JH/00/26/A

The Scottish Parliament

JUSTICE AND HOME AFFAIRS COMMITTEE

AGENDA

26th Meeting, 2000 (Session 1)

Wednesday 6 September 2000

The Committee will meet at 9.30 am in Committee Room 2, Committee Chambers, George IV Bridge, Edinburgh.

1. **Minister and Deputy Minister for Justice:** The Committee will take evidence from the Minister for Justice and Deputy Minister for Justice on progress to date and future plans of the Scottish Executive Justice Department.

2. **Domestic Violence:** The Committee will consider a report from Maureen Macmillan on a proposed Protection from Abuse Bill.

3. **Legal Aid Inquiry:** The Committee will consider the remit of its inquiry into legal aid and access to justice.

4. **Petition:** The Committee will consider petition PE116 by Mr James Strang.

Andrew Mylne
Clerk to the Committee, Tel 85206

****

The following papers are attached for this meeting:

Agenda item 1

International Criminal Court – Letter to the Convener from the Minister for Justice	JH/00/26/1
HM Chief Inspector of Prisons for Scotland – Report for 1999/2000	

Agenda item 2

Note by Senior Assistant Clerk on proposed Protection from Abuse Bill	JH/00/26/2

Agenda item 3

Note by Senior Assistant Clerk on Legal Aid Inquiry	JH/00/26/3

[Note: Members should have received a SPICe research note on legal aid, copies of which are also available from the Reference Centre.]

Agenda item 4

Note by Senior Assistant Clerk on PE116 (copy of petition and letter from Minister for Justice attached)	JH/00/26/4

Papers not circulated:

The clerks have received copies of the following documents, which are not circulated. Members may obtain copies from the Document Supply Centre or the sources indicated.

- *Community Legal Service: Financial conditions for funding by the Legal Services Commission: A Consultation Paper*, Lord Chancellor's Department, July 2000. This paper seeks views on a package of proposals to reform the financial conditions which apply to the Community Legal Service Fund (the English equivalent of civil legal aid). Also available on Internet at www.open.gov.uk/lcd.
- *An Evaluation of the Parent Information Programme*, Scottish Executive Central Research Unit, plus Research Findings No. 29 (a short summary of the document).

Statutory Instrument:

Members may wish to note that the Human Rights Act 1998 (Jurisdiction) (Scotland) Rules 2000, SSI 2000/301 were laid on 30 August and have been referred to the Justice and Home Affairs Committee. These Rules will be put onto a future agenda of the Committee. A copy of the Rules may be obtained from the Document Supply Centre.

JUSTICE AND HOME AFFAIRS COMMITTEE

Papers for information circulated for the 26th meeting, 2000

Regulation of Investigatory Powers (Scotland) Bill

Covert surveillance: draft code of practice — JH/00/26/5

Covert Human Intelligence Sources: draft code of practice — JH/00/26/6

Judicial Appointments Consultation

Justice and Home Affairs Committee response to the Scottish Executive Judicial Appointments Consultation — JH/00/26/8

PE89

Response from the Scottish Police Federation — JH/00/26/7

PE 102

Response from the Law Society of Scotland — JH/00/26/9

Miscellaneous

Provisional forward programme — JH/00/26/10

Extract from *The Scotsman* on land reform

Extracts from *The Herald* and *The Press and Journal* on motoring offences and the Carbeth Hutters

JH/00/26/1

SCOTTISH EXECUTIVE

Deputy First Minister & Minister for Justice
Jim Wallace QC MSP

St Andrew's House
Regent Road
Edinburgh EH1 3DG

Telephone: 0131-556 8400
scottish.ministers@scotland.gov.uk

Roseanna Cunningham MP MSP
Convener
Justice and Home Affairs Committee
The Scottish Parliament
EDINBURGH
EH99 1SP

25th August 2000

Dear Roseanna,

INTERNATIONAL CRIMINAL COURT

I am writing to inform you that the Foreign Secretary will be publishing a draft Bill today to give effect in England, Wales and Northern Ireland to the United Kingdom's obligations under the Statute of the International Criminal Court. This will be accompanied by a consultation paper inviting comments from interested parties on the content of the proposals. I will arrange for copies of both documents to be sent to you.

As you know, observing and implementing the United Kingdom's obligation is a devolved matter insofar as the obligations themselves relate to devolved matters. Since the necessary domestic legislation relates primarily to criminal law, jurisdiction and procedure, all of which are devolved matters, we therefore propose to bring forward a separate Scottish ICC Bill to deal with these matters. The Westminster Bill will, however, deal with certain reserved matters, such as judicial pensions, on a UK-wide basis.

I understand that the Foreign Secretary intends to introduce the Westminster ICC Bill as soon as Parliamentary time permits. In the event that the Westminster Bill is included in The Queen's Speech, I would hope to be in a position to introduce the corresponding Scottish Bill in January or February next year.

I will, of course, be giving evidence to the Justice and Home Affairs Committee on 6 September and will be happy to explain our thinking in more detail if it would be helpful to do so.

Yours sincerely,

JIM WALLACE

JH/00/26/2

JUSTICE AND HOME AFFAIRS COMMITTEE

Proposed Protection from Abuse Bill

Note by the Senior Assistant Clerk

Background

1. At its second meeting last year, the Committee agreed to consider Maureen Macmillan's proposal to extend the scope of matrimonial interdicts under the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (the 1981 Act). Since then the Committee has taken oral evidence from Scottish Women's Aid and the Family Law Association on 8 September 1999, and from the Scottish Partnership in Domestic Violence (the Partnership), the Association of Scottish Police Superintendents, the Association of Chief Police Officers in Scotland and the Sheriffs' Association on 22 September 1999. The Committee also received written evidence from the Association of Scottish Police Superintendents, City of Edinburgh Council Domestic Violence Probation Project, the Department of Social Security, the Law Society of Scotland, the Scottish Legal Aid Board, the Scottish Police Federation, Scottish Women's Aid, and the Sheriffs' Association. Also circulated to the Committee were the Scottish Law Commission Report on Family Law 1992 – Part XI of the Matrimonial Homes (Scotland) Act 1981, and the Scottish Partnership on Domestic Abuse – Workplans, March and October 1999.

2. The Committee appointed Maureen Macmillan MSP as reporter on domestic violence on 6 October 1999. She has met the Scottish Legal Aid Board, the Family Law Association, the Lord Advocate and the Law Society of Scotland. She also discussed her proposal with the Minister for Justice, Jim Wallace, and the Minister for Communities, Jackie Baillie, in April and with the Deputy Minister for Justice, Angus MacKay, earlier this month.

Amendment of the 1981 Act

3. The original proposal made by the Reporter was for a Bill to amend the 1981 Act. Section 15 of the 1981 Act allows the power of arrest to be attached to a matrimonial interdict but such a power of arrest ceases on termination of the marriage. The 1981 Act also applies to cohabiting heterosexual couples who are joint owners or tenants of the house and to a member of such a couple who is not otherwise entitled to occupy the house but who has obtained an order under section 18 of the Act granting occupancy rights.

4. Evidence indicated that it would be extremely difficult to extend protection to all those who require it by means of a Bill to amend the 1981 Act. The Committee therefore decided to examine the possibility of introducing a Bill of more general application aimed at protecting people from abuse, whatever their relationship. Such a Bill would complement the 1981 Act and would offer protection to those excluded from that Act, but would not include a power to deprive a person of his or her occupancy rights to their home. At its meeting on 4 April, the Committee agreed to

recommend the introduction of such a Bill as a Committee Bill (Protection from Abuse Bill).

Interdict with powers of arrest

5. The Reporter originally envisaged that the court procedures provided under the Protection from Abuse Bill be similar to those under the 1981 Act. On application by the victim, there would be an initial hearing before a sheriff who would decide whether there was a reasonable likelihood of further abuse and whether granting an interdict would be appropriate. If an interdict was granted at the initial hearing, the victim could then apply, at a subsequent hearing, to have a power of arrest attached to the interdict. The defender would have the right to be heard at any such subsequent hearing, and corroborating evidence would be required. If satisfied that the evidence showed a real danger of abuse, the sheriff could attach a power of arrest to the interdict for an appropriate period of time, which would be specified in the interdict. In the event of a subsequent breach of interdict, the sheriff would have discretion as to the penalty imposed for any breach of the interdict.

6. Where a person had been arrested for a breach of interdict but no criminal proceedings were to be taken under separate criminal sanctions, such as the law of assault, the procurator fiscal would inform the applicant and establish whether the applicant wished to pursue civil breach of interdict proceedings.

Breach of Interdict – a criminal offence

7. It has recently been suggested to the Reporter that an alternative to the above proposal would be to consider formulating the Bill along the same lines as the Protection from Harassment Act 1997. Under that Act a breach of a non-harassment order, whether the order was made by a criminal or civil court, is a criminal offence punishable on indictment by up to 5 years' imprisonment.

8. If an interdict granted under the Protection from Abuse Bill were to operate in the same way as a non-harassment order, breach of interdict would be a criminal offence. This would mean that the applicant would not have to apply for powers of arrest to be attached to the interdict, or decide whether to take civil proceedings for breach of interdict. As a result, the process would be more straightforward for the applicant who would not need to apply for legal aid on more than one occasion.

9. A possible disadvantage of this suggestion would be that it would take the decision of whether to prosecute for breach of interdict out of the hands of the victim. In some cases of domestic violence it may be that the victim would not wish the defender to be prosecuted. On the other hand, this could be seen as an advantage, since it could result in a prosecution in cases where the victim would be reluctant to prosecute through fear or intimidation, and would reduce the risk of the victim being "blamed" for the consequences of the legal process.

10. In Scots Law, criminal acts have to be proved beyond reasonable doubt, whereas a lower extent of proof is required in civil law, namely having to establish the case only on the balance of probability. However, in civil breach of interdict cases the criminal standard of proof is required, namely beyond reasonable doubt. This means

that the standard of proof would not change if breach of interdict were to be made a criminal offence. The usual requirement for proof beyond reasonable doubt is corroborative evidence from two witnesses. In relation to a charge of criminal breach of interdict where a breach consisted of being present in a prohibited location, sufficient evidence could be provided by the police officers who have witnessed the presence of the abuser.

Evidence

11. The Scottish Law Commission Report on Family Law 1992 (SLC Report No. 135) reported that there was strong opposition to making any breach of a matrimonial interdict with a power of arrest attached to it a criminal offence, mainly on the ground that it would cause undesirable confusion of civil and criminal remedies (Chapter XI, para. 11.43). However, the Protection from Harassment Act 1997, enacted since that report was written, establishes a precedent for other legislation which incorporates both civil and criminal proceedings.

12. In its evidence to the Committee, Scottish Women's Aid (SWA) argued that the enforcement of powers of arrest should be addressed. They argued that if an interdict is breached, the police can arrest the perpetrator at their discretion and that they were aware of "numerous cases" where an interdict has been breached and the abuser has not been arrested. They suggested that a way of overcoming this difficulty was to make breach of interdict a criminal offence, "if an interdict is breached, there is a relatively weak response from the criminal justice system; if a non-harassment order is breached, there could be severe criminal sanctions." SWA argued that non-harassment orders are being accessed by women not covered by the 1981 Act: "the main aim of the 1997 Act is to prevent stalking, not to deal with breaches of interdict, but it is being used for that purpose because it is far more effective than the other legislation" (cols 73-74).

Legal Aid Implications

13. There is a difference between rules governing civil legal aid, sought for an application for an interdict, and those governing criminal legal aid, sought by an accused in relation to criminal "breach of interdict proceedings". If the legal aided pursuer wishes to initiate breach of interdict proceedings, it is necessary to apply for legal aid on a second occasion, having already applied for legal aid, for initial proceedings to secure the interdict.

14. In discussion with the Reporter, the Scottish Legal Aid Board (SLAB) did not think that the original proposal considered by the Committee would lead to an increase in the civil legal aid budget, but the creation of a criminal offence for breach of interdict would probably increase demand on the criminal legal aid budget (see note on meeting between the Reporter and the Scottish Legal Aid Board, 14th October 1999: JH/00/4/7). Such an increase in expenditure might, however, be balanced by a reduction in civil legal aid expenditure.

The way forward

15. The Reporter recommends to the Committee the proposal to make breach of interdict a criminal offence. Evidence taken by the Committee indicated that the legal aid procedures often prevent victims from taking action in situations of domestic abuse. Making breach of interdict a criminal offence would reduce the number of civil legal aid applications necessary by victims. It would also offer more protection to the victim as the defender would be automatically arrested for the criminal offence of breach of interdict and the victim would not have to make the decision as to whether or not to initiate civil breach of interdict proceedings. The Committee is therefore invited to agree that its report to the Parliament making the case for a Committee Bill should advocate a Protection from Abuse Bill along the lines outlined above.

23 AUGUST 2000 ALISON E TAYLOR

JH/00/26/

Justice and Home Affairs Committee

Legal Aid Inquiry

Background

1. At its meeting on 26 April, the Committee agreed that its first priority, when time became available, was to consider legal aid in relation to access to justice. This note sets out options available to Committees when conducting inquiries, and when considering the remit of the inquiry.

Appointment of an adviser

2. Rule 12.7 of the Standing Orders states that a Committee may, with the approval of the Parliamentary Bureau, appoint an adviser. The role of advisers is principally to work with committee clerks to provide expert support and advice in the organisation and implementation of inquiries by committees. Advisers will, for example, prepare background briefing papers for committees, assist in the scoping and framing of remits for inquiries, assist in the selection of appropriate witnesses, and contribute to the preparation of committee reports. The **Committee is invited to consider whether it wishes to appoint an adviser for its inquiry into legal aid in relation to access to justice.**

3. If the Committee agrees to appoint an adviser, it is invited to agree to a specification and job description for the adviser as outlined below.

4. It is envisaged that the main aspects of the inquiry into legal aid in relation to access to justice on which the Committee will require guidance from an adviser will be the following:

Remit: The adviser will advise the Committee on possible remits for the inquiry, and which witnesses it should consider taking evidence from. The adviser will advise the Committee on areas of questioning, etc.

Analysis: The adviser will assist the Committee in analysing any information received as part of the inquiry, and to formulate any recommendations.

Report: The adviser will assist the Committee clerks in drafting a report on the findings of the inquiry.

5. Adviser: Person Specification

Experience: The adviser will have experience in and an understanding of both Scots law and the current operation of the legal aid system.

Skills/Abilities: The adviser must have a proven analytical and interpretative skills and the ability to analyse evidence from a wide range of sources. The adviser must

have good communication skills, the ability to present information in an accessible style and to work to short deadlines.

Neutrality: The adviser must be able to advise the Committee dispassionately on the basis of available evidence without seeking to persuade it of any particular outcome or approach that he or she may favour, and should not be actively involved in any capacity that would compromise his or her ability so to act.

Availability: The adviser must be able to demonstrate that he or she has sufficient time to undertake the work over the life of the inquiry.

Confidentiality: The adviser's duties may involve handling confidential and sensitive material. The adviser will be required to maintain absolute confidentiality about the matters under consideration or which come before him or her. The adviser will be required to meet periodically with Clerking and SPICe staff, in Edinburgh, to discuss progress. The successful candidates will be required to declare any interests, relevant to the subject matter of the inquiry, pecuniary or otherwise, in advance of the award of any contract.

Structure of the inquiry

6. If the Committee agrees to appoint an adviser, he or she will be required at an early stage to advise the Committee on the remit of the inquiry. Legal Aid is a complex and wide issue, and the Committee may wish to consider narrowing the focus of its inquiry to specific areas. For example, an adviser may suggest that the Committee focus on either civil or criminal legal aid. Areas already touched on in Committee meetings include availability and eligibility; contributions; cases of special urgency; comparison between Scotland and England and Wales; information and access, e.g. community legal services; alternatives to legal aid, and value for money. The Committee may wish to have an initial discussion at this point about the remit of the inquiry.

7. At this stage, the Committee may wish to consider what options are open to it in conducting its inquiry. The main options are that the Committee can issue a call for evidence and contact specific people and organisations asking for written submissions. It can also take oral evidence from witnesses and visit relevant organisations. The Committee may also wish to consider commissioning a piece of external research on some aspect of legal aid.

AUGUST 2000 ALISON E TAYLOR

JUSTICE AND HOME AFFAIRS COMMITTEE

Petition PE116 by James Strang

Note by the Senior Assistant Clerk

Background

This petition calls for the Parliament to introduce appropriate provisions to ensure that aspects of Scots law are compatible with the obligations of Article 6(1) of the European Convention on Human Rights (ECHR).

The principal arguments made in the petition are that members of the Parole Board are appointed by the Scottish Executive and therefore do not provide "an independent and impartial tribunal" as required by Article 6(1), and that Ministers are responsible for the recall of prisoners, also in contravention of that Article.

The petition calls for the establishment of a forum "for the purposes of investigating and reviewing any potential conflicts between Scots law and procedure and the Convention rights".

Appointment of Parole Board

The Parole Board for Scotland is a statutory body set up to direct and advise Ministers on the release and licence of persons serving sentences of imprisonment, the conditions of release licences and any other matter connected with the release and recall of such prisoners. Under Schedule 2 to the Prisoners and Criminal Proceedings (Scotland) Act 1993, the Board consists of a Chairman and at least four other members appointed by Ministers. The Board must include among its members a High Court judge, a psychiatrist, a person experienced in the supervision and aftercare of prisoners and a criminologist.

The Scottish Ministers currently perform an important role in relation to the management of discretionary and mandatory life prisoners, and other prisoners released on licence. For discretionary life prisoners, the power of release rests with the Parole Board, but Ministers may and do make recommendations to the Board as to whether or not the risk of releasing a designated life prisoner is acceptable. The power to recall prisoners is exercised by Ministers. Ministers exercise no discretion in relation to designated life prisoners who are the subject of a recommendation to recall from the Parole Board, but have power to recall prisoners prior to consultation with the Board when this is judged expedient in the public interest.

The Convener of the Public Petitions Committee, John McAllion MSP, wrote to the Minister for Justice in April seeking his views on the matters raised in the petition (copy attached). In his reply (copy attached), the Minister indicated that in the light of the judgements in the cases of *Clancy v Caird* and *Starrs and Chalmers*, the Executive is "carefully considering various matters relating to the membership of bodies operating in devolved areas, including the Parole Board", but has thus far not identified an ECHR weakness in the existing arrangements governing the appointment of members to the Board. The Minister would not comment on the recall of prisoners to custody as this was the subject of court proceedings. (This relates to the petition of William Varey for judicial review of a decision of the Scottish

Ministers to revoke his licence and recall him to prison. Lady Paton dismissed the petition on 11 August 2000 and the matter is therefore no longer *sub judice*.) The Minister also referred to the forthcoming consultation on the creation of a Human Rights Commission which might address the need for a forum to investigate and review any potential conflicts between Scots law and ECHR.

Procedure

The Standing Orders make clear that, where the Public Petitions Committee (PPC) refers a petition to another committee it is for that committee then to take "such action as they consider appropriate" (Rule 15.6.2(a)).

Options

The Committee may wish to discuss the issues raised further with the Minister for Justice, either when he is before the Committee on 6 September, or by letter. It might also wish to seek the views of other relevant organisations, such as the Scottish Human Rights Centre. The Committee could also consider the matters raised in the petition during any consideration it gives to the Report of the Maclean Committee on Serious Violent and Sexual Offenders, which makes recommendations on the consideration of release, release powers and the role of Ministers. Alternatively, of course, the Committee may prefer simply to note the petition and take no further action.

29 AUGUST 2000 ALISON E TAYLOR

PE116

JH/00/26/4

The Scottish Parliament

PUBLIC PETITIONS COMMITTEE

Room G15
Parliamentary Headquarters
EDINBURGH
EH99 1SP

6 April 2000

Jim Wallace QC MSP
Deputy First Minister & Minister for Justice
The Scottish Executive
St Andrews House
Regent Road
EDINBURGH
EH1 3DG

Dear Jim,

I am writing to you in my capacity as Convener of the Public Petitions Committee of the Scottish Parliament.

At its meeting on 14 March, the Committee considered a petition from Mr James Strang, 57 Cleghorn Street, Dundee, calling for the Scottish Parliament to introduce appropriate provisions to ensure that certain aspects of Scots law are compatible with the obligations of Article 6 (1) of the European Convention on Human Rights. A copy of the petition is attached.

The Committee agreed that I should write to you seeking your comments on the issues raised in the petition. I should be grateful if you would provide the Committee with your views as soon as possible.

You may wish to note that the Committee also agreed that the petition should be passed to the Parliament's Justice and Home Affairs Committee for further consideration. I am copying this letter to that Committee's Convener for information.

I am grateful for your assistance in this matter.

Yours sincerely

John McAllion

JOHN McALLION MP MSP
Convener

Contact Telephone Number (Clerk): 0131 348 5186 Fax Number: 0131 348 5184
Email Address (Clerk): steve.farrell@scottish.parliament.uk

SCOTTISH EXECUTIVE

Deputy First Minister & Minister for Justice
Jim Wallace QC MSP

St Andrew's House
Regent Road
Edinburgh EH1 3DG

Telephone: 0131-556 8400
scottish.ministers@scotland.gov.uk

John McAllion Esq. MP MSP
Convenor
Public Petitions Committee
The Scottish Parliament
Room G15
Parliamentary Headquarters
EDINBURGH
EH99 1SP

Date: 13 June 2000

Dear John,

Thank you for your letter of 6 April inviting my comments on a petition submitted to the Scottish Parliament by Mr James Strang, 57 Cleghorn Street, Dundee, calling for the Parliament to introduce appropriate provisions to ensure that certain aspects of Scots law are compatible with the obligations of Article 6(1) of the European Convention on Human Rights. I regret the delay in this reply.

In his petition Mr Strang questions the independence and impartiality of the Parole Board in dealing with decisions about the release of certain classes of prisoner because its members are appointed by Scottish Ministers. In the light of the judgement of the Appeal Court in the case of *Chalmers and Starrs* and that of the Inner House of the Court of Session in the case of *Clancy v Caird*, the Executive is carefully considering various matters relating to the membership of bodies operating in devolved areas, including the Parole Board. What I can say at this stage is that we have not thus far identified an ECHR weakness in the existing arrangements governing the appointment of members to the Board. The ECHR recognises that the appointment of judges and members of tribunals by the Executive is permissible and indeed normal, provided there are in existence sufficient guarantees from outside pressures. The appointment procedures in relation to temporary sheriffs were not subject to criticism from the court in *Chalmers and Starrs*.

Mr Strang has also raised the procedures governing the recall of prisoners to custody and argued that because recall is ultimately the responsibility of the Executive that this does not meet the independence and impartiality test required by the Convention. This is a matter which is at present the subject of court proceedings and consequently it would not be appropriate for me to comment on this aspect of the petition.

If, in the light of our examination of the terms and conditions relating to membership of public bodies for which the Executive is responsible, it is considered that changes in the law governing

COVERT SURVEILLANCE

DRAFT CODE OF PRACTICE

Preliminary draft code: This document is circulated by the Scottish Executive in advance of enactment of the RIP(S) Bill as an indication of current thinking. It will be subject to changes and additions. Comments are welcomed on this preliminary draft. This draft is not part of the official consultation referred to in section 20(3) of the Bill, which can only take place after enactment.

FOREWORD

Surveillance plays a necessary part in modern life. It is used not just in the targeting of criminals but as a means of protecting the public from harm and preventing crime.

The covert surveillance covered by this code is in two categories: intrusive surveillance and directed surveillance. The code defines the two categories and the authorisation procedures for both. Authorisation for covert surveillance gives lawful authority to carry out surveillance. However, often surveillance operations will also involve interference with property. This requires separate authorisation and Part 6 of this code details the procedures that give lawful authority for the interference with property and wireless telegraphy.

General observation forms part of the duties of many law enforcement officers and other public bodies. Police officers will be on patrol at football grounds and other venues monitoring the crowd to maintain public safety and prevent disorder. Officers may also target a crime “hot spot” in order to identify and arrest offenders committing crime at that location. Trading standards officers might covertly observe and then visit a shop as part of their enforcement function to verify the supply or level of supply of goods or services that may be liable to a restriction. Such observation may involve the use of equipment to merely reinforce normal sensory perception, such as binoculars, or the use of cameras, where this does not involve systematic surveillance of an individual. It forms a part of the everyday functions of law enforcement or other public bodies. This low-level activity will not usually require any authorisation under the provisions of the Regulation of Investigatory Powers (Scotland) Act 2000.

Neither do the provisions of the RIP(S) Act or of this code of practice cover authorisation for the use of overt CCTV surveillance systems. Members of the public are aware that such systems are in use, for their own protection, and to prevent crime.

Neither this foreword nor the guidance notes, which appear in the footnotes, are parts of the code. They are provided to assist police officers and others in its application.

CONTENTS

1 GENERAL

1.1 This code of practice provides guidance on the use of covert surveillance by public authorities under the Regulation of Investigatory Powers (Scotland) Act 2000 ("the RIP(S) Act"). The code also provides guidance on operations involving interference with property or wireless telegraphy under Part III of the Police Act 1997 ("the 1997 Act"). Such activity will often take place as part of a covert surveillance operation. This code replaces the code of practice on Intrusive Surveillance issued pursuant to section 101(3) of the 1997 Act.

1.2 **Section 2** of this code provides guidance on the relationship between the RIP(S) Act and the UK Regulation of Investigatory Powers Act 2000 ("the 2000 Act"), including the arrangement for cross-border operations.

1.3 A copy of the code should be readily available, for reference purposes, at public offices of public authorities designated to carry out covert surveillance, and where people are detained in custody. It should also be readily available to any members of a public authority or department who are actively involved in intrusive or directed surveillance operations.

1.4 The RIP(S) Act provides that the code is admissible as evidence in criminal and civil proceedings. If any provision of the code appears relevant to any court or tribunal considering any such proceedings, it must be taken into account.

Interpretation

1.5 In this code:

– **"confidential material"** has the same meaning and definitions as in the Police Act 1997. It consists of:

  –matters subject to legal privilege;

  –confidential personal information; or

  –confidential journalistic material.

  "Matters subject to legal privilege" includes 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[1].

"Confidential personal information" is 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[to him/her], 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[2]. 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"** includes 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.

– **"Covert surveillance"** means surveillance that is carried out in a manner calculated to ensure that the persons subject to the surveillance are unaware that it is or may be taking place.

– For the purposes of authorising intrusive surveillance under the RIP(S) Act or interference with property under the 1997 Act, a **"designated deputy"** means:

– the person holding the rank of assistant chief constable designated to act under section 5(4) of the Police (Scotland) Act 1967 (c. 77);

---

[1] **Guidance note:** Legally privileged communications will lose their protection if there is evidence, for example, that the professional legal adviser is intending to hold or use them for a criminal purpose; privilege is not lost if a professional legal adviser is properly advising a person who is suspected of having committed a criminal offence. The concept of legal privilege shall apply to the provision of professional legal advice by any agency or organisation.

[2] **Guidance note:** Confidential personal information might, for example, include consultations between a health professional or a professional counsellor and a patient or client, or information from a patient's medical records.

- the person designated to act in the absence of the Director General of the National Criminal Intelligence Service under section 8 of the 1997 Act (c. 80).

- The "designated deputy" may act as "authorising officer" only in the circumstances outlined in section 5(4) of the Police (Scotland) Act 1967, or section 8 of the 1997 Act.

– **"Private information"** includes information about a person relating to his private or family life.

– **"Private vehicle"** means any vehicle that is used primarily for the private purpose of the person who owns it or of a person otherwise having the right to use it. This does not include a person whose right to use the vehicle derives only from his having paid, or undertaken to pay, for the use of the vehicle and its driver for a particular journey. A vehicle includes any vessel, aircraft or hovercraft.

– For the purposes of authorising intrusive surveillance in residential premises under the RIP(S) Act and of authorising interference with property under the 1997 Act, **"relevant area"** or **"area of operation"** means:

- in relation to a police force maintained under section 1 of the Police (Scotland) Act 1967, the area in Scotland for which that force is maintained;

- in relation to the National Criminal Intelligence Service, Scotland.

– **"Residential premises"** means any premises occupied or used, however temporarily, for residential purposes or otherwise as living accommodation.

– For the purposes of authorising intrusive surveillance, or interference with property under the 1997 Act, **"senior authorising officer"** (RIP(S) Act) or **"authorising officer"** (1997 Act) means:

- the chief constable of every police force maintained under section 1 of the Police (Scotland) Act (police forces in Scotland);

- the Director General of the National Criminal Intelligence Service.

– A **"senior official"** means a member of the Senior Civil Service.

– **"Serious crime"** means conduct which constitutes one or more criminal offences where:

(a) it involves the use of violence, results in substantial financial gain 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.

– **“Working day"** means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.

– **"Chief Surveillance Commissioner", "Surveillance Commissioner"** and **“Assistant Surveillance Commissioner”** are persons who hold or have held high judicial office and who have been appointed by the Prime Minister to undertake functions specified in the 1997 Act in relation to the police and NCIS. They have also been appointed to undertake functions specified in the RIP(S) Act in relation to certain activities undertaken by Government departments and other public authorities in Scotland.

2 RELATIONSHIP WITH THE UK REGULATION OF INVESTIGATORY POWERS ACT 2000

2.1 The 2000 Act is the appropriate legislation for surveillance which will mainly take place outwith or start outwith Scotland, or is for reserved purposes such as national security or economic wellbeing. The RIP(S) Act is the appropriate legislation and should be used by Scottish public authorities for all other surveillance (see **sections 4.17 and 4.18** in relation to the recording of telephone or other conversations).

2.2 The 2000 Act contains provisions to allow cross border operations. An authorisation under the RIP(S) Act will allow Scottish public authorities to conduct surveillance anywhere within the UK for a period of up to 3 weeks at a time. This 3-week period will restart each time the border is crossed, provided it remains within the original validity period of the authorisation.

2.3 The 2000 Act is the appropriate legislation for public authorities from other parts of the UK other than those named in section 5 of the RIP(S) Act if they need to carry out surveillance operations in Scotland.

3 AUTHORISATIONS and PRODUCT

3.1 An authorisation will provide lawful authority for a public authority to carry out covert surveillance. Responsibility for authorising surveillance operations will vary, depending on whether the authorisation is for “intrusive surveillance” or “directed surveillance”, and which organisation is involved. There is no requirement on the part of a public authority to obtain an authorisation for a covert surveillance operation and the decision not to obtain an authorisation would not, of itself, make an action unlawful. However, public authorities are strongly recommended to seek an authorisation where the purpose of the covert surveillance, wherever that takes place, is to obtain private information about a person, whether or not that person is the target of the investigation or operation. Obtaining an authorisation will make the action less vulnerable to challenge under the Human Rights Act 1998.

3.2 Any person giving an authorisation should first satisfy him/herself that the authorisation is necessary on particular grounds and that the surveillance is proportionate to what it seeks to achieve. The fullest consideration should be given in cases where the subject of the surveillance might reasonably expect high degree of privacy, for instance in his/her home, or where there are special sensitivities, such as where the surveillance may give access to confidential material or communications between a Minister of any religion or faith and another individual relating to that individual’s spiritual welfare. An authorisation should not be sought or obtained where the sole purpose of the authorisation is to obtain legally privileged material. However, an authorisation may be appropriate for other purposes but which, incidentally, catches legally privileged material.

3.3 Particular consideration should be given to collateral intrusion on or interference with the privacy of persons other than the subject(s) of surveillance. Such collateral intrusion or interference would be a matter of greater concern in cases where there are special sensitivities, for example in cases of premises used by lawyers or for any form of medical or professional counselling or therapy.

3.4 An authorisation request should include an assessment of the risk of any collateral intrusion or interference. This will be taken into account by the authorising officer, particularly when considering the proportionality of the surveillance.

3.5 Those carrying out the covert surveillance should inform the authorising officer if the operation/investigation unexpectedly interferes with the privacy of individuals who are not the original subjects of the investigation or covered by the authorisation in some other way. In some cases the original authorisation may not be sufficient and consideration should be given to whether a separate authorisation is required.

3.6 Any person giving an authorisation will also need to be aware of particular sensitivities in the local community where the surveillance is taking

place or of similar activities being undertaken by other public authorities which could impact on the deployment of surveillance. In this regard, it is recommended that the authorising officers in NCIS consult the local chief constable where the authorising officer considers that conflicts might arise.

Combined authorisations

3.7 A single authorisation may combine:

– two or more different authorisations under the RIP(S) Act;

– an authorisation under the RIP(S) Act and an authorisation under Part III of the 1997 Act.

3.8 A single authorisation may combine two or more different authorisations under the RIP(S) Act. For example, a single authorisation may combine authorisations for directed surveillance or intrusive surveillance and the conduct of a source. However, the provisions applicable in the case of each of the authorisations must be considered separately. Thus, a police superintendent could authorise directed surveillance and the conduct of a source but an authorisation for the use of a source and intrusive surveillance would need the separate authority of a superintendent, a chief constable and the approval of a Surveillance Commissioner.

3.9 In cases where one agency is acting on behalf of another, it is normally for the tasking agency to obtain or provide the authorisation. For example, where surveillance is carried out by the Armed Forces on behalf of the police, authorisations would be sought by the police and granted by the appropriate authorising officer. However, in cases where the Security Service is acting in support of the police or other law enforcement agencies in the field of serious crime, authorisations would normally be sought by the Security Service.

Handling and disclosure of product

3.10 There should be a central record held in each force, Service or authority of all authorisations. These records will be confidential and should be retained for a period of at least five years from the ending of the authorisation. Where it is believed that the records could be relevant to pending or future criminal proceedings, they should be retained for a suitable further period, commensurate to any subsequent review.

<u>The Police, and NCIS</u>

3.11 If there is any reason to believe that the product obtained during the course of an investigation might be relevant to that investigation or to another investigation or to pending or future civil or criminal proceedings then it should not be destroyed but retained if it forms part of the unused prosecution material gained in the course of an investigation, or which may be relevant to an investigation. Where the police believe that the product might be relevant

to future civil or criminal proceedings, and there is a possibility that a Surveillance Commissioner might order the destruction of such material, they should inform the Surveillance Commissioner of their belief and the reasons for it.

3.12 Authorising officers are reminded of the importance of safeguarding confidential and sensitive information. They must also ensure compliance with the appropriate data protection requirements and any relevant codes of practice produced by individual authorities in the handling and storage of material. Where material is obtained by surveillance, which is wholly unrelated to a criminal or other investigation or to any person who is the subject of the investigation, and there is no reason to believe it will be relevant to future civil or criminal proceedings, it should be destroyed immediately. Consideration of whether or not unrelated material should be destroyed is the responsibility of the senior authorising officer.

3.13 There is nothing in the RIP(S) Act that prevents material obtained through the proper use of the authorisation procedures from being used in other investigations. However, the use outside the public authority which authorised the surveillance, or the courts, of any material obtained by means of covert surveillance and, other than in pursuance of the grounds on which it was obtained, should be authorised only in the most exceptional circumstances.

4 DIRECTED SURVEILLANCE

4.1 Surveillance is directed if it is covert, but not intrusive (as defined in section 5), and is undertaken:

(a) for the purposes of a specific investigation or operation;

(b) in such a manner as is likely to result in the obtaining of private information about a person (whether or not one specifically identified for the purposes of the investigation or operation); and

(c) otherwise than by way of an immediate response to events or circumstances the nature of which is such that it would not be reasonably practicable for an authorisation under this Part to be sought for the carrying out of the surveillance.

4.2 Directed surveillance is conducted where it involves the observation of a person or persons with the intention of gathering private information to produce a detailed picture of a person's life, activities and associations. However, it does not include covert surveillance carried out by way of an immediate response to events or circumstances which, by their very nature, could not have been foreseen. For example, a plain-clothes police officer would not require an authorisation to conceal him/ herself and observe a suspicious person who he comes across in the course of a patrol. However, the longer the observation continues, the less likely it would be considered to be an immediate response.

4.3 Directed surveillance does not include any type of covert surveillance in residential premises or in private vehicles. Such activity is defined as "intrusive surveillance" and is dealt with in **section 5**. However, where surveillance is carried out by a device designed or adapted principally for the purpose of providing information about the location of a vehicle (a tracking device), the activity is classed as directed surveillance and should be authorised accordingly.

4.4 Nor does directed surveillance include entry on or interference with property or wireless telegraphy. These activities are subject to a separate regime of authorisation as set out in **section 6**.

4.5 An authorisation for directed surveillance may be issued when an authorising officer is satisfied that the action is necessary:

– for the prevention or detection of crime or the prevention of disorder;

– in the interests of public safety;

– for the protection of public health[3]; or

[3] **Guidance note:** This could include investigations into infectious diseases or contaminated products.

– for any other purpose prescribed in an order made by the Scottish Ministers.

4.6 The authorising officer must be satisfied that:

– the action is necessary on one or more of the grounds set out in **section 4.5**; and

– the surveillance is proportionate to what it seeks to achieve.

Authorisation Procedures

4.7 The public authorities entitled to authorise directed surveillance are listed in section 5 of the RIP(S) Act.

4.8 Authorisations will generally be given in writing by the authorising officer. However, in urgent cases, they may be given orally. In such cases, a written record that the authorising officer has expressly authorised the action should be recorded in writing as soon as is reasonably practicable. This should be done by the person to whom the authorising officer spoke.

4.9 If an authorising officer is not available, authorisation may be given by a person entitled to act in the absence of the authorising officer, as specified in ***[title of Statutory Instrument]***. Such an authorisation must be in writing.

4.10 Ideally, authorising officers should not be responsible for authorising their own activities ie those in which they are directly involved. However, it is recognised that this may sometimes be unavoidable, especially in the case of small organisations, or where it is necessary to act urgently.

4.11 Designated persons within the Police and NCIS may only grant authorisations on application by a member their own force or Service. Except in circumstances set out in **section 4.15** authorising officers are a police superintendent or equivalent. Those designated as being able to authorise directed surveillance are listed in ***[title of statutory instrument]***.

4.12 Officers entitled to act in urgent cases in the absence of the authorising officer, except in circumstances set out in **section 4.15**, are those of inspector rank or equivalent.

4.13 Authorisations for directed surveillance are subject to review by the Chief Surveillance Commissioner (see **section 7**).

SPECIAL RULES

4.14 There are certain cases that call for a higher level of authority because of the sensitive nature of the directed surveillance. Details of these categories of cases are set out in **section 4.15**.

Confidential material

4.15 In cases where the likely consequence of the directed surveillance would be for any person to acquire knowledge of confidential material[4], the authorising officer will be a chief constable or equivalent (see ***statutory instrument***). In urgent cases, the person designated to act in the absence of the chief constable or equivalent will be entitled to authorise such surveillance.

4.16 In this connection, any person giving an authorisation is reminded that police forces in Scotland and NCIS have given an undertaking not to mount surveillance operations in circumstances covered by the Seal of the Confession (see **section 6.9**).

Recording of telephone or other conversations

4.17 The 2000 Act is the appropriate legislation for the interception of communications sent by post or by means of public telecommunications systems or private telecommunications systems attached to the public network, including interception where one party to the conversation consents.

4.18 However, the question will frequently arise whether a surveillance device may legitimately be used in circumstances where the incidental effect will be to enable the overhearing of what is said by a party to a telephone conversation who is speaking from a location where a device is installed. The use of a surveillance device should not be ruled out simply because it may incidentally pick up one end of a telephone conversation, and such product can be treated as having been lawfully obtained. However, its use would not be appropriate where the sole purpose is to overhear speech which, at the moment of interception, is being transmitted by a telecommunications system. In such cases an application should be made for a warrant under section 7 of the 2000 Act.

Information to be provided in applications for authorisation

4.19 A written application for authorisation for directed surveillance must record:

- the grounds on which authorisation is sought (eg for the detection of crime or the protection of public health);
- consideration of why the directed surveillance is proportionate to what it seeks to achieve;
- the identity or identities, where known, of those to be the subject of directed surveillance;

[4] **Guidance note:** See definition of confidential material in interpretation section.

– the action to be authorised and level of authority required;

– an account of the investigation or operation;

– an explanation of the information which it is desired to obtain as a result of the authorisation;

– any potential for collateral intrusion;

– the likelihood of acquiring any confidential material.

4.20 Additionally, in urgent cases, the authorisation should record (as the case may be):

– reasons why the authorising officer or the person entitled to act in his/her absence considered the case urgent;

– reasons why the authorising officer or person entitled to act in his/her absence was not available to give an authorisation.

Duration of authorisations

4.21 A written authorisation will cease to have effect at the end of a period of three months beginning with the day on which it took effect.

4.22 Urgent oral authorisations or written authorisations given by a person who is entitled to act only in urgent cases should be renewed in writing as quickly as possible, and in any case will cease to have effect after 72 hours, beginning with the time when the authorisation was granted.

Renewals

4.23 If at any time before an authorisation would cease to have effect, the authorising officer considers it necessary for the authorisation to continue for the purpose for which it was given, he/she may renew it in writing for a further period of three months, beginning with the day when the authorisation would have expired but for the renewal. Authorisations may be renewed more than once, provided they continue to meet the criteria for authorisation.

4.24 All requests for the renewal of an authorisation for directed surveillance must record:

– whether this is the first renewal or every occasion on which the authorisation has been renewed previously;

– the information required in the original request for a authorisation, as listed in **section 4.19**;

together with

– any significant changes to the information in the previous authorisation;

– why it is necessary to continue with the surveillance;

– the content and value to the investigation or operation of the information so far obtained by the surveillance;

– an estimate of the length of time the surveillance will continue to be necessary.

Cancellations

4.25 The authorising officer must cancel an authorisation if he/she is satisfied that the directed surveillance no longer meets the criteria for authorisation. Where the authorising officer is no longer available, this duty will fall on the person who has taken over the post of authorising officer or the person who is acting as authorising officer until the post is filled.

4.26 Authorisations for directed surveillance, and any subsequent renewals and cancellations, are subject to review by the Chief Surveillance Commissioner

5 INTRUSIVE SURVEILLANCE

5.1 Covert surveillance as defined in the RIP(S) Act is "intrusive surveillance" if it:

(a) involves the presence of an individual, or of any surveillance device on any residential premises or in any private vehicle; or

(b) is carried out in relation to anything taking place on residential premises or in a private vehicle by means of any surveillance device that is not present on the premises or in the vehicle.

5.2 However, it is only "intrusive" under **5.1(b)**, if it consistently provides information of the same quality and detail as might be expected to be obtained from a device actually present on the premises or in any private vehicle. Thus, an observation post outside premises, which provides a limited view and no sound of what is happening inside the premises would not be considered as intrusive surveillance. "Residential premises" might be in the form of a house, a yacht, a railway arch or other makeshift shelter. It includes hotel rooms, bedrooms in barracks and prison cells but not any common area to which a person is allowed access in connection with his or her occupation of any accommodation[5]. A private vehicle is defined in the interpretation section and could include any vehicle used for family, leisure or domestic use.

5.3 In many cases, a surveillance operation may involve both intrusive surveillance and interference with property. In such cases, both activities need authorisation. This can be done as a combined authorisation (see **section 3.7**), although the criteria for authorisation of each activity must be considered separately.

5.4 An authorisation for intrusive surveillance may only be issued by a chief constable or the Director General of NCIS if he/she is satisfied that the authorisation is necessary on the grounds that it is:

– for the purpose of preventing or detecting serious crime; and

– the authorised surveillance is proportionate to what it seeks to achieve.

5.5 A factor which must be taken into account in deciding whether an authorisation is necessary and proportionate is whether the information which it is thought necessary to obtain by means of the intrusive surveillance could reasonably be obtained by other means.

[5] **Guidance note:** In cases of doubt about what constitutes residential premises, officers should seek guidance from the appropriate Commissioner through the recognised contact point in each agency.

Use of covert human intelligence source with technical equipment

5.6 A covert human intelligence source wearing or carrying a surveillance device and invited into residential premises or a private vehicle does not require special authorisation to record activity taking place inside those premises or vehicle. Authorisation for the use of that covert source may be obtained in the usual way[6]. The human source should not, however, use an invitation into residential premises or a private vehicle as a means of installing equipment without the proper authorisation being in place. If the equipment is to be used, other than in the presence of the covert source, an intrusive surveillance authorisation and, if necessary, interference with property authorisation, should be obtained.

Seal of Confession

5.7 The undertaking not to mount a covert surveillance operation in circumstances that may breach the Seal of Confession (see **section 6.9**) also applies to intrusive surveillance operations.

Authorisation procedures

5.8 Authorisations will generally be given in writing by the senior authorising officer. However, in urgent cases, they may be given orally. In such cases, a statement that the senior authorising officer has expressly authorised the action should be recorded in writing as soon as is reasonably practicable. This should be done by the person with whom the senior authorising officer spoke. If the senior authorising officer is absent as provided for in section 5(4) of the Police (Scotland) Act 1967, or section 8 of the Police Act 1997, an authorisation can be given in writing or, in urgent cases, orally by the designated deputy. Where, however, in an urgent case, it is not reasonably practicable for the designated deputy to consider an application, then written authorisation may be given:

– in the case of the police, by an assistant chief constable;

– in the case of NCIS by the person designated by the Director General [7];

5.9 Applications to the senior authorising officer for authorisation must be made in writing by a member of that officer's own force or Service. In relation to intrusive surveillance in residential premises, an authorisation can only be given where those premises are within the area of operation of that police force or Service. The application should specify:

[6] **Guidance note:** See the code of practice for the use of covert human intelligence sources.

[7] **Guidance note:** This will be an officer of a rank no lower than an assistant chief constable, or in the case of the National Criminal Intelligence Service, an assistant chief investigation officer.

– the identity or identities of those to be the subject of the intrusive surveillance (where known);

– the property which the intrusive surveillance will affect;

– the identity of individuals and/or categories of people, where known, who are likely to be affected by collateral surveillance;

– details of the offence planned or committed and of the intrusive surveillance involved;

– how the authorisation criteria (as set out in **section 5.4 and 5.5**) have been met;

– whether the operation or investigation is likely to lead to the acquisition of any confidential material;

– in case of a renewal, the content and value to the investigation of the product so far obtained, or an explanation of the failure to obtain any results;

– and subsequently record whether authority was given or refused, by whom and the time and date.

5.10 Additionally, in urgent cases, the authorisation should record (as the case may be):

– reasons why the senior authorising officer or designated deputy considered the case urgent;

– reasons why the senior authorising officer or the designated deputy was not available to give an authorisation.

Approval of Surveillance Commissioners

5.11 The authorisation for intrusive surveillance under the RIP(S) Act will not take effect until it has been approved by a Surveillance Commissioner and the authorising officer has been notified, except in cases of urgency.

5.12 Where the case is urgent, the authorisation can take effect immediately and intrusive surveillance can begin without the approval of the Surveillance Commissioner. Much will depend on the circumstances of the individual operation, but the urgency provisions should **not** be used routinely. However, it must be recognised that there may be circumstances, for example, where it is impractical to obtain the approval of a Surveillance Commissioner. In such cases, the authorising officer must include his/her reasons for considering the case to be urgent in the notification of authorisation that he/she sends to the Surveillance Commissioner (see **section 5.13**). If the Surveillance

Commissioner is not satisfied as to the reasons for treating the case as urgent to be reasonable, he has the power to quash the authorisation.

Notifications

5.13 Where a person gives, renews or cancels an authorisation, he/she must, as soon as is reasonably practicable, give notice of it in writing to a Surveillance Commissioner, in accordance with whatever arrangements have been made by the Chief Surveillance Commissioner. In urgent cases, the notification must specify the grounds on which the case is believed to be one of urgency.

5.14 There may be cases that become urgent after approval has been sought but before a response has been received from a Surveillance Commissioner. In such a case, the authorising officer should give a fresh authorisation and notify the Surveillance Commissioner that the case is urgent (pointing out that it has become urgent since the previous notification). In these cases, the authorisation will take effect immediately.

5.15 The information to be included in the notification to the Surveillance Commissioner of the authorisation is set out in the ***[title of Statutory Instrument]***. All notifications must record:

– the grounds on which the case was considered to be urgent (where relevant);

– how the authorisation criteria have been met (see **section 5.4**);

– the identity or identities of those to be the subject of the intrusive surveillance (where known);

– the property against which any intrusive surveillance is to take place;

– the nature of the surveillance authorised;

– whether the intrusive surveillance is considered likely to lead to collateral intrusion;

– whether the surveillance is likely to lead to the acquisition of any confidential material.

Authorisation Records

5.16 In all cases of intrusive surveillance, the relevant authority should maintain:

– a copy of notification to the Surveillance Commissioner and notification of approval given by him or her;

- a record of the period over which the intrusive surveillance has taken place (including any significant suspensions of coverage);

- a record of the result of periodic reviews of the authorisation (see **section 5.22**); and

- a copy of any renewal of an authorisation, plus the supporting documentation submitted when the renewal was requested.

5.17 Finally, it should record the date and time when any instruction was given by the senior authorising officer to cease intrusive surveillance or when the authorisation was cancelled [or quashed]. Where an authorisation is quashed or cancelled a written instruction should be given to those carrying out the surveillance to inform them that the surveillance is not to be continued. A record should be kept of this instruction.

Duration of Authorisations

5.18 A written authorisation given by a senior authorising officer or a designated deputy will cease to have effect at the end of a period of three months, beginning with the day on which it took effect. This means from the time the authorisation was granted under the urgency procedures or from when the Surveillance Commissioner approved the authorisation and the person who gave the authorisation has been notified.

5.19 Oral authorisations given in urgent cases by authorising officers or their designated deputies, and written authorisations given by those only entitled to act in urgent cases (see **section 5.8**), should be renewed in writing as quickly as possible and will, in any event, cease at the end of the period of 72 hours beginning with the time when they took effect.

Renewals

5.20 If at any time before the day on which an authorisation expires the senior authorising officer or, in his/her absence, the designated deputy considers the authorisation should continue to have effect for the purpose for which it was issued, he/she may renew it in writing for a further period of three months. As with the initial authorisation, the senior authorising officer must first seek the approval of a Surveillance Commissioner to its renewal. The renewal will take effect from the time the Surveillance Commissioner has approved the renewal and the person who gave the authorisation has been notified (but not before the day on which the authorisation would have ceased to have effect). In urgent cases, where a renewal suddenly becomes necessary, it can take effect immediately but a Surveillance Commissioner must be notified of the renewal as soon as is reasonably practicable. The notification must specify the grounds on which the case is believed to be one of urgency.

5.21 All requests for renewal of a warrant or authorisation or for approval of a renewal to a Surveillance Commissioner [see ***title of SI***] must record:

– whether this is the first renewal or every occasion on which the warrant/authorisation has been renewed previously;

– the information required in the original request for a warrant/authorisation, as listed in **section 5.9**;

together with:

– any significant changes to the information in the previous application for a warrant/authorisation;

– why it is necessary to continue with the intrusive surveillance;

– the content and value to the investigation of the product so far obtained under the surveillance;

– the results of periodic reviews of the operation by a senior officer;

– an estimate of the length of time the intrusive surveillance will continue to be necessary.

5.22 Authorisations may be renewed more than once, if necessary, and the renewal should be noted as part of the "authorisation record" (see **section 5.16**).

Reviews and Cancellations

5.23 A person who has given an authorisation must cancel it (or one given in his/her absence) if satisfied that the action authorised by it is no longer necessary. Regular reviews of authorisations should be undertaken to assess the need for the intrusive surveillance to continue. These should be recorded on the authorisation record (see **section 5.16**). Particular attention is drawn to the need to frequently review[8] authorisations where the intrusive surveillance involves confidential material or collateral surveillance on persons other than those who are the subjects of surveillance.

5.24 Surveillance Commissioners must be notified of cancellations of authorisations. The information to be included in the notification is set out in the ***[title of statutory instrument]***. All notifications must record:

– the time and date when the instruction was given by the senior authorising officer to cease surveillance;

[8] **Guidance note:** The senior authorising officer should determine how often a review should take place. This should be as frequently as is considered necessary and practicable.

– the reason why the authorisation was cancelled;

– the outcome of the investigation and the nature of any criminal proceedings contemplated;

– the arrangements made for the storage of material obtained as a result of surveillance, for its review and destruction when it is no longer of use and for the immediate destruction of unrelated material.

5.25 The Surveillance Commissioner has the power to cancel an authorisation if he/she is satisfied that, at any time after an authorisation was given or renewed, there were no reasonable grounds for believing that the criteria set out in **section 5.4** were met. In such circumstances, the Surveillance Commissioner may order the destruction of records, in whole or in part, other than those required for pending civil or criminal proceedings.

Ceasing of surveillance activity

5.26 As soon as the decision is taken that an intrusive surveillance operation should be discontinued, the instruction must be given to those involved in the operation to stop listening, watching or recording the activities of the subject(s). The date when such an instruction was given should be recorded in the authorisation record and the notification of cancellation.

5.27 In cases where an authorisation is quashed/cancelled by a Surveillance Commissioner, the senior authorising officer must immediately instruct those carrying out the surveillance to stop listening, watching or recording the activities of the subject of the authorisation. The date (and time, if appropriate) when such an instruction was given should be recorded on the authorisation record.

6 ENTRY ON AND INTERFERENCE WITH PROPERTY AND WIRELESS TELEGRAPHY

6.1 The 1997 Act provides lawful authority for the interference with property and wireless telegraphy by the police and NCIS. Many of the same conditions apply to this type of operation as apply to intrusive surveillance. Where this is so, reference is made to earlier parts of the code.

6.2 In many cases a surveillance operation may involve both covert intrusive surveillance and interference with property. In such cases, both activities need authorisation to be in accordance with the law. This can be done as a combined authorisation, although the criteria for authorisation of each activity must be considered separately (see **section 3.7**).

6.3 Responsibility for such authorisations rests with the "authorising officer" as defined in the 1997 Act, that is the chief constable or equivalent. Authorisations require the personal authority of the authorising officer except in urgent situations, where the authorising officer is absent. The urgency procedures are the same as those under the RIP(S) Act (see **section 5.8)**. Authorisations under the 1997 Act may not be necessary where the authority is acting with the consent of a person able to give permission in respect of relevant property. However consideration should still be given to the need to obtain an authorisation under the RIP(S) Act.

6.4 Authorisations may only be given by an authorising officer on application by a member of his or her own force or Service for interference with property and wireless telegraphy within the authorising officer's own area of operation (see **section 1.5** for interpretation of "relevant area"). However, an authorising officer may authorise the taking of action outside the relevant area solely for the purpose of maintenance or retrieval of devices or equipment.

6.5 Any person giving an authorisation for interference with property must believe that:

– the action is necessary for the purpose of preventing or detecting serious crime as defined in the 1997 Act (see interpretation section); and;

– the action is proportionate to what it seeks to achieve.

The authorising officer will also take into account whether what the authorised conduct seeks to achieve could reasonably be achieved by other means.

6.6 Any person giving an authorisation for interference with property has the same need to be aware of any impact on local communities in the same way as other covert surveillance operations. To ensure that the authorising officer is aware of any particular local community sensitivities, it is recommended that authorising officers in NCIS consult the local chief

constable, where they consider this appropriate. In the case of Northern Ireland, the chief constable of the RUC should be informed of any surveillance operation undertaken by other law enforcement agencies which involve those officers in maintaining or retrieving covert surveillance equipment within the RUC area.

Cases requiring prior approval of a Surveillance Commissioner

6.7 In certain cases, an authorisation for interference with property will not take effect until it has been approved by a Surveillance Commissioner and the authorising officer has been notified (but see procedures outlined in **section 5.12** regarding cases of urgency). These are cases where the person giving the authorisation is satisfied that:

- any of the property specified in the authorisation:
  - is used wholly or mainly as a dwelling or as a bedroom in a hotel; or
  - constitutes office premises; or
- the action authorised is likely to result in any person acquiring knowledge of:
  - matters subject to legal privilege;
  - confidential personal information; or
  - confidential journalistic material.

6.8 "Office premises" are defined, by reference to section 1(2) of the Offices, Shops and Railway Premises Act 1963 as, any building or part of a building whose sole or principal use is as an office or for office purposes (which means purposes of administration, clerical work, handling money and telephone or telegraph operation).

Seal of Confession

6.9 Any person giving an authorisation is reminded that the police and NCIS have given an undertaking not to mount operations in circumstances covered by the Seal of the Confession. In addition, where they are satisfied that a Minister of Religion is not him/herself involved in the matter under investigation, and they believe that surveillance will lead to them intruding on spiritual counselling between the Minister and a member of his/her faith, they should, in preparing the case for authorisation, give serious consideration to discussing the matter first with a relevant senior representative of the religious authority. The views of the senior representative would be included in the request for authorisation. In this respect, spiritual counselling is defined as conversations with a Minister of Religion acting in his/her official capacity.

Spiritual counselling does not amount to a sacramental confession, but the person being counselled is seeking or the Minister is imparting forgiveness, absolution and the resolution of conscience with the authority of the Divine Being of their faith.

Authorisation procedures

6.10 The same procedures apply to applications for interference with property as for authorisations for intrusive surveillance under the RIP(S) Act. In detail:

– applications will normally be in writing, except in urgent cases (see **section 5.8**);

– the information which should be included in applications to the authorising officer are set out in **section 5.9**;

– the duration of authorisations will be the same (see **sections 5.18-5.19**);

– authorisations can be renewed (see **sections 5.20-5.22**);

– authorisations should be reviewed and cancelled (see **sections 5.23-5.25**);

– an "authorisation record" should be maintained (see **sections 5.16-5.17**);

– instructions should be given for the ceasing of interference with property (see **section 5.26**);

– the same procedures should apply for the handling and disclosure of product (see **sections 3.10-3.13**).

Notifications to Surveillance Commissioners

6.11 The notifications to Surveillance Commissioners in relation to the authorisation, renewal and cancellation of authorisations in respect of interference with property are in accordance with the requirements of the Police Act 1997 (Notifications of Authorisations etc) Order 1998. They differ slightly from the notifications for intrusive surveillance under the RIP(S) Act and are therefore reproduced in full below.

6.12 All notifications of authorisations must record:

– whether it is a case for which the approval of a Surveillance Commissioner is required;

– if it is a case which would otherwise require the approval of a Surveillance Commissioner but in which interference with property has started because of urgency, the grounds on which the case was considered to be urgent;

– the grounds on which the authorising officer believes the matters specified in section 93(2) of the 1997 Act (ie how the authorisation criteria have been met);

– the identity or identities of those to be the subject of the interference with property, where known;

– the property against which any interference is to take place;

– the nature of the interference authorised and the reason why the interference with property in question is necessary;

– whether the interference with property is considered likely to lead to collateral intrusion on or interference with persons other than the person being directed by the authorisation;

– whether or not it will be necessary to retrieve any equipment used in the operation.

6.13 All notifications of renewals must record:

– whether this is the first renewal or every occasion on which the authorisation has been renewed previously;

– the information required in a notification of authorisation, as they apply at the time of renewal; plus

– every respect in which the information in the previous authorisation has changed;

– why it is necessary to continue with the authorisation;

– the content and value to the investigation of the product so far obtained through the interference;

– the results of periodic reviews of the authorisation, so as to enable the authorising officer to review his decision;

– an estimate of the length of time the authorisation will continue to be necessary.

6.14 All notifications of cancellation must record:

– the time and date when the instruction was given by the authorising officer to cease interference, and when the interference with property ceased, where that is different;

– the reason why the authorisation was cancelled;

– the outcome of the investigation and the nature of any criminal proceedings contemplated;

– the arrangements made for the storage of material obtained as a result of interference with property, for its review and destruction when it is no longer of use and for the immediate destruction of unrelated material.

6.15 The intelligence agencies should provide the same information, as and where appropriate, when making applications, requests for renewal and requests for cancellation of property warrants.

Retrieval of equipment

6.16 Where a Surveillance Commissioner quashes or cancels an authorisation or renewal, he/she will, if there are reasonable grounds for doing so, order that the authorisation remain effective for a specified period, to enable officers to retrieve anything left on the property by virtue of the authorisation. He or she can only do so if the authorisation or renewal makes provision for this. A decision by the Surveillance Commissioner not to give such an order can be the subject of an appeal to the Chief Surveillance Commissioner.

6.17 Because of the time it can take to remove equipment from the person's property it may also be necessary to renew a property warrant in order to complete a retrieval.

7 OVERSIGHT

7.1 Oversight of the use of the powers contained in the 1997 and RIP(S) Acts will be provided by the Chief Surveillance Commissioner, Surveillance Commissioners and Assistant Surveillance Commissioners, in respect of operations by the police, NCIS and other public authorities;

7.2 It will be the duty of any person having functions under the 1997 and RIP(S) Acts and any person taking action in relation to which a warrant or authorisation was given, to comply with any request of the relevant Commissioner for documents or information as required by him/her for the purpose of enabling him/her to discharge his/her functions.

Functions of Surveillance Commissioners

7.3 The RIP(S) Act amends the functions of the Chief Surveillance Commissioner and Surveillance Commissioners. The 2000 Act introduces Assistant Surveillance Commissioners, who will also have functions under the RIP(S) Act.

Functions of Assistant Surveillance Commissioners

7.4 Each Assistant Surveillance Commissioner will be responsible for providing an oversight of authorisations for directed surveillance and the conduct or use of covert sources by public authorities, other than the police.

Functions of Surveillance Commissioners

7.5 Each Surveillance Commissioner is responsible for:

– scrutinising as soon as is reasonably practicable every notice of authorisation for interference with property and intrusive surveillance received;

– deciding whether to grant or refuse approval of authorisations under the 1997 Act which involve a dwelling, hotel bedroom or an office or matters subject to legal privilege, confidential personal information or confidential journalistic material;

– deciding whether to give or refuse approval of authorisations under the RIP(S) Act which involve intrusive surveillance;

– notifying the authorising officer whether or not an authorisation, which the authorising officer believes requires approval, is approved;

– quashing an authorisation or renewal where the Surveillance Commissioner is, at any time, satisfied that there were no reasonable grounds for being satisfied that it met the criteria for authorisation for interference with property or intrusive surveillance (those matters detailed

in **sections 5.4** and **5.5**) or for the case to be one of urgency (see **section 5.12**) or cancelling an authorisation where the Surveillance Commissioner is satisfied that, at any time, there were no reasonable grounds for continuing to believe that it met the criteria;

– reporting the findings to the authorising officer and to the Chief Surveillance Commissioner when the Surveillance Commissioner decides to cancel or quash an authorisation for interference with property or intrusive surveillance;

– deciding whether to order the destruction of records obtained as a result of interference with property or intrusive surveillance, wholly or in part (other than those required for pending criminal or civil proceedings);

– ordering, in appropriate cases, that an authorisation for interference with property under the 1997 Act remain effective for a specified period to retrieve anything from the property;

– giving assistance to the Tribunal set up under the 2000 Act for the investigation of complaints;

– assisting the Chief Surveillance Commissioner in keeping under review the use by the police and NCIS of powers to authorise and conduct directed surveillance.

Functions of the Chief Surveillance Commissioner

7.6 The Chief Surveillance Commissioner is responsible for:

– keeping under review the adequacy of the arrangements and the performance of functions by authorising officers, Surveillance Commissioners and Assistant Surveillance Commissioners under the 1997 and RIP(S) Acts;

– considering appeals by authorising officers, modifying the decisions of Surveillance Commissioners in relation to intrusive surveillance authorisations, and notifying the outcome as required by the 1997 and RIP(S) Acts;

– giving assistance to the Tribunal set up under the 2000 Act for the investigation of complaints;

– keeping under review the use by the police and NCIS of powers to authorise and conduct directed surveillance;

– making an annual report to Scottish Ministers on the discharge of functions under the RIP(S) Act and reporting at any other time on any matter relating to those functions;

– making an annual report to the Prime Minister and to Scottish Ministers under the 1997 Act and reporting at any other time on any matter relating to those functions. [See SI 1999 number 1747, schedule 6].

Appeals under the 1997 and RIP(S) Acts

7.7 Authorising officers may appeal to the Chief Surveillance Commissioner within a period of 7 days against any decision made by a Surveillance Commissioner:

– to refuse to approve an authorisation or its renewal;

– to quash an authorisation or renewal;

– to cancel an authorisation;

– to order the destruction of records when cancelling or quashing an authorisation (other than those required for pending civil or criminal proceedings);

– to refuse to order that the authorisation remain effective for a specified period to allow the retrieval of anything left on the premises by virtue of the authorisation (in respect of 1997 Act only).

7.8 Any decision by a Surveillance Commissioner to order the destruction of records will not become operative until the period for appealing against the decision has expired and, where there is an appeal, a decision dismissing it has been made by the Chief Surveillance Commissioner.

7.9 The Chief Surveillance Commissioner and Surveillance Commissioners will not give any reasons for a determination except, where appropriate, to the authorising officer, the Surveillance Commissioner who made a decision and the Scottish Ministers (when he dismisses an appeal).

For operations by other public authorities

7.10 The Assistant Surveillance Commissioners and Surveillance Commissioners are also responsible for:

– assisting the Chief Surveillance Commissioner, as required, in keeping under review the use by designated public authorities of the powers to authorise and conduct directed surveillance;

– giving assistance to the Tribunal set up under the 2000 Act for the investigation of complaints.

8 COMPLAINTS AND REDRESS

8.1 A single Tribunal for the UK established under the 2000 Act will deal with all:

- proceedings brought under section 7 of the Human Rights Act which concern the RIP(S) Act or which concern authorisations under Part III of the 1997 Act;

- any complaint brought in relation to conduct under the RIP(S) Act.

8.2 The Tribunal will deal with any complaint or proceedings, within the terms of **section 8.1**, relating to conduct which has taken place under an authorisation or warrant or which should not have taken place without such an authorisation/warrant.

9 INFORMATION LEAFLET

9.1 All public authorities listed in section 5 of the legislation should ensure that the information leaflet "Complaints about the exercise of powers under the Regulation of Investigatory Powers (Scotland) Act 2000" is readily available at any premises to which the public have access.

THE USE OF

COVERT HUMAN INTELLIGENCE SOURCES

CODE OF PRACTICE

Preliminary draft code: This document is circulated by the Scottish Executive in advance of enactment of the RIP(S) Bill as an indication of current thinking. It will be subject to changes and additions. Comments are welcomed on this preliminary draft. This draft is not part of the official consultation referred to in section 20(3) of the Bill, which can only take place after enactment.

FOREWORD

Some forms of intrusive investigation, such as covert surveillance, have changed and developed over the years and become more sophisticated as a result of technical development. The use of human beings to provide information, on the other hand, goes back hundreds of years with informants playing a major role in or contributing to significant changes in history. Their use and value has also been recognised in various court judgements, together with the need to protect their identity. Up until now, the use of such sources has never been the subject of statutory control in this country. Their continued use is, however, essential to the maintenance of law and order and for the protection of the public.

Covert sources are uniquely able to provide information that comes to their notice during conversations with their associates or family. Members of the public are encouraged to give information or provide assistance to the police and other authorities carrying out their public functions and, generally, they see this as part of their civic duty, with no expectation of a reward. Trade and businesses will obtain personal information as part of their normal business practices, which they will pass to the police or other regulatory bodies, if they suspect criminal activity. The gathering and disclosure of information, in such a fashion, is governed primarily by the provisions of the Data Protection Act 1998. In other cases, there may be a different statutory basis for the disclosure of information. For example, the Drug Trafficking Act 1994 provides a statutory basis for disclosure of suspicious financial transactions. Nothing in the provisions of the Regulation of Investigatory Powers (Scotland) Act 2000, nor in this code of practice, affects such activity.

Similarly, these provisions are not intended to apply in circumstances where members of public contact numbers specifically set up to receive anonymous information (such as Crimestoppers, the Anti Terrorist Hotline or the Customs Drugs Freephone). The actions of these callers would not generally come within the definition of a covert source. However, someone might become a covert source as a result of a relationship with a public authority begun in this way.

Neither this foreword nor the guidance notes, which appear as footnotes, are parts of the code. They are provided to assist police officers and others in the application of the code.

CONTENTS

1 GENERAL

1.1 This code of practice provides guidance on the use and conduct of covert human intelligence sources by public authorities listed in section 5 of the Regulation of Investigatory Powers (Scotland) Act 2000 ("the RIP(S) Act").

1.2 A covert human intelligence source ("a source") is defined in section 1(7) of the RIP(S) Act as a person who establishes or maintains a personal or other relationship with another person for the covert purpose of facilitating anything that:

(a) covertly uses such a relationship to obtain information or to provide access to any information to another person; or

(b) covertly discloses information obtained by the use of such a relationship or as a consequence of the existence of such a relationship.

1.3 A relationship is used covertly if, and only if, it is conducted in a manner calculated to ensure that the person is unaware of its purpose.

1.4 Any interference with the rights protected by Article 8(1) of the European Convention on Human Rights will give rise to a violation of Article 8, unless the interference is in accordance with the law, is in pursuit of one or more of the legitimate aims referred to in Article 8(2) and is “necessary in a democratic society” to achieve the aim or aims in question. The provisions of the RIP(S) Act and this code cover those activities where a relationship is established or maintained specifically to obtain or provide access covertly to information about the private or family life of another person. They also cover those activities where the relationship itself can be construed as an infringement of a person’s private or family life.

General extent of powers

1.5 There is nothing in the RIP(S) Act, the effect of which is to exclude any material obtained from the use or conduct of a source from being adduced as evidence in court proceedings. There are well-established legal procedures which, at the court’s discretion, will protect the identity of a source from disclosure in such circumstances.

1.6 The code covers activities conducted by:

– police forces in Scotland;

– the National Criminal Intelligence Service (NCIS); and

– any other public authority listed in section 5 of the RIP(S) Act.

1.7 A copy of the code should be readily available, for reference purposes, at public offices of public authorities designated to use sources, and where people are detained in custody. It should also be readily available to any members of an agency or department who are actively involved in operations where sources are deployed.

1.8 The RIP(S) Act provides that the code is admissible as evidence in criminal and civil proceedings. If any provision of the code appears relevant to any court or tribunal considering any such proceedings, it must be taken into account.

Interpretation

1.9 For the purpose of this code:

– **"Authorising officer"** is the person who is entitled to give an authorisation for the use or conduct of a source in accordance with section 5 of the RIP(S) Act.

– **"Chief Surveillance Commissioner", "Surveillance Commissioner"** and **"Assistant Surveillance Commissioner"** are persons who hold or have held high judicial office and who have been appointed by the Prime Minister to undertake functions specified in the Police Act 1997 or in the RIP(S) Act in relation to the police and NCIS. They also undertake functions in relation to Government departments and other public authorities.

– **"The conduct"** of a source is action of that source, falling within the terms of the RIP(S) Act, or action incidental to it.

– **"Confidential material" has** the same meaning and definitions as in the Police Act 1997. It consists of:

  – matters subject to legal privilege;

  – confidential personal information; or

  – confidential journalistic material.

  "matters subject to legal privilege" includes 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[1].

"Confidential personal information" is 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 [to him/her], 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[2]. 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" includes 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.

– **"Controller"** means the person/the designated managerial officer within the relevant public authority referred to in section 4(6)(b) of the RIP(S) Act, responsible for the general oversight of the use of the source.

– **"Directed surveillance"** means covert surveillance (other than intrusive surveillance) where this is in relation to a specific investigation or operation carried out to obtain (or likely to obtain) private information about a particular person or persons (whether or not they have been specifically identified for the purposes of the investigation or operation).

---

[1] **Guidance note:** Legally privileged communications will lose their protection if there is evidence, for example, that the professional legal adviser is intending to hold or use them for a criminal purpose; privilege is not lost if a professional legal adviser is properly advising a person who is suspected of having committed a criminal offence. The concept of legal privilege shall apply to the provision of professional legal advice by any agency or organisation.

[2] **Guidance note:** Confidential personal information might, for example, include consultations between a health professional or a professional counsellor and a patient or client, or information from a patient's medical records.

It does not include surveillance undertaken by way of an immediate response to events or circumstances where it would not have been reasonably practicable for an authorisation to have been sought.

– **“Handler”** means the person referred to in section 4(6)(a) of the RIP(S) Act holding an office, rank or position within the relevant investigating authority and who will have day to day responsibility for:

  – dealing with the source on behalf of that authority;

  – directing the day to day activities of the source;

  – recording the information supplied by the source; and

  – monitoring the source’s security and welfare.

– **"A public authority"** means any public authority within the meaning of section 6 of the Human Rights Act 1998, other than a court or tribunal.

– **“The use”** of a source is any action to induce, ask or assist a person to engage in the conduct of a source or to obtain information by means of an action of the source.

2 RELATIONSHIP WITH THE UK REGULATION OF INVESTIGATORY POWERS ACT 2000

2.1 The UK Regulation of Investigatory Powers Act 2000 ("the 2000 Act") is the appropriate legislation for authorisation of a source who will operate mainly in Scotland or whose use or conduct starts outwith Scotland, or will mainly take place outwith Scotland, or is for reserved purposes such as national security or economic wellbeing. The RIP(S) Act is the appropriate legislation and should be used by Scottish public authorities for all other use of covert human intelligence sources. (See **sections 3.27 and 3.28** in relation to the recording of telephone or other conversations).

2.2 The 2000 Act contains provisions to allow cross border operations. The RIP(S) Act will authorise the use or conduct of a source anywhere within the UK for a period of up to 3 weeks at a time. This 3 week period will restart each time the border is crossed by the source, provided it remains within the original validity period of the authorisation.

2.3 The 2000 Act authorises the conduct or use of a source by public authorities from other parts of the UK in Scotland (other than those named in section 5 of the RIP(S) Act).

3 AUTHORISATION

3.1 Responsibility for authorising the use or conduct of a source rests with the authorising officer. Authorisations require the personal authority of the authorising officer.

3.2 Any person giving an authorisation for the use or conduct of a source must be satisfied that:

– the authorisation is necessary on the grounds specified in **section 3.3**;

– the authorised use or conduct is proportionate to what it seeks to achieve (see **section 3.5**); and

– satisfactory arrangements exist for the management of the source (see **section 4**).

3.3 An authorisation will be considered necessary if it is necessary:

– for the prevention or detection of crime or for the prevention of disorder;

– in the interests of public safety;

– for the protection of public health; or

– for any other purpose prescribed in an order made by the Scottish Ministers.

3.4 A source has no licence to commit crime. They may, in the context of an authorised operation, infiltrate a criminal conspiracy or be a party to the commission of criminal offences, within the limits recognised by case law and with the approval of the authorising officer. A source who acts beyond these limits will be at risk of prosecution. The need to protect the source cannot alter this principle.

3.5 Before authorising the use or conduct of a source, the authorising officer should first satisfy himself that the likely degree of intrusion into the privacy of those potentially affected is proportionate to what the use or conduct of the source seeks to achieve. He or she should also take into account the risk of intrusion into the privacy of persons other than those directly implicated in the operation or investigation (collateral intrusion). Measures should be taken, wherever practicable, to avoid unnecessary intrusion into the lives of those not directly connected with the operation. Particular care should be taken in circumstances where people would expect a high degree of privacy or where, as a consequence of the authorisation, “confidential material” is likely to be obtained. For example, an authorisation should not be sought or obtained where the sole purpose of the authorisation

is to obtain legally privileged material. However, an authorisation may be appropriate for other purposes but which, incidentally, catches legally privileged material. Consideration should also be given to any adverse impact on community confidence that may result from the use or conduct of a source or information obtained from that source.

3.6 Additionally, the authorising officer must make an assessment of any risk to a source in carrying out the conduct in the proposed authorisation.

Cultivation of a source

3.7 Cultivation is the process of developing a relationship with a potential source, with the intention of:

- making a judgement as to his/her likely value as a source of information;

- determining whether and, if so, the best way in which to propose to the subject that he/she become a source.

3.8 It may be necessary to infringe the personal privacy of the potential source in the process of cultivation. In such cases, authorisation is needed for the cultivation process itself, as constituting the conduct (by the person undertaking the cultivation) of a source.

Use of directed surveillance against a potential source

3.9 Similarly, it may be necessary to deploy directed surveillance against a potential source as part of the process of assessing their suitability for recruitment, or in planning how best to make the approach to them. Authorisation for such use of directed surveillance would need to be obtained separately but could be part of a combined authorisation (see **section 3.31**).

Use and conduct of a source

3.10 Many relationships with sources are established without an initial cultivation process. However, both the use and conduct of the source will still require authorisation.

3.11 Authorisation for the use and conduct of a source is required prior to any tasking. Tasking is an assignment given to the source, asking him or her to obtain information, to provide access to information and to otherwise act, incidentally, for the benefit of the relevant public authority. It may involve the source in infiltrating existing criminal activity in order to obtain that information.

Authorisation procedures

3.12 Authorisations will generally be given in writing by the authorising officer. However, in urgent cases, they may be given orally by the authorising officer. In such cases, a statement that the authorising officer has expressly authorised the action should be recorded in writing as soon as is reasonably practicable. This should be done by the person to whom the authorising officer spoke but should later be endorsed by the authorising officer.

3.13 An authorising officer can also act as the controller or handler of a source. Ideally, though, authorising officers should not be responsible for authorising their own activities, e.g. those in which they, themselves, are to act as the source or in tasking the source. However, it is recognised that this is not always possible, especially in the cases of small organisations.

3.14 Designated persons within the Police and NCIS may only grant authorisations on application by a member of their own force or Service.

3.15 Officers entitled to act in urgent cases in the absence of an authorising officer, except in circumstances set out in **section 3.20-3.26**, are those of, at least, inspector rank or equivalent (see ***statutory instrument***).

Officers working under cover

3.16 A member of a public authority may, by concealing his or her identity or otherwise acting covertly:

- infiltrate an existing criminal conspiracy;
- arrest a suspected criminal or criminals;
- counter a significant threat to public order;
- counter a significant threat to public safety;

3.17 In some cases, officers of a public authority undertake work in which they represent themselves (in their own identity or by use of an alias) to be an official of a different public authority. This, in itself, may not necessarily require authorisation. However, an authorisation may be required when the officer is engaging in the conduct of a source.

3.18 In cases where officers of a public authority undertake work in which they represent themselves to be acting on behalf of another person (ie not a public authority) to establish a personal or other relationship for the covert purpose of obtaining information, authorisation will be required for the officer to engage in the conduct of a source in relation to each cover capacity used.

3.19 Authorising officers who can give authority for officers to work under cover, as described in **sections 3.16** to **3.18**, are the same as those giving authority for the use of a source (ie superintendent or equivalent level).

SPECIAL RULES

3.20 There are certain cases, as set out in **sections 3.21-3.26**, that call for a higher level of authority either:

- because of the nature of the source deployed; or
- because the use or conduct of a source is particularly sensitive.

Confidential material

3.21 In cases where the likely consequence of the conduct of a source would be for any person to acquire knowledge of 'confidential material'[3], the deployment of the source requires special authorisation. In these cases, the authorising officer will be a chief constable or equivalent (see ***statutory instrument***).

3.22 In urgent cases, a person designated or entitled to act in the absence of the authorising officer will be able to authorise the use or conduct of a source.

Vulnerable individuals

3.23 Vulnerable individuals, such as the mentally impaired, will only be authorised to act as a source in the most exceptional circumstances. Authorisation would be required by an assistant chief constable or equivalent (see ***statutory instrument***).

Juvenile sources

3.24 Special safeguards also apply to the authorisation for the use or conduct of juvenile sources; that is sources under the age of 18 years. **On no occasion can the use or conduct of a source under 16 years of age and living with his parents be authorised, to give information against his or her parents**. In other cases, authorisations can be given with the following additional safeguards;

- juvenile sources can give information about other members of their immediate family in exceptional cases;
- a parent/guardian or other "appropriate adult" should be present at meetings with the juvenile source under the age of 16 years.

3.25 In addition, an authorisation should not be granted unless or until:

[3] **Guidance note:** see interpretation section at 1.9.

- the safety and welfare of the juvenile has been fully considered;

- the authorising officer has satisfied him/herself that any risk has been properly explained and understood by the juvenile;

- a risk assessment has been undertaken as part of the application to deploy a juvenile source, covering the physical dangers and the moral and psychological aspects of his or her deployment;

3.26 Authority for the deployment of a juvenile source is at assistant chief constable level or equivalent (see ***statutory instrument***). Authorisations should last no longer than one month, renewable for a period of a further month.

Recording of telephone or other conversations

3.27 The 2000 Act is the appropriate legislation for the interception of communications sent by post or by means of public telecommunications systems or private telecommunications attached to the public network, including interception where one party to the conversation consents.

Use of covert human intelligence source with technical equipment

3.28 A covert human intelligence source wearing or carrying a surveillance device and invited into residential premises or a private vehicle does not require special authorisation to record activity taking place inside those premises or vehicle. Authorisation for the use of that covert source may be obtained in the usual way. The human source should not, however, use an invitation into residential premises or a private vehicle as a means of installing equipment without the proper authorisation being in place. If the equipment is to be used, other than in the presence of the covert source, an intrusive surveillance authorisation should be obtained.

Information to be provided in applications for authorisation

3.29 An application for authorisation for the use or conduct of a source must record:

- details of the purpose for which the source will be tasked or deployed (e.g. In relation to organised drugs smuggling, a series of racially motivated crime etc);

- the grounds on which authorisation is sought under the RIP(S) Bill (e.g. for the prevention and detection of crime or the protection of public health);

- where a specific investigation is involved, details of that investigation or operation;
- details of what the source will be tasked to do;
- details of the level of authority required;
- details of who will be affected;
- details of any confidential material that might be obtained as a consequence of the authorisation.

3.30 A standard form for use in applications for authorisation is attached to this code **[NB. This form is not attached to this draft Code]**. This sets out the basic information that is required on an application and can be adapted to the needs and requirements of particular public authorities.

Combined authorisations

3.31 A single authorisation may combine two or more different authorisations under the RIP(S) Act. For example, a single authorisation may combine authorisations for directed surveillance or intrusive surveillance and the conduct of a source. However, the provisions applicable in the case of each of the authorisations must be considered separately. Thus, a police superintendent could authorise directed surveillance and the conduct of a source but an authorisation for the use of a source and intrusive surveillance would need the separate authority of a superintendent, a chief constable and the approval of a Surveillance Commissioner.

Duration of authorisations

3.32 Except in relation to juvenile sources, a written authorisation will cease to have effect at the end of a period of twelve months beginning with the day on which it took effect.

3.33 Oral authorisations or authorisations given by a person who is entitled to act only in urgent cases should be renewed in writing as quickly as possible and, in any event, will cease to have effect after 72 hours, beginning with the time when the authorisation was granted.

Renewals

3.34 If at any time before an authorisation would cease to have effect, the authorising officer considers it necessary for the authorisation to continue for the purpose for which it was given, it may be renewed, in writing, for a further period of twelve months, beginning with the day on which the authorisation would otherwise cease to have effect, but for the renewal. An application for renewal should not, though, be made until shortly before the authorisation period is drawing to an end. An authorisation can be renewed at any time

before the time at which it ceases to have effect, by any person who would be entitled to grant a new authorisation. Authorisations may be renewed more than once, provided they continue to meet the criteria for authorisation.

Reviews

3.35 Before an authorising officer renews an authorisation, he must be satisfied that a review has been carried out of the use made of the source during the period authorised, the tasks given to the source and the information obtained from the use or conduct of the source.

3.36 If satisfied that the criteria necessary for the initial authorisation continue to be met, he/she may renew it in writing for a further period.

Cancellations

3.37 The authorising officer must cancel an authorisation if he/she is satisfied that the use or conduct of the source no longer satisfies the criteria for authorisation or that the procedures for the management of the source are no longer in place (see **section 4.5**). Where the authorising officer is no longer available, this duty will fall to any person who has taken the place of the authorising officer or who is deputising for the authorising officer in his absence or while the post is vacant. Where possible, the source must be informed that the authorisation has been cancelled. This should happen as soon as possible after the cancellation of the authorisation. Where necessary the safety and welfare of the source following cancellation should continue to be assured.

4 MANAGEMENT OF SOURCES

Tasking

4.1 Tasking is the assignment given to the source by the handler or controller, asking him/her to obtain information, or to otherwise take an action leading to the obtaining of information.

4.2 In some instances, the tasking given to a person will not necessarily involve interference with a person's ECHR Article 8 rights. For example a source may be tasked with finding out purely factual information about the layout of commercial premises. Alternatively, a trading standards officer or health inspector may be involved in the test purchase of items which have been labeled misleadingly or are unfit for consumption. In such cases, it is for the relevant public authority to determine where, and in what circumstances, such activity may interfere with Article 8 and require authorisation.

4.3 The deployment of a source to infiltrate or gain trust in order to obtain personal information is not amenable to specific, step by step authorisation. In many cases, the source will be a relative or associate of the target and will already have details of that person's private life or have access to that person's home on a regular basis. For this reason it is not possible or necessary to define and authorise each separate occasion when a meeting with the source is for the specific purpose of obtaining personal information to pass on to the police or other public authority.

4.4 It is equally difficult to predict exactly what might occur each time a source meets with the target of an investigation. There may be occasions when unforeseen action or undertakings which, had they been foreseen would have needed authorisation, might be required of the source by the target. When this happens, it must be recorded as soon as practicable after the event and an authorisation should be obtained before any such further conduct is carried out.

Management responsibility

4.5 All authorisations for the use or conduct of a source should be in writing. In addition, public authorities should ensure that arrangements are in place for the proper oversight and management of sources. These require that:

(a) every source must have a designated handler;

(b) every source must have a designated controller.

4.6 The day-to-day contact between the public authority and the source is to be conducted by the handler, who will be an officer below the rank of the authorising officer. Some tasking may be given in direct response to

information provided by the source on the occasion of his/her meeting with the handler and, as such, will come within the control of the handler.

4.7 In cases where the authorisation is for the use or conduct of a source whose activities benefit more than a single public authority, responsibilities for the management and oversight of that source may be taken up by one authority or can be split between the authorities.

Security and welfare

4.8 Any public authority deploying a source should take into account the safety and welfare of that source, when carrying out actions in relation to an authorisation or tasking, and to foreseeable consequences to others of that tasking. Before authorising the use or conduct of a source, the authorising officer should ensure that a risk assessment is carried out to determine the risk to the source of any tasking and the likely consequences should the role of the source become known to the target or those involved in the target activity. The ongoing security and welfare of the source after the cancellation of their role should also be considered at the outset.

4.9 The handler is responsible for bringing to the controller's attention any concerns about the personal circumstances of the source, insofar as they might affect:

- the validity of the risk assessment
- the proper conduct of the source operation, and
- the safety and welfare of the source.

4.10 Where deemed appropriate, the controller must ensure that the information is considered by the authorising officer, and a decision taken on whether or not to allow the authorisation to stand.

Record keeping

4.11 The records maintained by public authorities must be maintained in such a way as to preserve the confidentiality of the source and the information provided by that source. There should, at all times, be a designated person within the relevant public authority who will have responsibility for maintaining a record of the use and conduct made of a source. Such a record must contain the following details (except in the case of undercover officers, where not all the requirements will apply):

- a means of referring to the source - without disclosing his true identity - to those who have a legitimate interest in the source's reporting;

- the source's true identity (available only to those within the organisation who need to know);
- details of the target or area of activity against which the source is to be deployed;
- the authorisation for the use or cultivation of the source (where appropriate) ;
- a risk assessment on the deployment of the source (see **section 4.8**);
- the authorisation for the conduct of the source;
- why, if appropriate, there has been an oral authorisation;
- all subsequent renewals;
- written details of the date and circumstances of the initial recruitment and registration for use of the source (where appropriate);
- a record of the identity of the source's handler(s) and controller, and a note of when these change;
- records of contact between the investigating public authority and the source (whether or not tasking was issued or information exchanged);
- detailed records of tasking (as defined in **section 4.1** above) given by the handler and/or controller to the source;
- records of all information given by the source;
- detailed records of intelligence derived and disseminated from this information;
- details of any review (which should occur no less frequently than annually) of the use or conduct made of the source and the information provided by him/her;
- details of any rewards or other benefits offered and/or given to the source, in cash or otherwise[4];

[4] **Guidance note:** A benefit may include the supply to a Court of information which may lead to a reduced sentence for a source who has been convicted of an offence.

- details of any information relevant to the security of the source which may have an impact on the validity of the most recently conducted risk assessment;

- confirmation that such information has been considered by the authorising officer, and a decision taken to allow the authorisation to stand;

- the grounds for withdrawal of an authorisation or refusal to renew an authorisation.

4.12 In the event that a source is specifically tasked in a way which is intended or likely to interfere with the ECHR Article 8 rights of any person or persons not previously considered as coming within the remit of the original authorisation, or to a degree significantly greater than previously identified, the handler or controller must refer the proposed tasking to the authorising officer, who should consider whether a separate authorisation is required. This should be done in advance of any tasking and the details of such referrals must be recorded.

Retention and destruction of the product and records of the use of a source

4.13 All records relating to the use and conduct of a source must be available for inspection by one of the Commissioners described in **section 5**. They must therefore be capable of being retrieved at a central point within each public authority.

4.14 Where there is reasonable belief that material relating to any activity by a source could be relevant to pending or future criminal or civil proceedings, it should be retained if it forms part of the unused prosecution material gained in the course of a criminal investigation, or which may be relevant to an investigation.

4.15 Authorising officers must also ensure compliance with data protection requirements and, where appropriate, with any relevant code of practice on data protection.

4.16 Subject to 4.14, all records should be retained for a minimum of one year to ensure that they are available for inspection by a Commissioner. Thereafter material must not be destroyed, save with the authority of the authorising officer. It is essential that this responsibility should be managed at a senior level in the relevant organisation and that officers are clearly identified and are held accountable for carrying out this function.

5 OVERSIGHT BY COMMISSIONERS

5.1 Oversight of all use of the powers contained in the RIP(S) Act will be provided by the Chief Surveillance Commissioner, Surveillance Commissioners and Assistant Surveillance Commissioners.

5.2 It will be the duty of any person having functions under the RIP(S) Act and any person taking action in relation to which an authorisation was given, to comply with any request of a Commissioner for documents or information as required by him/her for the purpose of enabling him/her to discharge his/her functions.

Functions of Commissioners

5.3 The RIP(S) Act extends the remit of the Chief Surveillance Commissioners so that they will be responsible for:

- monitoring the use by the police and NCIS of the powers relating to the use and conduct of sources;

- giving all assistance to the Tribunal set up under the 2000 Act for the investigation of complaints;

- making an annual report to the Scottish Ministers on the discharge of his/her functions under the RIP(S) Act and to report at any other time on any matter relating to those functions.

5.4 The Chief Surveillance Commissioner may seek the assistance of any Surveillance Commissioner or Assistant Surveillance Commissioner in carrying out these functions.

6 COMPLAINTS AND REDRESS

6.1 A single Tribunal for the UK set up under the 2000 Act will deal, among other things, with all complaints in relation to:

- proceedings brought under section 7 of the Human Rights Act in relation to use or conduct of a source by the police, NCIS, and other public authorities;

- any complaint brought in relation to conduct under the RIP(S) Act.

6.2 The Tribunal will deal with any complaint or proceedings, within the terms of **section 6.1**, relating to conduct which is alleged to have taken place, or which might reasonably have been considered should have taken place, under an authorisation for the use or conduct of a source.

7 INFORMATION LEAFLET

7.1 In general, public authorities listed in section 5 of the legislation should ensure that the information leaflet "Complaints about the exercise of powers under the Regulation of Investigatory Powers (Scotland) Act 2000" is readily available at any public office of that public authority.

7.2 In addition, any public authority specified in the RIP(S) Act, or designated by order, should ensure that details of the relevant complaints procedure are provided to anyone making representations that disclose some ground of complaint against one or more of these authorities.

Justice and Home Affairs Committee

Response to the Executive consultation on judicial appointments

The Committee welcomes the opportunity to respond to the Executive's proposals for changes to the judicial appointments system in Scotland.

Background

1. At its meeting on 26 April, the Committee appointed Michael Matheson as Reporter to consider the issues raised in the consultation paper. The Reporter met Neil McLeod of the Sheriff Court Users' Group, John Scott of the Scottish Human Rights Centre and Neil Brailsford of the Faculty of Advocates (notes of those meetings are attached) before reporting back to the Committee at its meeting on 4 July. Taking account of views expressed by consultees and during the discussion on 4 July, the Committee responds to the questions raised in the consultation paper as follows.

2. In this response, we have followed the order of headings in Chapter 8 of the paper, but refer to particular questions by reference to the paragraph numbers where they first occur in earlier chapters.

Introductory comments

3. The Committee believes appointments to the bench should be based solely on ability. Any appointments system should be consistent with equal opportunities, but we believe that a quota system to ensure representatives from minorities are appointed would be inappropriate. All those consulted by the Reporter took the same view.

4. In a wider context, the Committee believes the lack of ethnic minority or female representation on the bench is largely a result of the fact that, until recently, the composition of those studying law and thus entering the legal profession has not fully reflected the diversity of modern society. We suggest there is a wider issue here that could be looked at separately by the Executive. It is essential that there should be a mechanism to ensure appointments are transparent, fair and allow the best candidates to become sheriffs or judges, regardless of gender or background.

5. In relation to public appointments generally, the Committee is aware that the Scottish Executive has recently issued a separate consultation paper, *Appointments to Public Bodies in Scotland: Modernising the System.* We will be interested to see the tone of responses to that paper and if those proposals will have an impact on proposals for changes to judicial appointments procedure.

6. In common with our consultees, the Committee believes the system of judicial appointments could and should be improved.

Requirements of our judiciary (paragraphs 3.3, 3.6 and 3.7)

7. In addition to legal qualifications, the obvious criteria for appointment are qualities such as independence, integrity and impartiality. John Scott from the Human Rights Centre suggested that a willingness to keep up to date with developments

in the law should also be seen as important, especially given the rapid developments taking place in ECHR case law.

8. A statement of the criteria used in making judicial appointments should be published.

9. Issues of diversity and equality of opportunity could be more fully taken into account by involving a lay element in those considering applications.

Recruitment advertising and applications (paragraphs 2.12, 2.15, 4.4 and 4.5)

9. Consideration of judicial appointments should involve the current judiciary, legal profession and wider lay interests. The definition of "lay" in this context merits consideration. It could range from someone with no formal legal training to someone who has completed a law degree or even a non-practising professor of law. Lay involvement in the appointments process would also allow relevant interest groups to contribute to the consideration of judicial appointments.

10. In line with current practice for recruiting sheriffs (and now part-time sheriffs), our consultees thought that vacancies for judges should be advertised. The Committee agrees, and we see no good reason why such advertisements should not be placed in the national press, rather than just in legal journals.

11. A related issue is whether the sole mechanism for consideration of candidates for appointment should be response to public advertisements. At present, those considered for appointment as sheriffs include, in addition to those who apply, persons whose names are recommended by the Lord Advocate. The Committee would have no objection in principle to persons also being nominated by the Faculty of Advocates, the Law Society of Scotland or current members of the judiciary. However, we share the concern expressed by Mr Brailsford of the Faculty of Advocates that allowing nomination by Scottish Ministers could run into difficulties in relation to the European Convention on Human Rights.

12. The Committee has no view on whether there should be a prescribed format for applications, although there would be value in consistency.

Judicial Appointments Board and lay involvement (paragraphs 4.6 - 4.15)

13. In consensus with those consulted, the Committee thinks there is a strong case for the establishment of a judicial appointments board, and that it should be created by statute. However, we doubt whether there would be merit in conducting professional competence tests prior to appointment.

14. The Committee has no strong views about the actual size of the board, provided the membership commands respect. The Committee believes the Board should include a combination of lay and legally-qualified representation, although the proportions of that composition require careful consideration. Although a variety of suggestions were made by consultees, the Committee does not have a firm view at this stage on the most appropriate sources from which to draw lay members.

15. John Scott of the Scottish Human Rights Centre thought Ministers should not be able to recommend the appointment of a person not initially considered by the Board. Mr Brailsford of the Faculty of Advocates, by contrast, had no difficulty with giving Ministers such a power, although recognising that it might have ECHR implications. Regardless of the ECHR point, the Committee is inclined to think that such a power would be inappropriate.

16. Neil McLeod of the Sheriff Court Users' Group suggested the Board produce an annual report rather than the triennial one proposed in the consultation paper. We have no strong views on which is preferable.

Candidate confidentiality (paragraph 2.12 and 4.16)

17. The Committee is of the view that the issue of publicising the names of those who are unsuccessful as well as those who are successful will cause the most concern to those in the legal profession.

18. We think a balance will need to be struck between transparency and confidentiality of procedure. We understand the concern expressed by Neil Brailsford of the Faculty of Advocates about protecting the privacy of individual applicants; but we also acknowledge that, for reasons of public interest, appointments to such important positions in public life require to be, and to be seen to be, conducted fairly and openly.

19. We have no objection to unsuccessful candidates being notified in confidence of the specific reasons for this. However, we think that published data should be limited to a general classification of reasons for non-appointment, presented in such a way that particular reasons cannot be attributed to individuals. This is necessary to ensure that applicants who are found to be unsuitable on a particular occasion do not suffer professional embarrassment as a result. The publication of general data would, however, assist candidates in identifying potential areas where they might need to accumulate more experience or undertake training.

Appointment of sheriffs principal and sheriffs (chapter 5)

20. Those we consulted saw the merit in having periodic recruitment exercises for shrieval vacancies. The Committee believes recruitment exercises conducted at fixed intervals rather than on an *ad hoc* basis could provide for a useful pool of approved candidates available to consider when specific vacancies arose, but acknowledge that this might cause practical problems for individual candidates.

21. Neil McLeod and John Scott suggested that successful candidates might remain eligible for appointment for up to three years. The Committee has not reached a view either on this period or on what a suitable interval might be between recruitment exercises.

Management of judicial resources and code of conduct (chapter 6)

24. Neil Brailsford thought there should be a mechanism for sheriffs principal to deal with sheriffs who were not performing adequately. John Scott and Neil McLeod believed their managerial role should be increased. Although we recognise the

importance of management and supervision of the judiciary, the Committee is not in a position to assess the existing workloads of sheriffs principal (or the Lord President), and is therefore not in a position to say whether it would be realistic to add this additional responsibility.

25. We agree with our consultees that there would be merit in preparing a Code of Judicial Conduct. Mr McLeod was concerned that any Code should include some method of gauging whether or not criteria were being met.

Temporary judicial appointments (chapter 7)

26. We think the Board's role should extend to consideration of applications for part-time sheriffs and temporary judges. As Mr McLeod said, those appointed on a part-time or temporary basis are making judicial decisions at the same level of responsibility as those appointed on a full-time basis.

27. We also agree with our consultees that retired judges are a useful resource if used occasionally, assuming that the individual in question had performed satisfactorily before retirement.

SCOTTISH POLICE FEDERATION
Established by Act of Parliament
E-mail: djkeil@scottishpolicefederation.org.uk
Web Site: www.spf.org.uk

Ms. Fiona Groves,
Justice and Home Affairs Committee,
Scottish Parliament,
Room 3.10,
Committee Chambers,
Edinburgh, EH99 1SP.

Our ref: DJK/JM/V. 28th August, 2000.

Dear Ms. Groves,

Petition PE89 from Eileen McBride -
Enhanced Criminal Record Certificates
Police Act 1997 Part V.

I refer to your communication of 16th August 2000 relative to the above subject and reply herewith on behalf of the Scottish Police Federation.

The Scottish Police Federation acknowledges that the inclusion of non-conviction information in the proposed Enhanced Criminal Record Certificates is a delicate matter which may well raise a legal challenge on the basis of Article 6 of the European Convention of Human Rights.

It is easy to see the reasons for the petitioners concerns.

We believe, however, that this measure can be well justified on the basis of proportionality and the duty of the Executive to balance any individual loss of civil rights against the public safety and right to life of children in our community.

The principle in the proposed legislation is that the applicant voluntarily joins with a prospective employer or appointing body in establishing that he/she presents no known risk to children or vulnerable adults who will be entrusted to their care.

It is vital that the code of practice currently being developed in consultation with the Association of Chief Police Officers in Scotland, the Scottish Criminal Record Office and the Executive staff is seen to be robust enough to support a defence of proportionality and that the operation of the code of practice is properly monitored.

Please address all communications to: General Secretary, 5 Woodside Place, Glasgow G3 7QF
Tel: 0141 332 5234 / 0141 332 6268 Fax: 0141 331 2436
E-mail: scottishpolicefederation.org.uk

JH/00/26/9

The Law Society of Scotland
26 DRUMSHEUGH GARDENS
EDINBURGH EH3 7YR
0131 226 7411
DX ED1 EDINBURGH
FAX. 0131 225 2934
EMAIL. lawscot@lawscot.org.uk

DIRECT DIAL:
0131 476 8203
DIRECT FAX:
0131 225 4243
OUR REF:
LS/614/agk/cn
YOUR REF:
DATE:
30 August, 2000

Ms Fiona Groves,
Assistant Clerk to the Justice and Home Affairs Committee,
The Scottish Parliament,
Edinburgh,
EH99 1SP.

Dear Fiona,

PE 102 – James Ward

I refer to the above and write to advise that the Insolvency Solicitors Committee of the Law Society of Scotland has had the opportunity of considering Petition PE 102 from James Ward. As you will be aware, the Society cannot comment on the specific details of any one case and accordingly offers no comment in relation to the case of Mr Ward.

On the general question of appeals, the Committee confirms that there is no right of appeal against an Order of sequestration. This is because any appeal would necessarily be directed against the appellant's opponent in law, in the case of bankruptcy the petitioning creditor. This would be inappropriate as once a sequestration Order is granted, the court is under a duty to consider the interests of all creditors and not only the interests of the petitioning creditor. Accordingly, to grant a right of appeal against the petitioning creditor would be inconsistent with the principles behind the award of sequestration.

It should be noted however that, in the Committee's view, the current law is satisfactory and that a range of remedies are available to an individual who finds him or herself subject to an award of sequestration. The individual can petition the court for recall of sequestration and this will provide an appropriate means of review.

I hope this is of some assistance to you but should you require to discuss this further please do not hesitate to contact me.

Yours sincerely,

Mrs Anne Keenan
Deputy Director

Dictated by A Keenan and signed on her behalf

The concept of non-conviction information is not entirely new in Scotland. Police Information to Council Licensing Boards concerning applicants for various types of licence or for their renewal frequently include information concerning outstanding cases reported to Procurators Fiscal. Licensing Boards, after a hearing at which the applicant may be heard or be represented, then take a decision on the merits and as to whether they grant, reject or suspend the application pending the judicial outcome of the allegations. This is justified on the basis of public safety and, as far as we are aware, is generally accepted.

We believe the provisions of Part V of the Police Act, 1997 are well founded and sensible and should prove effective in denying those with evil intent easy access to occupations and posts which afford them opportunity and temptation to cause harm. Provided that a reasonable Code of Practice is adhered to, no detriment to applicants should occur.

It is also our belief that, given these circumstances, any challenge on the basis of E.C.H.R. would be unlikely to succeed.

I trust this is of assistance to you.

Yours sincerely,

Douglas J. Keil, QPM,
General Secretary.

Justice and Home Affairs Committee

Response to the Executive consultation on judicial appointments

The Committee welcomes the opportunity to respond to the Executive's proposals for changes to the judicial appointments system in Scotland.

Background

1. At its meeting on 26 April, the Committee appointed Michael Matheson as Reporter to consider the issues raised in the consultation paper. The Reporter met Neil McLeod of the Sheriff Court Users' Group, John Scott of the Scottish Human Rights Centre and Neil Brailsford of the Faculty of Advocates (notes of those meetings are attached) before reporting back to the Committee at its meeting on 4 July. Taking account of views expressed by consultees and during the discussion on 4 July, the Committee responds to the questions raised in the consultation paper as follows.

2. In this response, we have followed the order of headings in Chapter 8 of the paper, but refer to particular questions by reference to the paragraph numbers where they first occur in earlier chapters.

Introductory comments

3. The Committee believes appointments to the bench should be based solely on ability. Any appointments system should be consistent with equal opportunities, but we believe that a quota system to ensure representatives from minorities are appointed would be inappropriate. All those consulted by the Reporter took the same view.

4. In a wider context, the Committee believes the lack of ethnic minority or female representation on the bench is largely a result of the fact that, until recently, the composition of those studying law and thus entering the legal profession has not fully reflected the diversity of modern society. We suggest there is a wider issue here that could be looked at separately by the Executive. It is essential that there should be a mechanism to ensure appointments are transparent, fair and allow the best candidates to become sheriffs or judges, regardless of gender or background.

5. In relation to public appointments generally, the Committee is aware that the Scottish Executive has recently issued a separate consultation paper, *Appointments to Public Bodies in Scotland: Modernising the System.* We will be interested to see the tone of responses to that paper and if those proposals will have an impact on proposals for changes to judicial appointments procedure.

6. In common with our consultees, the Committee believes the system of judicial appointments could and should be improved.

Requirements of our judiciary (paragraphs 3.3, 3.6 and 3.7)

7. In addition to legal qualifications, the obvious criteria for appointment are qualities such as independence, integrity and impartiality. John Scott from the Human Rights Centre suggested that a willingness to keep up to date with developments

in the law should also be seen as important, especially given the rapid developments taking place in ECHR case law.

8. A statement of the criteria used in making judicial appointments should be published.

9. Issues of diversity and equality of opportunity could be more fully taken into account by involving a lay element in those considering applications.

Recruitment advertising and applications (paragraphs 2.12, 2.15, 4.4 and 4.5)

9. Consideration of judicial appointments should involve the current judiciary, legal profession and wider lay interests. The definition of "lay" in this context merits consideration. It could range from someone with no formal legal training to someone who has completed a law degree or even a non-practising professor of law. Lay involvement in the appointments process would also allow relevant interest groups to contribute to the consideration of judicial appointments.

10. In line with current practice for recruiting sheriffs (and now part-time sheriffs), our consultees thought that vacancies for judges should be advertised. The Committee agrees, and we see no good reason why such advertisements should not be placed in the national press, rather than just in legal journals.

11. A related issue is whether the sole mechanism for consideration of candidates for appointment should be response to public advertisements. At present, those considered for appointment as sheriffs include, in addition to those who apply, persons whose names are recommended by the Lord Advocate. The Committee would have no objection in principle to persons also being nominated by the Faculty of Advocates, the Law Society of Scotland or current members of the judiciary. However, we share the concern expressed by Mr Brailsford of the Faculty of Advocates that allowing nomination by Scottish Ministers could run into difficulties in relation to the European Convention on Human Rights.

12. The Committee has no view on whether there should be a prescribed format for applications, although there would be value in consistency.

Judicial Appointments Board and lay involvement (paragraphs 4.6 - 4.15)

13. In consensus with those consulted, the Committee thinks there is a strong case for the establishment of a judicial appointments board, and that it should be created by statute. However, we doubt whether there would be merit in conducting professional competence tests prior to appointment.

14. The Committee has no strong views about the actual size of the board, provided the membership commands respect. The Committee believes the Board should include a combination of lay and legally-qualified representation, although the proportions of that composition require careful consideration. Although a variety of suggestions were made by consultees, the Committee does not have a firm view at this stage on the most appropriate sources from which to draw lay members.

15. John Scott of the Scottish Human Rights Centre thought Ministers should not be able to recommend the appointment of a person not initially considered by the Board. Mr Brailsford of the Faculty of Advocates, by contrast, had no difficulty with giving Ministers such a power, although recognising that it might have ECHR implications. Regardless of the ECHR point, the Committee is inclined to think that such a power would be inappropriate.

16. Neil McLeod of the Sheriff Court Users' Group suggested the Board produce an annual report rather than the triennial one proposed in the consultation paper. We have no strong views on which is preferable.

Candidate confidentiality (paragraph 2.12 and 4.16)

17. The Committee is of the view that the issue of publicising the names of those who are unsuccessful as well as those who are successful will cause the most concern to those in the legal profession.

18. We think a balance will need to be struck between transparency and confidentiality of procedure. We understand the concern expressed by Neil Brailsford of the Faculty of Advocates about protecting the privacy of individual applicants; but we also acknowledge that, for reasons of public interest, appointments to such important positions in public life require to be, and to be seen to be, conducted fairly and openly.

19. We have no objection to unsuccessful candidates being notified in confidence of the specific reasons for this. However, we think that published data should be limited to a general classification of reasons for non-appointment, presented in such a way that particular reasons cannot be attributed to individuals. This is necessary to ensure that applicants who are found to be unsuitable on a particular occasion do not suffer professional embarrassment as a result. The publication of general data would, however, assist candidates in identifying potential areas where they might need to accumulate more experience or undertake training.

Appointment of sheriffs principal and sheriffs (chapter 5)

20. Those we consulted saw the merit in having periodic recruitment exercises for shrieval vacancies. The Committee believes recruitment exercises conducted at fixed intervals rather than on an *ad hoc* basis could provide for a useful pool of approved candidates available to consider when specific vacancies arose, but acknowledge that this might cause practical problems for individual candidates.

21. Neil McLeod and John Scott suggested that successful candidates might remain eligible for appointment for up to three years. The Committee has not reached a view either on this period or on what a suitable interval might be between recruitment exercises.

Management of judicial resources and code of conduct (chapter 6)

24. Neil Brailsford thought there should be a mechanism for sheriffs principal to deal with sheriffs who were not performing adequately. John Scott and Neil McLeod believed their managerial role should be increased. Although we recognise the

importance of management and supervision of the judiciary, the Committee is not in a position to assess the existing workloads of sheriffs principal (or the Lord President), and is therefore not in a position to say whether it would be realistic to add this additional responsibility.

25. We agree with our consultees that there would be merit in preparing a Code of Judicial Conduct. Mr McLeod was concerned that any Code should include some method of gauging whether or not criteria were being met.

Temporary judicial appointments (chapter 7)

26. We think the Board's role should extend to consideration of applications for part-time sheriffs and temporary judges. As Mr McLeod said, those appointed on a part-time or temporary basis are making judicial decisions at the same level of responsibility as those appointed on a full-time basis.

27. We also agree with our consultees that retired judges are a useful resource if used occasionally, assuming that the individual in question had performed satisfactorily before retirement.

JH/00/26/10

JUSTICE AND HOME AFFAIRS COMMITTEE

Provisional Forward Programme

Tuesday 5 September, 10 am, 5,14c PHQ
Note: this is not a formal meeting of the Committee, and there will be no Agenda, Minutes or Official Report.
Leasehold Casualties (Scotland) Bill – briefing by Scottish Executive officials

Wednesday 6 September, 9.30 am, CR2 (**note: change of venue**)
See Agenda for details

Thursday 7 September
Regulation of Investigatory Powers (Scotland) Bill – Stage 3 in the Parliament.
Note: the current business programme, agreed by the Parliament in July, gives Wednesday 6 September as the date for this debate. However, it is now proposed – in Business motion S1M-1137 – that this debate be moved to Thursday. Since that motion cannot be taken until the Wednesday, **the closing date for amendments remains Monday 4 September**. It is expected that the Marshalled List and groupings will be available the day before the stage takes place.

Monday 11 September, 2pm, **Glasgow, City Chambers CR8 (note venue)**
Prisons – evidence on HM Chief Inspector of Prisons Report for 1999/2000 from Clive Fairweather, Chief Inspector of Prisons for Scotland; Eric Fairbairn, Deputy Chief Inspector, Brian Henaghen, Staff Officer, Dr Mike Ryan, Medical Adviser, and Teresa Medhurst, Former Inspector

Leasehold Casualties (Scotland) Bill – Stage 1 evidence from Adam Ingram and the Law Society of Scotland

Tuesday 19 September, 9.30am, Chamber
Protection of Wild Mammals (Scotland) Bill – evidence on enforcement aspects from Sgt Sandy Brodie of ACPOS and the Scottish Campaign against Hunting with Dogs

Abolition of Poindings and Warrant Sales Bill – Stage 2

Wednesday 27 September, 9.30am, Chamber
Taking stock and budget process 2001-02 – evidence from the Lord Advocate and Solicitor General for Scotland

Protection of Wild Mammals (Scotland) Bill – evidence on enforcement aspects from Scottish Countryside Alliance

Wednesday 4 October, 9.30am, CR3
Budget process 2001/02 – evidence from the Minister for Justice

Leasehold Casualties (Scotland) Bill – Stage 1 evidence from Dr Eric M Clive, Scottish Law Commission, Alistair G Rennie, Deputy Keeper of the Registers, and

Mr Ian Davis, Head of Legal Services at Registers of Scotland, Scottish Executive, and Brian Hamilton

Draft report on Protection of Wild Mammals (Scotland) Bill

Meetings after the autumn recess (9 October – 22 October)

Members are advised to note the following dates and times in their diaries. Venues (other than 23 October) are subject to change at short notice.

Monday 23 October, 2pm, **Stirling (note venue)**

Tuesday 31 October, 9.30am, Chamber

Wednesday 8 November, 9.30am, CR3

Tuesday 14 November, 9.30am, Chamber

Wednesday 22 November, 9.30am, Chamber

Tuesday 28 November, 9.30am, Chamber

Wednesday 6 December, 9.30am, CR3

Tuesday 12 December, 9.30am, Chamber

Wednesday 20 December, 9.30am, Chamber

Winter recess (21 December – 7 January)