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Criminal Justice Systems in Europe and North America

SCOTLAND

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THE CRIMINAL JUSTICE SYSTEM OF SCOTLAND

1. Demographic Issues

1.1 As of 30th June 1999 the total population of Scotland was 5,119,200.

1.2 The minimum age of criminal responsibility is 8 years, which is an absolute limit. Children aged between 8 and 16 years may be prosecuted before a criminal court as regards particularly serious crimes, though protections are in place to make any proceedings less public and stressful to the accused. The total number of people who have reached the minimum age of criminal responsibility is 4,629,300, approximately 90% of the population.

1.3 Full criminal responsibility is reached at 16 years of age. The total number of people who have reached this age is 4,342,432, approximately 85% of the population.

1.4 There is only a very small minority of people residing in Scotland who are non-natives.

1.5 The most common nationalities among non-natives are English, Irish and Welsh (although most of these are United Kingdom citizens). Other European nationalities, such as Spanish, German and Italian, are also represented, though in even smaller number.

1.6 The proportion of the population living in urbanised areas is approximately 67%. An area is defined as “urbanised” if it has more than 2.1 residential addresses per hectare, or if it has more than 0.1 non-residential addresses per hectare.

1.7 In the spring of 2000, 2,272,000 people were employed in Scotland, approximately 72% of the population having reached the generally accepted “working age” of sixteen years. Of these, approximately 54% were male. At the same time, the number of unemployed persons was 888,000, approximately 28% of the country’s potential workforce. Of these, 698,000 (approx. 22% of the potential workforce) were not actively seeking work, with “long-term illness”, “looking after a family home” and studying being the main reasons for persons not seeking work.

2. Criminal Law Statutes

2.1 Scotland is somewhat unusual in that, unlike many European countries, it does not have a criminal code. As a result, it is impossible to make reference to a single convenient place where one might find an *official* statement as to what types of behaviour constitute crime in Scotland. This situation is generally viewed as something of a double-edged sword. On the one hand, it allows the criminal law of Scotland to be flexible, but on the other, it leaves the law open to criticism as being less definite and less certain than that of other jurisdictions.

Therefore, instead of identifying a single written code, reference must be made to a number of other sources. Every branch of the criminal law (and indeed all law in Scotland) is derived from these sources, either individually, or through a mixture of these elements. They are: the common law (i.e. case law); the works of certain "institutional" writers of the 18th and 19th centuries, whose observations and opinions are given authoritative status; and finally legislation, in the form of Acts of Parliament, any secondary legislation, and also any extra-national legislation by which Scotland is bound.

The common law of Scotland is a system consisting, traditionally, of long-standing rules whose origins either cannot be traced or have no legislative foundation. However, a more practical definition is that the "common law" has been constructed gradually from the decisions made by judges sitting in the higher courts. In criminal matters, the supreme court is the High Court of Justiciary (henceforth "High Court"). Most of the basic principles were laid down by the High Court in the 18th and 19th centuries but the criminal law is still developing and changing. However, even though the law may be altered, it is not permissible to apply it retroactively as a result of the incorporation of the European Convention on Human Rights (Article 7.1) in Scotland (and the United Kingdom) in 1998. Despite this, there exists some confusion as to whether the High Court, in practice, is prevented from applying the law retroactively,

owing to the Court enjoying what is known as a "declaratory power," which allows it, in effect, to "create" new crimes. However, use of the declaratory power is subject to various restrictions, which safeguard against its abuse. In any case, the decisions of the court should not, as a fundamental constitutional rule, directly conflict with a rule laid down by Parliament (see below for more details on this).

The history of the Scottish common law is long: the High Court adopted its modern form in 1672 but records of its authority can be traced for many centuries prior to this. Against that background, it would an arduous task indeed to establish what part of the common law is based solely on judicial decisions through the ages. But such studies have been done at various intervals throughout the recent history of the Scottish criminal law system, and it is from studies of this type that the "institutional writings" are drawn. (Indeed, it is arguable that the work of institutional writers is merely a documentation of the common law at the time, but the real value of such writings is the enunciation, analysis and discussion of the principles which have emerged from the decisions of the courts.)

This brings us to the second source of Scottish criminal law. The first study of judicial decisions was made in the late 18th century by Baron David Hume, who documented and commented upon the law up to 1797. This work, entitled *Commentaries on the Law of Scotland Respecting Crimes*, was updated as far as a fourth edition (published in 1844, by prominent advocate Benjamin R. Bell), and is afforded "authoritative" status. Such status is also enjoyed by several other works in which the authors, although basing their treatises on the work of Hume, have collated subsequent cases and expressed views upon the development of the law. These are Alison's *Principles of the Criminal Law of Scotland* (1832) and MacDonald's *Practical Treatise on the Criminal Law of Scotland* (latest edition published 1948). These institutional writings remain an important source of Scots law, and are an often used starting point by anyone wishing to establish the law regarding a certain crime. Finally, Gordon's *Criminal Law of Scotland* (3rd edition published

2000 and 2001) has not yet attained "institutional" status but is indisputably regarded as the most important current text in the area.

The third source of law in Scotland is legislation, usually in the form of Acts of Parliament. Legislative rules are not subject to development in the same way as common law rules; they can only be amended by subsequent Acts. The words of these rules *are* however open to interpretation by the judges who must enforce them, and such interpretations form part of the law itself. As previously mentioned, the decisions of a court should not directly conflict with the will or decision of Parliament because, constitutionally, the latter is supreme. As a result of "Parliamentary supremacy," the common law can have no effect on existing legislation, while legislative rules can radically alter the common law (for example, in 1995 an Act of Parliament radically altered the common law which prohibited male homosexual acts).

Some legislation is created by bodies or persons to whom Parliament has delegated by statute the relevant authority. The extent of these delegated powers are usually detailed very clearly in the "parent" statutes. There are two main types of this non-Parliamentary legislation: "Statutory Instruments", which are used increasingly in the criminal law to create traffic offences and the like; and "byelaws", often made by local authorities, regulating local matters like parking and dog-fouling in parks. Non-Parliamentary legislation enjoys the same status as Parliamentary legislation, since the power under which it is created is seen as deriving directly from Parliament.

As regards Parliamentary authority, in the early 18th century Scotland and her neighbour England were brought together by the Treaty of Union in 1707. This brought about the demise of the Scottish Parliament, where a great deal of criminal legislation had been passed. The same was true, of course, of the English Parliament. It was assumed that the legislation of both Parliaments would remain, and would be common to both countries of the new Union. However, over the course of the eighteenth century, more and more Scottish legislation became outdated, and

was replaced by Acts of the new "United Kingdom" Parliament. The modern criminal law in Scotland very rarely relies on pre-Union legislation and, until 1998, all current legislation was created by the UK Parliament in London, although Acts applying solely to Scotland have the country's name in parentheses towards the end of the official title.

However, in 1998 the UK underwent a process of devolution of power away from London, which saw the creation of a new Scottish Parliament in Edinburgh. The Scottish Parliament now has authority to legislate on certain matters, including law and order (with the exception of certain UK "home affairs" issues such as drug abuse and firearms). So, within the permitted areas, Acts of the Scottish Parliament form an important part of the criminal law, and in keeping with the UK's constitutional tradition, these Acts are, again, superior to any court decision. It must be noted that in areas in which the Scottish Parliament is *not* competent, legislation passed in Westminster remains supreme.

It is also important to note that Scotland is also bound by certain extranational legislation, such as legislation of the European Parliament, and the European Convention on Human Rights. This is the only situation where the supremacy of Parliament is compromised.

The criminal law of Scotland has undergone a number of important statutory reforms since 1945, for example: the abolition of the death penalty (Murder (Abolition of Death Penalty) Act 1965, the "codification" of many sexual offences (Sexual Offences (Scotland) Act 1976); and the legalisation of various homosexual practices (Criminal Justice (Scotland) Act 1980). There have also been some important changes to the common law as a result of innovative decisions by the High Court, for example: abolition of the rule that a man could not be convicted of rape against his wife in *S v H.M.A.* 1989 SLT 469, expressly because of changed social attitudes since the time of the institutional writers; and making it a crime to supply materials to be used by children for the purposes of "glue-sniffing" in *Khaliq v H.M.A.* 1984 JC 23 (a move which took legislation in England and Wales).

2.2 As a result of the complex nature of Scotland's criminal law, there is no single publication which documents the law in its entirety. Instead, what one must do is consult a number of publications which together provide a comprehensive account of the criminal law of Scotland. For this purpose, the list that follows provides core texts for each source of the law.

As regards institutional writings, Hume's *Commentaries on the Law of Scotland Respecting Crimes* remains the most important. As noted above, the most important modern text is Gordon's *Criminal Law of Scotland, Vols 1 and 2.*

To trace the development of the common law on crime, decisions of the High Court are published in a variety of official law reports. The most important of these are: *Session Cases* (cited JC because criminal cases are in the section of each volume devoted to the High Court of Justiciary); *Scottish Criminal Case Reports* (cited SCCR); and *Scots Law Times* (cited SLT). These series overlap to a very large extent, in that they report the same cases.

Legislation is also published in a number of forms. The most useful source of criminal legislation is *Statutes in Force – Official Revised Edition*, which makes strenuous efforts to rewrite criminal – and other – legislation in accordance with amendments and repeals. Also worthy of note is the *Current Law Statutes* series. While this publication has no official authority, it remains a useful reference source for U.K. legislation. Finally, all U.K. legislation is officially published by The Stationery Office, and any Acts etc passed from 1988 onwards are available via the World Wide Web at the homepage of Her Majesty's Stationery Office at *http://www.hmso.gov.uk*.

The full bibliographic references (including ISMB / ISSN)for all the above titles are included in the main bibliography at the end of this report. There are at present no official translations of any of the materials cited.

2.3 As legislation is an important source of Scots criminal law, it would be impractical to provide a comprehensive list of the vast number of statutory offences. The definitions of such offences are contained in the relevant legislation. Attention can be drawn to the more significant criminal statutes, all of which define the statutory offences to which they relate. These include: the Misuse of Drugs Act 1971 (as amended by subsequent legislation); the Sexual Offences (Scotland) Act 1976: the Road Traffic Acts of 1988 and 1991, alongside the Road Traffic Offenders Act 1988; the Carrying of Knives, etc. (Scotland) Act 1993; and the Firearms (Amendment) Acts of 1988 and 1994.

3. Procedural law statutes

3.1 The principal statute governing criminal procedure is now the Criminal Procedure (Scotland) Act 1995 (as amended) which in many ways is akin to a Code of Criminal Procedure (henceforth it will be referred to as "the 1995 Act"). This statute brings together law from a variety of sources on every aspect of criminal procedure, and provides a definitive statement of the current law on these matters. As it has drawn its content from various earlier proclamations of the law, its history is somewhat complicated.

Little is known about the maintenance of law and order in Scotland prior to the end of the eleventh century. Throughout the twelfth and thirteenth centuries, as a result of the influence of the Norman feudal system, an attempt was made to impose central government and, consequently, a system of criminal justice. However, at this time Scotland was a country troubled greatly by war and religious disharmony, and the existence of these problems forced the system into decline, eventually causing an entire halt to its development in the early fourteenth century. No further advances in the law of criminal procedure occurred until after the 1707 Treaty of Union between Scotland and England. Despite the fact that the legislative power had passed to the Parliament of the United Kingdom, Scottish criminal procedure succeeded in evolving independently, and retains today a character which is very distinct from that of England. In recent times, major developments have increasingly had their origins in statutory provisions rather than in the common law.

The 1995 Act, which was passed with a view to setting out a definitive statement of all aspects of criminal procedure, both consolidates earlier statutes on criminal procedure and incorporates (with appropriate amendments) all relevant rules which previously were to be found elsewhere. As regards the first function, the Act follows two previous statutes: the Criminal Procedure (Scotland) Act 1887 and the Criminal Procedure (Scotland) Act 1975. As regards the second, a number of sections in the 1995 Act are restatements (with amendments where necessary) of pro-

visions contained in other statutes, including: the Criminal Evidence Act 1965; the Police (Scotland) Act 1967; the Criminal Justice (Scotland) Act 1980; and the Prisoners and Criminal Proceedings (Scotland) Act 1993.

Since its enactment, the 1995 Act has been subject to several amendments, all of which have been incorporated in its text, the most significant being those made by the Crime and Punishment (Scotland) Act 1997, the Crime and Disorder Act 1998, and the Bail, Judicial Appointments, etc. (Scotland) Act 2000.

The most significant reform since 1945 has been the effective codification of criminal procedure, initially through the Criminal Procedure (Scotland) Act 1975 and now in the 1995 Act. Also of major importance was the creation of a non-punitive, welfare oriented approach to young offenders, who are rarely prosecuted in the courts but instead are dealt with through a system of relatively informal "children's hearings" (see 7.3 below). This followed upon recommendations by the Kilbrandon Committee (*Report on Children and Young Persons, Scotland*, 1964, HMSO, Edinburgh) which were implemented in 1968. Another development has been the huge increase in cases processed outwith the formal court structure, principally through the issue of "fixed penalties" in road traffic cases and "fiscal (prosecutor) fines" as regards various other minor offences.

3.2 All U.K. legislation is officially published by The Stationery Office, and any statutes passed since 1988 is available via the World Wide Web at the homepage of Her Majesty's Stationery Office at http://www.hmso.gov.uk. As explained above, the nearest Scotland has to a Procedural Code is the Criminal Procedure (Scotland) Act 1995 (ISBN: 0105446955).

3.3 Although the 1995 Act is derived from and influenced by a number of preceding statutes, it supersedes all previous legislation. Therefore, when subsequent amendments are taken into account, it constitutes a comprehensive

statement of the law as regards criminal procedure. There is no separate system of administrative or any other penal offences in Scotland.

3.4 The Children (Scotland) Act 1995 now incorporates the welfare oriented system of children's hearings (see 3.1 above) into a wider statute concerned with most aspects of child welfare. Where an offence is committed by a juvenile (under 16 or 18 if they are already in the system), the police will bring this to the attention of a Reporter whose task is normally to determine whether the child is in need of some measure involving compulsory care. If so, the Reporter will refer the child to a children's hearing, comprising a panel of three lay persons with specialised training. A children's hearing is an administrative tribunal not a court of law and thus does not decide whether the child is "guilty" of the offence; indeed, if there is a dispute over the facts, the case must be referred to court (see 7.3 for more details of "hearings"). It should always be remembered that there are many reasons why children come before children's hearings other than that they may have committed an offence.

In the rare case where the offence committed by the juvenile is too serious to be dealt with by a children's hearing, it will be referred to the public prosecutor. The procedures for dealing with this small minority of young offenders is set out in Part V of the Criminal Procedure (Scotland) Act 1995 (see 7.3 for more details).

4. The court system and the enforcement of criminal justice

4.1 Part I of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") sets out the court system, detailing its organisation and the jurisdiction of each of the criminal courts, these being the High Court of Justiciary, Sheriff Courts, and District Courts (see 6.5 for more details). The only major reform to the court system since 1945 was the creation in 1975 of the District Courts, which replaced a variety of minor local courts, such as the Police Courts, Burgh Courts etc. This was carried out by the District Courts (Scotland) Act 1975.

4.2 All U.K. legislation is officially published by The Stationery Office, and any passed from 1988 onwards is available via the World Wide Web at the homepage of Her Majesty's Stationery Office at http://www.hmso.gov.uk. The ISBN of the 1995 Act is 0105446955. It is not available in any languages other than English.

4.3 The provisions outlined in Part I of the 1995 Act are mostly restatements of laws drawn from earlier statutes. These include: the Circuit Courts and Criminal Procedure (Scotland) Act 1925; the Sheriff Courts (Scotland) Act 1971; and the District Courts (Scotland) Act 1975. In any event, the 1995 Act (as amended) now supersedes all previous statutes on this matter, and should be taken as a complete and authoritative statement of the law in this area.

4.4 The law as regards the organisation of the police is outlined in Part II of the 1995 Act. The law as regards the organisation of solicitors is mainly contained in the Solicitors (Scotland) Act, while the rules governing advocates stem primarily from the common law. The main source of the law concerning imprisonment is the Prisons (Scotland) Act 1979 but also of relevance are the Prisoners and Criminal Proceedings (Scotland) Act 1993, the Criminal Justice and Public Order Act 1994, and the 1995 Act, Part XI. There is no

dedicated probation service in Scotland, the relevant functions being undertaken by generic social workers.

4.5 (See 3.4 above.)

5. The fundamental principles of criminal law and procedure

5.1 At the outset of this chapter, it must be noted that Scotland has no Penal Code (see 2.1) and thus no statutory definitions of many important principles and concepts. The criminal law of Scotland has not, in one sense, traditionally recognised the "legality principle" because the High Court has always possessed a power which allows it to "declare" the law. The "declaratory power" can be invoked to make criminal an act not previous thought to be unlawful, thereby rendering the accused liable to conviction. Although this power may be applied only in very restricted circumstances, is now rarely used and is subject to much academic debate, it remains an apparently constitutionally-protected power of the High Court.

However, with the passing of the Human Rights Act by the United Kingdom Parliament in 1998, the European Convention for the Protection of Human Rights and Fundamental Freedoms was formally incorporated into UK law (and therefore into the law of Scotland). This Act prevents the UK courts from acting in any way inconsistent with the terms of the Convention. Article 7 of the Convention impliedly protects individuals against retroactive application of the criminal law. Given the direct enforceability of this Article in the UK courts, it appears that the declaratory power is therefore left in a somewhat uncertain position. The question of whether it remains competent remains unanswered by Parliament or by the courts.

5.2 The criminal law of Scotland does not formally classify crimes in terms of severity. The nearest Scots law comes to dividing offences in this way is to recognise two distinct forms of criminal procedure. These are "summary" and "solemn" procedure. The former is appropriate for less serious crimes and, in theory (if not in fact), is more flexible, speedy and relatively informal. If the case goes to trial, it is heard by a judge, either a sheriff or a lay justice (some-

times two of the latter), without a jury. In contrast, solemn procedure (or procedure "on indictment" to give it another name) is for more serious offences and is more lengthy (in theory) and more strictly governed by rules of procedure. Trials of this type are always heard before a jury, with either a sheriff or High Court judge on the bench.

However, it would be incorrect to say that the distinction drawn between summary and solemn procedure constitutes a firm division between offences. Most common law crimes can be prosecuted under either summary or solemn procedure, and while some statutory offences designate which procedure is to be employed, many do not. Where a choice exists, the decision as to which procedure to employ lies with the prosecutor.

As regards the grouping of crimes by type, once again no formal classifications exist in Scots criminal law. It is, however, traditional and convenient for commentators and legal writers, when documenting Scots criminal law, to employ *some* method of division between crimes. The most common method is to group together crimes based on significant features which they appear to have in common. Therefore, it is possible to group crimes under headings such as "Crimes Against the Person", "Crimes of Dishonesty", "Sexual Offences" and so forth. The institutional writers, such as Hume, generally devoted a chapter to each individual crime, with only some grouped together under a common heading (for example, murder, culpable homicide and some other offences are classified under the general heading "homicide").

It has become the norm that, purely for statistical purposes (e.g. for the monitoring of crime trends) activities contrary to the criminal law are divided into "crimes" and "offences", and are further divided into groupings by type of crime within each category. It must be noted that all such divisions are used for reasons of administrative convenience only, and have no legal basis whatsoever.

5.3 The minimum age of criminal responsibility under Scots law is eight years, and no person under this age may be charged with an offence. Between the ages of eight and sixteen years, the offender can be prosecuted before a criminal court, although it is much more normal for the child to be referred to a childrens' hearing (see 3.4 above).

The minimum age at which an offender may be dealt with as an adult is sixteen years.

5.4 As Scotland has no Penal Code, concepts such as strict liability cannot be enshrined within it. However, the criminal law of Scotland does indeed recognise the notion of strict liability, as discussed in the following section.

5.5 The general rule in Scots criminal law is that an accused must display intent before he is guilty of an offence. However, there do exist a number of statutory offences which give rise to "strict liability" if committed. Providing an exhaustive list of such offences is impossible due to the high number of statutory provisions involved, but attention can be drawn to three of the most significant areas in which strict liability arises. The first is road traffic offences, governed by the Road Traffic Acts of 1988 and 1991, and the Road Traffic Offenders Act 1988. The second is various crimes involving offensive weapons, governed by the Carrying of Knives, etc. (Scotland) Act 1993, and certain provisions of the Criminal Law (Consolidation) (Scotland) Act 1995, which consolidated certain provisions contained in the earlier Civic Government (Scotland) Act 1982. The third is a variety of drugs offences, governed predominantly by the Misuse of Drugs Act 1971, as amended by a number of subsequent Acts and secondary legislative measures.

5.6 In Scotland, certain non-human "legal" persons can be convicted for a limited number of crimes. Certain business organisations – particularly incorporated companies – are treated in Scots law as separate legal entities (or "*personae*") from the people who own, direct or are employed by them. Consequently, they can be accused, tried or convicted of crimes in much the

same way as human persons can. Generally, the limits of corporate responsibility are dictated by practical and conceptual considerations. In other words, if it is practically possible for the non-human person to have "committed" the crime, that legal person may be subject to criminal proceedings. Of course, the converse is also true, so an important limitation (though an indirect one) can be found as regards crimes which have a specific intent in their description, for example "shamelessly indecent conduct". A company (or other non-human person) cannot display the qualitative notion of "shamelessness", and so such a charge would be incompetent.

5.7 Scots criminal law at present recognises three grounds of justification which negate the committal of a criminal offence. There are, of course, particular rules to be observed and limitations on the applicability of these defences. The grounds of justification are "lawful authority", "self-defence" and "necessity". It should be noted that each of these are common law defences and, in keeping with the tradition of Scots criminal law, each case is judged upon its own merits.

Lawful authority is pled where the accused can be said to have held some position or other status which provided him the authority to act as he did. An example of this is where a police officer shoots dead an armed and dangerous fugitive. This defence may be pled in a range of circumstances, but it is always subject to certain limitations, such as the force used not being excessive and an absence of viable alternatives.

Self-defence is pled where the accused can be said to have acted to protect his own person or life or, to a lesser extent, that of others. There are very strict rules governing the use of this defence, particularly when the accused has committed homicide. Specifically, the threat to the accused must be imminent, the action taken must be necessary and proportional to the threat faced, and there is a duty imposed on any person to employ any reasonable means of retreat or escape before acting in an otherwise criminal manner.

Necessity is pled where the conduct of the accused person was necessary in order to either serve some greater public good, or protect his own welfare.

Generally the former is looked upon more favourably as a defence, and in either case restrictions apply, such as there having been no reasonable alternative to the act committed.

Scots criminal law also recognises a number of other defences which are said to "excuse" the conduct in question. The significant distinction between justifications and excuses is that the former focus upon the actions carried out by the accused, while the latter focus upon his responsibility. In other words, excuses do not render the conduct lawful; rather they negate the accused's criminal responsibility. Examples of "excuse" defences are many, but include insanity or coercion by a third party.

5.8 There is no time-bar as regards the prosecution of common law crimes, thus an accused may be prosecuted regardless of how much time has elapsed since the alleged criminal conduct. It should be noted, however, that it is within a judge's discretion to refuse to allow a prosecution to proceed where the delay in initiating proceedings is deemed to be oppressive to the accused. With regard to statutory offences, the relevant legislation will give details of any time bars which are in place, and of when the prescriptive period begins. If no specific time-limit is set, then a general time limit for prosecution of six months from the date of the alleged offence is deemed to apply.

Once proceedings have begun, however, various time-bars come into effect. In solemn cases, the trial must commence within one year of the accused's first court appearance and, if he is in custody, within 110 days (see 6.2.4). In summary cases, there is no equivalent of the one-year-rule but, if the accused is in custody, the trial must commence within 40 days of the first court appearance (see 6.2.4).

5.9 As already stated, Scotland has no formal Penal Code. Discussions of divisions into general and specific parts are therefore irrelevant to the Scottish criminal justice system.

5.10 Due to the complex nature of Scots criminal law, definitions of crimes appear, sometimes in many variants, in the case law, statutory law and legal writings of Scotland. The definitions given here are consequently drawn from a variety of sources, but wherever possible the definition which is formally recognised has been given.

5.10.a) The legal definition of murder which is generally accepted in Scotland is that given by the institutional writer, Macdonald: "murder is constituted by any wilful act causing the destruction of life, whether intended to kill, or displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of the consequences" (*Criminal Law*, p 89*)*.

5.10.b) The lesser crime of culpable homicide has no single simple definition. It applies very broadly, covering any homicide of a human being for which the perpetrator of the conduct should be held criminally responsible (excluding murder and other more clearly defined homicides). Culpable homicide covers: 1) assaults which result in death, where the accused does not display the necessary intention to kill or wicked recklessness as to the risk of death; 2) injury caused recklessly during an illegal act, though without malice to cause harm at all; 3) injury caused recklessly during *any* act whatsoever, or as Hume says, "[where] some punishment is due, though the slaughter happen in the performance even of a lawful act, if there be great heedlessness and indiscretion, or a want of due caution and circumspection, in the way of doing the thing" (*Commentaries*, p 233); 4) where an accepted "excuse" (see 5.7), for instance, provocation or diminished responsibility, reduces the crime from murder.

5.10.c) While no "official" specification of robbery exists in Scots criminal law, it can be defined as the taking and appropriation of property from another, by force and against his will. This is based on the writings of Macdonald (*Criminal Law*, p 39), augmented by opinions expressed in a number of authoritative cases, including *O'Neill v. H.M.*

Advocate 1934 JC 38. This definition neatly encapsulates the definition of the crime, and is widely accepted.

5.10.d) The crime of assault has a very wide definition in Scots law. The definition most commonly accepted by the courts is that given by Macdonald (*Criminal Law*, p 115) which states simply that assault may be defined as an attack upon the person of another. Under this definition, there is no necessity for injury to be suffered, and the court has decided that assault may be constituted by threatening gestures "sufficient to produce alarm" (see *Atkinson v. H.M. Advocate* 1987 SCCR 534). Spitting has also been judicially held to constitute an assault (*James Cairns* (1837) 1 Swin. 597) as has the cutting off of a woman's hair while she slept (*Charles Sweenie* (1858) 3 Irv. 109).

Under Scots law, an assault may be aggravated in a number of ways. Broadly these aggravating circumstances can be divided into four groups. The first involves an ultimate intention that the accused was alleged to have had at the time of the assault. Examples of this given by Hume include assault with intent to kill, assault with intent to ravish, and assault with intent to rob. A second type of aggravation can be constituted by the surrounding circumstances in which the assault was committed, for example if a firearm was used, or if the accused carries out the attack in his victim's home. Thirdly, an assault can be aggravated by indecent conduct on the part of the accused, for example if he attacked a woman and then fondled her in a sexual manner (note, however, that "indecent assault" is not merely a form of aggravated assault: it is a separate offence altogether). Fourthly, and finally, the results of the attack can also give rise to an aggravation, for example if an assault leads "to the danger of life" or "to serious injury".

5.10.e) The accepted definition of theft in Scots law is the taking and appropriation of another person's property without consent, where the accused knows that the property belong to another and intends to deprive him of it or its use. While again no "official" definition exists, this widely accepted terminology is based on the institutional writings of Macdonald (*Criminal Law*, p. 16). It has further been augmented by the opinions of other legal

commentators, and by opinions expressed in a number of authoritative cases (including *Carmichael v. Black* 1992 SCCR 709).

The crime of theft can be aggravated in a number of ways, but there are two circumstances where aggravations of theft most commonly occur. The first is that of "housebreaking", where the thief has entered any "shut and fast building" (to use Hume's definition) and subsequently commits the theft. "Housebreaking" is applicable to any building. The second is termed "opening of lockfast places", and is constituted by the accused having committed his theft after opening certain locked items, such as safes, chests, and cabinets.

6. The organization of the investigation and criminal procedure

6.1 General issues

6.1.1 In Scotland, virtually all prosecutions are brought by the public prosecution service. This is headed by the Lord Advocate, a government minister, and his deputy, the Solicitor General. The Lord Advocate appoints several members of the Scottish Bar to act as Advocates Depute, these senior law officers being known collectively as Crown Counsel. Their task is both to prosecute in the High Court, where the most serious cases are heard, and to provide advice to local prosecutors, known as Procurator Fiscals, about various other categories of case. Most prosecutions are undertaken locally by procurator fiscals or their "deputes" (i.e. deputies) in the Sheriff Court or District Court. Although it is theoretically possible in Scotland for individuals to initiate private prosecutions in solemn (i.e. serious cases), this requires the permission of the Lord Advocate or High Court and, in practice, is very rare. There were only two private prosecutions in the twentieth century, the last being *H.M. Advocate v. Sweeney* 1983 SLT 48. (See 6.4 for more details of the system of prosecution.)

The procurator fiscal is also responsible for the investigation of crime, but in practice this role is delegated to the police. Although the police enjoy a great deal of discretion in the investigation of crime, they remain responsible to the procurator fiscal, and must obey any instructions that are received from the prosecutor's office. Further, the role of the police is limited to investigation. They have no discretion to decide whether the results of investigation would justify a prosecution or otherwise. This discretion lies entirely with the procurator fiscal. To aid in such decisions, the police are required to put the results of their investigations fairly in a report before the prosecutor. The evidence to be used in court is gathered by the police throughout the investigative stages of a case. In order for such evidence to be admissible in court, various rules

of procedure must be followed. (See 6.3 for details about the organization of the police.)

The Scottish criminal justice process is adversarial in nature. In most cases, the matter is disposed of without trial, mainly through the accused pleading guilty, either upon his first appearance in court or, more commonly, in a subsequent pre-trial hearing. If a trial does prove necessary, evidence is presented at court very simply, with witnesses providing oral testimony, and any physical evidence, such as stolen goods or the murder weapon, being displayed. All decisions relating to the presentation of evidence are made by the relevant legal representatives, i.e. either the prosecuting or defending lawyer. The judge has no prior knowledge of the case and has no role in determining what evidence is led. The ability of prosecution and defence to adduce evidence is controlled by various evidentiary rules.

Witnesses are summoned at the discretion of counsel. Generally, anyone with relevant evidence may be heard. It should be noted that the concept of "relevance" has been quite narrowly drawn in the Scots law of evidence (see 6.2.9). Witnesses must also be competent. Those deemed incompetent are individuals who, for example, as a result of their youth or mental incapability are unable to distinguish between truth and falsehood or appreciate the nature of the proceedings. Also worthy of mention is the fact that an accused cannot be compelled to give evidence. The spouse of an accused is a competent witness for all parties, but cannot be compelled to give evidence against his or her spouse, unless he or she is the victim of the crime which resulted in the charge. Questions are presented, in turn, by the two counsel, each questioning their own witnesses first. The judge generally may not ask questions, but may do so to clear up any matters which are unclear, so long as these matters have initially been introduced by counsel.

In a summary trial – i.e. in less serious cases where there is no jury (see 6.5 below) - the judge (either a sheriff or a lay justice) determines the verdict once all the evidence has been heard. In a solemn trial – i.e. in serious cases - the judge (either a High Court judge or sheriff) instructs the jury as to the

applicable law and the jury then retires, in seclusion and without the judge, to determine the verdict. Once the accused has either pled guilty or, less commonly, been found guilty after a trial, the judge hears representations, known as "a plea in mitigation", from the defence and then passes sentence. Where the accused has pled guilty, this will be preceded by a short statement, summarising the facts of the case, from the prosecution. It should be noted that the jury has no role in determining or advising upon sentence; their function is simply to determine the guilt or otherwise of the accused.

6.1.2 There is no officially recognised concept of a "pre-trial" phase in the Scottish criminal justice process. Consequently, this term might be said, in a non-technical sense, to cover all activity which occurs before trial. Viewed in this way the pre-trial phase is generally accusatorial, or adversarial, in nature, but historically it has also involved certain forms of procedure which were of a somewhat inquisitorial character. The best example is pre-trial judicial examination of the accused in solemn procedure. Historically, this was an opportunity for the accused to make a declaration to the sheriff, including, for instance, his own version of events, explanation of his conduct, and so on. This was very important up until 1898, since before then the accused was not a competent witness at his own trial. Subsequently, the importance of pre-trial judicial examination gradually diminished, and the modern-day form of this procedure, which is not often used, is vastly different from the original form. Today, such an examination, if it occurs, is conducted by the prosecutor in front of a sheriff, and so while some aspects of the inquisitorial character are retained, as a whole the procedure is adversarial.

6.1.3 As noted above, all activity which occurs before trial might be regarded as the pre-trial phase. This includes various stages such as investigation by the police, judicial examination of the accused, pre-trial proceedings such as preliminary or first "diets" (the Scottish term for a court date or appearance), the lodging of special defences, and preliminary pleadings. The "pre-trial phase" can most accurately be said to end with the beginning of the trial itself, that is to say, when the first Crown witness is called. It should be emphasised that most cases are concluded well before the trial phase, usually with a plea of

guilty by the accused but sometimes with the desertion of the case by the prosecution.

6.1.4 The trial phase of Scottish criminal procedure has a strictly adversarial character. As noted above, the judge has no knowledge of the case whatsoever when the trial begins. It is for the prosecution and defence each to present their evidence, decide which witnesses to call, what questions to ask etc. The function of the judge is to oversee the proceedings, not to become overly involved with the examination of witnesses. He is entitled to ask questions, but only to clear up any uncertainties or ambiguities which are not sufficiently addressed by counsel. He is also permitted to ask any questions which are relevant to the proper determination of the case, but this discretion is exercised very carefully, and employed only when necessary. In the event of a dispute between the parties about the applicable legal rules, the judge will determine the matter. For example, if a question arises about the admissibility of certain evidence or the competence of a witness, it is for the judge to determine the matter. In jury trials, the judge instructs the jury as to the applicable substantive law, for instance, the definition of murder or the concept of provocation. Again, it should be emphasised that the vast majority of prosecutions are concluded by a guilty plea, thus avoiding any need for a trial.

6.1.5 The Scottish criminal justice system does not recognise the institution of the examining judge. The evidence against the accused is gathered and presented by the public prosecutor. If the prosecutor requires a warrant or wishes to remand the accused in custody etc, such a request is dealt with by an ordinary member of the judiciary, i.e. one who is involved in the normal judicial business of conducting trials, sentencing offenders etc.

6.1.6 The criminal law and procedure of Scotland remains at present uncodified. Most of the procedural law is contained in the Criminal Procedure (Scotland) Act 1995 (henceforth "the 1995 Act"), which is the nearest thing to a code that exists in Scotland (see 3.1 above). The Act is divided into the following parts:

I. Criminal Courts: Jurisdiction and Powers
II. Police Functions
III. Bail
IV. Petition Procedure
V. Children and Young Persons
VI. Mental Disorder
VII. Solemn Proceedings *(i.e. serious cases)*
VIII. Appeals from Solemn Proceedings
IX. Summary Proceedings *(i.e. less serious cases)*
X. Appeals from Summary Proceedings
XA. Scottish Criminal Cases Review Commission
XI. Sentencing
XII. Evidence
XIII. Miscellaneous

6.2 Special Issues

Arrest and pre-trial detention

6.2.1 With limited exceptions, powers of apprehension are enjoyed exclusively by the police, acting under the authority of the public prosecutor. At this stage, Scots law recognises, and distinguishes between, two specific measures: "detention" (under ss. 13 and 14 of the 1995 Act); and arrest.

The power of detention is enjoyed only by the police. If a police constable has reasonable grounds for suspecting that a person is committing or has committed an offence, he can require that person to provide his name and address, and can ask him for an explanation of the circumstances which have given rise to the constable's suspicion. A person detained in this way must be told why he is being detained and that failure to comply with the constable's instructions is a criminal offence. The suspect may be taken to the police station and detained in custody. At the end of six hours, the detainee must either be set free or arrested.

Arrest may follow detention or may occur without detention having taken place. It can be effected with or without a warrant, and the rules which govern each procedure are slightly different. At the heart of both, however, is the principle that the individual executing the arrest (normally a police officer of some kind) must not go beyond the powers vested in him.

Following arrest, the accused person must be brought before court (usually the local Sheriff Court) on the next day upon which it is sitting. The court will then normally commit the accused for trial, although the matter may simply be adjourned. In the latter eventuality, if the accused is in custody, there are slightly different rules in solemn and summary cases. As regard the former, the accused must be brought back before the court within eight days for full committal for trial (or release); as regards the latter, the accused must be brought back to court in seven days, unless there is special cause, and the case may be adjourned again, subject to an overall time-limit of 21 days in total from the first court appearance, after which he must be committed for trial or released. The court must consider the matter of bail at all such appearances. After full committal for trial, (i.e. on the assumption that the accused has not as yet pled guilty), the court may remand the accused in custody until the trial or release him on bail (dealt with in Part III of the 1995 Act). In practice, the prosecutor has an important role in determining whether the accused is granted bail because if the prosecutor does not object to a bail application, the court will usually be content to grant bail. There are very strict time limits upon the length of time an accused may be held in custody prior to the commencement of the trial (see 6.2.4 below). The accused is entitled to apply for bail at every court appearance and, once full committal has taken place, appeal against the refusal of such an application (see 6.2.7).

6.2.2 The legal prerequisite for detention for up to 6 hours under the 1995 Act is that the police officer must have reasonable grounds for suspecting that a person has committed, or is in the process of committing, an offence punishable by imprisonment. An accused may be arrested without warrant for

similar reasons as regards certain types of crime specified in the 1995 Act (s 21) and, at common law, the police have quite wide and loosely defined powers to arrest suspects for serious crimes or if an offender is fleeing. Where a court warrant has been issued for the arrest of an accused, the police will have little difficulty in establishing that the legal prerequisites have been met. Following arrest, as noted above, the accused must be brought before a court as soon as possible and, at that first appearance, the court must consider whether the accused should be granted bail. It may refuse to grant bail for a number of reasons, for instance, that the accused is likely to interfere with the prosecutor's inquiries, or reoffend, or abscond, or that given the nature of the offence it is in the interests of justice that bail should not be granted.

6.2.3 As noted above, following arrest, the sheriff will decide whether an accused should be subject to pre-trial detention. Where an accused applies for bail, the court must dispose of the application within 24 hours of it being lodged. If it fails to do this, the accused will be liberated. The accused is entitled to appeal against the court's refusal to grant bail. The prosecution may appeal against the grant of bail, in which case the accused remains in custody, but the appeal has to be heard by the High Court within 72 hours or the accused must be released (see 6.2.5).

6.2.4 In solemn cases, where the accused is held in custody, the trial must begin within 110 days of the accused being committed for trial (s. 65 of the 1995 Act). In summary cases, if the accused is in custody, the trial must commence within 40 days of his first appearance on the complaint (s 147). In both instances, this period may be extended by the court on the application of either the prosecutor or the accused. If these time-limits are breached, the accused must be set free and no further proceedings may be brought in respect of the relevant charges.

6.2.5 As noted above, an accused, once arrested, must be brought before the relevant court upon the next day on which it is sitting. At that stage, the court must determine whether the accused should be released on bail, having heard representations from both the prosecution and the defence. Thereafter, in solemn cases, full committal for trial must take place within 8 days, and in

summary cases, the accused must be brought back before the court every 7 days, with a total limit of 21 days, until he is fully committed for trial. On any of these subsequent appearances, the matter of bail may be reconsidered. Once the accused has been committed for trial, he may make an application for bail to the sheriff. This must be determined by the Sheriff within 24 hours (1995 Act, s 23). The accused may appeal to the High Court against any refusal by the sheriff to allow him bail and the prosecutor may appeal against any decision to allow the accused bail. In the latter event, the appeal must be heard within 72 hours or the accused will be liberated (s 32).

6.2.6 When passing a custodial sentence on an accused person who has pled or been found guilty, the court is required to have regard to any period of time for which the accused was imprisoned while awaiting trial. Normally, this will simply be deducted from the length of his sentence.

Appeals

6.2.7 (See 6.5.6)

Absence of the defendant

6.2.8 The accused must generally be present at his own trial, although this principle is subject to some exceptions. Firstly, where the accused engages in misconduct in order to prevent a trial taking place or continuing, the court may order him to be removed. The court may then continue the trial in his absence. If the accused is not represented by legal counsel, the court must appoint counsel to represent him. Secondly, where the accused lodges a plea of insanity in bar of a trial, the court may hear the plea in the absence of the accused, if it is not practicable or appropriate for him to be present.

Evidence

6.2.9 Scots criminal law recognises a number of commonplace evidentiary principles, such as the presumption of innocence, the privilege against self incrimination and the right to silence. As elsewhere these are qualified to some extent in practice and the recent incorporation of the European Convention of Human Rights (ECHR) into Scots law has led to considerable discussion and some refinement of these and related precepts. On a more detailed level, it is worth summarising some of the main concepts in the Scots law of evidence, principally the burden of proof, sufficiency, relevancy, weight, admissibility, and the competence and compellability of witnesses.

As in other adversarial systems, the burden of proof falls upon the prosecutor, who must cite sufficient evidence to prove the case against the accused "beyond reasonable doubt". It should be noted that Scots law requires the case against the accused to be corroborated, which means that the main elements of the offence must be proved by two separate pieces of evidence from independent sources. In other words, the evidence of one eye-witness can never be "sufficient" to prove the case - even if the court believes that witness entirely, there must be some other piece of evidence against the accused, whether it be forensic evidence, a confession, or the testimony of another witness. On occasion, a burden of proof may fall on the accused, often where he is alleging particular facts in his defence or attempting to displace a presumption created by facts which the prosecution have established. For example, an accused who is claiming insanity must prove this to be so. In this instance, the facts which the accused is seeking to establish must be proved only "on the balance of probability", a less onerous test than "beyond reasonable doubt".

A fundamental requirement of any evidence which is to be led at trial is that it must be "relevant". Relevance is more a question of law than a question of fact - that is to say something which the layman might assume is relevant is not recognised as such in law. A good example of this is evidence of any previous convictions, which are generally regarded as irrelevant. Collateral or remote evidence is generally excluded, except where a pattern of previous events

bears upon the current offence. Circumstantial evidence may be relevant, and if weighty enough may prove a case in itself. The weight of any piece of evidence is a question of fact; in other words it is for the decision maker – whether that be the jury or a judge – to determine the significance of any piece of evidence in the light of all the other circumstances of the case.

Evidence must also be admissible. Admissibility must be distinguished from relevance, since evidence which is highly relevant may be deemed inadmissible. Good examples of this include: evidence which has been illegally obtained, e.g. through unlawful surveillance or searches; and evidence which is valueless or deceptive, e.g. hearsay, which is generally inadmissible in Scots law (although this is subject to exceptions).

As noted above (at 6.1.1), there are rules about the competence and compellability of witnesses.

6.3 The organization of detection and investigation

6.3.1 There are eight geographically separate police forces in Scotland, each covering a different part of the country. These do not mesh neatly with the 32 council areas through which local government functions are carried out. In strict legal terms each of the 32 councils is the police authority for its own area, but where (as is normal) a police force area covers more than one council area, most of the functions of a police authority are delegated to joint police boards.

In addition to these eight police forces, a number of other police forces operate in Scotland. These are mostly statutorily constituted, and have been created to operate in a particular area, or for a specific purpose. Examples include the Ministry of Defence police force, the British Transport Police, and the Royal Parks Constabulary. It should be noted that the police in Scotland are not responsible for customs and excise, immigration control or the running of prisons. Separate government bodies exist which are responsible for these areas.

While considerable differences exist between the organisation and structure of the eight mainstream Scottish police forces, certain features are common to them all. A Chief Constable, operating from the Force Headquarters, commands each force. He is assisted by a Deputy Chief Constable and (if required) one or more Assistant Chief Constables. The Deputy Chief Constable acts in the absence of the Chief Constable. The former's role can be generalized to include the responsibility of maintaining discipline and assisting in the overall strategic management of the force. Assistant Chief Constables generally carry out a number of functional responsibilities throughout the force area. Typical responsibilities include personnel management, finance, communications and operations including management of operations planning (public order, crowd control etc.) and support services management (dog branch, underwater search unit, air support, etc.).

Generally, Force Headquarters will contain a number of specialist and support units which may be headed by an Assistant Chief Constable. Force Headquarters may have a Traffic Division, which has a responsibility for providing routine cover for major roads and motorways. The Division will also include specialist services in traffic management, accident prevention and accident investigation. Force areas are sub-divided into a number of sub-units, termed divisions or subdivisions. Each area, depending upon its size, population and nature will generally be commanded by ranks from Chief Inspector up to Chief Superintendent. The areas will contain one or more police stations.

Sub-Divisional or Divisional officers-in-charge will generally have total operational responsibilities for their areas and will report directly to Force Headquarters Operation Department, which is normally headed by an Assistant Chief Constable. It is normal for divisional areas to be further sub-divided into functional units known as beats. Normally these beats, especially if located in urban areas, are patrolled by foot patrol officers with back-up emergency support being provided by sub-divisional response vehicles. Police officers work basic shift duties within a well structured team. Each team is led by a section Sergeant who is in turn supervised by an Inspector. In areas where the population density is small, or the area covered is large (normally

rural beats), a single Constable will be provided with transport to facilitate adequate coverage. He will generally not be as continuously supervised as a colleague based in an urban beat. In many respects he is self-supervising and may set his own hours of work subject to ensuring that all areas are adequately policed.

6.3.2 The police enjoy a great deal of discretion in the investigation of crime but they remain responsible to the prosecution service. Police officers are agents of the law, not of the police authority nor of the central government. As such, they may be prosecuted in respect of any criminal act committed in the performance of their duties and may be sued for civil wrongs. They are answerable to a Police Disciplinary Code.

Control of the Scottish police forces rests in a tripartite arrangement between Scottish ministers at national government level, the relevant Police Authority at local government level and the Chief Constable. The Scottish ministers are concerned with the general organization, administration and operation of the police forces, and are answerable to Parliament. The police authority maintains each police force and has a legal responsibility to ensure an adequate and efficient police force. The Chief Constable is statutorily responsible for the appointment of officers to the force, and to oversee disciplinary procedures of all officers up to the rank of Chief Superintendent.

Police forces are supervised by Her Majesty's Inspectors of Constabulary, who, under the direction of the Scottish ministers, annually visit and inquire into the state and efficiency of police forces. Their reports are published and are available for general inspection.

6.3.3 The Chief Constable has considerable autonomy in the determination of policy. However this discretion is subject to a number of constraints. Most significantly, the Chief Constable is under a duty to comply with any (lawful) instructions from the Lord Advocate, the relevant (in jurisdictional terms) Sheriff Principal or the appropriate local Procurator Fiscals in relation to offences and prosecutions. The Chief Consta-

ble must further submit an annual report on the policing of his force area to the police authority. The Chief Constable will also consider guidance issued by the Scottish Executive in relation to new or emerging legislation, and will respond to administrative, economic and social policy consultation documents circulated by the Scottish Executive.

6.3.4 As explained above, the various police forces which exist in Scotland are managed and controlled locally. Owing to this policy of decentralisation, there are very few national law enforcement agencies which exist to perform a particular function. Instead, it is left to the individual forces to form their own specialised agencies to target directly issues which are most relevant to the area for which they are responsible. For example, many forces have a Drugs Squad, a Fraud Squad, and a Stolen Vehicles Squad. Other examples of such internal structuring include squads for: the investigation of domestic violence; to deal with instances of sex offending; and to tackle race crimes and consider race issues.

In addition to the above, there are several overarching organisations that operate on a national scale. These are the Drug Enforcement Agency, the British Transport Police (Scotland), and Crimestoppers, a charitable organization operated largely by the police to allow members of the public anonymously to report any suspicious occurrences or provide information regarding crime to local police forces.

6.4 The organization of the prosecution agency

6.4.1 The Scottish prosecution service is headed by the Lord Advocate, a government minister, and his deputy, the Solicitor General, also a government appointee. At least one of these Law Officers is always a member of Parliament (now, it would appear, the Scottish Parliament rather than its UK equivalent). In administrative and financial terms, the prosecution service is run by Crown Office in Edinburgh and headed by the Crown Agent, who is accountable to the Lord Advocate. The Crown Agent is traditionally a career

prosecutor who has worked his way up through the ranks of the public prosecution service.

The Lord Advocate appoints several members of the Scottish Bar to act as Advocates Depute, these senior law officers being known collectively as Crown Counsel. Their task is both to prosecute in the High Court of Justiciary, where the most serious cases are heard, and to provide advice to local prosecutors about various other categories of case. Most prosecutions take place in the Sheriff Court or District Court, and in these instances the Lord Advocate acts through local prosecutors, known as Procurators Fiscal. There are 49 procurators fiscal spread across urban and rural Scotland. Their offices have caseloads of very different complexions and sizes: several of the smallest receive under 1,000 crime reports a year while the largest office receives around 80,000. In some of the smaller offices, the procurator fiscal is the only legally qualified member of staff whereas in the largest office (Glasgow) there are around 60 other legally qualified prosecutors – known as assistant fiscals and depute fiscals – and nearly 400 administrative staff.

6.4.2 Virtually all criminal prosecutions are conducted, in the name of the Lord Advocate, by members of the public prosecution service - whether these be advocate deputes in the High Court or procurator fiscals (or their deputes) in the lower courts. A small number of statutory offences may be prosecuted by another public body specified in the legislation, e.g. Customs and Excise or an education authority, but in practice even these are normally undertaken by the public prosecutor. Private prosecutions are available for more serious cases, but these require the concurrence of the Lord Advocate (head of the Scottish prosecution service) or the High Court and are extremely rare (see 6.1.1).

In criminal cases, the prosecutor is “master of the instance” and thus determines the charges and in which court the case is to be heard. A number of offences, principally murder and rape, must be heard before the High Court, but generally the prosecutor will select the venue thought appropriate in terms of the gravity of the offence, paying particular attention to the sentencing powers of the various courts. Thus, unlike in

some jurisdictions, the accused has no say in the matter and may not, for example, demand that his case be heard before a jury.

Once a prosecution has been launched, the most significant aspect of prosecutorial discretion relates to the negotiation of guilty pleas or, as it is commonly known, "plea bargaining". The vast majority of prosecutions are concluded by a guilty plea rather than a trial, and many such pleas result from some kind of agreement between the defence and the prosecution. Plea bargaining in Scotland usually manifests itself in charge-bargaining, e.g. in return for a guilty plea, the prosecutor may reduce a charge of assault to the danger of life (an aggravated form of assault) to a charge of assault to severe injury (also an aggravated form of assault, but one of less severity). While this type of bargaining is perfectly legitimate in Scotland, it is extremely informal and entirely at the discretion of the prosecutor.

6.4.3 The most significant aspect of the Scottish system of public prosecution is its complete independence, a status which has long been established and frequently emphasised. The service operates under the principle of expediency – that is to say, the decision whether to prosecute or not is discretionary – and prosecutors act in what they consider to be the "public interest". The prosecution service does not have to account for its actions to the police, the courts, or to the individuals concerned, nor does it have to provide reasons for its decisions. It is accountable solely to Parliament through the Lord Advocate. In most cases, the local procurator fiscal will act alone but, in the most serious or difficult of cases, the advice of Crown Counsel will be sought.

The nature of the discretionary powers enjoyed by the prosecution service makes it difficult to monitor and control. In theory, the Lord Advocate is accountable to Parliament, but in practice, unless there has been some particularly startling abuse of power, such matters are unlikely to be raised in Parliament. The importance placed on the independence of the prosecution service dictates that there is no accountability to any other external body. However, there do exist certain controls, both internal and external, which act upon prosecutorial discretion. As regards the former, the Crown Office em-

ploys two mechanisms. Firstly, instructions and guidelines are frequently issued by the Crown Office to fiscals on policy matters and the handling of cases. Secondly, there is a requirement that fiscals' offices submit detailed monthly statistics on the disposal of cases to the Crown Office.

External controls are very few in number. Generally those dissatisfied with a decision of the prosecution service (whether they be accused or victim) have little recourse. Normally, all such an individual can do is ask the procurator fiscal or Crown Office to reconsider the decision, in which case it will usually be reviewed by the decision-maker's superior. There do exist, however, other avenues through which prosecutorial accountability may be pursued. As regards the dissatisfied victim, there is the right of private prosecution, though this applies only to cases heard under solemn proceedings and requires the concurrence of the Lord Advocate or the High Court (see 6.1.1). The accused has the option to argue in court that the Crown decision to prosecute was "oppressive" but this has little practical chance of success. There is also a slim possibility of an aggrieved party seeking judicial review of a prosecutorial decision. There are no Scottish precedents for this, and the conventional view is that such a remedy is not available (unlike in England).

6.4.4 As a result of the wide discretion traditionally possessed by fiscals, it has always been regarded as permissible for them to adopt some alternative to prosecution. The desire to process criminal cases in a cheaper and more efficient manner, coupled with certain humanitarian considerations, has resulted in the emergence of a number of alternatives to prosecution.

No proceedings

The option of "no proceedings" has always been available, whereby the prosecution simply deserts the case against the accused and there are no further consequences for him.

Warning

Where something more than "no proceedings" is required, but a full prosecution in court is not necessary, a warning may be issued to the accused, either

by way of a letter or personally by the procurator fiscal, who can require the accused to appear at his office for this purpose. Regardless of the method, the accused is told that his conduct was unacceptable and if repeated will result in prosecution. Since the accused is not given the opportunity to deny the conduct charged, receipt of a warning does not count as a criminal conviction. The warning is, however, kept on record by the procurator fiscal.

Diversion

The procurator fiscal may also offer the accused diversion from prosecution to receive social work help, psychiatric attention, or to participate in a mediation/reparation scheme. At present this happens in only a small but growing proportion of cases.

Fixed penalty

The fixed penalty system for road traffic offences enables prosecutors to offer alleged offenders the opportunity to pay a fine, of £24 or £48, without the necessity for a prosecution or court hearing. The accused can challenge the allegations and have his case heard in court. Acceptance of a fixed penalty imposed by a procurator fiscal count as a criminal conviction. This process should be distinguished from similar fixed penalty schemes operated by the police and traffic wardens for very minor offences (for example, illegal parking). Under the latter scheme, the case never gets to the procurator fiscal unless the accused wishes to challenge the allegation.

Fiscal fine

The prosecutor fine, or "fiscal fine" as it is known in Scotland, works in a similar way to the fixed penalty. It applies to minor non-traffic criminal offences, for example breach of the peace, shoplifting, and urinating in a public place. Unlike the fixed penalty, however, it does not count as a criminal conviction, despite the fact that the accused is entitled to challenge its imposition by insisting upon going to court and pleading not guilty. Prosecutors are empowered to operate a scale of penalties, ranging from £25 to £100.

6.5 Organisation of the courts

6.5.1 There are three criminal courts in Scotland: the High Court of Justiciary, the Sheriff Court, which may sit in solemn mode (i.e. with a jury) or summary mode (i.e. without a jury), and the District Court. Generally, any one of these courts may be a court of first instance but all appeals are heard by the High Court.

The lowest tier of criminal court in Scotland is the District Court, which functions under summary procedure (used for less serious crimes). The jurisdictions for the various district courts are based on the boundaries of the local government districts. Either one or two lay Justices of the Peace sit, aided by a legally qualified clerk, to hear minor offences. They have a maximum sentencing power of 60 days imprisonment. Owing to the volume of work, in Glasgow District Court there are also two legally qualified Stipendiary Magistrates, who have the power to impose the same penalties as a sheriff in summary procedure. The prosecutor in the district court is the procurator fiscal.

The second tier is the Sheriff Court. Scotland is divided into six sheriffdoms, each of which (except Glasgow) contains several sheriff courts spread across the main towns in that sheriffdom. Each sheriffdom has a Sheriff Principal and a number of sheriffs who act as judges in the various sheriff courts (the busier courts having more than one sheriff – Glasgow has around 20). Sheriffs are full-time judges and are selected from experienced solicitors or members of the Scottish bar. The majority of criminal cases in Scotland are dealt with in the sheriff courts. In criminal trials the sheriff may sit with or without a jury. If the case is prosecuted under "solemn" procedure, which is reserved for more serious crimes, the sheriff sits with a jury and the maximum sentence that he can impose is 3 years. If the sheriff decides that his sentencing powers are inadequate, he may remit the case to the High Court for sentencing. If the case is prosecuted under "summary" procedure, which is appropriate for less serious crimes, the sheriff sits without a jury and the maximum sentence that he can generally impose is 3 months imprisonment (although, in certain limited

circumstances, this maximum period can go up to 6 months and one or two statutory offences even provide for a maximum sentence of 12 months). The prosecutor in the sheriff court is the procurator fiscal, regardless of whether the trial is by solemn or summary procedure.

The supreme court in Scotland is the High Court of Justiciary. It consists of the Lord Justice General (the most senior judge), the Lord Justice Clerk (the senior judge in criminal matters) and around 25 other High Court judges. These same judges also comprise the superior civil court in Scotland, the Court of Session. The High Court is a court of first instance for the most serious of offences and, indeed, murder and rape may not be prosecuted in any other court. The High Court sits in Edinburgh but as a court of first instance the High Court continuously visits other Scottish towns "on circuit" and may try crimes committed anywhere in Scotland. Trials in the High Court are presided over by a single judge sitting with a jury. Prosecutions before the High Court are conducted by an advocate depute, one of the Crown Counsel appointed by the Lord Advocate (see 6.4.1).

The High Court also sits as a Court of Criminal Appeal, which deals with all criminal appeals from any court, including the High Court, whether they are against conviction, sentence, or both. All appeals are heard before a bench of judges (usually three) in Edinburgh (see 6.5.2).

6.5.2 As explained above, any of the three criminal courts in Scotland may hear a case at first instance. It should be remembered that decisions as to the court in which any given case will be heard are made at the discretion of the procurator fiscal (see 6.4).

Only the High Court has jurisdiction in criminal appeals. These are heard in Edinburgh by a bench of High Court judges sitting as a Court of Criminal Appeal (see 6.5.6 for details of appeals procedures). The House of Lords has no jurisdiction in Scottish criminal cases. However, since the incorporation of the ECHR into Scots law, the Judicial Committee of the Privy Council (essentially the House of Lords) has the final say in determining whether any of its provisions have been breached in Scotland, as well as the rest of the

UK. As a consequence, several appeals relating to Scots criminal procedure have been heard before the Privy Council.

6.5.3 Cases in the district or sheriff court must generally be heard in the court responsible for the district or sheriffdom in which the crime was committed. An exception to this is where hearing the case before this court would be prejudicial to the accused, or would cause significant inconvenience. The district court has jurisdiction only in summary (less serious) cases, while the sheriff court has jurisdiction in both summary and solemn (more serious) cases. The High Court of Justiciary may try crimes committed anywhere in Scotland and has exclusive jurisdiction in the most serious crimes. The High Court hears cases only by solemn procedure, and has sole jurisdiction in cases of criminal appeal. The House of Lords has no jurisdiction in Scottish criminal cases (but the Judicial Committee of the Privy Council has jurisdiction as regards alleged breaches of the ECHR).

6.5.4 Generally speaking, a criminal case will be heard at first instance by a single justice or sheriff in summary procedure, or by a sheriff and jury, or judge and jury, in solemn procedure. Occasionally, more than one justice will hear a case in the district court. Appeals are made to the High Court of Justiciary sitting as an Appeal Court, and will be heard by a bench of three or more judges. History has seen cases where virtually the whole court was convened but, although there is no formal maximum limit set upon the number of judges who can hear a case, in modern times it is unlikely this would reoccur. (In one recent case, a bench of nine judges was convened, in order to re-examine a precedent set by a bench of seven judges.)

6.5.5 There are two main forms of lay participation recognised in the Scottish criminal justice system: the judicial role performed by Justices of the Peace sitting in the district court; and the role of juries, which are composed of 15 lay persons selected at random from the electoral register, in the sheriff courts and High Court.

Justices are appointed by the Secretary of State, and perform a function similar to that of a sheriff presiding over a case heard by summary procedure. A justice is arbiter of both fact and law, and is responsible for the disposal of the case through determining guilt and, if appropriate, sentencing the accused. Justices are assisted by a legally qualified clerk. Jurisdiction of the district court is generally limited to the least serious offences. Powers of punishment possessed by justices are restricted to financial penalties of up to £2,500 and custodial sentences of up to 60 days.
Trial by a jury of lay persons is possible in Scotland, although the accused has no "right" to this because the decision as to the type of procedure to be used, and thus whether a jury will be employed, is made by the procurator fiscal (see 6.4.2). Under solemn procedure, if the case proceeds to trial, the jury is mandatory. Where such a trial is to take place, a jury of 15 people will be drawn from the list of eligible jurors who are cited for possible service. Eligible jurors are randomly selected from the electoral register of the region in which the case will be heard. The right of "peremptory challenge", under which both the prosecution and defence could reject up to three jurors without giving reason, has now been abolished in Scotland. As a result, jurors can only be rejected if good cause for doing so is shown, or if all parties agree that the person is unsuitable to be a juror.

The role of the jury is said to be as an arbiter of fact. It is the role of the judge to "direct" the jury on matters of law, and on how they should properly reach their verdict based on what facts they believe to have been established. However, this process in reality is far more complex, and jurors are inevitably influenced by considerations beyond those outlined by the judge in his direction. As in most other relevant jurisdictions, the jury returns a "general verdict" and thus, in practice, can ignore the strict letter of the law by returning any verdict it wants without having to give reasons.

Three verdicts are available to a jury in Scotland. These are: guilty, not guilty, and the somewhat unusual verdict of not proven. The latter two verdicts result in the acquittal of the accused, who may not be re-tried under the same charge. A verdict of not proven is said to be amount to "a second class ac-

quittal". A majority verdict will be accepted. There is no minimum consensus rule as appears in many other justice systems, a bare majority of eight being sufficient to convict. No reasons are required to be given for the verdict reached.

6.5.6 All appeals are to the High Court of Justiciary (sitting in its appeal capacity), regardless of which court heard the case at first instance. Such appeals undergo a "sift" whereby one judge determines whether the points raised have any substance before they go forward to the appeal proper. If an appeal is rejected at this stage, the appellant may appeal against this decision. There are various forms of appeal procedure depending upon whether the decision challenged relates to a preliminary point or the final result of the case. In the rare situation where there exists no statutory or common law remedy against a decision, it is competent to appeal to the *nobile officium* of the High Court. This is a power which allows the High Court to do justice where no other legal remedy exists. It is not frequently exercised by the High Court.

A person found guilty may appeal against conviction, or against the sentence imposed, or against conviction *and* sentence. The prosecutor may also appeal against conviction and/or sentence but cannot appeal against an acquittal by jury. In the latter instance, there may, very occasionally, follow a "Lord Advocate's Reference" where the prosecution disagrees with a decision or instruction by the trial judge on a point of law. However, if the appeal is upheld, this makes no difference to the acquittal but simply sets a legal precedent for the future. It is rare for the prosecution to appeal against sentence, this only occurring where the punishment imposed is felt to be excessively lenient.

It is vital to note that a case is not reheard at appeal nor is there any other general reconsideration of the evidence. In other words, the High Court does not re-try the original case. Consequently, it will not hear witnesses (subject to the rare exception where there is fresh evidence, not heard at the original trial, which the High Court may hear in order to determine whether there should be a new trial). In general, therefore, the High Court will restrict

itself to reviewing issues of due process and the fairness of the procedure which led to the accused's conviction.

In solemn cases, the only ground of appeal is that there has been a miscarriage of justice. In practice, various grounds are subsumed under this general heading, most commonly that there was insufficient evidence for the jury to convict or that the judge misdirected the jury. It should be noted that an appeal may also be brought on the ground that there is fresh evidence which was not available at the original trial. In disposing of an appeal against conviction the High Court may: affirm the verdict of the jury; or set aside the verdict of the jury and quash the conviction; or set aside the verdict and substitute an amended verdict; or set aside the verdict and grant authority to bring a new prosecution, which will result in a retrial. As noted above, in practice, an appeal against conviction will only succeed on procedural grounds, there being no rehearing of the case. In disposing of an appeal against sentence, the High Court may affirm the sentence, or quash the sentence and impose another, which may be either more or less severe.

In summary cases, the accused again may appeal on the ground that there has been a miscarriage of justice, which subsumes various more detailed grounds in practice. The method of appeal against conviction (or conviction *and* sentence) is by "stated case", whereby the trial judge states the facts found by him and poses certain questions to the High Court. This document will be accompanied by any relevant observations of the trial judge, including opinions as to evidence, witnesses, etc. In disposing of an appeal by stated case the High Court may: remit the case back to the lower court with their opinion and any direction thereon; or affirm the verdict of the lower court; or set aside the verdict of the lower court and either quash the conviction or substitute an amended verdict; or set aside the verdict of the lower court and grant authority to bring a new prosecution, which will result in a retrial. In disposing of an appeal against sentence, the High Court may affirm the sentence or quash the sentence and impose another, which may be more or less severe.

The prosecutor may, in summary cases only, appeal against an acquittal on a point of law. The appropriate method is by stated case, and fresh evidence may not be introduced during the appeal proceedings. Where an appeal against acquittal is sustained, the High Court may: convict and sentence the accused; or remit the case to the lower court with instructions to convict and sentence the accused; or remit the case to the lower court with the High Court's opinion on the case.

6.5.7 The Scottish criminal justice system recognises a very strong system of precedent. Decisions of the High Court sitting in its appeal capacity are binding on all lower courts, but only in so far as those decisions are relevant to the later case. Decisions of the High Court may also be binding on itself, but this depends upon the number of judges who preside over the case. As a court of first instance, the High Court comprises a single judge sitting with a jury. As an appeal court, the High Court comprises a bench of three or more judges. Thus, decisions of the High Court as an appeal court are binding on the High Court as a trial court, and also on the High Court sitting as an appeal court with a bench of the same or a smaller size. If the High Court wishes to review one of its earlier decisions, it must convene a larger bench than that which reached the earlier decision. (One recent decision involved a bench of 9 judges over-ruling an earlier decision made by 7 judges, which in turn had over-ruled an earlier decision by a smaller bench.)

6.6 The Bar and Legal Council

6.6.1 A solicitor is under no obligation to advise or act for an accused person, and has the right to refuse his services. An exception to this is in cases of murder, attempted murder or culpable homicide, where a duty solicitor appointed under the national Legal Aid scheme must act for the accused.

The solicitor of an accused person does not have the right to be present during police questioning, or whilst a suspect is being detained by the police (i.e. detention short of arrest). The solicitor does have a right of access to certain information from the police, upon the detention or arrest of his client.

The type of information which must be provided is that relating to the alleged crime and the manner in which it was allegedly committed, any statements which the accused person has made to the police, and details of any incriminating evidence which has been uncovered. However, the extent to which the police must provide this information is limited, and the police generally do not provide anything more than they are required to. The solicitor has the right to be present if his client wishes to make a full statement to the police, whether the statement be an admission of his guilt or an affirmation of his innocence. The solicitor also has the right to be a witness to any identification parade in which his client is required to appear, and may object to the composition of such a parade if he feels it is prejudicial to his client.
In the comparatively rare event of there being a judicial examination (see 6.1.2), which would normally take place the day after arrest, the solicitor of an accused person has the right to a private interview with his client before the client makes his appearance in court. The solicitor has the right to be present during the judicial examination, but only at the request of his client.

In preparing the defence before trial, the solicitor of the accused has a limited right to precognosce any of the Crown witnesses. Precognitions are simply interviews conducted outwith court, and may be conducted personally by the solicitor. They are generally not made under oath, but the solicitor can apply to have a witness cited for precognition under oath, which is conducted before a sheriff. There is no firm legal obligation on a Crown witness to give a precognition to the defence, although generally it is seen as the witness's civic duty to do so. The solicitor also has a right of access to certain documentary productions for the Crown, such as forensic reports and transcripts of audio recordings. He has a further right to examine all Crown productions (e.g. the murder weapon). The defence is entitled to lead evidence from any witness or of any production on the Crown list. Throughout the pre-trial phase the solicitor retains a right of audience with his client.

If an advocate is required to represent the accused (for example where the case is to be heard in the High Court), the solicitor has the right to instruct

counsel to act on his client's behalf. Counsel can be named personally, or alternatively the decision may be left to the discretion of an advocates' clerk, with a general request for counsel being submitted to their office in Edinburgh.

6.6.2 Any person who is detained or arrested must immediately be informed that he is entitled to inform a solicitor. However, the detained or arrested person has no right of access to his solicitor while he is being questioned by the police. As noted above, the person arrested does have the right to a private interview with his solicitor before appearing for judicial examination and the right to have his solicitor present during this examination. Further, an accused who is remanded in custody may consult with his solicitor, who is entitled to visit him in prison. In practice, there are rarely difficulties of access.

6.6.3 Cost-free legal aid is available in Scotland, but in limited circumstances only. Generally speaking, in summary cases, there is a financial condition imposed that the accused must be unable to defend himself without suffering undue hardship either to himself or his dependants and have no other means (such as insurance) which might cover court expenses. No financial contribution is required to be made by the accused. In solemn cases, the financial test is simply that the accused would suffer undue hardship if required to pay for representation. In addition, every person brought before a court from custody is entitled to initial free advice and representation from a duty solicitor. A further condition imposed upon the granting of legal aid in summary proceedings is that doing so must be in the interests of justice. Certain statutory examples have been laid down of situations where legal aid should be provided. These include situations where a substantial question of law may arise, or where the accused has difficulty understanding the proceedings against him.

Decisions as to whether applications for legal aid will be successful are made by the Scottish Legal Aid Board. Certain questions, such as some application of the undue hardship test, are answered by the court. Applications for legal aid in criminal appeals are decided by the Board, which must apply the hardship test and, further, decide whether substantial grounds for making the appeal exist, and whether it is reasonable to do so.

6.6.4 In Scotland, only an advocate, a solicitor-advocate or solicitor can appear as legal counsel in criminal proceedings. The latter may only appear in the sheriff and district courts, while both of the former may appear before the High Court and either of the lower courts.

Admission to the offices of Advocate and Solicitor is controlled by the Faculty of Advocates and the Law Society of Scotland respectively. Solicitor-advocates are trained solicitors who have successfully applied for "extended rights" which enable them to appear before the superior Scottish courts. They are not members of the Bar, but may be legal counsel in criminal proceedings before the High Court. The processes of qualification as an advocate or solicitor are similar (though not identical), and each comprises three stages: knowledge of the law of Scotland, normally demonstrated through the attainment of a Law degree from a Scottish university; acquisition of the Diploma in Legal Practice, again from a Scottish university; and training in an approved legal office under a training contract (generally 21 months for an advocate, 12 months for a solicitor), during which time a test of Professional Competence must be successfully taken. Advocates must spend a further nine months (approximately) in pupillage under an established advocate, during which time further examinations must be taken in evidence, pleading, practice and professional conduct. Criminal convictions or bankruptcy do not automatically bar entry into either profession, but will be investigated thoroughly.

6.7 The Position of the Victim

6.7.1 There exists no recognised legal definition of "victim" in Scots criminal law. The term "complainer" was used historically, when it was the responsibility of the victim to investigate the case and initiate proceedings, but the original meaning of this term has become defunct with the establishment of a public prosecution service, which instigates virtually all criminal proceedings in Scotland. Consequently, the terms "victim" and "complainer" are both competent to describe persons who have been subjected to criminal behaviour, and are used virtually synonymously.

6.7.2 The victim has no officially recognized role in pre-trial proceedings. Recent statements by the Scottish Executive do not refer to the victim having "rights", but rather to the victim having "needs" that should be satisfied. These have been described as including: being treated with understanding and fairness; being kept informed as an investigation or case proceeds; and compensation for any suffering caused. There is currently great variance in the degree to which concrete measures have been taken to ensure these needs are satisfied.

6.7.3 It remains competent in Scotland for a crime victim to initiate a private prosecution upon failure by the procurator fiscal to prosecute. This remedy is available only in cases to be heard under solemn proceedings and requires the agreement of the Lord Advocate (head of the Scottish prosecution service) or the High Court of Justiciary. This procedure operates very rarely: only two such actions were allowed during the entire twentieth century.

6.7.4 Victims of crime in Scotland still have the right to bring action in the civil courts against any person who has wronged them. The victim retains this right even if the defender to the action has been acquitted of criminal charges relating to the alleged wrongful conduct. The civil proceedings are entirely separate from any criminal proceedings.

6.7.5 Victims of crime enjoy no right to present charges or be heard at any stage of criminal proceedings brought at the instance of the public prosecutor. As noted above, subject to the very limited right of private prosecutions, all prosecutions fall into this category.

6.7.6 Victims in Scotland have no right to legal counsel at any stage during the prosecution of the person accused of committing the offence against them.

6.7.7 Victims in Scotland have no right of appeal against a prosecutor's or court's disposal of a case.

6.7.8 The victim may be assisted by the State in claiming compensation from the offender in two ways. The first is through the existence of reparation and mediation schemes, as an alternative to prosecution, whereby offenders compensate their victims either financially or by payment in kind. It is entirely within the discretion of the prosecution whether to refer an offender to such a scheme rather than prosecute him. At present, the operation of such schemes is heavily restricted in Scotland, both geographically and as regards the types of offence for which it is considered appropriate. The second, and more likely, possibility is that of a compensation order, whereby the court, upon convicting the offender, may sentence him to pay a sum of money to the victim as compensation. The court may impose a compensation order as a criminal sentence on its own or combine it with another means of disposal, most commonly a fine. However, the victim cannot apply for a compensation order to be made, and this decision is entirely at the discretion of the court.

6.7.8 Victims of violent crime have the right to state compensation under the Criminal Injuries Compensation Scheme. This was set up in 1964 to compensate victims of violent crime in respect of their injuries: the Scheme does not cover loss caused by damage to property or other financial loss, and no similar schemes exist for this purpose at present. The Scheme is now operated under statutory authority by the Criminal Injuries Compensation Authority which awards pre-set fixed sums dependent upon the type and severity of injury suffered, except in the most serious of cases, where awards are made on a more individual basis. Applications for compensation are made by way of a standard form, which is completed and sent to the Board for consideration, accompanied by any relevant photographic or other evidence. The minimum award which can be made under the Scheme is £1,000, while the maximum is £500,000.

6.7.9 A number of both national and local Victim Support Schemes operate in Scotland. During the 1980s a number of local schemes emerged, staffed by unpaid volunteers and receiving little or no governmental funding. However throughout the 1990s a national Victim Support Scheme has developed, with over 70 regional schemes operating under the general heading of Victim Support Scotland. These individual schemes are locally managed by committees

and some are run by unpaid co-ordinators. The focus of victim support work has been face-to-face contact with victims, achieved through visits to the victim's home. Specific areas of support range from primary support such as emotional support, the provision of information and practical advice, to more specialised support such as counselling for victims of sexual assault, and preparation for giving evidence in court. References to Victim Support are generally made by the police, who are the first point of contact for many victims of crime. Victim Support Scotland is largely government funded, with increasing sums of money being granted in recent years.

7. Sentencing and the system of sanctions

7.1 The criminal law of Scotland remains, at present, uncodified. Thus there is no single document to which one would refer as "the Penal Code". However, much legislation as regarding criminal procedure and sanctions is statutory. As explained above (see 3.1), the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") is the primary statute in this area. Part XI of this Act outlines various classifications of sanction competent under Scots law (see 7.5).

7.2 The 1995 Act makes no distinction between "punishments and measures" and/or between "principal punishments and additional punishments".

7.3 As regards the vast majority of juvenile offenders who are referred to a children's hearing (see 3.4), the Children (Scotland) Act 1995, Part II, sets out the available options. At all times, the hearing must be governed by what it considers to be the best interests of the child (s 16 of the above Act). That is the "paramount" consideration but two other "overarching principles" are also important: first, the child must be given an opportunity to express his/her views; and, the hearing should not do anything unless it is better for the child than doing nothing, i.e. a principle of "minimum intervention". Punitive and similar considerations are, quite simply, completely irrelevant.

Broadly speaking there are three main possibilities open at a hearing. First, the hearing can be continued if the members feel that they do not have enough information to reach a decision. *Inter alia* the hearing may require the child to attend or reside at a clinic or hospital etc for up to 22 days for a report to be prepared. Second, the hearing may discharge the referral and, indeed, must do so if they are not satisfied that compulsory measures of supervision are necessary in the interests of the child. This means, essentially, that no further action can be taken against the child as a result of the offence which led to the referral.

Third, the hearing may make a "supervision requirement" if this is considered to be in the best interests of the child (s 70). This may be residential (including secure accommodation) or non-residential. It may require the child to live at a particular residential establishment (the precise place must be named in the supervision requirement), or with foster carers, or with one parent, or in any other place. A supervision requirement may also require the child to comply with conditions, and the discretion of the hearing to impose conditions is very wide. For instance, the child may be required to attend school regularly, or attend a training project, or regularly meet a social worker, or co-operate with a plan drawn up by a social work department, or attend a drug or rehabilitation unit.

As regards young offenders who are prosecuted in the courts, the Criminal Procedure (Scotland) Act 1995, Part V, outlines various special provisions regarding their detention. Thus, it is not competent to impose the sanction of imprisonment on a person under the age of 21 years. In circumstances where the court would normally impose such a sanction, convicted persons aged between 16 and 21 years may be sentenced instead to detention in a Young Offenders institution. The length of sentence imposed must be of no greater length than would be competent had the convicted person been aged over 21 years and sentenced to imprisonment.

The 1995 Act also contains special provisions regarding young persons convicted of murder. Where a person under the age of 18 years is convicted of murder, he shall be detained without time limit under appropriate conditions in a suitable place. Where the person is aged between 18 and 21 years, he shall be detained without time limit in a Young Offenders institution.

Finally, in the rare case of a child under 16 being convicted under solemn procedure, the child shall be detained under appropriate conditions in a suitable place for as long as the sentence requires. Detention as a sanction for children should be employed only when no other appropriate methods of disposal are available.

7.4 There are no special sanctions for civil servants, military personnel or any other major group.

7.5 The criminal law of Scotland contains the following provisions regarding particular sanctions available to the courts, which are set out in Part XI of the 1995 Act. (For sanctions available to the prosecutor, see 6.4 above.)

Capital punishment
The sanction of capital punishment is no longer competent in Scots law. Until relatively recently, this sanction could be imposed upon persons convicted of murder, treason or piracy. Today, however, there is no offence for which Scots law permits capital punishment.

Imprisonment
The minimum period of imprisonment in Scotland is five days. The maximum period is for life. A conviction of murder carries a mandatory life sentence. In cases where a life sentence is imposed, the judge must make a recommendation as to the minimum period that should be served before the offender is considered for release on licence. Reasons must be given for any such recommendation.

Deprivation of liberty for an indeterminate period
A life sentence is indeterminate (see above). All other prison sentences are determinate.

Hospital Order
In the case of a convicted person who is mentally disordered, the court may make a "hospital order" and, where the offender is dangerous, he may be sent to the State Hospital at Carstairs (s. 58, rather than Part X, of the 1995 Act). A Hospital Order is indeterminate, release being dependent on a medical judgment about the patient's mental health.

Probation
Where a person is convicted of any offence, other than one carrying a fixed penalty, the court may place him on probation. The court must consider the

nature and circumstances of the offence, and should obtain a report on the circumstances and character of the accused person. The court must be satisfied that there are suitable means by which the order may be supervised. A probation order may be between six months and three years. The court can attach conditions to a probation order and if the probationer breaches any of these, the court may cite him to appear before it. The offender may then be fined up to Level 3 on the Standard Scale of fines, or be sentenced in accordance with the original offence. Alternatively, the court may extend the period of probation, or make a community service order (see below). These same sanctions may be imposed if the offender is convicted of another offence whilst on probation (in addition to any sanctions imposed as a result of the further conviction).

Other forms of detention and measures involving supervision

A "restriction of liberty order" may be imposed on convicted persons over the age of 16 years, whereby the court may restrict the offender's movements as it thinks fit. The restriction may involve the offender being required to be in a certain place at certain days or times (but not for more than 12 hours at a time), or being banned from going to a certain place (or places) at specified days or times. Restriction of liberty orders may apply for up to 12 months. They can be enforced through electronic tagging.

A "drug treatment and testing order" may be made as regards offenders over the age of 16. Such an order must be for a period of between six months and three years. It is a measure aimed at rehabilitation rather than punishment, and aims to stop the offender misusing drugs. It may be combined with other orders, for example a restriction of liberty order or a probation order. The offender must be willing to comply with the terms of the order and attend an establishment for medical treatment.

There is also the possibility of a "non-harassment order" which is aimed at preventing "stalking". It forbids a convicted person offender from approaching or otherwise harassing (the precise details are for the court to determine)

the victim of the offence for which he was convicted for any period (including an indeterminate period of time). The maximum penalty for breach of such an order is 5 years under solemn procedure and 6 months under summary procedure.

Another form of detention / restriction is a "supervised attendance order", competent where an offender has failed to pay a fine not exceeding Level 2 on the Standard Scale of fines (up to £500). Under such an order, the offender must attend a place of supervision over a period of time for not less than 10 hours, and not more than 50 hours (if the fine was below Level 1) or 100 hours (in all other cases). Supervised attendance orders may only be imposed on persons aged 18 years and over.

Community service

Where a person over the age of 16 years is convicted of an offence for which he may be sentenced to imprisonment, the court may, as an alternative, order community service. Such an order obliges the offender to undertake unpaid work for a specified amount of time: for those tried under summary procedure, 80 to 240 hours; and for those tried under solemn procedure, from 80 to 300 hours. The offender must agree to this sentence, and there must be a suitable scheme in the area. The court must obtain a report from the Social Work department confirming that the offender is suitable for such an order.

Any work ordered to be undertaken under a community service order must be performed within 12 months. For the period during which the offender is liable to perform community service, he must report any change of address to the local authority officer, who will oversee and be responsible for the work undertaken. Any instructions given to the offender by the local authority officer should be complied with, but such instructions must not conflict with the religious beliefs of the offender, or impose upon other important responsibilities that the offender is required to meet (such as attendance at school). If the offender fails to comply with the order, he may be brought back before the court. The offender may then be fined up to Level 3 on the Standard Scale of fines. The court may also revoke the order and sentence the offender in ac-

cordance with the original offence. If another offence is committed whilst the offender is subject to a community service order, the court may, when passing sentence, consider the fact that the order was still in force or, if applicable, the fact that the offence was committed at a place where work under the order was being carried out.

Fines

The Criminal Procedure (Scotland) Act 1995 confers on courts a general power to fine for any offence, subject to other statutory provisions regarding sentence. Under solemn procedure, there is no limit to the amount of the fine. Under summary procedure, there exists a Standard Scale of fines. The amounts detailed in this Scale are subject to change over time. The Standard Scale is divided into Levels, and the figures currently in force are outlined below.

Level 1	£200
Level 2	£500
Level 3	£1000
Level 4	£2500
Level 5	£5000

The maximum which may currently be fined on this Scale, therefore, is £5000. A sheriff may impose the maximum but a justice of the district court may not exceed Level 4 (i.e. £2,500) unless a statute provides otherwise (currently no such additional statutory provisions exist). Certain statutes permit fines of up to £20,000 on summary procedure on conviction in the sheriff court, or by a stipendiary magistrate in the district court. In cases of multiple convictions, it is competent for the court to aggregate a number of fines, thus imposing a final amount potentially greater than the prescribed sum. In imposing a fine, the court must consider the ability of the offender to pay and his personal circumstances. The court must also determine whether the fine should be paid as a lump sum or through a series of instalments, again considering the circumstances and financial position of the offender.

Compensation orders

Where a person is convicted of an offence, the court can order him to pay compensation to the victim for personal injury, loss or damage caused. The court must consider the ability of the offender to pay when making such an order (unlike the position as regards civil damages). It is competent for the court to impose both a compensation order and a fine, but where the offender does not have the financial means to pay both, the compensation order should be preferred. If both sanctions *are* imposed, the compensation order should be satisfied first. Awards of damages made as a result of subsequent civil proceedings should be assessed without regard to the compensation order, but the amount actually payable by the offender shall be reduced by any amount paid under the order.

Confiscation and forfeiture

Under the Proceeds of Crime (Scotland) Act 1995 (rather than Part XI of the Criminal Procedure (Scotland) Act 1995), the court has the power to order confiscation of property which represents the proceeds of crime. There are further special provisions as regards the proceeds of crimes relating to drug trafficking.

Some statutes make provision for the forfeiture of property connected with the commission of crime once the offender has been convicted. For instance, the Road Trafffic Offenders Act 1988 enables the court to order forfeiture of the vehicle involved.

Caution

It is also competent, although rare, for the court to caution a convicted person, where there is no fixed penalty for the offence committed. In such circumstances the court may order the offender to "find caution" (a small sum of money) for good behaviour for such period as is deemed appropriate, but not exceeding 12 months. If the offender remains of good behaviour for the specified period, the money is returned to him.

Admonition

The court may dismiss an offender with an admonition (i.e. a warning). This is usually appropriate only where the offence is minor but it is also often used following a deferred sentence (see 8.1 below). An admonition counts as a conviction, although no penalty has been imposed upon the convicted person.

Absolute Discharge

The court may discharge an offender without registering a conviction against his name. This is quite rare and will only occur where the offence is extremely trivial or if there is something very peculiar about the offender or the circumstances of the offence which justifies this action.

7.6 In the case of default in the payment of a fine, it is competent for the court to convert this fine into a sentence of imprisonment. The 1995 Act stipulates the following conversions:

Fine			Maximum period of imprisonment
Less than £200			7 days
£200	-	£500	14 days
£500	-	£1000	28 days
£1000	-	£2500	45 days
£2500	-	£5000	3 months
£5000	-	£10,000	6 months
£10,000	-	£20,000	12 months
£20,000	-	£50,000	18 months
£50,000	-	£100,000	2 years
£100,000	-	£250,000	3 years
£250,000	-	£1 million	5 years
Over £1 million			10 years

The court may also, as an alternative to a sentence of imprisonment, make a supervised attendance order (see 7.5, above).

7.7 The Road Traffic Offenders Act 1988 dictates mandatory disqualification from driving as regards certain motoring offences. The general minimum is 12 months, although if the court feels this is inappropriate, the offender may be disqualified for a shorter period. There is no maximum limit on the period for which a traffic offender may be disqualified. Where the offence does not require mandatory disqualification, the court has the discretion to disqualify for any length of time. If a person is convicted twice in 10 years of an offence carrying mandatory disqualification, the general minimum disqualification is extended to three years. The offence of causing death by dangerous driving carries a mandatory minimum disqualification of two years.

A "penalty point" system also operates as regards road traffic offences. Conviction for certain offences, such as speeding, results in "penalty points" being added to the offender's licence. If a driver accrues 12 or more penalty points, he is liable to disqualification.

Where the court imposes disqualification, the offender can also be required to re-sit his driving test upon conclusion of the disqualification period.

7.8 In addition to the specialised provisions on sentencing contained in Part XI of the 1995 Act, some general provisions apply:

Where an offender has pled guilty to the offence, the court may take this into account when determining sentence. The stage in the proceedings at which the accused pled guilty may also be of relevance. In other words, "sentence discounting" is permissible, although not obligatory (1995 Act, s 196).

Where a sheriff hearing a case under solemn procedure feels that his sentencing powers are inadequate to dispose of the case, he may remit the case to the High Court for sentencing. (It should be noted that where a case is heard under summary procedure, it may not be remitted in this way: there is no provision for increasing the maximum sentences allowed under summary procedure.)

In appeals against sentence, the High Court may issue an opinion which is designed to act as "guidelines" for lower courts in similar cases in the future. Finally, any sentence imposed must be pronounced in open court in the presence of the accused.

7.9 Conviction for certain offences in Scotland results in the following specific sanctions:

Traffic offences
Traffic offenders may be subject to disqualification from driving and revocation of their driving licence (see 7.7).

Narcotics offences
Under the Proceeds of Crimes (Scotland) Act 1995 anyone convicted of drug trafficking may be subject to confiscation of any proceeds resulting from the offence. "Proceeds" are considered to include any payments or rewards made to the offender at any time in connection with drug trafficking.

The 1995 Act stipulates a mandatory custodial sentence of seven years where a person is convicted of trafficking a Class A drug (such as heroin and cocaine) and has been convicted of the same offence on two previous occasions.

As described above (7.5), a court may impose a Drug Treatment and Testing Order on drugs offenders.

Firearms offences
To keep firearms in Scotland a person must possess a certificate authorizing him to do so. There are various specific offences involving firearms, for instance: to possess a firearm without a certificate; to use a firearm for the purposes of resisting arrest; to possess a firearm with intent to endanger life or cause serious injury; and to possess a firearm for the purposes of committing an offence. The court may order forfeiture of any firearm used in connection with any of these offences.

Environmental offences

The Environmental Protection Act 1990 contains various provisions concerning environmental offences. Under this statute, the maximum penalty for the offence of causing pollution is a fine of £20,000. Where the offence has been committed by a corporate body, the Director, Secretary, or any other member who gave consent for the polluting act may also be held personally liable.

Economic offences

There are no special sanctions employed for economic offences. Such offences most commonly attract monetary sanctions, although imprisonment and other sanctions are frequently employed.

8. Conditional and suspended sentence, and probation

8.1 A conditional or suspended sentence does not exist in Scotland. The only analogous mechanism is the "deferred" sentence.

A criminal court may defer the passing of sentence (1995 Act, s 202). Normally this is done where it is felt appropriate that the convicted person be given an opportunity to demonstrate his good behaviour and ability to function constructively in society. In most such instances, the case will be deferred for 12 months but the court may stipulate any time period. The court may also attach any conditions to the period of deferment that are deemed appropriate. At the end of the defined period, the individual must return to court for final determination of sentence. If, during his period at liberty, the convicted person has demonstrated good behaviour, this will be taken into account by the court when passing final sentence and an admonition (see 7.5) is not uncommon.

8.2 Sentence may be deferred as regards any offence. This disposal is more common where the crime is minor but the courts have occasionally deferred sentence in serious cases, such as that of attempted murder. It should be remembered that the court can impose any conditions upon deferment that are deemed appropriate.

8.3 The court may not impose a partially suspended sentence.

8.4 The court may attach any conditions to a deferred sentence that are deemed appropriate. There exists no comprehensive list of what these conditions may be, and the court has full discretion. The most common condition is that the offender be of good behaviour. Other commonly attached conditions include: repayment of loss incurred through damage or theft of goods; a prohibition on leaving the country; and an obligation to attend at a police station regularly during the period of deferment. However, the conditions must not constitute another sentence. For example, the attaching of a condition that the offender must stay at home during certain times would

constitute a restriction of liberty order, and would not be permitted. Further, the conditions should not be so burdensome as to prevent the offender leading a normal life, since this would be inconsistent with the principle of deferment of sentence.

8.5 Responsibility for the supervision of compliance with any conditions imposed upon a deferred sentence falls to officers of the local authority or, if applicable, to the social worker who is supervising the offender. If a condition of good behaviour is attached, this is difficult in practice to supervise, but will be implied if the individual is not again involved with the police.

8.6 If the individual is in breach of stipulated conditions, or is convicted of another offence during the period of deferment, the court may issue a citation for the accused to appear before the court. The court may then consider the original sentence as though the defined period of deferment had ended, and pass a final sentence regarding the original offence. If applicable, such sanctions will apply in addition to sanctions arising as a consequence of the further offence.

8.7 There is no dedicated probation service in Scotland. While the ultimate responsibility for probation-type services lies with the Scottish Executive Justice Department, such services fall under the remit of local authorities, who provide them through their Social Work Departments. These departments deliver probation services on a day-to-day basis, largely through specially trained social workers who work with offenders in various areas, such as courts, penal institutions, and the community.

8.8 The main functions of the social workers described above is to work with offenders during all stages of the criminal justice process, advising and assisting the offender in various areas within the justice system. Social workers deliver probation services in a variety of ways, for example: preparation of social enquiry reports on offenders, to be taken into consideration by the court before sentence is passed; supervision and assistance of individuals who are subject to probation orders; organization and monitoring of commu-

nity service projects (see 7.5); working with prisoners to assist in rehabilitation and preparation for release; and assisting newly released persons to reintegrate into society, helping them find accommodation, work, and so on.

8.9 Volunteers most commonly become involved in the provision of probation-type services through involvement in the various voluntary organizations that exist to support persons recently released from prison. A small number of these organizations currently exist within Scotland, and a larger number operate throughout the UK. The most significant of these is the Scottish Association for the Care and Rehabilitation of Offenders (SACRO).

9. The prison system and the after-care of prisoners

9.1 Organization of the prison system

9.1.1 The administration of prisons in Scotland is the political responsibility of the Minister for Justice, a member of the Scottish Executive. Responsibility for the day to day running of Scottish prisons has been delegated to the Scottish Prison Service, which remains responsible to the Ministers of the Scottish Parliament.

9.1.2 The majority of prisons in Scotland are managed publicly, although provisions do exist to allow "contracting out" of prison management to private organizations. As stated above, public prisons are primarily the responsibility of the Scottish Prison Service, which is run by a Prisons Board consisting of a Chief Executive, a Deputy Chief Executive, four departmental Heads and two lay directors. The Board is assisted by civil servants and other support staff. Each public prison has a Governor who may, if required, be assisted by one or more deputies. The Governor has a very wide range of statutory responsibilities, such as visiting prisoners, maintaining good communication with staff, record keeping, and the establishment of appropriate privilege systems. Public prisons are staffed by uniformed prison officers, who have various powers and responsibilities relating to general operation of the prison and the maintenance of order. The operation of public prisons is supported by various civilian staff, such as instructors and secretaries. A chaplain and a medical officer are also appointed to each public prison.

At present, the management of only one prison, namely Kilmarnock, has been "contracted out". Such privatised prisons remain the ultimate responsibility of the Scottish Executive, but are controlled and operated by the party to whom they have been contracted out. Private prisons have a Director and a Controller, both of whom must be approved by the Scottish Executive. A Director has broadly the same powers and responsibilities as a Governor, though they

are not as extensive. The Controller has an ongoing responsibility to review the running of the prison, and to investigate allegations of misconduct on the part of prison officers. Support staff, including prison officers, operate similarly in private prisons as in public prisons. However, another category of officer, known as prison custody officers, may also operate in private prisons, performing a variety of functions, including escort and prisoner search functions.

Whether public or private, all prisons in Scotland are within the remit of Her Majesty's Inspectorate of Prisons for Scotland. This Office is responsible for regularly inspecting and reporting on individual penal establishments.

9.1.3 The development of prison policy is the responsibility of the Scottish Executive, specifically the Minister for Justice. He is aided in this function by various advisory bodies, who make regular reports to the Justice Department. These bodies include the Scottish Prison Service, Her Majesty's Inspectorate of Prisons for Scotland, and the Central Research Unit of the Scottish Executive.

9.1.4 As described in Chapter 7, Part XI of the Criminal Procedure (Scotland) Act 1995 outlines a large number of provisions relating to sentencing, imprisonment and fines. The main source of primary legislation governing imprisonment, however, is the Prisons (Scotland) Act 1989, which is a consolidation of the Prisons (Scotland) Act 1952. The 1989 Act covers virtually every aspect of imprisonment, such as: central administration; confinement, treatment and discharge of prisoners; and the detention of young offenders. This Act has been amended by several subsequent measures, most importantly: the Prisoners and Criminal Proceedings (Scotland) Act 1993, which deals mainly with release from custody; and the Criminal Justice and Public Order Act 1994, which covers various matters such as the privatisation of prisons and the responsibilities of Governors.

The legal position of prisoners is largely laid out in delegated legislation, principally the Prisons and Young Offenders Institutions (Scotland) Rules 1994.

These Rules outline the legal position of prisoners in relation to a wide variety of matters, such as: business activity (no prisoner may carry on any trade, profession or vocation from within prison); counselling (many prisons have drug and alcohol counselling programmes, although the Rules only require that "appropriate" programmes be provided); education (again "appropriate" programmes must be provided); correspondence (prisoners retain a general right to send or receive mail whilst in prison); political activity (no prisoner may vote or stand as a political candidate whilst imprisoned); property, money and possessions (any prohibited property must be submitted to prison staff, and the Governor has a large degree of discretion regarding what prisoners may or may not keep in their cells); religion (prisoners must be afforded every reasonable opportunity to observe the requirements of their religious and moral beliefs); telephone communication (prisoners may have access to telephones, although any calls made may be monitored and/ or recorded; and tobacco (prisoners have the right to possess and smoke tobacco, but only at such times and in such places as the Governor rules appropriate).

9.1.5 There are presently 19 prisons and Young Offenders institutes in Scotland. These range in size from around 100 inmates to around 1,000 inmates. Prisons in Scotland are not classified into different types. Instead, the prisoners themselves are, according to the security categories outlined in Schedule 2 of the Prisons and Young Offenders Institutions (Scotland) Rules 1994. These categories are:

- Category A: A prisoner who would place national security at risk, or be highly dangerous to the public or to prison staff and their families or to the police in the event of an escape and who must be kept in conditions of maximum security.
- Category B: A prisoner who is considered likely to be a danger to the public and who must be kept in secure conditions to prevent his escape.
- Category C: A prisoner who is considered unlikely to be a danger to the public and who can be given the opportunity to serve his sentence with the minimum of restrictions.

- Category D: A prisoner who is considered not to be a danger to the public and who can be given the opportunity to serve his sentence in open conditions.

Prisoners must be classified into one of the above categories as soon as is practicable upon their arrival at prison, usually within 48 hours. This matter is the responsibility of the prison Governor. It is generally accepted that a prisoner will be put into the lowest category possible (i.e. the category demanding least security), and reasons must be given to the prisoner in respect of classification decisions.

While prisons and institutions are not classified, the Scottish Prison Service has the authority to set aside prisons for particular classes or security categories of prisoner. Thus, while no prison in Scotland is strictly a "high security" prison, there are certain prisons which tend to house high security inmates (those classified as security category A). Prisoners may be transferred between prisons at the discretion of the Prison Service, and this results in similar inmates being housed in, or transferred to, similar prisons.

9.1.6 Convicted persons aged between 16 and 21 years cannot be sent to prison. Instead, these persons are detained in a Young Offenders institution. There are currently five such institutions in Scotland. The system is similar to that of adult imprisonment, the main differences being in the rules relating to visitation rights and other privileges. Specifically, young offenders have far broader exercise and recreation rights than inmates in adult prisons.

Persons under the age of 16 years may be detained in an appropriate home or other suitable institution. They are entitled to a minimum of two 30 minute visits each week, and have a right of access to such educational programmes as their need requires. They cannot be forced to work as older prisoners can. Detained persons under the age of 16 may not be allowed access to tobacco in any circumstances, and may not be subjected to cellular confinement as a disciplinary measure.

9.1.7 The Scottish Prison Service has the power to allocate and transfer prisoners at its discretion. Governors may allocate prisoners to any part of their prison designed for the purpose of confinement. In making these decisions, regard should be had to the security classification of the prisoner, and of any other relevant factor (such as sex, age, and so on).

9.1.8 Sharing of rooms by more than one prisoner is permitted where this is deemed appropriate by the Governor and Medical Officer. While no official limit exists on the maximum number of prisoners who may be confined together, practical limitations are imposed by the various rules regarding accommodation, i.e. that cells must be of adequate size and furnishing to protect the health and safety of prisoners. In practice, as a result of over-crowding in the prison system, it is common for prisoners to have to share cells.

9.1.9 Generally every convicted prisoner may be required to work while in prison. Exemptions from work can be granted by either the Governor (if he thinks such exception appropriate) or the Medical Officer (if appropriate on medical grounds). Prisoners may also be excused from working whilst attending educational or counselling classes. The implementation of work programmes is primarily the responsibility of the Governor, and such work programmes must be devised in consultation with the prisoner. These programmes should be designed to improve the prisoner's prospects for reintegration into society upon his release. Restrictions on prisoners' work include that prisoners may not generally work in the service of another prisoner or prison officer, and may not be required to work more than 40 hours per week, spread over a maximum of six days. Prisoners are entitled to reasonable remuneration for work, and will receive partial wages whilst sick or on approved leave.

All prisoners under the normal minimum school-leaving age must be provided with an education. All other prisoners must be afforded the opportunity to pursue such educational programmes as are appropriate and reasonably practicable. Arrangement and implementation of these programmes is the responsibility of the Governor.

Pre-trial detainees cannot be required to work or to take educational or counselling classes, but may volunteer to do so. In such circumstances, working and learning conditions are the same as those applied to convicted prisoners.

9.1.10 It is competent for a prisoner to pursue work or educational activities outside the prison, but this is subject to the discretion of the Scottish Prison Service and subject to conditions. Restrictions apply to the effect that generally only prisoners of security categories C and D (low to minimum security risks) are eligible, and the prisoner must be deemed appropriate for such programmes by the prison Governor and Medical Officer. Any proposed work premises and conditions must also be deemed appropriate, and suitable measures regarding escort and supervision must be implemented.

9.1.11 Temporary release may be granted to prisoners on the authority of the Governor, subject to directions made by the Scottish Prison Service. There are six types of temporary release that can be granted: short home leave (for a maximum of 48 hours); Christmas and summer leave (for a maximum of five days); pre-training for freedom leave (maximum five days); long home leave (maximum five days); pre-parole leave (for a maximum of three days); and unescorted exceptional day release (one day only). Only prisoners of security category D (minimum security risk) may be granted temporary release.

9.1.12 Prison-breaking is a criminal offence in Scotland at common law. As such, there is no maximum penalty, and the cases suggest that the penalty should be "not inconsiderable". In any event, absconding from prison tends to be treated in practice as a breach of prison discipline, and as such is dealt with internally through the prison system's internal disciplinary mechanisms. Under such mechanisms, the Governor can impose a range of punishments, most significantly: removal of privileges for a period not exceeding 14 days, adding up to 14 days to the original sentence, and forfeiture of the right to wear one's own clothing for an unlimited period (prisoners in Scotland can generally wear their own clothes whilst imprisoned: the removal of this right is

only competent as a disciplinary measure against those who have attempted to escape or abscond).

9.1.13 The Scottish prison system does not presently contain any significant minority categories of prisoner.

9.1.14 Scotland, through its continuing status as part of the United Kingdom, is bound by a number of international conventions regarding extradition and the transfer of prisoners. The UK is a party to: the European Convention on Extradition (1957, ratified by the UK on 13 February 1991); the European Convention on Mutual Assistance in Criminal Matters (1959, ratified by the UK on 29 August 1991); and the European Convention on the Transfer of Sentenced Persons (1983, ratified by the UK on 30 April 1985).

9.2 Conditional release (parole), pardon and after-care

9.2.1 In Scotland a distinction is drawn between several types of conditional release and parole. The principal statute in this area is the Prisoners and Criminal Proceedings (Scotland) Act 1993.

Shorter term prisoners

Any person convicted of an offence and sentenced to less than 4 years of imprisonment is eligible for release after serving one half of the total sentence (subject to any additional days accrued as a result of actions taken for breach of prison discipline). On release from custody, the only condition generally imposed is that, should the individual be convicted of a further offence punishable by imprisonment, he may be returned to prison to serve the whole or part of the original sentence. This is in addition to any sanctions imposed as a result of the subsequent offence. It should be noted that this condition applies only to those imprisoned as a direct result of their sentence; fine defaulters, for example, are not subject to the provision.

If appropriate, a person imprisoned for between 1 year and 4 years may also be subjected to a supervised release order. Such an order requires that, for a

period not exceeding 12 months (or the remainder of the prison sentence at the point of release), the offender may be placed under the supervision of a local authority and required to comply with such conditions as are deemed appropriate. Breach of such conditions may result in the offender being returned to prison for the whole or part of the period during which the supervision order would apply.

Longer term prisoners

Persons sentenced to more than four years are eligible for consideration for parole after one half of the total sentence (subject to any additional days accrued as a result of actions taken for breach of prison discipline). The prisoner must be notified in writing that he is to be considered for parole, and he must be sent a dossier containing any materials thought relevant to the case. A similar dossier will be sent to the parole board. This information will include the prisoner's record in prison, details of the offence for which he was originally imprisoned, a record of any previous offences, and reports on the prisoner's circumstances, behaviour, and suitability for release. On receipt of the dossier, the prisoner may submit to the board any representations in writing of his own, or any other written information that he feels is relevant to his case. The board should take into account the following factors when considering a prisoner for parole (though this list is not exhaustive): the nature and circumstances of the original, or any other, offence; the prisoner's conduct in prison; the likelihood of re-offending or of the prisoner causing harm upon release; and any information provided by the prisoner or any other party of relevance to the case.

Separate from the possibility of parole at the half-way stage of the sentence, all prisoners sentenced to more than four years qualify for release "on licence" after serving two-thirds of the total sentence (subject to any additional days accrued as a result of actions taken for breach of prison discipline). Conditions of the licence are imposed by the parole board, but this type of release should not be confused with release on parole. Arrangements may be made through the social services for supervision of any person released on licence. If such conditions are breached, or if the individual is convicted of a

further offence whilst released on licence, he may be returned to prison by the court.

9.2.2 As explained above, all persons sentenced to less than four years imprisonment qualify for release after serving half of their sentence; and all persons serving more than four years are eligible for parole after serving half of their sentence and qualify for release on licence after serving two-thirds.

9.2.3 The most common condition attached to all forms of conditional release is that the individual be of good behaviour. This involves not re-offending, or being convicted of any other offence. The most common further and specific condition is a requirement that the individual be supervised during a stipulated period after release. Supervision of this kind is the responsibility of a specified local authority, and is operated practically through its social work department (see 8.7-8). In the case of a supervised release order or parole, any condition(s) will apply for a specified period and otherwise they will apply until the end of the period of the original sentence.

9.2.4 Recommendations for conditional release are made to the Scottish Executive by the Parole Board for Scotland.

9.2.5 Supervision for compliance with conditions attached to release is the responsibility of a specified local authority. In practice, supervision is arranged and operated by the social work department, and the day to day delivery of this service is provided by specially trained social workers (see 8.7-8).

9.2.6 If a condition attached to release is broken, a warrant may be issued for the arrest of the individual, who may be returned to prison for either the whole or part of the original sentence, or the whole or part of any other relevant period, such as the remainder of any period stipulated in a supervision order.

9.2.7 A pardon may be granted by the First Minister of the Scottish Executive, who has a discretionary power of mercy. This is done under the Royal Prerogative of Mercy and is very rare.

9.2.8 The after-care of prisoners falls under the remit of the social work department, operating under the relevant local authority. The day to day delivery of these services is provided by specially trained social workers. The voluntary sector also plays a role in this regard (see 8.7-9 above).

9.2.9 The primary function of these services is to offer assistance to the newly-released person as he re-integrates into society, and to reduce as far as possible the chances of re-offending. To these ends, the main services provided are assistance in finding accommodation and work, and the provision of information regarding charitable or other organizations that the newly-released person can consult for further help and assistance.

10. Plans for Reform

10.1 At present, two major reviews of criminal procedure are taking place, aimed principally at improving the efficiency of the criminal justice process. First, a review of the High Court, under the chairmanship of Lord Bonomy (a High Court judge), is looking at the increasing demands upon that court and the associated problems of delay in dealing with cases. It should be noted that this review is not examining solemn procedure *per se* because its terms of reference do not include the solemn jurisdiction of the sheriff courts. Nevertheless, its recommendations may well impact upon solemn procedure as a whole and upon the sheriffs courts, particularly as one possible proposal would be to extend the solemn jurisdiction of the latter thus allowing it to deal with the "bottom end" of cases presently dealt with in the High Court. The original timetable envisaged that Lord Bonomy would report to the Scottish Executive before the end of 2002.

The second review, under the chairmanship of Sheriff Principal McInnes, has been asked to examine the provision of summary justice, including the division of work between the district courts and the summary jurisdiction of the sheriff courts, with the aim of improving the effectiveness and efficiency of the process of summary justice. Thus, its remit covers summary procedure as a whole as well as the structures and jurisdiction of the relevant courts. This group will report to the Scottish Executive in the middle of 2003. As a result of falling workloads in the district court (see chapter 11), largely as a result of the growth of alternatives to prosecution, it seems possible that one recommendation might be that the least serious cases dealt with in the sheriff courts under summary procedure should be allocated to the district courts. Thus, one significant overall effect of these two reviews might be a general adjustment of the jurisdictions of the criminal courts - in particular, an increase in the maximum sentencing powers of each – in order that cases can be "pushed down" to lower courts across the system as a whole.

Additionally, the Scottish Parliament, through its Justice (2) Committee, is conducting a major enquiry into the prosecution service, the Crown Office

and Procurator Fiscal Service. Its remit is to investigate whether the resources presently available to the prosecution service are sufficient to enable it to investigate, prepare and progress cases thoroughly and accurately. In particular, the Committee is looking at: liaison with other agencies in the criminal justice process; trends in the numbers and types of case; the impact of the incorporation of the ECHR into Scots law; alternatives to prosecution; staffing, including recruitment and retention of experienced staff; and sensitivity to the needs of victims and witnesses. The main result of this enquiry might well be to suggest an increase in the funding of the prosecution service, in order to allow it to cope adequately with an ever-widening range of responsibilities in an increasing complex legal environment.

On a more detailed level, legislation on new measures for dealing with dangerous offenders is presently proceeding through Parliament (Criminal Justice Bill 2001). Much of this stems from the MacLean Committee (*A Report of the Committee on Serious Violent and Sexual Offenders*, Scottish Executive, SE/2000/68, Edinburgh, 2000) which recommended various improvements to the arrangements for dealing with high risk, violent and sexual offenders, including personality disordered offenders. In particular, it recommended: a new lifelong sentence (Order for Lifelong Restriction) and a new regime for assessing and managing the risk posed by such offenders which would be supported by a new body (Risk Management Authority). This Bill also makes changes to the arrangements for the treatment of parole and life sentence prisoners which were necessitated by the incorporation of the ECHR into Scots law. The Bill also expands community justice measures, such as electronic tagging.

Also under consideration in the Scottish Parliament at present is the Sexual Offences (Procedure and Evidence) (Scotland) Bill, which is designed principally to prevent rape victims from being personally examined by the accused, which can occur at present if the accused chooses not to be legally represented (see Scottish Executive, *Redressing the Balance – Cross-Examination in Rape and Sexual Offence Trials*, Edinburgh 2000). The Bill prevents the accused from representing himself as regards serious sexual offences: either he must appoint a solicitor or the court will do

it for him. Its provisions also require an accused to give prior notice of any defence of consent, equating it with the "special" defences such as alibi and self-defence. Finally, if the accused is allowed by the court to lead sexual history/character evidence about the victim, the Bill renders it more likely that the accused's previous sexual offences convictions (if they exist) will be led by the prosecution (although, at the time of writing, the precise mechanics are still under debate).

In the longer term, it is likely that a recent paper on the *Age of Criminal Responsibility* by the Scottish Law Commission (Discussion Paper No. 115, Eddinburgh: 2001), concerning the age of criminal responsibility will lead to changes in this area. The Commission envisages, first, abolition of the present rule that criminal capacity is reached at the age of eight and, second, retention of the current position whereby children under the age of 16 are not prosecuted except in exceptional circumstances. It suggests that where there is a prosecution of a child under 16, the Crown will always have to prove that the child had the mental capacity to commit the crime.

It is also probable that over the next few years there will be new legislation on "stalking" and harassment and an evaluation of the present position is currently being carried out by the Scottish Executive Justice Department. There is also movement afoot to introduce "victim statements" along the lines of the "victim impact" statements which have been adopted elsewhere (Scottish Executive, *Consultation Document on the Procedures for a Victims' Statements Scheme*, Edinburgh: 2001). Finally, considerable effort has recently been devoted to examining the problems faced by child witnesses. The Scottish Executive is currently considering how best to take forward recommendations made by the Lord Advocate's Working Group on Child Witness Support in 1999 in the wake of earlier discussions of the problems (see Scottish Office, *Towards a Just Conclusion – Vulnerable and Intimidated Witnesses in Scottish Criminal and Civil Cases*, Edinburgh: 1998). It is likely that further reforms will be forthcoming here.

10.2 As in other countries, the Scottish Executive, and most other interested parties, have for a long time been committed to reducing the use of imprison-

ment and replacing, in appropriate cases, with non-custodial sanctions. This is because of a feeling that prison does not work, its expense, and overcrowding in the Scottish prison system. Attempts are ongoing: to introduce and expand alternatives, such as electronic tagging (see "restriction of liberty orders" in 7.5 above) and drug testing (see "drug treatment and testing orders" in 7.5 above); to reduce the numbers of fine defaulters ending up in prison (see "supervised attendance orders" in 7.5 above); and to cut the number of women receiving custodial sentences. Further, experiments with "Drug Courts" are beginning, whereby Glasgow Sheriff Court devotes certain sittings solely to dealing with drugs offences, the emphasis being on treatment and rehabilitation within the community. As Table 10 in the next chapter indicates, the desire to reduce the prison population has not yet been reflected in practice, because the number of people in prisons has remained relatively constant for quite some time. It may be, however, that the prison population would have grown without such pressures.

10.3 There has been a slight tendency, although not nearly as marked as in many other jurisdictions, to increase the sentencing powers of judges for certain offences, principally those involving serious violence and sexual assault. The legislative changes resulting from the deliberations of the MacLean Committee have already been described (above 10.1). Additionally, section 205A of the Criminal Procedure Scotland) Act 1995 created a "two strikes" rule (inserted in 1997) as regards offences involving serious violence and sexual assaults, whereby a second such offence prosecuted in the High Court results in a life sentence. This provision has not yet been implemented and it looks increasingly unlikely that it will ever be brought into force. In contrast, section 205B of the 1995 Act (also inserted in 1997) sets out a minimum sentence (of 7 years) for a third conviction involving drug trafficking, and this has been implemented. Given the extent of judicial discretion in Scotland as regards sentencing, and the lack of any information about sentencing decisions, it is not clear whether such legislative measures have much, if any, impact on the sentences actually passed by judges.

10.4 Over recent years, there has been an increasing consciousness of the problems faced by crime victims, and various steps have been taken to amel-

iorate their position see 6.7 and 10.1 above). Government funding for Victim Support Scotland (see 6.7.9) has slowly increased over the years. There have been various initiatives to provide help and support to victims and witnesses required to attend court. At present, the public prosecution service (Crown Office and Procurator Fiscal Service) is in the process of setting up a Victim Liaison Scheme, whereby most local offices will have an especially trained member of staff whose task will be to communicate with the victims of crime, informing them of decisions made, easing their fears about attending court etc. As noted above, considerable effort has recently been expended to help vulnerable victims give their evidence in court, for instance, by introducing the possibility of giving evidence through a video link and protecting the victims of sexual assaults from having their character impugned by the defence.

11. Statistics on Crime and Criminal Justice

In Scotland, the Scottish Executive Statistics Service annually produces a Statistical Bulletin on Criminal Justice. At the time of publication, the most recent Bulletin was that produced for 2000, from which the following data has been drawn (unless stated otherwise). It should be remembered that there is no legal distinction between "crimes" and "offences" (see 5.2 above).

Table 1: Overview of action within the criminal justice system, 2000

THE POLICE

Crimes Recorded:	Crimes Cleared:	Offences Recorded:	Offences Cleared:
423,172	187,767	499,592	479,165
	Crime Clearance (%):		Offence Clearance (%):
	44		96

PROCURATORS FISCAL

Reports received: 288,831	No Proceedings brought: 45,475
Referred to Reporter: 1,762	Transferred to other PF office: 9,792
Diversion: 1,277	Fiscal warnings: 18,275
Fiscal fines: 16,356	PF conditional offers (motor vehicle offences): 7,997

THE COURTS

Persons proceeded against: Crimes: 49,248 Offences: 87,778	No charge proved: 19,017
Custody: 15,265	Community sentence: 12,414
Monetary Penalty: 77,348	Other sentence: 12,982

Table 2: Summary of known action, 1990-2000 (thousands)

	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
Crimes recorded by the police	518	573	565	517	500	476	452	421	432	436	423
Offences recorded by the police	423	428	434	464	464	452	452	489	516	504	500
Crimes cleared by the police	155	164	166	160	169	168	166	164	178	189	188
Offences cleared by the police	403	407	411	419	442	432	433	467	497	484	479
Referrals to Reporter to Children's Panel	25	25	25	23	26	28	28	28	28	31	27
Offences dealt with under Vehicle Defect Rectification Scheme	22	21	21	21	23	30	28	31	35	31	n/a
Police conditional offers (motor vehicle offences)	-	-	-	90	112	110	124	124	152	168	160
Procurator Fiscal action											
Total reports received	381	390	367	318	290	281	282	289	293	282	289
Fiscal warnings	14	14	15	15	16	18	19	23	22	19	18
Conditional Offers	100	106	108	46	9	11	8	8	9	9	8
Fiscal Fines	17	16	18	16	15	17	14	19	19	18	16
Diversion	1	1	1	1	1	1	1	1	1	1	1
No proceedings	41	35	36	36	45	37	38	35	40	43	45
Proceeded against in court	199	201	199	184	179	177	175	173	159	147	137

As can be seen from Table 2, there has been a general reduction in the number of crimes recorded by the police since 1990, while the number of offences recorded has risen. (This trend might in part be due to the re-classification of certain criminal activities for statistical purposes.) There has been an overall rise in the number of both crimes and offences cleared up by the police, although the percentage of crimes cleared up still remains below 50% of those recorded. The number of persons proceeded against in court has generally fallen since 1990, although this cannot be attributed to an increase in popularity of other actions by procurators fiscal, since the total number of reports received by the prosecution service has also gone down.

Table 3: Persons proceeded against by main crime / offence, 1990-2000 (thousands)

Main Crime or Offence	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
All crimes and offences	199	201	199	184	179	177	175	173	159	147	137
All crimes	63	64	65	64	63	62	63	59	56	53	49
Non-sexual crime of violence	3.9	3.9	4.7	4.9	4.6	4.9	5.7	5.2	5.2	5.5	5.5
Homicide	0.1	0.1	0.1	0.1	0.1	0.2	0.2	0.1	0.1	0.1	0.1
Serious assault	1.1	1	1.1	1.2	1.2	1.2	1.4	1.4	1.4	1.5	1.5
Handling offensive weapons	1.4	1.5	2	2.2	2	2.4	2.9	2.6	2.7	2.7	2.9
Robbery	0.8	0.9	0.9	1	1	0.8	0.9	0.8	0.7	0.8	0.7
Other	0.5	0.4	0.4	0.4	0.3	0.3	0.3	0.3	0.3	0.3	0.3
Crimes of indecency	1.8	1.6	1.6	1.6	1.6	1.5	1.2	1.4	1.5	1.1	0.8
Sexual assault	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2
Lewd and indecent behaviour	0.4	0.4	0.4	0.3	0.4	0.3	0.4	0.4	0.4	0.4	0.3
Other	1.2	1	1	1.1	1	1	0.6	0.8	0.9	0.5	0.3
Crimes of Dishonesty	39.4	40	40	37.7	35.7	33.9	32.5	31.1	29.8	27.9	25.2
Housebreaking	7.5	7.2	7.1	6.4	6.1	5.5	4.6	4.1	3.7	3.7	3.2
Theft by opening lockfast places	3.5	3.9	3.7	3.6	3.6	3.1	2.9	2.7	2.3	2.1	2
Theft of motor vehicle	3.2	3.5	3.7	3.5	3.5	3.4	3.5	3.3	2.8	2.5	2.3
Shoplifting	7.1	7.9	8.5	8.2	7.3	7.2	7.8	7.9	8.4	8.5	8.3
Other Theft	10.8	9.9	9.5	8.6	7.5	7.5	7.2	7.1	6.8	6.2	5.3
Fraud	2.8	2.7	2.5	2.6	2.8	2.7	2.4	2.3	2.4	2	1.8
Other	4.5	4.8	5.2	4.8	4.9	4.5	4.1	3.7	3.4	2.9	2.3
Fire-raising, vandalism, etc.	6.8	6.6	6.6	6	5.6	5.8	6.2	5.9	5.5	4.9	4.8
Fire-raising	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.1	0.2	0.1	0.1
Vandalism, etc.	6.6	6.4	6.4	5.8	5.4	5.6	6	5.8	5.3	4.8	4.7
Other crimes	10.7	12	12.1	13.8	15.1	16	17.2	15.5	14.4	13.9	13
Crimes again public justice	7.2	7.5	7.3	8.4	8.8	9.4	9.7	7.2	6.2	6.2	6.5
Drugs	3.4	4.4	4.7	5.3	6.2	6.5	7.4	8.2	8.1	7.7	6.4
Other	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1
All offences	136	137	134	120	116	115	113	113	113	94	88
Miscellaneous offences	62.1	60	61.8	55.8	50	52.2	53.9	52.7	48.2	40.2	39
Simple assault	16.4	15.5	15.1	14.8	14.3	14.9	15.6	15.9	15.2	13.8	13.1
Breach of the peace	23.5	22	21.1	20.4	19.1	20.6	22.3	22.3	20.7	16.6	15.4
Drunkenness	2.9	2.3	2.3	1.8	1.5	1.4	1.2	1	0.8	0.5	0.5
Other	19.2	20.2	23.3	18.8	15.1	15.3	14.8	13.5	11.5	9.3	10
Motor vehicle offences	73.8	76.6	72	64.6	66	62.8	58.7	60.3	54.6	53.3	48.7
Dangerous and careless driving	8.9	7.8	7.2	5.9	5.1	5.3	5.2	5.1	4.2	3.7	3.1
Drunk driving	9	8.6	8.3	7.8	7.6	7.8	8.3	8.9	7.5	7.2	7.1
Speeding	18.2	21.8	19.5	15.4	16.8	15.1	12.6	11.8	12.6	14.3	11.4
Unlawful use of vehicle	20.8	21.7	22	22	22.9	21.5	21.1	22.2	20	18.6	19.1
Vehicle defect offences	5	4.5	4.1	3.3	3.6	3.7	3.6	3.8	3	2.4	1.9
Other	11.8	12	10.9	10.2	10	9.4	7.9	8.5	7.3	7.1	6.1

Table 3 reiterates the general decline in the number of persons proceeded against in court. It also shows a general reduction in proceedings resulting from most crimes and offences, most significantly crimes of indecency, and crimes of dishonesty. However, there has been a general increase in the number of persons proceeded against in court for non-sexual crimes of violence, and for drug-related crimes.

Table 4: Persons proceeded against in court by type of court, 1990-2000 (per cent)

Type of court	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
High court	1	1	1	1	1	1	1	1	1	1	1
Sheriff court	51	50	50	52	55	56	58	58	58	61	62
District court	42	43	43	41	38	37	36	36	37	33	33
Stipendiary magistrate court	6	6	6	6	6	6	6	6	5	5	4

Table 4 shows that the majority of court proceedings are still conducted in sheriff courts. There has, since 1990, been a general decline in the use of district courts (including cases heard by stipendiary magistrates). It remains the case that only a very small percentage of proceedings are conducted in the High Court.

Table 5: Persons proceeded against by main crime / offence and outcome of court proceedings, 2000 (per cent)

Main Crime or Offence	Not guilty plea accepted	Acquitted (not guilty)	Acquitted (not proven)	Charge Proved
All crimes and offences	11	2	1	86
All crimes	15	3	1	81
Non-sexual crime of violence	13	9	4	75
Homicide	1	6	6	87
Serious assault	10	13	7	69
Handling offensive weapons	14	7	2	77
Robbery	15	6	1	78
Other	15	10	3	72
Crimes of indecency	9	8	5	78
Sexual assault	10	19	8	63
Lewd and indecent behaviour	9	7	6	78
Other	9	3	2	86
Crimes of Dishonesty	15	2	1	83
Housebreaking	13	2	1	84
Theft by opening lockfast places	20	3	1	77
Theft of motor vehicle	35	2	1	62
Shoplifting	9	1	<0.5	90
Other Theft	12	2	1	85
Fraud	18	2	1	79
Other	13	4	2	82
Fire-raising, vandalism, etc.	11	4	1	83
Fire-raising	10	7	5	77
Vandalism, etc.	12	4	1	83
Other crimes	18	2	1	79
Crimes again public justice	23	2	<0.5	75
Drugs	13	2	1	84
Other	26	5	-	68
All offences	8	2	1	89
Miscellaneous offences	9	4	1	86
Simple assault	12	8	2	78
Breach of the peace	10	3	1	86
Drunkenness	5	1	-	94
Other	3	1	<0.5	95
Motor vehicle offences	7	1	<0.5	92
Dangerous and careless driving	7	2	1	90
Drunk driving	4	1	<0.5	95
Speeding	1	<0.5	<0.5	99
Unlawful use of vehicle	11	<0.5	<0.5	89
Vehicle defect offences	15	<0.5	<0.5	85
Other	9	1	<0.5	90

Table 6: Number of persons with a charge proved by sex and age, 1990-2000 (per 1,000 of population)

Type of accused	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
Males (including age unknown)	74	74	73	67	67	65	64	63	59	54	49
Under 16	0.7	0.7	0.5	0.5	0.6	0.7	0.6	0.5	0.5	0.3	0.2
16	107	93	92	74	78	80	79	74	72	62	46
17	216	219	205	190	182	194	201	198	179	161	139
18	253	270	271	248	236	247	267	255	227	199	194
19	235	242	248	239	223	218	234	240	217	201	178
20	214	213	221	211	218	200	214	210	199	182	171
21-25	163	166	167	162	165	163	163	162	152	142	135
26-30	114	115	116	108	112	110	109	110	105	98	93
31-40	72	74	72	68	71	70	67	68	64	59	55
Over 40	29	29	28	25	25	25	23	23	21	19	17
Females (including age unknown)	12	13	14	12	10	11	10	10	9	8	8
Under 16	0.04	0.07	0.04	0.02	0.03	0.07	0.05	0.04	0.02	0.02	0.04
16	9	11	8	7	6	9	8	8	8	6	6
17	22	21	22	21	17	18	22	22	21	19	17
18	24	27	28	27	24	25	28	29	28	26	24
19	24	25	28	27	22	24	25	27	25	25	23
20	25	26	29	29	25	24	25	26	25	25	24
21-25	26	28	31	28	25	26	25	25	25	23	22
26-30	22	25	28	24	21	22	20	20	18	16	17
31-40	15	17	18	17	14	15	14	13	12	10	10
Over 40	5	5	5	5	4	4	4	4	3	3	3

Table 6 shows that a far greater number of men are convicted of criminal charges than women. Due to the vast difference in numbers, it would be difficult to conclude that this is for any reason other than that males tend to commit more crime. It can also be observed that, for both males and females, a greater number of people aged between 18 and 25 are convicted of criminal charges. Again, the numbers involved strongly suggest that this is because persons between those ages commit the most crime.

Table 7: Persons with a charge proved by main penalty, 1990-2000 (thousands)

Main penalty	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
Total	177	179	177	163	159	157	153	150	140	127	118
Custody	13	13.5	14.6	15.3	16.1	16.9	16.9	16.2	15.9	16.1	15.2
Prison	8.8	9.2	10.1	10.8	11.6	12.1	12.1	11.6	11.4	11.6	10.9
Young Offenders institution	4.2	4.3	4.5	4.5	4.5	4.8	4.7	4.6	4.5	4.5	4.3
Other custody	<0.1	<0.1	<0.1	<0.1	<0.1	<0.1	<0.1	<0.1	<0.1	<0.1	<0.1
Community sentence	9	10	10.9	10.8	11.5	11.4	12.1	12.6	12.5	12.5	12.4
Probation	4.3	4.8	5.4	5.7	6.2	6.1	6.4	6.8	7.1	7.3	7.3
Community service order	4.7	5.2	5.5	5.1	5.3	5.3	5.7	5.7	5.2	4.9	4.7
Supervised attendance order	-	-	-	-	-	-	<0.1	0.1	0.1	0.1	0.1
Restriction of liberty order	-	-	-	-	-	-	-	-	0.1	0.2	0.2
Drug treatment and testing order	-	-	-	-	-	-	-	-	-	-	0.1
Monetary penalty	137	137	134	119	114	112	107	105	96	84	77
Fine	135	135	132	117	112	110	105	104	95	83	76
Compensation order	2	2	2	2	2	2	2	1	1	1	1
Other sentence	17.6	18.3	18.6	18.2	17.3	17.1	17.2	16.5	15.2	14.1	13
Insanity, hospital, guardianship	0.2	0.1	0.1	0.1	0.1	0.1	0.2	0.2	0.1	0.1	0.1
Caution or admonition	16.6	17.2	17.4	17	16.3	15.8	15.8	15	13.9	12.9	11.8
Absolute discharge	0.8	0.9	1	1	0.8	1	1	1.1	1	1	1
Remit to children's hearing	<0.1	0.1	0.1	0.1	0.1	0.2	0.2	0.2	0.2	0.1	0.1

Table 7 shows a general increase in the number of persons being given custodial sentences since 1990, although this figure has gradually began to decrease since peaking in the mid-1990s. There has also been a fairly steady increase in the number of community sentences handed down, whilst the use of monetary and other penalties appears to be decreasing.

Table 8: Persons with a charge proved by main crime / offence and main penalty, 2000 (row percentage)

Main Crime or Offence	Custodial Sentence	Community Sentence	Monetary Penalty	Other Sentence
All crimes and offences	13	11	66	11
All crimes	25	18	44	13
Non-sexual crime of violence	40	28	22	10
Homicide	85	8	1	6
Serious assault	50	31	15	4
Handling offensive weapons	27	29	32	12
Robbery	70	21	5	4
Other	18	28	14	40
Crimes of indecency	29	23	31	16
Sexual assault	60	20	11	9
Lewd and indecent behaviour	39	38	16	6
Other	10	12	51	27
Crimes of Dishonesty	29	20	39	12
Housebreaking	53	25	16	6
Theft by opening lockfast places	37	27	27	9
Theft of motor vehicle	30	30	30	11
Shoplifting	26	14	46	14
Other Theft	24	18	44	14
Fraud	9	16	62	12
Other	25	25	38	11
Fire-raising, vandalism, etc.	7	11	70	12
Fire-raising	32	38	17	13
Vandalism, etc.	7	10	72	12
Other crimes	16	14	52	18
Crimes again public justice	18	16	40	27
Drugs	14	13	64	9
Other	62	15	15	8
All offences	7	7	77	10
Miscellaneous offences	13	12	57	18
Simple assault	13	16	54	17
Breach of the peace	8	6	67	19
Drunkenness	1	1	76	21
Other	19	15	47	19
Motor vehicle offences	3	3	91	3
Dangerous and careless driving	4	3	89	4
Drunk driving	2	6	91	1
Speeding	-	<0.5	99	<0.5
Unlawful use of vehicle	6	4	83	7
Vehicle defect offences	-	-	93	7
Other	<0.5	<0.5	97	2

Table 8 shows that, in the year 2000, monetary penalties were by far the most common sentence imposed upon convicted persons. These disposals were used for the vast majority of offences, and for a large number of crimes, such as vandalism and drug-related crime. Custodial sentences remained the most

common for non-sexual crimes of violence such as homicide, serious assault and robbery.

Table 9: Persons with a charge proved receiving custodial sentences by main crime / offence, 1990-2000 (per cent)

Main Crime or Offence	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
All crimes and offences	7	8	8	9	10	10	11	11	11	13	13
All crimes	18	19	19	21	22	22	23	22	22	25	25
Non-sexual crime of violence	35	34	38	41	41	40	41	38	38	39	40
Homicide	74	69	86	85	83	86	88	86	88	81	85
Serious assault	48	48	52	53	51	51	53	48	48	49	50
Handling offensive weapons	12	13	19	23	25	25	27	25	24	25	27
Robbery	65	61	66	68	63	65	64	64	70	70	70
Other	8	13	10	12	17	21	27	20	19	18	18
Crimes of indecency	13	12	13	14	16	18	23	21	19	27	29
Sexual assault	54	51	51	61	54	58	58	50	52	61	60
Lewd and indecent behaviour	23	20	27	25	37	38	40	42	44	43	39
Other	4	5	3	3	3	5	6	7	4	7	10
Crimes of Dishonesty	20	21	21	23	25	25	25	25	26	29	29
Housebreaking	35	35	37	41	43	44	44	45	47	51	53
Theft by opening lockfast places	21	24	23	25	29	31	31	33	33	36	37
Theft of motor vehicle	21	22	26	28	30	30	32	30	29	31	30
Shoplifting	17	18	17	20	23	21	20	21	22	26	26
Other Theft	15	15	16	18	20	20	20	22	24	26	24
Fraud	9	10	9	9	8	8	11	9	12	13	9
Other	17	19	19	20	21	22	22	24	23	25	25
Fire-raising, vandalism, etc.	6	6	7	7	7	7	7	7	7	7	7
Fire-raising	24	22	27	28	28	29	38	35	29	22	32
Vandalism, etc.	5	6	6	7	7	7	7	6	7	7	7
Other crimes	15	14	14	15	15	16	18	15	15	16	16
Crimes again public justice	18	17	17	19	19	19	19	15	16	17	18
Drugs	10	10	9	10	10	13	17	15	14	15	14
Other	13	30	48	32	22	39	26	14	33	48	62
All offences	3	3	3	4	4	5	5	6	6	6	7
Miscellaneous offences	5	6	6	7	8	8	9	9	11	12	13
Simple assault	9	9	10	11	12	11	13	12	12	12	13
Breach of the peace	4	5	5	6	7	6	7	7	7	8	8
Drunkenness	1	<0.5	1	<0.5	1	1	1	2	2	3	1
Other	4	5	4	6	8	10	10	11	16	20	19
Motor vehicle offences	1	1	1	2	2	2	2	2	2	2	3
Dangerous and careless driving	1	1	1	2	3	3	3	3	3	4	4
Drunk driving	1	2	2	2	2	2	2	2	2	2	2
Speeding	-	-	<0.5	-	-	-	-	-	-	-	-
Unlawful use of vehicle	3	3	3	3	4	4	5	5	5	6	6
Vehicle defect offences	-	-	-	-	-	-	-	-	<0.5	-	-
Other	<0.5	<0.5	<0.5	<0.5	<0.5	<0.5	<0.5	<0.5	<0.5	<0.5	<0.5

Table 9 shows that, for almost every type crime or offence, there has been a general increase in the percentage of convicted persons being given a custodial sentence. The only exceptions to this are fraud, where the percentage of custodial sentences has remained fairly constant, and certain motor vehicle offences (such as speeding), where the majority of cases continue to be disposed of through monetary penalties.

Table 10: Average daily prisoner population 1995-2001 (information obtained from the Scottish Prison Service Annual Reports 1999-2000 and 2000-2001)

Type of custody	95-96	96-97	97-98	98-99	99-00	00-01
Remand	988	1,021	927	971	975	880
Persons under sentence	4,644	4,971	5,133	5.057	4,999	5,003
Adult prisoners	3,921	4,173	4,359	4,348	4,320	4,347
Less than 4 years	2,022	2,183	2,141	2,036	1,987	2,024
4 years or over (including life)	1,899	1,990	2,218	2,312	2,333	2,323
Young Offenders	723	798	773	710	697	656
Less than 4 years	588	623	574	518	502	481
4 years or over (including life)	135	175	200	191	176	175
Total	5,632	5,992	6,059	6,029	5,974	5,883

Table 10 shows that the total average daily prisoner population in Scotland has remained fairly constant since the mid-1990s. It can be seen that the number of young offenders has generally declined, as has the number of prisoners on remand. However, this is off-set by an increase in the number of adult prisoners serving sentences of 4 years or more.

12. Bibliography

There are no significant texts on Scottish criminal law or procedure which have been translated into other European languages. There is however a very wide range of information available, all in English.

Demographic issues

Statistics on demographic issues are published regularly by National Statistics, which is the official source for authoritative information on the United Kingdom's economy and society. National Statistics may be accessed via the world wide web at http://www.statistics.gov.uk.

Sources of criminal law

- HUME, D. *Commentaries on the Law of Scotland Respecting Crimes* (4th ed. by BELL, B.R.). Edinburgh: Bell and Bradfute, 1844. (Reprinted by the Law Society of Scotland, 1986) (ISBN: 0902023160)
- MACDONALD, J.H.A. *Practical Treatise on the Criminal Law of Scotland* (5th ed. by WALKER, J. and STEVENSON, S.J.). Edinburgh: W. Green, 1948. (ISBN: 071325660)
- *Scots Law Times*. (ISSN: 0036-908X)
- *Session Cases*. (ISSN: 0037-282X)
- *Scottish Criminal Case Reports*. (ISSN: 0263-2381)
- *Statutes in Force – Official Revised Edition*. (ISBN (latest guide): (0118041444) *Current Law Statutes* series (ISBN 0421548002).

Sources of criminal procedure

· *Criminal Procedure (Scotland) Act 1995*. London: HMSO, 1995 Chapter 46. (ISBN: 0105446955)

Texts on criminal law

· GORDON, G.H. *Criminal Law* (3rd ed. by CHRISTIE M.). Edinburgh. W.Green, 2000 (Vol. 1) and 2001 (Vol. 2). (ISBN 0414010566)

· JONES, T.H. and CHRISTIE, M.G.A. *Criminal Law*. Edinburgh: W.Green / Sweet & Maxwell, 1996. (ISBN: 0414011465)
· GANE, C.H.W. and STODDART, C.N. *A Casebook on Scottish Criminal Law*. Edinburgh: W. Green / Sweet & Maxwell, 1995. (ISBN: 041400843X)

Texts on criminal procedure and criminal justice

· RENTON & BROWN'S CRIMINAL PROCEDURE (6th ed. by GORDON G.H.). Edinburgh: W.Green / Sweet and Maxwell, 1996. (ISBN 0414011511) (This is a loose-leaf volume which is regularly up-dated.)
· BROWN, A.N. *Criminal Evidence and Procedure*. Edinburgh: T & T Clark, 1996. (ISBN: 0567005119)
· GANE, C.H.W. and STODDART, C.N. *Criminal Procedure in Scotland: Cases and Materials*. Edinburgh: W. Green / Sweet & Maxwell, 1994. (ISBN: 0414010280)
· GANE, C.H.W. "Scotland." *In*: C. VAN DEN WYNGAERT, ed. *Criminal Procedure Systems in the European Community*. London: Butterworths, 1993. (ISBN: 0406022763)
· DUFF, P. and HUTTON, N. (eds.) *Criminal Justice in Scotland*. Aldershot: Ashgate, 1999. (ISBN: 1855218909)
· SCOTTISH POLICE COLLEGE. "Scotland." *In*: ASSOCIATION OF EUROPEAN POLICE COLLEGES. *Police and Justice Systems in the European Union*. Apeldoorn, LSOP, 2000. (ISBN: 9055001171)
· STEWART, A..L. *The Scottish Criminal Courts in Action* (2nd ed.). Edinburgh: Butterworths, 1997. (ISBN: 0406999430)

Children

· NORRIE, K. McK. *Children's Hearings in Scotland.* Edinburgh: W. Green / Sweet and Maxwell, 1997. (ISBN: 0414011759)

The prison system

· McMANUS, J.J. *Prisons, Prisoners and the Law*. Edinburgh: W. Green / Sweet & Maxwell, 1994. (ISBN: 0414010191)
· *Scottish Prison Service* (website): http://www.sps.gov.uk

Sentencing

· NICHOLSON, G.C.B. *The Law and Practice of Sentencing.* Edinburgh: W. Green, 1992. (ISBN: 0414010116)

Statistics on crime and criminal justice

· SCOTTISH EXECUTIVE STATISTICS SERVICE. *Statistical Bulletin (Criminal Justice Series)*. Edinburgh: National Statistics, 2001.

· *National Statistics* (website): http://www.scotland.gov.uk/stats.

· *Scottish Prison Service* (website): http://www.sps.gov.uk

Sentencing

· NICHOLSON , G.C.B. *The Law and Practice of Sentencing.* Edinburgh: W. Green, 1992. (ISBN: 0414010116)

Statistics on crime and criminal justice

· SCOTTISH EXECUTIVE STATISTICS SERVICE. *Statistical Bulletin (Criminal Justice Series)*. Edinburgh: National Statistics, 2001.

· *National Statistics* (website): http://www.scotland.gov.uk/stats.

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- In Chapters 2 & 3: Information regarding the historical development of Scottish criminal law in Chapter 2 was drawn from Jones and Christie's *Criminal Law* (W. Green / Sweet & Maxwell, 1996), Brown's *Criminal Evidence and Procedure* (T & T Clark, 1996) and Sheehan's *Criminal Procedure* (Butterworths, 1990).
- In Chapter 5: Jones and Christie's text was again consulted, and in addition use was made of Gane and Stoddart's *Case book on Scottish Criminal Law* (W. Green, 2001).
- In Chapter 6: On general issues, Gane's essay in Van Den Wyngaert's *Criminal Procedure Systems in the European Community* (Butterworths, 1993) was consulted regularly, and Brown's previously cited text was used also. Information for several other sections was drawn from essays in Duff and Hutton's *Criminal Justice in Scotland* (Ashgate, 1999), including: Duff, *The Prosecution Service: Independence and Accountability*; Moody, *Victims of Crime*; McManus, *Imprisonment and Other Custodial Sentences*; and Hutton, *Sentencing in Scotland*. For the section on policing, information was primarily gleaned from the "Scotland" chapter of the AEPC text on *Policing in the European Union*, used with kind permission of the Tulliallan Police Training Academy.
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- In Chapter 11: Statistics were compiled through use of the 2000 Statistical Bulletin on Criminal Justice, produced by the Scottish Executive Statistics Service, and from the Annual Reports of the Scottish Prison Service 1999-2000 and 2001-2002.

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APPENDIX 1

1. Demographic issues

1.1 What is the total population as of 1 January 20___?

1.2 What is the minimum age of criminal responsibility? Is this an absolute limit, or are courts allowed discretion on a case-by-case basis? What is the total population that has reached this minimum age?

1.3 What is the age at which full (adult) criminal responsibility is reached? What is the total population that has reached this age?

1.4 What is the total number of non-natives (aliens) as of 1 January 20___?

1.5 What are the most important nationalities represented among these non-natives?

1.6 What proportion of the population lives in urbanised areas? (What is the definition of urbanised areas used in your country?)

1.7 How many people are employed? What percentage of the employed are male? How large is the unemployment rate?

2. Criminal law statutes

2.1 Please provide a brief history of your Penal Code. When was it enacted? Has it been influenced by foreign Penal Codes and, if so, by which? What have been the major reforms of the Penal Code since 1945?

2.2 In what languages has the Penal Code been officially published? What translations are available (English, French, German, Spanish, Russian, other)? Please provide the bibliographical references and, if available, the inter-national standard book number (ISBN).

2.3 What other main statutes contain definitions of criminal offences, such as narcotics offences, traffic offences, environmental offences or economic offences? Please list these statutes, with their date of enactment and describe in brief their content. Should violation of these statutes be deemed an administrative infraction or transgression, please note this.

3. Procedural law statutes

3.1 Please provide a brief history of your Code of (Criminal) Procedure. When was it enacted? Has it been influenced by foreign procedural codes and, if so, by which? What have been the major reforms of the Code since 1945?

3.2 In what languages has the Procedural Code been officially published? What translations are available (English, French, German, Spanish, Russian, other)? Please provide the bibliographical references and, if available, the international standard book number.

3.3 What other main statutes contain provisions on criminal procedure? Please list these statutes, with their date of enactment and describe in brief their content. If your country has a system of administrative penal offences, please refer also to the statute which contains the applicable procedural provisions.

3.4 Is there a special statute on juvenile offenders? Please give the date of enactment and describe in brief its content.

4. The court system and the enforcement of criminal justice

4.1 Please provide a brief history of the statute on the organisation of the court system (if separate from the Code of Procedure). When was it enacted? What have been the major reforms of this statute since 1945?

4.2 In what languages has this statute been officially published? What translations are available (English, French, German, Spanish, Russian, other). Please provide the bibliographical references and, if available, the international standard book number.

4.3 What other main statutes contain provisions on the organisation of the court system? Please list these statutes, with their date of enactment and describe in brief their content.

4.4 What statutes contain provisions on the organisation of the police, the bar, and the prison and probation agency?

4.5 Is there a special statute on criminal procedure in the case of juvenile offenders? Please give the date of enactment and describe in brief its content.

5. The fundamental principles of criminal law and procedure

5.1 Is the principle of legality established in the Penal Code? If so, please annex an English translation of the relevant provision.

5.2 What division of offences (e.g. crime/delit/contravention or Vegrehen/ Verbrechen) is made by the Penal Code, and on what criteria is this division based? Is the same division used in other criminal law statutes as well and, if not, what divisions are used?

5.3 What are the minimum and maximum ages at which an of-fender is dealt with as a juvenile? What is the minimum age at which an offender is dealt with as an adult offender?

5.4 Is strict liability for certain offences or categories of offences recognised in the Penal Code? If yes, for which offences?

5.5 Is strict liability for certain offences or categories of offences recognised elsewhere in criminal law? If yes, for which offences?

5.6 Is criminal responsibility restricted to individuals, or can also groups of persons be held responsible ("corporate responsibility")?

5.7 What grounds for justification are expressed in the Penal Code? Apart from these written grounds, are other grounds recognised in case law?

5.8 What time limits bar prosecution of criminal offences?

5.9 Is the Penal Code divided into a general part and a special part? If not, is another division used? In order to provide an overview of the contents of the Penal Code, please append a table of contents that provides the titles of parts and chapters of the Penal Code.

5.10 Please provide an English translation of the legal definition of (a) murder, (b) intentional homicide, (c) robbery, (d) (ordinary, simple) assault, and (e) (ordinary, simple) theft. What aggravating circumstances are mentioned in the Penal Code in the cases of assault and theft?

6. The organisation of the investigation and criminal procedure

6.1. General issues

6.1.1 Please describe briefly the main aspects of ordinary criminal procedure (for example, how is the procedure initiated, how is evidence gathered and presented, who is summoned, what is the role of counsel, who has the right to be heard, who presents questions).

6.1.2 Does the pre-trial phase have an inquisitorial or an accusatorial character?

6.1.3 At what stage is the pre-trial phase deemed to end, and the trial stage to begin?

6.1.4 Does the trial phase have an inquisitorial or an accusatorial character?

6.1.5 Does your system recognise the role of the examining judge (juge d'instruction, Untersuchungsrichter), and if so, what is the function of the examining judge?

6.1.6 Is the Code of Judicial Procedure divided into a general part and a special part? If not, is another division used? In order to provide an overview of the contents of the Code of Judicial Procedure, please append a table of contents that provides the titles of parts and chapters of the Code.

6.2 Special issues

6.2.1 Please describe briefly the stages of apprehension, arrest and pre-trial detention as recognised in your system.

6.2.2 What are the legal prerequisites for the application of apprehension / arrest / pre-trial detention?

6.2.3 Who decides on the application of pre-trial detention?

6.2.4 Is the maximum term of pre-trial detention determined in law? Is there any trend towards shortening this maximum term?

6.2.5 Who may request a review of the decision to hold a suspect in pre-trial detention, and/or does the law prescribe an automatic review of this decision at regular intervals?

6.2.6 How is the term of pre-trial detention to be deducted from the sentence?

6.2.7 What are the general legal remedies (appeal) against a decision by the court of first instance?

6.2.8 May a case be tried in the absence of the defendant?

6.2.9 Please describe briefly the main rules of evidence (types of admissible evidence, methods of acquiring evidence and the assessment of evidence).

6.3 The organisation of detection and investigation

6.3.1 What is the composition and internal organisation of the national agency responsible for the detection and investigation of criminal offences?

6.3.2 Who supervises and controls this activity?

6.3.3 Is this agency subject to written or oral instructions by the prosecution agency in the investigation of specific offences?

6.3.4 Do special law enforcement agencies exist for the detection and investigation of (1) traffic offences, (2) narcotics offences, (3) firearms offences, (4) environmental offences, (5) economic offences, or other major offence categories?

6.4 The organisation of the prosecution agency

6.4.1 What is the composition and internal organisation of the national prosecution agency?

6.4.2 What are the main duties and powers of the prosecution agency in criminal cases?

6.4.3 Is the prosecution agency a dependent or independent body? Are its decisions subject to review by another body? Who is vested with the right to

issue directives to the prosecution agency regarding (a) general prosecution policy and (b) prosecution of specific cases?

6.4.4 What possibilities exist in your system for the police or the prosecution agency to close a criminal case officially on the basis of, for example, composition, caution or simplified procedure?

6.5 Organisation of the courts

6.5.1 What is the composition and internal organisation of the court system?

6.5.2 What courts deal with criminal offences as the first instance and as the appellate level?

6.5.3 What are the main rules of jurisdiction?

6.5.4 What criminal offences are tried by a full bench and what are tried by a single judge?

6.5.5 What forms of participation by laypersons are recognised in your system? What questions are they competent to decide?

6.5.6 What is the highest court in criminal matters? Is it competent to review a decision in full, is its review limited to the issues appealed, or is it restricted to controlling due process and the fairness of the procedure?

6.5.7 What is the significance of decisions of this highest court as precedents?

6.6. The Bar and legal counsel

6.6.1 What are the legal rights of the Bar during the pre-trial stage?

6.6.2 Does the suspect have the right to counsel immediately upon apprehension / arrest by the police? Does the suspect have this right during pre-trial detention?

6.6.3 Is cost-free legal aid provided to (1) those who are apprehended / arrested by the police, (2) those held in pre-trial detention, and/or (3) those charged with an offence? If so, under what conditions is cost-free legal aid provided?

6.6.4 What qualifications must a member of the Bar or legal counsel fulfil?

6.7 The position of the victim

6.7.1 Does your system recognise a legal definition of "victim" ("injured person", "complainant")?

6.7.2 Does the victim have an officially recognised role in pre-trial proceedings, for example in the presentation of evidence or in questioning?

6.7.3 Does the victim have legal remedies against a decision of the police or the prosecutor not to proceed with a case?

6.7.4 Does the victim have the right to present civil claims in connection with criminal proceedings? Are there any restrictions on this right?

6.7.5 Does the victim have the right to present criminal charges and/or to be heard on the charges presented by the public prosecutor?

6.7.6 Does the victim have the right to counsel?

6.7.7 Does the victim have the right of appeal?

6.7.8 Is the victim assisted by the State in claiming compensation from the offender?

6.7.8 Does the victim have the right to State compensation for injuries or loss caused by crime? If so, please describe briefly the system used.

6.7.9 Does your country have national and/or local victim support schemes? If so, please describe these schemes briefly, including the extent to which they are supported by the State.

7. Sentencing and the system of sanctions

7.1 What classification of sanctions is given in the Penal Code?

7.2 Does the Penal Code distinguish between punishments and measures and/or between principal and additional punishments?

7.3 Does the Penal Code or another statute provide special sanctions for juveniles? If so, please describe these provisions.

7.4 Does the Penal Code or another statute provide special sanctions for civil servants, military personnel or other major groups?

7.5 Please provide information concerning the provisions on the following sanctions:

* capital punishment;
* imprisonment (what is the general minimum and maximum);
* deprivation of liberty for an indeterminate period;
* other forms of detention (what is the general minimum and maximum);
* probation and other measures involving supervision;
* community service;
* compensation orders;
* fines and/or day-fines (what is the general minimum and maximum; how is the size of the day-fine calculated)
* (other) alternatives or substitutes for imprisonment or fine.

7.6 In case of default of payment of a fine, may a fine be converted into imprisonment or another sanction? What is the term of such imprisonment, or the severity of such sanction? Who determines the conversion?

7.7 What measures (for example withdrawal of license, restriction of rights) may be imposed on adults as a reaction to an offence? In what cases can such measures be imposed, and for how long?

7.8 Does the Penal Code (or other statute) contain general provisions on sentencing? If so, please explain them briefly.

7.9 What general or specific sanctions or measures are used for (1) traffic offences, (2) narcotics offences, (3) firearms offences, (4) environmental offences, and (5) economic offences?

8. Conditional and/or suspended sentence, and probation

8.1 Please describe the basic provisions concerning the conditional and/or suspended sentence.

8.2 For what offences and what sentences may the conditional or suspended sentence be applied?

8.3 May the court impose a sentence that is suspended only in part?

8.4 What general or special conditions may be attached to a conditional or suspended sentence?

8.5 Who supervises compliance with such conditions?

8.6 What is the procedure followed if an offender is in breach of a condition, and what are the possible consequences?

8.7 What are the main lines of the organisation of the probation service on the national and the regional level?

8.8 What are the main functions of the probation service?

8.9 What is the role of volunteers in probation activities?

9. The prison system and after-care of prisoners

9.1. Organisation of the prison system

9.1.1 Does the prison administration form part of the Ministry of Justice? If not, under which Ministry does it function?

9.1.2 What are the main lines of the organisation of the prison administration?

9.1.3 Who is responsible for the development of prison policy?

9.1.4 Please describe briefly the main legislation on the enforcement of prison sentences and fines, and on the legal position of prisoners.

9.1.5 Please describe briefly the prison system in your country (the number, size and classification of prisons: high security, semi-open, open, night prisons etc.).

9.1.6 Please describe briefly the juvenile prison system in your country.

9.1.7 Who decides on the placement of prisoners in different prisons?

9.1.8 Does your system allow more than one prisoner per prison cell?

9.1.9 What activities are convicted prisoners and pre-trial detainees required to participate in (prison work, education, other)?

9.1.10 Under what conditions can a prisoner work or pursue education outside the prison?

9.1.11 Under what conditions can a prisoner be granted a furlough?

9.1.12 Is absconding from prison deemed a criminal offence, and if so what is the minimum and maximum penalty imposed?

9.1.13 Do your prisons contain any significant minority categories of prisoners (e.g. aliens)?

9.1.14 Is your country a contracting party to an international convention on the transfer of prisoners to their home country in order to serve a prison sentence imposed by a judge abroad?

9.2 Conditional release (parole), pardon and after-care

9.2.1 Please describe the basic provisions concerning conditional release (parole).

9.2.2 Under what legal conditions may a prisoner be released conditionally, and what is the minimum term to be served?

9.2.3 What general or special conditions may be attached to conditional release?

9.2.4 Who decides on conditional release?

9.2.5 Who supervises compliance with the conditions?

9.2.6 What is the procedure followed if an offender is in breach of a condition, and what are the possible consequences?

9.2.7 Which person or agency is empowered to grant pardon or amnesty?

9.2.8 Please describe briefly how the after-care of released prisoners is organised in your country.

9.2.8 Please describe briefly how the after-care of released prisoners is organized in your country.

9.2.9 What functions does this organization have (assistance in providing housing and employment, counselling services, etc.)

10. Plans for reform

10.1 Are there any major reforms related to the issues dealt with in this questionnaire that are now under discussion and that are planned to come into force during the following five years? If so, please describe briefly the purpose of the reforms, and what agency or committee is preparing the reforms. Please provide bibliographical references if available.

10.2 Is there a tendency in your country to reduce the use of imprisonment and/or to expand the use of non-custodial sanctions? If so, please describe briefly the reasons for this tendency and the results achieved.

10.3 Is there a tendency in your country to increase sentences for certain offences (e.g. narcotics offences, environmental offences, certain serious economic offences, certain serious violent offences)? If so, please describe briefly the reasons for this tendency and the results achieved.

10.4 Is there a tendency in your country to increase the support provided to victims of offences? If so, please describe briefly the reasons for this tendency and the results achieved.

11. Statistics and research results on crime and criminal justice

Please prepare a short (ca. 3-5 page) summary of crime trends and the operation of criminal justice in your coun-try over the past decade, using available statistics and research results.

Such a summary might include indicators on, for example, the following:

- trends in homicide, robbery, assault and theft (NB question 5.10)
- clearance rate
- number of convicted offenders
- number of different sanctions imposed
- trends in the use of imprisonment and in the total prison population.

12. Bibliography

Please provide a list of general references in crime and criminal justice in your country, with particular attention to references available in the major international languages.