

JUSTICE AND HOME AFFAIRS COMMITTEE

Papers for information circulated for the 12th meeting **Agenda**

Note by Clerk and Questionnaire on meetings outside Edinburgh JH/00/12/1

Adults with Incapacity (Scotland) Bill
Letter from Mr and Mrs MacDonald JH/00/12/2

Freedom of Information
Revised draft letter to Minister for Justice – members are requested to contact the Clerks if they have any comments, by 2pm on Monday 20 March JH/00/12/3

Minutes of the 11th Meeting, 2000 JH/00/11/M



JUSTICE AND HOME AFFAIRS COMMITTEE

AGENDA

12th Meeting, 2000 (Session 1)

Tuesday 21 March 2000

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

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

Note: if necessary, the Committee will adjourn for lunch and resume at 2.30 pm.

Andrew Mylne
Clerk to the Committee
Tel 85206

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

Feedback on Meeting in Stirling, 6 March 2000

Note by the Clerk

I have been asked by the Head of Committee Office to seek feedback from members about the meeting in Stirling on 6 March. That meeting was part of a "pilot scheme", and the information sought here will be useful in assessing further such schemes, and the advantages and disadvantages of meetings outside Edinburgh. Questionnaires are also being sent to Clerks, Security, Broadcasting, the Official Report and Public Information. I have filled in two questions below on your behalf (venue and public attendance).

Please return completed forms in the internal mail (or fill out the form on your computer and e-mail) to the address at the bottom of the form.

1. About the Venue

Which venue did you use? **Stirling Council offices**

Please rate (✓)

(a) the standard of the accommodation and the facilities

(Very High)	2	3	4	(Totally Unsuitable)

(b) accessibility by train/car

(Very convenient)	2	3	4	(Totally Inconvenient)

(c) was there access for the disabled Yes/No

Please comment on the venue.

2 About the pilot sitting

(a) Did many members of the public attend the sitting? **No**

(b) Would a venue somewhere outside the Central Belt have been more appropriate for your Committee? Yes/No

If Yes, please say why.

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3 About sitting outside Edinburgh.

(a) Please comment on the effect sitting outside Edinburgh has on:

Your other work eg Constituency (For OR please deal with impact on production of OR for this committee AND overall impact on production of OR)

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(b) Your Chamber work

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(c) The cost involved for you/your department **(For Staff Only)**

N/A

(b) Would you find it convenient if sittings outside Edinburgh on a Monday afternoon were introduced on a regular basis with Committee Meetings in Glasgow/Stirling on a rota basis?

(Very convenient)	2	3	4	(Totally Inconvenient)

4. Any other Comments?

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Thank you for completing the form.

PLEASE RETURN BY 24TH MARCH TO: Hazel Anderson, Room 2.08 Committee Chambers.

04/00/12/2

Peter & Dorothy
McDonald

13th March 2000

Roseanna Cunningham
Chair, Justice Committee
Scottish Parliament
Edinburgh
EH99 1SP

Dear Ms Cunningham,

Adults with Incapacity (Scotland) Bill

We are writing to request that, in the interests of social justice, you vote against the introduction of the above bill which we understand is due to become law in the next few weeks. We understand that this bill has been designed to consolidate existing legislation by clarifying who can make decisions on behalf of and adults who, for particular reasons are unable to make certain decisions for themselves. Whilst we recognise the need for legislation, we strongly believe that this particular bill is so badly drafted that it will do more harm than good to the people who are likely to be affected by it.

Without going into the details of what is a particularly complex piece of legislation, we would like to draw your attention to the following:

- If this bill is enacted with the amendments currently agreed, the civil liberties of disabled people will be adversely affected. Many people certified under this law will not be able to appeal against the decision to certify them. There is no provision for independent advocacy under this law.
- 4 different procedures are proposed for assessing incapacity. This will mean inconsistency in practice.

- This bill, if enacted, will mean that for example, managers of nursing homes and group homes will be able to manage “incapable” people’s money- a clear conflict of interest.
- Disabled people and their carers have not been consulted on this bill. Other major pieces of legislation have made provision for public consultation. We consider that it is wrong to rush through such controversial legislation, especially in the Scottish Parliament where there is not the safeguard of a second chamber, without wider public consultation.

We consider that this bill is seriously flawed. Philosophically, it goes against everything else that the Scottish Parliament stands for in terms of social justice and inclusion. We believe that given proper consultation and debate, *better* legislation could be drafted to meet the very real need to “tidy up” existing laws.

We strongly urge you to vote against this bill.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'P & D McDonald', written in a cursive style.

Peter & Dorothy McDonald



JUSTICE AND HOME AFFAIRS COMMITTEE

MINUTES

11th Meeting, 2000 (Session 1)

Wednesday 15 March 2000

Present:

Scott Barrie
Christine Grahame
Kate MacLean
Michael Matheson
Pauline McNeill

Roseanna Cunningham (Convener)
Gordon Jackson (Deputy Convener)
Maureen Macmillan
Mrs Lyndsay McIntosh
Euan Robson

Also present: Robin Harper, Brian Monteith.

Apologies were received from Phil Gallie.

The meeting opened at 9.34 am.

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

The following amendments were agreed to (without division): 2, 3, 4, 5, 6, 7, 8, 142 and 9.

The following amendments were disagreed to (by division)—

139 (For 3, Against 6, Abstentions 0)

143 (For 4, Against 6, Abstentions 0)

144 (For 4, Against 6, Abstentions 0)

Amendment 140 was moved and, with the agreement of the committee, withdrawn.

Another amendment was not moved.

Sections 1, 2, 4, 5, 7 and 8 were agreed to without amendment.

Sections 3 and 6 were agreed to as amended.

The meeting was adjourned from 10.49 am to 11.06 am.

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

The following amendments were agreed to (without division): 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44 and 45.

Amendment 149 was disagreed to by division: For 3, Against 6, Abstentions 1.

Amendments 145, 127 and 1 were moved and, with the agreement of the committee, withdrawn.

Other amendments were not moved.

Sections 9, 12, 13 and 14 and schedules 4 and 5 were agreed to without amendment.

Sections 10, 11, 15, 16, 17 and 18 and schedules 1, 2 and 3 were agreed to as amended.

The Deputy Minister for Justice responded on behalf of the Executive to the issues raised in petition PE44 by Archie MacAllister in relation to section 17 of the Bill.

3. **Petition:** The Committee took note of petition PE71 by James and Anne Bollan, calling for the Scottish Parliament to examine and amend as necessary the rules governing legal aid in relation to Fatal Accident Inquiries. The Committee agreed to invite the Scottish Legal Aid Board to comment on the general issues raised in the petition. The Committee would consider after Easter whether to initiate a more general inquiry into legal aid and access to justice.
4. **Freedom of Information:** The Committee considered a draft letter to the Minister for Justice in response to the Scottish Executive's consultation paper *An Open Scotland*. It was agreed that a revised draft would be circulated for approval before the next meeting.

The meeting closed at 12.39 pm.

Andrew Mylne
Clerk to the Committee

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 and 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.

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

Culture and Openness

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. However, the Committee has some concerns that this is the area where most difficulties will arise and we would welcome clearer commitments as to how the existing "culture of secrecy" could be turned round into a "culture of openness". In other FOI regimes, this has proven particularly problematic.

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).

In this connection, we would be interested to know how you propose to appoint the Information Commissioner, given the need to ensure that he or she is, and is seen to be, sufficiently independent.

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 outlined four main grounds that might be considered for disclosure and suggested that a Freedom of Information Act be given some special status in relation to other statutes (cols 807-9). We would be interested to know your response to those points.

Interaction between ECHR and FOI

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.

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).

FOI and the Crown Office

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).

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.

Interaction between UK FOI regime and Scottish FOI regime

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.

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).

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.