JH/00/16/A

JUSTICE AND HOME AFFAIRS COMMITTEE

AGENDA

16th Meeting, 2000 (Session 1)

Tuesday 2 May 2000

The Committee will meet at 10 am in the Hub, Castlehill, Edinburgh

1. **Budget 2001-02:** The Committee will take evidence on the Executive's expenditure proposals from—

   Gerard Brown, Member of Council and Convener of the Legal Aid Committee, Martin McAllister, Vice-President Elect and Vice-Convener of the Legal Aid Committee and Michael Clancy, Director, Law Society of Scotland

   Professor Frank Stephen, author of *Legal Aid Expenditure in Scotland: Growths, Causes and Alternatives*, Professor of Economics, University of Strathclyde

2. **Petitions:** The Committee will consider the following petitions—

   PE29 by Alex and Margaret Dekker;

   PE55 by Tricia Donegan;

   PE71 by James and Anne Bollan;

   PE83 by Concern for Justice;

   PE89 by Mrs Eileen McBride.

3. **Scottish prisons (in private):** The Committee will consider a draft report.

Andrew Mylne
Clerk to the Committee
Tel 85206

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The following papers are attached for this meeting:

Agenda item 2	
Note by the Clerk on petitions PE29 and PE55 (letter from the Lord Advocate attached)	JH/00/16/8
Note by the Clerk on petition PE71	JH/00/16/7
PE71 - Letter and enclosures from the Scottish Legal Aid Board	JH/00/16/3
Note by the Clerk on petition PE83 (copy of petition and related material attached)	JH/00/16/6
Note by the Clerk on petition PE89 (letter from the Minister for Justice attached)	JH/00/16/4
Agenda item 3	
Draft report (private paper)	JH/00/16/5

JUSTICE AND HOME AFFAIRS COMMITTEE

Papers for information circulated for the 16th meeting

Letter to the Convener from the Minister for Justice on the Small Claims (Scotland) Amendment Order 2000 and the Sheriff Courts (Scotland) Act 1971 (Privative Jurisdiction and Summary Cause) Order 2000.	JH/00/16/1
Letters from the Minister for Justice to Christine Grahame and Maureen Macmillan on the Abolition of Feudal Tenure etc. (Scotland) Bill	JH/00/16/9
Letter to the Convener from the Minister for Justice on Freedom of Information.	JH/00/16/2
Extract from the *Scottish Daily Express* on freedom of information	
Note by the Clerk on forthcoming meeting slots	
Minutes of the 15th Meeting	JH/00/15/M

Note: The clerk to the House of Commons Home Affairs Committee has provided a copy of the following recent reports, which may be consulted in Room 3.5 CC:

- *Drugs and Prisons*, 5th Report 98-99 – Report, Evidence and Government reply
- *Managing Dangerous People with Severe Personality Disorder*, 1st Report 99-00 – Report with Evidence.

Copies of these reports can also be obtained from the Document Supply Centre, although this may take a few days.

JUSTICE AND HOME AFFAIRS COMMITTEE

Forthcoming meeting slots

Note by the Clerk

At the last meeting, a number of members raised concerns about some of the slots for forthcoming meetings that have been allocated to the Committee. In particular, members expressed concerns about the two Monday slots on 15 and 22 May. A number of members asked whether either or both of those slots could be rearranged for the Tuesdays, or the venue moved to Glasgow.

The Convener explained at the meeting that the overall allocation of slots during the period between the Easter and Summer recesses had been agreed by the Conveners' Liaison Group. In reaching a decision, the Group had been made aware of the very considerable difficulties involved in finding any satisfactory allocation of slots, given the great pressures on all committees during this period. There are 16 committees competing for a limited number of suitable venues, and the overall amount of committee activity that can be accommodated in a single week is constrained by the overall capacities of the broadcasting, Official Report and clerking operations, all of which are already fully stretched. The weeks in question are particularly difficult, because of the additional burden placed on the system by the Parliament's temporary move to Glasgow (as a result of the Church of Scotland General Assembly taking place in the Chamber) when it will meet all day on Wednesday, thus preventing any committee meetings taking place on the mornings of those Wednesdays.

The first solution offered to the Conveners' Liaison Group involved all committees meeting on Tuesday, but for only two hours each. It was the Convener's concern that this Committee could not afford to have the amount of time available to it reduced to that extent that led to the present solution.

Since Wednesday's meeting, I have checked again with colleagues in the Committee Office. Moving meetings to Glasgow during those weeks is, I regret to say, out of the question, because of the considerable additional burden this places on broadcasting, in particular. It would have been possible to move one or both of the Monday slots to a Tuesday, but any such Tuesday slot would still be strictly limited to a maximum of two hours. The Convener has taken the view that this remains unacceptable, and that the schedule outlined in the papers circulated for the last meeting should therefore remain unaltered.

27 April 2000 ANDREW MYLNE

JH/00/16/8

JUSTICE AND HOME AFFAIRS COMMITTEE

Petition PE29 by Alex and Margaret Dekker and Petition PE55 by Tricia Donegan

Note by the Senior Assistant Clerk

Background: PE29

Following referral by the Public Petitions Committee (PPC) of petition PE29 from Alex and Margaret Dekker, the Committee agreed at its 12th meeting last year to write to the Lord Advocate inviting him to respond to the five points set out in the petition. (The petition was circulated as JH/99/12/1.) The Committee considered the Lord Advocate's reply at its 5th meeting this year (8 February). Most members of the Committee appeared in the discussion to support the Lord Advocate's position on the law and on Crown Office policy, though perhaps with reservations about the provision of information to victims' families. Nevertheless, it agreed to defer concluding its consideration of the petition until Mr and Mrs Dekker had had an opportunity to respond to the Lord Advocate's letter. They have now done so, and their response was circulated to members directly by Mr and Mrs Dekker.

Background: PE55

PE55 by Tricia Donegan, which has also been referred to this Committee by the PPC, is similar to PE29 in that it relates to prosecutions following a death caused by a road traffic accident. The petition invites the Parliament to investigate why road traffic law is not being applied and proposes that;

a) the cars belonging to people accused of causing death in driving incidents should be impounded;
b) that families of road traffic victims should have a right to demand a fatal accident inquiry; and
c) that previous convictions of those accused of causing death in road traffic incidents should be taken into account.

The PPC wrote to the Lord Advocate asking for his comments on the petition on 25 January, and a copy of that letter, together with the petition itself, was circulated for this Committee's 5th meeting this year (8 February) as JH/00/5/12. The Lord Advocate has now replied to the PPC, and a copy of his letter is attached.

At its 5th meeting, the Committee agreed to write to the Department of Transport, Environment and the Regions (DETR), the UK department responsible for the relevant road traffic legislation, to bring the two petitions to Ministers' attention. The Committee also asked for further details of ongoing research by the Transport Research Laboratory which will examine sentencing trends and assess whether there is sufficiently clear guidance on the law and its purpose. This research is due to be published in the Autumn of this year.

Options

The Committee has already agreed to bring to a close its consideration of the Dekkers' petition, having considered their response to the Lord Advocate's letter.

If the Committee continues to believe that the position set out by the Lord Advocate is correct, then it could conclude its inquiry with a short report to that effect. Publishing the report would provide an opportunity to make widely available the evidence received on this matter. However, if the Committee believes the Dekker's submission brings the Lord Advocate's view into doubt, then it might wish to write again to the Lord Advocate, or perhaps take further evidence from other parties. (Given the heavy workload the Committee faces for the foreseeable future, such evidence would probably have to be in writing, and from a limited number of witnesses.)

The Committee may wish also to express a view on Ms Donegan's petition in the same report. In doing so, it may wish to respond to the three proposals in the Donegan petition.

27 April 2000 SHELAGH MCKINLAY

JH | 00 | 16 | 8

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Mr Steve Farrell
Clerk to the Public Petitions Committee
Committee Office
George IV Bridge
EDINBURGH

14 February 2000

Dear Mr. Farrell.

PE55 Petition by Tricia Donegan calling for the Scottish Parliament to conduct an investigation to establish why the full powers of the law are not enforced in all cases which involved death by dangerous driving

Thank you for your letter of 25 January 2000 enclosing a copy of the above Petition.

I note that the Committee has recognised that I have recently provided a very full and detailed response to the Justice and Home Affairs Committee on similar issues which were raised in Petition PE29 from Alex and Margaret Dekker. Accordingly, I shall restrict my comments on this occasion to the issue of "preservation of evidence" in cases involving charges of causing death by dangerous driving.

I think it would assist the Committee if I begin by detailing the circumstances and procedural history of the case against Daniel Tasker which arose from the tragic death of David McKenzie.

Background

On 26 November 1998 there was a road accident on the Leven to Lundin Links Road, Fife. A vehicle driven by Daniel Tasker crossed the centre line of the road and collided more or less head on with a vehicle coming in the opposite direction. The driver of that vehicle, David McKenzie, was killed. Daniel Tasker fractured his right leg and dislocated his right hip. He was taken to hospital in Dunfermline where he received/

received medical treatment. At approximately 5.35 pm, (the accident having occurred at approximately 2.00 pm), the police attended at the hospital and cautioned Mr Tasker in respect of a possible Section 3 prosecution. He gave a brief account of his recollection of the accident. The police returned to the hospital on 29 November. Because of Tasker's medical condition on 26 November they gave him a further opportunity to say anything else he wished to in relation to the accident. At that stage he said "The car pulled out to the right once before that day, just before the Collinsburgh Straight on a bend".

The police then cautioned and charged Tasker with contraventions of Sections 1, 87, 143 and 47 of the Road Traffic Act 1988. He made no reply.

The vehicle driven by the accused at the time of the accident was Ford Escort registered number A765 JLS. Following the accident, it was taken to the premises of Ace Recovery Services, Buckhaven, where it was held at the behest of the police pending expert examination. On 27 November 1998 it was examined there by Neil Ritchie, Police Constable of Fife Constabulary Traffic Department, who is a time served motor vehicle technician and the holder of several City and Guilds certificates in motor vehicle engineering.

Police Constable Ritchie's examination of the vehicle revealed no defects which, in his view, could have contributed to the accident. In light of Daniel Tasker's remarks about the vehicle pulling to the right, the police looked particularly closely at the braking system. Because of the damage to the vehicle they were not able absolutely to rule out the possibility that brake imbalance had caused the vehicle to pull to the right. It was not possible to test the vehicle further to clarify this point. Once this vehicle had been examined, it was concluded that the car itself was not necessary to the Crown case and it was decided to release the vehicle to its owner. The Procurator Fiscal was advised that the car was owned by Daniel Tasker's brother, Darren Tasker, who was in fact a passenger in the car at the time of the accident. Consequently, the Procurator Fiscal wrote to both Daniel and Darren Tasker on 4 December 1998 to advise that the car was being released.

In addition, the Procurator Fiscal advised Daniel Tasker that consideration was being given as to whether criminal proceedings would be taken against him in respect of the road/

road traffic accident. The Procurator Fiscal explained that he may wish to instruct an expert to examine the vehicle on his behalf and if so, he should have this expert make immediate contact with Darren Tasker. He was also advised that he may benefit from obtaining legal advice.

These letters were personally served on the Tasker brothers, on Daniel Tasker in the Queen Margaret Hospital, Dunfermline on 4 December, and on Darren Tasker at his girl-friend's house on 6 December 1998.

At the same time, the owner of Ace Recovery Services, was advised that the vehicle was no longer required by the Crown and could be released to its owner.

Thereafter, Ace Recovery Services heard nothing from the accused or his brother. Neither of the Taskers made any contact with the Procurator Fiscal's Office to indicate an interest in the vehicle. By 26 January 1999 Ace Recovery Services had concluded that the Taskers were not going to uplift the vehicle and it was destroyed.

Thereafter the circumstances of the road traffic accident were fully investigated by the Procurator Fiscal and the matter was reported on precognition to Crown Office where an instruction was issued by Crown Counsel to prosecute Daniel Tasker for a contravention of Section 1 of the Road Traffic Act 1988, causing death by dangerous driving. An indictment was served in May 1999 for a sheriff and jury sitting commencing on 21 June 1999. That sitting was adjourned to a sitting commencing on 12 July 1999 on defence motion to enable them to carry out further preparatory work for the trial and, in particular, to have an expert examine the car being driven by the accused at the time of the accident. At this stage, I am advised that it was not appreciated by either the defence or the Procurator Fiscal that the vehicle had in fact already been destroyed. This was discovered by the defence on 30 June 1999.

On 6 July 1999 a preliminary diet was held at the instance of the defence in order to hear a plea in bar of trial on the basis of oppression, given that the car had been destroyed. This plea was repelled by the court.

After sundry procedure, including another unsuccessful challenge to the proceedings on the same point, the matter proceeded to trial at Kirkcaldy Sheriff Court on 2 August 1999.

Evidence was led from the Crown and the defence, and at the close of the defence case the jury were directed by the Sheriff to return a verdict of not guilty on the Section 1 charge, the Sheriff at that stage having upheld a plea that the defence had been given no proper opportunity to examine the car, and that the material prejudice caused thereby could not be cured by direction from the Sheriff.

"Preservation of Evidence"

I turn now to the specific issue raised by Ms Donegan, namely the preservation of evidence where charges of causing death by dangerous driving have been brought. I have given detailed consideration to this very anxious case and I can fully appreciate Ms Donegan's anger and frustration at the outcome of the criminal proceedings which were taken up by the Procurator Fiscal at Kirkcaldy. In an earlier letter to the Justice Department of the Scottish Executive, Ms Donegan stated that the "Procurator Fiscal in this case was brilliant" and that "all available evidence was looked at before they proceeded with the case". I mention that merely to illustrate that the acquittal of Daniel Tasker, and the manner in which it occurred, was the Sheriff's responsibility and the Sheriff's alone. The Procurator Fiscal at Kirkcaldy has provided me with a detailed report regarding the conduct of the trial and I am satisfied that the Crown appropriately and strenuously opposed the defence arguments in this case, citing all relevant legal authority in support of the Crown's position.

The situation as far as the Crown was concerned was that the accused was given a clear opportunity to have the vehicle examined. It was the Procurator Fiscal's reasonable expectation that, with the benefit of her advice, the accused would take steps to preserve his own position and instruct the necessary action in light of the clear possibility of criminal proceedings being raised against him. It was not expected that his failure or refusal to take such action would undermine proceedings to the extent that it did.

At the trial, the Crown competently led evidence of PC Ritchie's examination of the vehicle, without the vehicle being present in court. You will not be surprised to learn that Scots law recognises that production of the car itself in such cases is not necessary (see Maciver v McKenzie 1942 JC 51 and MacLeod v Woodmuir Miners Welfare Society Social Club 1961 JC 5). That rule does not, however, mean that the prosecution/

prosecution has an unrestricted right to dispose of productions and to lead secondary evidence. In particular, failure to give an accused an opportunity of examining an article may give rise to prejudice which, in extreme cases, may be fatal to the prosecution. At the trial of Daniel Tasker, the Procurator Fiscal argued that the accused had been given an opportunity to have the car examined but that, in any event, a fair trial could be secured by appropriate directions to the jury. In so arguing, the Procurator Fiscal referred to the case of HMA v Sorrie 1996 SCCR 778, in which the High Court of Justiciary stated in relation to missing productions, that where the defence demonstrate that there are steps which might have been taken in relation to such productions, which might have produced results, and which now cannot be taken, the jury can be directed to take them into account in favour of the accused in deciding whether or not the case has been proved against him beyond reasonable doubt.

The applicable law imposes no duty on the Crown to preserve indefinitely evidence on behalf of the defence, where the Crown does not intend to produce that evidence at the trial, and where the accused has failed or refused to take up the opportunity to have the production examined.

The law is also clear that the fairness of such a situation will usually be a matter for the jury, although the court retains a discretion to hold that, in particular circumstances, unfairness and prejudice is so great that it cannot properly be left to the jury. That is the view that the Sheriff took in the case against Daniel Tasker.

That is a decision with which the Crown did not agree but, as you may know, it is not possible under the Criminal Procedure (Scotland) Act 1995 for the Crown to appeal against the acquittal of an accused who has been prosecuted on indictment.

I am, however, concerned to avoid a repetition of what happened in this case, insofar as it is in my power to do so. I must stress that the court of first instance will always have a discretion in such matters which the Lord Advocate cannot constrain. But I have looked carefully at the events leading up to the trial and I consider that it would have been better if the Procurator Fiscal had delayed release of the car until after he had intimated to the accused that criminal proceedings were being contemplated, that the car was no longer needed by the Crown and that it would be in his best interest to have the vehicle examined and to obtain legal advice. The Procurator Fiscal at Kirkcaldy/

Kirkcaldy agrees with this and I have instructed officials at the Crown Office to clarify and highlight departmental guidance to Procurators Fiscal in this regard.

That said, I understand why the Procurator Fiscal acted in the way that she did. Procurators Fiscal are aware that productions should not be retained by the Crown where it is not intended to produce them at the trial. This is particularly so when the item in question belongs to someone other than the accused and has a significant monetary value. Bear in mind also that the owner of the car in this case was the accused's own brother, who was travelling as a passenger in the car at the time of the accident. In all the circumstances, the Procurator Fiscal's contention that the accused had in fact been given an adequate opportunity to have the car examined, appears to have been a reasonable one.

In conclusion, having given detailed and careful consideration to the facts of this case and to the applicable law, I am disappointed that the Sheriff took the decision that he did. I also understand the anguish which this legal decision has caused to Ms Donegan. As I have explained, I am legally powerless to bring about a review by the High Court of Daniel Tasker's acquittal, but I believe I have taken such steps as are within my power to minimise the possibility of the court's discretion being exercised in this way in the future.

I hope this will assist the Committee's deliberations on Ms Donegan's Petition.

Yours sincerely,

Hardie

THE LORD HARDIE

mbm\feb\058

JH/00/16/7

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 was discussed by the Committee at its meeting on 15 March (Official Report column 962) where it was decided to write to the Scottish Legal Aid Board for observations on the general issues raised by the petition and the Board's approach to applications for civil legal aid in connection with FAIs. A detailed response is attached.

At its meeting on 26 April, the Committee considered its future work programme and a list of subjects for possible inquiry. The Committee agreed that the first priority, when time became available, was to consider legal aid in relation to access to justice.

Options

The most appropriate action would seem to be for the Committee to deal with the concerns contained in the petition when it initiates an investigation into legal aid and access to justice in due course.

27 April 2000 FIONA GROVES

JH/00/16/6

JUSTICE AND HOME AFFAIRS COMMITTEE

Petition PE83 by Concern for Justice

Note by the Clerk

Background

This petition was originally presented to the Parliament in January. After correspondence between the clerk to the Public Petitions Committee and the petitioners, a revised petition was submitted. The petition now calls on the Parliament to:

> "(a) conduct an inquiry into the condemnation of named persons by sheriffs or judges in Scottish courts where those persons are NOT present as witnesses and are NOT represented, resulting in their suffering an injustice, and possible public humiliation throughout the media; and
> (b) to enact legislation which would provide an opportunity for those who find themselves in such circumstances to seek legal remedy."

I attach a copy of the original petition, a "supporting document: explanatory addendum" submitted with the petition; and a letter to the clerk of the PPC from the chairperson of Concern for Justice. The PPC has taken legal advice on the petition and, on the basis of that advice, agreed on 14 March, to refer the petition to the Justice and Home Affairs Committee for further consideration. In making that referral, the PPC has suggested that the Committee should consider only the general issues raised and not the particular facts and circumstances of the court case that gave rise to the petition.

As members may be aware, the court case in question involved a minister of the Free Church of Scotland who was accused of sexual assault against five women. The minister was acquitted, and the sheriff made various statements in court to the effect that the women concerned had made false allegations against him. This case was instrumental in the acrimonious split in the Free Church, the implications of which are still being felt.

The group Concern for Justice was set up in direct response to the above case and has as its stated aim clearing the name of the women concerned. The petition raises the general issue of the ability at present of sheriffs to make criticisms of and accusations about witnesses not present or represented in the court, and seeks a change in the law to provide people so criticised or accused legal redress. As the Committee may be aware, statements of sheriffs acting judicially are protected by absolute privilege. Such statements are but one category of communications (together with, for example, statements made in proceedings of the Parliament) protected by absolute privilege, which is a defence to an action of defamation or other verbal injury. The general issue raised by the petition might be said to be the principle of statements of sheriffs acting judicially being protected by absolute privilege.

The Convener has, from the outset, stressed that the Justice and Home Affairs Committee cannot be seen as any kind of appeal court or tribunal in relation to individual cases. In its consideration of any petition, therefore, she would already be keen to ensure that it is only the general issue raised that is addressed and not the particular facts and circumstances of any case in which the petitioner was involved. In the Committee's consideration of the Dekkers' petition and elsewhere, this approach has been endorsed by other members.

Concern for Justice – in a pamphlet explaining the origins of the group, copies of which are available on request from the clerks – is keen to emphasise that "the issues with which the group is concerned are separate altogether from any differences and dissensions which may be causing "grief and turmoil" in [the Free] church. They are concerned with our rights under the law, our legal rights and also our human rights." Nevertheless, the Committee needs to be aware of the close connection between the concerns raised in the petition and a complex and acrimonious doctrinal dispute within the Free Church.

Options

The Committee may feel that the way in which the petition presents the issue it raises is so narrowly drawn that it is not an appropriate issue for the Committee to address. In particular, it might be thought that the scope of the inquiry that the petition invites the Committee to undertake is so closely modelled on the circumstances of the particular case from which it arose as to make it, in practice, impossible for the Committee to conduct such an inquiry without that inquiry being seen as a review of the case in question. More generally, the Committee may simply feel that the privileged status of statements made by judges is an important legal safeguard and something it would not wish to bring into question in the way that the petition requests.

Alternatively, if the Committee feels that the issue raised is important and could be considered without straying into the particularities of the case in question, it may wish to consider how it would wish to conduct such an inquiry and from whom it would invite evidence. In doing so, the Committee would have to take account of the considerable difficulties it would face in finding time to conduct such an inquiry before the Autumn.

27 April 2000 ANDREW MYLNE

JUSTICE AND HOME AFFAIRS COMMITTEE

Petition PE 89 by Mrs Eileen McBride

Note by the Clerk

Background

This petition calls for the Parliament to repeal the legislation which allows non-conviction information to be included on an Enhanced Criminal Record Certificate and has been referred to this Committee by the Public Petitions Committee. The petitioner is concerned that the inclusion of such information negates an individual's right to be presumed innocent until proven guilty in a court of law.

The Committee considered the petition at its 13th meeting this year (29 March) and agreed to write to the Minister for Justice asking when the Executive proposed to bring into force Part V of the Police Act 1997, to comment on the suggestion that the relevant provisions might be in breach of the European Convention on Human Rights, and seeking further information about guidance being prepared by a "Part V project board".

The Minister replied on 25 April – copy attached. His letter says that the Executive intend to commence Part V, but not for two years or so; that the Executive have been advised that the use of Enhanced Criminal Record Certificates would not breach the Convention; and that the Executive is working with the Association of Chief Police Officers to prepare guidance on the circumstances when non-conviction information may be released.

Options

It seems clear from the Ministers letter that the ECHR-compatibility of these certificates is not entirely clear-cut, and that the Executive considers that there is a real possibility of legal challenge to their use. That being so, the Committee may wish to write to the Minister asking to be kept informed of progress in preparing the Code of Practice.

Given the Committee's busy workload, however, and the number of other petitions demanding its attention, the Committee may wish to close consideration of this petition. This could be done by writing to the petitioner with a copy of the Minister's letter and any reply by the Convener. Should the Committee undertake further scrutiny at a later date on the basis of information about the Code of Practice provided by the Executive, the petitioner could be kept informed at that time.

Alternatively, if the Committee feels that the issues raised merit further consideration at this stage, it could seek other views on the likely implications of the use of these Certificates. An obvious candidate for such evidence would be the Scottish Human Rights Centre, whose views on the civil liberties implications could be sought.

27 April 2000 ANDREW MYLNE

Supporting document: explanatory addendum.

We, the committee of *Concern for Justice*, declare that there is an apparent anomaly in the Criminal Law of Scotland which affects the legal rights of everyone in Scotland, and also their Human Rights: the ability of a Sheriff in court to publicly name and condemn persons without their being present, heard or represented in that court.

We declare this on the basis of the following facts.

Between April and June 1996 a man appeared in Edinburgh Sheriff Court charged with the alleged sexual assault of five young women, but this number was reduced to four on a technicality. The young women were not all known to one another, but were appearing as witnesses for the Prosecution under the Moorov Doctrine, a doctrine of mutual corroboration, in which a number of separate, but similar, offences may corroborate one another, even although only one witness speaks to each.

On completion of the case for the Prosecution, the presiding Sheriff decided there was a 'Case to Answer' and by doing so was in effect confirming that the Moorov Doctrine was applicable. Defence counsel had tried to refute that and to have the charges dismissed but did not succeed.

Several weeks later the case for the Defence was presented. The defence was 'conspiracy'. It was claimed that about twelve or so men named by the accused had procured and persuaded the young women to make false allegations against him to conspire with them to have him prosecuted, and to appear in the Sheriff Courts as witnesses for the Prosecution, thus subjecting themselves not only to public examination, but to hostile cross-examination at great risk of damaging their own reputation, their careers and their lives in general. The Defence claimed that these named men had done this in order to bring about the downfall of the accused. None of the young women knew all of the men with whom they were supposed to be involved with in the alleged conspiracy.

On the basis of the accused's statements in Court and those of his chosen witnesses the Sheriff decided to accept his version of events and he was acquitted. It is appreciated that Sheriffs are entrusted with a very wide discretion as to the way they handle particular cases, provided they do so within the confines imposed by the Law.

The problem with that acquittal and the reason for this Petition is that the men named by the accused as conspirators were not given the opportunity to answer the accusation of conspiracy made against them by the accused, in his bid for acquittal. The Sheriff condemned them as conspirators without insisting they be given the opportunity to reply, he condemned them without ever hearing what they had to say, without seeing them in order to assess for himself their credibility or otherwise, and without even verifying for himself that they did actually exist as real people. They did of course exist, and the remarks made about them by the Sheriff in his summing up were

published throughout the media. Having been branded as conspirators by the Sheriff they were publicly humiliated and widely condemned as such, as were the young women who were also named and publicly branded as liars and co-conspirators. Not only were the men named but photographs of some of them were also allowed to be published. The Sheriff's remarks and comments were made from the Bench under the protection of Privilege and could be repeated indefinitely in the media, causing great personal distress to the men and the young women involved and to their families. The women still stand by the statements which they made in Court.

After the trial a number of people wrote to the Scottish Office and various other people who could possibly help, but there would seem to be no solution in Law to the cruel dilemma in which these men and the young women found themselves as a result of the manner in which the accused had been acquitted.

If the Sheriff was acting 'within the confines imposed by the Law',. then it would seem that there is a very serious loophole in our Law which needs to be addressed. It would appear that what happened to these men could actually happen to anyone in Scotland at any time, with no means of redress available under the Law. If that is so then the Law requires to be amended to take account of that loophole in the interests of the people of Scotland. We believe that there is something seriously wrong if under our law anybody could find themselves publicly condemned as having been part of a criminal conspiracy on the say-so of a person on trial and his chosen witnesses, with no right of reply.

If the Sheriff was not acting 'within the confines imposed by the Law', then these men and the women all suffered a grave and serious public injustice, which is affecting them and will affect them all of their lives, unless it is publicly acknowledged; and it was in any case almost certainly an infringement of their Human Rights.

During the trial there were two funds. One fund set up to pay the expenses of the accused and the other set up to pay the fare of one of the young women to come back from Tasmania as a witness for the Prosecution. The person who administered the second fund was called into court by the Defence and condemned for that. The Sheriff also said in his summing up that this fund was an 'interference with the course of Justice.' No such comment was made about the first fund. It has not been possible to ascertain why one fund should differ from the other in that respect. After the trial Crown Office considered the case with regard to possible charges of Perjury, but decided that criminal proceedings against the Prosecution witnesses (the young women) would not be justified, and repaid to the second fund the fare of the young woman who came from Tasmania to give evidence for the Prosecution.

The Petitioners therefore request that the Scottish Parliament consider the following questions with a view to providing a solution to this apparent anomaly in the Law of Scotland as it is in the Public Interest for them to do so. If no such anomaly exists, then the Petitioners request that the Scottish Parliament advise on or provide a legal remedy for the alleged conspirators, in order to prevent a future similar injustice and also to avoid the possible setting up of a dangerous precedent in our Law.

Questions which concern the people of Scotland

1. Is it the Law in Scotland that any of us can be publicly condemned as being guilty of wrongful behaviour or of committing an offence (in this case 'Conspiracy') without ever having been charged and without ever appearing in court, the decision having been made by a Sheriff on the basis of statements and accusations made in the witness-box by a person of trial, and his chosen witnesses, in his endeavour to achieve acquittal?
If this is the Law we would respectfully request the Scottish Parliament to take measures to amend the Law in order to correct this anomaly.

2. Is it right and just that having been condemned in a criminal court, unseen and unheard, that the Law should allow the names and even some photographs of those so condemned to be published throughout the media, as a result of which they are humiliated, disgraced and even their livelihoods endangered?
If this is the Law we would respectfully request the Scottish Parliament to consider changing the Law to take account of this further anomaly.

3. How can the alleged conspirators in the 1996 trial obtain some Justice in Scotland?

4. Can it be made mandatory for a record to be kept of all court trials involving sexual assault, even when trials such as the 1996 trial take place in a summary Sheriff Court?

5. Can the Scottish Parliament advise how the fund set up to pay the fare of a Prosecution witness can be an 'interference with the course of justice' while the fund set up to pay the expenses of the accused apparently is not?

Steve Farrell,
Clerk to the Public Petitions Committee,
Room G18,
Parliamentary Headquarters,
Edinburgh,
EH99 1SP.

27th January 2000

Dear Mr. Farrell,

Thank you for your letter of 21st January with regard to the Petition submitted by Concern for Justice, and I now resubmit it in a shortened form as requested.

Although it was the trial of Donald Macleod which highlighted the apparent loophole in our Law, it could have been some other case, and so the matter is one of public concern. It would seem from what happened in that case that a Sheriff can condemn members of the public from the bench, make very disparaging and damaging remarks about them, and allow these remarks to be published throughout the media, destroying their reputations and the lives of themselves and their families,solely on what the person in the dock says about them in order to get himself acquitted. A Sheriff can apparently do this even although these members of the public did not appear in his court as witnesses or in any other capacity, even although the Sheriff did not set eyes on them and knew nothing about them, and was in no position to judge for himself their credibility or reliability etc. That is what happened in the Macleod case, and apparently there is no remedy in Law for any one of us so treated, and so that loophole in our Law still exists as a threat to all of us.

The Sheriff is protected by Privilege regarding what he says from the bench about witnesses and others appearing in his court at any trial. We doubt very much if that Privilege extends to allow the making of disparaging remarks about members of the public, on the basis of what the person in the dock might say about them, especially when these people are not given the opportunity to answer but are in effect tried and found guilty in their absence. That is what happened in the Macleod trial to a number of men, mainly colleagues of Macleod.

We would like to ascertain what the Law is and if the loophole exists to have it closed. If, however the Sheriff actually abused the privilege afforded to him on the bench, we would expect at least an acknowledgment that the men all suffered a gross public injustice. This is what we wish to get over in the Petition. We may have to adapt it again, and would be glad of any advice you may be able to give.

Yours Sincerely,

A. MacKenzie

Agnes Mackenzie (Concern for Justice)

SCOTTISH EXECUTIVE

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Roseanna Cunningham MSP
Convener
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Date: 25 April 2000

Dear Roseanna,

PETITION PE89 – CALLING FOR THE SCOTTISH PARLIAMENT TO REPEAL THE LEGISLATION WHICH ALLOWS NON-CONVICTION INFORMATION TO BE INCLUDED ON AN ENHANCED CRIMINAL RECORD CERTIFICATE

Thank you for your letter of 4 April about the petition from Mrs Eileen McBride which was considered by the Justice and Home Affairs Committee on 29 March.

In your letter you ask for clarification on a number of issues on Part V of the Police Act 1997 to help the Committees consideration of the petition. First you ask about when the Part V provisions will be implemented. Responsibility for implementing Part V of the Police Act 1997 passed to Scottish Ministers in July 1999. We have considered the proposals and are content that implementation should proceed. The main justification for the extension of criminal record checks is the protection of children and vulnerable adults. Priority is therefore to be given to the issue of the Enhanced Criminal Record Certificates (ECRC) with the other certificates being phased in to ensure a smooth transition from the current arrangements for criminal record checks. We estimate that it will take some two years to equip the Scottish Criminal Record Office for the new much expanded system of checks and it is unlikely that the new certificates will be available before January 2001 at the earliest.

You also ask for my comments on the suggestions that the inclusion of non-conviction information in Enhanced Criminal Record Certificates might breach the European Convention on Human Rights. Part V was drawn up after extensive consultation and deliberation, and the disclosure of non-conviction information was very carefully considered. It was particularly difficult to strike a balance between the rights of individuals and the protection of children, but the decision turned on whether risks to society were greater if limited non-conviction information was carefully released or

withheld. Legal advice was also sought on this point and the advice received suggested that the risk of challenge under ECHR was not great, provided there was clear guidance on the type of information which Chief Constables should release and also that the procedures were regularly reviewed.

To this end we intend to put in place safeguards to protect the release of this sensitive information. Guidance on the kind of information which should be released is being prepared in consultation with a Committee of the Association of Chief Police Officers in Scotland, (ACPOS) and a Code of practice is being drawn up as required by the legislation. In addition we intend to monitor the procedures and keep them under review. Enhanced Criminal Record Certificates will be copied to the individual as well as to the employer, and the individual will be able to query any information which is considered to be inaccurate.

I hope this information is helpful and provides the Committee with assurance that the release of non-conviction information will be considered very carefully for reliability and relevance before it is included on an enhanced criminal record certificate.

Yours sincerely,

JIM WALLACE

JH/00/16/1

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Ms Roseanna Cunningham MSP
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18 April 2000

Dear Roseanna,

Thank you for your letter of 14 March which sought advice on when it was intended to relay the 2 Statutory Instruments to bring about increases to the Small Claims and the Summary Cause jurisdiction limits.

The Orders will be re-laid which concerns which prompted their withdrawal have been addressed. Concerns which had been raised included the need to have in place new procedural rules, particularly in relation to Summary Cause procedure, and also the need for an amendment to the Table of Fees payable to solicitors in Summary Causes actions. These are not matters for Ministers.

Yours sincerely
Jim

JIM WALLACE

GMK06093

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Maureen MacMillan MSP
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Date: **April 2000**

Thank you for your letter of 4 April concerning an amendment which you laid at Stage 2 to the Abolition of Feudal Tenure etc. (Scotland) Bill and which you withdrew after I undertook to give the matter further consideration. I am sorry that our attempts to meet after Stage 2 were not successful.

The amendment you laid was aimed at protecting agricultural land. The effect would be to permit the preservation of a burden affecting an area of agricultural land (or which was once agricultural land) for the benefit of an adjoining area of agricultural land. Preservation would be contingent on both areas of land having been formally part of the same agricultural unit. It would also be contingent on the burden having been originally imposed in order to facilitate the better management and protect the continued use of the agricultural unit. Other amendments were also laid which, though not identical to yours, were also concerned with the same general area of the Bill.

During Stage 2, two separate, but related, issues were raised. One was that while the Bill treats rural and urban areas equally, the effect of the 100 metre requirement is likely to be more harsh in the country where distances between houses are greater. The second was your point, that land itself may require a degree of protection not afforded by the Bill, whose approach is to protect buildings, not land.

Two approaches were considered which might deal with this. The first was that there should be a distinction in the distance limit between town and country - in other words, 100 metres or a similar distance might suffice for the town, but a greater distance would be appropriate for rural areas. The

other approach was that a new category of burden was required to protect agricultural land - something which might be called an "agricultural burden".

We have given some thoughts to these two approaches but we are not sure that either of them would work. Taking the different distance possibility first, we think that the problem with it is that it is very difficult to make a definition of urban and rural land which would work for these purposes. The concept of a new category of burden which would be capable of preservation also poses problems of definition. Furthermore if we were to make special provision for agricultural burdens, it would probably be necessary to make similar provision for commercial or industrial burdens to provide similar protection, particularly in view of the considerable representations we have already received from commercial interests.

As you know, the Scottish Law Commission has also been receiving representations from commercial developers in the context of their work on real burdens. Some developers have argued that it will be necessary to provide in the future for greater protection for commercial developments and that the corollary of this is that feudal burdens of a similar nature should be capable of being saved. This is part of the reason why it has been clear that we would have to look again at the Feudal Bill in the context of the recommendations on real burdens and why we have decided not to commence Part 4 until the Title Conditions Bill has been enacted. This will effectively mean that, although superiors and their agents may now begin to examine their titles to identify burdens which they wish to preserve under the relevant provisions of the Bill, they will not be able to register notices or agreements to save those burdens until a date to be specified by Scottish Ministers.

In summary, we think it would make sense to look at this whole issue again in relation to the Title Conditions Bill. I hope this explanation is helpful.

ANGUS MACKAY

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Date: April 2000

ABOLITION OF FEUDAL TENURE ETC. (SCOTLAND) BILL

Following your contribution to the debate during the Stage 2 consideration of the above Bill in relation to the Crown and the "public interest" in land in Scotland, I thought it might be helpful if I wrote to you in advance of the Stage 3 debate to explain the background to the Executive amendment which we have undertaken to bring forward.

The general approach of the Bill is to treat the Crown like any other feudal superior. The Bill abolishes superiorities in section 2. Section 7 extinguishes any remaining feuduties and section 16 abolishes a superior's right to enforce real burdens. Section 56 then applies these provisions to the Crown. The second part of section 56 makes it clear that the prerogative rights of the Crown are unaffected by the Bill

As you know, there has been much interest in the application of the Bill to Crown rights and "public interest" in land in Scotland generally. It has been argued that section 56 (Crown application) of the Bill should be revised to specify which Crown rights are being abolished in order to prevent any inadvertent abolition of unspecified rights. It has also been suggested that the present drafting of section 56 would mean the loss of what is argued to be the Crown's representation of public interest in land ownership.

The relevant rights of the Crown in Scotland are known as the *regalia*. The *regalia* are Royal rights and are divided into the *regalia majora* and the *regalia minora*. As I explained at Stage 2 we do not think there is a problem as regards the *regalia minora*. These are property rights which the Crown may exercise as it pleases and which it can alienate. If they have not been alienated, then they have never entered the feudal system and so will not be affected by the Bill. If they have been alienated, then section 2 would convert the present vassal's interest into simple ownership.

The *regalia majora* are, however, in a different position. They may not be alienated and so they are still held by the Crown. They are said to be held by the Crown as guardian of the public interests for navigation, fishing and other public uses. There may be some uncertainty as to their source. They may derive from the prerogative, but some of those making representations to the Executive in this area are arguing that sovereignty and the paramount superiority are linked. They have quoted Professor Gretton in the Stair Memorial Encyclopaedia (volume 18, paragraph 42) where he states "in feudalism, landownership and sovereignty coincided, so that the Crown sovereignty over Scotland and its ultimate tenurial superiority were the same thing, identical concept". They have identified other authorities to cast doubt on the source of the *regalia majora*, or at least to show that it is hard to determine this source conclusively. From the leading modern case on the subject, Shetland Salmon Farmers v Crown Estate Commissioners 1991, which you referred to at Stage 2, it seems that the public rights over the foreshore and seabed are best seen as distinct from the ownership rights of the Crown. Indeed the Crown rights are commonly described as subject to the public rights. Some confusion is caused by the fact that the Crown has certain rights and obligations as a sort of public trustee, to safeguard public rights, such as navigation, for the public. In that case, Lord McCluskey said that in his opinion the Crown's ownership of solum of the seabed (which is one of the *regalia minora*) derived from the prerogative but this right was qualified "by a trust to secure that public rights are protected".

In view of the uncertainty over the origins of the *regalia majora* and the scope for differing views as to whether they derive from the prerogative or may have a feudal source, we have decided to amend the Bill to clarify that for the purposes of the Bill the *regalia majora* are to be treated as part of the prerogative and so will be unaffected by the Bill. This is an "avoidance of doubt" measure. We do not intend to preserve any part of the Crown's ultimate superiority: indeed it remains a fundamental tenet of the Bill that all superiorities, including that of the Crown, should be abolished.

Although we have identified that the *regalia majora* may be held in the public interest, we have been unable to identify other rights being so held.

I hope this is helpful.

ANGUS MACKAY

JH/00/16/

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Date: 18 April 2000

Dear Roseanna,

I was pleased to receive your letter of 21 March, offering comment on the Executive's consultation document on Freedom of Information, *An Open Scotland.*

I welcome the Committee's interest in this matter, and I appreciate the Committee's broad welcome for the proposals. My officials are preparing a summary of responses and I will ensure that a copy is provided to the Committee in due course.

The specific points you have raised on the culture of openness and the appointment of the Commissioner, on the way in which the public interest is to be handled, on the possible implications of ECHR, and on the availability of information from the Crown Office, are important. These will be taken into account as we analyse all of the responses, develop further our policy, and prepare the draft Bill.

I have noted the Committee's concerns that there might be different rights of access to information in relation to devolved and reserved matters, and I thought it might be helpful if I clarified the legislative split between the UK and the Scottish FOI regimes. In *An Open Scotland* (paragraphs 1.5 – 1.8) we set out the policy on devolving 'access to information', which was given effect by an amendment to the Scotland Act in June of last year. The competence of the Scottish Parliament to legislate on access to information relates to information held by the Scottish Parliament, any part of the Scottish Administration, the Parliamentary corporation, and any Scottish public authority with mixed functions or no reserved functions. Scottish bodies will therefore operate under the Scottish FOI legislation. UK bodies will operate under the UK FOI legislation.

This split does not hinge on whether the information held relates to reserved or devolved matters, and the arrangement ensures that any public authority throughout the UK should operate only a single FOI regime. UK information supplied to a Scottish body to be held in confidence will however not be subject to the Scottish FOI legislation. Requests for such information would be referred to the originating UK body for a release decision.

I hope this is helpful, and I look forward to discussing the draft Bill with the Committee in due course.

Yours sincerely,

JIM WALLACE

JH/00/15/M

JUSTICE AND HOME AFFAIRS COMMITTEE

MINUTES

15th Meeting, 2000 (Session 1)

Wednesday 26 April 2000

Present:

Scott Barrie
Phil Gallie
Kate MacLean
Michael Matheson
Pauline McNeill
Roseanna Cunningham (Convener)
Gordon Jackson (Deputy Convener)
Maureen Macmillan
Mrs Lyndsay McIntosh

Also present: Donald Gorrie

Apologies were received from Christine Grahame

The meeting opened at 9.38 am.

1. **Meeting in private:** The Committee agreed to consider a draft report on Scottish prisons in private at its next meeting.

2. **Budget 2001-02:** The Committee took evidence on the Executive's expenditure proposals from—

   Andrew Normand, Crown Agent, and Sandy Rosie, Principal Establishment and Finance Officer, Crown Office;

   Niall Campbell, Head of Civil and Criminal Law Group, Ian Allen, Head of Legal Aid Branch, Mark Batho, Assistant Director of Finance, Ruth Ritchie, Team Leader Finance (Justice Department), and David Stewart, Head of Judicial Appointments and Finance Division, Scottish Executive;

   John Ewing, Chief Executive, Scottish Courts Service;

   Elizabeth May, Assistant Director, Finance and Administration, David McKenna, Assistant Director, Operations, Victim Support Scotland.

   Gordon Jackson declared an interest in relation to legal aid; Mrs Lyndsay McIntosh declared an interest as a former justice of the peace and in relation to the District Courts Service.

3. **Judicial Appointments:** The Committee appointed Michael Matheson as Reporter to consider the issues raised in the Scottish Executive consultation paper.

4. **Future Business:** The Committee considered its future work programme. Members expressed concerns about the volume of Executive business being referred to the Committee and about the effect this was having on the Committee's ability to initiate scrutiny or to propose changes on issues other than those formally referred to it. Members also expressed concern that, if the Committee was to fulfil the demands being made of it between now and the summer, it needed to be assured access to suitable venues at suitable times for Committee meetings. A list of subjects for possible inquiry was considered and the Committee agreed that the first priority, when time became available, was to consider legal aid in relation to access to justice and that the second priority was to consider either self-regulation of the police and the legal profession or delays in, and the administration of, the civil courts.

The meeting closed at 12.24 pm.

Andrew Mylne
Clerk to the Committee