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JH/00/11/A

JUSTICE AND HOME AFFAIRS COMMITTEE

AGENDA

11th Meeting, 2000 (Session 1)

Wednesday 15 March 2000

The Committee will meet at 9.30 am in the Chamber, Assembly Hall, the Mound, Edinburgh

1. **Abolition of Feudal Tenure etc. (Scotland) Bill:** The Committee will consider the Bill at Stage 2 (Day 1).

2. **Petition:** The Committee will consider PE71 by James and Anne Bollan on legal aid.

3. **Freedom of Information:** The Committee will consider a draft letter to the Minister for Justice in response to the Scottish Executive's consultation paper *An Open Scotland*

Andrew Mylne
Clerk to the Committee
Tel 85206

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The following papers are attached for this meeting:

Agenda item 1
Memorandum by the Scottish Landowners' Federation JH/00/11/8

Agenda item 2
Note by the Assistant Clerk on Petition PE71 (copy of petition attached) JH/00/11/1

Extract from *The Herald,* 2 March 2000

Agenda item 3
Draft letter to Minister for Justice (to follow) JH/00/11/2

Members are reminded to bring with them copies of the Bill and Accompanying Documents, together with any papers from the Stage 1 process that are considered relevant (such as the Committee's Stage 1 Report). Copies of the Marshalled List will be available from Document Supply first thing in the morning and will also be available in the Chamber. A list of groupings will be available in the Chamber at the beginning of the meeting.

JUSTICE AND HOME AFFAIRS COMMITTEE

Papers for information circulated for the 11th meeting

Note by the Clerk on forward programme, March – May 2000	JH/00/11/3
Letter from the Lord Advocate's Private Secretary on petition PE29 by Alex and Margaret Dekker	JH/00/11/4
Letter from Janis Cherry on the Abolition of Poindings and Warant Sales Bill	JH/00/11/5
Note by the Senior Assistant Clerk on Social Partnership Funding	JH/00/11/6
Letter from the Minister for Justice to the Convener of the Equal Opportunities Committee on the Adults with Incapacity (Scotland) Bill	JH/00/11/7
Minutes of the 10th Meeting, 2000	JH/00/10/M

Papers available to members on request

The following papers have been received by the Clerks but are not circulated because of their size. We would, however, be happy to provide a copy to any member of the Committee on request.

HM Prisons Inspectorate intermediate reports on Cornton Vale (January 2000) and Low Moss prisons (January 2000)

JH/00/11/8

Scottish Landowners' Federation

Submission to

The Scottish Parliament
Justice and Home Affairs Committee

on the detail of the

ABOLITION OF FEUDAL TENURE ETC (SCOTLAND) BILL

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SLF Submission to Scottish Parliament Justice and Home Affairs Committee on the detail of the Abolition of Feudal Tenure etc.(Scotland) Bill

Contents

1.0 SLF'S INTEREST IN THE BILL

SLF is the representative organisation for owners and managers of rural land of widely varying types and extents throughout Scotland. Members include many rural business people in all sectors – tourism, agriculture, and a range of diversified rural enterprises. Almost 60% of SLF members own less than 500 acres; SLF has a well informed, realistic perspective on the way the current system of tenure of land may affect a land manager whose land marches with that of a number of neighbours, and may indeed itself surround that of one or more neighbours. Members will have to operate the provisions of the new legislation on a day to day basis. Its *detail* is therefore of critical concern to them, and will impact directly on the financial position of farms, rural businesses of many kinds, and those holding and managing rural land for other purposes.

2.0 SLF's Approach to the Principle of the Bill

As long ago as February 1996, on a consideration of the Scottish Law Commission's 1991 consultation paper, SLF Law and Parliamentary Committee resolved to support the principle of the abolition of the remaining features of the feudal system, subject to appropriate safeguards for the preservation of existing and the creation of future useful permanent conditions on land. In particular, the Committee took the view that *anyone seeking to enforce a real burden should have to demonstrate interest to do so.* Further, SLF strongly supports the stated policies of placing the superior in the same position as the ordinary disponer of land, and the "filtering out" of feudal burdens which no longer serve any useful purpose or could not now be enforced for lack of interest to do so. *Accordingly, SLF supports the broad policy objective of the Bill.*

3.0 SLF's Views On The Detail Of The Bill

SLF does have some serious concerns about the way in which certain provisions of the Bill, as they are presently drafted, would work in practice. It asks the Committee to look at these in detail, and to obtain and consider evidence about how they would work, not just from legal and other experts, but from the people who will have to operate them and will be affected by them.

The main provisions and matters of concern to SLF are: -

3.1 Section 17 (7) (a) – "100 Metre" Rule

The inflexibility of the rule, as drafted, is inappropriate. As the law stands at present, the beneficiary of a real burden which has been constituted in a *disposition* who seeks to enforce such a real burden must meet the *test* of demonstrating, qua owner of an area of land, a *patrimonial* (i.e., a monetary or amenity) *interest* to enforce. It is unlikely that such an interest could be demonstrated *unless the benefited proprietor's land is adjacent to the burdened ground.* But such an interest might well be demonstrable without the existence of a dwelling house within the short distance of 100 metres.

Circumstances in rural areas are so various that flexibility is essential. It may well be that it is difficult to differentiate between urban and rural areas for this purpose, but any such difficulty should not under any circumstances be allowed to become a reason for imposing upon rural areas any provision which is not adequately adapted to them and gives rise to injustice in practice.

In a rural context, the requirement for a dwelling house within 100 metres is not a relevant or applicable test. This can be well illustrated by the evidence of practical examples – for instance, the case of the working farmer who has "feued off" a cottage in the middle of his farm, but at some distance from other buildings. He undoubtedly has a very strong interest in the use to which that cottage may be put. Proprietors of burdened ground are protected by the "*interest*" test (see paragraph 3.3 below). The imposition of a "*proximity*" test would be acceptable to the extent of being in practice a requirement to demonstrate interest, but any question as to the *use of the benefited proprietor's land (e.g., for a dwelling house*) should not be part of any "proximity" test. Apart from the practicalities of the situation it puts a former feudal superior at a significant disadvantage compared with an outright seller of land who faces no such test to determine the enforceability of burdens imposed by him. SLF believes that the Committee would be assisted by the opportunity of looking at evidence of illustrative examples in some detail on the ground. There cannot be anything to lose, and there could be a great deal to gain by doing this.

3.2 Section 18 – Reallotment by Agreement

SLF supports the principle of reallotment by agreement, wherever that is possible; it is the ideal solution, when it can be achieved. But its limitations should be fully explored. For example, the former vassal's land may already be subject to a standard security, the terms of which would prevent him entering into an agreement burdening his land *even where he is perfectly willing to do so*.

3.3 Section 19 - Reallotment of real burden by order of Lands Tribunal.

In many rural situations (and this must be contrasted with urban and suburban situations which will inevitably be different) the "100 metre" rule will not cover a case where a former superior has a very good reason to preserve a former feudal real burden, and the only possible option for someone seeking to do so will be to go to the Lands Tribunal – unless, of course, in a particular case, agreement can be reached.

The apparent justification for the imposition of this hurdle on former feudal superiors is the fear of indiscriminate registration of former feudal real burdens. That would of course be extremely undesirable.

SLF believes it can be demonstrated by practical example that this fear is unfounded.

3.3.1 First, many feudal real burdens could not possibly be enforceable now, because the superior can not demonstrate the necessary interest, if he is challenged. [At present, a feu superior's interest to enforce a feudal real burden benefiting his superiority is presumed, *but it can be questioned and negatived.*]

3.3.2 Second, superiors will only go to the considerable time, trouble and expense of seeking to preserve the former real burdens that really matter, and will concentrate efforts to do so on those alone – typically, in a rural context, in the house in the middle of the farm case already mentioned. The identification of *every* individual feu pertaining to each superiority, and the registering of the appropriate notices in each case would involve a huge amount of work, and enormous cost. That is a very effective practical deterrent against any attempt to go for a mechanical mass preservation of existing feudal real burdens.

3.3.3 Third, any person seeking to enforce a former feudal real burden which has been realloted by one of the methods set out in the Bill will have to demonstrate *interest* to do so. That is a severe but appropriate test. It is the test which currently has to be met when seeking to enforce a *non-feudal* real burden. *It would be utterly illogical and quite pointless for a former superior to seek to reallocate a feudal real burden if there is in fact no prospect of enforcing it, and no former feu superior would waste his own time and money trying to do so.* That fact provides a "built in" filtering mechanism.

3.3.4 The "interest" test, applied to a realloted former feudal real burden, fully meets both the policy objectives involved – that of effectively weeding out redundant burdens (for the reasons just given), as well as that of placing former feudal real burdens on the same footing as ordinary burdens created in *dispositions.* It is the only test which should be adopted to qualify a former feudal real burden (which has been duly registered for preservation by reallotment, thus giving "*title*" to enforce) for *enforceability.*

3.3.5 It does not advance attainment of the Bill's policy objectives to require a feu superior at any stage to pass a former feudal real burden through the distinctively *different and far more severe* test of demonstration of "substantial loss or disadvantage" to him if the burden were to fall (or, at least, not to subsist in a modified form). The "substantial loss or disadvantage" test is not applicable at any stage in the process of seeking to establish *either title, or interest* to enforce a real burden constituted in an ordinary disposition. The imposition of the "substantial loss or disadvantage" test in the Bill *inevitably* puts a superior at a disadvantage as compared with an ordinary seller of land. ***The Policy Memorandum on the Bill explicitly states that such a result would be unfair.*** If there is to be a double test at all, and there are very strong arguments against that, then putting the very much more difficult, new test first must be to put the cart before the horse; *it makes the second test ("interest") redundant.*

3.3.6 It must be borne in mind that even if a real burden, whether a feudal burden, a former feudal burden which has been preserved, or a burden created in an ordinary disposition can be enforced, there is still a further protection for the

proprietor of the burdened land. He may apply to the Lands Tribunal to have *any* land obligation, which includes any type of real burden however created or preserved, varied or discharged, and many such applications are wholly or partially successful.

3.4 Summary of SLF Submissions on Reallotment of Former Feudal Real Burdens in General Cases

3.4.1 ***The "100 metre" rule should be dispensed with, but if it is not, it must be radically modified to provide the flexibility which would be very necessary under rural conditions.***

3.4.2 ***If the "100 metre" rule is dispensed with, there is no need to provide for the complex and expensive procedure for reallotment by order of the Lands Tribunal; if, however, such a procedure is to be adopted, the test to be applied should be one of demonstrating an interest to enforce, and not that proposed.***

3.5 Section 17 (7) b(i) and c(ii) Reallotment of Real Burden By Nomination of New Dominant Tenement – A Special Rural Issue

SLF has serious concerns that the Bill as drafted, either directly or indirectly, will destroy shooting and fishing rights (other than salmon fishings rights) reserved to the Superior. This is a not infrequent situation. It is an issue of significance to the important sporting tourism industry. The Bill treats such rights as being real burdens affecting the feu. It is appreciated that this is the advice which the Executive has received from the Scottish Law Commission, but the Scottish Law Commission's view, with all respect to them, is not one which is universally held. Even if the Commission is correct, the rights in question are in jeopardy because of the terms of the Bill for the reasons explained in Appendix 1. There is also attached as Appendix 2 the Opinion of the Solicitor General dating from 1962 which is relevant. Particular attention is drawn to the Solicitor General's reference to the joint Opinion of Lords Mackenzie and Kinloch in Leith – v Leith and Others 1862 24D 1059.

3.6 Burdens Ancillary To Minerals and Salmon Fishings

Provisions should be made in the Bill so that burdens ancillary to rights to minerals and to salmon fishings are preserved without need to proceed to registration. Rights to minerals and salmon fishings are , in effect, no less than ordinary neighbouring properties. Such rights may well have been, and very often will have been, sold off to other parties by former superiors. Owners of such rights would not be alerted to the need to register such burdens in order to preserve them, if such a need arose, because the feu they will nominally have benefited is nothing to do with them. It may be added that the same principle applies to any other former feudal real burdens which are clearly conceived to be for the benefit of an already identifiable area of ground. **Such burdens should continue to be enforceable by the proprietor at the time of minerals and salmon fishings without any need for registration.**

3.7 Section 32 to 38 - Compensation: "Development Value" Feudal Real Burdens

It needs to be emphasised that land has often been feued at less, and much less than market value, or for no consideration at all for purposes in the general community interest or to benefit specific groups in some way e.g. sports teams.

3.7.1 In the first place, SLF believes that in cases (and there are a considerable number of them throughout the country) where superiors parted with land for a *considerably reduced payment*, or indeed for *no payment at all*, reflecting a feuing condition restricting the use of the land concerned (to give examples of such uses, those of amenity ground, sports fields, building of school houses), the feuing condition imposing the restriction should be capable of preservation on the same basis as a right to enter or otherwise make use of the burdened land or a right of pre-emption or of redemption, as currently provided for in Section 18 (7) (b) of the Bill. (In some cases, the relevant restriction may continue to be enforceable in some other way, i.e. by means of a standard security but that will by no means always be the case). Such a provision would be only fair to former superiors and their successors.

3.7.2 In the second place, even if a development value burden does fall as a consequence of the provisions of the Bill, there certainly ought to be an effective prohibition upon former feuars becoming able to make what could be potentially very large windfall profits as a consequence of transactions (e.g. with housing developers) which were originally excluded by a restriction on use imposed in conjunction with a reduction in consideration for the grant of the feu, or indeed in a feudal grant for a nominal or nil consideration.

3.7.3 SLF cannot understand why the right to claim compensation is only assignable in the limited circumstances set out in Section 33. The Scottish Law Commission stated that it did not wish to see a market in compensation rights, which is a small risk when compared with the inconvenience of a restriction on something which would otherwise be freely transmissible.

3.7.4 The basis of compensation must take account to an appropriate extent of the realities of present day land values and the loss of legitimate expectations to enforce particular rights. The Bill does not do that.

3.8 Section 65

SLF believes that the term should be increased to 200 years. Many financial institutions are not prepared to grant commercial loans over leases any less than 150 years.

4.0 Conclusion

SLF would welcome an opportunity to be heard on these detailed points, and would do its utmost to assist the committee in an enquiry into the way in which provisions would work in practice. It would particularly welcome an

opportunity to provide the Committee with witnesses who could speak to the way in which the legal machinery involved might be expected to function.

Appendix 1.

Rights to Shoot and Fish Attached to Feudal Superiorities

SLF has serious concerns about the continuation of rights to shoot and fish attached to feudal superiorities. Although Section 47 does define a real burden as including a non-exclusive right of fishing or game, provided that it is constituted as a real burden, SLF believes that the prior question arises to whether or not such a right is in law a real burden. Even if it is a real burden, there is still the question as to whether it could be enforced as such in future. Whether the right is regarded as a pertinent of the superiority interest, or as a real burden enforceable by the superior, the critical point is that as matters stand at the moment the superiority interest exists in the same land as the land over which the right is to be exercised, and hence there is the superior's interest as such to enforce it, even if the right is properly classified as a real burden. But if the title to enforce, (always assuming that the rights concerned can be real burdens), is transferred to adjoining ground it would appear that interest to enforce would automatically be lost, because the loss of such a right would not in any way adversely the affect the value or amenity of the ground to which the right to enforce the burden is attached i.e. no *patrimonial interest* would be at issue, and if the right is not properly classified as a real burden but as a full part of the superiority interest, that right will be lost with the abolition of the superiority. Accordingly, for a former superior's right to shootings and fishings to survive, this subject requires more extensive treatment in the Bill than it has received at the moment. Otherwise, many former superiors will find that they have been deprived of a valuable right. *If such rights are lost, then a right to compensation must arise.*

Appendix 2.

OPINION
For
THE DIRECTOR OF FORESTRY (SCOTLAND)
Re
SHOOTING LEASES

1. I agree with the view expressed in the Memorial that there is conflict in the authorities, and that if the most recent statements be accepted, then this question would fall to be answered in the affirmative. Unfortunately these recent judicial dicta and text-book statements do not mention and appear to have overlooked the binding Whole Court case of Leith v. Leith and others 1862 24D 1059, and certain subsequent cases proceeding thereon. That case is entered in the Faculty Digest only under "Entail" and "Expenses", may have contributed to the omission of reference to it in the more recent books and dicta. It was concerned with whether or not shootings fell to be valued for certain entail purposes. The Whole Court, however, in order to determine that question had to consider as part of their ratio decidendi whether or not a lease

of shootings was a mere delegation of a personal privilege (as had been held in various cases hitherto), or whether it was a true separate estate in land enjoying the common law realty of an agricultural lease. By a majority of 6 to 5 the Whole Court discarded the previous view. Lords Mackenzie and Kinloch, two of the majority, in their joint Opinion at p. 1967, said that till a comparatively recent period shootings had not, in our law, the character of property. They then mentioned Pollock, Gilmour & Co., 1828,.6 913, Inner House case to the contrary, and described how the law has moved since then to regard shootings as real leases, and as property in themselves, and not as mere delegated privileges. This decision of the Whole Court was quoted to, and followed (as it had to be, there being no option), by the first Division in Stewart v. Bulloch 1881 8R. 381. At p. 383 Lord President Inglis said, "If indeed it was the law that a right of shootings was a mere personal franchise as at one time the Court appeared inclined to hold – there would be a great deal to be said against the application of the words of the Statute to a lease of the shootings, but I think it has now been laid down in a series of decisions that this is not the nature of a right of shootings, but that what the tenant receives under such a lease is a right of occupation of land, as much as in the case of an agricultural tenant." This observation is the more significant as Lord President Inglis, along with the Lord Justice Clerk, 19 years earlier had been among the five dissentients in Leith who had been in favour of the old view that a shooting lease was merely a delegated privilege. In Marquis of Huntly v. Nicol 1896 23 R. 610, the First Division held that a right of game shooting was capable of being real, and was so in that particular case, and binding on successors. The decision, is not quite in point, however, as the right arose not by lease but by a real condition contained in the infeftment. It is however, a further nail in the coffin of the Institutional Writers' view that shooting rights cannot be more than mere franchise.

In my Opinion the conflicting line of authority cannot prevail, upon examination. Pollock, Gilmour & Co., 1828 6S 913 though an Inner House case was considered by the Whole Court in Leith in 1862, in the context of being part of the older law over-ruled by them. Birkbeck v. Ross 1865 4R 272 though reverting to the old law, was only an Outer House case. Lord Barcaple in reporting to the Second Division, considered at p. 274 (Note) the effect of Leith to be that it was of no importance whether or not the shootings were let, and he considered Pollock, Gilmour & Co still to be law. This, however, can only have proceeded accepting the views of the over-ruled minority of five Judges in Leith, an easy mistake, as they are printed first in the Report. It may not be without significance that the Second Division, who acquiesced in his Report, included the Lord Justice Clerk, Lord Benholme, and Lord Neaves, all of whom were in the dissenting minority of the Whole Court in Leith, and who might therefore be predisposed to distinguish it if at all possible.

In the century following the Whole Court case and its followers-on (e.g. Stewart v Bulloch) there have been several dicta favouring the old view, both in cases and in text-books, but in none has the dictum been necessary as part of the binding ratio decidendi, and in none of these adverse cases had Leith been cited as a reminder to the Court in argument or commented on or referred to in the judgements.

Thus in Campbell v. McLean 1870 8M. (H.I.) 40, a case concerning pasturage, Lord Chancellor Matherley at p. 44 stated that a shooting lease was a mere privilege, not binding on singular successors. In Earl of Galloway v. Duke of Bedford 4F. 851 at 861, Lord President Kinross said "It is, like the right of shooting, merely a delegation of a personal privilege not capable of being made real, and not binding .... upon a singular successor." This too was obiter, as the decision concerned trout fishings, not shootings, and again the binding Whole Court decision was not even cited in argument, presumably because of its obscure position in the Digest. A similar criticism can made of Lord Glasgow's Trustees v. Clark 1889 16R 545, where at p. 549 Lord President Inglis said that shootings were only a "so-called" lease, and were a mere personal franchise. (A reversion to his dissent in the Whole Court case). In Beckett v. Bisset 1921 2 S.L.T. 33, it was held in the Outer House that a right to shootings could not be made effectual against singular successors by the particular machinery of a real burden in a Disposition.

This was a correct result, as a right to shootings can be conferred on a person living far from the lands in question and thus lacks the "neighbourhood" characteristic which is an essential of all real burdens in Dispositions other than those for a fixed sum of money. Leith was referred to by the Lord Ordinary but he disregarded it, although such was not necessary for the decision of the case. In the more recent case, Marner v. Flaws 1940 S.L.T. 150, in the Outer House Lord Robertson held that as with shootings in Beckett a right to trout fishing could not be made a real burden a disposition. He made certain observations on shootings to the effect that there might be a distinction between the law applicable to them and to trout fishings. Leith was not among the many cases he considered.

Gloag and Henderson's Scots Law (5th Ed.) p, 336, quotes only Pollock, Birkbeck and the Earl of Galloway, omitting the all important Leith line of authority, in arriving at the author's view. Farquharson 1870 9M 66 is also footnoted, but that is a favourable case, not supporting Gloag and Henderson's proposition. Lord Kinloch at p.75 said "Whatever was at first held theoretically, I think the progress of society and the practice of the country have now placed shootings in the category of property, and given to a lease of shootings the proper character and legal affect of leases generally." Burn's Conveyancing (4th Ed.) p.180 contains a statement that a right to shootings effectual against a purchaser, cannot be created even by lease. The statement, with great respect to the late author, is somewhat misleading to the profession as the Whole Court case is not adverted to, and the sole authority footnoted by Professor Burns to support the proposition is Beckett v. Bissett 1921 2S.L.T. 33, an Outer House case which it was not thought necessary to include in the official Session Cases, and which dealt with only one type of machinery, the real burden in a disposition. That case did not purport to deal with conditions in a Feu Charter binding on successive vassal-purchasers, nor with leases binding per se by virtue of their equiperation to agricultural leases at common law in Leith, and in Stewart. Green's Encyclopaedia Vol.9 para. 148, in the article by Professor Morrison then of the Conveyancing Chair at Aberdeen University, states that a lease for shooting purposes is good against singular successors, but in footnoting only Farquharson (supra) in support, the author

founds on a case which though favourable, proceeded as ratio upon the speciality that the leases land had no occupier other than a shooting tenant, and no fruits or yield other than deer and game. The Whole Court decision is again overlooked. Rankine on Leases (3rd Ed.) p.504 starts by saying that shooting leases are not valid in questions with singular successors, but on the next page goes on to consider Leith v. Leith and ends by accepting the view that shooting leases are on a par with other leases and that the earlier law no longer applies.

In these circumstances the weight of authority is to the effect that shooting leases as such are on a par with agricultural leases, and thus valid against singular successors, unless the ineffective machinery of trying to constitute the arrangement by real burden in a disposition instead of by lease, is attempted. The apparent statement to the contrary in dicta and text-books are each vulnerable in that they proceed on citation of superseded, and in some cases of Outer House, authority in conflict with the Whole Court decision, and such a position once having been started each author tends to follow his predecessor's views.

I therefore answer this Question in the Negative, with the undermentioned Qualifications. While this involves departure from the advice which the Memorial states has been provisionally tendered to the Memorialist by the Agents, the position must, despite the reasons I have mentioned it support of my views, nevertheless contain a substantial degree of uncertainty. For the Court today, though technically bound by the Whole Court decision, might nevertheless be disposed to distinguish it in a manner I have not foreseen, especially looking to the narrowness of the 6 to 5 decision, the Judges themselves differing markedly. It would, therefore, be a question of circumstances as to whether to risk contesting a particular case against a given singular successor, and would depend on the value of the shootings at stake, and the chance of obtaining a suitable substitute shoot, weighed against the above element of uncertainty which pervades the matter, although in my view the chance of success would be substantially greater than the risk of failure.

2. Strictly this Question does not arise in view of the above Negative answer, but in view of the qualifications attached to the answer, I deal with this Question, as ob majorem cautelam, it would be advisable to protect shootings tenants by a more certainly effective course than the lease itself. In my opinion only the first method, vis:- a reservation in a Feu Disposition, would be effective. It is quite settled that matters which cannot be made Real Burdens in an ordinary Disposition because they may lack one or more of the elements desiderated in Taylors of Aberdeen as the leading case, can nevertheless be effective s Real conditions when inserted in a deed where Superior and Vassal are the parties. The principle applied, is that privity of contract is deemed to exist between a Superior and every successor in the Vasselage. Menzies on Conveyancing p.575. 577. Marquis of Tweedale's Trustees. 1880 3R. 620. See also Stewart v. Duke of Montrose 1860 22D 755 per Lord Deas at p.803 – "Almost any obligation of a definite nature however collateral – however extrinsic ... and however temporary ... may be created a real burden over the heritable estate either of Superior or Vassal." Hemming v. Duke of Atholl 1883 11R. 93

exemplifies a case where the Superior's right (to shoot deer) faired against singular successors of the Vassal for the reason that it was not worded precisely enough. Lord Craighill at p.99 gave it as his opinion that a properly worded shooting right could be reserved "as a condition of the feu." Lord Young reserved his opinion on this point. As an analogy trout fishing rights as between singular successors where the relationship is that of Superior and Vassal would derive their effectiveness from the notional continuing privity of contract. (Patrick v. Napier 1867 5M. 683 per Lord President at foot of p.695). The main loophole which can exist occurs where a vassal disposes to a purchaser who holds uninfeft on a personal title, and who is strictly thus not yet a vassal qua the Superior. The reservation of the shootings should therefore be made expressly binding on such a person (Menzies p.575 deals with this necessity). A Feu Contract with its bilateral content is slightly preferable to Feu Disposition, for these purposes, but both would, in my Opinion, be effective. There should be express reference in the deed, to the vassal remaining bound whether the Superior retains the shootings in his own hands or whether he delegates or alienates them (or has already alienated them) by lease for a period:- if such necessity to recognise delegation thus becomes a contract with the first vassal I can find no authority to derogate from the general principle that there would be notional privity with the successors in the feu.

3. Only above vis:- a lease entered into with the proposed shooting tenant, probably binding without further machinery, but fortified ob majorem cautelam by the Superior's right being inserted in a Feu Disposition or Feu Contract as the instrument of "sale" to the purchaser.

4. This Question is superseded in view of the negative answer to Question 1, but in view of the qualification settlements may not be out of place where the sums are not large, and I, therefore, deal with it. There is very little authority about the measure of damages in shooting lease cases. Critchley v. Campbell 11R. 475 concerned the value to be put upon dispossession from two beats on a shoot, but no principle can be derived from the case. It is thus necessary to look at the measure of damages in leases of other kinds, to extract such principles as would appear applicable also to shooting leases. In England, is leases generally, a measure referred to in Mayne and McGregor on Damages (12th Ed.) p.479 and 483, is the market value of the rent for the number of years of the unexpired period less the rent in fact contracted for ie. loss of the bargain. I think such a rule with the undermentioned modifications would fall within the general principles of Scots Law also, as regards measure. A low rent if enjoyed is thus an element which does not restrict damages to a low figure, but which operates to make the loss the difference between that and the larger market-value rent which the dispossessed tenant would have to pay to get a similar shoot elsewhere. (A comparable principle is the measure between contract price and market price and market price in a sale of Goods (Sale of Goods Act, 1893, Sec.51). This measure would probably be restricted to a period less than the outstanding duration, if there were reasonable prospects of obtaining a like favourable bargain in comparable subjects, sooner. If the breach occurred early on in a 25 years lease I think it doubtful whether more than a proportion of the outstanding period would ever be taken

as the number of years by which to multiply the measured difference. For the lease is personal to one tenant and other possible terminations other than by breach would need to be allowed for. That would be a question of probable forecast for a judge to estimate, as would an element of solatium for the inconvenience of dispossession from the actual enjoyment and for the trouble of seeking elsewhere. (Rankine on Leases (3rd Ed.) p.496 and direction to the jury in Dalziel v. Duke of Queensbery 1825 4 Mur. 10, 18).

5. I have nothing to add.

THE OPINION OF
(Sgd). D.C. Anderson
SOLICITOR GENERAL

Crown Office
9 Parliament Square
EDINBURGH 1.
8th March, 1962.

JH/00/11/1

JUSTICE AND HOME AFFAIRS COMMITTEE

Petition PE71 by James and Anne Bollan

Note by the Assistant Clerk

Background

This petition calls for the Scottish Parliament to examine and amend as necessary the rules governing the award of legal aid, to ensure that any family who has lost a close relative, and whose death has required a Fatal Accident Inquiry, shall have a right to Legal Aid enabling them to access the justice system. The petition has been referred to this Committee by the Public Petitions Committee.

Options

The most appropriate action would seem to be for the Committee to note the petitioner's concerns for the time being, awaiting the outcome of the first meeting after Easter. Then the Committee will have decided what inquiries it wishes to next initiate. The issue of legal aid and access to justice has already been suggested as an area for consideration and it will be open to the Committee at that meeting to decide whether or not to initiate an investigation which might encompass the concerns contained in the petition.

However, meanwhile, it is proposed that, as a first step, the petition be sent to the Scottish Legal Aid Board for comment on the general issues.

10 March 2000 FIONA GROVES

To the Scottish Parliament.

"A right to access the justice system, supported with Legal Aid."

We, the undersigned, declare.....

We are being denied Legal Aid by the Scottish Legal Aid Board to take the First Minister and the Scottish Prison Service to court regarding the death of our youngest daughter Angela who died in Cornton Vale Prison Stirling on 26/4/1996. Angela was 19 when she died. Angela was the fourth of nine young women who have lost their lives in Cornton Vale.

We are both on low fixed incomes and are too poor to pay the Court costs. (We are raising this reparation action on behalf of Angela's daughter Stephanie who is five and in our Legal Custody). The findings of the F.A.I. held into Angela's death form the basis of our case.

We are being socially excluded from the justice system by S.L.A.B., an unelected quango, who are acting as judge and jury and denying our granddaughter the right to have a Court decide if the Scottish Prison Service was negligent and caused Angela's death.

The Petitioners therefore request that the Scottish Parliament.....

Intervene and change the rules governing the award of Legal Aid to ensure any family who has lost a close relative, whose death has required a Fatal Accident Inquiry, shall have a right to Legal Aid enabling them to access the justice system. The probable cause test in these cases should be dropped and it should be considered reasonable for Legal Aid to be awarded.

This change would allow our own family to pursue our granddaughter's case.

The pain we continue to suffer after the loss of our daughter is deep, dark and unimaginable. We need to know why Angela died. We need to know who was responsible. Someone in the S.P.S. needs to be held to account in a Court of law, for Angela's avoidable death. We seek justice and the truth not just for ourselves but for Stephanie who has an undeniable right to know why her mum was allowed to die, whilst in the care of the state.

James & Anne Bollan
4 Endrick Way
Sutherland Gardens
Alexandria G83 OUR
Dumbartonshire.

17/1/2000

JUSTICE AND HOME AFFAIRS COMMITTEE

Forward Programme March – May 2000

Note by the Clerk

Note: some of the details below are provisional at this stage

Wednesday 15 March
Abolition of Feudal Tenure etc. (Scotland) Bill – Stage 2 (Day 1)

Tuesday 21 March (**also afternoon – if required**)
Abolition of Feudal Tenure etc. (Scotland) Bill – Stage 2 (Day 2)

[Tuesday 28 March
Abolition of Feudal Tenure etc. (Scotland) Bill – Stage 2 (extra day) – **if required**]

Wednesday 29 March
Abolition of Feudal Tenure etc. (Scotland) Bill – Stage 2 (Day 3)

Tuesday 4 April
Consideration of draft report on Scottish prisons
Initial consideration of annual budget process

Weeks beginning 10 & 17 April
April Recess

Wednesday 26 April
Consideration of future business (the "1st meeting after Easter" list)

Other expected dates for meetings between April and Summer recesses:
Tuesday 2 May, Wednesday 10 May, Tuesday 16 May, Wednesday 24 May, Tuesday 30 May, Wednesday 7 June, Tuesday 13 June, Wednesday 21 June, Tuesday 27 June, Wednesday 5 July.

Week Beginning 10 July:
Summer Recess begins

Note: Forthcoming Bills and other business

During the above period, the following Executive Bills are likely to be referred to the Committee:

> Intrusive Surveillance - may be introduced prior to the Easter Recess, with a requirement to complete Stage 1 soon thereafter.
>
> Land Reform – expected to be introduced before the summer recess.

The following Members' Bills may also be referred:

Abolition of Poindings and Warrant Sales - if the Parliament agrees the Bill's general principles in the Stage 1 debate, it is likely this Bill will be referred back to the Committee for Stage 2.

Protection of Wild Mammals (Scotland) – the Committee is expected to be asked by the Bureau to report to the lead committee (Rural Affairs) at Stage 1.

As part of the 3-stage annual budget process, the Committee will be required to consider the Executive's expenditure figures for 2001/02 in relation to Justice and Home and Affairs. The Committee is required to report to the Finance Committee by the end of May, giving its views on the Executive's strategic priorities for spending. Further information about this process will be circulated nearer the time.

The following petitions have been referred to the Committee:

PE55 by Tricia Donegan on dangerous driving

PE89 by Eileen McBride on non-conviction information on Enhanced Criminal Record Certificates

PE102 by James Ward on sequestration

9 March 2000 ANDREW MYLNE

JH/00/11/4

LORD ADVOCATE'S CHAMBERS
25 CHAMBERS STREET
EDINBURGH EH1 1LA

Telephone: 0131-226 2626
Fax (GP3): 0131-226 6910

Ms S McKinlay
Senior Assistant Clerk
Justice and Home Affairs Committee
Room 3.9 Committee Chambers
George IV Bridge
EDINBURGH

2 March 2000

Dear Ms McKinlay

PETITION PE 29 FROM ALEX AND MARGARET DEKKER

I refer to your letter of 10 February on behalf of the Committee requesting further details about the feasibility into improving services for victims and witnesses referred to in Lord Hardie's letter of 5 January 2000 on the above Petition. It would appear that your letter has crossed with mine of 9 February to Andrew Mylne, outlining the announcement which Lord Hardie made to the Parliament on 10 February.

I can advise that a research and consultancy firm with experience in the field of criminal justice have now been commissioned to undertake the feasibility study, which is to commence forthwith. As I stated in my letter of 9 February, it is hoped that the report will be submitted to the Steering Group in May 2000 to permit it to be considered by Ministers before the summer.

The Committee seek more specific information on what the study will entail and which aspects of service the study will cover. The information in my letter of 9 February may assist in that regard. Essentially, the study is to examine the feasibility of establishing a dedicated service to provide information and support to victims and witnesses in cases reported to Procurators Fiscal, having regard to existing structures and services, notably voluntary sector interests. Alison Paterson, Director of Victim Support/

Support Scotland has accepted an invitation to sit on the Steering Group which oversee and support the consultants.

I hope that this is helpful.

Yours sincerely

JEFF GIBBONS
Private Secretary

mbm\mar\020

SH/00/11/5

Eugene

Dear Ms Godman,

I am emailing you as a resident of your West Renfrewshire constituency.

As a member of the Institute of Credit Management, and a professional Credit Manager with over 15 years experience of credit control and debt recovery, both consumer and commercial, I must express my concerns at the Bill to abolish poindings and warrant sales.

Whilst I have some sympathy with some of Mr Sheridans points regarding poindings and warrant sales, I feel that I must express my opinion on what would happen if this Bill becomes law, without full consideration of its potential effects.

My first point is that commercial debtors will be equally affected by this bill. Surely Mr Sheridan is attempting to protect consumers? If this bill is successful, I may have to recommend reviewing the policy of extending credit to commercial clients. This will inevitably hit the small trader or newly established company hardest. I will also have to question whether to extend credit to sole traders and partnerships at all. This is hardly in the spirit of generating wealth for Scotland, however it may prove necessary to protect the assets of my employer.

Secondly, the removal of poindings/warrant sale will remove a very useful method of identifying the "wont pay's" from the "cant pays". In my experience there are a great number of "wont pay's" who know the system only too well, and will hold off to the last possible moment before making payment. Any responsible credit manager will not raise a warrant sale where they feel that it will cause excessive hardship to the debtor. Normally the only way to assess this is from the poinding report supplied by the Sherriff officer. Please bear in mind that by the time we have instructed a poinding we have already been through the court process to obtain a decree, and that there are time to pay facilities available during this process, which would in many instances satisfy the creditor and assist the debtor, thereby removing any need for the poinding or warrant sale.

There are, of course a number of "cant pay's" who do deserve some protection. However sometimes these people can and do obtain credit with absolutely no intention of honouring the debts incurred. You may well argue that its my job to ensure that I do not extend credit to these individuals. However, credit management is a risk business and nobody in credit management expects that they will have no bad debt. We do take risks, but hopefully these should be controlled and evaluated.

From a personal viewpoint, I am also concerned at the high level of unpaid council tax in Scotland, which I believe to be particularly high in the West Renfrewshire area. How will the Council collect the growing arrears when further hampered by the lack of a very effective collection tool in poindings/warrant sales? I trust that if the arrears situation worsens due to the removal of poindings/warrant sales that those people in your

constituency who do pay, will not be hit by increased council tax or experience further reductions in services supplied.

I am not opposed to reform, I would welcome it. However it must follow balanced and well informed debate, considering the creditors points as well as the debtors. To simply remove poindings and warrant sales is not the answer to any of the problems that consumers or the credit industry face.

Yours faithfully

Janis J Cherry MICM

JH/00/11/6

JUSTICE AND HOME AFFAIRS COMMITTEE

SOCIAL PARTNERSHIP FUNDING

Note by the Senior Assistant Clerk

Committee decision

At its meeting on 8 February the Committee agreed to pursue obtaining Social Partnership Funding to carry out a deliberative polling exercise into issues relating to offending with the most likely topics on which participants' views would be sought being alternatives to custody and attitudes to sentencing. The purpose is to inform wider debate and possible future committee inquiries.

Following discussion with SPICe a proposal on how to take the issue forward is set out below.

Scope

The committee will require to refine its views on the topics it wishes to cover in the exercise e.g. should alternatives to prosecution be included in addition to alternatives to custody. (The more detailed paper to be produced by the clerks and SPICe will seek members' views on this issue.)

Number and identification of participants

The number of participants required depends in part on the type of event envisaged by the committee e.g. a plenary "debate" is not feasible with as many as 250 – 600 people in the audience (figures suggested in the CSG report).

It should also be borne in mind that the way in which participants are identified impacts on the number required. For example, if a **random sample** of citizens is invited then statistically around 100 people might be enough to make the event meaningful. However, if a **cross-section** of the community is deliberately identified the number of participants require to produce a credible result in statistical terms may be significantly higher.

One option for identifying participants is through the Scottish Household Survey where respondents indicate whether they would be interested in taking part in further research initiatives.

Format of the event

Firstly the committee should consider whether it wishes participants to be polled before as well as after the event to see whether, and if so how, the session may have changed their views. If the event was held in the Chamber this could perhaps be done using the electronic voting system. If not it would be likely to involve participants completing an anonymised questionnaire before and after the event.

Regardless of which route is chosen the question setting should be done by a consultancy with the relevant expertise. (Analysing written questionnaires is likely to increase costs.)

A concern when bringing together large numbers of members of the public in an event such as this is ensuring maximum levels of participation. Since many people are not comfortable speaking in a large group it is proposed that the event include workshop groups led by experienced facilitators. A possible format is set out below. It includes a factual presentation and the opportunity for participants to listen to the opinions of a range of experts.

- *Plenary session*: Participants are polled for their views prior to the event (if appropriate). (If a written questionnaire is involved participants may be asked to complete this in advance of the event.)

- *Plenary session*: participants listen to:

    - a factual presentation on the options available in terms of sentencing and alternatives to custody and the extent to which they are used; and

    - the views of a range of "experts" (this could involve a question and answer session).

- *Workshop Groups*: participants would then divide into workshop groups to consider a realistic fictional scenario with the aid of a professional facilitator.

- *Plenary*: Participants would return to a plenary session where the final poll would be conducted and where participants could report back on the outcome of the workshop sessions if this was thought to be beneficial and realistic.

Follow-up to the event

The facilitators could write up a report of the break-out groups and analysis of the results of the poll could be carried out and published.

Process: Respective responsibilities

***The Committee*:** Once Committee members have agreed the format of the event, and assuming it is successful in gaining funding, they may wish to contribute to the organisation of the event in other ways. Possibilities include suggesting possible scenarios (which would then be worked up by consultancy/facilitators) and expert speakers (although an advertisement seeking interest should also be published). It may not be appropriate for members to play an active role in the event on the day since it is important that they are not seen to be influencing or manipulating debate – however, they could have a role in chairing discussion.

***SPICe and Committee Clerks*:** Once the event has been approved by the Conveners' Liaison Group, SPICe and the Committee clerks will be responsible for producing a specification for hiring consultants. Committee clerks will be responsible for the overall effective management of the event.

***Consultancy*:** A consultancy would be required to set the questions in the poll and develop scenarios, following briefing from the Committee, SPICe and the Committee clerks. They would also provide facilitators for the workshop sessions, write up reports of the workshops and conduct a detailed analysis of the poll results.

Venue

The venue chosen for the event will have a significant impact on the costs. One option would be to use the Parliamentary Chamber for the plenary session (obviously this would limit the number of participants to around 130) and committee rooms and other parliamentary meeting rooms for workshop sessions.

Of course, the event need not be held in Edinburgh. If it is to be held outwith the Parliament, local authority venues could be investigated to keep costs to a minimum. Hiring commercial conference facilities can prove extremely expensive.

Next Steps

Together with SPICe, the Clerks will produce a more detailed paper covering the proposed format of the event and including estimated costs (to cover consultancy fees and travel and subsistence for participants) for the Committee's approval. Following Committee approval a bid will be submitted to the Convener's Liaison Group. If the bid is successful, a tender exercise to select a consultancy firm must be carried out and the work commissioned.

Timescale

It is hoped to submit a costed proposal to the Conveners' Liaison Group meeting on 28 March. This would mean the event being funded from the 2000/2001 budget rather than this year's budget. However this should not disadvantage the committee in any way since it has been confirmed that a similar budget is available for next year.

Timescale for the event

There is a considerable amount of work to be done in mounting such an event. If the Parliament is to be used the event would have to take place on either a Monday or a Friday or during recess.

It is unlikely that results from the event would be available less than three months after approval is given, and longer may be required.

9 March 2000 SHELAGH MCKINLAY

SCOTTISH EXECUTIVE

JH/00/11/7

Deputy First Minister & Minister for Justice
Jim Wallace QC MSP

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Kate MacLean MSP
Convenor
Equal Opportunities Committee
The Scottish Parliament
George IV Bridge
Edinburgh
EH99 1SP

Date: 22 February 2000

Miss Barton
MHB 29/2

Dear Kate,

ADULTS WITH INCAPACITY (SCOTLAND) BILL
NEAREST RELATIVE

I am writing about the Executive approach to the treatment of same sex partners as the "nearest relative" under the Adults with Incapacity Bill, with a view to reaching an agreement on this before the issue is discussed again in the Parliament at Stage 3.

As I understand it, our objectives are the same. Both the Executive and the Equal Opportunities Committee wish to ensure that where an adult with incapacity is in a stable relationship with a same sex partner, that person can be regarded as the "nearest relative" for the purpose of statutory consultation by anyone undertaking an intervention on the adult's behalf.

We are, I think, agreed that same sex partners should be treated in the same way as opposite sex partners in a similar stable relationship. We do not want to discriminate between these partnerships. However it is not the Executive's policy to equate cohabitation with marriage. I already indicated this in my statement on family law on 20 January.

It was in this spirit that we lodged amendment 152, which was withdrawn by Iain Gray on 8 February following debate in the Justice and Home Affairs Committee. The amendment 152A, lodged by Nora Radcliffe, was also discussed and withdrawn, on the basis that the Parliament would revert to this issue at Stage 3.

At the Committee on 8 February, it was disputed whether our amendment was discriminatory. As I have said, we did not intend it to be. Our amendment was designed to put into statute an objective test which would be likely to be applied by the courts in ascertaining whether a person was a partner of the relevant type, whether of the same or the opposite sex.

There is, however, an alternative approach which I would like to put to you. This would be as follows:

In section 76, page 50, line 29, at end insert—

<(1A) Where—

(a) an adult has no spouse or where an adult has a spouse but subsection (1B) applies; and

(b) a person of the same sex as the adult—

(i) is and has been, for a period of not less than six months, living with the adult in a relationship which has the characteristics, other than that the persons are of the opposite sex, of the relationship between husband and wife; or

(ii) if the adult is for the time being an in-patient in a hospital, had so lived with the adult until the adult was admitted;

then that person shall be treated as the nearest relative.

(1B) This subsection applies where the adult's spouse is permanently separated from the adult, either by agreement or under an order of a court, or has deserted, or been deserted by, the adult for a period and the desertion persists.>

As I have indicated, it is not our policy to equate cohabitation and marriage, and I do not read that as the intention of your Committee. This wording would achieve the desired policy but would leave it to the courts to determine, in the event of challenge, what constituted "the characteristics ... of the relationship between husband and wife" in the case of two people of the same sex. It may be that in the light of the relevant case law, in particular the case of Fitzpatrick against Sterling Housing Association Limited, House of Lords, 28 October 1999, the courts would set similar tests to those we proposed to apply in amendment 152, but that would be a matter for them.

I would be very grateful for your views on this proposal before we lodge our amendment and would be happy to discuss the matter with your Committee.

Yours sincerely,

JIM WALLACE

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JH/00/10/M

JUSTICE AND HOME AFFAIRS COMMITTEE

MINUTES

10th Meeting, 2000 (Session 1)

Monday 6 March 2000

Present:

Scott Barrie	Roseanna Cunningham (Convener)
Christine Grahame	Gordon Jackson (Deputy Convener)
Maureen Macmillan	Michael Matheson
Mrs Lyndsay McIntosh	Pauline McNeill

Apologies were received from Euan Robson.

The meeting opened at 2.07 pm.

1. **Abolition of Feudal Tenure etc. (Scotland) Bill:** The Convener moved S1M-618—That the Committee, in its consideration of the Bill at Stage 2, take the sections in numerical order and each schedule immediately after the section that introduces it. The motion was agreed to.

2. **Petition:** The Committee took note of petition PE44 by Archie MacAllister, calling for the Scottish Parliament to reconsider section 17 of the Abolition of Feudal Tenure etc. (Scotland) Bill.

3. **Scottish Prisons:** The Committee heard evidence on issues affecting women prisoners from—

   Ms Kate Donegan, Governor of HM Establishment Cornton Vale.

4. **Freedom of Information:** The Committee heard evidence on the Scottish Executive's proposals from—

   Professor Alan Miller, Scottish Human Rights Centre.

The Committee adjourned from 4.01 pm to 4.11 pm.

5. **Scottish Prisons (in private):** The Committee considered options for a draft report on Scottish prisons.

The meeting closed at 5.00 pm.

Andrew Mylne
Clerk to the Committee

DRAFT 13/3/00

JUSTICE AND HOME AFFAIRS COMMITTEE

Draft Letter from the Convener to the Minister for Justice: Response to Executive Consultation Paper on Freedom of Information

In your statement to the Parliament about freedom of information (FOI) on 25 November 1999 (Official Report, col 993), you invited comments from this Committee. We welcome the opportunity to comment on the proposals contained in your consultation paper *An Open Scotland.*

The Committee has taken evidence from officials of your Department, David Goldberg and Professor Alan Miller, and I attach copies of the Official Reports of the relevant meetings (16 February and 6 March 2000). We recognise that, in the time available, we have been able only to skim the surface of the subject, but nevertheless hope that you will find this response of some assistance.

Principal issues arising from the evidence

The main points arising from the evidence we have taken are as follows.

Mr Goldberg, speaking on behalf of the Campaign for Freedom of Information saw the proposal for enforceable legal rights of access to certain information as a "tremendous leap forward" (col 806). Both he and Professor Miller agreed that the Executive proposals compared favourably with those south of the border. They welcomed, in particular, the proposal that those wishing to withhold information are to be required to show that they would suffer "substantial prejudice" (rather than merely "prejudice") and the proposal that the Scottish information commissioner is to have power to order release of information (rather than merely recommend such release) (cols 791-2 and 906).

We learned that cross-border public bodies, such as the Forestry Commission, will be subject to the UK FOI regime. Your officials explained the difficulties that would arise if bodies operating in Scotland as well as elsewhere in the UK were subject to different regimes for different aspects of their work (col 799).

According to Professor Miller, the European Convention on Human Rights (ECHR) – particularly article 8 (right to privacy) and article 6 (right to a fair trial) – was likely to be more significant in practice than the terms of the Executive legislation in shaping the rights that people enjoy in future. (cols 904 and 899). In cases where Convention rights could be invoked, there was already a "test of proportionality" established by ECHR case law, and it was this that the courts would be principally guided by in applying FOI law, rather than the nature of the exemption laid down in national legislation (col 901).

On a related point, Mr Goldberg drew the Committee's attention to ongoing work in the Council of Europe, which might lead to a formal international treaty. This too was

likely to be as significant as the Executive's forthcoming Bill in determining how any FOI regime in Scotland worked in practice (col 806).

Your officials explained that the term "public interest" would not be defined in the forthcoming legislation but that guidance would be given to public bodies to help them decide on the factors or criteria to be taken into account in deciding whether disclosure of information was in the public interest. However, we also understand that your intention is to include a "purpose provision" in the Bill that would provide some statutory basis for assessing "public interest" (cols 801-3). Mr Goldberg sympathised with the approach of incorporating a specific public interest test in guidelines and outlined four main grounds that might be considered for disclosure (cols 808-9). He also suggested that consideration be given to a means of giving a Freedom of Information Act some special status in relation to other statutes (col 807).

One issue which particularly concerned the Committee was how the Lord Advocate, in his role as Crown prosecutor in Scotland, would be affected by the new regime. The Crown Office witness explained that the Lord Advocate does not give reasons for specific decisions, although on occasions had stated the kinds of reasons that informed decisions, and invited suggestions about reconciling the competing needs of the victim, accused and the public interest (cols 794-5). Mr Goldberg said that there should be a presumption that reasons are given for decisions about disclosure of information. He also pointed out that timing was important; as with matters of commercial confidentiality, if sufficient time had passed there would no longer be a risk of substantial prejudice (col 809). Professor Miller also anticipated that the Crown Office would require to provide more information in future, and suggested that, where a decision by the Lord Advocate was challenged in the courts, the outcome was likely to be determined by the application of article 8 of the Convention. (col 903).

For Professor Miller, monitoring the implementation of the FOI regime was crucial, and he suggested that a human rights commission might play such a role (col 902). He anticipated a lot of litigation in the early years of the new regime (col 910). Mr Goldberg saw effective implementation of the law as the crucial element in the proposals; the real test would be whether a culture of openness developed within the public sector (col 810).

Preliminary view of the Committee

The Committee is generally welcomes the consultation paper and notes, in particular, that the Executive's proposals are distinctive from and in some respects further reaching than those in the UK Bill.

We welcome the Executive's commitment to fostering a culture of openness in the public sector. We believe that this is vital to the success in practice of any legislation, and that it must be adequately resourced, if the intentions behind the proposed legislation are to be realised and if the rights it will provide are to be accessible and relevant to the Scottish people.

We believe that some mechanism will be needed to ensure that victims of crime have access to information about the criteria used by the Lord Advocate in making prosecution decisions.

Although we realise that the Executive cannot introduce any Bill in the Parliament until satisfied that it is compatible with the Convention, we think there is a particular need to consider how the provision made by a Freedom of Information Act fits with the terms of the Convention itself if the provisions of the Act are not to be set aside in practice by the courts in favour of direct appeal to Convention rights. We believe this issue will require careful consideration during the passage of the Bill in order to ensure that the resulting legislation can be upheld in practice and that the number of legal challenges to it is kept to a minimum.

Finally, we have some concerns about the impact in practice of having different rights of access to information in relation to devolved and reserved matters. This is a distinction that the public are likely to find difficult to understand, and it will be important to avoid any suggestion that information is being categorised as reserved simply in order to make access to it more difficult to obtain.

I hope that you find these early indications of the Committee's thinking of assistance. We look forward to considering the draft Bill in due course.