JH/00/32/A

JUSTICE AND HOME AFFAIRS COMMITTEE

AGENDA

32nd Meeting, 2000 (Session 1)

Wednesday 8 November 2000

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

1. **Subordinate legislation:** The Committee will debate—

   Motion S1M-1235 by Angus MacKay—That the Committee recommends that the Regulation of Investigatory Powers (Notification of Authorisations etc.) (Scotland) Order 2000, be approved; and

   The Regulation of Investigatory Powers (Prescription of Offices, Ranks and Positions) (Scotland) Order 2000 (SSI 2000/343).

2. **Visit to Barlinnie:** Members will report back on a visit to HMP Barlinnie.

3. **Petitions:** The Committee will consider—

   a draft letter to the Minister for Justice on petition PE89 by Eileen McBride;

   written evidence from the Scottish Human Rights Centre on petition PE116 by James Strang;

   written evidence from the Scottish Legal Aid Board on petition PE200 by Andrew Watt.

4. **Leasehold Casualties (Scotland) Bill (in private):** The Committee will consider a draft stage 1 report on the Bill.

5. **Budget process 2001/02 (in private):** The Committee will consider a draft report to the Finance Committee on stage 2 of the budget process 2001-02.

Andrew Mylne
Clerk to the Committee, Tel 85206

The following papers are attached for this meeting:

Agenda item 1	
Note by the Assistant Clerk (Affirmative SSI attached)	JH/00/32/1
Copies of the SSI can also be obtained by accessing the Stationery Office website – http://www.scotland-legislation.hmso.gov.uk/legislation/scotland/ssi2000/20000340.htm)	
Note by the Assistant Clerk (Negative SSI attached)	JH/00/32/2
Copies of the SSI can also be obtained by accessing the Stationery Office website – http://www.scotland-legislation.hmso.gov.uk/legislation/scotland/ssi2000/20000343.htm)	
Agenda item 3	
Draft letter to Minister for Justice on PE 89	JH/00/32/3
Submission from the petitioner on PE89 (e-mailed to members by petitioner in advance of meeting on 31 October)	JH/00/32/4
Note by the Assistant Clerk on PE116	JH/00/32/5
Submission from the Scottish Human Rights Centre on PE116	JH/00/32/6
Note by the Assistant Clerk on PE200	JH/00/32/7
Submission from the Scottish Legal Aid Board on PE200	JH/00/32/8
Agenda item 4	
Draft report (private paper – TO FOLLOW)	JH/00/32/9
Agenda item 5	
Draft report (private paper – TO FOLLOW)	JH/00/32/10

Papers not circulated:

Agenda item 4
Members may wish to bring with them the Bill, accompanying documents, and official reports of the meetings at which the Bill was discussed (11 September and 4 October). Members may also wish to consult written evidence submitted in relation to the Bill.

Agenda item 5
Members may wish to refer to the statement on justice expenditure by the Minister for Justice and the subsequent debate in the *Official Report* of the Parliament for 27

September; the *Official Report* of Committee meetings on 27 September and 4 October; the Committee's report at Stage 1 of the process (reprinted as an Annex to the Finance Committee 11th Report, 2000 (SP Paper 154); *Making a difference for Scotland – Spending Plans for Scotland 2001-02 to 2003-04.* Copies of these documents may be obtained from the Document Supply Centre.

JUSTICE AND HOME AFFAIRS COMMITTEE

Papers for information circulated for the 32nd meeting, 2000

Letter and enclosures from Mr and Mrs Dekker on PE29 (circulated to non-members only; copies already sent by the petitioners to all MSPs)	JH/00/32/11
Regulation of care – Invitation to a briefing (members only)	
Written Answer on prison population	
Letter from Jackie Baillie, Minister for Social Justice, on domestic violence, *Scotsman*, 30 October 2000	
Minutes of the 31st Meeting, 2000	JH/00/31/M

JH/00/32/1

JUSTICE AND HOME AFFAIRS COMMITTEE

The Regulation of Investigatory Powers (Notification of Authorisations etc.) (Scotland) Order 2000 (SSI 2000/340)

Note by the Assistant Clerk

Background

The Regulation of Investigatory Powers (Scotland) Act was passed by the Scottish Parliament on 7 September and received Royal Assent on 28 September. Under section 10(1) of the Act, the chief constable of the relevant police force has the power to grant, renew or cancel authorisations for intrusive surveillance. Under section 12(1), in urgent cases, the assistant chief constable may act for the chief constable. Section 10(2) stipulates the circumstances under which an authorisation may be granted. Section 13(2)(c) of the Act provides for Scottish Ministers to prescribe, by order, the information which must be given to the ordinary Surveillance Commissioner when the relevant person grants, renews or cancels such authorisation.

The Subordinate Legislation Committee considered the instrument on 24 October, and had no comments to make. The Justice and Home Affairs Committee has been designated lead Committee to report to the Parliament by 20 November.

Section 13(3) specifies what must be included in a notification to the Commissioner when granting or renewing an authorisation. The notice must state that the permission of the Commissioner is required before the authorisation will take effect or that the authorisation is satisfied on the grounds of urgency. In addition, Articles 2, 3 and 4 of this Order specify the information to be included in a notification of granting, renewing or cancelling an authorisation respectively.

Procedure

The instrument was laid on 29 September and came into force on 2 October, 3 days after it was laid, in order that it was in force when the European Convention on Human Rights became incorporated into UK law on 2 October. Under section 13(6) and (7), on the first occasion which Scottish Ministers exercise their powers under section 13(2)(c), the order does not need to approved by the Scottish Parliament before being made, but ceases to have effect if it is not within 40 days of being made.

Under 10.6, the Order being an affirmative instrument, it is for the lead committee to recommend to the Parliament whether the instrument should remain in force. The relevant Minister has, by motion S1M-1235 (set out in the Agenda), proposed that the Committee recommends the approval of the Order.

At the end of the debate, the Committee must decide whether or not to agree to the motion, and then report to the Parliament accordingly. Such a report need only be a short statement of the Committee's recommendation.

2 November 2000 FIONA GROVES

EXECUTIVE NOTE

The Regulation of Investigatory Powers (Notification of Authorisations etc.) (Scotland) Order 2000 (S.S.I. 2000/340)

The above Order was made in exercise of the powers conferred by section 13(2)(c) of the Regulation of Investigatory Powers (Scotland) Act 2000 ("the RIP(S) Act"). The Order is subject to affirmative resolution procedure (within 40 days of the Order being made) in order for it to remain in force. This procedure applies by virtue of section 13(6) and (7) of the RIP(S) Act because it is the first occasion on which the Scottish Ministers exercise their powers to make an order under section 13(2)(c).

Policy Objectives

Whenever the chief constable of a police force maintained under or by virtue of section 1 of the Police (Scotland) Act 1967 grants, renews or cancels an authorisation for intrusive surveillance under the RIP(S) Act, a notification must be given to a Surveillance Commissioner. This Order specifies the information to be included in such notifications.

The details required in the notifications are designed to ensure that operations carried out under the RIP(S) Act are robust enough to resist challenge under the ECHR but that they also reflect practical law enforcement considerations. An important element in this respect is that the details to be provided under this Order are similar to those required under similar legislation such as that which applies to interference with property by the police and Customs under Part III of the Police Act 1997 (The Police Act 1997 (Notifications of Authorisations etc.) Order 1998 (SI 1998/3241)). Unified procedures in this respect will facilitate the issue of combined authorisations under the RIP(S) Act and Part III of the Police Act 1997.

Further, the contents of this Order are similar to those provided for under parallel UK legislation (section 35(2)(c) of the Regulation of Investigatory Powers Act 2000). This serves the dual purpose of ensuring consistency of standard across the whole of the UK and of facilitating cross-border operations.

Consultation

Scottish Police Forces have been consulted during the preparation of the Order and on a draft of the Order.

Financial Effects

This Order incurs no additional financial effects on the Scottish Executive, local government, Scottish Police forces or other public authorities to those arising from the RIP(S) Act itself. The financial implications of the RIP(S) Act are outlined in the Financial Memorandum published with the Explanatory Notes for the RIP(S) Act.

Scottish Executive Justice Department
29 September 2000

JH/00/32/2

JUSTICE AND HOME AFFAIRS COMMITTEE

The Regulation of Investigatory Powers (Prescription of Offices, Ranks and Positions) (Scotland) Order 2000 (SSI 2000/343)

Note by the Assistant Clerk

Background

The Regulation of Investigatory Powers (Scotland) Act was passed by the Scottish Parliament on 7 September and received Royal Assent on 28 September. Section 8(1) of the Act provides for Scottish Ministers to prescribe, by order, those individuals, holding such offices, ranks or positions within the relevant public authorities, who will be entitled to grant authorisations under sections 6 and 7. Such designated persons will have the power to grant authorisations for the carrying out of directed surveillance under section 6 and the conduct or use of a covert human intelligence source under section 7. Section 8(3) of the Act lists the relevant public authorities.

The Subordinate Legislation Committee considered the instrument on 24 October, and had no comments to make. The Justice and Home Affairs Committee has been designated lead Committee to report to the Parliament by 20 November.

The Schedule to the Order lists the relevant public authority in column 1, the prescribed office in column 2, and the additional prescribed office in urgent cases in column 3. Article 3 of the Order states that a holder of an office in column 3 may only grant the authorisation "where it is not reasonably practicable having regard to the urgency of the case for the application to be considered by an individual in the same authority holding an office, rank or position listed in column 2." The Committee might wish to comment on the level of office prescribed in columns 2 and 3.

Procedure

Under Rule 10.4, the instrument is subject to negative procedure - which means that the Order remains in force unless the Parliament passes a resolution, not later than 40 days after the instrument is laid, calling for its annulment. Any MSP may lodge a motion seeking to annul such an instrument and, if such a motion is lodged, there must be a debate on the instrument at a meeting of the Committee.

The instrument was laid on 29 September and is subject to annulment under the Parliament's standing orders until 21 November. However, the instrument came into force on 2 October, 3 days after it was laid, in order that it was in force when the Human Rights Act came into force on 2 October. Under Article 10(2) of the Scotland Act 1998 (Transitory and Transitional Provisions) (Statutory Instruments) Order 1999, the Executive is required to provide an explanation to the Presiding Officer whenever a negative instrument comes into force less than 21 days after it is laid (attached). Although academic in reality, members might wish to comment on the Executive's explanation for its failure to meet the 21 day rule.

In terms of procedure, unless a motion for annulment is lodged, no further action by the Committee is required.

2 November 2000 FIONA GROVES

EXECUTIVE NOTE

The Regulation of Investigatory Powers (Prescription of Offices, Ranks and Positions)(Scotland) Order 2000 (S.S.I. 2000/343)

The above instrument was made in exercise of the powers conferred by sections 8(1), 9(3) and 24(4) of the Regulation of Investigatory Powers (Scotland) Act 2000 ("the RIP(S) Act"). The instrument is subject to negative resolution procedure by virtue of section 28(3) of the RIP(S) Act.

Policy Objectives

The purpose of this Order is to prescribe the offices, ranks and positions for the purposes of section 8(1) of the RIP(S) Act, under which individuals holding such offices, ranks or positions are designated persons for the purposes of granting authorisations under sections 6 and 7 of the RIP(S) Act. Those individuals holding an office, rank or position listed in column 2 of the Schedule to the Order, within a relevant public authority listed in column 1, may grant authorisations for directed surveillance or the conduct or use of covert human intelligence sources as detailed in sections 6 and 7 of the RIP(S) Act respectively. Column 3 details the lowest office, rank or position able to authorise such surveillance or the conduct or use of such sources in urgent cases.

The level of offices prescribed have arisen from consultation with the public authorities concerned. The levels of seniority of each of the offices, ranks and positions have been chosen with a view to their being appropriate to the nature and significance of surveillance activities to be authorised. They also reflect practical law enforcement considerations.

The purpose of this Order is to ensure consistency of standard across all public authorities in Scotland. Further, where appropriate the offices, ranks and positions listed equate with those provided for under parallel UK legislation (section 30(1) of the Regulation of Investigatory Powers Act 2000) to ensure a consistency of standard across the whole of the UK.

Consultation

The following bodies have been consulted during the preparation of the instrument and on a draft of the Order:

Departments within, and Executive Agencies of, the Scottish Administration
The Convention of Scottish Local Authorities
Scottish Police Forces
The Scottish Environment Protection Agency

Financial Effects

This Order incurs no additional financial effects on the Scottish Executive, local government, Scottish Police forces or other public authorities to those arising from the RIP(S) Act itself. The financial implications of the RIP(S) Act are outlined in the Financial Memorandum published with the Explanatory Notes for the RIP(S) Act.

Scottish Executive Justice Department
29 September 2000

DRAFT

JH/00/32/3

Justice and Home Affairs Committee

Reply to: Clerk to the Committee
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November 2000

Petition PE89 by Eileen McBride – Enhanced criminal record certificates

I am writing on behalf of the Committee with regard to the above petition, which calls for the repeal of legislation which will allow non-conviction information to be included on enhanced criminal record certificates.

As you may recall, my predecessor, Roseanna Cunningham, wrote to you about the petition on 4 April, after the Committee had first considered it. In your reply of 25 April, you confirmed the Executive's intention to bring Part V of the Police Act 1997 into force, and said that the legal advice you had received suggested that "the risk of challenge under ECHR was not great, provided there was clear guidance on the type of information which Chief Constables should release".

When the Committee considered your letter on 15 May, it decided to invite other views. Written evidence has since been received from Barnardo's Scotland, the Law Society of Scotland and the Scottish Police Federation. On the basis of the concerns raised in that evidence, the Committee has agreed that I should write to you again.

The Committee recognises that a difficult balance is being struck between the need to protect children's safety, and the principle that someone is innocent until proven guilty by the courts. We accept that, in order to strike an appropriate balance, disclosure of some non-conviction information may be appropriate in limited and clearly defined circumstances, so long as any such disclosure is subject to a test of proportionality. However, it is clear that much will depend on what is in the code of practice to which you referred in your letter. I would therefore be grateful if you could

keep the Committee informed of progress towards finalising that code of practice, and let me know as soon as a date for commencement of Part V of the 1997 Act has been decided upon.

In addition, the Committee invites you to consider reviewing the appeals mechanism in Part V of the 1997 Act. That mechanism allows a decision to disclose non-conviction information to be appealed only after disclosure has taken place. The Committee is interested to know why it provides no opportunity for the person concerned to be informed in advance of the information being disclosed. Although we appreciate that such a mechanism could be cumbersome, there is a danger without it that even a successful appeal under the Act as it stands will not prevent permanent damage being done to the good name and reputation of the person concerned. If this is an option that was considered and rejected, we would be grateful to know the reasons for that decision.

There is a final point about the appeal mechanism that presently exists in the Act that we would invite you to consider. As the appeal is made to the Scottish Ministers, the question of whether the appeals mechanism is sufficiently independent to satisfy the requirements of the European Convention on Human Rights. We would therefore be interested to know what consideration the Executive gave to this point when reaching the conclusion that “the risk of challenge under ECHR was not great”.

Please find enclosed a copy of the petition and related papers, including relevant extracts from the *Official Report* of the Committee’s meetings at which the petition has been considered.

Copies of this letter go to the petitioner and to the Clerk to the Public Petitions Committee.

ALASDAIR MORGAN
Convener

JH/00/32/4

JUSTICE AND HOME AFFAIRS COMMITTEE

Petition PE89

Supplementary submission from Eileen McBride

PE89 which relates to the inclusion of unproven allegations on Enhanced Criminal Record Certificates, comes before the Justice Committee on Tuesday 31 October. In your deliberations, I urge you to have regard to the following:
The replies you have received from the Scottish Police Federation, Barnardo's Scotland and the Law Society of Scotland seem to agree on the need for accuracy and an appeals procedure, and to share an opinion that a challenge to Enhanced Criminal Record Certificates is unlikely.

I have received many assurances from MSPs and others that Enhanced Criminal Record Certificates would contain only "accurate" information, but have been unable to persuade anyone to define the word in this context. If it is recorded on a certificate that a person has had certain allegations made against him, it will presumably be true that such allegations have indeed been made. Thus an appeal on grounds of **accuracy** would almost certainly be futile. What matters is whether accusations are recorded **which have not and cannot be proved in a court of law.** This would obviously be an infringement of the right to be presumed innocent.

In addition, appeals will take time, and a prospective employer who does not receive a requested certificate within the expected time will have a strong suspicion that an appeal is underway. This could jeopardise the applicant's prospects of employment, a further infringement of human rights. The very act of recording unproven accusations, with the intention of passing the information to a prospective employer violates the right to the presumption of innocence, and a challenge under the European Human Rights Legislation would certainly succeed. I do not share the view that a challenge is unlikely. Since appeals concerning the right to be presumed innocent have already been made by convicted drug dealers - and upheld - it is inevitable that the same remedy will be sought by people who are not guilty of any offence.

The submission from Barnardo's states:
"Children and young people are an extremely vulnerable group often without a voice in decisions that can affect their safety and well being. Therefore we do need measures to protect them from adults who present a risk"
While this is true, people against whom false allegations have been made are just as vulnerable, and have an equal right to be protected. We cannot and must not sacrifice such a basic principle of law, even in the important cause of child protection. Children must be protected from dangerous people, yes, and innocent people, i.e. those against whom nothing has been proven, need to be protected from having their lives ruined unjustly. I have no interest in protecting child abusers, whose offences will rightly be recorded and reported. I am very interested in protecting people **against whom unproven allegations have been made.**

The submission from the Police Federation refers to "proportionality". I understand this to mean that the acceptability of including unproven allegations on a certificate will depend on the strength of the Chief Constable's belief that the person has in fact committed an offence. If there is sufficient evidence for such belief, a conviction should be sought and secured in the usual way. If not the person is to be presumed innocent, and his name not besmirched.

The submission from the Law Society (Page 2 par. 2) states that an applicant has the option of withdrawing the application before a disclosure is made. My concern is for people **who have not been proved guilty of any offence.** The law should change so that they need not fear "disclosure".

Page 2 Par.6&7 of the same submission lends support to my concerns about exactly what is to be included in Certificates, and agrees with me that the legislation cannot prevent the inclusion of details which cannot be substantiated. As regards what is relevant, the Law Society seems to believe that that decision will be made subjectively by the Chief Officer involved. It is very worrying that details of acquittals could be included - a clear example of mud sticking, and being enabled to do so officially. **Being suspected of an offence is not the same as being guilty.** While I trust Procurators Fiscal to prosecute in good faith, it is inevitable that some innocent people will be suspected and even charged. That is why we have a legal system that requires accusations to be tested according to due process of law, and why those against whom the allegations cannot be proved are to be presumed innocent.

To summarise:

Enhanced Criminal Record Certificates violate the fundamental right (i) to be presumed innocent (ii) to employment (iii) to honour and good reputation

The European Court of Human Rights has already held that **simply not invoking a statute is not sufficient protection of a person's human rights**. The unjust statute **must** be repealed.

The proposed safeguards would be ineffective as outlined above.

Please make the courageous decision to repeal the section of the Police Act which relates to ECRCs **before** the inevitable challenge is made, which can only be after some unfortunate citizen has had his or her life ruined. Please give Scotland laws that are based on **justice**, not on what is or is not likely to be challenged.

Eileen A. McBride
29 October 2000

JH/00/32/5

JUSTICE AND HOME AFFAIRS COMMITTEE

Petition PE116 by James Strang

Note by the Assistant Clerk

Background

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

At present the Parole Board consists of members appointed by the Scottish Ministers, and those Ministers are also are responsible for the recall of prisoners to custody. In relation to ECHR generally, the petitioner 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."

Before referring the petition to the Committee, the Public Petitions Committee wrote to the Minister for Justice. In his response of 13 June, the Minister stated the Executive was considering "various matters relating to the membership of bodies operating in devolved areas, including the Parole Board." No comment was made in relation to the issue of recall of prisoners to custody, as this was the subject of court proceedings at the time. If, as a result of the review and court proceedings, changes were considered necessary, the Minister indicated the Executive would bring proposals before the Parliament. The Minister also indicated the Executive's intention to publish a consultation paper on whether a Human Rights Commission should be established.

The Committee considered the petition on 6 September, and it was agreed to write to the Scottish Human Rights Centre (SHRC) inviting comments on the issues raised by the petitioner. A copy of the response is attached. In summary, the Scottish Human Rights Centre advocates the establishment of a Human Rights Commission.

On 14 September, when the then First Minister announced the legislative programme for the coming year, he said "There will be a Bill to deal with the need to strengthen rights which have been brought to the fore by the incorporation into Scots Law of the European Convention of Human Rights. The Bill will cover matters of substance focusing on adult mandatory life prisoners, security of tenure for Parole Board members and legal aid. It is essential that we deal with the challenges that have emerged. Our intention is that the Bill will be brought forward later this autumn" (col 379, Official Report). It is anticipated that this Bill will be introduced during November and will be referred to this Committee.

Procedure

The Standing Orders make clear that, where the Public Petitions Committee 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

In light of the pending introduction of the ECHR Compliance Bill and the expected publication of a Human Rights Commission consultation paper by the turn of the year, the Committee might wish simply to take note of the petition. However, in doing so, it could send a copy of the petition and response from SHRC to the Executive and write to the petitioner suggesting that he examine the Bill when it is published and, if he wishes to, submit any comments to the Committee during Stage 1. In addition, the petitioner could be informed when the Executive publishes its consultation paper, and again be made aware of the opportunity to submit comments.

1 November 2000 FIONA GROVES

NB – The petition was previously circulated as an attachment to a note by the Senior Assistant Clerk (JH/00/26/4). The letter from Minister for Justice was also attached.

Scottish Human Rights Centre

Ionad Chòirichean Dhaonna na h-Alba

-achy
- copy to former

Our ref.: RM.1023..FG

Fiona Groves
Justice and Home Affairs Committee
Room 3.10
Committee Chambers
George IV Bridge
Edinburgh EH99 1SP

23 October 2000

Dear Ms Groves

Petition PA116 from James Strang

Further to your letter (12 September 2000) regarding the above petition my apologies for the late response this is due to staff changes at SHRC. For your records Professor Alan Miller is no longer working for SHRC and has been replaced by myself hence all correspondence should be directed to me or to our chair John Scott.

Mr Strang raised 3 main points: the introduction of remedial provisions to ensure Scots law complies with ECHR, doing so before this is tested in court and establishing a forum to review Scots law compatibility with ECHR.

In response to the latter points first, the Scottish Executive are in the process of producing a consultation paper on a Human Rights Commission which is due out before Christmas. SHRC has been advocating the setting up of such a commission for a number of years. Such a body would be able to fulfil the functions which Mr Strang suggests, such as scrutiny of legislation, taking evidence and reviewing practice and procedures. It would have additional benefits in that it would not only assist the Parliament but also individuals and organisations as well providing a well resourced, independent and impartial service on human rights in Scotland. Until such time as a Commission is set up (at the earliest 2002 if it is agreed to) Parliament relies on its committees and civil servants to provide such information and scrutiny. Committees can and do invite evidence from outside bodies (as you have done in this instance) however this is not as comprehensive or as well resource an option as a Human Rights Commission would be.

With regard to the compliance of the Parole Board with the ECHR my understanding is that this will form part of the forthcoming ECHR compliance bill hence I would hope that this will remedy any defect in this situation. Until such time as this Bill is published I can give no further comment on this issue.

16 Holland Street, Glasgow G2 4NG. Tel 0141 332 5960 Fax 0141 332 5309. email shrc@dial.pipex.com www.shrc.dial.pipex.com

Formerly Scottish Council for Civil Liberties

SHRC is a company limited by guarantee. Registered office as above. Affiliated to the International Federation of Human Rights Leagues

If you have any questions or require further information about any of the above please feel free to contact me on 0141 332 5315.

Best wishes.

Yours sincerely

Rosemarie McIlwhan

Rosemarie McIlwhan
Development Officer

JH/00/32/7

JUSTICE AND HOME AFFAIRS COMMITTEE

Petition PE200 by Andrew Watt

Note by the Assistant Clerk

Background

This petition calls for the Parliament to review the working methods of the Scottish Legal Aid Board "particularly in relation to collection and reimbursement of compensation monies collected". The petition is supported by Patricia Ferguson MSP.

The petition was considered by the Committee on 13 June. The Committee agreed to write to the Board for clarification of current working practices in relation to the reimbursement of compensation. In its response of 1 November (attached), the Board explains the legal framework within which the Board operates and also sets out the process followed in this regard.

Any contribution, which a person assisted by legal aid requires to pay, is paid into the Board's Fund. Fees to solicitors and other outlays are paid out of this Fund and any expenses or property received from the other party to the proceedings is paid into the Fund. Under the relevant Regulations, subject to prescribed exceptions, the Board has a statutory duty to ensure that any net liability or loss to the Fund is met. The Board states on page 2 that the purpose of the rule is to avoid the taxpayer carrying the expense of a case and to ensure a legally aided party is not in a better or worse position than a privately paying litigant.

The petition was prompted by the petitioner's own difficulties in obtaining compensation. It appeared that the Board does not release monies collected on behalf of those awarded compensation until the full amount, including interest and expenses, has been received. Disagreeing with this, the Board, at page 4/5, said that it "will collect and hold funds recovered only until the net liability to the Fund has been discharged. After that, any funds received by the Board will be distributed as soon as practicable to the assisted person."

Options

In view of the response received, the Committee might wish to write again to the Board, thanking it for the clarification of its working practices and—

- noting the Board's intention to review its Treasury management arrangements and associated regulations in order to ensure the earlier release of funds to assisted persons;
- welcoming the Board's commitment to publishing improved guidance for the public and legal profession; and
- asking that the Committee be kept informed of progress made in this regard.

The letter to the Board could be copied to the Executive and to the petitioner. The petitioner could also be informed of the Committee's inquiry into legal aid and access

to justice and be notified of the forthcoming opportunity to submit comments to the Committee on issues within the remit of the inquiry.

2 November 2000 FIONA GROVES

NB – The petition was previously circulated as an attachment to a note by the Assistant Clerk (JH/00/22/7).

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Telephone (0131) 226 7061
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JH/exp/32kB
- PE200
- ackn.
- copied to
phn

Fiona Groves
Assistant Clerk
The Scottish Parliament
Committee Chambers (Room 3.10)
George IV Bridge
Edinburgh
EH99 1SP

Please ask for extension number: 415

Your ref: Petition PE200

Please quote the department above and our reference:

CEX308

1 November 2000

Dear Ms Groves

PETITION PE200 – ANDREW WATT

Thank you for your letter dated 4 October regarding the above.

1.LEGAL BACKGROUND

The Board's current working methods in relation to "the collection and reimbursement of compensation monies collected" are based on the statutory requirements of The Legal Aid (Scotland) Act 1986 and on case law. I have summarised the relevant parts of these for you in Appendix 1 to this letter and will be happy to provide any further explanation or information on these if you wish.

To understand the processes undertaken by the Board, it may be helpful if you were to refer to Appendix 1 before reading further.

2.PROCESS

Having set out the legal background, it may be useful if I illustrate by example the way that a legally aided case, such as the one referred to in the Petition, is likely to proceed.

STEP 1	Board grants legal aid which may be subject to contribution
↓	
STEP2	If contribution payable, paid into Fund
↓	
STEP 3	Case proceeds with benefit of legal aid

Please note that from 1 October 1999 the Board's new DX addresses are:

General mail should be sent to Scottish Legal Aid Board DX 555250 General Mail EDINBURGH 30	Applications mail should be sent to Scottish Legal Aid Board DX 555251 Applications only EDINBURGH 30

STEP 4	Case concludes via out of court settlement or court hears evidence
STEP 5	Court grants decree if appropriate
STEP 6	Solicitor submits his bill to Board and confirms outcome of case
STEP 7	Solicitor's/counsel's fees and outlays paid from Fund
STEP 8	Any expenses (costs) received by the Board, for example from the assisted person's solicitor, following settlement, taxation or order of court, are paid into the Fund. Property received by the Board is paid into an interest bearing account held by the Board.
STEP 9	Property sufficient to cover any potential shortfall (eg if expenses not fully paid yet) is retained in an interest bearing account held by the Board
STEP 10	Action may have to be taken by the Board or the assisted person's solicitor to collect any outstanding expenses or property.
STEP 11	Board determine if there is a net liability (loss) to Fund (see Appendix 1)
STEP 12	If yes property transferred to Fund. If no, payment made to assisted person.

3.ISSUES ARISING WITHIN PROCESS

3.1 Degree of Discretion Exercisable by the Board

The provisions which require the net liability to the Fund to be met from property recovered or preserved by the assisted person are mandatory except where regulations provide specifically that they do not apply. These exceptions are set out in Regulation 33 (*see Appendix 1)*, and the list provided is exhaustive. The Board has no discretion to waive its right to recoup the net loss in any other situations. It is also important to note that a solicitor acting for a client on a private basis would also seek to recover his fees in full from any property recovered or preserved.

The above is important to note because the purpose of these provisions is to ensure two things:

- The taxpayer does not carry the expense of the case when funds have been received from the opponent.
- The legally aided party is placed in no better or worse position than a privately paying litigant.

3.2 Steps Taken to Recover Debts

In a legally aided case, the legal aid certificate allows the solicitor acting for the assisted person to take steps to enforce the recovery of property, and the Board will liaise with the solicitor to agree if recovery steps will be taken by the solicitor or the Board. Generally, the Board will only take over responsibility for recovery of debts due when the solicitor confirms that he is unable to commence or continue with such action. If the solicitor takes responsibility for recovery of the debt, the Board has procedures in place to review progress in individual cases, allowing it to take over recovery if it is not satisfied with the progress being made.

To recover the amount due to meet the net liability to the Fund, the assisted person's solicitor or the Board may require to take action to recover either the property recovered or preserved in the case or the expenses awarded in the case or both the property and the expenses. The actions which the Board can take to recover such a debt are no different to those which can be taken by any other person or body in Scotland attempting to recover a debt. Briefly, these could involve:

- informal negotiation or
- coercive steps against the debtor such as: arrestment of property,
  arrestment of wages
  poindings & warrant sales
  sequestrations/liquidations or
- protective steps such as inhibitions against property.

Guidelines exist within the Board as to the authorisation and taking of such steps. These could lead to immediate payment in full, payment by instalments or to no payment. A debtor's right to make payments by instalments applies equally to a debt to the Board as to a debt to any other creditor. Recovery of a sum due to the Board may, therefore, be made either immediately, over a period of time, or not at all, depending on the circumstances of the individual debtor.

For example, wages arrestments cannot be undertaken if the debtor is self-employed and poindings and/or arrestments of property can only be effected if property which belongs to the debtor can be identified. Assets apparently belonging to the debtor may, in fact, be owned by other parties. For example, an expensive car driven by a debtor may suggest a degree of affluence, but the car may be owned by an employer or company. Similar issues may arise regarding residential properties of high value, where ownership may lie with a spouse. Issues and difficulties may also arise in relation to debtors who are not insured for awards made against them or in the case of recalcitrant debtors who determinedly take steps to avoid or to delay payment, or who pay the principal amount awarded against them in a case, but then refuse to pay the expenses awarded.

This last point should be noted in particular. It is often our experience that debtors will pay promptly, or at least in priority to expenses awarded against them, the principal or capital sum awarded against them. This may be because interest accrues, currently at 8%, on principal and capital sums awarded by courts, but no such interest attaches to awards of expenses. It is also the case that some debtors will simply take all possible steps to avoid meeting their liability.

General mail should be sent to	Applications mail should be sent to
Scottish Legal Aid Board DX 555250 General Mail EDINBURGH 30	Scottish Legal Aid Board DX 555251 Applications only EDINBURGH 30

3.3 Confidentiality of Information

The constraints imposed by Section 34 of the Legal Aid (Scotland) Act 1986 mean that it is not always possible to keep the assisted person fully informed when the Board is not able to immediately recover any amount outstanding to it. Provision of such information could be a breach of Section 34(1)(b) which is a criminal offence. Information can only be disclosed with the consent of the person who furnished it. It may, therefore, be the case that the Board is taking all reasonable steps within the law to effect recovery within a reasonable timescale, and can report that much to the assisted person but is prohibited from disclosing the detailed information to the assisted person which would demonstrate the reasonableness and adequacy of the steps it has taken.

3.4 Monies Held by the Board

There are two points which I would like to highlight:

- The Board does not need to hold all of the principal or capital sum awarded to an assisted person, but only enough to cover the net liability to the Fund (*see Appendix 1).*Any sums in excess of the net liability are paid to the assisted person or his/her solicitors as soon as possible.
- Any sums which the Board does hold are held in an interest bearing account and the interest on sums held is payable to the assisted person.

3.5 Cases Where No Expenses are Awarded or sought

The examples referred to above have assumed that expenses are awarded against the assisted person's opponent. In a number of cases, particularly family cases, this may not be so. In a case where no expenses are sought or awarded, some or all of the amount recovered by the assisted person, subject to the exemptions set out in the Appendix and to any contribution which has been paid by the assisted person, will have to be retained by the Board to meet the net loss to the Fund.

3.6 Time Taken to Determine Expenses Payable

Where the parties to the case are unable to agree the expenses, it may be necessary to have the expenses independently assessed by the Auditor of Court in a process known as taxation. In some cases this may mean that the expenses may not be resolved for some time and the Board has no control over this timing.

4. COMMENT ON NOTE BY ASSISTANT CLERK TO PETITION PE200

I would like to comment on a statement contained in the note to Petition PE200 under reference JH/00/22/7 prepared by you and dated 9 June 2000. This says "It appears that the Board does not release monies collected on behalf of those awarded compensation until the full amount, including interest and expenses, has been received." This is not correct. The Board will collect

and hold funds recovered only until the net liability to the Fund has been discharged. After that, any funds received by the Board will be distributed as soon as practicable to the assisted person in accordance with Regulation 40(4)(e) of the Civil Legal Aid (Scotland) Regulations 1996 or, in accordance with Regulation 42(2), to any solicitor who has acted for the assisted person prior to the grant of legal aid.

5. GENERAL

Our experience, borne out by several recent meetings with local law faculties and with the public is that there is an inadequate knowledge base regarding these provisions. The "Report on Public and Faculty Meetings, February to June 2000" was sent by the Board to members of the Justice Committee on 29 September 2000.We are committed to publishing improved guidance to help the public and the legal profession.

It should also be noted that the question of whether property has been preserved or recovered is often a complex issue to resolve, but is one which Board staff regularly discuss with solicitors acting for assisted persons.

6. CONCLUSION

I hope that it is clear from the above firstly that the Board's actions regarding recovery of the net liability to the Fund are consistent with the requirements of the governing legislation and secondly that the assisted person in this context is placed in no more advantageous or disadvantageous position than a privately paying client.

The Board has a statutory duty to ensure that the net liability to the Fund is met. It is only when that liability has been met in full that the assisted person is entitled to receive any additional sums. This places the assisted person in the same position as a privately paying client. The Board can and does take all available legal steps to recover such debts, but is subject to the same practical issues in debt recovery as any other creditor. There are statutory provisions on confidentiality which limit the information which the Board can disclose in individual cases. There is a need to improve understanding and knowledge of the operation of these arrangements and the Board is committed to doing this.

We are reviewing our Treasury management arrangements and the associated legal aid regulations to establish whether there are ways to reduce the time taken for the net liability to be recovered and consequently ensure earlier release of funds to legally assisted persons.

I hope that this is the information you require, but if I can be of further assistance, please do not hesitate to contact me.

Yours sincerely

Julie Gramer

p.p. Lindsay Montgomery, Chief Executive.

Please note that from 1 October 1999 the Board's new DX addresses are:

General mail should be sent to	Applications mail should be sent to
Scottish Legal Aid Board	Scottish Legal Aid Board
DX 555250	DX 555251
General Mail	Applications only
EDINBURGH 30	EDINBURGH 30

APPENDIX 1

SUMMARY OF LEGAL BACKGROUND

Statutory References

Section 4(3) (c)) of the Legal Aid (Scotland) Act 1986 requires the Board to pay into the Fund "any sum which is to be paid in accordance with section 17 of this Act out of property recovered or preserved for any party to any proceedings who is in receipt of legal aid."

Section 17(2B) of the Legal Aid (Scotland) Act 1986 states that "Except in so far as regulations made under this section otherwise provide, where, in any proceedings, there is a net liability to the Fund on the account of any party, the amount of that liability shall be paid to the Board by that party, in priority to any other debts, out of any property (wherever situate) which is recovered or preserved for him –

(a) in the proceedings; or

(b) under any settlement to avoid or bring them to an end."

Section 34 of the Legal Aid (Scotland) Act 1986 deals with Confidentiality of Information and states that no information furnished for the purposes of the Act may be disclosed without the consent of the person who furnished it. Disclosure of information in breach of this section is an offence.

Regulation 33 of the Civil Legal Aid (Scotland) Regulations 1996 sets out a list of occasions when Section 17(2B) shall not apply – these exemptions relate in the main to certain state benefits, aliment, periodical allowance and to the first £2,500 of any property recovered or preserved in certain family proceedings.

Regulation 40 (2) of the Civil Legal Aid (Scotland) Regulations 1996 allows the Board to take proceedings in its own name or in the name of the assisted person to ensure payment of the amount of the net liability.

Case Law

The leading case remains the decision of the House of Lords in *Hanlon -v- The Law Society (1981) AC 124.* The Board's analysis of whether property has been recovered or preserved in particular cases is guided by the *Hanlon* case. Essentially, property is recovered or preserved if it has been put at issue within the proceedings – ie a claim has been made against the property and the assisted person has gained or retained the property.*(See Appendix 2 for extract)*

Definitions

To understand and place the above in context, there are a number of terms which it is important to understand:

Proceedings: These are the proceedings for which legal aid has been made available, and they include any appeal or method by which the property is physically recovered, for example by a step in diligence.

Net Liability to the Fund: This is the loss to the Fund which occurs when payments out of the Fund, by way of fees and outlays properly incurred by the assisted person's solicitor and counsel, exceed income to the Fund, by way of any contribution from the assisted person and expenses recovered from his opponent.

Recovered or preserved: Property is recovered when a pursuer succeeds against the defender in a claim for property from the opponent. Property is preserved when a claim against property fails. Detailed guidance on these issues is set out in the *Hanlon* case.

Property: this term has been used in this paper to describe any property including money awarded or agreed for payment in the course of a case (eg a capital sum in divorce proceedings or damages in a personal injury case.)

reopening of an inquiry, circumstances in which no reasonable minister would fail to reopen it. There is no doubt in my mind that this is very far from being such a case.

I would allow the appeal.

Appeal allowed with costs in House of Lords.

Solicitors: *Treasury Solicitor; Clinton Davis & Co.*

M. G.

[HOUSE OF LORDS]

HANLON . . . . . APPELLANT

AND

THE LAW SOCIETY . . . . . RESPONDENT

[1979 H. No. 2807]

1979 May 14, 15, 16, 18; June 21
1979 Nov. 2, 5; Dec. 4
1980 Feb. 27, 28; March 3, 4; May 1

Reeve J.
Lord Denning M.R., Sir John Arnold P. and Donaldson L.J.
Lord Edmund-Davies, Lord Simon of Glaisdale, Lord Fraser of Tullybelton, Lord Scarman and Lord Lowry

Legal Aid—Costs—Charge on property—Property adjustment order—Divorce—House owned by husband—Legally aided wife claiming transfer—Husband disputing claim—Court ordering transfer to wife—Single legal aid certificate covering divorce proceedings and property adjustment proceedings—Whether legal aid fund entitled to charge on house—Whether house "property . . . recovered or preserved"—Whether recovered or preserved "in the proceedings"—Whether discretion in The Law Society to postpone enforcement of charge or accept charge on substitute security—Matrimonial Causes Act 1973 (c. 18), s. 24 (1) (a)—Legal Aid Act 1974 (c. 4), s. 9 (6)—Legal Aid (General) Regulations 1971 (S.I. 1971 No. 62 (L. 1)) (as amended by Legal Aid (General) (Amendment No. 2) Regulations 1976 (S.I. 1976 No. 628), reg. 2, and Legal Aid (General) (Amendment) Regulations 1977 (S.I. 1977 No. 1293), reg. 7), reg. 18 (10) (c) (i)

Law Reform—Whether necessary—Legal aid—Costs—Divorce—Property adjustment order following divorce—Charge on property recovered or preserved for benefit of legal aid fund—Whether matrimonial home as sole capital asset suitable subject for charge

Section 24 of the Matrimonial Causes Act 1973 provides:

"(1) On granting a decree of divorce, . . . or at any time thereafter . . . , the court may make any one or

more of the following orders, . . . (*a*) an order that a party to the marriage shall transfer to the other party, . . . such property as may be . . . specified, being property to which the first-mentioned party is entitled, either in possession or reversion; . . ."

Section 9 of the Legal Aid Act 1974 provides:

". . . (6) Except so far as regulations otherwise provide, any sums remaining unpaid on account of a person's contribution to the legal aid fund in respect of any proceedings and, if the total contribution is less than the net liability of that fund on his account, a sum equal to the deficiency shall be a first charge for the benefit of the legal aid fund on any property . . . which is recovered or preserved for him in the proceedings."

Regulation 18 of the Legal Aid (General) Regulations 1971, as amended, provides machinery for the attachment and enforcement of the charge imposed by section 9 (6) of the Act of 1974 and provides:

". . . (10) The provisions of this regulation shall not apply to—. . . (*c*) the first £2,500 of any money, or of the value of any property, recovered or preserved by virtue of an order made . . . under the provisions of—(i) section . . . 24 . . . of the Matrimonial Causes Act 1973; . . ."

On July 28, 1971, the plaintiff was granted an emergency legal aid certificate to prosecute a suit for divorce. On January 19, 1972, a full certificate was granted to her, with a contribution of £115. The marriage was ultimately dissolved on May 15, 1974, on a supplemental petition by the husband based on two years' separation. The plaintiff's original petition included a prayer for the transfer to her of the matrimonial home, the legal title to which was in the husband. The husband's answer to the petition included a prayer for the transfer to him of any interest that the plaintiff might be held to own in the house. On February 6, 1976, the plaintiff applied under sections 23 and 24 of the Act of 1973 for periodical payments in respect of herself and the four children of the marriage, a lump sum and transfer to herself of the matrimonial home. The registrar ordered the husband to transfer the house to the plaintiff subject to the existing mortgage and to make periodical payments of £6 a week in respect of each of the two youngest children of the marriage, the plaintiff to pay to the husband a lump sum of £5,000. The plaintiff was unable to raise the £5,000 and appealed against the registrar's order to Rees J., who increased the periodical payments, and again to the Court of Appeal, who ordered transfer of the house to her without payment in return, the periodical payments being reduced to a nominal sum. The plaintiff's costs by that date amounted to a total of £8,025, being made up of £925 in respect of the divorce proceedings, £1,150 in respect of custody and access proceedings and £5,950 in respect of the proceedings under sections 23 and 24 of the Act of 1973. The house was worth about £14,000, subject to a mortgage of nearly £4,000. On May 8, 1979, the plaintiff, who wished to sell the house, which was in need of repair, and buy a smaller one, took out an originating summons against The Law Society claiming, inter alia, a declaration that The Law Society was not entitled to a charge on the house pursuant to section 9 (6) of the Act of 1974 and the Regulations of 1971, as amended. Reeve J. held that The Law Society held a charge on the [illegible]

The question of the discretion of The Law Society to postpone enforcement of the charge or to accept a substitute charge on a replacement house was not raised before him. The Court of Appeal by a majority (Lord Denning M.R. and Sir John Arnold P., Donaldson L.J. dissenting) dismissed an appeal by the plaintiff, Lord Denning M.R. holding that she had recovered or preserved the whole house in the proceedings under sections 23 and 24 of the Act of 1973 and that, accordingly, The Law Society's charge applied to the whole house, Sir John Arnold P. holding that she had recovered only the husband's half-share of the equitable estate and that, accordingly, the charge extended to that half-share only, less the first £2,500 of its value, Donaldson L.J. holding that a property adjustment order did not result in the recovery or preservation of any property and that, accordingly, The Law Society had no charge on the house, but that, if his view were wrong, the plaintiff had recovered the whole value of the house and that accordingly the charge would extend to the whole house. All the members of the Court of Appeal expressed the view that The Law Society had a discretion to postpone enforcement of the charge: (*per* Sir John Arnold P. and Donaldson L.J. only if it was in the interests of the legal aid fund to do so); Lord Denning M.R. expressed the view that The Law Society also had a discretion to accept a substitute charge on a replacement house, but Sir John Arnold P. and Donaldson L.J. disagreed.

On appeal by the plaintiff by leave of the Court of Appeal: —

Held, dismissing the appeal, (1) that on the true construction of regulation 18 (10) (*c*) (i) of the Legal Aid (General) Regulations 1971, as amended, property that was the subject of a property adjustment order under section 24 (1) (*a*) of the Matrimonial Causes Act 1973 was liable to a charge in favour of the legal aid fund under section 9 (6) of the Legal Aid Act 1974; that it had been "recovered or preserved" within section 9 (6) if its ownership or transfer had been in issue in the proceedings as a matter of fact rather than of theoretical risk; that on the facts of the present case the ownership of the whole house had been in issue between the parties; and that, accordingly, the house was property recovered by the plaintiff in respect of the husband's interest and preserved to her in respect of her own and was subject to the charge in favour of the legal aid fund (post, pp. 172E–F, 179C, 180F–H, 181C–E, 184H—185B, 187C—188A, 189H—190A, 191E, 199B–D, 200E–H.

Dictum of Sir George Jessel M.R. in *Foxon* v. *Gascoigne* (1874) 9 Ch.App. 654, 657n. applied.

Observations on the use of subordinate and subsequent legislation in statutory interpretation (post, pp. 178D–H, 185H—186C, 193F—194G); and on the relevance of cases under the Solicitors Acts in interpreting "property recovered or preserved" in the Act of 1974 and in the context of proceedings under the Act of 1973 (post, pp. 176G—177C, 190E–G).

(2) That "the proceedings" in section 9 (6) were not restricted to the actual proceedings in which the preservation or recovery of the property took place but extended to all the proceedings covered by the legal aid certificate; that, accordingly, the house had been recovered or preserved in the divorce proceedings within the meaning of section 9 (6) and the whole sum of £8,025, less the wife's contribution of £115, was a charge on the house (post, pp. 172E–F, 182D, 184H—185B, 187B–D, 201F—202C).

Per curiam. (i) Nothing in regulation 19 (2) of the Regulations of 1971 takes away the ordinary power of The Law Society as chargee to postpone enforcement of the charge or to accept a substitute charge on a replacement house or both if it chooses to do so. In considering how to exercise this discretion, its duty is not only to the legal aid fund as such but also to the legal aid scheme as a whole (post, pp. 172F–G, 184B–C, H—185B, 188C–F, 203E—204A).

(ii) Any tribunal exercising jurisdiction under sections 23 and 24 of the Act of 1973 should bear in mind the possible effect of a charge under section 9 (6) of the Act of 1974, if necessary calling on The Law Society for counsel. It will generally be advantageous to adjudge the beneficial interests in property the subject of an order under section 24 of the Act of 1973 (post, pp. 172E–F, 184F–G, H—185H).

(iii) The appropriate executive and legislative authorities should urgently consider the problem raised in this appeal and make any consequent amendments of the Act or the regulations that seem desirable (post, pp. 172H—173A, 184G–H, H—185B, 188E–F, 204C—205A).

Decision of the Court of Appeal, post, p. 142E; [1980] 1 All E.R. 763 affirmed.

The following cases are referred to in their Lordships' opinions:

Alexander v. *Mackenzie*, 1947 J.C. 155.

Blatcher v. *Heaysman* [1960] 1 W.L.R. 663; [1960] 2 All E.R. 721, C.A.

Britt v. *Buckinghamshire County Council* [1964] 1 Q.B. 77; [1963] 2 W.L.R. 722; [1963] 2 All E.R. 175, C.A.

Clayton, In re [1940] Ch. 539.

Cooke v. *Head (No. 2)* [1974] 1 W.L.R. 972; [1974] 2 All E.R. 1124, C.A.

Devonshire (Duke) v. *O'Connor* (1890) 24 Q.B.D. 468, C.A.

Foxon v. *Gascoigne* (1874) L.R. 9 Ch.App. 654, Sir George Jessel M.R., 657n., C.A.

Gissing v. *Gissing* [1971] A.C. 886; [1970] 3 W.L.R. 255; [1970] 2 All E.R. 780, H.L.(E.).

Hales v. *Bolton Leathers Ltd.* [1950] 1 K.B. 493; [1950] 1 All E.R. 149, C.A.; [1951] A.C. 531; [1951] 1 All E.R. 643, H.L.(E.).

Hanlon v. *Hanlon* [1978] 1 W.L.R. 592; [1978] 2 All E.R. 889, C.A.

Hyde v. *White* [1933] P. 105.

Inland Revenue Commissioners v. *Hinchy* [1960] A.C. 748; [1960] 2 W.L.R. 448; [1960] 1 All E.R. 505, H.L.(E.).

Kay v. *Lovell* [1940] Ch. 650.

Kirkness v. *John Hudson & Co. Ltd.* [1955] A.C. 696; [1955] 2 W.L.R. 1135; [1955] 2 All E.R. 345, H.L.(E.).

Luby v. *Newcastle-under-Lyme Corporation* [1965] 1 Q.B. 214; [1964] 3 W.L.R. 500; [1964] 3 All E.R. 169, C.A.

McFarlane v. *McFarlane* [1972] N.I. 59.

Mills v. *Mills* [1963] P. 329; [1963] 2 W.L.R. 831; [1963] 2 All E.R. 237, C.A.

Neill v. *Glacier Metal Co. Ltd.* [1965] 1 Q.B. 16; [1964] 2 W.L.R. 55; [1963] 3 All E.R. 477.

Pettitt v. *Pettitt* [1970] A.C. 777; [1969] 2 W.L.R. 966; [1969] 2 All E.R. 385, H.L.(E.).

The third objection was the basis of Donaldson L.J.'s dissent. But is it true that, *for the purpose of ascertaining what has been recovered or preserved,* everything goes into hotchpotch and is at risk? Counsel for the respondent recognised the absurdity, in view of the width of the word "property," of answering "yes," and the force this would give to Donaldson L.J.'s initial dissent. He suggested that for the purpose of the charge under section 9 (6) of the Act of 1974 property is recovered or preserved if it is an asset which either has been put in issue or was affected by the order of the court. But to add the second criterion would mean, for instance, that if it were established without dispute that the entire beneficial ownership was in the wife and the husband was ordered to transfer the bare legal title, in effect it would be the wife's undisputed beneficial interest which would be considered to be "recovered or preserved" so as to become the subject of the charge. That would be preposterous.

This is relevant to the fourth objection to the reasoning of Sir John Arnold P. A bare legal title is a shell; it cannot be the subject of an effective legal charge in favour of someone who has notice that the entire beneficial title is elsewhere. I cannot, with respect, see that the equitable interest is "shielded" or "protected" or in any sense "preserved" by being united with the legal title.

I think that two of the cases under the Solicitors Acts are of value on this part of the appeal and support the line taken by Sir John Arnold P. In *Pinkerton* v. *Easton* (1873) L.R. 16 Eq. 490, Lord Selborne L.C. said, at p. 493, that whether and what property is recovered or preserved are questions of fact. That case was cited with approval by Sir George Jessel M.R. in *Foxon* v. *Gascoigne* (1874) L.R. 9 Ch.App. 654, where he said, at p. 657n.:

> ". . . where the plaintiff claims property, and establishes a right to the ownership of the property in some shape or other, there the property has been recovered; . . . where a defendant's right to the ownership of property is disputed, and that right has been vindicated by the proceedings, there the property has been preserved."

Sir George Jessel's explanation may be too narrow for all the cases decided under the liberally construed Solicitors Acts. But it seems to me to explain the words in their ordinary sense and thus to be applicable analogically to a case like the instant. In other words, property has been recovered or preserved if it has been in issue in the proceedings —recovered by the claimant if it has been the subject of a successful claim, preserved to the respondent if the claim fails. In either case it is a question of fact, not of theoretical "risk." In property adjustment proceedings, in my view, it is only property the ownership or transfer of which has been in issue which has been "recovered or preserved" so as to be the subject of a legal aid charge. What has been in issue is to be collected as a matter of fact from pleadings, evidence, judgment and/or order. I can see no reason for extending the words to items of property the ownership or possession of which has never been questioned.

Andrew Mylne
Clerk to the Justice & Home Affairs Committee
The Scottish Parliament
Edinburgh
EH99 1SP

30th October 2000

Dear Mr Mylne,

PE29 - Calling for action to be taken in relation to the decisions and considerations in prosecuting road traffic deaths

As you know the Justice and Home Affairs Committee have deferred further consideration of PE29 until the Transport Research Laboratory (TRL) completes and publishes its findings on road death issues. For information, I now enclose a copy of our letter sent last week to all MSP's and Scottish MP's at Westminster which raises serious concerns about this study within a Scottish context.

Several weeks ago we raised these concerns with our MP Rosemary McKenna. She is now in receipt of a reply from Lord Whitty. I enclose a copy of his response which does not reassure us. It would appear that Scotland is having no prominence in the TRL study.

Yours sincerely,

Margaret & Alex Dekker

«Title» «Christian_Names» «Surname» «Title_2»
The Scottish Parliament
Edinburgh
EH99 1SP

24th October 2000

Dear «Title» «Surname»,

Road Traffic Act (Road Deaths)
Transport Research Laboratory Study

I am sure you are aware there is a growing public disquiet, in Scotland, about the lenient approach of the criminal justice system to drivers who have killed innocent victims by bad driving. With this in mind I would refer you to the above TRL study, a UK project, commenced in May 1998, (before the Scottish Parliament was convened) and due to be completed in October 2000.

The objective of the study is, "To determine the effect of the 1991 Road Traffic Act on the procedures that identify, convict and sentence those guilty of very bad driving offences. The research seeks to ascertain how the police view bad driving, what is leading prosecutors to select one offence rather than another, and why courts choose one penalty rather than another. By examining the whole procedure, from charging to sentencing, as well as carrying out an analysis of sentencing trends and reconviction rates before and after the 1991 Act was introduced". "This exploration will seek to identify whether 'lesser' charges of for example, careless driving are being brought where a charge of dangerous driving might be more appropriate".

Numerous references have been made in House of Commons debates and by the Justice and Home Affairs Committee at the Scottish Parliament to "wait and see" this research before taking further action on road death issues laid before them.

While it appears from the TRL remit that study would be in-depth, I would draw your attention to the following facts and ask you to bear them in mind when you scrutinise the TRL UK findings.

1. **Historical**
The criminal justice system has evolved separately north and south of the border. Also, the definition of 'reckless' now 'dangerous' as in Section 1 and 2 of the Road Traffic Act, was established in Scotland in 1980 in the appeal case of Allan v Patterson 1980 S.L.T. 77. Following the North Report, this definition was adopted by the government of the day to be incorporated into the amended U.K. Road Traffic Act 1991.

It follows, that the pursuit of the TRL remit within a Scottish context is questionable, when the law with respect to section 1 and 2 of the Road Traffic Act has remained unaltered in Scotland since 1980.

2. **Availability of archived records in Scotland**

Fiscal records of the wide ranging 'Careless driving' offences are kept for 5 years (6 years by police). Fiscal records of 'Causing death by dangerous driving' are kept for 10 years. Also during the past year, MSP's have asked for the statistics of charges brought, proceeded against and proven in court for those cases where death has been the consequence of a driver's 'Carelessness'. The Justice Minister has replied that these statistics are not collected on a death basis. Thus, there are serious concerns on the availability, indeed existence, of these records pre and post 1991 to be examined and included as stated in the research's remit.

3. **Police participation in TRL Project**

Only two Scottish police forces have been invited by the TRL to participate in this project, Lothian & Borders and Tayside. Lothian & Borders police board have stated; "The arrangements in place in Lothian & Borders work well within the constraints of the legal process and in fact are regarded as an example of good practice within the police service".
While this claim may be open to question (see figures in Table 1 attached), the concern is that the information obtained by TRL from the two participating police forces are not representative of all eight Scottish police forces and thus give a 'weighted' and inaccurate view.

4. **Sample Size in TRL Project**

In 1998 there were 39 offences of 'Causing death by dangerous driving' recorded by the police in the **whole of Scotland**. Only 17 offences were proceeded against in court. By way of example, consider then the sample size available from the two participating police forces for the last two years, as in attached Table 1. It is clearly visible that even by examining all cases from the two participating police forces for 'Causing death by dangerous, the sample size would be too small for the TRL study to produce any significant findings. A recent statement from a TRL senior researcher stated that **only eight cases from the two participating police forces** had been tracked through the courts as "extreme cost" prohibited further cases being examined.
This study has taken $2\frac{1}{2}$ years to complete and the findings will be used by both Parliaments at Westminster and Scotland in considering road death issues laid before them.

Consequently, from the invited police force participation, the sample size and the questionable availability of records in Scotland it can be clearly seen that the TRL study cannot fulfil it's remit to produce meaningful findings for Scotland. Add to this the devolved criminal justice system and the historical facts and it is clear that the objectives will only be delivered by an **external** in-depth study, in Scotland, on 'charging through to sentencing' following innocent victims road deaths. Further examination of the criminal justice statistics in Scotland would prove that it is not a huge task. An in-depth study would identify the shortcomings in the law and/or its application in Scotland before considering the introduction of any new measures.

We would therefore seek your support, with that of all Scottish MSP's and MP's, to ensure that; The Scottish Parliament carry out an independent review on road death issues.

Yours sincerely,

Margaret & Alex Dekker

cc All Scottish MSP's & MP's
enc Table 1 - statistics

Sample size in TRL Study of 'Causing death by dangerous driving' (CDDD)

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FROM LORD WHITTY
PARLIAMENTARY UNDER SECRETARY OF STATE

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REGIONS

DEPARTMENT OF THE ENVIRONMENT
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Ms Rosemary McKenna CBE MP
House of Commons
LONDON
SW1A 0AA

OUR REF: W/025404/00
YOUR REF: 000197

13 OCT 2000

ROAD TRAFFIC ACT – RESEARCH ISSUES

Thank you for your letter of 20 September enclosing this one from your constituents, Margaret and Alex Dekker about the current study by the Transport Research Laboratory (TRL) into the workings of the Road Traffic Act 1991.

I am of course aware of the tragic circumstances of Steven Dekker's death, and I welcomed the opportunity to discuss the issues arising from this case when we met last November. There are one or two points which I think are important to make in response to Mr and Mrs Dekker's concerns.

Firstly, Mr and Mrs Dekker are correct in pointing out that the historical background to the existing legislation is slightly different in Scotland and that the Road Traffic Act 1991 represented less of a change in the law there than in England and Wales. However, the current research was commissioned as a national project examining the use and application of the law on dangerous and careless driving throughout Great Britain. Whilst experience in Scotland is an important part of that study, it was never the intention to give it specific prominence in this research.

One of the main aims of the research was to examine current practice and to identify concerns in the operation of the law and the legislation itself. The background to the 1991 Act will be referred to in the research report and the researchers have been looking at whether the Act has made a difference to the pattern of prosecutions and convictions for dangerous and careless driving. Much of the research is, however, concerned with what is happening now and whether there is a need to address current problems in the way the legislation is being interpreted.

The methodology for the research project has followed well-established lines, consisting of a mixture of in-depth analysis of selected cases and interviews, a wider postal survey and data analysis. This has applied equally to Scotland as England and Wales in order to obtain as a wide a range of views as possible and to avoid the possibility of the information obtained being unrepresentative.

Mr and Mrs Dekker have also referred to the sample size used in tracking cases of causing death by dangerous driving in Scotland. The purpose of this part of the research was to observe the arguments used in court, and by studying particular examples to understand the basis for some of the decisions being made. The research has also used case examples to examine the relationship between types of offences and resulting convictions. But it was not intended that tracking should be conducted on a larger number of cases.

On Mr and Mrs Dekker's point about statistics of court cases, I should explain that it was not the purpose of this research to obtain statistics of charges brought, proceeded against and proven in court for those cases where a death occurred and a charge of careless driving was brought. TRL's remit was to analyse sentencing trends, but it did not make a distinction between those careless driving convictions that involved a fatality and those that did not. It has only been possible to analyse the charges reported prosecuted and proven in a sample of English fatalities because the English police send fatal accident files to TRL. The Scottish police do not do this.

I hope this is helpful in allaying Mr and Mrs Dekker's concerns about the research. If they do have any doubts, I would simply urge them to study TRL's report carefully once it has been published before making up their minds about the validity of the methodology and findings. We will certainly be giving it the closest scrutiny before reaching any conclusions.

Regarding Mr and Mrs Dekker's suggestion that the Scottish Executive should undertake an in-depth study of cases involving road deaths, I am copying this correspondence to Jim Wallace at the Executive for any comments he may wish to make.

LORD WHITTY

Des McNulty (Clydebank and Milngavie) (Lab): To ask the Scottish Executive how the number of people and proportion of the population in penal establishments in Scotland compares with the equivalent figures for the rest of the UK and Europe and what steps are being taken to reverse the growth in the prison population in Scotland that took place between 1979 and 1998.

(S1W-7222)

Mr Jim Wallace: The available information is given in the table below.

The size of the prison population is the product of a number of factors including the level of crime, levels of reporting and detection, and decisions on prosecution and sentencing. As far as sentencing is concerned, we are committed to ensuring that the courts have a wide range of sentencing options available so that sentencers can make a non-custodial decision where they consider it is appropriate to do so in the circumstances of the particular case.

We are working with local authorities to improve the quality and effectiveness of community disposals with the aim of increasing the confidence of sentencers and the public in such disposals. (The use of probation and community service orders has almost doubled over the past 10 years).

We have funded the national roll-out of Supervised Attendance Orders for fine defaulters and are considering extension of the current pilot diversion from prosecution schemes.

New community disposals being piloted include Drug Treatment and Testing Orders for drug misusers who commit crime on a frequent basis to fund their drug addiction.

We are also piloting Restriction of Liberty Orders (electronic tagging) and are reviewing options for wider use of electronic monitoring.

Since 1991-92, when the arrangements for 100% funding of criminal justice social work services were fully introduced, the funding for community disposals has risen from £16.5 million to £42.8 million, an increase of 159%.

Prison Population, rate per 100,000 population by jurisdiction as at 1 September

	Number of prisoners			Rate[1] per 100,000 population		
Year	Scotland[2]	UK[3]	European Union[4,5,8]	Scotland[2]	UK[3]	European Union[4,5,8]
1999	6,030	72,782	360,760[6]	118	123	96
1998	6,018	73,243	361,604	118	124	96
1997	6,084	69,579	352,893	119	118	94
1996	5,862	63,039	339,385	114	107	91
1995	5,626	58,631	331,420	110	100	89
1994	5,585	56,888	331,892	109	97	89
1993	5,637	53,172	324,008	110	91	88
1992	5,257	53,418	299,990[7]	103	92	82
1991	4,839	53,145	270,363	95	92	74
1990	4,724	52,106	262,514	93	91	72
1989	4,986	55,282	260,713	98	96	72

SH/00/32/11

Andrew Mylne
Clerk to the Justice & Home Affairs Committee
The Scottish Parliament
Edinburgh
EH99 1SP

30th October 2000

Dear Mr Mylne,

PE29 - Calling for action to be taken in relation to the decisions and considerations in prosecuting road traffic deaths

As you know the Justice and Home Affairs Committee have deferred further consideration of PE29 until the Transport Research Laboratory (TRL) completes and publishes its findings on road death issues. For information, I now enclose a copy of our letter sent last week to all MSP's and Scottish MP's at Westminster which raises serious concerns about this study within a Scottish context.

Several weeks ago we raised these concerns with our MP Rosemary McKenna. She is now in receipt of a reply from Lord Whitty. I enclose a copy of his response which does not reassure us. It would appear that Scotland is having no prominence in the TRL study.

Yours sincerely,

Margaret & Alex Dekker.

Margaret & Alex Dekker

«Title» «Christian_Names» «Surname» «Title_2»
The Scottish Parliament
Edinburgh
EH99 1SP

24th October 2000

Dear «Title» «Surname»,

Road Traffic Act (Road Deaths)
Transport Research Laboratory Study

I am sure you are aware there is a growing public disquiet, in Scotland, about the lenient approach of the criminal justice system to drivers who have killed innocent victims by bad driving. With this in mind I would refer you to the above TRL study, a UK project, commenced in May 1998, (before the Scottish Parliament was convened) and due to be completed in October 2000.

The objective of the study is, "To determine the effect of the 1991 Road Traffic Act on the procedures that identify, convict and sentence those guilty of very bad driving offences. The research seeks to ascertain how the police view bad driving, what is leading prosecutors to select one offence rather than another, and why courts choose one penalty rather than another. By examining the whole procedure, from charging to sentencing, as well as carrying out an analysis of sentencing trends and reconviction rates before and after the 1991 Act was introduced". "This exploration will seek to identify whether 'lesser' charges of for example, careless driving are being brought where a charge of dangerous driving might be more appropriate".

Numerous references have been made in House of Commons debates and by the Justice and Home Affairs Committee at the Scottish Parliament to "wait and see" this research before taking further action on road death issues laid before them.

While it appears from the TRL remit that study would be in-depth, I would draw your attention to the following facts and ask you to bear them in mind when you scrutinise the TRL UK findings.

1. **Historical**

The criminal justice system has evolved separately north and south of the border. Also, the definition of 'reckless' now 'dangerous' as in Section 1 and 2 of the Road Traffic Act, was established in Scotland in 1980 in the appeal case of Allan v Patterson 1980 S.L.T. 77. Following the North Report, this definition was adopted by the government of the day to be incorporated into the amended U.K. Road Traffic Act 1991.

It follows, that the pursuit of the TRL remit within a Scottish context is questionable, when the law with respect to section 1 and 2 of the Road Traffic Act has remained unaltered in Scotland since 1980.

2. **Availability of archived records in Scotland**

Fiscal records of the wide ranging 'Careless driving' offences are kept for 5 years (6 years by police). Fiscal records of 'Causing death by dangerous driving' are kept for 10 years. Also during the past year, MSP's have asked for the statistics of charges brought, proceeded against and proven in court for those cases where death has been the consequence of a driver's 'Carelessness'. The Justice Minister has replied that these statistics are not collected on a death basis. Thus, there are serious concerns on the availability, indeed existence, of these records pre and post 1991 to be examined and included as stated in the research's remit.

3. **Police participation in TRL Project**

Only two Scottish police forces have been invited by the TRL to participate in this project, Lothian & Borders and Tayside. Lothian & Borders police board have stated; "The arrangements in place in Lothian & Borders work well within the constraints of the legal process and in fact are regarded as an example of good practice within the police service".
While this claim may be open to question (see figures in Table 1 attached), the concern is that the information obtained by TRL from the two participating police forces are not representative of all eight Scottish police forces and thus give a 'weighted' and inaccurate view.

4. **Sample Size in TRL Project**

In 1998 there were 39 offences of 'Causing death by dangerous driving' recorded by the police in the **whole of Scotland**. Only 17 offences were proceeded against in court. By way of example, consider then the sample size available from the two participating police forces for the last two years, as in attached Table 1. It is clearly visible that even by examining all cases from the two participating police forces for 'Causing death by dangerous, the sample size would be too small for the TRL study to produce any significant findings. A recent statement from a TRL senior researcher stated that **only eight cases from the two participating police forces** had been tracked through the courts as "extreme cost" prohibited further cases being examined.
This study has taken $2\frac{1}{2}$ years to complete and the findings will be used by both Parliaments at Westminster and Scotland in considering road death issues laid before them.

Consequently, from the invited police force participation, the sample size and the questionable availability of records in Scotland it can be clearly seen that the TRL study cannot fulfil it's remit to produce meaningful findings for Scotland. Add to this the devolved criminal justice system and the historical facts and it is clear that the objectives will only be delivered by an **external** in-depth study, in Scotland, on 'charging through to sentencing' following innocent victims road deaths. Further examination of the criminal justice statistics in Scotland would prove that it is not a huge task. An in-depth study would identify the shortcomings in the law and/or its application in Scotland before considering the introduction of any new measures.

We would therefore seek your support, with that of all Scottish MSP's and MP's, to ensure that; The Scottish Parliament carry out an independent review on road death issues.

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PARLIAMENTARY UNDER SECRETARY OF STATE

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E-Mail: larry_whitty@detr.gsi.gov.uk

OUR REF: W/025404/00
YOUR REF: 000197

Ms Rosemary McKenna CBE MP
House of Commons
LONDON
SW1A 0AA

13 OCT 2000

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1988	5,229	57,229	266,150	103	100	73
1987	5,466	54,746	264,002	107	96	73

Source: Statistical contacts in each country.

Notes:

1. Based on estimates of national population.

2. Average daily population; figure for 1999 is provisional.

3. England and Wales figure as at 31 August.

4. Current EU 15 comprising: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Eire, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden and UK.

5. Figures for Austria as at 31 August; figures for Belgium are average daily population; figures for Finland and Spain as at 31 December; figures for Germany as at 30 September and figures for Netherlands as at 1 January.

6. Figures for Germany and Luxembourg relate to 1998.

7. Includes estimated figure for Germany.

8. Pre-1992 figures for Germany relate to West Germany only, post-1992 figures relate to East & West Germany.

Opinion

LETTERS TO THE EDITOR

Committed to action against domestic violence

I refer to Linda Watson Brown's otherwise excellent article (Opinion, 27 October) about men's abuse of women, and would like to respond to comments about the results of the Day to Count Domestic Violence. To conclude, as she and Tanya Thompson (26 October) have done, that domestic abuse is twice as prevalent in Scotland as in the rest of the UK on the basis of the results of this snapshot survey is extremely speculative.

The Day to Count Domestic Violence revealed that police in Scotland received a higher percentage of calls related to domestic abuse than police in other parts of the UK This does not tell us that domestic abuse is more common in Scotland; it tells us that there is more reporting of domestic abuse incidents to the police in this country.

There is no evidence that the incidence of domestic abuse is higher in Scotland than anywhere else, nor is there any reason why it should be. Domestic abuse is not caused by alcohol, poverty, bad housing, unemployment or any other such individual factors. It stems from gender inequalities in society, and a historical context whereby men have enjoyed greater status, wealth, influence, control and power than women. This is true in all societies, no more or less so in Scotland than elsewhere.

The Day to Count Domestic Violence was a very interesting and useful exercise, and was the first of its kind in the world. It has provided us with a wealth of information. However, it is only a snapshot of one particular day, and care should be taken in drawing conclusions from it.

There could be a number of reasons for the apparent discrepancy in reporting rates between Scotland and the rest of the UK. Police forces in Scotland have improved their response to this crime very considerably in recent years and this, or a number of other factors, could have influenced the higher reporting rates in Scotland.

It is also recognised that raising awareness about domestic abuse as part of a strategy to reduce and ultimately eliminate it will inevitably lead initially to a rise in demand for services. In Scotland, the executive has run a very successful TV, radio and press advertising campaign over the past two years; we have established a national telephone helpline for anyone affected by domestic abuse. Voluntary organisations such as Women's Aid, Rape Crisis and the Zero Tolerance Trust have also been working to raise awareness.

We have been working on a "3 Ps" approach to tackling domestic abuse in Scotland. First, protection: the family law white paper, "Parents and Children", includes a number of proposals to extend the legal protection available by providing interdicts with power of arrest to divorcees and cohabitees, and by increasing the areas covered by these court orders. The executive is also supporting the justice and home affairs committee's Protection from Abuse Bill, which will provide the remedy of an interdict with power of arrest to anyone experiencing recurring abuse.

On provision, £8 million is being invested over the next two years. We have given £3 million, which is being matched by local authorities, and other partners, to establish the first ever Domestic Abuse Service Development Fund. This is providing money to nearly 60 projects aimed at improving services for women and children experiencing domestic abuse. Scottish Homes has also provided £2 million to provide over 120 bed spaces in refuges, and we are committed to providing further spaces in the future.

Looking at prevention, we have set up a pilot project in four schools and in a number of youth groups in Edinburgh, using the Zero Tolerance Trust's "Respect" integrated educational package, aimed at challenging young people's attitudes to violence against women, and promoting relationships based on equality and respect.

Linda Watson Brown calls for a "coherent, comprehensive approach initiated by the Scottish executive". I will shortly receive the final report of the Scottish Partnership on Domestic Abuse, which has been working since November 1998 on such an approach. It has also produced a national strategy to address domestic abuse, an action plan, and good practice guidelines and service standards, which will be published in November.

I can assure Linda Watson Brown we are fully committed to making a difference; we have started to put in place resources needed, and have no intention of delaying this vital work.

JACKIE BAILLIE
Minister for Social Justice
Scottish executive
MSP, Dumbarton

Thatcher legacy

I have travelled on the west c... railway line three tim... last eight months ... railway a...

Origin of Britain

...dair MacLeod (...

Points of view