

SPICe Briefing

The Scottish Criminal Justice System: Legal & Administrative Arrangements

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This briefing is one of six covering various aspects of the Scottish criminal justice system. It looks at the basis of Scots criminal law, including consideration of devolved and reserved issues. It also outlines key administrative arrangements.

The other five briefings in this series are:

- [The Scottish Criminal Justice System: The Police](#)
- [The Scottish Criminal Justice System: The Public Prosecution System](#)
- [The Scottish Criminal Justice System: The Criminal Courts](#)
- [The Scottish Criminal Justice System: The Prison Service](#)
- [Children and the Scottish Criminal Justice System](#)



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CRIMINAL LAW

Legislation and the Common Law

A number of important elements of Scots criminal law are dealt with in legislation, for example:

- Misuse of Drugs Act 1971 – includes offences relating to the production, supply and possession of controlled drugs (eg heroin, cocaine, amphetamine and cannabis)
- Criminal Procedure (Scotland) Act 1995 – includes provisions on the jurisdiction of the criminal courts, bail, summary and solemn court proceedings, sentencing and appeals
- Sexual Offences (Scotland) Act 2009 – provides a statutory framework for most sexual offences (eg rape and sexual assault)

However, much of the criminal law in Scotland is still based on the common law – including many of the more common and most serious offences (eg theft, assault and murder).

The basis of any particular statutory offence or rule (eg procedural rules) will be found in one or more authoritative documents (eg an Act of the Scottish or UK Parliament). This is not the case in relation to areas covered by the common law. Instead, the common law on any topic is generally derived from a series of court judgements ruling on the application of common law principles in particular cases. These principles may be traced back to various sources, including the works of a number of authoritative legal writers from previous centuries (eg David Hume, 1757-1838).¹

Although a particular criminal offence or rule may currently be covered by the common law, the Scottish Parliament and/or UK Parliament may decide to legislate on the topic. This may involve adding a statutory offence in an area already covered by a more general common law offence (eg the Emergency Workers (Scotland) Act 2005 added various statutory offences dealing with assault without altering the more general common law offence of assault). It may also involve the replacement of existing common law offences with statutory ones (eg as provided for in the Sexual Offences (Scotland) Act 2009 – although the provisions which would abolish relevant common law offences have not been commenced at the time of writing).²

The courts have a vital role in relation to the interpretation of both statutory and common law offences. The process of interpreting the common law is somewhat different from that involved in interpreting legislation, given that the common law on any particular area is not set out in a single authoritative source. Nevertheless, part of the role of the courts is to interpret both legislation and common law principles so that they can be properly applied in particular cases.

Devolved and Reserved Issues

Section 29(1) of the Scotland Act 1998 provides that any Act of the Scottish Parliament is not law in so far as any of its provisions are outwith the legislative competence of the Parliament. One of the limitations on legislative competence is that it does not extend to reserved matters (as opposed to devolved matters). Schedule 5 to the 1998 Act provides a list of reserved matters. In relation to criminal justice, these reservations include ones relating to the following areas: (a) misuse of drugs; (b) firearms; and (c) road traffic offences.

¹ Nephew of the philosopher David Hume.

² Section 52 of the Sexual Offences (Scotland) Act 2009 provides for the abolition of various common law crimes such as rape in relation to offences committed after the coming into force of the section. Commencement of the section was delayed to ensure that there are no cases where, owing to unforeseen circumstances, it is not possible to prosecute using the new statutory offences.

Where a matter is not reserved it is devolved – thus allowing the Scottish Parliament to validly legislate on the matter (assuming the planned legislation is not outwith the legislative competence of the Parliament on some other basis).³ Although some significant areas of criminal law are reserved, most of this topic is devolved.

Whilst the Scottish Parliament can only legislate on devolved matters, the UK Parliament is able to legislate on both devolved and reserved matters. However, a convention has developed (the Sewel Convention) that the UK Government will not normally seek to legislate on matters devolved to the Scottish Parliament without its consent. This agreement is achieved in each case by the Scottish Parliament voting on a Legislative Consent Motion. Information on such motions is set out on the Scottish Government's website under the heading of "[Sewel Convention – Legislative Consent Motions](#)".

The assessment of whether or not a proposal for legislation deals with wholly devolved matters, wholly reserved matters, or a mix of devolved and reserved matters is not always straight forward. For example, even though the law in relation to culpable homicide is mainly a devolved matter, legislation on this topic in particular circumstances may deal with reserved matters. In 2006, a Corporate Manslaughter and Corporate Homicide Bill was introduced in the House of Commons, seeking to reform the law in Scotland as well as in other parts of the UK. Although an expert group established by the then Scottish Executive to review the law on corporate liability for culpable homicide had earlier produced separate proposals for Scotland, the Executive subsequently concluded that the Scottish Parliament did not have the power to legislate in the area:

"The Bill is being extended to Scotland because lawyers in Whitehall and the Scottish Executive have concluded that the Scottish Executive has no power to enact separate Scottish legislation in this area because the Bill covers health and safety and business associations, both of which are matters reserved to the Westminster Parliament under Schedule 5 of the Scotland Act 1998. An article in the Financial Times quoted the Scottish Executive's view that a Sewel motion was unnecessary: 'As a result, the Westminster Bill covers Scotland. Given that the Bill is wholly reserved there is no need for the Scottish Parliament to give its consent'." (Peck and Brevitt 2006, pp 43-44)

ADMINISTRATION

This section provides information on which bodies are responsible for the development and running of some of the main areas of the criminal justice system in Scotland.

Criminal Justice Policy

As noted above in relation to legislative competence, despite the fact that significant areas of criminal law are reserved most of the topic is devolved to the Scottish Parliament. Similarly, the Scottish Government (including the Cabinet Secretary for Justice) has responsibility for most criminal justice policy.

³ A legislative provision would also be outwith the competence of the Scottish Parliament if it was, for example, incompatible with the convention rights derived from the European Convention on Human Rights.

Policing

Scotland currently has eight ‘territorial’ police forces.⁴ The Police (Scotland) Act 1967 provides for a ‘tripartite’ sharing of responsibility for policing between: (a) the Scottish Government; (b) police authorities or joint police boards (made up of local authority councillors); and (c) chief constables.

The responsibilities of each include:

- Scottish Government – policing policy
- police authority or joint police board – setting a police force’s budget, appointing its senior police officers (with the agreement of the Scottish Government), and determining the numbers of police officers and civilian support staff for a force
- chief constables – operational decisions about police deployment and law enforcement

Further information on policing is provided in the SPICe briefing – Scottish Criminal Justice System: The Police.

Prosecution of Criminal Offences

The responsibilities of the [Crown Office & Procurator Fiscal Service](#) cover the prosecution of crime in Scotland (including decisions on whether criminal prosecution is appropriate in individual cases). It is headed by the Lord Advocate.⁵ Although he is part of the Scottish Government, the Lord Advocate acts independently of it in relation to criminal prosecutions. His duty to act independently is now expressly set out in section 48(5) of the Scotland Act 1998.

The Crown Office & Procurator Fiscal Service is the only public prosecution authority in Scotland. Although prosecutions by private individuals are possible in some circumstances, they are extremely rare.

Further information on the prosecution of crime is set out in the SPICe briefing – Scottish Criminal Justice System: The Public Prosecution System.

Criminal Courts

The responsibilities of the Scottish Court Service include providing the staff, buildings and technology to support Scotland’s courts and the work of the independent judiciary.

As a result of changes made by the Judiciary and Courts (Scotland) Act 2008, the Scottish Court Service has (since April 2010) been run as an independent statutory body governed by a board chaired by the Lord President (the most senior judge in Scotland).

Further information about the court is set out on the [Scottish Courts](#) website and in the SPICe briefing – Scottish Criminal Justice System: The Criminal Courts.

⁴ At the time of writing, the Scottish Government is considering options for reforming the structure of policing in Scotland. These include the possibility of reducing the number of police forces.

⁵ The current Lord Advocate is Frank Mulholland QC (appointed May 2011).

Criminal Legal Aid

The Scottish Government has overall responsibility for legal aid policy. The criteria for granting legal aid and legal aid rates are set out in legislation.

The [Scottish Legal Aid Board](#) (a non-departmental public body responsible to the Scottish Government) has responsibilities including:

- managing the legal aid fund
- assessing applications for, and making payments of, legal aid
- advising the Scottish Government on the operation and development of legal aid

Criminal Justice Social Work

Criminal justice social work services are directly funded by the Scottish Government. They are, however, provided as part of local authority social work services. The services provided include the provision of:

- social enquiry reports to assist courts with the sentencing of offenders
- community sentences (eg community payback orders)
- supervision for offenders released from custody on licence

Prisons

The [Scottish Prison Service](#) (SPS) is an agency of the Scottish Government with responsibility for Scotland's prisons and young offenders institutions.

Its responsibilities extend to both publicly and privately managed prisons. The latter are operated under contract by private companies. They are still part of the SPS estate and prisoners remain under the overall care of the SPS.

Further information on prisons is set out in the SPICe briefing – Scottish Criminal Justice System: The Prison Service.

SOURCES

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