the day assigned or the following day. In the period before the reforms were brought in, one in three trials were adjourned at least once and around 15% twice or more. The reforms include set hearings in advance of the trial to determine the state of readiness of both sides for trial, and fixed trial dates instead of court sittings. The Crown is also voluntarily disclosing its evidence against the accused at an earlier stage, to help the defence give advice on how to plead and prepare their case sooner."

(The Journal Online, 15 May 06)

Civil Courts Review (Gill Review)

The reasons for the commission of the Scottish Civil Courts Review (hereafter the Gill Review) were established in then Justice Minister Cathy Jamieson's foreword for the White Paper *'Modern Laws for a Modern Scotland: A Report on Civil Justice in Scotland, 2007'*:

“We have agreed with Scotland’s senior judiciary that a major review of the civil courts is needed, to ensure that their structure, procedures and working methods promote access to justice and early, proportionate resolution of disputes, as well as making the best use of resources... we recognise that there is work to be done to improve access to legal information, advice, and representation where necessary and to raise awareness of mediation and other forms of dispute resolution”

(Scottish Executive, 2007, 1)

The main objectives were to review the provision of civil justice by the courts in Scotland, including their structure, jurisdiction, procedures and working methods, having particular regard to

- the cost of litigation to parties and to the public purse;
- the role of mediation and other methods of dispute resolution in relation to court process;
- the development of modern methods of communication and case management; and
- the issue of specialisation of courts or procedures, including the relationship between the civil and criminal courts.

The Review adopted as its overarching aim the goal of ensuring that the civil courts provide the public with a high quality system of civil justice, and adopted the following principles by which such a system should operate. In summary, it:

- should be fair in its procedures and working practices;
- should be apt to secure justice in the outcome of disputes;
- should be accessible to all and sensitive to the needs of those who use it;
- it should encourage early resolution of disputes and deal with cases as quickly and with as much economy as is consistent with justice;
- should make effective and efficient use of its own resources, allocating them to cases in proportion to the importance and value of the issues at stake; and
- should have regard to the effective and efficient employment of the resources of others.³²

The Review identified a number of key themes to be addressed. Of key significance was the pressure of criminal business and its impact on civil cases in that they were

³² <http://www.scotcourts.gov.uk/civilcourtsreview/theReport/Synopsis280909.pdf>

routinely deferred or interrupted to make way for criminal business, causing unacceptable delay and expense. A second area concerned the need for a greater degree of judicial specialisation. Practitioners and court users were strongly in favour of a greater degree of specialisation in the Sheriff court, principally in family law, commercial law, personal injury, consumer and housing cases. The hierarchy of the courts and appropriate use of judicial resources formed a third area of concern, whereas over-reliance on temporary and part-time resources formed the fourth area. The need for effective case management and reformed procedures were identified as another area to be addressed. The issues around investment in information to improve the efficiency of the conduct and management of civil business were also identified. As were party litigants and the need for a new forum or method for dealing with lower value cases. For litigants who do not have legal representation, even those court procedures. Finally, problems relating to the cost and funding of litigation were identified.

In 2009, the Gill Review reported with 206 recommendations, proposing a package of structural and functional reforms to address the problems identified. These included a **(re)structuring of the civil court system**; the introduction of a **new case management model**; increased use of **IT and the use of email** as a means of communicating with the courts and the judiciary; video and telephone conferencing; and the digital recording of evidence; proposals around **mediation** and other forms of **dispute resolution**; proposals around **facilitating early settlement**; proposals in relation to **enhancing the court's case management powers**; expediting **judgments**; **access to justice for party litigants**; the cost and funding of **litigation**; the promotion of **public legal education**, and; the establishment of a **Civil Justice Council for Scotland** to keep under review the provision of civil justice by the courts in Scotland, including matters such as the structure of the courts, their jurisdiction, procedures and working methods, and the cost of litigation. ³³

The Scottish Government is in agreement with the Gill review's core conclusion that the court should exercise effective control over the conduct and pace of litigation, with the effect of courts being granted greater powers:

"There should be set out an explicit articulation of the court's role and responsibilities in these respects. The Scottish Government also supports moves towards simplification through both the abolition of separate petition and ordinary cause procedures in Court of Session and the combination of summary cause and small claims under simplified procedure in actions before the district judge."

³³ <http://www.scotcourts.gov.uk/civilcourtsreview/theReport/Synopsis280909.pdf>

(Scottish Government, 2010a, 39)

The legislative timetable to enact these reforms has yet to be formalised. Justice Minister Kenny MacAskill comments;

“Although there is no time to introduce a Civil Courts Reform Bill in the current legislative programme, the Government and the court have already undertaken a range of action in prompt response to the recommendations. These consensual actions have been taken in advance of issuing a formal response, and without identification of a dedicated legislative vehicle. They include the adoption or the active consideration of relevant recommendations on McKenzie Friends, safeguarders, protective costs orders and class actions under the various provisions of the Legal Services and Children’s Hearings Bills and proposed revisions to the rules of court.”

(The Journal Online, 14/06/10)

Review of Sheriff and Jury Procedure (Bowen Review)

In April 2009, a review was commissioned by the Justice Secretary Kenny MacAskill in order to ensure the system for sheriff and jury business is as ‘fair, effective and efficient as possible.’ It was conducted by Sheriff Principal Bowen QC and followed on from previous independent reviews of the High Court, led by Lord Bonyon, and summary justice reform, led by Sheriff Principal McInnes.

The remit of the Review was to examine:

“The arrangements for sheriff and jury business, including the procedures and practices of the Sheriff Court and the rules of criminal procedure as they apply to solemn business in the Sheriff Court; and to make recommendations for the more efficient and cost-effective operation of sheriff and jury business in promoting the interests of justice and reducing inconvenience and stress to the victims and witnesses involved in cases.”

(Scottish Government, 2010b, 5)

Bowen stated his intention to identify where there is waste in the system and try to eliminate it, by proposing procedures which allow for straightforward cases to be disposed of quickly whilst retaining flexibility to accommodate more complex cases.³⁴ The main recommendations of the Review are:

³⁴ <http://www.scotland.gov.uk/News/Releases/2010/06/11114540>

- To only cite witnesses to give evidence in a case once it is known the case will proceed to trial - in order to produce significant savings, both in reducing inconvenience to witnesses and in the cost of citing witnesses;
- To introduce a 'new compulsory business meeting' to bring together the Crown and defence to discuss cases at an early stage of proceedings- such that parties will be better prepared for court appearances and produce a higher number of pleas of guilty at an early stage in proceedings;
- To enhance the current statutory provisions and require the Crown and defence at First Diet to be able to inform the court about their preparation of the case and allow the court to resolve any issues to be addressed at that stage- this will mean that First Diets should work as intended as a clearing house for cases going to trial;
- To allow a longer period between the indictment of the case and the first diet – to allow for outstanding issues to be resolved before First Diet, thereby minimising the need for continued First Diets;
- To accommodate these procedural changes, it is proposed that the statutory time limits for commencing trials in sheriff and jury cases be extended for custody cases to 140 days, this is in line with the High Court time limit;
- The report also proposes that legal aid provision for sheriff and jury cases should be reviewed so that it supports early resolution of cases, as it does in the High Court and in summary justice.

(Scottish Government, 11/06/10)

Alongside recommendations for changes to procedure, the Report also makes a number of practical recommendations. These include considering wider use of TV links between courts and prisons, greater use of standby arrangements for witnesses, continuity of sheriffs involved in individual cases and sheriffs taking a more rigorous approach to the issue of persons not attending for jury duty without excuse.

Invoking the coterminous cultural changes discussed in the earlier Bonomy and Gill Reviews, Bowen stipulates that “a change in mindset by all parties” is required to effect change. The Scottish Government (2011: 5) categorised Bowen’s recommendations into two broad groups: those that are for the Government and the courts to progress through legislation and rules, and; those which seek to bring

about cultural change and implement 'best practice' standards among the stakeholders in the system.

Particularly positive emphasis was placed upon the following recommendations:

- Indicting cases to a first diet only and fixing the trial date for a case once it is known that the case will go to trial
- Extending the time limit between service of the indictment and the first diet to 29 days along with proposals for some alterations to time limits in order to make that happen.
- The introduction of a compulsory business meeting (CBM), to be fixed when the accused first appears on petition and held prior to service of the indictment
- Legal Aid should be reviewed to incentivise early resolution of case

(Scottish Government, 2011, 6)

UK Supreme Court Decisions (Carloway Review)

In October 2010, the Lord President nominated Lord Carloway to lead a review of the law and practice in light of the United Kingdom Supreme Court's recent decision in the case of *Cadder v HM Advocate* and the subsequent passage of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010.

The terms of the Review are to:

(a) To review the law and practice of questioning suspects in a criminal investigation in Scotland in light of recent decisions by the UK Supreme Court and the European Court of Human Rights, and with reference to law and practice in other jurisdictions;

(b) To consider the implications of the recent decisions, in particular the legal advice prior to and during police questioning, and other developments in the operation of detention of suspects since it was introduced in Scotland in 1980 on the effective investigation and prosecution of crime;

(c) To consider the criminal law of evidence, insofar as there are implications arising from (b) above, in particular the requirement for corroboration and the suspect's right to silence;

(d) To consider the extent to which issues raised during the passage of the Criminal Procedures (Legal Assistance, Detention and Appeals)

(Scotland Act) 2010 may need further consideration, and the extent to which the provisions of the Act may need amendment or replacement; and

(e) To make recommendations for further changes to the law and to identify where further guidance is needed, recognising the rights of the suspect, the rights of victims and witnesses and the wider interests of justice while maintaining an efficient and effective system for the investigation and prosecution of crime.³⁵

There have many critical voices emerging from the legal community as part of the consultation which began in April 2011. Professor Alan Miller of the Scottish Human Rights Commission derides the Scottish legal system for being insufficiently forward looking in relation to the Cadder case:

“Our legal system was proven to be incapable of addressing a problem such as Cadder. The European Committee for the Prevention of Torture made periodic visits in the 1990s and early 2000s to Scotland... The committee was very taken aback that a country like Scotland was still allowing that practice in Police stations, and raised it directly with the Scottish Office in the early 90s, and then again in the early 2000s with the Scottish Government saying it was a matter of urgency because it had been reported ten years earlier.”

(The Firm, 08/04/11)

Cameron Ritchie, President of the Law Society of Scotland, queries the utility since Cadder of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010:

“We are still concerned about the increased length of detention time now provided for in the Act, which has increased from six hours to 12 hours and even 24 hours for a small number of cases. We are also concerned that this section of the Act does not contain any provision for children or vulnerable adults. We continue to have reservations about the facilities available at police stations for the purposes of holding suspects for increased lengths of time. We voiced this view to the Scottish Parliament’s Justice Committee in March and we hope these concerns will be addressed.”

(The Journal Online, 10/06/11)

³⁵ <http://www.scotland.gov.uk/About/CarlowayReview>

Lord Carloway's Report will be published in autumn 2011.

The Introduction of 'New' Criminal Justice Bodies in Scotland

Post-Devolution Scotland has seen the creation and introduction of a large number of new criminal justice bodies. As McAra (2008) remarks, there has been a "massive expansion of criminal justice 'architecture' at both the national and local level; indeed, over 100 new institutions have been constructed since 1998" (2008: 490). In terms of adult criminal justice, these include: a national and local criminal justice boards; drug and alcohol action teams; community justice authorities; the Police Services Authority; the Scottish Crime and Drug Enforcement Agency; specialist adjudication in the form of domestic violence, drugs and youth courts; the multi-agency public protection arrangements (MAPPA) and the Risk Management Authority. The main functions of these bodies and their key objectives are summarised in the following section.

National Criminal Justice Board (NCJB)

In 2003 a Report by Sheriff Andrew Normand set out recommendations on how to achieve a more effective integration of aims and targets across the Scottish criminal justice system. The Report suggested that no single agency could tackle the complexities involved in reducing the levels of re-offending and recommended that an effective framework of cross-system mechanisms and better joined-up working needed to be implemented. This led to the creation of the Scottish National Criminal Justice Board in 2003, which collaborates with eleven Local Boards including: the Sheriff Principal; the Crown Office and Procurator Fiscal Service; the local police force and the Scottish Court Service.

Local Criminal Justice Boards (LCJBs)

There are eleven LCJBs in Scotland, listed as follows: Argyll and Clyde; Ayrshire; Central; Dumfries and Galloway; Fife; Glasgow and Strathkelvin; Grampian; Highlands and Islands; Lanarkshire; Lothian and Borders; and Tayside. Each board has a core remit to "provide for efficient joint working and oversight of the performance of the criminal justice system". The boards also work with the NCJB, which is tasked with monitoring the overall performance of the criminal justice system and making recommendations in connection with overall aims, objectives and targets.³⁶ The LCJBs are independent bodies, convened by the relevant Sheriff Principal, and representative of criminal justice organisations in each area. For the most part,

³⁶http://www.glasgowcja.org.uk/NR/rdonlyres/94C0BF57-8232-4D75-B142-91E408009168/0/criminal_justice_board_strategic_plan_2009_2012.pdf

each Local Board consists of the Sheriff Principal (Chair), the Area Procurator Fiscal, the Court Service Assistant Area Director and the local police representative.

LCJBs are responsible for overseeing the effective implementation of the reforms to summary criminal justice at local level, responsible for monitoring system performance, identifying elements of the process where performance falls below desired levels and identifying and implementing ways to improve system performance. The work being undertaken within the context of the summary justice reform monitoring and evaluation framework is intended to support the local boards in carrying out these functions.

Robust evaluations of specific aspects of the reforms to summary justice will hinge on the active participation of members of the LCJBs: their views and the data they acquire and interrogate will provide a crucial picture of what is changing and why. The evaluations will also inform LCJBs of the impact of and reactions to the reforms across Scotland, enabling them to see how local priorities affect others' practice.³⁷

Community Justice Authorities (CJA)

CJAs were introduced under the **Management of Offenders etc. (Scotland) Act 2005** (see *Legislative Developments*). There are eight CJAs covering all local authorities in Scotland. Table 1 lists these as: Glasgow; Northern; Tayside; Fife and Forth Valley; Lothian and Borders; North Strathclyde; Lanarkshire; South West Scotland. The primary role of CJAs is to plan and co-ordinate offender services. CJAs also deliver services on behalf of local authority criminal justice social work services, and the Scottish Prison Service. It is also possible for some of the statutory functions of these organisations to be transferred to a CJA with the agreement of all concerned.

Table 1: Community Justice Authorities

Northern	Tayside	Fife & Forth Valley	Lanarkshire	South West Scotland	North Strathclyde	Lothian & Borders
Highland	Dundee	Fife	North	E Ayrshire	Renfrewshire	Edinburgh
Moray	Angus	Falkirk	Lanarkshire	N Ayrshire	E Renfrewshire	E. Lothian
Aberdeen	Perth &	Stirling	South	S Ayrshire	Inverclyde	Midlothian
Aberdeenshire	Kinross	Clackmannan	Lanarkshire	Dumfries & Galloway	W Dunbartonshire	W. Lothian
Eilean Siar					E Dunbartonshire	Scottish Borders
Orkney					Argyll & Bute	
Shetland						

*City of Glasgow is a Unitary CJA

Adapted from: Scottish Government Background Paper on CJAs.

(<http://www.scotland.gov.uk/Resource/Doc/925/0063082.pdf>)

³⁷ <http://www.scotland.gov.uk/Publications/2009/07/10110349/8>

Risk Management Authority (RMA)

The RMA is a public body and was established by the **Criminal Justice (Scotland) Act 2003** (see *Legislative Developments*). Its functions relate to the risk assessment of offenders whose liberty presents a risk to the public at large and minimising risk in respect of a small number of serious violent and sexual offenders who may be or have been sentenced to the Order for Lifelong Restriction. The RMA is the recognised authority on risk assessment and risk management in Scotland. The RMA is tasked with supporting the work undertaken by statutory, voluntary and private organisations to ensure that standards of effective and robust risk management practice are set, adopted and maintained with regards to violent and sexual offenders generally, and more specifically, to the management of Order for Lifelong Restriction (OLR) processes (a sentence introduced in June 2006).

Multi Agency Public Protection Arrangements (MAPPA)

MAPPA evolved from the recommendations of several high-profile Reports: the Cosgrove Report (sex offending), Irving Report (reducing the risk) and the work of the Information Sharing Steering Group which led to the **Management of Offenders etc (Scotland) Act 2005** (see *Legislative Developments*). The fundamental purpose of MAPPA is public safety and the reduction of serious harm. Its introduction across Scotland in April 2007 gave a consistent approach to the management of offenders across all local authority and police force areas, providing a framework for assessing and managing the risk posed by some of those offenders.

Scottish Police Services Authority (SPSA)

The SPSA was established in 2007 as a non-departmental public body to promote the efficiency and effectiveness of the police in Scotland by providing police support services, and national training to police officers through the Scottish Police College. Its legislative vehicle was the **Police, Public Order and Criminal Justice (Scotland) Act 2006**. In addition, the SPSA maintain specialist frontline officers and intelligence staff for the Scottish Crime and Drug Enforcement Agency (SCDEA).³⁸ With its own board it operates independently of the Government, though it remains accountable to Holyrood. The Board is appointed by Ministers and consists of Chief Constables, joint police board conveners and lay persons. It has a staff of over 1600 and an annual budget of £100 million. Whilst centralisation of the SPSA has improved communication between various bodies and made for a more effective system, there

³⁸ <http://www.spsa.police.uk/about>

are far-reaching implications for policing policy in Scotland in the future. For example, the expansion of national policing services comes at the expense of the eight local forces autonomy, centralising forensic science and information technology (though these resources continue to be located within forces).

“The possibility of other support services, for example recruitment and procurement, coming under the aegis of SPSA in the future may be seen as either an opportunity or a threat, depending on one’s view of the direction in which police organisational structures in Scotland should be moving, either for the status quo or towards greater integration”.

(Scott, 2011, 125)

Scottish Crime and Drug Enforcement Agency (SCDEA)

The Scottish Drug Enforcement Agency was established in April 2001 defined in legal terms as a common service under the 1967 Police (Scotland) Act, but in practice it was conceived of primarily as an arm of frontline policing:

“As a result, SDEA primarily developed as an intelligence gathering organisation, involved in anti-money-laundering activities, witness protection and hi-tech crime whilst also becoming the external face of Scottish policing in a range of collaborations with UK, European and international police bodies. In particular, its work began to move away from combating drug crime on the streets to focusing on the criminal networks responsible for the trafficking of drugs and other goods in the form of serious organised crime”.

(Scott, 2011, 125)

In 2006 it became the Scottish Crime and Drug Enforcement Agency (SCDEA) as designated in the **Police, Public Order and Criminal Justice (Scotland) Act 2006**. The new name better reflects a commitment to tackling serious organised crime in all its forms. Crucially, in a departure from the SDEA's collaborative agreement status under section 12 of the Police (Scotland) Act 1967, the 2006 Act placed the Scottish Crime and Drug Enforcement Agency (SCDEA) on a clear statutory footing allowing it to expand and develop.

The primary functions of the SCDEA, as laid down in the Police, Public Order and Criminal Justice (Scotland) Act 2006, are to:

- prevent and detect serious organised crime;

- contribute to the reduction of such crimes in other ways and to the mitigation of its consequences; and
- gather, store and analyse information relative to -
- the prevention, detection, investigation or prosecution of offences; or
- the reduction of crime in other ways or the mitigation of its consequences.

In addition the Agency is also responsible for the Scottish Money Laundering Unit, the Scottish Witness Liaison Unit and e-Crime Unit.³⁹

Criminal Cases Review Commission

The Scottish Criminal Cases Review Commission is a public body which was created in April 1999, by **section 194A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 25 of the Crime and Punishment (Scotland) Act 1997**. Whilst this body was created shortly before Devolution, its inclusion is worthwhile when exploring post-devolution Scotland. The Commission is a non-departmental public body whose role is to consider alleged miscarriages of justice and if, after proper investigation it believes that i) a miscarriage of justice may have occurred and ii) that it is in the interests of justice that a reference should be made, it may refer a case to the High Court for determination. By statute at least one-third of Commission members must be advocates or solicitors of at least 10 years' standing. The Commission is funded by the Scottish Government Justice Directorate (JD) and is accountable to the Scottish Parliament for those public funds. Research undertaken to mark the 10th anniversary of the Commission found that:

“60% of conviction referrals and 92% of sentence referrals resulted in successful appeals. These figures are broadly similar to the English Commission, which may be significant given that the Scottish Commission refers a higher percentage of cases in respect of which it receives applications (8% as against 3.8%). This “referral rate” figure remains higher (6% as against 3.8%) even if referrals in respect of punishment parts are discounted from the Scottish figure.”

(SCCJR, 2009, 59)

Specialist Courts

Scotland has piloted various specialist forms of adjudication to address particular categories of offending - or where the circumstances of the offender are a major factor in his or her offending behaviour.

³⁹ <http://www.sdea.police.uk/About-Us/aboutus.htm>

In October 2004 a pilot **Domestic Abuse Court**, based at Glasgow Sheriff Court, sat for the first time. The development of the pilot domestic abuse court followed a recognition of the need to address problems in dealing with domestic abuse through traditional courts. In parallel, a support service, ASSIST, was established to help victims before and after the case has gone through the specialist court⁴⁰ providing support to 1,383 victims over the two years:

“The key factors which contributed to effective practice in the response to victims and other witnesses... appeared to be:

- *a victim-centred approach, with an emphasis upon safety, supported by appropriate processes such as risk assessment and safety planning, information;*
- *the provision of independent support to victims at all stages by an organisation with expertise in domestic abuse.”*

(Scottish Government, 2007, 60)

This approach has resulted in promising criminal justice impacts compared to traditional courts. Improved outcomes include:

“a higher proportion of cases in which there was a guilty plea at some stage (81% compared to 73%); a higher proportion of guilty pleas at the first appearance (21% compared to 18%), a higher proportion of pleas changed to guilty at or before the intermediate diet (54% compared to 45%), a higher conviction rate (86% compared to 77%) and a lower level of case attrition (10%, compared to 18%). The speed of processing cases was much faster in the domestic abuse court than the comparison courts, with an intermediate diet held within 29 days in 76% of cases (compared to 20%), and nearly three quarters of cases calling reaching a trial diet in 6 weeks, compared to only 13% in the comparison courts”.

(Scottish Government, 2007, ii-iii)

These improvements did however come at a higher financial cost than a "traditional" Sheriff summary court in many respects. For example:

“... the cost of dedicated staff (£80,000 for a Procurator Fiscal Depute), the provision of a support service (around £400,000 for the ASSIST service)

⁴⁰ <http://www.scotland.gov.uk/Publications/2004/12/20345/47608>

and the costs arising from the higher number of cases proceeding to trial.”

(Scottish Government, 2007, iv)

Scotland's first **Drug Court** was established in Glasgow Sheriff Court in October 2001 and a second pilot Drug Court was established in Fife in August 2002. The Fife Drug Court sits in Dunfermline and Kirkcaldy Sheriff Courts. Both Drug Courts are aimed at offenders aged 21 years or older of both sexes, in respect of whom there is an established relationship between a pattern of serious drug misuse and offending. They aim to reduce the level of drug-related offending behaviour, to reduce or eliminate offenders' dependence on or propensity to use drugs and to examine the viability and usefulness of a Drug Court in Scotland, especially, in the case of Fife, in a non-urban centre. All Orders made by the Drug Court are subject to drug testing (urinalysis) and regular (at least monthly) review.⁴¹

The courts are targeted at those with complex and deeply entrenched drug problems to help them recover from addiction and rebuild their lives. Specialist sheriffs, multi-agency working and effective case management are key characteristics of the drug court. Following a review of the success and effectiveness of drug courts, Ministers agreed to extend funding until March 2012. The extension of funding was conditional on establishing savings and efficiencies in the operation of the Drug Courts which could be implemented from March 2012.⁴²

⁴¹ <http://www.scotland.gov.uk/Publications/2003/08/17878/23845>

⁴² <http://www.scotland.gov.uk/Topics/Justice/law/Drugs-Strategy/prevention/lawenforcement>).

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