THE LAW COMMISSION
and
THE SCOTTISH LAW COMMISSION
(LAW COM No 264)
(SCOT LAW COM No 175)

POWERS OF CRIMINAL COURTS (SENTENCING) BILL

REPORT ON THE CONSOLIDATION OF
LEGISLATION RELATING TO SENTENCING

Presented to the Parliament of the United Kingdom
by the Lord High Chancellor and the Secretary of State for Scotland
by Command of Her Majesty
Laid before the Scottish Parliament by the Scottish Ministers
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To the Right Honourable the Lord Irvine of Lairg,
Lord High Chancellor of Great Britain,
the Right Honourable Dr John Reid MP,
Secretary of State for Scotland,
and the Scottish Ministers.

The Bill which is the subject of this Report consolidates certain enactments relating to the powers of courts in England and Wales to deal with offenders and defaulters and to the treatment of such persons. A small number of provisions of the Bill, relating to the transfer of court orders and certain other cross-border matters, extend also to Scotland; a smaller number extend also to Northern Ireland. In order to produce a satisfactory consolidation it is necessary to make the recommendations which are set out in Appendix 1 to this Report.

The recommendations numbered 1 to 4, 6 and 7 relate to England and Wales only and are accordingly made by the Law Commission alone. The recommendations numbered 5(A) and (B) also affect the law of Scotland and are therefore recommendations of both the Law Commission and the Scottish Law Commission.

The bodies and persons listed in Appendix 2 to this Report have been consulted in connection with the recommendations and do not object to any of them.

ROBERT CARNWATH,
Chairman, Law Commission

BRIAN GILL,
Chairman, Scottish Law Commission

11 February 2000

APPENDIX 1

RECOMMENDATIONS

Section 47 of the Crime and Disorder Act 1998: remission of offenders by youth courts

1. Section 47(1) of the Crime and Disorder Act 1998 makes provision among other matters for the case where an offender is convicted by a youth court when under 18, but reaches the age of 18 before he is sentenced. In such a case, section 47(1) enables the youth court to remit the offender to an adult magistrates' court for sentence, and section 47(4) provides that the adult magistrates' court may deal with the case in any way in which it would have power to deal with it if all proceedings relating to the offence which took place before the youth court had taken place before the adult magistrates' court.

Section 47(4) ignores subsections (8) to (8B) of section 7 of the Children and Young Persons Act 1969. The effect of these subsections is that an adult magistrates' court which convicts an offender when he is under 18 must exercise its power under section 56(1) of the Children and Young Persons Act 1933 to remit the offender to a youth court for sentence unless his case is one which can properly be dealt with by the adult court by means of a discharge, a fine or an order requiring his parent to enter into a recognizance in respect of him. (There is an exception for cases where the offender has to be referred to a youth offender panel under the Youth Justice and Criminal Evidence Act 1999, but this will not apply to an offender who has been remitted under section 47(1) of the 1998 Act.) Accordingly, where an offender who was convicted when under 18 is remitted under section 47(1) of the 1998 Act to an adult magistrates' court for sentence, the apparent result of section 47(4), read with section 7(8) to (8B) of the 1969 Act, is that the court to which he is remitted has no power to do anything except remit the offender back again to a youth court for sentence or discharge him, fine him or require his parent to enter into a recognizance. Such a restriction of the adult magistrates' court's powers clearly defeats the object of section 47(1), which is to enable the offender, now no longer under 18, to be appropriately sentenced by an adult court.

We recommend that, in reproducing section 47(4), there should be an express disapplication of the provision of the Bill reproducing section 7(8) of the Children and Young Persons Act 1969.

Effect is given to this recommendation in clause 9(3) of the Bill.

Section 71 of the Children and Young Persons Act 1969: Isles of Scilly

2. Section 71 of the Children and Young Persons Act 1969 provides that that Act shall have effect, in its application to the Isles of Scilly, with such modifications as the Secretary of State may by order specify. Provisions such as this are often found in Acts conferring functions on local authorities because the Scillies have a unique local authority, the Council of the Isles of Scilly: an order has in fact been made under section 71 modifying the meaning of "local authority" in the 1969 Act. Section 71 refers to the whole

of the 1969 Act, but, clearly, not every provision of the Act requires modification to apply satisfactorily in the Scillies.

The Bill reproduces a number of provisions of the 1969 Act, nearly all of them in the series of clauses and Schedules about supervision orders and in the clause containing general definitions. Some of the provisions reproduced in these clauses and Schedules do require modification in their application to the Isles of Scilly. Accordingly, the Bill also includes a provision, corresponding to section 71 of the 1969 Act, which confers power to modify these clauses and Schedules for the Isles of Scilly.

There are, however, a few provisions of the 1969 Act which are reproduced elsewhere in the Bill than in these clauses and Schedules. These are:

(a) section 7(8) to (8B) of the 1969 Act (whose effect is explained in recommendation 1 above);

(b) the part of section 7(7) of that Act which expressly prevents a court from imposing a supervision order for an offence for which the sentence is fixed by law under section 53(1) of the Children and Young Persons Act 1933 (ie, the words "Subject to … section 53(1) of the Act of 1933"); and

(c) section 70(3) of that Act (whose effect is that for the purposes of the 1969 Act the age of a person is deemed to be that which it appears to the court to be).

To reproduce the effect of section 71 of the 1969 Act exactly, the Bill would have to include power to make modifications for the Isles of Scilly of each provision of the Bill which corresponds to a provision of the 1969 Act listed above. However, the content of these provisions is such that it is thought they never would require modification for the Isles of Scilly. Therefore no purpose would be served by the Bill's picking them out for mention as provisions which may be modified for the Scillies.

Accordingly, we recommend that, in reproducing section 71 of the 1969 Act, the Bill should not confer power to make modifications for the Isles of Scilly of the provisions of the Bill reproducing those provisions of the 1969 Act listed above.

Effect is given to this recommendation (by omission) in clause 68(1) of the Bill.

Part I of the Criminal Justice Act 1991: meaning of "sentence of imprisonment"

3. Part I of the Criminal Justice Act 1991 uses the term "custodial sentence". This is defined in section 31(1) of that Act as meaning, in relation to an offender of or over the age of 21, a sentence of imprisonment. "Sentence of imprisonment" is defined in section 31(1) as not including either a committal to prison for contempt of court or an attachment for contempt of court. The reference to an "attachment" is redundant because the process of attachment for contempt of court is obsolete, but the reference to a committal for contempt of court is effective. "Sentence of imprisonment" is used nowhere in Part I of the 1991 Act except in the definition of "custodial sentence".

In relation to offenders under 21, "custodial sentence" is defined in section 31(1) of the 1991 Act as meaning any of a number of specified sentences, none of which includes a committal for contempt.

Accordingly, in relation to any offender, "custodial sentence" in Part I of the 1991 Act does not include a committal (to prison or any other form of detention) for contempt of court. The main result of this is that the restrictions on the imposition of "custodial sentences" in sections 1 to 4 of the 1991 Act do not apply to committals for contempt of court.

There are a number of offences which are referred to, by some enactments, as offences "kindred to" contempt. Examples of enactments using this term are section 9(1) of the Criminal Justice Act 1982 (which allows the committal to detention of 18 to 20 year olds for contempt of court or a kindred offence) and section 21(3)(b) of the Powers of Criminal Courts Act 1973 (section 21 imposes restrictions on passing sentences of imprisonment on persons not previously sentenced to imprisonment: subsection (3)(b) excludes from "sentence of imprisonment" a committal to prison for contempt or a kindred offence.) The phrase "kindred offence" is considered to refer to conduct punishable under a statutory provision - such as section 12 of the Contempt of Court Act 1981 or section 14 of the County Courts Act 1984 - which would be a contempt of court if performed in relation to a superior court. It has also been held to include the offence of failing to comply with an order under section 115(3) of the Magistrates' Courts' Act 1980 to enter into a recognizance to keep the peace.

However, some enactments use the term "contempt" to describe offences which might, using the above definition, be described as merely "kindred to" contempt. For example, section 12 of the Contempt of Court Act 1981, which enables magistrates' courts to punish conduct that would certainly be contempt of court if performed in relation to a superior court, is entitled "Offences of contempt of magistrates' courts". Similarly, section 14(5) of that Act describes as "offences of contempt" various statutory offences relating to inferior courts. In short, it appears that a clear distinction has not always been drawn between offences of contempt and offences kindred to contempt.

The definitions of "sentence of imprisonment" and "custodial sentence" in section 31(1) of the Criminal Justice Act 1991 do not expressly exclude from "custodial sentence" committals for offences kindred to contempt. Therefore such committals are not expressly excluded from the restrictions imposed by sections 1 to 4 of that Act on the imposition of custodial sentences. Whether, despite this, they are actually excluded depends on how widely the reference to "contempt of court" in section 31(1) is to be construed. This is a point that, given the differing references in different enactments to "offences of contempt" and "offences kindred to contempt", must be in doubt. However, the inconsistency between the 1991 Act definition of "custodial sentence" on the one hand and, on the other, section 9(1) of the Criminal Justice Act 1982 and section 21(3)(b) of the Powers of Criminal Courts Act 1973 (both of which are also reproduced in the Bill and both of which refer specifically to "kindred offences") implies that in the 1991 Act "custodial sentence" does not exclude a committal for an offence kindred to contempt, although it excludes a committal for contempt.

It is thought that a better result would be achieved if "custodial sentence" in Part I of the 1991 Act did expressly exclude committals for offences kindred to contempt as well as committals for contempt itself. If the opposite line were taken and committals for offences kindred to contempt were to be treated as "custodial sentences" for the purposes of sections 1 to 4 of the 1991 Act, the courts would be in the difficult position of having to decide, when committing a person to prison, whether the conduct for which he is being committed actually was a contempt or whether it was only an offence "kindred to" contempt. If it was contempt, the restrictions in sections 1 to 4 would not apply, but if it was only kindred to contempt, those restrictions would apply. There does not seem any good reason for requiring the courts to make this distinction: the feature of the "kindred offences" is that they are similar in nature to contempt, and it is therefore logical for committals for them to be treated in a similar way to the way committals for contempt are treated.

"Custodial sentence", as defined by section 31(1) of the 1991 Act, is used in a small number of provisions (in addition to sections 1 to 4 of the 1991 Act and provisions referring to those sections) which are reproduced in the Bill. In most instances the context excludes committals for offences kindred to contempt. The possible exceptions are sections 67(4) and 69(4) of the Crime and Disorder Act 1998. There appears no reason why these provisions should make a distinction between the treatment of committals for contempt of court and committals for offences kindred to contempt.

We recommend that, in reproducing the definitions of "custodial sentence" and "sentence of imprisonment" now in section 31(1) of the 1991 Act, the Bill should include express provision to the effect that committals for offences kindred to contempt of court, as well as committals for contempt itself, are not "sentences of imprisonment" and are therefore not "custodial sentences" for the purposes of the Bill.

Effect is given to this recommendation in clause 76(2) of the Bill.

Section 39 of the Crime (Sentences) Act 1997: Community driving licences

4. The Driving Licences (Community Driving Licence) Regulations 1996 and 1998 amend the Road Traffic Act 1988, the Road Traffic Offenders Act 1988 and other legislation in order to give effect to Council Directive 91/439/EEC of 29 July 1991 on driving licences (as amended). Driving licences issued by states within the European Economic Area (other than the United Kingdom) are referred to in these Acts, as amended by the Regulations, as "Community licences". The amendments made by the Regulations authorise holders of Community licences who become resident in Great Britain to drive there for specified periods, generally 5 years, without the need to exchange their licences for British ones. They also provide for the issue to such Community licence holders of counterpart licences on which endorsements can be made.

The provision made by the 1996 Regulations about Community licences and their counterparts calls for consequential amendments in related legislation. One such amendment made by those Regulations is in section 44 of the Powers of Criminal Courts Act 1973. Section 44 confers power on a sentencing court, in certain cases where a

vehicle has been used for the purposes of an offence, to disqualify a person from driving. It obliges a court which disqualifies an offender under that section to require the offender to produce any British driving licence held by him, together with its counterpart. In addition, as amended by the 1996 Regulations, section 44 obliges the court to require the offender to produce any Community licence held by him, together with the counterpart of the Community licence.

Section 39 of the Crime (Sentences) Act 1997 confers a separate power on sentencing courts to disqualify offenders from driving, similar to but wider than the power conferred by section 44 of the 1973 Act. Like section 44 of the 1973 Act, section 39(4) and (6) of the 1997 Act oblige a court which disqualifies an offender under section 39 to require the offender to produce any British driving licence held by him, together with its counterpart. However, section 39 omits any mention of Community licences and their counterparts, apparently ignoring the regime for these licences established by the 1996 Regulations. It is thought that this omission was inadvertent, and that section 39 should have made provision about Community licences and their counterparts corresponding to that in section 44 of the 1973 Act as amended by the 1996 Regulations.

We recommend that in reproducing section 39(4) of the 1997 Act an obligation should be placed on the court to require the production of any Community licence held by the offender, together with its counterpart.

Effect is given to this recommendation in clause 146(4) and (5) of the Bill.

Section 53 of the Powers of Criminal Courts Act 1973: execution in Scotland of process of a court in England and Wales

5. (A) Section 53 of the Powers of Criminal Courts Act 1973 has the effect that section 4 of the Summary Jurisdiction (Process) Act 1881 applies to any process issued under Part I of the 1973 Act as it applies to process issued under the Magistrates' Courts Act 1980. "Process" in the context of the 1973 Act appears to mean summonses and arrest warrants. Section 4 of the Summary Jurisdiction (Process) Act 1881 enables a process issued by a court in England and Wales to be served or executed in Scotland.

A provision to the same effect as section 53 of the 1973 Act is to be found in paragraph 3(4) of Schedule 1 to the Youth Justice and Criminal Evidence Act 1999, applying to process issued under paragraph 3(2) of that Schedule.

There are a number of other enactments reproduced in the Bill which confer powers to issue summonses and arrest warrants analogous to the powers in Part I of the 1973 Act and paragraph 3(2) of Schedule 1 to the Youth Justice and Criminal Evidence Act 1999. These are section 16 of the Children and Young Persons Act 1969, section 19 of the Criminal Justice Act 1982, Schedule 2 to the Criminal Justice Act 1991, paragraph 6 of Schedule 3 to that Act and section 77 of and Schedule 5 to the Crime and Disorder Act 1998. None of these enactments has the benefit of a provision applying section 4 of the Summary Jurisdiction (Process) Act 1881 to the summonses and warrants issued under them; the result is that such summonses and warrants cannot be served or executed in

Scotland. This is thought to be oversight rather than deliberate policy, particularly as the 1991 Act provisions are to some extent a re-enactment of provisions that were once in the 1973 Act and therefore once benefited from section 53 of that Act.

We recommend that, in reproducing section 53 of the 1973 Act, its application should be extended to summonses and warrants issued under the provisions of the Bill deriving from the enactments mentioned above.

Effect is given to this recommendation in clause 159 of the Bill.

(B) Section 58 of the Powers of Criminal Courts Act 1973 applies certain provisions of that Act to Scotland. As enacted, it extended section 53 of that Act to Scotland. This was completely logical, because a provision which provides for the service and execution of English summonses and arrest warrants in Scotland must be made part of the law of Scotland if it is to have practical effect. That this is so is recognised by, for example, section 68(7) of the 1999 Act. However, the reference to section 53 of the 1973 Act in section 58 was repealed by the Criminal Procedure (Scotland) Act 1975 (which also made a repeal in section 53 itself). Following this repeal in section 58 of the 1973 Act, section 53 of the 1973 Act is, strictly speaking, ineffective. Since the 1975 Act was a consolidation, this cannot have been an intended result.

We recommend that the provision of the consolidation reproducing section 53 of the 1973 Act should extend to Scotland.

Effect is given to this recommendation in clause 167 of the Bill.

Power to make subordinate legislation: transitional provision

6. The Bill consolidates a number of provisions empowering the Secretary of State to make secondary legislation. In particular, it reproduces various powers to amend, by order, the characteristics of particular types of sentence. An example is the power of the Secretary of State in section 14(7) of the Powers of Criminal Courts Act 1973 to alter the maximum number of hours of community service which may be imposed by a community service order.

Most of these powers are not expressed to include power to make transitional provision, but there is inconsistency on this point: for example, the power conferred by section 61(7) of the Crime and Disorder Act 1998 to amend the minimum or maximum duration of a drug treatment and testing order does (by virtue of section 114) include express power to make transitional provision.

In the cases where there is specific provision allowing the inclusion of transitional provision in orders amending sentencing powers, the specific provision does serve a purpose. It makes clear that an amending order which increases the maximum severity of a penalty may include transitional provision preventing the increase from applying in relation to an offence committed before the date when the amending order takes effect,

thereby avoiding any possibility of a heavier penalty being imposed for the offence than was applicable at the time the offence was committed.

There appears to be no reason for the inconsistency, as respects the power to include transitional provision, between the order-making powers conferred by the Crime and Disorder Act 1998 to amend certain types of sentence and the comparable powers in other Acts reproduced in the Bill. The most appropriate way to remove the inconsistency would seem to be to extend the power to include transitional provision in orders so that it applies to all order-making powers of the Secretary of State under the Bill. The great majority of these are powers to make orders amending sentencing powers and, as discussed above, would benefit from a specific provision enabling orders made under them to include transitional provisions ensuring that they do not apply to previously committed offences. In relation to other order-making powers in the Bill, it is not thought that extending them to allow the making of transitional provision would result in a significant widening of the powers.

We therefore recommend that all order-making powers conferred on the Secretary of State by the Bill should include power to make transitional provision.

Effect is given to this recommendation in clause 160(6) of the Bill.

Schedule 5 to the Crime and Disorder Act 1998: "place of safety"

7. Paragraph 4(4) of Schedule 5 to the Crime and Disorder Act 1998 makes provision for the case where a young offender is arrested in connection with the breach or proposed amendment of a reparation order or action plan order. It provides that if the offender cannot be brought immediately before the appropriate court, the person in whose custody he is may make arrangements for his detention in a place of safety. This provision is virtually identical to provision made by section 16 of the Children and Young Persons Act 1969 in relation to the breach or proposed amendment of a supervision order. However, in that section "place of safety" has, by virtue of the third definition in section 70(1) of the 1969 Act, the same meaning as in the Children and Young Persons Act 1933. In Schedule 5 to the 1998 Act "place of safety" has no defined meaning.

It is thought that the absence of a definition of "place of safety" in Schedule 5 to the 1998 Act was an oversight, and that the phrase was intended to bear the same meaning as it does in the equivalent provision in section 16 of the 1969 Act.

We recommend that in reproducing paragraph 4(4) of Schedule 5 to the 1998 Act a definition of "place of safety", in the same terms as that in section 70(1) of the 1969 Act, should be included.

Effect is given to this recommendation in paragraph 6(4) of Schedule 8 to the Bill.

APPENDIX 2

CONSULTEES

The Lord Chief Justice
The Council of Circuit Judges
The Chief Metropolitan Magistrate
The Joint Council of HM Stipendiary Magistrates
The Magistrates' Association
The Justices' Clerks' Society
The Lord Chancellor's Department
The Youth Justice Board
The Scottish Executive
Dr David Thomas, QC, LLD