JH/00/20/A

JUSTICE AND HOME AFFAIRS COMMITTEE

AGENDA

20th Meeting, 2000 (Session 1)

Tuesday 30 May 2000

The Committee will meet at 9.45 am in the Hub, Castlehill, Edinburgh.

1. **Item in private:** The Committee will decide whether to take item 5 in private.

2. **Draft Bail, Judicial Appointments etc. (Scotland) Bill:** The Committee will take evidence on the general principles of the draft Bill from—

   Jamie Gilmour (solicitor and former temporary sheriff);

   Sheriff Wilkinson, Past President, and Sheriff RJD Scott, member of the Council, the Sheriffs' Association;

   Anne Keenan, Deputy Director, Michael McSherry, Criminal Law Committee, and Joseph Platt, Judicial Procedure Committee, Law Society of Scotland;

   Sandy Brindlay, Legal Affairs Spokesperson, Scottish Rape Crisis Network.

3. **Act of Sederunt:** The Committee will consider the following negative instrument—

   Act of Sederunt (Fees of Shorthand Writers in the Sheriff Court) (Amendment) 2000 (SSI 2000/145).

4. **Divorce, etc (Pensions) (Scotland) Regulations:** Pauline McNeill to move S1M-914— That the Justice and Home Affairs Committee recommends that nothing further be done under the Divorce, etc (Pensions) (Scotland) Regulations 2000 (SSI 2000/112).

5. **Budget process 2001-02:** The Committee will consider a revised draft report.

6. **Regulation of Investigatory Powers (Scotland) Bill (in private):** The Committee will consider a draft report.

Andrew Mylne
Clerk to the Committee, Tel 85206

The following papers are attached for this meeting:

Agenda item 2	
Article by Jamie Gilmour from *Holyrood* magazine	JH/00/20/6
District Courts Association Good Practice Guidelines [Note: this document was referred to by the DCA witnesses in evidence at the 19th meeting.]	JH/00/20/3
Legal Opinion obtained by District Courts Association	JH/00/20/11
Letter to the Assistant Clerk from the Secretary to the Justices Committee, Falkirk Council	JH/00/20/7
Sample of letter to MSPs from South Lanarkshire Council	JH/00/20/8
Letter to the Assistant Clerk from North Lanarkshire Council	JH/00/20/9
Agenda item 3	
Note by the Clerk on SSI 2000/145	JH/00/20/5
SSI 2000/145 (members only)	JH/00/20/12
Agenda item 5	
Revised draft report (private paper)	JH/00/20/4
Agenda item 6	
Codes of practice on Surveillance, Use of Informants and Undercover Operations	JH/00/20/2
Draft report	JH/00/20/10

Papers not circulated:

Agenda item 3

A note by the Assistant Clerk (JH/00/19/4), SSI 2000/112 (JH/00/19/8) and an Executive Note on SSI 2000/112 (JH/00/19/12) were circulated for the 19th meeting.

SSI 2000/145 is available on the Internet at:
http://www.scotland-legislation.hmso.gov.uk/legislation/scotland/ssi2000/20000145.htm

Agenda item 6

In addition to the Codes of Practice circulated as JH/00/20/2, the Scottish Executive has provided:

- Code of Practice on Interception of Communications and Accessing Communications Data;
- Code of Practice on the Recording and Dissemination of Intelligence Material; and

- Public Statement on Standards in Covert Law Enforcement Techniques by the Association of Chief Police Officers and HM Customs and Excise.

These are normally available on the National Criminal Intelligence Service website, although for technical reasons they are unavailable at present. In the meantime, copies may be obtained on request from the clerks.

JUSTICE AND HOME AFFAIRS COMMITTEE

Papers for information circulated for the 20th meeting

Letter from Roderick Macpherson, Society of Messengers-at-Arms and Sheriff Officers (in reply to the letter from the Convener circulated as JH/00/17/4).	JH/00/20/1
Minutes of the 19th Meeting	JH/00/19/M

Note: The clerk has been sent a copy of the Digital Scotland Task Force Report, which the Executive believes may be of interest to members of the Committee. Digital Scotland is a Scottish Executive initiative which "aims to ensure that Scotland obtains and retains maximum economic and social advantage from information and communication technologies".

The task force was chaired by Peter Peacock MSP and included representatives of the public sector, industry and academics. The report is available on the Executive website (http://www.scotland.gov.uk/digitalscotland) or members can obtain a copy by e-mail on request from the Clerk.

JH/00/20/6

JUSTICE AND HOME AFFAIRS COMMITTEE

Act of Sederunt (Fees of Shorthand Writers in the Sheriff Court) (Amendment) 2000 (SSI 2000/145)

Note by the Assistant Clerk

Background

The above negative instrument has been referred to the Committee by the Subordinate Legislation Committee. This Act of Sederunt increases the fees chargeable to shorthand writers for work done in civil actions in the Sheriff Court by about 3%. The last increases were in 1999.

Although laid on 18 May, the instrument comes into force on 1 June, less than 21 days later. If an instrument is to come into force earlier than 21 days from the date it was laid, then, in accordance with SSI 1996/1096, a letter of explanation from the responsible authority to the Presiding Officer is required. Attached is the letter which explains that the 21 day rule was "overlooked" by the Court of Session authorities', who were concentrating on making the most efficient arrangements for court personnel in bringing this and the instruments below into force on the same day.

Having considered the instrument on 23 May, the Subordinate Legislation Committee had no comments to make.

Procedure

This Act of Sederunt is made as a negative instrument – that is, an instrument that comes into force and remains in force unless the Parliament passes a resolution calling for its annulment.

Any MSP may lodge a motion seeking to annul such an instrument and, if that happens, there must be a debate on the instrument at a meeting of the committee. However, as there appears to be nothing controversial in these Regulations, it seems unlikely that any MSP will lodge such a motion. In that event, no further action by the Committee is required.

Note: The following related SSIs have also been made:

- Act of Sederunt (Rules of the Court of Session Amendment No.2) (Fees of Shorthand Writers) 2000 (SSI 2000/143); and
- Act of Sederunt (Rules of the Court of Session Amendment No.3) (Appeals from the Competition Commission) 2000 (SSI 2000/144)

These have not been laid before the Parliament and are not subject to any Parliamentary procedure. Copies are available on request from the clerks.

24 May 2000 FIONA GROVES

Justice and Home Affairs Committee

19th Meeting, 2000

Monday 22 May 2000

The Committee will meet at 1.30 pm in Committee Room 1

1. **Census SSIs:** The Committee will debate (for up to 30 minutes)—

   Motion S1M-834 Angus MacKay—That the Committee recommends that the draft Census (Scotland) Amendment Order 2000, to the extent that it relates to the particulars printed in italics in article 2(3), be approved; and

   the Census (Scotland) Regulations 2000

2. **Insolvency Bill:** The Committee will consider a letter and Memorandum from the Minister for Justice on the Insolvency Bill currently being considered by the UK Parliament.

3. **Draft Bail, Judicial Appointments etc. (Scotland) Bill:** The Committee will take evidence on the general principles of the draft Bill from—

   Angus MacKay, Deputy Minister for Justice, Colin Miller, Head of Bill Team, Robert Shiels, Head of Criminal Justice Division 3, and David Stewart, Head of Judicial Appointments and Finance Division, Scottish Executive;

   Alison Patterson, Director, and David McKenna, Assistant Director, Operations, Victim Support Scotland;

   Helen Murray JP, Chairman, and Phyllis Hands, Secretary, District Courts Association.

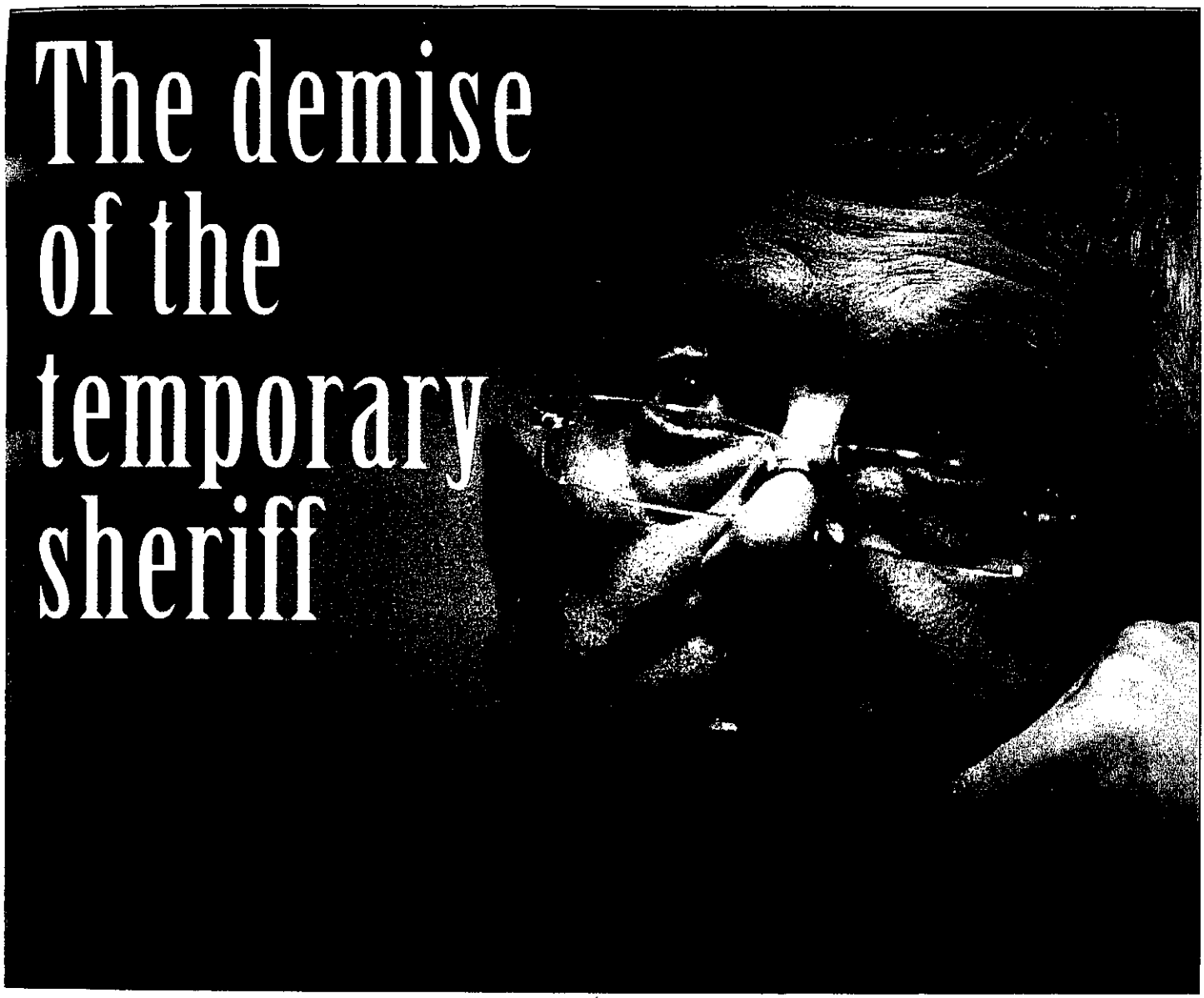
4. **Subordinate Legislation:** The Committee will consider the following negative instruments—

   Divorce etc. (Pensions) (Scotland) Regulations 2000 (SSI 2000/112)

   European Communities (Lawyer's Practice) (Scotland) Regulations 2000 (SSI 2000/121)

5. **Budget process 2001-02 (in private):** The Committee will consider a draft report.

The demise of the temporary sheriff



JAMIE GILMOUR examines the position of the temporary sheriff and how the current situation is a far cry from that intended when the Act to allow the appointment of them was introduced nearly thirty years ago

THE temporary sheriff is a creature of statute. The power to appoint temporary sheriffs was conferred on the Secretary of State for Scotland by s.11 (2) of the Sheriff Courts (Scotland) Act 1971 which states that: "Where as regards any sheriff - (a) a sheriff is by reason of illness or otherwise unable to perform his duty as sheriff, or (b) a vacancy occurs in the office of sheriff, or (c) for any other reason it appears to the Secretary of State expedient so to do in order to avoid delay in the administration of justice in that sheriffdom, the Secretary of State may appoint a person (to be known as a temporary sheriff) to act as a sheriff for the sheriffdom".

It was the intention of Parliament that such appointments be made to cope with the death or illness of a permanent sheriff, his annual vacations or a declinature of jurisdiction. It was also to take account of a sudden but transient increase in the volume of business in a particular sheriff court. What has happened since 1971 is a far cry from what was originally intended. In 1980 there were some 26 temporary sheriffs. In 1988 the number had increased to approximately 50. By 1995 the number had increased to 120. The zenith was subsequently reached with 134 temporary shrieval commissions being granted. The dramatic increase was Treasury led. Successive governments saw the use of a temporary sheriff as a more cost effective way to run the sheriff court system. Temporary sheriffs could do the work of a permanent sheriff without enjoying the same rate of remuneration and without payment of any pension contribution. A temporary sheriff was engaged on a day to day basis and, if necessary, an assignment could be cancelled at short notice without payment of any cancellation fee unless the temporary sheriff could certify that he had suffered a loss of other remunerative work. It was seen as a flexible and economic way to put bodies on the judicial bench. The appointment of a temporary sheriff was itself transient since, although s.11 (4) of the 1971 Act empowered the Secretary of State to grant a commission to a temporary sheriff until recalled (which did give the impression of some permanence) the convention developed of commissions being awarded annually and subject to review by the Lord Advocate.

The use of temporary sheriffs for the administration of justice in the sheriff courts did not end there. The temporary sheriff has been used to sponsor the administration of justice in the Supreme Courts. Following the retiral of Lord Emslie as Lord President of the Court of Session in 1989 the then Conservative Government

introduced s.35 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 giving power to the Secretary of State, but in effect the Lord Advocate, to appoint temporary judges to avoid delays in the administration of justice in the High Court and in the Court of Session. There has been as many as nine temporary judges, seven drawn from the ranks of sheriffs in Scotland. It will not be difficult to follow that if seven sheriffs are away on High Court or Court of Session duty without, incidentally, an increase in salary, their duties in the sheriff court require to be undertaken by other sheriffs, namely temporary sheriffs. This arrangement has proved very satisfactory and attractive for the Treasury since the services of a judge are obtained for the price of a temporary sheriff. Lord Emslie would never have permitted the engagement of sheriffs as temporary judges regarding it as something of a fraud on the public.

The large scale use of temporary sheriffs is illustrated by the fact that in the year to 31st October 1999 temporary sheriffs sat for an aggregate of almost 6,300 days. This is an alarming number and represents the workload of 30 permanent sheriffs. Indeed some temporary sheriffs had the distinct air of permanence about them since several were sitting on a full time basis.

The inevitable conclusion is that the use of the temporary sheriffs has gone far beyond what was envisaged in s.11 of the 1971 Act. Temporary sheriffs have been "shoring up" the system doing approximately 25 per cent of the workload in the sheriff courts. Successive administrations have been blinded by the economies of the temporary shrieval system. We were well on the way to a privatised shrieval system flying full in the face of the doctrine of the independence of the judiciary in view of the nature of the appointment of the temporary sheriff and the lack of security of tenure.

The principle of security of tenure is one which has troubled the Temporary Sheriffs' Association for some considerable time. Since 1993 the Council of the Association has regularly sought longer commissions for temporary sheriffs all to no avail. One known reason for the administration not recommending the grant of longer commissions was the fear that it might open the door to the requirement to pay pensions to temporary sheriffs. With hindsight it might well be seen as a case of pennywise pound foolish.

The lack of security of tenure was aggravated by the recent decision of the Lord Advocate, Lord Hardie, not to renew commissions of temporary sheriffs who had reached the age of 65 years although by statute, permanent sheriffs now appointed do not retire until the age of 70 years. The aggravation was compounded by the fact that it was indicated to three temporary sheriffs that despite reaching the age of 65 years their commissions would be renewed. The Lord Advocate's policy and this discriminatory cull were described by one illustrious member of the legal profession as "an uncomfortable manifestation of power".

The excessive use of the temporary sheriff came to an abrupt halt on 11 November 1999. The judgment of the Appeal Court in Starrs and Chalmers v Ruxton which, at time of writing, has been briefly but swiftly reported in 1999 GWD 37 - 1793, concludes, that a temporary sheriff is not an "independent and impartial tribunal" within the meaning of Art.6(1) of the European Convention on Human Rights. Lord Cullen at page 39 of his Opinion states "...appointment by the executive is consistent with independence only if it is supported by adequate guarantees that the appointed judge enjoys security of tenure. It is clear that temporary sheriffs are appointed in the expectation that they will hold office indefinitely, but the control which is exercised by means of the one year limit and the discretion exercised by the Lord Advocate detract from independence".

The judgment has sent a tidal wave through the system of administration of justice in Scotland affecting along the way accused persons, litigants, lawyers, witnesses, procurators fiscal, sheriff clerks, temporary sheriffs and sheriffs since temporary sheriffs will no longer undertake any new criminal or civil cases. The judgment has also put the damper on the engagement of temporary judges.

There may be an appeal to the Judicial Committee of the Privy Council by the Lord Advocate but in the immediate term the judgment has major repercussions for the operation of both criminal and civil business in our sheriff courts. Short term it will result in minor havoc in respect of the timetabling of all manner of business in the sheriff court. Trials will require to be adjourned and adjourned again. This will possibly give rise in the future to challenges that accused persons are not coming to trial within a reasonable time, in possible contravention of Art.6 of the Convention. Priority will require to be given to cases involving young or vulnerable individuals. Priority will also require to be given to cases which might otherwise be time barred. Many prosecutions will be abandoned by procurators fiscal, against the public interest. In addition there will be major difficulties for witnesses who will find themselves trying to recall the facts of an incident of trial diet many, many months after the event. There will no doubt be test cases following the Starrs/Chalmers judgment concerning procedural matters where a temporary sheriff was involved and where a temporary sheriff proceeded to conviction and sentence. In the longer term, the structure of the shrieval system as we know it may require to be radically overhauled, resulting in more and more permanent sheriffs being appointed and being required to float from court to court rather than be entrenched in one court house or indeed within one sheriffdom.

Those advising the Minister of Justice, Jim Wallace QC, on dealing with the crisis will require to sift

Sheriffdom of Lothian and Borders
Practice Note: Non-availability of Temporary Sheriffs

I, Gordon Nicholson, Queen's Counsel, Sheriff Principal of Lothian and Borders, in pursuance of the powers conferred by Section 15 (2) of the Sheriff Courts (Scotland) Act 1971, and all the common powers enabling me in that behalf, order and direct as follows:

1. With immediate effect the business of the courts in the Sheriffdom of Lothian and Borders shall, so far as is practicable, be programmed and dealt with in accordance with the following order of priority:

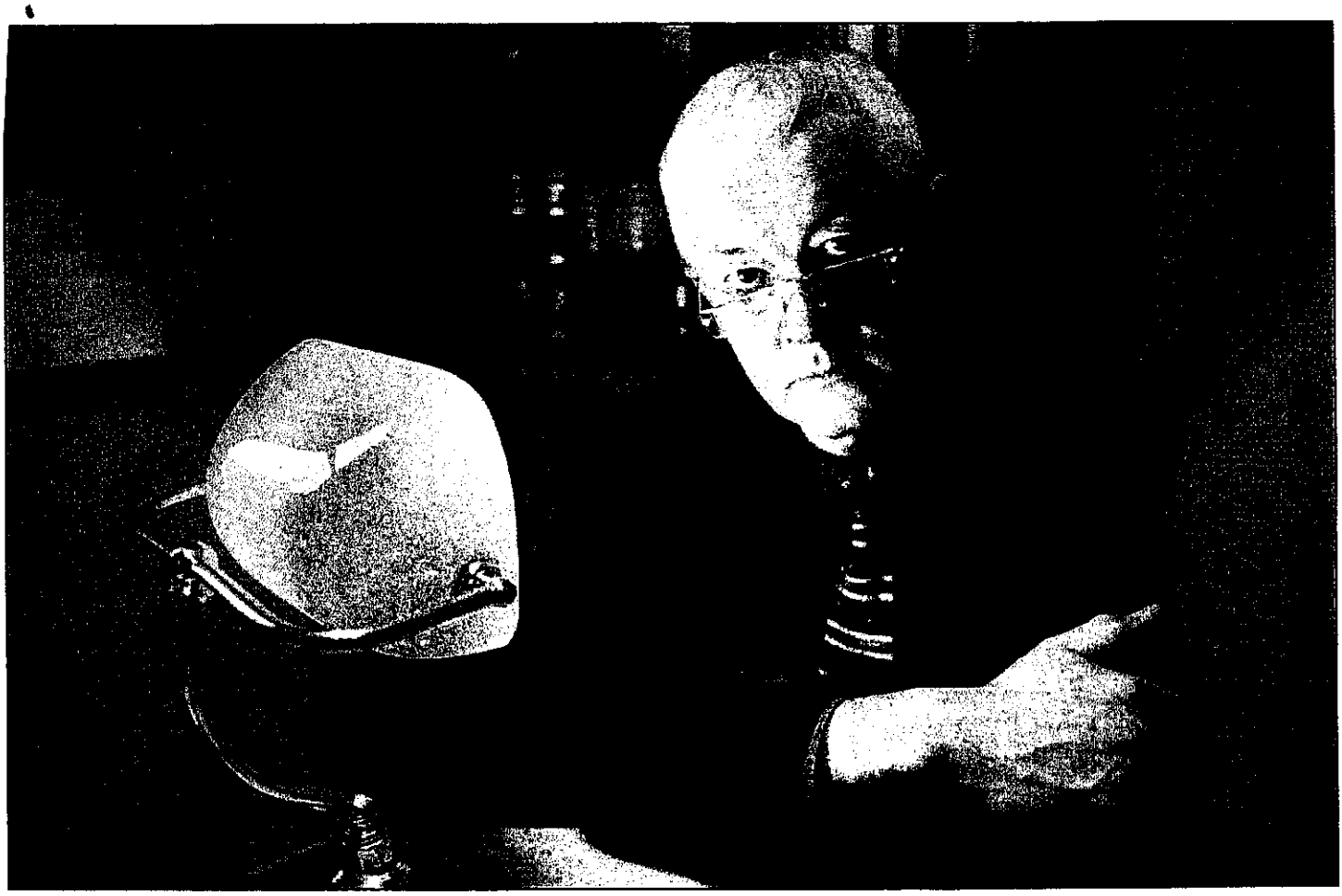
(1) Cases involving a person or persons appearing from custody.
Trials, both solemn and summary, in which a statutory time limit is imminent.
Trials involving witnesses who are children or otherwise vulnerable.
Pleas court.
First diet courts and intermediate diet courts.
(2) Referrals and appeals from children's hearings.
Mental health applications.
(3) Family actions involving disputes about children.
Adoption and freeing for adoption cases.
Ordinary courts, options hearings courts, and motions courts.
Sequestrations and liquidations.
Summary cause and small claim courts (excluding proofs and full hearings).
(4) Trials, both solemn and summary, which are not covered by the provisions of sub-paragraph (1) hereof.
(5) Ordinary proofs and debates (other than those in family actions involving children).
Summary cause proofs and small claim full hearings.
Fatal accident inquiries (unless the subject matter is of considerable public importance).
(6) Any other business not specified above.

2. Sheriff clerks shall have regard to the above order of priorities when allocating business.

3. Where a court is unable to complete all of the business allocated on any given day, business having the lowest order of priority shall be discharged in order to ensure that business having higher priority is completed.

4. This direction shall subsist until further notice.

I appoint this Practice Note to be inserted in the Act Book of Edinburgh and to be published on the Notice Boards of all Sheriff Courts within the Sheriffdom of Lothian and Borders.



through the opinions of Lord Cullen, Reed and Prosser to see if there is light at the end of the tunnel enabling the Scottish Executive to appoint temporary or part time sheriffs in some shape or form whilst fulfilling the criteria of independence of the judiciary and security of tenure. An appeal to the Judicial Committee of the Privy Council is unlikely to alter the import of the Starrs/Chalmers judgment but it may give guidance to the Scottish Executive in finding a solution.

Such a solution may be difficult and intricate to find given the portents of the judgment but, considering the observations of Lord Reed, certain criteria require to be addressed. These include (a) manner of appointment; (b) term of office; (c) existence of guarantees against outside pressures and (d) the appearance of independence.

The Appeal Court did not appear to have a difficulty coming to the conclusion that the initial appointment of a temporary sheriff by the executive was "not inherently objectionable". The conclusion was that the present manner of appointment of temporary sheriffs did not point towards a lack of judicial independence. There has, of course, been much talk about the establishment of a judicial appointments board to select judges and sheriffs thus removing the privilege from the Lord Advocate, introducing transparency into the process of selection, and also removing observations of patronage and cronyism which critics inevitably voice when appointments are made.

However, taking a lead from s.95 of the Scotland Act 1998 which empowers the First Minister to appoint permanent sheriffs after consultation with the Lord President, there is nothing to prevent the Lord President having his own ad hoc committee drawn from sheriffs principal, sheriffs, senior members of the Faculty of Advocates and the inevitable lay-person who knows something about the operation of the sheriff court to advise on the appointment of temporary sheriffs. Such individuals who appear regularly in court and have their ears close to the ground are best placed to determine the best candidates.

On the issue of term of office, one factor is certain, bearing in mind the views expressed by the Appeal Court judges. It will not be possible for the purpose of maintaining judicial independence, to grant a term of office to a temporary sheriff which is renewable. Lord Reed at page 19 of his Opinion draws attention to the European Charter on the statute for judges: "Clearly, the existence of probationary periods or renewal requirements presents difficulties, if not dangers, from the angle of the independence and impartiality of the judge in question, who is hoping to be established in post or to have his or her contract renewed".

Observations have been made that in general the appointment of temporary judges and the appointment of judges for probationary periods is inconsistent with judicial independence. Significantly, therefore, the Scottish Executive may require to exclude from the ranks of temporary sheriffs individuals who have aspirations to be permanent sheriffs. Lord Reed at page 21 of his Opinion draws attention to the extra-judicial observations made by Kirby J. of the High Court of Australia: "But what of the lawyer who would welcome a permanent appointment? What of the problem of such a lawyer faced with the decision which might be very upsetting to government, unpopular with the media or disturbing to some powerful body with influence? Anecdotal stories soon spread about the 'form' of acting judges which may harm their chances of permanent appointment in a way that is unjust. Such psychological pressures, however subtle, should not be imposed on decision-makers". The single conclusion must therefore be that temporary sheriffs will require to be appointed like permanent sheriffs ad vitam aut culpam.

The third consideration relates to the existence of guarantees against outside pressures such as are available to permanent sheriffs in terms of s.12 of the 1971 Act which sets out an established procedure for the removal of a sheriff by reason of inability, neglect of duty or misbehaviour but which specifically excludes temporary sheriffs. It is made clear in no uncertain terms by Lord Reed at page 26 of his Opinion that "...a temporary sheriff does not, as a matter of law, enjoy anything which constitutes security of tenure in the normally accepted sense of that term". Accordingly, to have a pool of temporary sheriffs, provision will require to be made for an independent procedure for the removal of a temporary sheriff on the grounds stated above. However, the position is not as simple as that since the security of tenure relates to a part-time resource which is expected to sit on the bench in the sheriff court for a suggested number of days each

year. Security of tenure, therefore, will include allocation of work. "Sidelining" or non-allocation of work effectively amounts to removal from office. That would be incompatible with any provision for a temporary sheriff made in terms similar to s.12 of the 1971 Act. A mechanism would, therefore, require to be in place, independent of the executive, to call into question alleged non-allocation of work. Careful consideration will also be required to be given to any request by the executive for a temporary sheriff to carry out a set number of days. There could be no sanction for not carrying out a recognised number of days per annum for such sanction would be an unacceptable external pressure.

The last criterion is the appearance of independence, the tribunal commanding public confidence. This inspires notions and concepts of independence, integrity and impartiality. Significantly, the Appeal Court held that the judicial oath is an insufficient guarantee to avoid a legitimate doubt about the avoidance of a conflict of interest illustrated by the fact that in terms of s.6 of the 1971 Act permanent sheriffs are not entitled to practice law. The serious question, therefore, arises whether a part-time sheriff should not be in a similar position.

The court did not accept that in the present appeal there was a legitimate doubt on the matter of impartiality or independence but the red flag was waving that if a temporary sheriff was to be involved in civil proceedings, some legislative safeguard required to be in place against a reasonable apprehension of bias. The inevitable conclusion is that, unless or until there is some legislative safeguard, there might only be a future for the temporary sheriff in criminal matters.

In summary, therefore, to appoint a pool of temporary sheriffs and to accord with the Starrs/Chalmers judgment, it is desirable but not necessary to alter the present system of appointment. It will be obligatory to appoint temporary sheriffs ad vitam aut culpam. A formal procedure for removal divorced from the executive will be required in respect of an allegation of inability, neglect of duty or misbehaviour. A mechanism to challenge or investigate "sidelining" will need to be in place. This, in turn, will require some indication of the minimum and maximum number of days it is expected that a temporary sheriff will occupy the judicial bench otherwise there will be the inevitable question of when is a part-time sheriff not a part-time sheriff? This will put a governor on an abuse of the part-time system. Finally, there will be the requirement of a formal safeguard to secure the appearance of independence at least in relation to civil cases conducted by a temporary sheriff.

But the dilemma for the Scottish Executive does not end there. The permanent appointment of a temporary sheriff raises also the issue of payment of a commensurate salary in view of the permanency of the commission since the temporary sheriff is not being appointed to office on an ad hoc basis. To pay other than commensurate salary would be unequitable and open to challenge.

Further, the temporary sheriff receiving a commission ad vitam aut culpam may well be entitled to a pension contribution paid on a pro rata basis. The UN Basic Principles on the Independence of the Judiciary makes reference not only to the term of office of a judge being secured by law but also adequate remuneration and pension.

There will also be the requirement to pay fees to temporary sheriffs for additional work. Presently temporary sheriffs are paid at half-rate for dealing with additional work such as preparing stated cases or writing judgments. This meant that if it took two days to write a judgment the temporary sheriff received a fee equivalent to one court day. If a permanent sheriff has a writing day to prepare a judgment (during the present crisis these will be as scarce as hens' teeth) normal salary of course, is paid. The new found status of a temporary sheriff may require him to be adequately and properly remunerated for additional work.

The big attraction of the temporary shrieval system is its flexibility and cost effectiveness. A new system can again be flexible to deal with illness, holidays and sudden increase in business but the cost effectiveness will disappear on an obligation to pay commensurate salary, pro rata pension and additional fees. The sheriff courts fulfil an important and significant social duty handling the bulk of civil and criminal business in our courts. That duty is not being presently fulfilled. For years successive governments and those advising them have been obsessed by cost, blinkered to other considerations which the Starrs/Chalmers judgment has now brought to prominence. There have long been accusations of anonymous advisers knowing the price of everything but the value of nothing. There is no alternative but to grasp the nettle of expense and, instead, engage a greater number of "floating" permanent sheriffs and a small pool of temporary sheriffs who, on the basis of what I have said above, may require, at first, to be drawn from the ranks of retired solicitors or retired sheriffs. If that is the course that has to be taken then it is imperative for the efficient and economic operation of the system that the assignments of floating sheriffs and temporary sheriffs are centrally controlled by a booking unit within the Scottish Executive Justice Department adequately staffed and remunerated. If floating sheriffs fall under the control of sheriff clerks within a particular sheriffdom then they are "gobbled up" and effectively become resident sheriffs.

Urgent and positive action is required by the Scottish Executive to arrest and improve the present situation in our sheriff courts. There may be residual work for temporary sheriffs into the year 2000 but appointment is a separate issue outwith the scope of this article. The temporary sheriff as presently recognised dies on 31 December 1999. The demise will have nothing to do with any millennium virus.

Jamie Gilmour has been a temporary sheriff since 1988 and secretary of the Temporary Sheriffs' Association from 1993 to date. Any views expressed in the article are personal and are not necessarily the views of any other member of the Temporary Sheriffs' Association.

Temporary Sheriffs- Article 6(1) of the European Convention on Human Rights

Hugh Latta Starrs and James Wilson Chalmers v PF Linlithgow

PF Linlithgow v Gary John Johnstone and David Michael Gunn

THE Crown Office have confirmed that following the decision of the Appeal Court in the above cases, full consideration is being given to the question of an appeal to the Judicial Committee of the Privy Council.

In the meantime, interim instructions have been issued to Procurators Fiscal that if a part heard trial has been set down to be continued before a temporary Sheriff, Procurators Fiscal should invite the court ex proprio motu to discharge the trial diet and fix a fresh diet of trial to proceed before a permanent Sheriff.

In respect of trials set down to commence before a temporary Sheriff, Procurators Fiscal are instructed to invite the temporary Sheriff to adjourn the trial diet in order that the trial may take place before a permanent Sheriff. It is considered that it remains competent for temporary Sheriffs to deal with matters other than those which involve determination of the criminal charge and in other instances to discharge the trial diet and fix a new diet of trial.

District Courts

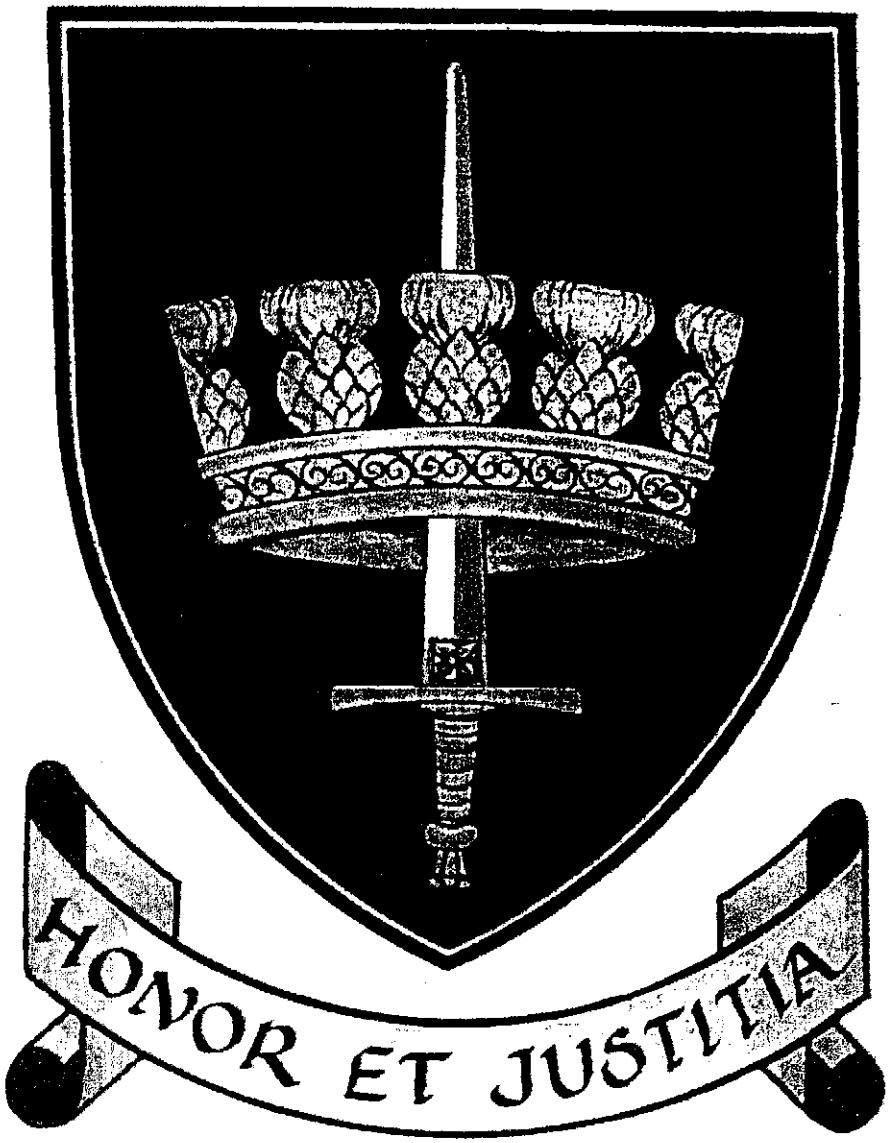
The Lord Advocate also considers that the cases may have implications for prosecutions in the District Courts. Specifically, he considers there are grounds for a view that the position of Justices who are also councillors might be affected by technical aspects of the decision. Consequently, on November 19 1999 the Lord Advocate instructed Procurators Fiscal, as an interim precautionary measure, that they should not proceed with prosecutions before Justices who are also councillors. The same action to be taken in respect of temporary Sheriffs is to be followed for these Justices.

The Lord Advocate has said that this action is not intended in any way to call into question the integrity of those Justices. It is an interim measure until a concluded view has been reached by the Lord Advocate and the Minister for Justice on the compatibility of courts presided over by such Justices with the European Convention on Human Rights.

Elish Angiolini
Head of Policy Group
Crown Office

JH/00/20/3

DISTRICT COURTS ASSOCIATION



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DISTRICT COURTS ASSOCIATION
GOOD PRACTICE GUIDELINES

The Good Practice Guidelines are offered as standards which the Association feels will be conducive to the effective and proper running of District Courts. It is, however, a matter for each Justices Committee and each Justice to implement the Guidelines as they see fit. The District Courts Association has given very thorough consideration to all the Guidelines issued. It is recommended that where Justices Committees approve the Guidelines, they take steps to encourage observance of them by individual Justices. The Association hope, that, whether or not individual Committees agree with all the Guidelines, they will ensure that all serving Justices receive copies of them.

The Guidelines are deliberately set at the standard which the Association expects of an able, experienced Justice. It is recognised that as such, they may, at least initially, be standards to be striven for as much as achieved. The Association is firmly of the belief that the Guidelines are a vehicle for improving standards and should not be rejected on the basis that they are more demanding than existing practice.

GOOD PRACTICE GUIDELINE A

MINIMUM LEVEL OF TRAINING FOR NEW JUSTICES

Reason for Guideline:-

The Justices Committee have a statutory duty to ensure that all Justices receive adequate training before being appointed to the Court Rota. Appendix 1 to the Justices Handbook sets out the scheme of basic training in detail. This Guideline is designed to set a minimum standard in respect of basic training.

1. Local Training

Justices should undergo a minimum of 25 hours of basic training in accordance with the scheme laid down in Appendix I of the Justices Handbook. Justices should attend at least 75% of the training sessions arranged locally.

2. National Training

It would be preferable if Justices attend a national and/or regional training seminar for new Justices prior to sitting on the bench or as soon as practicable thereafter.

3. Record Keeping

Justices Committees should maintain records of each new Justices's attendance at basic training sessions. New Justices should not be appointed to the Court Rota until they have completed the training detailed above.

Where a Justice sits on a bench of three it may be appropriate for some of the training to comprise of sitting with experienced Justices on the bench.

GOOD PRACTICE GUIDELINE B

MINIMUM LEVEL OF TRAINING FOR JUSTICES

Reason for Guideline:-

The Justices Committee have a statutory duty to ensure that all bench serving Justices are appropriately trained and continue to receive adequate training during their time on the bench. This guideline is designed to set minimum standards in respect of their training.

1. Local Training

Every bench serving Justice should undergo a minimum of 10 to 20 hours of training at local level each year and attend at least fifty percent of training sessions arranged locally.

2. Regional Training

Every bench serving Justice should attend a Regional Training Seminar once every 2 years.

3. National Training

Every bench serving Justice should attend a National Training Seminar once every 5 years.

4. Record Keeping

Justices Committees should maintain records of each bench serving Justice's attendance at training sessions.

GOOD PRACTICE GUIDELINE C

CODE OF ETIQUETTE TO BE FOLLOWED IN THE DISTRICT COURT

Reason for Guideline:-

There are certain, unwritten, rules of court etiquette which are important to the proper working of the court. It is good practice to follow these rules and this guideline sets them out.

1. When the Justice enters or leaves the court it is customary for everyone to stand. The court/bar officer usually shouts "court" on both occasions. On this occurring the Justice should enter or leave the court without delay. At the end of a trial people tend to walk out as the Justice is leaving. It is for the court/bar officer to decide whether to make them wait or not.

2. It is usual for Agents, Fiscal and the Clerk, to bow to the Justice before he/she sits down. The Justice should return the bow.

3. The Justice should greet the Agents and Fiscal after having sat down by saying "good morning".

4. The Justice should be referred to as "Your Honour".

5. If possible the Justice should address Agents and the Fiscal by their title and surname. Agents who are not known to the bench should identify themselves. The Clerk should be addressed in the same manner. Accused and witnesses should also be addressed by title and surname and treated with courtesy unless their behaviour demands otherwise. The court/bar officer should be addressed as "court/bar officer".

6. Agents and the Fiscal should wait for a signal from the Justices before addressing the bench. Agents, the Fiscal and if appropriate the Clerk should stand to address the bench. The Justice should thank the Agent or Fiscal after he/she has finished addressing the bench.

7. The Justice should be patient especially with witnesses or accused who are unfamiliar with court procedure and the Justice will often have to explain the procedures to them. As with addresses from Agents a Justice should thank a witness for his or her evidence.

8. The Justice should be decisive and speak clearly and confidently.

9. Situations arise in court where what is said is not heard. Where this is nobody's fault then the Justice should simply ask that it be repeated. If it is the fault of speaking by Agents, Fiscal or Clerk they should be asked politely to refrain from speaking.

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10. The Justice should ensure that the other participants in the proceedings also observe the rules of etiquette. A solicitor or Fiscal should not be unnecessarily rude to a witness nor vice versa.

11. The Justice should ensure that order is kept in the court. If anyone is behaving in what appears to be a deliberately disrespectful way they should be reprimanded. Sometimes the court/bar officer will do this. If a reprimand does not work they can be removed from the court, taken to the cells to cool off or warned that they might be convicted of contempt of court.

12. A Justice should be aware that when the court is in session it is his/her court and he/she is responsible for being aware of what goes on in the courtroom and keeping control of the courtroom. A Justice should not be afraid to deal with any situations which arise within the court and should ensure that the court is treated with dignity at all times. The Justice, bar officer, and Clerk should present a united front and the Justice should not be seen to criticise the court officials.

13. The subject of humour in court can be difficult. Obviously there is room for humour, especially of a spontaneous nature. The court could be accused of taking itself too seriously if there was not. However, where a situation does give rise to laughter it sometimes encourages the witness or accused to "play to the gallery". That kind of situation is to be discouraged. The Justice should never "play to the gallery".

14. Where an Agent is appearing with his client present the Justice should address the Agent and not the accused unless there is a particular reason for speaking to the accused direct e.g. when passing sentence.

15. The Justice should set an example to everyone else with regard to behaviour in court.

16. The Justice, Clerk, Agents and Fiscal should wear gowns or other appropriate clothing in court and present a smart appearance.

GOOD PRACTICE GUIDELINE D

CODE OF PRACTICE BETWEEN CLERKS AND JUSTICES

Reason for Guideline:-

To avoid any confusion between the respective role of the Justice and the Clerk. The term "Clerk" here means "legal assessor".

1. All decisions are to be made by the Justice and are to be his or her responsibility.

2. Whenever legal submissions are made by parties the Justice should seek the advice of the Clerk before proceeding (includes no case to answer, verdicts and objections).

3. The advice of the Clerk may be given in open court or in private but should be given in private if either the Clerk or the Justice requests that it be so.

4. As far as possible the proceedings of the court should be conducted by the Justice (i.e. after identification and e.g. procedure regarding unrepresented accused going to trial).

5. The Clerk must bring any procedural or legal irregularity occurring during the court to the attention of the Justice.

6. Any legal advice or advice on a procedural matter given by the Clerk should be accepted by the Justice, or an adjournment should be sought.

7. Justices and Clerks should both take notes of evidence and Justices should note any relevant parts of the plea in mitigation and the reason for their sentences.

8. In relation to sentencing matters, the Clerk may draw to the attention of the Justice any sentencing practices of the court or any aspect of the case which may be of significance to the disposal of the case by the Justice.

9. In relation to trails the Justice should, in appropriate circumstances, adjourn prior to delivering a verdict and be prepared to outline to the Clerk the basis of the decision and the Clerk should draw to the attention of the Justice any part of the case which runs contrary to the proposed decision.

10. Clerks should note any comments made by the Justice in open court regarding verdict or sentence.

GOOD PRACTICE GUIDELINE E

EXPLANATION OF PROCEDURE TO AN UNREPRESENTED ACCUSED

Reason for Guideline:-

It establishes a line of communication between the accused and the Justice which should continue throughout the trial.

The accused is a lay person and will understand the explanation better if it is given by a lay Justice in lay terms.

1. The explanation of procedure to an unrepresented accused at a trial should be given by the presiding Justice.

2. The accused will be given detailed written guidance at an appropriate stage in the proceedings - perhaps at the intermediate diet or at the call over of the trials and will have an opportunity to read this prior to commencement of the trial (suggested wording attached - Appendix A). Justices should have written guidance on what should be covered in the explanation. See Appendix B.

APPENDIX A

NOTES FOR ACCUSED PERSONS APPEARING FOR TRIAL WITHOUT A SOLICITOR

Introduction

These notes have been written to help you with your trial. They explain what will happen in your trial. You should read them through to the end before your trial starts. The Justice (the presiding judge) will also explain the procedure to you at the beginning of your trial. You can ask him questions if there is something you do not understand. The Justice will also help you with the procedure during the trial if you have any difficulties. Paper and a pen will be available for you to take notes.

People in Court

The people present in court are the Justice, his Clerk and the Prosecutor. A Court Officer will show you into the court and call the witnesses. The Justice is not a lawyer. He is a member of the public selected and trained to act as a judge in the District Court. You should call the Justice "your Honour". The Clerk, who sits below the Justice, is a lawyer whose job it is to make notes of what happens in court and to advise the Justice on matters of law. The prosecutor is known as the "Procurator Fiscal" and is also a lawyer.

Procedure at the trial

The Procurator Fiscal begins the trial. He calls his witnesses in turn and asks questions of them. When the Procurator Fiscal is asking his witnesses questions you should listen carefully and note anything with which you disagree. After he has finished you will be asked if you wish to cross-examine the witness. You should stand up to do this. At this stage you should ask questions and not make statements. If you hear anything with which you disagree you should put your version to the witness. If you do not do this the court may assume that you agree with what has been said . Also, if you are to give evidence about something which the witness could comment on but has not yet mentioned, you should ask a question about that. If you do not do that you may not be allowed to raise the matter later in your own evidence. The Procurator Fiscal may then re-examine the witness.

What to do if you feel there is insufficient evidence against you

If, after all the evidence has been led by the Procurator Fiscal, you think that not enough has been said to convict you, you may at this stage ask the court to decide the case. (This is referred to as a plea of "no case to answer"). To make a decision at this stage the court must accept all the evidence given whether it is believed or not and decide whether or not this evidence would be enough to convict you. If the court find that there is no sufficient evidence the case will be dismissed, otherwise the case will continue. The fact that the case continues doe not mean that the court thinks you are guilty. It simply means that evidence has been led, which if believed, would be sufficient for a conviction.

Leading/

Leading of evidence in your defence

If the case is to continue you must decide whether you wish to give evidence. You do not have to give any evidence but if you do, you should give evidence first before any of your witnesses. Your evidence is given from the witness box and you must take the oath or affirm that you will tell the truth. You will be committing an offence if you do not tell the truth. Your evidence should be your version of what happened. You should speak slowly and clearly. It is probably a good idea to give your version in the order in which things happened. After you have finished the Procurator Fiscal will cross-examine you.

If you have any witnesses they will be placed on oath and you will ask them questions. You should first ask each witness to state his or her name, address, age and occupation. Try to ensure that your questions do not contain the answers as this will make your witnesses less reliable for the Justice. For example do not ask "Did you arrive at 10 o'clock?". Instead you should ask "At what time did you arrive?". Your witnesses will be cross-examined by the Procurator Fiscal and then you will have an opportunity to ask further questions on any matter which has arisen in the cross-examination.

Summary of the Evidence

The Procurator Fiscal is then invited to sum up. This allows him to comment on the evidence which had been led and to give his assessment of the verdict which should be reached. You are then invited to do the same. You should comment on what has been said. Do not give any further evidence yourself.

Decision or Verdict

The verdict will either be given immediately or the Justice may wish to leave the court to consider the evidence and/or to take legal advice from the Clerk. In order to find you guilty the Justice must be satisfied that there is no reasonable doubt that you committee the offence. If there is a reasonable doubt the appropriate verdict is one of not guilty.

If you are found guilty the Procurator Fiscal will give the Justice any previous convictions and make any further comments he wishes. You will then be asked if you want to say anything prior to sentence and you will also be asked about your financial circumstances. You will then be sentenced.

Appeal

You can appeal against the conviction or against the sentence, or both. You must do so within seven days from the date of the trial and the appropriate form can be obtained from the District Court office.

APPENDIX B

TRIAL PROCEDURE WITH UNREPRESENTED ACCUSED: AIDE MEMOIRE FOR JUSTICES

Before the trial commences ascertain if accused has any witnesses and if they are present.

1. **At beginning of trial**

Accused whilst still standing in the dock to be given general outline of procedure as follow:-

(a) Procurator Fiscal will examine his witnesses in turn and accused will have the right of cross-examination; Procurator Fiscal can re-examine;

(b) accused may give evidence and call witnesses all subject to cross-examination by Procurator Fiscal; accused may re-examine;

(c) Procurator Fiscal then sums up and then accused sums up;

(d) summing-up means commenting on the evidence led and is not an opportunity for giving more evidence.

2. **After first witness for prosecution has been examined by Procurator Fiscal**

The accused is told that he now has the opportunity to cross-examine the witness and should be given the following information:

(a) he should try to ask questions which can be answered by the witness and not just make statements;

(b) he should question the witness on any part of his evidence with which the accused disagrees, and that if he does not the court may conclude that he is not disputing it;

(c) he should ask the witness questions about anything that is going to be said by him or his witnesses in his defence which the witness is able to comment on.

Procurator Fiscal to re-examine.

3./

3. At close of prosecution case

If there is no possibility of a "no case to answer" plea, go on to 4. below. If there is any possibility, then explain the accused's right to make such a submission as follows:-

(a) he has the right to put the Fiscal's case against him to the test at this stage on the basis that there has been insufficient evidence to convict him, but on the basis that all the evidence which has been led is accepted;

(b) if the motion is successful he will be acquitted;

(c) if it is unsuccessful the trial will merely proceed without any prejudice to the final outcome;

(d) ask him if he wishes to make that submission.

4. Prior to the defence evidence being led

(a) Establish if accused is to give evidence himself. Explain that he has the right to remain silent if he so wishes. Explain that if he is to give evidence then it must be done under oath and subject to cross-examination by the Procurator Fiscal.

(b) If the accused is to give evidence and there are witnesses, explain that he should give evidence first.

(c) If the accused chooses to give evidence he goes into the witness box and is placed under oath. The Justice should then ask the accused to make his statement and when he is finished he should ask if he has anything else to say . If appropriate the Justice may ask the accused if he wishes to say anything about any particular aspect of the case.

(d) If the accused has witnesses he should be told to ask them questions to obtain the evidence to support his case. Procurator Fiscal to cross-examine. Accused to re-examine.

5. After all the defence evidence has been led

Explain to the accused that both parties can now sum up with the Procurator Fiscal going first. Explain that all he can do is comment on the evidence and not use the opportunity for giving more evidence.

GOOD PRACTICE GUIDELINE F

NUMBER OF HOURS JUSTICES SHOULD SIT ON THE BENCH PER ANNUM

Reason for Guideline:-

It is recognised that in order to maintain an appropriate level of competence Justices should undertake a minimum number of court duties. This guideline is designed to set an agreed standard.

1. Every bench serving Justice should undertake a minimum of between 4 and 10 court sittings per annum depending on the size of the court. Where a Justice is unable to fulfill 50% of his allocated court sittings in any particular year, the Justices Committee should investigate, and unless there is a valid reason the Justice should be removed from the court rota.

2. Where a period of twelve months has elapsed since a Justice last sat on the bench, he must attend a refresher training course and attend court as an observer prior to presiding on the bench on a subsequent occasion.

GOOD PRACTICE GUIDELINE G

MEETINGS OF JUSTICES COMMITTEES

Reason for Guideline:-

Justices Committees should meet often enough to be able to monitor their court and consider local and national business affecting their court. Non bench serving Justices may see things from a different perspective which can be useful.

Justices Committee should meet on a quarterly basis and/or when business requires it. Consideration should be given to having some non bench serving Justices on the Committee.

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GOOD PRACTICE GUIDELINE H

MONITORING OF THE COURT

The Justices Committee should carry out an annual/bi-annual audit of the facilities and personnel of the District Court. The overall efficiency and effectiveness of the court depends on all the players within the court.

1. MONITORING OF COURT ACCOMMODATION

The Justices Committee should carry out an annual audit of the facilities available at their District Court.

Reason for Guideline:-

This is recommended by the Scottish Consumer Council and Justice Charter - Members of the public and witnesses form an impression of a District Court from the accommodation provided. The recommendations contained in the Scottish Consumer Council report should be borne in mind by Justices Committees. There should be separate witness rooms for Crown witnesses and Defence witnesses. The Justices Committee should be satisfied that intimidation of witnesses does not take place within their District Court and that witnesses are kept fully informed.

2. MONITORING OF JUSTICES

Justices should be monitored on a regular basis in accordance with a scheme agreed by each Justices Committee, for the purposes of giving Justices objective information to assist in the development of their skills on the bench.

Reason for Guideline:-

Each Justice of the Peace sits alone or on a multiple bench. No Justice is able to see how his/her court operates from the public perception and is, therefore, unable to tell whether or not the interests of Justice, and indeed the community are being served. This view is obtained by someone sitting in the public benches. As there is no one body specifically set up for this purpose, fellow Justices and/or members of the Justices Committee for the commission area would be able to approach this problem.

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A monitoring scheme should be set up by each Justices Committee. In order for a fair appraisal to take place, it may be necessary for three or five Justices to view each serving Justice so that any clash of personalities or personal preferences could be eliminated. The Committee would consider all the reports and assess whether or not the presiding Justice requires specific training in one area, whether general training is required or that the Justice is carrying out his/her duties in an appropriate and competent manner.

If local Justices feel unable to monitor the Justices from their own area then adjacent commission areas could make arrangements for monitoring to be done by each other. It must be stressed that it is not the level of fine, or type of sentence that is being monitored, but the Justices ability to ensure that the accused and all other persons concerned within the court feel that there has been a fair hearing and that Justice has been seen to be done.

3. MONITORING OF COURT OFFICIALS

Justices Committees should monitor on a bi-annual basis the performance of all court officials operating on a regular basis within their District Court.

Reason for Guideline:-

The overall efficiency and effectiveness of the court depends on all the players within the court. The Bar Officer, the Clerk, the Procurator Fiscal, the Defence Agents, Police and the Social Workers appearing before the court all affect the smooth running of court proceedings. The Justices Committees should be aware of the part which each player should play. Any concerns which the Committee may have can be brought to the attention of the appropriate bodies. This could perhaps be done by setting up a District Court Liaison Committee with representatives from all bodies to meet annually or as required.

GOOD PRACTICE GUIDELINE I

PROCEDURE FOR REMOVING JUSTICES FROM THE ROTA

Reason for Guideline:-

A Justices Committee may find it difficult to remove a Justice from the rota where they have not encountered the problem before and there is no procedure set down which they can apply. This guideline would enable Justices Committees to address this problem by a procedure which was well known to all Justices and avoid any ill feeling. At present, there are no guidelines available from the Scottish Office for the use of Committees.

A suggested procedure is:-

1. Any complaint about a Justice of the Peace should be intimated to the Clerk by the Justices and/or assessors.

2. On the receipt of a complaint the Clerk will meet with the Chairman of the Committee to discuss the terms of the complaint. In the event of the complaint being against the Chairman the Clerk should discuss it with the Vice Chairman. They may decide to take any of the following courses of action:

(i) Note the complaint and take no further action.

(ii) To meet with the Justice concerned to discuss the complaint and resolve the matter.

If the matter cannot be resolved in (ii) above,

(iii) Draw the complaint to the attention of the Committee who would decide what action should be taken. At this stage the complaint should be put in writing and the Clerk would then write to the Justice advising him of the complaint.

3. Should the matter be drawn to the attention of the Committee they could take one of the following actions:

(i) Note the complaint.

(ii) Warn the Justice as regard to his/her future conduct detailed in the complaint.

(iii) Ask the Justice to attend before the Committee to explain the conduct complained of. Should the Committee decide to hold such a hearing they would require to give the Justice seven days notice of the hearing, advising him of the terms of the complaint or grounds on which the hearing is to be held.

4. Should the Committee decide to hold a hearing, having heard the Justice in explanation the Committee could take one of the following courses of action:

(i) Note the complaint and take no further action.

(ii) Reprimand the Justice and warn him regarding his future conduct.

(iii) Remove the Justice from the court rota for a period of up to one year, after which he will require to retrain.

(iv) Remove the Justice from the court rota for all time coming.

(v) Request the Secretary of State to remove the office of Justice of the Peace from him.

5. The hearing held in respect of paragraph 4 should be informal. The complainer should be asked if he wishes to attend to address the Committee on the terms of the complaint. The Justice of the Peace will be given the opportunity to respond. Both parties may then be asked questions by the Committee. Both parties should then be heard in conclusion. Both parties should be asked to leave the hearing while discussion takes place. Both parties should be invited to return to hear the Committee's decision. The decision will be intimated in writing to both parties.

6. The Clerk to the Justices Committee will require to intimate whatever action has been taken to the Secretary of Commissions.

DISTRICT COURTS ASSOCIATION

On the applicability of Article 6(1) of the European Convention on Human Rights to Justices of the Peace appointed under and in terms of the District Courts (Scotland) Act 1975

ADVICE

1.1 I refer to my instructing solicitors' letter of 26 November 1999 and to the associated Memorial for the Opinion of Counsel.

1.2 I am asked to advise, as a matter of urgency, on a number of questions relating to the applicability of Article 6(1) of the European Convention on Human Rights to Justices of the Peace appointed under and in terms of the District Courts (Scotland) Act 1975 in the light of the decision of the Justiciary Court of Appeal in *Starr & Chalmers v. Procurator Fiscal, Linlithgow* [1] on the independence of temporary sheriffs.

Human Rights in Scotland

2.1 As is well known, the Scotland Act 1998 has already effected a partial implementation of the Human Rights Act 1998 (which is not otherwise expected

[1] Appeal Nos. 1798/99, 1799/998, 2006/998 *Hugh Starrs and another v. Procurator Fiscal, Linlithgow*, unreported decision of the Appeal Court, High Court of Justiciary, 11 November 1999, available at www.scotcourts.gov.uk

to be brought into force until at least October 2000) as regards the acts (and arguably, too, the omissions[2]) of the Scottish Parliament and Executive. On 20 May 1999 the Scottish Executive became subject to Human Rights review under the Act. The Scottish Executive consists in: the First Minister; Scottish Ministers who have been appointed by the First Minister from among the members of the Scottish Parliament; and, crucially, the Scottish Law Officers, the Lord Advocate and the Solicitor General for Scotland, neither of whom need to be appointed from among the elected Members of the Scottish Parliament.

2.2 Once the Human Rights Act 1998 comes wholly into force, it will be unlawful for the courts in Scotland (as "public authorities" under that Act) to act in a way which is incompatible with a Convention right. In this interim period between the coming into force of the Scotland Act and the Human Rights Act, the courts are themselves **not** yet **directly** subject to the Convention. However, the Lord Advocate, as a member of the Scottish Executive, is so bound. The Lord Advocate's actions accordingly become subject to human rights scrutiny with effect from 20 May 1999 when his office was devolved and he became a member, *ex officio*, of the Scottish Executive. Accordingly since that date decisions made by the Lord Advocate as head of the Crown Office, and as such responsible for criminal prosecutions and the investigation of fatal accidents in Scotland, became subject to review by the courts under the provisions of Schedule 6 to the Scotland Act 1998 as raising "devolution issues".

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[2] See the decision of Lord Penrose in *Her Majesty's Advocate v. Bryan Robb*, unreported decision 20 September 1999 at page 5:

> "Section 6(6) of the Human Rights Act 1998 defines 'act' as including a failure to act, subject to certain exceptions. There is no express provision to that effect in the Scotland Act, but it is plain that, while the express qualifications are necessarily different in the context of the two Acts, the expressions must have the same general scope, and the word 'act' in Section 57(2) [of the Scotland Act] must include failure to act."

The requirements of an "independent and impartial tribunal" [3]

3.1 In *Hugh Starrs and another v. Procurator Fiscal, Linlithgow* [4] the complainers,. Hugh Starrs and James Chalmers, were successful in their claim that their prosecution on summary complaint before a Temporary Sheriff sitting in Linlithgow Sheriff Court contravened their rights under Article 6(1) of the European Convention to a trial before "an independent and impartial tribunal established by law". [5] The Appeal Court of the High Court of Justiciary, consisting in a three judge bench composed of the Lord Justice Clerk Lord Cullen, Lord Prosser and Lord Reed, were unanimous in their finding that the terms and conditions under which Temporary Sheriffs held their appointment, namely on commissions from the Lord Advocate of one year only, renewable annually at his pleasure, was not compatible with the requirements that judges be seen to be independent of the Executive and, in particular, of the prosecution service. Accordingly, in continuing to bring prosecutions before such Temporary Sheriffs following the coming into force in Scotland of the relevant provisions of the European Convention, the Lord Advocate was acting in a manner incompatible with the Convention.

3.2 In the appeal in *Starr and Chalmers* the Appeal court was advised by the Solicitor General that "**the Lord Advocate expected the procurator fiscal to be**

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[3] See, generally, R. Stevens "A loss of innocence ?: Judicial Independence and the Separation of Powers" (1999) 19 *Oxford Journal of Legal Studies* 365-402 for a review of the case law and arguments on the implications of the doctrine of the separation of powers on and for the judicial office.

[4] Appeal Nos. 1798/99, 1799/998, 2006/998 *Hugh Starrs and another v. Procurator Fiscal, Linlithgow*, unreported decision of the Appeal Court, High Court of Justiciary, 11 November 1999, available at www.scotcourts.gov.uk

[5] Article 6(1) of the European Convention on Human Rights is in the following terms:

> "In the **determination of his civil rights and obligations** or **of any criminal charge** against him, everyone is entitled to **a fair and public hearing** within reasonable time by **an independent and impartial tribunal** established by law. Judgments shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

bound by the Convention as he is, and that he would not take any point that something which was done by the procurator fiscal was not his act as Lord Advocate and as a member of the Scottish Executive".

3.3 On the facts of that case, then, the decision of the fiscal to continue, on 8 July 1999, a prosecution which was originally begun **before** the Lord Advocate had become subject to the Convention constituted a reviewable act for the purposes of the human rights provisions of the Scotland Act. The court was accordingly willing to consider the substance of the challenge, namely whether or not it was compatible with the accused's Article 6(1) rights for that prosecution to be brought before a sheriff appointed on a temporary basis.

3.4 The Court of Appeal judges in *Starr and Chalmers* were at pains to underline the fact that they were considering the question of the impartiality and independence of temporary sheriffs in the abstract and as a matter of principle. Accordingly no actual evidence of any form of partiality or bias in favour of the prosecution was needed for the question of the possible breach of the accused's Article 6(1) rights to be raised. What was important, then, was appearances – justice had to be seen to be done, and to ensure impartiality as viewed objectively there must exist "sufficient guarantees to exclude any legitimate doubt in this respect." [6]

3.5 Section 11 of the Sheriff Courts (Scotland) Act 1971, which serves as the statutory basis for the appointment of temporary sheriffs, was examined in detail. Section 11(2) allowed the Secretary of State to appoint temporary sheriffs to act as sheriff where a sheriff was unable to perform his duties as a sheriff because of illness, or where there was a vacancy for a sheriff, or where it appeared to the Secretary of State that for any other reason it was "expedient so to do in order to avoid delay in the administration of justice in that sheriffdom". Section 11(4) provides, baldly, that "the appointment of a temporary sheriff principal or of a temporary sheriff

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[6] *Findlay v, United Kingdom* (1997) 24 EHRR 221 at paragraph 73

shall subsist until recalled by the Secretary of State". There was accordingly no security of tenure for anyone appointed temporary sheriff.

3.6 The court was then advised as to current practice in the appointment and continued engagement of persons as temporary sheriffs. Although nominally a matter for the Secretary of State (and now the Scottish Ministers), in practice the Lord Advocate was said to play a "crucial role" in these appointments. Appointments were made, normally in December, and always for one year only. A temporary sheriff would, in the normal run of things, expect to be re-appointed at the end of each year if he or she were still willing to serve in this capacity, but there was no guarantee or right of re-appointment, and indeed no guarantee that his or her services would be used during any period of appointment. It was accepted by the Solicitor-General that "service as a temporary sheriff could be regarded as providing suitability for a permanent appointment" and that "temporary sheriffs formed in effect a pool from which permanent appointment might be made, although not all permanent appointments came from that pool" Lord Cullen noted the following, perhaps crucial description of the post:

> "The Solicitor General was unable to explain why a period of one year had been chosen. He accepted that, in practice, the system was not one of 'temporary' appointment (other than in the sense that the appointment were formally for a period of one year, and lacked security of tenure) but was one of **part-time appointments which were intended to be long-term**."

3.7 In *Starr and Chalmers* the Appeal Court then looked at a selection of cases from the European Court of Human Rights to determine whether temporary sheriffs could be said to constitute "impartial and independent" tribunals for the purposes of Article 6(1). Having regard to the manner of appointment of temporary sheriffs by the head of the prosecution service, their one year renewable term of office, their lack of security of tenure, their lack of financial security once appointed (in that they could be sidelined and offered no work), the lack of any statutory

safeguards in relation to the recall of their appointment, and the possibility of susceptibility to pressure insofar as they ultimately sought from the Lord Advocate a permanent appointment with security of tenure, the appeal court judges concluded that temporary sheriffs under the current regime did not present the "appearance of independence" necessary to maintain individual and public confidence in the administration of justice. As such, temporary sheriffs as an institution, and without any suggestion of any actual subjective bias on the part of individual acting as temporary sheriffs, could not be said to constitute an independent and impartial tribunal for the purposes of Article 6(1) of the Convention. Accordingly, the decision of the procurator fiscal to continue prosecutions before temporary sheriffs constituted action incompatible with the accused's Article 6(1) fair trial rights. The suggestion that the fact that temporary sheriffs were able to continue to practice law constituted further grounds for questioning their impartiality or independence was, however, rejected by the court

3.8 Both Lord Cullen and Lord Reed, perhaps rashly, went on to express their doubts as the *vires* of the practice which had grown up over the years of using temporary sheriffs as a permanent supplement to the shrieval bench appointed in order to deal with a substantial part of the routine work of the sheriff courts throughout Scotland rather than as *ad hoc* engagement to meet a particular emergency need, as appeared to be envisaged by the terms of Section 11 of the 1971 statute. Lord Cullen expressed his doubts as to the *vires* of the imposition of a one year term of appointment for temporary sheriffs as there seemed to be no statutory basis for the imposition of any such term or condition to the appointment. He noted:

> "Rather than a control over numbers, the use of the one year term suggests a reservation of control over the tenure of office by the individual, enabling it to be brought to an end within a comparatively short period. This reinforces the impression that the tenure of office by the individual temporary sheriff is at the discretion of the Lord Advocate. It does not, at least *prima facie*, square with the appearance of independence."

3.9 The recent decision of the Employment Appeal Tribunal in *Smith v. DTI* [7] also discusses the question of the requirements of Article 6(1) and finds Employment Tribunals, at least in cases involving the Secretary of State for Trade and Industry (or President of the Board of Trade), wanting on the grounds that as presently established and administered by the employment tribunal service, an agency of the Department of Trade and Industry the Tribunal members could be said to be sufficiently independent from the Secretary of State to constitute objectively independent and impartial tribunals for the purpose of Article 6(1). Leave was granted for the matter to be appealed to the English Court of Appeal, but I do not know whether any such appeal has been marked.

The implications of *Starrs and Chalmers*

4.1 On a practical level, a close reading of the ruling in *Starrs and Chalmers* indicates that it does not mean the automatic end of all part-time judicial appointments. The Appeal Court has held that lawyers continuing in practice while occasionally taking on cases does not of itself compromise their objective appearance of independence and impartiality. What it will require in any judicial appointment which is to accord with the requirements of Article 6(1), whether it be the members of an employment tribunal, immigration adjudicator or stipendiary magistrate, is at least the following:

(i) an element of security of tenure involving procedural safeguards against dismissal;

(ii) any appointment for a specific limited term would have to be for a reasonable period and certainly greater than one year;

(iii) guaranteed levels of work (and payment, if the work is remunerated);

[7] EAT 741/97 *Smith v. Secretary of State for Employment* unreported decision of 11 October 1999, digested in [1999] *Times Law Reports* 694

(iv) no suggestion that their performance in any part-time appointment is being used as a probationary period for any possible full-time permanent appointment; and

(v) a fair and open method of appointment.

4.2 The question that arises in the present case is the extent to which Justices of the Peace pass the *Starr & Chalmers* criteria.

Appointment and Removal of JPs

4.3 In relation to the general method of appointment of Justices of the Peace, I am advised that appointments as JPs are made by the First Minister on the basis of nominations made to him by local Justices of the Peace Advisory Committees (JPAC) who follow guidance given them by the First Minister in respect of the qualities sought and the factors which would disqualify a candidate's appointment. In practice the First Minister rarely, if ever, rejects a nomination duly put forward by the Advisory Committee which effectively has a discretion to nominate whom it chooses within the general guidelines given to it. I am not advised how and by whom the Justice of the Peace Advisory Committee is made, and how they go about the process of nominating particular candidates for appointment.

4.4 Once appointed by the First Minister under Section 9 of the District Courts (Scotland) Act 1975, Justices of the Peace hold the office for life, although they are no longer entitled to sit on the bench after the age of seventy, being then placed on the Section 15 supplemental list and limited to carry out "signing duties". Section 9(2) provides that justices may only be removed by specific instrument on behalf of and in the name of Her Majesty under the hand of the First Minister.

4.5 In addition Section 11 of the 1975 Act makes provision for the nomination by local authorities of "*ex officio* Justices" from among their elected Members. Section 11, so far as relevant, provides as follows:

> (2) "Each local authority may nominate up to one quarter of their members to serve as *ex officio* justices for their area, and **any person so nominated shall hold office as *ex officio* justice** from the date on which the local authority intimate their nomination to the Secretary of State and shall continue as such for the period during which he remains a member of the authority and continues to retain the authority's nomination.
>
> ...
>
> (5) Each local authority shall intimate to the Secretary of State the date on which a person duly nominated under subsection (2) above ceases to be a member of the authority or on which his nomination is terminated by the authority
>
> ...
>
> (7) A person holding office as an *ex officio* justice by virtue of subsection (2) above shall hold office as if appointed in accordance with subsection 9(2) of this Act as a justice for the commission area concerned"

4.6 It would appear, then, that the appointment of *ex officio* justices may be terminated by the local authority withdrawing their nomination, or their ceasing to be an elected member of the local authority, or by the First Minister removing him from office in the same manner and circumstances as he might remove a Justice appointed by him under the provisions of Section 9.

Rule against bias – nemo iudex in causa sua [8]

4.7 Section 12 of the 1975 Act provides that a justice of the peace who is also a member of the local authority may not act as a member of the district court in any proceedings involving the authority or any officer or committee thereof, other than proceedings involving the district prosecutor

4.8 Further, Section 13 provides that where a solicitor is a justice of the peace for a particular commission area, in general neither she nor her partners, staff or employees may act directly or indirectly as a solicitor in or in connection with any proceedings before either a district court or licensing court of court of appeal for that area.

Guaranteed levels of work for JPs

4.9 Section 16(1)(b) of the 1975 Act provides that Justices Committees for each Commission Area shall approve the duty rota of the justices within their area. These committees are constituted by justices from the area elected each year by their fellow justices, with any stipendiary magistrate entitled to sit as a member of the committee *ex officio*.

4.10 The annotations to the 1975 Statute notes that "the provisions in subsection 16(1)(b) by which the justices' committee is to approve the duty rota of justices would enable the justices committee to prevent unsuitable justices from sitting on the bench".

[8] For an example of the application to the District Court of this common law principle, and the principle that justice should be seen to be done, see *Tennant v. Houston (Lanark Procurator Fiscal)* 1986 SCLR 556

Financing of District Courts

4.11 Section 23(1) provides that all expenses in connection with the district court and justice of the peace business shall be defrayed by the local authority concerned. Section 23(2) provides that "except where otherwise provided, all fines imposed in the district court shall accrue to the local authority concerned.

4.12 It would appear, then, that the district court is financed partly by fines imposed and collected by the courts, partly by income from fixed penalties and partly direct government grant. I am not advised as to the relative breakdown of these relevant sources of income but am informed that over half the total fines collected is remitted to central government by virtue of unspecified rules on the destination of fines.

Position of Clerks to the District Court

4.13 In contrast to sheriff clerks, clerks to the District Court are required by Section 7(1) of the 1975 Act to be qualified as either an advocate or a solicitor. These district court clerks are appointed and employed by the local authority, whether on a full-time or part-time basis and act as clerk and "legal assessor" to the court.

4.14I understand that the role of the clerk is not to participate in the ascertaining of fact or the ultimate decision making process of the justices but is simply to advise them as to the law if required. [9] In judicial review proceedings it has been held that it is not open to the clerk to the licensing board acting on his own to determine issues of the competency of applications for licences, such legal matters being questions to be referred to and **decided upon** by the licensing board. [10]

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[9] See *Matts v. Cumming (Director of Legal Services, Glasgow)* 1999 SCLR 249

[10] See, for example: *Docherty v. Leitch* 1998 SLT 374, OH *per* Lord Bonomy ; *Datelock Ltd. v. Bain* 1998 SLT 381, OH, *per* Lord Gill; and *Tait v City of Glasgow District Licensing Board* 1987 SLT 340, OH *per* Lord Clyde

Independence and impartiality in the context of the legal system as a whole

5.1 One of the more surprising, and unsatisfactory, aspects of the decision in *Starr & Chalmers* is that it was not argued on behalf of the Lord Advocate that, however one decided on the independence and/or impartiality of the temporary sheriffs, Article 6(1) of the Convention would not have been breached on the grounds that the decision of the temporary sheriffs, in both criminal and civil matters could be appealed and reviewed on their whole merits to a properly constituted independent and impartial tribunal within the court system, in the form of the Sheriff Principal or the Inner House in civil matters, and the Appeal Court of the High Court of Justiciary in criminal issues. In this way the appearance of justice being seen to be done was being preserved because any allegation of actual subjective (and indeed unconscious) bias could properly be raised on appeal.

5.2 In *Lauko v. Slovakia* [11] a case concerning the lawfulness of a State entrusting the prosecution and punishment of minor offences to administrative authorities the heads of which were appointed by the executive and whose officers had the status of salaried employees, the European Court of Human rights held that the lack of any guarantees against outside pressures, the absence of any appearance of independence, and the impossibility of appealing against the decision to the general court system constituted a breach of the Article 6(1) fair trial guarantee. The Strasbourg Court reviewed its relevant case law in the following terms:

> "63. The Court [of Human Rights] recalls at the outset that the right to a fair trial, of which the right to a hearing before an independent tribunal is an essential component, holds a prominent place in a democratic society.[12] In order to determine whether a body can be

[11] *Lauko v. Slovakia*, judgment of 2 September 1998, EctHR, Application 26138/95 before the Commission, decision of 30 October 1997 and *Kadubec v. Slovakia*, judgment of 2 September 1998, EctHR, Application 27061/95 before the Commission, decision of 30 October 1997. See too the admssibility decision of the Court of Human Rights in Application 29021/95 *J. K. v. Slovakia*, judgment of 25 May 1998, EctHR. Both decisions are accessible at www.dhcour.coe.fr/hudoc

[12] See, *mutatis mutandis*, the *De Cubber v. Belgium* judgment of 26 October 1984, Series A no. 86, p. 16, § 30 *in fine*.

considered to be "independent" of the executive it is necessary to have regard to [i] the manner of appointment of its members and the duration of their term of office, [ii] the existence of guarantees against outside pressures and [iii] the question whether the body presents an appearance of independence [13].

...

While entrusting the prosecution and punishment of <u>minor</u> offences to administrative authorities is <u>not</u> <u>inconsistent with</u> <u>the Convention</u>, it is to be stressed that the person concerned must have an opportunity to challenge any decision made against him before a tribunal that offers the guarantees of Article 6. [14] "

5.3 The decision in *Lauko* and its associated cases [15] make a clear distinction between the **seriousness of offences** brought before a particular criminal tribunal and the implications that this has as regards Article 6(1) ECHR. It is quite clear from *Lauko* and earlier cases that as regards the prosecution and punishment of **<u>minor</u> criminal offences** there is no breach of Article 6(1) if this is carried out by a tribunal such as an administrative body which is not properly independent of the executive **<u>provided</u>** that there is provision for proper review of any such decision on appeal by a properly constituted independent and impartial tribunal. As the Court of Human Rights noted in its 1984 decision in *Öztürk v. Germany*:

"Having regard to the large number of minor offences, notably in the sphere of road traffic, a Contracting State may have good cause for relieving its courts of the task of their prosecution and punishment.

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[13] See, *inter alia*, the *Le Compte, Van Leuven and De Meyere v. Belgium* judgment of 23 June 1981, Series A no. 43, p. 24, § 55, and the *Campbell and Fell v. the United Kingdom* judgment of 28 June 1984, Series A no. 80, pp. 39–40, § 78

[14] See the *Öztürk v. Germany*, judgment of 21 February 1984, Series A no. 73, p. 19, § 52 , pp. 21–22, § 56

[15] *Kadubec v. Slovakia*, judgment of 2 September 1998, ECtHR, *Reports of Judgments and Decisions* 1998-VI, Application 27061/95 before the Commission, decision of 30 October 1997 and the more recent admissibility decision of the Court of Human Rights in Application 29021/95 *J. K. v. Slovakia*, judgment of 25 May 1998, ECtHR. Both decisions are accessible at www.dhcour.coe.fr/hudoc

> Conferring the prosecution and punishment of minor offence on administrative authorities is not inconsistent with the Convention provided that the person concerned is enabled to take any decision thus made against him before a tribunal that does offer the guarantees of Article 6" [16]

5.4 The Appeal Court in *Starrs and Chalmers* appear not to have been referred to this line of jurisprudence from the European Court of Human Rights and appear to have proceeded on the assumption that in **every** criminal trial the tribunal at first instance had to possess all the characteristics of independence and impartiality required by Article 6(1) ECHR. It is, however, arguable, from the decision in *Findlay*, a case concerning the procedures followed in Courts Martial, that such a requirement under the Convention may be made only in relation to **serious** criminal matters. As the Human Rights Court stated there:

> "The defects referred to ... [could not] be corrected by any subsequent review proceedings. [17] Since the applicant's hearing was concerned with serious charges classified as 'criminal' under both domestic and Convention law, he was entitled to a first instance tribunal which full met the requirements of Article 6(1)." [18]

5.5 Secondly, the possibility that the appeal process might remedy any of the perceived defects in the standing of temporary sheriffs even where they are hearing serious criminal charges was not, apparently explored in *Starrs and Chalmers*. In its 1984 judgment in *De Cubber v. Belgium*, the European Court

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[16] *Öztürk v. Germany*, judgment of 21 February 1984, Series A no. 73, p. 19, § 52 , pp. 21–22, § 56

[17] The applicant's sentence had been confirmed by the confirming officer (who was also the convening officer of the Court Martial) and his requests for further internal review to the Deputy Director General of Personal Services and the Defence Council had been rejected. His application for leave to move for judicial review of these was also unsuccessful before the Divisional Court on the basis that the court martial had been conducted fully in accordance with the provisions of the Army Act 1955 and there was no evidence of improper conduct or hostility on the part of the judge advocate.

[18] *Findlay v, United Kingdom* (1997) 24 EHRR 221 at paragraph 73

of Human Rights found that an individual who had been tried and found guilty of forgery offence had not received a fair trial under Article 6(1) because one of the judges of the court which convicted him had previously acted as investigating magistrate in the same case. Even in this case, the question of the possibility of remedying these defects on appeal was raised and the Court dealt with the matter thus:

> "At the hearing the Commission's delegate and the applicant's lawyer raised a further question, concerning not the applicability of Article 6(1) but rather its application to the particular facts: had not the subsequent intervention of the Ghent Court of Appeal 'made good the wrong' or 'purged' the first-instance proceedings of the 'defect' that vitiated them ?
>
> The Court considers it appropriate to answer this point although the Government themselves did not raise the issue in such terms.
>
> **The possibility certainly exists that a higher or the highest court might, in some circumstances, make reparation for an initial violation of the Convention's provisions: that is precisely the reason for the existence of the rule of exhaustion of domestic remedies contained in Article 26.** Thus the *Adolf* judgment of 26 March 1982 noted that the Austrian Supreme Court had 'cleared ... the applicant of any finding of guilt' an applicant in respect of whom a District Court had not respected the principle of presumption of innocence laid down by Article 6(2). [19]
>
> The circumstances of the present case were, however, different. The particular defect in question did not bear solely upon the conduct of the first instance proceedings: its sources being the very composition of the Oudenaarde criminal court, the defect involved matters of internal

[19] *Adolf v. Austria* 4 *European Human Rights Reports* 313 at paragraphs 38-41.

organisation and the Court of Appeal did not quash on that ground the judgment of 29 June 1979 in its entirety."

5.6 Thus, it seems to me that the judgment of the Appeal Court in *Starrs and Chalmers* might properly be subject to appeal on at least two grounds: firstly, that question of the possibility of the existing appeal process case being sufficient to purge any defects in the independence of Temporary Sheriffs at first instance; *et separatim* on the grounds that the Appeal Court did not consider the distinction between minor and serious criminal matters which might have allowed the retention of temporary sheriffs for the hearing of the former category of cases.

Conclusion

6.1 In *Her Majesty's Advocate v. David Shields Montgomery and another* Lord Rodger, the Lord Justice General noted as follows:

> "[P]utting the matter generally, he [the Lord Advocate] and his representatives have no power to act in a manner which would prevent an accused person from having a fair trial. **But it was <u>always</u> the case that a Lord Advocate and his representatives were not entitled to act oppressively, in a manner which would prevent an accused person from having a fair trial**: if they did, the court could intervene and sustain a plea of oppression in bar of trial. ... **While the authority now given to Convention rights in our law means that, when considering what constitutes a fair trial, the court <u>must</u> take account of Convention law and jurisprudence, the issue will still fall to be dealt with under our existing procedures.**" [20]

[20] Appeal 557/99 *Her Majesty's Advocate v. David Shields Montgomery and another* High Court of Justiciary *qua* Criminal Appeal Court, unreported decision of 14 September 1999, accessible at www.scotcourts.gov.uk

6.2 Against that background, and in the light of the case law outlined above, I would answers my instructing solicitors' questions in the order and numbering set out in the Memorial in the following terms:

(i) On the face of it, the fact that Justices of the Peace are appointed by the First Minister does not contravene the requirements of independence and impartiality of the judiciary set out in Article 6(1) ECHR, and I would agree with the tenor of the remarks on this point as set out by agent in Paragraph 3 of their memorial. I have, however, insufficient information as to the composition and procedure of the Justice of the Peace Advisory Committee to be able to assess whether the role played by them in the nomination of justices is compatible with this Article. Similarly in the absence of further information as to how and on what grounds any termination of appointment or withdrawal of commission has a justice may be carried out by the First Minister I cannot comment as to whether there are sufficient safeguards for security of tenure for justices of the peace so as to allow them to function properly independently and impartially of the Executive. [21]

(ii) The annotation to the 1975 statute indicate that the provisions allowing, effectively, for the appointment of *ex officio* justices

[21] In *Bryan v. UK* A355/a (1996) 21 EHRR 342, the European Court of Human Rights noted as follows at paragraph 38 of the judgment:

> "[T]he very existence of this available power of the Executive whose on policies may be in issue [to revoke the power of a planning inspector to decide a case] is enough to deprive the inspector of the requisite appearance of independence notwithstanding the limited exercise of the power in practice"

Compare, however, with *Campbell and Fell v. UK* A/80 (1985) 7 EHRR 165 at paragraph 80 where the Strasbourg court found that although the Home Secretary could require a prison Board of Visitors member to resign, this would be done in only the most exceptional circumstances and as such the power was not such as to compromise their independence. See, also, *McMichael v. UK* A/307/B (1995) 20 EHRR 205 at paragraphs 63 and 114 in relation to the removability of members of Children's Panels.

by local authorities from among the ranks of the elected councillors was controversial and "strenuously opposed on the grounds that it would lead to politically motivated appointments". My understanding of current practice in many continental European jurisdiction in relation to high judicial appointment is that politically based appointments are regarded as normal and acceptable. The main problem with *ex officio* justice, as I see it, is not their appointment but rather that there are no legal or conventional restraints on the possible termination of their appointment by the local authority. There is then a lack of guarantees against the possibility of outside pressure and little appearance of independence in the case of ex officio justices of the peace appointed from the ranks of serving councillors.

(iii) I do not think that the approval of duty rota provision of Section 16(1)(b) raises insurmountable Article 6(1) ECHR problems. It seems to me to be a matter required for administrative convenience. The problem identified in the *Starrs and Chalmers* case in relation to possible "side-lining" of temporary sheriffs lay in the fact, as I read the judgment, that a temporary sheriff is only paid if and when he or she is asked to appear therefore if not asked to appear he or she will (potentially) suffer financially. Where however, as in the case of justices of the peace, there is **no** link between work done and any remuneration (other than refund of expenses incurred) it does not seem to me that the possibility that a justice could be dropped from the rota does not have implications for their independence or impartiality.

(iv) I should need more information on the existence of any direct link between fines imposed and money used for the running of the District Courts. As I understand matters, the local authority has the responsibility of bearing the costs of providing and running the district court. [22] Fines imposed in the District Court accrue to the local authority concerned in the running of the court, unless contrary provision is made. It would seem then to be within the discretion of the funding local authority whether or not to use such monies as accrue from fines to offset the running costs of the district court. I do not understand there to be any specific hypothecation of these amounts, however, and I would have thought that the duty of the local authority to maintain a functioning district court applies and may be enforced regardless of the levels of fines gathered from it. Accordingly I cannot see that Article 6(1) ECHR considerations impact on this matter.

(v) Specific provision is made in Section 12 of the 1975 Act for the avoidance of bias in relation to cases involving the Justices of the Peace and local authorities of which they are members or by which they are employed or otherwise associated. In addition to the principle that justice should be seen to be done in such cases, I do not see that Article 6(1) adds or detracts from the existing law on this matter and the Justices should consider any appearance of conflict on a case by case basis.

(vi) It seems to me that the signing of warrants constitutes participation in the judicial process and accordingly should be subject to the same rules against bias and the principle of *nemo judex in causa sua* as apply in relation to court hearings, that is

[22] See *Strathclyde Regional Council v City of Glasgow District Council* 1989 SLT 235, IH

to say that members, employees and associates of the local authority should not be involved in issuing warrants in cases involving the local authority so as to avoid the appearance of partiality and maintain confidence in the independence of the court system. [23]

(vii) The question of the role of the clerk in cases in which the local authority employing him are also a party is a difficult one. If the clerk clearly keeps to his or her function of advising on the law only and not participating in the finding of the facts or in the final decision then it is arguable that the requirements of Article 6(1) are being adhered to. In a case like this, it seems to me that the best policy is one of openness with the advice on the law given by the clerk being made available to the parties as well as to the justices. Such a course would have the advantage of allowing any mis-direction or wrong advice on the law to be corrected on appeal, thereby preserving the appearance of impartiality and independence.

6.3 In general, it seems to me that the best way of avoiding claims of possible breach of Article 6(1) is to have as open a procedure as possible and emphasise the possibility of an appeal with the judicial structure to a tribunal which has all the characteristics of independence and impartiality required by Article 6(1) ECHR. It is clear from the jurisprudence of the Strasbourg in *Lauko v. Slovakia* and associated cases that minor criminal matters may be assigned to first instance

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[23] See, for example, *Belilos v. Switzerland* A/132 (1988) 10 EHRR 466 at paragraph 67 where the Strasbourg Court commented in a case a fine imposed by a single member of the Police Board who was himself a seconded police officer, albeit that he was in this capacity not subject to orders, took a judicial oath and could not be dismissed:

> "the ordinary citizen will tend to see him as a member of the police force subordinate to his superiors and loyal to his colleagues. A situation of this kind may undermine the confidence which must be inspired by courts in a democratic society. In short the applicant could legitimately have doubts as to the independence and organisational impartiality of the police board."

tribunals which do not meet all the requirements of Article 6(1) provided always that there is a proper opportunity for appeal/review of these decisions by higher courts. The required standard of such higher court review (whether it is required to view findings in fact or limited to errors in law) is not entirely clear from the Strasbourg jurisprudence. It is arguable that so long as the appeal or reviewing court in question can properly consider the substance of the alleged violation of the appellant's Convention rights by the tribunal at first instance, then this would constitute sufficient compliance with the requirements of the Convention.

6.4 The European Court of Human Rights has considered the adequacy of judicial review as a remedy against the decisions of a public authority in the context of Article 13 ECHR, the effective remedy provision. In *Vilvarajah and Others v. United Kingdom* [24] the Court of Human Rights held that proceedings by way of judicial review afforded an effective remedy (for the purposes of Article 13 ECHR) to asylum applicants who were arguing that their return to their country of origin would expose them to the risk of torture or to inhuman or degrading punishment or treatment contrary to Article 3 ECHR. The Strasbourg Court held that in the context of domestic judicial review proceedings the applicants were able to, and did, advance the substance of the Convention arguments before the national courts which were able to carry out an independent assessment (applying a "most anxious scrutiny") of the lawfulness of an individual's extradition or expulsion in the context of Article 3. [25] In these cases, the Court of Human Rights found that the test applied by the domestic courts in applications for judicial review of decisions by the Secretary of State in extradition and expulsion matters coincided with the Strasbourg Court's own approach under Article 3 of the Convention. [26] More recently, however, in the Gay Service Personnel challenge, *Smith and Grady v. United Kingdom*, [27] the European Court of Human

[24] *Vilvarajah and Others v. United Kingdom* judgment of 30 October 1991, A/215 (1992) 14 EHRR 248

[25] See, too, *Soering v. United Kingdom* judgment of 7 July 1989, Series A/161 (1989) 11 EHRR 439

[26] See, to like effect, the recent admissibility decision in Application 42225/98 *JED v. United Kingdom*, unreported decision of 2 February 1999

[27] *Smith and Grady v. United Kingdom*, unreported decision of 27 September 1999, ECtHR

Rights held that the threshold of irrationality or unreasonableness in judicial review proceedings was "placed so high that it effectively **excluded <u>any</u> consideration by the domestic courts** of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the Court's analysis of complaints under Article 8 of the Convention".

6.5 Thus insofar as the courts to whom appeal lies from decisions of the district court can consider allegations of breach of Article 6(1) by reason of the appearance of bias or the suspicion of subjective partiality, then the District Courts may be said to be properly integrated into an independent and impartial court system such as to prevent the appearance of violation of the Convention rights of those appearing before it. It has too be stressed that this is a line of argument which was **not** put to the Appeal Court in *Starrs and Chalmers* but it may be that if that decision is appealed to the Privy Council, then that court may consider the whole matter.

6.6 I trust that the foregoing answers agents' queries and concerns at this stage. My instructing solicitors should, however, not hesitate to contact me if there is any matter arising from this note on which I might usefully further advise, whether in writing or at a consultation.

30 November 1999

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AIDAN O'NEILL QC

DISTRICT COURTS ASSOCIATION

On the applicability of Article 6(1) of the European Convention on Human Rights to Justices of the Peace appointed under and in terms of the District Courts (Scotland) Act 1975

FURTHER ADVICE

1.1 I refer to my instructing solicitors' letter of 17 January 1999 and to the associated Supplementary Memorial for the Opinion of Counsel. I apologise for my delay in replaying. Further to my Advice of 30 November 1999 I am asked a number of additional questions relative to the inter-relationship of Human Rights legislation with the current practice and set-up of the District Courts in Scotland.

1.2 I refer to my Advice of 30 November 1999 for the full background to this matter and in this Further Advice I will restrict myself to answering the supplementary questions specifically put to me. I shall deal with these questions in the order put to me in the Supplementary Memorial.

Position of clerk to the District court in general prosecutions

2.1 The position of the clerk is to act as the legal assessor to the court and to advise the Justices as to the relevant law when coming to a decision, all as set out in the

Code of Practice between Clerks and Justices which in set out on page 6 of the Good Practice Guideline prepared by the District Courts Association.

Position of clerk to the District court in prosecutions in matters within the jurisdiction of the local authority

3.1 The duty of the clerk remains in all cases to advise the court properly and conscientiously as to the relevant law, no matter the parties involved. The underlying suggestion in question put to me seems to be that the fact that the clerk is employed by the local authority may be thought to compromise the appearance of objectivity when advising the justices in matters within the jurisdiction of the local authority.

3.2 In *Sramek v. Austria* [1] the Strasbourg court considered a claim to the effect that an Austrian land court, the Regional Real Property Transactions Authority, made up of "(a) a person experienced in real property transaction matters, who shall act as chairman; (b) a member of the judiciary (*Richterstand*); (c) a legally qualified civil servant from the Office of the Regional Government, with training in real property transaction matters, who shall act as *rapporteur*; (d) a senior civil servant from the Agricultural Services Department (*technischer Agrardienst*) of the Office of the Regional Government; (e) a senior civil servant from the Forestry Services Department (*forsttechnischer Dienst*); (f) an agricultural expert; and (g) a lawyer (*Rechtsanwalt* or *Notar*)" did not constitute an independent and impartial tribunal for the purposes of Article 6(1) ECHR.

3.3 In holding that the applicant's Convention rights to an independent and impartial had indeed been infringed, the Strasbourg Court made the following observations:

38. "**Although the power of appointing the members - other than the**

[1] *Sramek v. Austria* A/84 22 October 1984 (1984) 7 EHRR 351

judge - is conferred on the *Land* Government, this does not suffice, of itself, to give cause to doubt the members' independence and impartiality: they are appointed to sit in an individual capacity and the law prohibits their being given instructions by the executive (see paragraph 26 above).

39. As far as the membership of the "tribunal" was concerned, the Regional Authority was composed of a farmer, who was the mayor - elected by universal suffrage - of a municipality in the Tyrol, as chairman; a judge of the Innsbruck Court of Appeal; another farmer, sitting as an agricultural expert; a lawyer; and three civil servants from the Office of the Land Government, one of whom acted as *rapporteur* (see paragraphs 13 and 24 above).

40. No question arises as to the independence and impartiality of the judge. The same applies to the agricultural expert. As for the lawyer, the applicant argued that he might on occasion have received instructions from the *Land* Government if he had been engaged to represent them in legal proceedings. However, even if he had – an eventuality that can in fact be discounted since it does not appear to have materialised in the present case -, his impartiality could not be called in question on that score alone.

Neither is there any problem as regards the fact that the person who, by reason of his experience in real estate matters, acted as chairman of the Regional Authority happened to be a mayor. It is true that the municipalities in Austria exercise their powers - whether in their own right or under delegation - subject to the supervision of the *Land* or the Federation (see Articles 119 and 119 (a) of the Constitution and paragraph 77 in fine of the Commission's report); however, it cannot be concluded from this that their mayors do not act independently in matters which - like those involved here - fall outside the ambit of those powers.

41. There remain the three civil servants from the Office of the *Land*

Government who, in accordance with the 1970/1973 Act (see paragraph 24 above), were, and had to be, included amongst the members of the Regional Authority.

...

[T]he *Land* Government, represented by the Transactions Officer, acquired the status of a party when they appealed to the Regional Authority against the first-instance decision in Mrs. **Sramek**'s favour, and in that one of the three civil servants in question had the Transactions Officer as his hierarchical superior (see paragraph 12 above). That civil servant occupied a key position within the Authority: as *rapporteur*, he had to set out and comment on the results of the investigation and then to present conclusions; the secretariat was provided by his department, namely division III b. 3 (see paragraphs 13 in fine, 14 and 28 in fine above).

As was pointed out by the Government, the Transactions Officer could not take advantage of his hierarchical position to give to the *rapporteur* instructions to be followed in the handling of cases (see paragraph 26 above), and there is nothing to indicate that he did so on the present occasion.

42. Nonetheless, the Court cannot confine itself to looking at the consequences which the subordinate status of the *rapporteur vis-à-vis* the Transactions Officer might have had as a matter of fact. In order to determine whether a tribunal can be considered to be independent as required by Article 6 (art. 6), appearances may also be of importance (see, *mutatis mutandis*, the above-mentioned Campbell and Fell judgment, Series A no. 80, pp. 39-40, para. 78, and the Piersack judgment of 1 October 1982, Series A no. 53, pp. 14-15, para. 30).

Where, as in the present case, a tribunal's members include a person who is in a subordinate position, in terms of his duties and the organisation of his service, *vis-à-vis* one of the parties, litigants may entertain a legitimate doubt about that person's independence. Such a situation seriously affects the confidence which the courts must

inspire in a democratic society (see, *mutatis mutandis*, the above-mentioned *Piersack* judgment, Series A no. 53, pp. 14-15, para. 30).

There was accordingly a violation of Article 6 para. 1 (art. 6-1).

3.4 This case would seem to indicate that in cases brought by, or arguably also on behalf of, the local authority before the District Court there may be a problem in relation to the appearance of impartiality of that court given that the legal assessor thereon, analogous in some ways to a *rapporteur*, is an employee of the local authority.

3.5 I am asked, however, as to the position in relation to prosecutions brought by the procurator fiscal in respect of matter which concern the local authority such as breaches of taxi licences or environmental health matters. If these prosecutions are brought as a result of an independent decision by the fiscal service rather than in some kind of agency capacity for the local authority, then it seems to me that there are far less grounds for a successful complaint of any compromise in the appearance of impartiality of the District Court such as to be incompatible with Article 6(1).

Ex-officio Justice signing warrants in non-local authority matters

4.1 Article 6(1) may be prayed in aid from the time when civil proceedings are instituted or, in criminal matters, when an individual has been given "official notification by the competent authority of an allegation that he has committed a criminal offence". [2]

[2] *Eckle v. Germany* A/51 (1983) 5 EHRR 1 at 27

4.2 It is not entirely clear to me what warrants a justice of the peace might be required to sign, but if they are entry and search warrants, warrants in relation to surveillance or telephone tapping, then these are matters more properly falling within Article 8 ECHR protection of privacy and family life. The procedure in relation to the obtaining of arrest warrants is governed by Article 5 ECHR.

4.3 Since the signing of warrants will not, in general, bring into play Article 6(1) considerations as we are here concerned with a procedure prior to the initiation of court action, the only relevant considerations of impartiality and *nemo iudex in causa sua* will be those derived from the common law. Accordingly there seems to me to be no particular Article 6(1) difficulties with e officio Justices continuing to sign warrants in matters in not related to local authorities of which they are members.

Income from Fines

5.1 I am asked if it would aid the independence of the District Court for all fine income to be remitted to the Consolidated Fund rather than, as at present, for fine income to be remitted to the local authority in whose district the court lies who are responsible for the provision and maintenance of the court.

5.2 I do not see how the present situation of the local authority retaining fine income raised from the District Court in order to offset in part the costs of their providing the court in question raises doubts as to the (appearance of) impartiality of the District Court.

5.3 There is no direct link between the amount of fine income and the workings of the local authority. It is not the local authority which sets the general or specific level of any fine, but rather the Justice hearing the case acting in accordance with the requisite guidelines and statutory constraints about him or her.

Councillor Justices

6.1 Standing the decision in *Sramek* which allowed for the participation of an elected mayor in court proceedings, it does not seem to me that there is any problem in independently (as opposed to *ex officio*) appointed Justice continuing to preside in District Courts, at least in cases which do not involve the authority of which he is a member.

The effect of the Human Rights Act on Section 12 of the District Courts (Scotland) Act

7.1 Section 3 of the Human Rights Act 1998 imposes a duty on **all** domestic courts and tribunals, so far as it is **possible** to do so, to read and give effect to **all** primary and subordinate legislation in a way which is compatible with those substantive provisions of the European Convention on Human Rights which have been incorporated into United Kingdom domestic law.

7.2 This provision would seem to be intended to parallel the strong interpretative obligation of national courts under Article 5 of the Treaty of Rome to interpret national law in accordance with the wording and purpose of the relevant Community provision, [3] even where the domestic legislation was enacted prior to the Community law provision in question. [4] The argument that the Westminster Parliament intends to comply with Community law in all circumstances unless it expressly says otherwise would provide the courts with a general background intention upon which to fasten and so permit a purposive interpretation of all national legislation. It may be said that Section 3 of the Human Rights Act 1998 imposes the same obligation on the courts in relation to Convention rights. It is the Westminster Parliament's intention that legislation be interpreted in accordance with the requirements of Convention rights where it is possible to do

[3] Case 14/83 *Von Colson v Land Nordrhein-Westfalen* [1984] ECR 1891; [1986] 2 CMLR 430.

[4] Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4153 at 4159, [1992] CMLR 305 at 322-3.

so, and however wide the departure from the *prima facie* meaning of the provision in question and notwithstanding that it might be said by the ordinary canons of construction to distort the plain meaning of the national legislation. The current Lord Chancellor, Lord Irvine of Lairg, has expressly made the parallel with the interpretative obligation already imposed under Community and has emphasised the breadth of the "possible" interpretative obligation explicitly imposed on the courts by the Human Rights Act as follows:

> "The [Human Rights] Act will require the courts to read and give effect to the legislation in a way which is compatible with Convention rights 'so far as it is possible to do so'. This ... goes far beyond the present rule. **It will not be necessary to find an ambiguity**. On the contrary the courts will be required to interpret legislation so as to uphold the Convention rights unless the legislation itself is so clearly incompatible with the Convention that it is **impossible** to do so.
>
> ...
>
> The court will interpret as consistent with the Convention not only those provisions which are ambiguous in the sense that the language used is capable of two different meanings but also those provisions where there is no ambiguity in that sense unless a clear limitation is expressed. In the latter category of cases it will be 'possible' (to use the statutory language) to read the legislation in a conforming sense because there will be no clear indication that a limitation on the protected right was intended so as to make it 'impossible' to read it as conforming." [5]

7.3 Where it is not possible to read Westminster primary legislation in a manner which is compatible with Convention rights, Section 3(2) provides that the legislative provisions in question remain fully valid, operative and enforceable. In contrast to the situation where there is an incompatibility with Community law,

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[5] Lord Irvine of Lairg "The Development of Human Rights in Britain under an Incorporated Convention on Human Rights" [1998] *Public Law* 221 at 228-9

national courts are not empowered even after incorporation of the Convention to "dis-apply" or suspend primary statutory provisions which contravene human rights. Where legislation emanating from the Westminster Parliament cannot be read and given effect to in accordance with the requirements of the Convention, and there is therefore an unavoidable conflict between the Convention rights and a specific legislative provision, Section 4 of the Act gives the higher domestic courts (in Scotland, that is the Court of Session or the High Court of Justiciary sitting as a court of criminal appeal) the power to make a declaration as to the incompatibility of this provision with the Convention as incorporated. [6] Such a declaration of incompatibility by the courts will, by virtue of Section 4(6)(a) of the Act, have no effect on the validity, continuing operation or enforceability of the offending legislative provision. Further, Section 4(6)(b) provides that any declaration of incompatibility is not binding on the parties to the proceedings in which it is made. The obtaining of a declaration of incompatibility will therefore be a Pyrrhic victory for the party in whose favour it is granted unless the applicable law is changed with retrospective effect in his case. [7]

7.4 It is not clear to me how the provisions of Section 12 of the 1975 Act which provides that a justice of the peace who is also a member of the local authority may not act as a member of the district court in any proceedings involving the authority or any officer or committee thereof, other than proceedings involving the district prosecutor, should be thought of as particularly subject to challenge on human rights grounds, but as a matter of principle it is clear that all legislation, whether pre-dating or post-dating the Human Rights Act 1998 will be subject to review on Convention rights grounds

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[6] The other "higher courts" for the purposes of the power to make "declarations of incompatibility" are the House of Lords, the Judicial Committee of the Privy Council the Courts-Martial Appeal Court and in England and Wales or Northern Ireland, the High Court of the Court of Appeal)

[7] See generally N. Bamforth "Parliamentary Sovereignty and the Human Rights Act 1998" [1998] *Public Law* 572-582

8.1 I am not entirely clear as to the meaning of this last question. Article 6(1) applies to the procedure of any body determining an individual's civil rights and obligations. This can include licensing matters as is clear from the decision in *Tre Traktörer v. Sweden* [8] where it was held that "possessions" for the purposes of Article 1 of Protocol 1 of the Convention was to be interpreted broadly so as to encompass a licence to sell alcohol. The licence was said to form part of the economic interest of a restaurant and the loss of the licence adversely affected goodwill in and the overall value of the business.

8.2 Similarly in *Pudas v. Sweden*[9] the holding of a taxi licence has been held to fall within the scope of the Convention. The protection of such property rights falls within the scope of Article 6(1) of the Convention with the result that licence holders are entitled to access to the courts and judgment within a reasonable time as regard any suggestion of an attempt to withdraw or limit the holding of the licence.

Conclusion

9.1 I trust that the foregoing answers agents' queries and concerns at this stage. My instructing solicitors should, however, not hesitate to contact me if there is any matter arising from this note on which I might usefully further advise. I would suggest that any further clarification would best be sought at consultation when agents underlying concerns may be fully ventilated

10 March 2000

Advocates Library
Parliament House
Edinburgh EH1 1RF

AIDAN O'NEILL QC

[8] *Tre Traktörer Aktiebolg v. Sweden* A/159 (1991) 13 *EHRR* 309

[9] *Pudas v. Sweden* A/125 (1988) 10 *EHRR* 339

DISTRICT COURTS ASSOCIATION

On the applicability of Article 6(1) of the European Convention on Human Rights to Justices of the Peace appointed under and in terms of the District Courts (Scotland) Act 1975

FURTHER ADVICE

March 2000

Phyllis Wilson
District Courts Association
Motherwell

JH/00/20/7

Clerk of the Peace
Secretary to the Justices Committee
Secretary to the Justices of the Peace Advisory Committee

Date: 22 May 2000
Our Ref. MG/SS/DC2/13
Your Ref.

Falkirk Council

Law & Administration Services

a chn. by phone.

fao Ms Fiona Groves
Justice and Home Affairs Committee
Room 3.10
Committee Chambers
George IV Bridge
Edinburgh
EH99 13P

Enquiries to: Moira Grant
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Dear Ms Groves,

BAIL, JUDICIAL APPOINTMENTS ETC (SCOTLAND) BILL

I have been instructed by my Justices Committee to write to you regarding the above. The Committee is concerned at some of the proposals within the Bill, in particular:-

1. The restriction on Justices who are elected Members from sitting on the Bench is considered to be unnecessary and in particular that there has been no evidence to indicate any lack of independence by Justices falling within this category.

   The restriction on both ex officio and Councillor Justices from sitting on Committees by virtue of being a Justice is also considered to be completely unnecessary.

The Justices Committee is also concerned about the apparent lack of mechanism for taking Justices who have been placed on the supplemental list by virtue of the restriction off that list and restoring their normal status.

I trust that these comments will be taken into consideration during the extensive debate on the Bill which is anticipated.

Yours sincerely

Moira

for Secretary to the Justices Committee

Director: Elizabeth S Morton

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Falkirk FK1 5RS.
DX 512820.
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JH/00/20/8

SOUTH LANARKSHIRE COUNCIL

CORPORATE RESOURCES

EXECUTIVE DIRECTOR **ALAN CUTHBERTSON**

- achn.
- ch to pubd

Our Ref: **AC/LC**
Your Ref:
If calling ask for: **Alan Cuthbertson**

10 May 2000

Ms Christine Creech MSP
The Scottish Parliament
EDINBURGH EH99 1SP

Dear Ms Creech

Bail, Judicial Appointments (Scotland) Bill

It is understood that the Scottish Executive intends to introduce a Bill to Parliament on 23/24 May 2000, which seeks to propose that elected members of local authorities (including ex officios) will not be eligible to hold office as full Justices by serving on the Bench, but will only be permitted to undertake signing duties.

Apparently the rationale behind this proposal is to comply with the European Convention on Human Rights and to avoid any perceived risk which would subject the District Court to failure to comply with that Act. The areas of concern presumably relate to the need for the Court to be seen to be fair and impartial in the context of the local authority retaining a proportion of fine income.

South Lanarkshire Council and in particular its Councillor Justices of the Peace take the view that the proposal to simply reduce the role of Councillor Justices is wholly unacceptable and fails to recognise the substantial implications for lay justice by removal of experienced Justices with considerable local knowledge and dedication from the Bench. The removal of such experienced Justices may result in a substantial backlog of cases at local level which would be detrimental to the justice system. The cost implications of funding alternative methods of dispensing justice should not be discounted.

There are 80 or so Elected Members throughout Scotland, who are fully bench trained and who have a valuable role to play at local level in ensuring prompt and appropriate disposal of cases. In the case of South Lanarkshire Council, there are 18 elected members alone who are affected by the proposed Bill.

One method of resolving the issue would be an amendment to the Bill which would seek to remit all fine income to the Exchequer and in return allocate this back to local authorities through increased Revenue Support Grant. This type of arrangement would result in a 100% allocation

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from Central Government and would be analogous to the collection by local authorities of non-domestic rates, all of which are remitted. If this amendment to the funding mechanism were made existing Councillor Justices could be retained thereby removing any perceived conflict of interest.

You are asked as an elected MSP for our area to support the above amendment and use all means at your disposal either to have that part of the Bill affecting Justices amended now or seek to have it removed for discussion at a later date. I would be happy to provide any further information you may require.

Yours sincerely

Alan Cuthbertson

Alan Cuthbertson
Executive Director (Corporate Resources)

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NORTH LANARKSHIRE COUNCIL

Our Ref: LDC GEN 1D MK Contact: Mitch Kerr
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Date: 24 May 2000 Fax: 01698 302211

Director of Administration
John O'Hagan

JH/00/20/9
ackn by phone.
FG.

Miss Fiona Groves
Assistant Clerk
Justice and Home Affairs Committee
The Scottish Parliament
Room 3.10
Committee Chambers
George IV Bridge
Edinburgh EH99 1SP

Dear Madam

Draft Bail, Judicial Appointments etc. (Scotland) Bill

I refer to the recent publication of the above Bill which I understand is currently being considered by the Justice and Home Affairs Committee.

The North Lanarkshire Justices of the Peace Committee have now had the opportunity of considering the terms of the draft Bill and have instructed me to submit a number of comments on the Bill on their behalf.

It is the view of the North Lanarkshire Justices Committee that the proposal to create a distinction between "full" and "signing" Justices is ill-conceived and that the consequent diminution in responsibility of Councillor Justices, whether nominated by the Local Authority or appointed by the Secretary of State, who have served summary justice well and fairly since the inception of District Courts in 1975, is unnecessary and unwarranted.

Section 12 (1) of the District Courts (Scotland) Act 1975 expressly provides a safeguard against what might be termed "conflict of interest" in a judicial setting. It has to be assumed that the Executive considers that Section 12 (1) no longer provides an adequate safeguard as it offers no protection to a challenge as to the "independence" of the District Court which cites a relationship between a Councillor Justice and the Local Authority as fines destination.

It is the view of the North Lanarkshire Justices Committee that the resolution of any such perceived conflict would not be insurmountable. Presents arrangements whereby a Local Authority retains court fines income could be amended by statute to provide that all fines are remitted to the Exchequer and funding of District Courts could be subject to direct control of Central Government, with the District Courts integrated into the Scottish Courts Service along with the High Court and Sheriff Courts. This arrangement would indeed also alleviate potential difficulties under ECHR in relation to Justices who are employees of the Local Authority and Justices who are employees and office-bearers of organisations, particularly in the voluntary sector, which are funded in whole or in part by the authority. The present challenge in relation to the position of legal assessors employed by the authority who sit in the District Court with the presiding Justice of the Peace would also be placed beyond doubt.

It is recognised that the position of Justices of the Peace nominated ex officio by the authority might be subject to an additional challenge in that there is a question about the security of tenure of such Justices. The North Lanarkshire Justices Committee suggest that ex officio Councillor Justices could be made subject to the proposed new arrangement to involve an independent judicial report by two Sheriffs Principal on an individual's fitness for office.

The Bill, as it stands, would have the effect also that Councillor Justices would not be able to become or remain members of any committee, as there is an express restriction on duties of Justices entered in the supplemental list in terms of Section 15 of the District Courts Act. This is an unnecessary restriction on Councillor Justices, far removed from any possible concern as to independence and impartiality of the court bench, and should not be countenanced. Indeed, it would require to be clarified whether any restriction on committee membership would be extended to membership of the Justice of the Peace Advisory Committee, as the restriction at Section 15 (8) refers to membership ".... of any committee or other body".

Finally, one further point of clarification in relation to the terms of the Bill arises. What would happen in the case of an existing Councillor Justice, who has been appointed by the Secretary of State, and who is in terms of the proposed new Bill restricted to a role of "signing Justice" and is entered in the supplemental list, and who subsequently ceases to hold office as an elected member of a local authority? Would that Justice be entitled to apply to be re-appointed as a "full Justice" and, if so, to whom would that application be submitted?

I trust that the foregoing representations will be placed before the Justice and Home Affairs Committee.

Yours faithfully

Head of Legal Services and
Clerk of the Peace

JH/00/20/2

SURVEILLANCE

CODE OF PRACTICE

Scope

This code of practice applies to authorisations for surveillance (not involving entry on or interference with property or with wireless telegraphy as regulated by the Police Act 1997) by police, the National Crime Squad, the Scottish Crime Squad, the National Criminal Intelligence Service and Her Majesty's Customs and Excise.

Published on 13 May 1999

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Published on 13 May 1999

1 GENERAL

1.1 This code of practice must be readily available at all operational police premises and offices of the National Crime Squad, the Scottish Crime Squad, the National Criminal Intelligence Service (NCIS) and HM Customs and Excise, for consultation and reference by police officers, customs officers, civilian employees of a police authority, persons detained in police or HM Customs and Excise custody and their representatives. Copies should be available for consultation by members of the public at all police stations and public offices of HM Customs and Excise.

1.2 Notes for guidance printed in this code are not part of the code unless indicated but are designed to assist police officers and others in its application.

1.3 This code applies to surveillance within the United Kingdom by the police, the National Crime Squad, the Scottish Crime Squad, the National Criminal Intelligence Service and HM Customs and Excise in circumstances to which the provisions of Part III of the Police Act 1997 do not apply.

1.4 Surveillance activity which falls outside the scope of the Police Act 1997 will be authorised and conducted in accordance with this code of practice. (See *Note 1A*)

1.5 Authorisations for surveillance will only be given in the interests of national security, for the prevention or detection of crime, for the maintenance of public order, for the maintenance of community safety, in the case of a significant public interest, in the assessment or collection of any tax or duty or of any imposition of a similar nature, or in co-operation with foreign law enforcement agencies in these matters.

1.6 The primary purpose of surveillance is to secure evidence to bring offenders before the Courts. In appropriate cases surveillance may be used for the gathering of intelligence.

1.7 Surveillance will only be used by the law enforcement agencies where they judge such use to be proportionate to the seriousness of the crime being investigated, and the history and character of the individual(s) concerned.

1.8 Before authorising surveillance, authorising officers will take into account the risk of intrusion into the privacy of persons other than the specified target of the surveillance (collateral intrusion). Measures will be taken wherever practicable to avoid collateral intrusion.

Interpretation

1.9 For the purpose of this code:

1.9.1 **Surveillance** means:

the covert watching of a person or group of persons or the covert listening to a person or group of persons over a period of time in the circumstances referred to in paragraphs 1.5 and 1.6 above, whether by unaided human watching or listening or through the medium of technical devices. In this code the term refers to such activity if it falls outside the scope of the Police Act 1997 Part III. (See *Note 1A*).

1.9.2 **Target** means:

an individual or group of individuals in respect of whom surveillance has been authorised, and such observed contacts of that individual or group of individuals as come to notice during the course of the authorised surveillance.

1.9.3 **Public place** includes:

places and premises to which the public have access or may have access, subject to conditions, and where a reasonable person would have no general expectation of privacy or would expect privacy to be significantly reduced. (See *Note 1B*)

1.9.4 **Authorising officer** means:

- a police officer or officer of HM Customs and Excise designated in this code to authorise the use of surveillance techniques not falling within the scope of Part III of the Police Act 1997;

- an officer of equivalent rank of the National Crime Squad, the Scottish Crime Squad or the National Criminal Intelligence Service. (See *Note 1C*)

1.9.5 **Serious crime**:

conduct shall be regarded as serious crime if, and only if:-

a) it involves the use of violence, results in substantial financial gain or loss, or is conduct by a large number of persons in pursuit of a common purpose, or

b) the offence, or one of the offences, is an offence for which a person who has attained the age of twenty one and has no previous convictions could reasonably be expected to be sentenced to imprisonment for a term of three years or more.

1.9.6 **Community safety**:

for the purpose of this code a significant threat to community safety includes criminal or anti-social behaviour which is intended or likely to spread the fear of crime or violence or which is intended or likely to corrupt or undermine the health and well-being of the young or other vulnerable sections of the community.

1.9.7 **Public interest**:

for the purposes of this code a significant public interest includes the maintenance of the security and integrity of law enforcement agencies or other public authorities.

1.9.8 **Confidential material**:

Matters subject to legal privilege:

both oral and written communications between a professional legal adviser and his/her client or any person representing his/her client made in connection with the giving of legal advice to the client or in contemplation of legal proceedings and for the purposes of such proceedings, as well as items enclosed with or referred to in such communications. Communications and items held with the intention of furthering a criminal purpose are not matters subject to legal privilege.

Confidential personal information:

information held in confidence concerning an individual (whether living or dead) who can be identified from it, and relating:

a) to his/her physical or mental health; or

b) to spiritual counselling or other assistance given or to be given, and

which a person has acquired or created in the course of any trade, business, profession or other occupation, or for the purposes of any paid or unpaid office. It includes both oral and written information and also communications as a result of which personal information is acquired or created. Information is held in confidence if:

- it is held subject to an express or implied undertaking to hold it in confidence; or

- it is subject to a restriction on disclosure or an obligation of secrecy contained in existing or future legislation.

Confidential journalistic material:

material acquired or created for the purposes of journalism and held subject to an undertaking to hold it in confidence, as well as communications resulting in information being acquired for the purposes of journalism and held subject to such an undertaking. (See *Note 1D*)

Notes for guidance

Note 1A *This code does not apply to the use of overt 'town centre' or similar police, Customs and Excise, local authority or private CCTV systems installed for the purpose of prevention or detection of crime and disorder in public places.*

Note 1B *It is not possible to give an exhaustive definition of public places. As defined, the term would apply to shopping centres, football grounds, public houses and similar venues as well as the more obvious public places, such as highways, parks and railway stations. It extends conditionally to private land which is capable of being overseen or overheard by the general public, for example the gardens and driveways of houses which are open to view from the highway. For the purposes of this code the oversight of such open private space, which does not involve trespass, is surveillance conducted in a public place, to be authorised as set out in paragraphs 3.9 and 3.10. Dwellings, hotel bedrooms and office premises should always be treated as private places.*

Note 1C *The Scottish Crime Squad is commanded by a Detective Chief Superintendent. Where authorisation is required from a more senior rank, application will be made to the appropriate officer in the force where most of the activity is expected to take place.*

Note 1D *More comprehensive definition of the terms 'matters subject to legal privilege', 'confidential personal information' and 'confidential journalistic material' are contained in sections 98, 99 and 100 respectively of the Police Act 1997. This code adopts the principles set out in that Act.*

2 SURVEILLANCE IN OR INTO PRIVATE PLACES

(See *Note 2A*)

2.1 The whole of this section applies, and only applies, to aural and visual surveillance in or into private places where no trespass on or interference with property occurs. Responsibility for authorisations for such surveillance rests with the authorising officer as set out below.

2.2 Before giving authorisations for surveillance, the authorising officer must be satisfied that:

- the surveillance is likely to be of value in connection with national security, in the prevention or detection of crime, in the maintenance of public order or community safety, in the case of a significant public interest or in the assessment or collection of any tax or duty or of any imposition of a similar nature;
- the desired result of the surveillance cannot reasonably be achieved by other means (see *Note 2B*);
- the risks of collateral intrusion have been properly considered.

2.3 In cases where the likely consequence of the surveillance would be for any person to acquire knowledge of 'confidential material', the surveillance will only be authorised in connection with serious crime or in the interests of national security.

2.4 In such cases special authorisation is required as set out in paragraph 2.9.

Temporary unforeseen surveillance in or into private places

2.5 Where, in the course of a surveillance operation previously authorised to be conducted in public places, an officer engaged in the authorised surveillance believes that:

a) in order to maintain contact with a moving target; or,

b) in order to assess whether the target has been lost;

it is necessary immediately to establish surveillance temporarily in or into a private place, he/she may do so subject to paragraph 2.1 above and subject to the conditions required by paragraph 2.16 below.

Temporary surveillance in or into private places may not be used to access 'confidential material'.

Authorisation procedures - surveillance in or into private places

2.6 Authorisations for surveillance in or into private places except in the circumstance of temporary surveillance set out in paragraph 2.5 above will be given in writing by the authorising officer.

2.7 In urgent cases oral authorisations may be given by the authorising officer.

2.8 Written authorisations for surveillance in or into private places, except in the circumstances of temporary surveillance will be given by:

- in the case of the police and the National Crime Squad, an Assistant Chief Constable;
- in the case of the Metropolitan Police and the City of London Police, a Commander;
- in the case of the Scottish Crime Squad, an appropriate Assistant Chief Constable;
- in the case of NCIS and HM Customs and Excise, an officer of equivalent rank.

2.9 Written authorisations for surveillance in or into private places in circumstances where paragraph 2.3 applies, may only be given by:

- in the case of the police, the Chief Constable;
- in the case of the Metropolitan Police, an Assistant Commissioner;
- in the case of the City of London Police, the Commissioner;
- in the case of the Scottish Crime Squad, the appropriate Chief Constable;
- in the case of the National Crime Squad and NCIS, the Director General;
- in the case of HM Customs and Excise, the Chief Investigation Officer.

2.9.1 In each case to which this paragraph applies the authorising officer will designate the officer to give authorisations in his/her absence.

2.10 Except in urgent cases applications to the authorising officer for authorisations for surveillance in or into private places must be made in writing and should specify:

- the name(s) where known or description(s) of the target(s);
- the private location(s) to be subject of surveillance;
- how the criteria in paragraph 2.2 have been met;
- an assessment of the likely extent of collateral intrusion;

and, in circumstances where paragraph 2.3 applies:

- the nature of the 'confidential material' and its relevance to the objectives of the investigation.

Duration of authorisations - surveillance in or into private places

2.11 Written authorisations last for a maximum of three months beginning with the day on which they took effect and may be renewed at intervals of not longer than three months.

2.12 Oral authorisations last for a maximum of seventy two hours from the time they were given.

2.13 Authorisations for surveillance in or into private places given under paragraphs 2.8 and 2.9 include authorities to conduct surveillance on the specified target(s) in public places for the duration of the authorisation.

2.14 The authorising officer will require reviews to be conducted at intervals of not longer than one month.

2.15 An authorising officer must cancel an authorisation if he/she becomes satisfied that the surveillance is no longer necessary or appropriate.

2.16 Temporary unforeseen surveillance in or into private places, as described in paragraph 2.5, may last only as long as is necessary to fulfil the described purpose. Temporary intrusions may not exceed twenty-four hours, without authorisation under paragraph 2.8.

Records - surveillance in or into private places

2.17 A record will be maintained of:

- the matters required at paragraph 2.10;
- authorisations given;
- oral authorisations and the reasons for urgency;
- an account of events observed and/or conversations overheard;
- the outcome of reviews;
- the grounds for withdrawal of or refusal to renew authorisations.

Where paragraph 2.5 applies, a record will be made of:

- the reason for the intrusion, and the nature and duration of the intrusion;
- the result of the intrusion.

Notes for guidance

Note 2A *This provision applies to surveillance activity which does not involve trespass on or interference with property. It applies to surveillance within private premises where consent of the owner or occupier, as appropriate, has been obtained, or to remote surveillance of private space. All surveillance operations in which acts of trespass can be foreseen require prior authorisation under Part III of the Police Act 1997.*

Where for purposes incidental to surveillance of a person targeted in an authorised operation it becomes necessary for an officer to enter briefly upon third party property (that is, property not under the control of the target) in circumstances where it is reasonable to assume that an innocent occupier would agree to the action in question, no Part III authorisation is needed. Such 'incidental' trespass may not be effected in dwellings, hotel rooms, or offices, nor may it afford an opportunity to access 'confidential material'.

Note 2B *It is not necessary for all other means to have been tried and failed but that in all the circumstances such other means would not be practicable or would be unlikely to achieve what the action seeks to achieve within a reasonable time or to the necessary evidential standard.*

3 SURVEILLANCE IN OR INTO PUBLIC PLACES

(See *Notes 1B and 2A*)

3.1 Discreet observation of the public in public places, including in designated police and customs control zones at ports and airports, is a necessary part of the normal duty of the law enforcement agencies. This code does not restrict the ability of officers to place and keep under observation individuals who have come to their attention in the normal course of duty and who are suspected of having committed or being about to commit offences, who are involved or likely to become involved in disorder or anti-social behaviour, or where such observation is necessary for the preservation of community or personal safety.

3.2 This part of the code applies to the planned deployment of covert surveillance resources against the public at large, in order to meet a particular law enforcement need, or against specified individuals in public places where no interference with property is intended. The following specific provisions relate therefore to the deployment of vehicle and foot surveillance personnel, the setting up of covert observation posts and the installation of equipment for covert, remote, monitoring of specified or unspecified individuals in public places.

3.3 Responsibility for authorisations for aural and visual surveillance in or into public places where no unlawful interference with property is proposed rests with the authorising officer as set out below.

3.4 Before giving authorisations for surveillance in or into public places where no interference with property is proposed the authorising officer must be satisfied that:

- the surveillance is likely to be of value in connection with national security, in the prevention or detection of crime, in the maintenance of public order or community safety, in the case of a significant public interest or in the assessment or collection of any tax or duty or of any imposition of a similar nature;
- the proposed surveillance is a reasonable means of achieving the desired result;
- the risks of collateral intrusion have been properly considered;
- the risks of temporary unforeseen surveillance in or into private places, as set out in paragraph 2.5, have been assessed.

3.5 In cases where the likely consequence of the surveillance would be for any person to acquire knowledge of 'confidential material', the surveillance will only be authorised in connection with serious crime or in the interests of national security.

3.6 In such cases special authorisation is required as set out at paragraph 3.11.

Authorisation procedures - surveillance in or into public places

3.7 Authorisations for surveillance in or into public places will be given in writing by the authorising officer.

3.8 In urgent cases oral authorisations may be given by the authorising officer.

3.9 Where the target(s) can be specified, authorisations for surveillance in or into public places may be given by:

- in the case of the police, the National Crime Squad and the Scottish Crime Squad, a superintendent;
- in the case of NCIS and HM Customs and Excise, an officer of equivalent rank.

3.10 Where no target can be specified, or where urgent authorisation for surveillance of a specified target in a public place is required, authorisations may be given by:

- in the case of the police, the National Crime Squad and the Scottish Crime Squad, an inspector;
- in the case of NCIS and HM Customs and Excise, an officer of equivalent rank.

3.11 Written authorisations for surveillance in or into public places in circumstances where paragraph 3.5 applies will be given by the authorising officers specified at paragraph 2.9.

3.12 Except in urgent cases applications to the authorising officer for surveillance in or into public places must be made in writing and should specify:

- the general location of the surveillance;
- the name(s) where known or description(s) of the target(s);
- how the criteria at paragraph 3.4 have been met;
- an assessment of the likely extent of collateral intrusion;

and, in circumstances where paragraph 3.5 applies:

- the nature of the 'confidential material' and its relevance to the objectives of the investigation.

3.13 Where in an authorised surveillance operation in a public place in which no personal target has been specified a person is subsequently selected as a target arising from the authorisation, the surveillance may continue in order to maintain contact with the target. The provisions of paragraph 2.5 apply.

Duration of authorisations - surveillance in or into public places.

3.14 Written authorisations last for a maximum of three months beginning with the day on which they took effect and may be renewed at intervals of not longer than three months.

3.15 Urgent authorisations given by an inspector, or equivalent, last for a maximum of twenty four hours from the time they were given. The officer designated at paragraph 3.9 may then give oral authorisation for the continuation of the surveillance. Such authorisations last a maximum of seventy two hours from the time they were given.

3.16 Continuation of surveillance under paragraph 3.13 lasts for a maximum period of twenty four hours.

3.17 The authorising officer will require reviews to be conducted at intervals of not longer than one month.

3.18 An authorising officer must cancel an authorisation if he/she becomes satisfied that the surveillance is no longer necessary or appropriate.

Records - surveillance in or into public places.

3.19 A record will be maintained of:

- the matters required at paragraph 3.4;
- authorisations given;
- oral authorisations and the reasons for urgency;
- an account of events observed and/or conversations overheard;
- the grounds for selection of a target at paragraph 3.13;
- as at paragraph 2.17, detail of necessary temporary surveillance in or into private space;

- the outcome of reviews;
- the grounds for withdrawal of or refusal to renew authorisations.

4 MAINTENANCE OF PHOTOGRAPHIC INTELLIGENCE RECORDS.

(See *Note 4A*)

4.1 Where it is proposed covertly to photograph an individual or group of individuals in a public place for the specific purpose of maintaining photographic intelligence records, and where there is no intention to conduct surveillance as defined in paragraph 1.9.1 above, the procedures set out below will apply.

4.2 Responsibility for the authorisations of photography for the purpose of maintaining photographic intelligence records rests with the authorising officer as described below.

4.3 Before giving authorisations for photography for this purpose the authorising officer must be satisfied that:

- the photography relates to an individual or group of individuals in respect of whom photographs have previously been taken on the grounds of there being reasonable cause to suspect that individual or group of individuals of involvement in the commission of criminal offences, threats to national security, public order, or community safety, and the grounds of suspicion remain valid, and those photographs are out of date or no longer adequate for the purpose; or,

- the photography relates to an individual or group of individuals who have not previously been photographed but whose photographs it is reasonably believed would be of material assistance to the law enforcement agencies in connection with national security, in the prevention or detection of crime, the maintenance of public order or the maintenance of community safety.

Authorisation procedures - maintenance of photographic intelligence records.

4.4 Authorisations for photography to maintain photographic intelligence records will be given in writing by the authorising officer.

4.5 In urgent cases oral authorisations may be given by the authorising officer.

4.6 Authorisations for photography to maintain photographic intelligence records may be given by:

- in the case of the police, the National Crime Squad and the Scottish Crime Squad, an inspector;

- in the case of the NCIS and HM Customs and Excise, an officer of equivalent rank.

Duration of authorisations - maintenance of photographic intelligence records.

4.7 Authorisations relate to individual applications and lapse when the authorised photographs have been taken. Where oral authorisation is given, it will be confirmed in writing within seventy two hours.

Records - maintenance of photographic intelligence records.

4.8 A record will be maintained of:

- the grounds for authorisation under paragraph 4.3;
- authorisations given;
- the date on which the photography took place;
- the names, where known, of all such persons photographed.

Note for guidance

Note 4A *This provision does not affect the principle that authorisations given elsewhere in this code include authorisations for all necessary photographic support to the surveillance which is being authorised.*

5 RETENTION OF MATERIAL

5.1 Where there is reasonable belief that material relating to any surveillance activity could be relevant to pending or future criminal or civil proceedings, it should be preserved in accordance with the requirements, where appropriate, of the Criminal Procedure and Investigations Act 1996 and other relevant legislation. (See *Note 5A*)

5.2 Where surveillance has been cancelled or where the surveillance has concluded but there is no belief that material relating to the surveillance will be required in pending or future criminal proceedings, it will be destroyed except where its retention may be justified on the grounds set out in the Code of Practice for Recording and Dissemination of Intelligence Material.

Note for guidance

Note 5A *The Criminal Procedure and Investigations Act 1996 does not fully extend to Scotland and Northern Ireland.*

6 COMPLAINTS PROCEDURES

6.1 The law enforcement agencies will maintain the standards set out in this code of practice.

6.2 Contraventions of the Data Protection Act 1998 may be reported to the Data Protection Commissioner or the officers set out in paragraph 6.3.

6.3 Complaints concerning breaches of the code may be made to the relevant Chief Constable, the Commissioner of the Metropolitan Police, the Commissioner of the City of London Police, the Director General of the National Crime Squad, the Commander of the Scottish Crime Squad, the Director General of the National Criminal Intelligence Service or the Chief Investigation Officer, or relevant Collector, of HM Customs and Excise, as appropriate.

USE OF INFORMANTS

CODE OF PRACTICE

Scope

This code of practice applies to authorisations for the use of informants in criminal investigations by police, the National Crime Squad, the Scottish Crime Squad, the National Criminal Intelligence Service and Her Majesty's Customs and Excise.

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1 GENERAL

1.1 This code of practice must be readily available at all operational police premises and offices of the National Crime Squad, the Scottish Crime Squad, the National Criminal Intelligence Service (NCIS), and HM Customs and Excise, for consultation and reference by police officers, customs officers, civilian employees of a police authority, persons detained in police or HM Customs and Excise custody and their representatives. Copies should be available for consultation by members of the public at all police stations and public offices of HM Customs and Excise.

1.2 Notes for guidance printed in this code are not part of the code unless indicated but are designed to assist police officers and others in its application.

1.3 This code applies to use of informants within the United Kingdom by the police, the National Crime Squad, the Scottish Crime Squad, the National Criminal Intelligence Service and HM Customs and Excise.

1.4 Terms relating to the use of informants are defined below. The use of informants will only be authorised and conducted in accordance with this code of practice.

1.5 Authorisations for the use of informants will only be given for the prevention or detection of crime, the maintenance of public order, the maintenance of community safety, in the case of a significant public interest, the assessment or collection of any tax or duty or of any imposition of a similar nature or in co-operation with foreign law enforcement agencies in these matters.

1.6 Informants will only be used by the law enforcement agencies where they judge such use to be proportionate to the seriousness of the crime being investigated, and the history and character of the individual(s) concerned.

1.7 Before authorising any informant activity, authorising officers will take into account the risk of intrusion into the privacy of persons other than the specified target of the informant activity (collateral intrusion). Measures will be taken wherever practicable to avoid collateral intrusion.

1.8 Informant handlers and controllers will be trained to approved standards.

1.9 Informants and the intelligence they produce are not resources made available for the exclusive use of individual informant handlers. Rather, they are resources deployed by and for the benefit of the whole of the law enforcement agency to which the informant reports.

1.10 Informants may not be used to incite the commission of offences which would not otherwise have been committed nor to entrap offenders who would not otherwise have been party to the commission of such offences.

1.11 Informants have no licence to commit crime. They may, in the context of a specifically authorised operation, be a party to the commission of criminal offences only within the limits recognised by case law and specified by the authorising officer. (See *Note 1A*)

1.12 In their use of informants the law enforcement agencies will take into account the requirement to maintain public confidence in law enforcement and the criminal justice system. By its nature the use of informants is a subject which must remain largely hidden from public view. That does not diminish the public's right to expect that the agencies will deal ethically with informants, that systems of internal accountability exist and that there will be adequate checks to ensure that the risks and costs of using informants are proportionate to the expected benefits. It is only by displaying clear ethical standards that public confidence in the use of informants can be maintained. In particular:

1.12.1 vulnerable individuals, such as the mentally impaired, will not be used as informants;

1.12.2 information received from informants will be subject to assessment and evaluation before being acted upon;

1.12.3 no authorisation for the use of an informant will be given unless the authorising officer is satisfied that the use of that specific informant is in proportion to the nature of the criminal problem to be tackled. Consideration must be given to any adverse impact on community confidence which may result from the use of that informant.

1.13 The law enforcement agencies equally acknowledge their obligations towards informants whose use has been authorised in accordance with the provisions of this code. In particular:

1.13.1 the agencies will assess the risks posed to an individual informant by the proposed use of that informant;

1.13.2 special care will be taken regarding the welfare and safety of juvenile informants (see Section 4);

1.13.3 the agencies will take all reasonable measures to preserve the confidentiality of the source of intelligence and information provided by informants;

1.13.4 the agencies will take all measures permitted by law to keep confidential the existence and identity of informants.

Interpretation

1.14 For the purpose of this code,

1.14.1 **Informant** means:

an individual whose very existence and identity the law enforcement agencies judge it essential to keep confidential and who is giving information about crime or about persons associated with criminal activity or public disorder. Such an individual will typically have a criminal history, habits or associates, and will be giving the information freely whether or not in the expectation of a reward, financial or otherwise. (See *Note 1B.*)

1.14.2 **Participating informant** means:

an informant who is, with the approval of a designated authorising officer, permitted to participate in a crime which others already intend to commit.

1.14.3 **Informant handler** means:

a trained law enforcement officer who has day to day responsibility for contact with an informant and for the initial evaluation of the information supplied by that informant.

1.14.4 **Informant controller** means:

a trained supervisory law enforcement officer who has responsibility for the control and supervision of the conduct of an informant handler, the maintenance of legal and ethical standards in informant operations and the assessment of suitable rewards.

1.14.5 **Informant reward** means:

a consideration in cash, goods or other benefits, whether from official or other sources, given to an informant or another on behalf of the informant in connection with the supply of information by the informant. A 'benefit' may include the supply to a Court of information which may lead to a mitigated sentence for such an informant who has been convicted of an offence.

1.14.6 **Authorising officer** means:

- a police officer or officer of HM Customs and Excise designated in this code to approve the use of informants;

- an officer of equivalent rank of the National Crime Squad, the Scottish Crime Squad (see *Note 1C*), or the National Criminal Intelligence Service.

1.14.7 **Serious crime**:

conduct shall be regarded as serious crime if, and only if:-

a) it involves the use of violence, results in substantial financial gain or loss, or is conduct by a large number of persons in pursuit of a common purpose, or

b) the offence, or one of the offences, is an offence for which a person who has attained the age of twenty one and has no previous convictions could reasonably be expected to be sentenced to imprisonment for a term of three years or more.

1.14.8 **Community safety**:

for the purpose of this code a significant threat to community safety includes criminal or anti-social behaviour which is intended or likely to spread the fear of crime or violence or which is intended or likely to corrupt or undermine the health and well-being of the young or other vulnerable sections of the community.

1.14.9 **Public interest**:

for the purposes of this code a significant public interest includes the maintenance of the security and integrity of law enforcement agencies or other public authorities.

1.14.10 **Confidential material**:

Matters subject to legal privilege:

both oral and written communications between a professional legal adviser and his/her client or any person representing his/her client made in connection with the giving of legal advice to the client or in contemplation of legal proceedings and for the purposes of such proceedings, as well as items enclosed with or referred to in such communications. Communications and items held with the intention of furthering a criminal purpose are not matters subject to legal privilege.

Confidential personal information:

information held in confidence concerning an individual (whether living or dead) who can be identified from it, and relating:

a) to his/her physical or mental health; or

b) to spiritual counselling or other assistance given or to be given, and

which a person has acquired or created in the course of any trade, business, profession or other occupation, or for the purposes of any paid or unpaid office. It includes both oral and written information and also communications as a result of which personal information is acquired or created. Information is held in confidence if:

- it is held subject to an express or implied undertaking to hold it in confidence; or

- it is subject to a restriction on disclosure or an obligation of secrecy contained in existing or future legislation.

Confidential journalistic material:

material acquired or created for the purposes of journalism and held subject to an undertaking to hold it in confidence, as well as communications resulting in information being acquired for the purposes of journalism and held subject to such an undertaking. (See *Note 1D*)

Notes for guidance

Note 1A *An informant who acts beyond the limits recognised by law and specified by the authorising officer will be at risk of prosecution. The need to protect an informant cannot alter this principle.*

Note 1B *This code is not intended to regulate the flow of information from public-spirited citizens to the law enforcement agencies although such information may sometimes be given in confidence.*

Note 1C *The Scottish Crime Squad is commanded by a Detective Chief Superintendent. Where authorisation is required from a more senior rank, application will be made to the appropriate officer in the force where most of the activity is expected to take place.*

Note 1D *More comprehensive definition of the terms 'matters subject to legal privilege', 'confidential personal information' and 'confidential journalistic material' are contained in sections 98, 99 and 100 respectively of the Police Act 1997. This code adopts the principles set out in that Act.*

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2 REGISTRATION AND USE OF INFORMANTS

2.1 A register will be kept of all informants.

2.2 Responsibility for authorisations to register and use an informant rests with the authorising officer as described below.

2.3 Before giving authorisations for the registration and use of an informant the authorising officer must be satisfied that:

- the use of the informant is likely to be of value in the prevention or detection of crime, in the maintenance of public order or community safety, in the case of a significant public interest, or in the assessment or collection of any tax or duty or of any imposition of a similar nature;
- the desired result of the use of the informant cannot reasonably be achieved by other means (see *Note 2A*);
- the risks of collateral intrusion have been properly considered.

2.4 In cases where the likely consequence of the use of the informant would be for any person to acquire knowledge of 'confidential material', the use of the informant will only be authorised in connection with serious crime.

2.5 In such cases special authorisation is required as set out in paragraph 2.8.

Authorisation procedures - registration and use of informants

2.6 Authorisations for the registration and use of an informant will be given in writing by the authorising officer.

2.7 Written authorisations for the registration and use of an informant may be given by:

- in the case of the police, the National Crime Squad and the Scottish Crime Squad, a Superintendent;
- in the case of NCIS, an officer of equivalent rank designated by the Director General;
- in the case of HM Customs and Excise, an officer of equivalent rank.

2.8 Authorisations for the use of an informant in circumstances where paragraph 2.4 applies may only be given by:

- in the case of the police, the Chief Constable;
- in the Metropolitan Police, an Assistant Commissioner;
- in the City of London Police, the Commissioner;
- in the case of the Scottish Crime Squad, the appropriate Chief Constable;
- in the case of the National Crime Squad and NCIS, the Director General;
- in the case of HM Customs and Excise, an officer of equivalent rank.

2.8.1 In each case to which this paragraph applies the authorising officer will designate the officer to give authorisations in his/her absence.

2.9 Applications to the authorising officer for authorisations for registration and use of an informant must be made in writing and should specify:

- the grounds for use of the informant, that is the nature of the criminal or public order or community safety activity on which the informant is likely to be of value;
- how the other criteria at paragraph 2.3 have been met;
- the nature of tasking which it is intended the informant should undertake, including where known the names of any person in respect of whom specific information is sought;

and, in circumstances where paragraph 2.4 applies:

- the nature of the 'confidential material' and its relevance to the objectives of the investigation.

2.10 On registration, informants will be briefed by the informant controller in the presence of the informant handler on the matters contained in paragraphs 1.10 and 1.11 and the fact recorded by the informant controller.

Controller tasking of informants

2.11 A controller may authorise the handler to direct the activity of an informant whose registration and use has been authorised in accordance with the procedures set out in paragraphs 2.7 and 3.5. Before giving such authorisations the controller must be satisfied that:

- the requirements of paragraph 2.3 continue to be met; and
- such authorisations will not entail access to 'confidential material' except as provided by paragraph 2.4.

Duration of authorisations - registration and use of informants

2.12 Written authorisations last for a maximum of twelve months beginning with the day on which they took effect and may be renewed at intervals of not longer than twelve months.

2.13 The authorising officer may require reviews to be conducted within the period, where in his/her judgement the circumstances require it.

2.14 Written authorisations under paragraph 2.8 last for a maximum of three months beginning with the day on which they took effect and may be renewed at intervals of not longer than three months.

2.15 In respect of authorisations under paragraph 2.8 authorising officers should determine the frequency of reviews which should take place at intervals of not longer than one month.

2.16 An authorising officer must cancel an authorisation if he/she becomes satisfied that the use of the informant is no longer necessary or appropriate.

Records - registration and use of informants

2.17 A confidential record will be maintained of:

- the matters in paragraphs 2.9 and 2.10;
- authorisations given;
- at registration, an assessment of perceived risks in the use of that informant together with rewards sought or offered to the informant;
- subsequent controller tasking and further rewards sought or offered;
- contacts between the informant handler and the informant;
- information passed to the handler by the informant;
- arrests or other law enforcement benefits gained from the use of the informant;
- rewards or other benefits received by the informant and expenses directly incurred in using the informant;
- the outcome of reviews;
- the grounds for withdrawal of or refusal to renew authorisations.

Note for guidance

Note 2A *It is not necessary for all other means to have been tried and failed but that in all the circumstances such other means would not be practicable or would be unlikely to achieve what the action seeks to achieve within a reasonable time or without unacceptable risks of the commission of crime.*

3 PARTICIPATING INFORMANTS

3.1 Before giving authorisations for the use of an informant in circumstances where the informant is participating or is likely to participate in criminal activity as defined in paragraph 1.11, the authorising officer must satisfy him/herself that:

- the participation will be of substantial value to an investigation concerning serious crime, a significant threat to public order or a significant threat to community safety;
- the desired result of the authorised participation by the informant cannot reasonably be achieved by other means (see *Note 2A*);
- the risks of collateral intrusion have been properly considered.

3.2 Paragraphs 2.4 and 2.5 apply to participating informants.

Authorisation procedures - participating informants

3.3 Authorisations for the use of a participating informant will be given in writing by the authorising officer.

3.4 In urgent cases oral authorisations may be given by the authorising officer.

3.5 Written authorisations for the use of a participating informant may be given by:

- in the case of the police and the National Crime Squad, an Assistant Chief Constable;
- in the Metropolitan Police and the City of London Police, a Commander;
- in the case of the Scottish Crime Squad, an appropriate Assistant Chief Constable;
- in the case of NCIS and HM Customs and Excise, an officer of equivalent rank;

3.5.1 In each case to which this paragraph applies the authorising officer will designate the officer to give authorisations in his/her absence.

3.6 Paragraphs 2.8 and 2.8.1 apply in the case of participating informants.

3.7 Except in urgent cases applications to the authorising officer for authorisations for the use of a participating informant must be made in writing and should specify:

- the names, as far as is known, of those subject to investigation;
- the nature of the serious crime, threat to public order or significant threat to community safety;
- how the criteria at paragraph 3.1 have been satisfied;
- the extent of the proposed participation - the exact nature of the criminal activity in which it is proposed the informant be authorised to take part;

and, in circumstances where paragraph 2.4 applies:

- the nature of the 'confidential material' and its relevance to the objectives of the investigation.

3.8 All authorised participating informants will be advised in writing by the informant controller of the exact nature of the authorisations given, the principles set out in paragraphs 1.10 and 1.11 above, and on his/her criminal liability in the event of the authority being exceeded. Participating informants will also be advised in writing of the cessation or withdrawal of authority to participate. In each case the informant will be required to sign his/her acknowledgement of the advice.

Duration of authorisations - participating informants

3.9 Written authorisations last for a maximum of three months beginning with the day on which they took effect and may be renewed at intervals of not longer than three months.

3.10 Oral authorisations last for a maximum of seventy two hours from the time they were given.

3.11 The authorising officer will require reviews to be conducted at intervals of not longer than one month.

3.12 An authorising officer must cancel an authorisation if he/she becomes satisfied that the informant's participation is no longer necessary or appropriate.

Records - participating informants

3.13 A confidential record will be maintained of:

- the matters in paragraphs 3.7 and 3.8;
- authorisations given and the extent of criminal participation authorised;
- oral authorisations and the reasons for urgency;
- an assessment of perceived risks in the use of that participating informant, together with rewards sought or offered to the informant;
- contacts between the handler and the informant;
- information passed by the informant to the handler;
- arrests or other law enforcement benefits;
- rewards or other benefits received by the informant and expenses directly incurred in using the informant;
- the outcome of reviews;
- the grounds for withdrawal of or refusal to renew authorisations.

4 JUVENILE INFORMANTS

4.1 The use of informants who have not attained the age of eighteen years (sixteen years in Scotland, except where the juvenile is the subject of a supervision requirement of a children's hearing) is permitted in accordance with the procedures set out in this code subject to the additional requirements set out below.

4.2 The use of juvenile informants carries particular risks. Authorising officers will give close attention to the issue of proportionality in the use of juvenile informants. As a general rule the younger the juvenile the more compelling a case for his/her use needs to be established. The use of a juvenile informant to give information about members of his/her immediate family requires the most careful consideration of the question of proportionality. Such use of a juvenile informant will be exceptional.

4.3 Authorising officers will weigh the seriousness of the criminality which is being investigated against the risks to the informant, given that informant's age and awareness. In every case involving the use of juvenile informants, the authorising officer must satisfy himself that that the risks have been properly explained and are understood by the informant.

4.4 Paragraphs 2.4 and 2.5 apply to the use of juvenile informants. Juvenile informants will be used to access 'confidential material' only in the most exceptional circumstances involving urgency in the prevention of serious harm or damage.

Authorisation procedures - juvenile informants

4.5 Where authorisations for the registration and use a juvenile informant have been given, such authorisations will be reviewed within seventy two hours of the authorisation by:

- in the case of the police and the National Crime Squad, an Assistant Chief Constable;
- in the case of the Metropolitan Police and the City of London Police, a Commander;
- in the case of the Scottish Crime Squad, an appropriate Assistant Chief Constable;
- in the case of NCIS and HM Customs and Excise, an officer of equivalent rank.

Duration of authorisations - juvenile informants

4.6 Subject to the approval of the officer designated by paragraph 4.5, authorisations for use of the juvenile informant will last for a maximum of one month beginning with the day on which initial authorisation was given and may be renewed at intervals of not longer than a month by the officer designated at paragraph 2.7.

Records - juvenile informants

4.7 The following additional matters will be subject of record where an informant has not attained the age of eighteen years (sixteen years in Scotland, except where the juvenile is the subject of a supervision requirement of a children's hearing):

- in circumstances where a juvenile informant's parent or guardian has not been informed of his/her role as an informant, a record will be kept of the grounds on which the decision not to inform the parent or guardian was taken;

- where the juvenile is a ward of Court, the fact that the Court has been advised of his/her proposed role as an informant and leave to proceed has been given by the Court.

5 RETENTION OF MATERIAL

5.1 Where there is reasonable belief that material relating to any informant activity could be relevant to pending or future criminal or civil proceedings, it should be preserved in accordance with the requirements, where applicable, of the Criminal Procedure and Investigations Act 1996 and other relevant legislation. (See *Note 5A*)

5.2 Where the use of an informant has been cancelled or where the investigation involving the informant has concluded but there is no belief that the material will be required in pending or future criminal or civil proceedings, the material will be destroyed except where its retention may be justified on the grounds set out in the Code of Practice for Recording and Dissemination of Intelligence Material.

Note for guidance

Note 5A *The Criminal Procedure and Investigations Act 1996 does not fully extend to Scotland and Northern Ireland*

6 COMPLAINTS PROCEDURES

6.1 The law enforcement agencies will maintain the standards set out in this code of practice.

6.2 Contraventions of the Data Protection Act 1998 may be reported to the Data Protection Commissioner or the officers set out in paragraph 6.3.

6.3 Complaints concerning breaches of the code may be made to the relevant Chief Constable, the Commissioner of the Metropolitan Police, the Commissioner of the City of London Police, the Director General of the National Crime Squad, the Commander of the Scottish Crime Squad, the Director General of the National Criminal Intelligence Service, or the Chief Investigation Officer, or relevant Collector, of HM Customs and Excise, as appropriate.

UNDERCOVER OPERATIONS

CODE OF PRACTICE

Scope

This code of practice applies to
authorisations for undercover operations by police,
the National Crime Squad, the Scottish Crime Squad,
the National Criminal Intelligence Service and
Her Majesty's Customs and Excise.

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1 GENERAL

1.1 This code of practice must be readily available at all operational police premises and offices of the National Crime Squad, the Scottish Crime Squad, the National Criminal Intelligence Service (NCIS) and HM Customs and Excise, for consultation and reference by police officers, customs officers, civilian employees of a police authority, persons detained in police or HM Customs and Excise custody and their representatives. Copies should be available for consultation by members of the public at all police stations and public offices of HM Customs and Excise.

1.2 Notes for guidance printed in this code are not part of the code unless indicated but are designed to assist police officers and others in its application.

1.3 This code applies to undercover operations conducted within the United Kingdom by the police, the National Crime Squad, the Scottish Crime Squad, the National Criminal Intelligence Service and HM Customs and Excise.

1.4 The term 'undercover operations' includes the activity of trained undercover officers, test purchasers and decoys as defined below. Such activity will only be authorised and conducted in accordance with this code of practice.

1.5 Authorisations for undercover operations will only be given in connection with national security, for the prevention or detection of crime, for the maintenance of public order, for the maintenance of community safety, in the case of a significant public interest, or in co-operation with foreign law enforcement agencies in these matters.

1.6 The primary purpose of undercover operations is to secure evidence to bring offenders before the Courts. Such operations may also be conducted in order to gather intelligence in support of the prevention or detection of crime.

1.7 Undercover operations will only be used by the law enforcement agencies where they judge such use to be proportionate to the seriousness of the crime being investigated, and the history and character of the individual(s) concerned.

1.8 Before authorising any undercover operations, authorising officers will take into account the risk of intrusion into privacy of persons other than the specified target of the undercover operation (collateral intrusion). Measures will be taken wherever practicable to avoid collateral intrusion.

1.9 All undercover operatives will be trained to approved standards.

1.10 The objectives of an undercover operation may not be furthered by attempts to incite the commission of offences, which would not otherwise have been committed, nor, by attempts to entrap offenders who were not otherwise disposed to the commission of such offences.

1.11 The undercover officer or test purchaser may be a party to the commission of criminal offences only within the limits recognised by case law and specified by the authorising officer.

Interpretation

1.12 For the purpose of this code:

1.12.1 **Undercover officer** means:

a specially trained law enforcement officer working under direction in an authorised investigation in which the officer's identity is concealed from third parties by the use of an alias and false identity so as to enable:

- infiltration of an existing criminal conspiracy;
- the arrest of a suspected criminal or criminals;
- the countering of a threat to national security, or a significant threat to community safety or the public interest.

1.12.2 **Test purchaser** means:

an appropriately trained law enforcement officer who seeks, by means of authorised activity, to establish the nature and/or availability of a commodity or service, the possession, supply or use of which involves an offence. (See *Note 1A*)

1.12.3 **Decoy** means:

an appropriately trained law enforcement officer who places him/herself passively in a position where he/she seeks to become the intended victim of a crime for the purpose of securing the arrest of the offender.

1.12.4 **Authorising officer** means:

- a police officer or officer of HM Customs and Excise, designated in this code to examine and approve applications to deploy an undercover officer, a test purchaser or decoy;

- an officer of equivalent rank of the National Crime Squad, the Scottish Crime Squad, or the National Criminal Intelligence Service. (See *Note 1B*)

1.12.5 **Serious crime**:

conduct shall be regarded as serious crime if, and only if:

a) it involves the use of violence, results in substantial financial gain or loss, or is conduct by a large number of persons in pursuit of a common purpose, or

b) the offence, or one of the offences, is an offence for which a person who has attained the age of twenty one and has no previous convictions could reasonably be expected to be sentenced to imprisonment for a term of three years or more.

1.12.6 **Community safety**:

for the purpose of this code a significant threat to community safety includes criminal or anti-social behaviour which is intended or likely to spread the fear of crime or violence or which is intended or likely to corrupt or undermine the health and well-being of the young or other vulnerable sections of the community.

1.12.7 **Public interest**:

for the purpose of this code a significant public interest includes the maintenance of the security and integrity of law enforcement agencies or other public authorities.

1.12.8 **Confidential material:**

Matters subject to legal privilege:

both oral and written communications between a professional legal adviser and his/her client or any person representing his/her client made in connection with the giving of legal advice to the client or in contemplation of legal proceedings and for the purposes of such proceedings, as well as items enclosed with or referred to in such communications. Communications and items held with the intention of furthering a criminal purpose are not matters subject to legal privilege.

Confidential personal information:

information held in confidence concerning an individual (whether living or dead) who can be identified from it, and relating:

a) to his/her physical or mental health; or

b) to spiritual counselling or other assistance given or to be given, and

which a person has acquired or created in the course of any trade, business, profession or other occupation, or for the purposes of any paid or unpaid office. It includes both oral and written information and also communications as a result of which personal information is acquired or created. Information is held in confidence if:

- it is held subject to an express or implied undertaking to hold it in confidence; or

- it is subject to a restriction on disclosure or an obligation of secrecy contained in existing or future legislation.

Confidential journalistic material:

material acquired or created for the purposes of journalism and held subject to an undertaking to hold it in confidence, as well as communications resulting in information being acquired for the purposes of journalism and held subject to such an undertaking. (See *Note 1C*)

Notes for guidance

Note 1A *The term 'test purchase' does not apply where officers of HM Customs and Excise are seeking by purchase to verify the supply, or level of supply, of goods or services which may be liable to a tax or duty.*

Note 1B *The Scottish Crime Squad is commanded by a Detective Chief Superintendent. Where authorisation is required from a more senior rank, application will be made to the appropriate officer in the force where most of the activity is expected to take place.*

Note 1C *More comprehensive definition of the terms 'matters subject to legal privilege', 'confidential personal information' and 'confidential journalistic material' are contained in sections 98, 99 and 100 respectively of the Police Act 1997. This code adopts the principles set out in that Act.*

Published on 13 May 1999

2 DEPLOYMENT OF UNDERCOVER OFFICERS

2.1 Responsibility for authorisations for the deployment of undercover officers rests with the authorising officer as described below.

2.2 Before giving authorisations for the deployment of undercover officers the authorising officer must be satisfied that:

- the deployment of undercover officers is likely to be of value in connection with national security, in the prevention or detection of serious crime, in the maintenance of public order or community safety, or in the case of a significant public interest;
- the desired result of the deployment cannot reasonably be achieved by other means (see *Note 2A*);
- the risks of collateral intrusion have been properly considered.

2.3 In cases where the likely consequence of the deployment of undercover officers would be for any person to acquire knowledge of 'confidential material', such deployments will only be authorised in connection with serious crime or the interests of national security.

2.4 In such cases special authorisation is required as set out in paragraph 2.8.

Authorisation procedures - undercover officers

2.5 Authorisations for the deployment of undercover officers will be given in writing by the authorising officer.

2.6. In urgent cases oral authorisations may be given by the authorising officer.

2.7 Written authorisations for the deployment of undercover officers will be given by:

- in the case of the police and the National Crime Squad, an Assistant Chief Constable;
- in the case of the Metropolitan Police and the City of London Police, a Commander;
- in the case of the Scottish Crime Squad, an appropriate Assistant Chief Constable;
- in the case of NCIS, an officer of equivalent rank designated by the Director General;
- in the case of HM Customs and Excise, the Chief Investigation Officer.

2.8 Authorisations for the deployment of undercover officers in circumstances where paragraph 2.3 applies may only be given by:

- in the case of the police, the Chief Constable;
- in the Metropolitan Police, an Assistant Commissioner;
- in the City of London Police, the Commissioner;
- in the case of the Scottish Crime Squad, the appropriate Chief Constable;
- in the case of the National Crime Squad and NCIS, the Director General;
- in the case of HM Customs and Excise, the Chief Investigation Officer.

2.9 In each case to which paragraphs 2.7 and 2.8 apply, the authorising officer will designate the officer to give authorisations in his/her absence.

2.10 Except in urgent cases applications to the authorising officer for authorisations for the deployment of undercover officers must be made in writing and should specify:

- the names (where known) of those to be targeted by the undercover operation;
- how the criteria at paragraph 2.2 have been met;
- the likelihood and extent of any undercover officer being required to be a participant in criminal activity in order to maintain his/her cover;

and in circumstances where paragraph 2.3 applies:

- the nature of the 'confidential material' concerned and its relevance to the objectives of the investigation.

2.11 Where an authorised undercover officer comes unexpectedly into possession of 'confidential material', and expects that access to continue, he/she should seek appropriate authorisation before continuing the operation.

Duration of authorisations - undercover officers

2.12 Written authorisations last for a maximum of three months beginning with the day on which they took effect and may be renewed at intervals of not longer than three months.

2.13 Oral authorisations last for a maximum of seventy two hours from the time they were given.

2.14 In respect of authorisations under paragraph 2.8 authorising officers should determine the frequency of reviews which should be at intervals of not longer than one month. In respect of other authorisations the authorising officer will require reviews to be conducted within the period where, in his/her judgement, the circumstances require it.

2.15 An authorising officer must cancel an authorisation if he/she becomes satisfied that the deployment of an undercover officer is no longer necessary or appropriate.

Records - undercover officers

2.16 A record shall be maintained of:

- the matters required in paragraph 2.10;
- authorisations given;
- oral authorisations and the reasons for urgency;
- contact(s) between the undercover officer and the target(s);
- the outcome of reviews;
- the grounds for withdrawal of or refusal to renew authorisations.

Note for guidance

Note 2A *It is not necessary for all other means to have been tried and failed but that in all the circumstances such other means would not be practicable or would be unlikely to achieve what the action seeks to achieve within reasonable time or to the necessary evidential standard.*

3 DEPLOYMENT OF TEST PURCHASERS AND DECOYS

3.1 Responsibility for authorisations for the deployment of test purchasers or for deployment of decoys rests with the authorising officer as set out below.

3.2 Before giving authorisations for the deployment of test purchasers the authorising officer must be satisfied that:

- the test purchase is required in support of an investigation into a criminal offence concerning the possession, supply or use of a commodity or service and that reasonable grounds have been established prior to the deployment of a test purchaser to suspect that such a criminal offence is being committed (see *Note 3A*);
- the desired result of the test purchase cannot reasonably be achieved by other means (see *Note 2A*);
- the risks of collateral intrusion have been properly considered.

3.3 Before giving authorisations for the deployment of decoys the authorising officer must be satisfied that:

- the decoy is to be used in the investigation of an established course of criminal conduct (see *Note 3B*);
- the desired result of the decoy operation cannot reasonably be achieved by other means (see *Note 2A*);
- the risks of collateral intrusion have been properly considered.

3.4 The deployment of test purchasers and decoys may not be used if their effect would be to secure access to 'confidential material'.

Authorisation procedures - test purchases and decoys

3.5 Authorisations for the deployment of test purchasers and decoys will be given in writing by the authorising officer.

3.6 Written authorisations for the deployment of test purchasers and decoys may be given by:

- in the case of the police, the National Crime Squad and the Scottish Crime Squad, a superintendent;
- in the case of NCIS and HM Customs and Excise, an officer of equivalent rank.

3.7 Applications to the authorising officer for authorisations to deploy test purchasers and decoys must be made in writing and should specify the matters set out below.

3.8 In cases of test purchase, applications should specify:

- the nature of the criminal offence(s) to be subject of the test purchase together with the names and addresses (as far as known) of the persons targeted;
- how the criteria at paragraph 3.2 have been satisfied.

3.9 In cases of decoy, applications should specify:

- the nature of the criminal conduct;
- the grounds for belief that further offences are likely to occur;
- how the criteria at paragraph 3.3 have been satisfied.

Duration of authorisations - test purchasers and decoys

3.10 Written authorisations last for a maximum of three months beginning with the day on which they took effect and may be renewed at intervals of not longer than three months.

3.11 The authorising officer will require reviews to be conducted at intervals of not longer than one month.

3.12 An authorising officer must cancel an authorisation if he/she becomes satisfied that the deployment of the test purchaser or decoy is no longer necessary or appropriate.

Records - test purchasers and decoys

3.13 A record shall be maintained of:

- the matters required at 3.8 and 3.9 as appropriate;
- authorisations given;
- details of the results of the test purchase;
- details of any person arrested as a result of the decoy operation;
- the outcome of reviews;
- the grounds for withdrawal of or refusal to renew authorisations.

Notes for guidance

Note 3A *Test purchase should not be used as a speculative means of search for the existence of a commodity or service where no other reasonable grounds exist to suspect that criminal offences have been or are being committed.*

Note 3B *There is no lower figure on the number of offences which may have been committed. Authorising officers will take into account corroborative information about the likelihood of another offence and the necessity of deploying a decoy in preference to other techniques.*

4 RETENTION OF MATERIAL

4.1 Where there is reasonable belief that material relating to an undercover operation could be relevant to pending or future criminal or civil proceedings, it should be preserved in accordance with the requirements, where applicable, of the Criminal Procedure and Investigations Act 1996 and other relevant legislation. (See *Note 4A*)

4.2 Where an operation has been cancelled or where the operation has concluded but there is no belief that the material will be required in pending or future criminal or civil proceedings, it will be destroyed except where its retention may be justified on the grounds set out in the Code of Practice for Recording and Dissemination of Intelligence Material.

Note for guidance

Note 4A *The Criminal Procedure and Investigations Act 1996 does not fully extend to Scotland and Northern Ireland.*

5 COMPLAINTS PROCEDURES

5.1 The law enforcement agencies will maintain the standards set out in this code of practice.

5.2 Contraventions of the Data Protection Act 1998 may be reported to the Data Protection Commissioner or the officers set out in paragraph 5.3.

5.3 Complaints concerning breaches of the code may be made to the relevant Chief Constable, the Commissioner of the Metropolitan Police, the Commissioner of the City of London Police, the Director General of the National Crime Squad, the Commander of the Scottish Crime Squad, the Director General of the National Criminal Intelligence Service or the Chief Investigation Officer, or relevant Collector, of HM Customs and Excise, as appropriate.

JH/00/20/1

From R.A. Macpherson, Past President

SOCIETY OF MESSENGERS-AT-ARMS AND SHERIFF OFFICERS

Affiliated to Union Internationale des Huissiers de Justice et Officiers Judiciaires

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Ms. Roseanna Cunningham, M.S.P.,
Convener of the Justice and Home Affairs Committee,
The Scottish Parliament,
Committee Chambers,
George IV Bridge,
EDINBURGH, EH99 1SP.

16th May, 2000.

Dear Convener,

Abolition of Poindings and Warrant Sales Bill

I am replying, with the full support of the office bearers and Executive Council of this Society, to your letter of 4th May addressed to me.

As a body, we are shocked at the terms of your last paragraph. We represent an honourable Scottish profession. We are numbered amongst the officers of arms, the officers of court and the officers of law of this country. Messengers-at-Arms are officers of the High Court of Parliament itself. We bear the ensign of public authority. The daily workings of the civil courts depend upon the faith of our executions. *Why are we being menaced with oaths?* Are you imputing that there is an "apparent discrepancy" between the evidence we gave and the truth? Mr. Sheridan's accusations, which you quote, should easily have been dismissed by examination of the written record of the evidence your Committee took and Mr. Sheridan's own speech in the debate.

Our members are dismayed that not a single M.S.P. challenged the offensive remarks about sheriff officers that Mr. Sheridan made in the Parliament. "The unaccountable and often ruthless Sheriff Officers", he said. But you know we hold our commissions from the Sheriffs Principal, and are subject to statutory rules. You know our function is to give effect to the lawful warrants of the courts and to do that in accordance with statute, the code of ethics of this Society, and the regulation of all those judges from whom we hold public commissions. It was a matter of particular regret to the Society that neither the Minister for Justice nor any member of the Justice Committee took the opportunity to refute such allegations when they were made.

Ram

SOCIETY OF MESSENGERS-AT-ARMS AND SHERIFF OFFICERS
Affiliated to Union Internationale des Huissiers de Justice et Officiers Judiciaires

Mr. Sheridan's remark, "I have often referred to them (sheriff officers) as rottweilers, but I must qualify that statement, many rottweilers are often better behaved", is just pretty low political rhetoric. "That unaccountable bunch of bullies", however, was more serious - because Mr. Sheridan then followed that slur by bringing the good name of the Justice and Home Affairs Committee into the sound bite. I noted that your letter to me was an open one, published with the Committee papers on the internet before we had a chance to refute the so-called "serious allegations". If your letter's appearance adds any seeming weight to claims against us then you have done us an injustice.

I now turn to the allegations. We told the Committee on 11th January - and Mr. Sheridan quoted this on 27th April, with some seeming disapproval - "Generally, we do not derive our income wholly from poinding and warrant sale." A reading of the evidence that Mr. Love and I gave to you shows that when Mr. Sheridan claimed in his speech that we had told you that our profession would not be "financially disadvantaged" at all by the passing of his bill, he was putting a gloss on our words that went well beyond paraphrase. I had plainly acknowledged to your Committee, "A prescribed fee is allowed in the Act of Sederunt for poinding, and it is obvious that the only people who can poind are sheriff officers; therefore of course there is a level of income associated with poinding." The simple truth is that our professional income is derived from the proper execution of our official duties, and charged in accordance with the Lords of Council and Session's acts of sederunt. (Being yourself, as an advocate, a fee-paid officer of the court, you will have a perfect understanding of this.)

Neither could we be faulted for telling you, "Our scope in service of citation and diligence is widespread." So it is. An officer of court carries out the duties of service of summonses, witness citations, charges, a variety of warning away notices, arrestments of ships, of bank accounts, of earnings; he executes inhibitions, interdicts, sequestrations for rent, ejections, the taking possession of effects, apprehensions, dealing with children in matrimonial squabbles, and various other miscellaneous warrants which proceed both from the Court of Session and the sheriff courts.

I come to the issue of whether Mr. Sheridan's obtaining of a copy of the minutes of the last annual general meeting of the Society of Messengers-at-Arms and Sheriff Officers in any way entitled him to convey the impression that there was some discrepancy between the Society's views therein expressed and the evidence that I gave to your Committee. Mr. Sheridan on 27th April referred to some *admission* - some revelation from this sequestered source - that these minutes record a hidden truth: that the abolition of poindings would mean that the Society's members' "very livelihoods are at stake". Now we have moved into the conjurer's province! How can this be read as some sounding "discrepancy"? You said to us, "You are not arguing from the point of view of job losses or anything like that." Quite so; that was not an argument that was presented by us to the Committee. I was perfectly entitled to state this: "our visit here is to address the *general principles of the bill*, which we urge you to reject. It is not for us to make any special pleading about the effect that the bill will have on our profession."

Ms. Roseanna Cunningham, M.S.P.,
Convener of the Justice and Home Affairs Committee.

16th May, 2000.

SOCIETY OF MESSENGERS-AT-ARMS AND SHERIFF OFFICERS
Affiliated to Union Internationale des Huissiers de Justice et Officiers Judiciaires

Mr. Sheridan then mishandled the supposed evidence that this set of minutes gave him. He stated, "The Society of Messengers-at-Arms and Sheriff Officers admits that its members' very livelihoods are at stake - it must combat the bill because 23,000 poindings last year brought in £1.6 million for sheriff officers." Now at page 10 in the minutes, an intervention by one of the members of the Society is recorded as follows: "He reminded members that it was their livelihood that was at stake and on the last occasion the Society had asked every member to contact their local M.P.s and draw to their attention the problems that could arise should the bill be passed. We had a very strong argument against the points made in the Bill and it was for individuals to make their voices heard."

Two points arise: firstly, the minuted remarks of a member of our Society at its annual general meeting do not, by that fact, state the official position of the Society. (If Mr. Alex Neil, for example, calls sheriff officers "Bully Boys" - as he does - would he therefore be stating the official S.N.P. policy?) Secondly, it is a novel suggestion that there is something improper in an officer of court - for all that, still one of your constituents - voicing to colleagues his concerns about the impact of a bill which, as framed, would not anticipate a replacement diligence against moveable property, and would profoundly damage the ability of Scottish courts to resolve certain debt recovery problems. There is no mystery about this: Every officer worries for his livelihood if circumstances might make Scotland a country where the law allows the payment of debt to become a purely voluntary matter.

Mr. Sheridan's comments in his speech to the Parliament on 27th April about me personally tended, I felt, to suggest something underhand in my conduct. (Or am I being too sensitive - for a "rottweiler"?) He said: "The same Roderick Macpherson is referred to in a letter from the Society of Messengers-at-Arms and Sheriff Officers of 11th January to all its members. That letter said that a firm of solicitors ... were working hard on the Society's behalf to combat the bill and that a team had been formed, including Roderick Macpherson, to work to defeat my bill. It is in black and white."

It is unjust to suggest that either the Society or I was anything other than "open and truthful" with the Parliament in the way that we gave our advice on this issue. The "Society's attitude towards the Bill" was never in doubt. You will remember that I told all of the members of your Committee - including Mr. Sheridan, *to his face* - "We call your attention to the fact that a vital remedy, as we regard it, that has always been available to holders of court decrees in Scotland, will be removed. We are concerned about the effect that that may have ... We perceive that the bill will cause a mischief to creditors in this country. That is the basis of our approach to the general principles of the bill." You know that the Society gave your Committee a paper that explicitly argued against the general principle of the abolition of execution against moveable property. You know that every M.S.P. received a briefing paper, under the Society's name, the unequivocal purpose of which was to urge Parliament not to leave Scotland without a diligence against moveables in a debtor's own possession. Has it become a "serious allegation" simply not to agree with Mr. Sheridan on this issue?

Ms. Roseanna Cunningham, M.S.P.,
Convener of the Justice and Home Affairs Committee.

16th May, 2000.

SOCIETY OF MESSENGERS-AT-ARMS AND SHERIFF OFFICERS
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As the professional officers to whom Parliament itself has entrusted the highly responsible work of executing poindings, we hope that our advice to Parliament, based on our practical experience, will have helped members to realise that some procedure for the attachment of moveable property in the hands of the debtor himself will always be necessary, whatever arrangements for the laws of diligence Parliament now makes. The Executive made clear that the balance would need to be restored by a new diligence against *moveable property*. In the Stage 1 debate, the Deputy Minister for Communities, having abandoned the Executive's amendment to the bill, nonetheless stated her understanding that, "The Committees have recommended that an alternative, humane diligence against moveable property is found."

We saw no good reason to consign the word "poinding" to history: but other than that, the basic principles of the position of our Society on the need for execution against moveable property are now seen to be part of the *consensus*. Do not forget that our Society not only helped to establish the current level of debtor protection in Scotland, but also argued that some further protections would be welcomed by sheriff officers. Officers of court want to be operating a system which enjoys public support because it is thoroughly *up to date* in the way it reflects a socially acceptable balance between the rights of creditors and debtors.

I hope that I have reassured you on your points of concern. Let me therefore reiterate my concerns: that the intemperate language used by M.S.P.s against the messengers-at-arms and sheriff officers tends to demean the Parliament and insults the court system. I trust that you will now use your position as convener of the Justice Committee to give prompt reassurance to the officers of court that we have from you what is due: support for our daily tasks in maintaining the rule of law, in accordance with all those diligences that Parliament itself provides, and courts lawfully command.

Yours sincerely,

Ranald Munro.