



JUSTICE AND HOME AFFAIRS COMMITTEE

AGENDA

34th Meeting, 2000 (Session 1)

Monday 20 November 2000

The Committee will meet at 2.00 pm in Committee Room 8, Glasgow City Chambers, George Square, Glasgow.

1. **Item in Private:** The Committee will decide whether to take item 6 in private.
2. **Restorative Justice:** The Committee will take evidence on the report by the Scottish Consortium on Crime and Criminal Justice, *Rethinking Criminal Justice in Scotland*, from—

Dr David Colvin, Chairman of SACRO (Safeguarding Communities – Reducing Offending), Susan Matheson, Chief Executive, SACRO, Janice Hewitt, Director, APEX Scotland, David McKenna, Assistant Director, Victim Support Scotland and Dr Jacqueline Tombs, member of the Consortium.

3. **Subordinate Legislation:** The Committee will consider the following affirmative instrument—

The Scotland Act 1998 (Cross-Border Public Authorities) (Adaptation of Functions etc.) (No.2) Order 2000 (SI 2000/draft);

4. **European Documents:** The Committee will consider the following European documents—

972: Initiative by the Federal Republic of Germany for a Framework Decision on criminal law protection against fraudulent or unfair anti-competitive conduct in relation to the award of public contracts in the common market;

1190: Draft Framework Decision on the standing of victims in criminal procedure.

5. **Visit to HMP Barlinnie:** The Committee will consider a draft letter to the Minister for Justice.

6. **Proposed Protection from Abuse Bill:** The Committee will consider a revised draft report.

Andrew Mylne
Clerk to the Committee, Tel 85206

The following papers are attached for this meeting:

Agenda item 2

Note by the Assistant Clerk

JH/00/34/6

Agenda item 3

Note by the Assistant Clerk

JH/00/34/4

Agenda item 4

Note by the Senior Assistant Clerk on European document 972 (copy of document, Explanatory Memorandum and Executive covering note attached)

JH/00/34/2

Note by the Senior Assistant Clerk on European document 1190 (copy of document, Explanatory Memorandum and Executive covering note attached)

JH/00/34/3

Agenda item 5

Draft letter to the Minister for Justice (**to follow**)

JH/00/34/7

Agenda item 6

Revised draft report (PRIVATE)(**to follow**)

JH/00/34/8

Papers not circulated:

Agenda item 2

Copies of the Scottish Consortium on Crime and Criminal Justice report can be obtained from the Consortium's website: <http://www.scccj.org/>. A reference copy is also available in the Document Supply Centre. Members are advised to bring a copy of the report with them to the meeting.

JUSTICE AND HOME AFFAIRS COMMITTEE

Papers for information circulated for the 34th meeting, 2000

Note by the Senior Assistant Clerk on Scottish Crime Survey JH/00/34/5

Letter to the Convener from the Minister for Justice on the proposed Convention Rights (Compliance) (Scotland) Bill JH/00/34/1

Minutes of the 33rd Meeting, 2000 JH/00/33/M

Subordinate legislation

Members may wish to note that the following instruments have been referred to the Committee and will be considered at future meetings:

- The Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) (No.2) Order 2000 (SI 2000/darft) – expected to be considered at the 35th meeting on 28th November;
- The Divorce etc. (Pensions) (Scotland) Amendment Regulations 2000, (SSI 2000/392) – expected to be considered at the 36th meeting on 6 December.

European documents

The following European documents have been sent to the Clerk by the Clerk to the European Committee. They are for information only and are not expected to appear on a future Agenda, unless a request that they should be considered is accepted by the Convener.

- 1224: Note from the incoming Presidency on a programme of measures to implement the principle of mutual recognition of decisions in criminal matters (together with Explanatory Memorandum by the Home Department);
- 1259: Communication from Portugal, France, Sweden and Belgium seeking the adoption by the Council of a Decision setting up a provisional judicial cooperation unit (EUROJUST 5);
- 1260: Communication from Portugal, France, Sweden and Belgium seeking the adoption by the Council of two Decisions, one setting up a provisional cooperation unit and the other setting up EUROJUST with a view to reinforcing the fight against serious organised crime (EUROJUST 6);
- 1385: Communication from Portugal, France, Sweden and Belgium seeking the adoption by the Council of a Decisions to establish EUROJUST with a view to reinforcing the fight against serious organised crime (EUROJUST 8), together with an Explanatory Memorandum by the Home Department;
- 1300: Commission Communication on mutual recognition of final decisions in criminal matters;
- 1390: Proposed Council Regulation extending the programme of incentives and exchanges for legal practitioners in the area of civil law (Grotius – civil).

Members may obtain copies of any of the above on request from the Clerks.

JUSTICE AND HOME AFFAIRS COMMITTEE
LATE PAPERS FOR MEETING ON 20 NOVEMBER 2000

Item 5 – Visit to HMP Barlinnie

Draft letter to the Minister for Justice

JH/00/34/7

Item 6 – Proposed Protection from Abuse Bill

Draft report (private paper – JHA members only)

JH/00/34/8

Item 2 – Restorative Justice

Susan Matheson, Chief Executive, SACRO and Dr Jacqueline Tombs, member of the Consortium will also attend as witnesses

Andrew Mylne
16 November 2000

JUSTICE AND HOME AFFAIRS COMMITTEE**“Rethinking Criminal Justice in Scotland”
Report of the Scottish Consortium on Crime and Criminal Justice**

Note by the Assistant Clerk

The Consortium brings together leading organisations concerned with crime and criminal justice in Scotland, including the Howard League Scotland, APEX Scotland, SACRO (Safeguarding Communities – Reducing Offending), the Scottish Human Rights Centre and Victim Support Scotland (page 3 of the Report). A number of other organisations and individuals are also associated with the work of the Consortium. The Consortium is funded by grants from charitable trusts.

The Consortium was established in 1998 “to take advantage of the opportunity for enhanced public debate about crime and criminal justice provided by the creation of the Scottish Parliament and Executive. [Its] aim is to reduce the incidence and alleviate the impact of crime in our society as far as is reasonably possible by whatever morally acceptable means can be shown to be most effective.”

The Consortium’s view is expected to be relevant to the Committee’s pending application for funding for a three-stage public consultation exercise to ascertain the views of the general public on issues surrounding sentencing and alternatives to custody, and the Committee’s continuing interest in prisons.

The report’s recommendations are set out at paragraphs 19-30. As explained at paragraph 7, many of the ideas “come together in the concept known as restorative justice; an approach to dealing with offending which concentrates on repairing the harm done by crime. Restorative justice emphasises—

- consideration and security for victims within the criminal justice system and access to services which help them to recover;
- rehabilitation of offenders by providing opportunities for their integration within the community;
- healing divisions within communities through mediation of neighbourhood disputes.”

The Consortium states that the ideas underpin a number of sanctions currently available in Scotland and that there is considerable potential to further develop restorative justice.

15 November 2000

FIONA GROVES

JUSTICE AND HOME AFFAIRS COMMITTEE**The Scotland Act 1998 (Cross-Border Public Authorities) (Adaptation of Functions etc.) (No.2) Order 2000 (SI 2000/draft)**

Note by the Assistant Clerk

Background

The Transport and Environment Committee has been designated lead Committee to report to the Parliament on the above draft Order by 4 December. The Justice and Home Affairs Committee and the Rural Affairs Committee have been asked to report to the Transport and Environment Committee by 24 November. The Subordinate Legislation Committee considered the instrument on 7 November, and had no comments to make.

Under section 89 of the Scotland Act 1998, provision may be made, by Order in Council, conferring or modifying functions relating to cross-border public authorities, and modifying their constitutions. The only authority within the remit of the Committee provided for in the Order is the Fire Services Examination Board at Schedule 5.

A proportion of the Board's expenses were previously met by the Scottish Office. The Order amends the Fire Services Act 1947 to give statutory authority to the Scottish Ministers to make payments for the cost of administering Fire Service promotion examinations from the Scottish Consolidated Fund.

Existing Regulations are amended so that the Board will be required to submit its reports and accounts to the Scottish Ministers, instead of to the Secretary of State for Scotland. The Home Secretary, in appointing members of the Board, is now to consult the Scottish Ministers, instead of the Secretary of State.

Consultation with the Board is required under section 89(3) of the Scotland Act, and the Executive Note explains that such consultation has taken place.

Procedure

The instrument was laid on 2 November and will come into force the day following that on which it is made. No recommendation to make the Order can be made unless a draft of the instrument has been laid before, and approved by resolution of both Houses of Parliament and the Scottish Parliament. Under Rule 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, proposed that the Transport and Environment Committee recommends the approval of the Order. That Committee is debating the Order on 29 November.

Under rule 10.2.2, the Committee must decide whether or not to make any recommendations to the lead committee.

15 November 2000

FIONA GROVES

EXECUTIVE NOTE

The draft Scotland Act 1998 (Cross-Border Public Authorities) (Adaptation of Functions etc.) Order 2000

Introduction

1. Section 88 of the Scotland Act confers a power on Her Majesty to specify, by Order in Council, bodies, government departments, offices and office-holders which are to be "cross-border public authorities" for the purposes of the Scotland Act. Such an Order may only specify bodies, government departments, offices or office-holders which have mixed functions, some of which relate to devolved matters in Scotland.

2. Specification as a cross-border public authority applies certain default requirements: see section 88 of the Scotland Act 1998. The normal transfer of functions to the Scottish Ministers under section 53 of the Scotland Act does not apply in relation to functions specifically exercisable in relation to any such authority, so that the Scottish Ministers do not automatically acquire functions in connection with the authority. Similarly, related provisions in sections 118 to 121 of the Act, which translate subordinate legislation procedure and requirements for funding, auditing and reporting to the equivalents for the Scottish Parliament, do not apply. However, section 88 requires Ministers of the Crown to consult the Scottish Ministers before exercising any specific function relating to the appointment or removal of members of the authority, or any function which might affect Scotland otherwise than wholly in relation to reserved matters. Provisions requiring reports relating to the authority to be laid before Parliament are extended so that the reports are also to be laid before the Scottish Parliament.

3. The default requirements in section 88 can be adjusted by an Order in Council under section 89 such as this one. Under section 89(2) the type of provision which may be made includes conferring or modifying functions relating to a cross-border public authority, and modifying its constitution. Section 89(3) provides that no recommendation shall be made to Her Majesty to make an Order under this section unless the cross-border public authority concerned has been consulted. All of the authorities affected by this draft Order have been consulted accordingly. By virtue of paragraph 1 of Schedule 7 to the Scotland Act 1998, Orders under section 89 are subject to negative resolution ("Type F") procedure. However, paragraph 3(2)(a) of the Schedule provides that, if the Order makes textual amendments to an Act, it is to be subject to affirmative resolution ("Type A") procedure. This being the case in relation to this draft Order, no recommendation to make the Order is to be made to Her Majesty in Council unless a draft of the instrument has been laid before, and approved by resolution of -

- (a) each House of Parliament, and
- (b) the Scottish Parliament.

Content of the Order

The British Waterways Board and the Inland Waterways Amenity Advisory Council

4. Under the Scotland Act 1998 responsibility for inland waterways in Scotland is devolved to Scottish Ministers. The British Waterways Board (BWB) and the Inland Waterways Amenity Advisory Council (IWAAC) both operate on a GB basis and were therefore specified as cross-border public authorities by the Scotland Act 1998 (Cross-Border Public Authorities) (Specification) Order 1999 (SI 1999/1319). This Order will modify the British Waterways Act 1975, the Transport Act 1962 and the Transport Act 1968 to give the Scottish Ministers largely the same functions with regard to BWB and IWAAC in Scotland as those currently held by UK Ministers in England and Wales.

5. BWB is a public corporation which runs its affairs on a commercial basis consistent with its statutory powers and obligations for navigation and the environment with its objectives agreed by the Government. It is expected to promote the use of its waterways for leisure and recreation, tourism, regeneration and transport while also conserving the waterways' built and natural heritage.

6. IWAAC was created by the Transport Act 1968 to advise Government and BWB about the use and development of the latter's waterways for recreation and amenity purposes.

7. The main functions that will be transferred to the Scottish Ministers as a result of this Order as regards BWB and IWAAC are:

Scottish Ministers will have powers:-

- ◆ To appoint two members to the BWB
- ◆ To appoint two members to IWAAC
- ◆ To give directions on format of accounts
- ◆ To make grants to BWB and recover excess revenue
- ◆ To make grants for research/development
- ◆ To lend to BWB and terms of repayment
- ◆ In relation to BWB's intention for a substantial outlay on capital
- ◆ To direct BWB on the maintenance of waterways
- ◆ To direct BWB regarding control of subsidiaries
- ◆ To direct BWB to supply such information as Ministers think fit including supply of an annual report
- ◆ In relation to planning development affecting BWB and
- ◆ In relation to inquiries affecting BWB and the question of expenses involved in such inquiries.

The consent of the Scottish Ministers will be required in the following circumstances:-

- ◆ Development by BWB of land not connected with their business
- ◆ Compulsory purchase of land by BWB
- ◆ If BWB wish to lend money, give a guarantee to a third party regarding an undertaking or for BWB to subscribe for/or acquire securities of a corporate body (participation in joint ventures).
- ◆ Borrowing powers of the Board
- ◆ BWB's power to promote or oppose any Bill in the Scottish Parliament
- ◆ Before BWB let the subsidiaries undertake certain activities e.g. borrowing, share issue.
- ◆ Bye-laws proposed by BWB

BWB will be required to:-

- ♦ Send audited accounts to the Scottish Ministers and to supply an annual report which must be laid before the Scottish Parliament.

IWAAC will be required to consult Scottish Ministers on:-

- ♦ The appointment of regional committees.

IWAAC functions to include:-

- ♦ Advising the Scottish Ministers.

UK Minister will be required to consult the Scottish Ministers on:-

- ♦ The appointments of the Chair both of the BWB and IWAAC.
- ♦ The appointment of the auditors.

The Scottish Ministers will be required to:-

- ♦ Lay BWB's annual report before the Scottish Parliament
- ♦ Lay a statement about fees/allowances of BWB members before the Scottish Parliament.

8. Agreement has been reached with DETR about the transfer of appropriate resources to the Scottish Executive to cover the Scottish Ministers' new responsibilities in this area.

The Royal Commission on Environmental Pollution

9. The Royal Commission on Environmental Pollution (RCEP) was set up under Royal Warrant in 1970. Its primary aim is to contribute to policy development in the longer term by providing an authoritative factual basis for policy-making and debate on environmental issues. The RCEP advises both on matters that are the responsibility of the UK Government and on matters that are devolved.

10. The Royal Commission was specified in the Scotland Act 1998 (Cross-Border Public Authorities) (Specification) Order 1999 as a cross-border public authority (CBPA) so that Ministerial responsibilities with respect to the Commission would be clearly established following the transfer of powers to the Scottish Ministers on 1 July 1999. Such specification means that Ministerial functions in relation to the Commission remain with UK Government Ministers, but that the Scottish Ministers will have to be consulted about the exercise of any Ministerial functions that affect Scotland.

11. The Royal Commission customarily sets its own line of enquiry, though the Royal Warrant for the Commission also requires it to "enquire into matters referred to it by one of Her Majesty's Secretaries of State or by one of Her Ministers". Notwithstanding specification as a CBPA, the Commission's purpose does not currently extend to matters referred to it by the Scottish Ministers. The purpose of this Order is to rectify the situation by giving the Scottish Ministers powers to refer matters to the RCEP, which that body may enquire into.

The Fire Services Examinations Board

12. The Fire Services Examinations Board (FSEB) is a cross-border public authority which is responsible for administering the statutory examinations whereby fire service personnel qualify for promotion. Since the present FSEB was established in 1985, a proportion of its expenses has been met by the former Scottish Office and now falls to be met by the Scottish Executive. That proportion, calculated on a population basis, represents the costs attributable to the administration of the statutory fire services examinations in Scotland. One effect of specifying the FSEB as a cross-border public authority is that power to meet those expenses does not transfer to the Scottish Ministers. The purpose of the modifications made in Paragraph 2 of Schedule 5 to this Order is to provide specific statutory authority for such payments to be made from the Scottish Consolidated Fund by the Scottish Ministers.

13. Paragraph 3 of the Schedule amends the Fire Service (Appointments and Promotion) (Scotland) Regulations 1978 so as to make it clear that reports and accounts which the FSEB had previously been required to submit to the Secretary of State are now to be submitted to the Scottish Ministers.

14. Paragraph 4 of the Schedule amends the Fire Services (Examinations) Regulations 1985 so as to reflect in those Regulations the effect of section 88(2) of the Scotland Act 1998. The function of the Secretary of State to appoint the Chairman and 4 members of the FSEB, and to determine periods of appointment, has previously been exercised by the Home Secretary in consultation with the Secretary of State for Scotland and is now to be exercised by the Home Secretary in consultation with the Scottish Ministers.

The Controller of Plant Variety Rights

15. Section 2 of the Plant Varieties and Seeds Act 1997 ("the 1997 Act") provides for the existence of an officer, known as the Controller, to head the Plant Varieties Rights Office. It is for the Controller to determine whether the variety and the applicant meet conditions for a grant of rights.

The Plant Varieties and Seeds Tribunal

16. Section 42 of the 1997 Act provides for the existence of a tribunal to hear and determine matters relating to the infringement of plant breeders' rights or to matters which include the infringements of plant breeders' rights. The Tribunal consists of a chairman, to be appointed by the Lord President of the Court of Session for the purposes of a Tribunal held in Scotland and 2 persons drawn from 2 panels.

The Plant Varieties Rights Office

17. The Plant Varieties and Rights Office (PVRO) was established by the Plant Varieties and Seeds Act 1964. Section 2 of the Plant Varieties Act 1997 provides for its continued existence.

18. The Order making function in paragraph 6(2) (c) of Schedule 2 to the 1997 Act relates to the priority of applications made in the UK for plant breeders' rights. It provides that priority may be claimed in respect of a parallel application if the UK application is submitted within 12 months of the earlier application. Priority is available in respect of applications for Community plant variety right or a right in a country or inter-governmental organisation

which is a member of the International Convention for the Protection of New Varieties of Plants (International Groups) (UPOV). Paragraph 6(2)(c) provides that Ministers may, by Order, designate other, non-UPOV countries, for the purposes of recognising priority of applications.

19. Paragraph 3 of Schedule 8 to the Scotland Act 1998 (Cross-Border Public Authorities)(Adaptation of Functions) Order 1999 (SI 1999/1747) provided for the regulation making functions in the 1997 Act to be exercisable with the consent of the Scottish Ministers. The present amendment makes similar provision in relation to the Order making function under paragraph 6(2)(c) of Schedule 2 to the 1997 Act.

31st October 2000
EXECUTIVE SECRETARIAT

JUSTICE AND HOME AFFAIRS COMMITTEE**European Document 972: Initiative by the Federal Republic of Germany for a Framework Decision on criminal law protection against fraudulent or unfair anti-competitive conduct in relation to the award of public contracts in the common market**

Note by the Senior Assistant Clerk

Background

This document has been referred to the Committee by the European Committee. It is an initiative for a framework decision. Framework decisions are comparable to EU Directives in so far as they are only binding as to the result, but leave the Member States the choice of form and method (i.e. they require implementation).

This framework decision is intended to create a uniform standard of judicial protection throughout the EU against unfair and potentially harmful practices in the EU wide award of contracts. Such a measure would also aim to strengthen the protection of both financial interests of contracting entities and of fair competition. It has the following objectives:

- to make it a criminal offence for one or more companies to obtain significant public contracts unlawfully through bribery, corruption or secret agreements;
- to provide for appropriate criminal penalties to be available;
- to provide for liability of legal persons [companies] in respect of fraudulent or unfair anti-competitive conduct committed on their behalf, and for penalties, including criminal or non-criminal fines, to be available;
- to provide rules for jurisdiction over the offences committed.

Implications for Scotland

Article 2(1) of the document outlines the offence of fraudulent or unfair anti-competitive conduct in relation to the award of public contracts. The Scottish covering note explains that criminal law is devolved and that our common law offence of fraud is significantly broader than the criminal offences available in England and Wales. Therefore, unlike in England and Wales, it is likely that it would already be possible to prosecute a person in Scotland for the offences outlined in Article 2(1). Therefore the Executive view is that existing common law would adequately cover the issues outlined in the document.

Procedure

The Committee is invited to consider the implications of this document in Scotland. Although the Committee is not required to take any further action, it could write to the Convener of the European Committee or to the Executive if it wishes to raise any concerns. The Committee may also wish to ask to be kept informed of any progress made in relation to these proposals.

15 November 2000

ALISON E TAYLOR

JUSTICE AND HOME AFFAIRS COMMITTEE**European Document 1190: The Draft Framework Decision on the standing of victims in criminal procedure**

Note by the Senior Assistant Clerk

Background

This document has been referred to the Committee by the European Committee. It is a draft framework decision. Framework decisions are comparable to EU Directives in so far as they are only binding as to the result, but leave the Member States the choice of form and method (i.e. they require implementation). The framework decision is not intended to dictate precisely how victims will interact with the criminal justice systems in individual Member States, but to ensure that there are common standards in place across Member States.

The aim of this document is to improve the status of victims of crime both in terms of the support and information they receive and their status in criminal proceedings. The main substantive items fall broadly into the following categories:

- protection of vulnerable or intimidated witnesses during court proceedings;
- the right to compensation;
- the exploration and promotion of mediation between offenders and victims.

Implications for Scotland

The implications for Scotland are well explained in the Scottish covering note. It notes that the majority of Articles are met by existing procedures, such as the Crown Office-based victim and witness service, and planned changes which have already been announced, such as the proposed Evidence (Sexual Offences) Bill.

Procedure

The Committee is invited to consider the implications of this document in Scotland. Although the Committee is not required to take any further action, it could write to the Convener of the European Committee or to the Executive if it wishes to raise any concerns. The Committee may also wish to ask to be kept informed of any progress made in relation to these proposals.

15 November 2000

ALISON E TAYLOR

EUROPEAN SCRUTINY ADVICE - SCOTTISH COVERING NOTE

Document Title: Draft Framework decision on the standing of victims in criminal procedure

Document Number: 9720/00

Minister with Responsibility: Jim Wallace

Lead Scottish Executive Department: Scottish Executive Justice Department

Policy Implications:

The Council of the European Union may take framework decisions to approximate the laws and regulations of the Member States. While these legal instruments are binding on the Member States as regards the result to be achieved, they remain free to choose the form and method by which to achieve those results. The framework decision is not intended to dictate precisely how victims will interact with the criminal justice systems in individual Member States, but to ensure that there are common standards in place across Member States.

The Council will consider, within a year of the implementation date, the measures taken by Member States to comply with this Framework Decision by means of a report based on progress reports from Member States and a report from the European Commission. The implementation dates are currently 5 years for Article 10, 3 years for Article 5, and one year for the remaining articles, all timed from the entry into force of the framework decision.

There is a UK parliamentary scrutiny reservation on the Framework Decision.

Scottish Interest:

The framework decision deals with devolved matters.

The Executive wants to see the position of victims in the criminal justice system enhanced. It welcomes the principles in the framework decision which are broadly in line with Scottish Ministers' policy on victims, and specifically with the strategy for victims which will be launched later this year. The principles of the framework decision will be taken forward via the strategy. Both cover areas such as the proper treatment of victims, particularly vulnerable victims; and practical recognition of needs for protection, information, and redress.

As the framework decision is still at draft stage, not all the specific implications for Scotland are yet clear. Some of the drafting in the framework decision would benefit from further work. These arise in the main from major procedural differences between continental jurisdictions where the victim may choose to be a party to the criminal proceedings, mainly for the purpose of compensation; and the position in Scotland, and in England and Wales, where the victim does not have a formal role of

EUROPEAN SCRUTINY ADVICE - SCOTTISH COVERING NOTE

Document Title:

**INITIATIVE BY THE FEDERAL REPUBLIC OF GERMANY FOR A FRAMEWORK DECISION
ON CRIMINAL LAW PROTECTION AGAINST FRAUDULENT OR UNFAIR ANTI-
COMPETITIVE CONDUCT IN RELATION TO THE AWARD OF PUBLIC CONTRACTS IN
THE COMMON MARKET**

Document Number:

SP972, EU REF 6920/00

Minister with Responsibility:

Jim Wallace

Lead Scottish Executive Department:

Scottish Executive Justice Department

Policy Implications:

1. In line with EC directives, large contracts are awarded mainly on the basis of calls for tender throughout the EU by conventional public contracting authorities and by other authorities acting as such in the water, energy, transport and telecommunications sectors.
2. The German Government has put the framework forward because it perceives certain problems with current international practice:
 - The legal situation as regards penalties for those involved in fraud or collusion with the intent of securing public contracts is not consistent across the EU;
 - States' fraud offences "can have only limited effect, as in practice the prosecution of such offences is often frustrated for lack of evidence of financial loss" (addendum to the framework, paragraph 2); and
 - Fines are not sufficient punishment to curb such offending.
3. The Home Office Explanatory Memorandum on the initiative suggests, at paragraph 13, that precisely what types of conduct are being targeted is somewhat unclear. The German Government has stated that it intends this framework to be aimed at "fraudulent conduct, not corruption". However, the drafting of the addendum to the framework is unclear on this point, and the Home Office is planning to seek clarification.
4. Article 2 (1) of the framework gives the relevant offences. The conduct described in Article 2 (1) would require to be criminal under Scots law.
5. There is also a question of Scottish jurisdiction which is raised by Article 7 (1) of the framework.

Scottish Interest:

6. Paragraph 9 of the Home Office Explanatory Memorandum states that, for England and Wales, there are criminal penalties for bribery and corruption in the public and private sectors, but violation of EC rules on procurement and competition are civil, not criminal, offences.
7. As far as procurement is concerned, we note that the framework initiative is aimed at those seeking public contracts, rather than the public authority awarding them. However, should it prove necessary to prosecute an individual for this type of corruption, there are statutory offences available under the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Local Government (Scotland) Act 1973.
8. With regard to anti-competitive conduct, administrative penalties for collusion or secret agreements are contained in the UK-wide Competition Act 1998, which is reserved under Schedule 5 Section C3 of the Scotland Act 1998.
9. However, criminal law is devolved, and our common law offence of fraud is significantly broader than the criminal offences available in England and Wales. Fraud may be defined as 'the bringing about of some practical result by means of a false pretence'. Therefore, unlike in England and Wales, it is likely that it would already be possible to prosecute a person in Scotland for the offences outlined Article 2 (1).
10. For the crime of fraud to take place, there are certain necessary preconditions: some form of deception is required, a practical outcome is required and *mens rea*, in the sense of an intention to deceive, is also required. However, there need not be shown to be any economic loss to the affected party. Therefore, the German Government's perceived problem with proving economic loss in order to bring criminal proceedings could be viewed as a lesser issue for Scotland than for other jurisdictions.
11. Furthermore, as this is a common law offence, the penalty is limited only by the court in which it is prosecuted. The maximum penalty for a crime prosecuted on indictment in the High Court is life. Therefore, the requirement in Article 3 of the framework that offences be punishable by "dissuasive criminal penalties including... penalties involving deprivation of liberty" is fulfilled already in Scots law.
12. In summary, the current provisions in criminal law appear to be compliant with Articles 2 and 3.
13. Article 7 (1) requires that each Member State establish its jurisdiction over (subs. a) anyone within its territory, (subs. b) its nationals overseas and (subs. c) on those acting on behalf of a legal person with its head office in the Member State.
14. It would be possible to notify the General Secretariat of the Council that the UK will not apply, or will only in some circumstances apply, Articles 7 (1) (b) and (c). However, if the UK were to wish to apply either of these clauses, it is likely that legislation would be required in Scotland to extend Scottish jurisdiction. This is not wholly unprecedented, as Scotland already has jurisdiction over UK nationals who have committed murder or culpable homicide abroad but are resident in Scotland, and it is proposed that Scotland will have extra-territorial jurisdiction for the purposes of the International Criminal Court.

Contact Details:

Jane Richardson
Scottish Executive Criminal Justice Division
Spur W1
Saughton House

Ext 42823

Date: 2 October 2000

972

Annex A

6920/00

Droipen 9

6290/00

Droipen 9 Add 1

**EXPLANATORY MEMORANDUM ON JUSTICE AND HOME AFFAIRS
MATTERS**

COMMUNICATION FROM THE FEDERAL REPUBLIC OF GERMANY -

**INITIATIVE BY THE FEDERAL REPUBLIC OF GERMANY FOR A
FRAMEWORK DECISION ON CRIMINAL LAW PROTECTION AGAINST
FRAUDULENT OR UNFAIR ANTI-COMPETITIVE CONDUCT IN
RELATION TO THE AWARD OF PUBLIC CONTRACTS IN THE COMMON
MARKET**

Submitted by the Home Office on [date] 8 May 2000

1. This Explanatory Memorandum on work being carried out under Title VI (Justice and Home Affairs) of the Treaty on European Union is being provided to Parliament in accordance with current arrangements for Parliamentary scrutiny, as amended in November 1998. The document was deposited with the Parliamentary Scrutiny Committees on 19 April 2000 under the terms of paragraph 127 (1) (iv) of Standing Order No 143, as a proposal for a common position, framework decision, decision or convention. As such, Ministers' ability to agree the document in Council is governed by the Scrutiny Reserve Resolution (as amended in November 1998).

SUBJECT MATTER

Scrutiny History

2. During their Presidency of the European Union, the Federal Republic of Germany proposed a Joint Action on criminal law protection against fraudulent or unfair anti-competitive behaviour in relation to public tenders in the internal market. Since the entry into force of the Amsterdam Treaty on 1 May 1999, Joint Actions are no longer available as a legal instrument. The draft Framework Decision on criminal law protection against fraudulent or unfair anti-competitive behaviour in relation to the award of public contracts in the common market has therefore been submitted to replace the draft Joint Action, and to reflect the legislative developments that have taken place at Council since the previous Communication.

3. The Joint Action was submitted for Parliamentary Scrutiny in April 1999; the Council document number was 6946/99. The House of Commons' European Scrutiny Committee (ESC) considered that the document was legally and politically important; it nonetheless cleared the document. This was on the basis that the measure would be re-submitted as a Framework Decision, that the necessary clarifications would have been received and that a more detailed scrutiny would be possible. The House of Lords' European Union Committee referred the document to sub-committee E.

4. Since Council document 6946/99 was deposited for scrutiny, the subject matter has not come up for discussion at the Substantive Criminal Law Working Group; therefore the clarifications have not been sought or received.

MINISTERIAL RESPONSIBILITY

5. The Home Secretary has responsibility for policy matters relating to the criminal law (except in Scotland) and takes the lead on judicial co-operation with other EU Member States within the framework of Title VI of the Treaty on European Union, in consultation, as necessary, with the Secretaries of State for Scotland and Northern Ireland and other colleagues.

LEGAL AND PROCEDURAL ISSUES

(i) Legal basis

6. Articles 31(e) and 34(2)(b) of the Treaty on European Union.

(ii) European Parliament Procedure

7. The European Parliament must be consulted on the draft Framework Decision, as required by Article 39(1) of the Treaty of Amsterdam. The European Parliament must deliver its opinion within a time limit to be set by the Council.

(iii) Voting Procedure

8. Unanimity of the Council.

(iv) Impact on United Kingdom Law

9. The text of the Framework Decision is broadly similar to that of the Joint Action. As was noted in the EM for Council Document 6946/99, if the text is adopted in its present form, the UK would be required to legislate for criminal sanctions against natural persons prosecuted for the conduct described in Article 2. The UK has criminal penalties for bribery and corruption in the public and private sectors, but infringement of the EC procurement rules is not a criminal offence. Instead, an aggrieved supplier can take civil action against those responsible. Collusion or secret agreements which violate EC competition law can be punished by administrative penalties imposed on the companies involved, but are not in themselves criminal offences. The legislation enabling administrative penalties to be imposed domestically came into force in March 2000 under the new Competition Act.

APPLICATION TO THE EUROPEAN ECONOMIC AREA

10. As a document directed at EU Member States, it has no effect on the EEA.

CONSULTATION WITH OUTSIDE INTERESTS

11. None at present.

POLICY IMPLICATIONS

12. The issues that were raised in the EM for Council Document 6936/99 remain, given that there has been no substantial change in the text. First, we have questioned the apparent duplication between Article 2(1) (first indent) and existing provisions of the EU Convention and the Joint Action on private sector corruption. This issue remains to be resolved.

13. Secondly, the EM for Council Document 6936/99 also noted that the drafting of the proposal left it unclear whether it is aimed at cartels, corruption or both. The addendum to 6920/00 indicates that the proposal is aimed at both cartels and corruption. However, at the meeting of the Substantive Criminal Law Working Group in April, the then Presidency (Germany) indicated that the then Joint Action was aimed at fraudulent conduct, not corruption. As indicated in the EM for Council Document 6936/99, cartels and corruption are both covered by more general measures in both UK and EU law. We will need, therefore, to seek justification and clarification on this particular point.

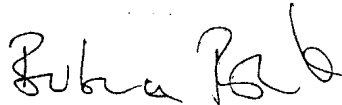
14. Finally, we remain concerned that the draft Framework Decision may have the effect of extending the criminal law to areas where civil remedies are, at present, considered to be sufficient by most Member States. The addendum to Council Document 6920/00 indicates that criminal law provisions exist in France, Germany and Spain. As yet, we do not know whether criminal law provisions exist in other Member States.

FINANCIAL IMPLICATIONS

15. None at present.

TIMETABLE

16. The text of 6920/00 will be discussed at a future meeting of the Substantive Criminal Law Working Group. We will raise the issues mentioned in paragraph 10.



MINISTER OF STATE FOR
THE HOME DEPARTMENT



COUNCIL OF
THE EUROPEAN UNION

Brussels, 20 March 2000 (29.03) —
(OR. de)

6920/00
ADD 1

LIMITE

DROIPEN 9

ADDENDUM TO COVER NOTE

from : Permanent Representative of the Federal Republic of Germany,
Dr Wilhelm Schönfelder

date of receipt : 9 March 2000

to : Secretary-General of the Council of the European Union, Mr Javier Solana

Subject : Communication from the Federal Republic of Germany

- Initiative of the Federal Republic of Germany for a framework decision on criminal law protection against fraudulent or unfair anti-competitive conduct on the award of public contracts in the common market

Delegations will find attached the comments of the Federal Republic of Germany on the abovementioned initiative.

Comments
on the German proposal
for a framework decision
on criminal law protection
against fraudulent or
unfair anti-competitive conduct
on the award of public contracts
in the common market

I. General

1. During its Presidency of the Council, Germany submitted on 23 March 1999 a draft joint action on protection against fraudulent or anti-competitive conduct on the award of public contracts in the common market (6946/99 JUSTPEN 16 CK4 16). It was discussed on 30 March 1999 in the then K4 Committee and forwarded to the European Parliament for consultation. The opinion of the European Parliament has not yet been delivered.

Since the entry into force on 1 May 1999 of the Treaty of Amsterdam, which no longer provides for the legal form of "joint action", it has become necessary for Germany to re-submit its proposal in the form of a framework decision. In addition to adapting it to the new legal form and a purely editorial redrafting, in the light of the initial reactions to the proposal of March 1999 minor changes were made in the preamble and in Article 2 of the draft, in order to clarify further the thrust of the legal act and increase its effectiveness.

2. The framework decision is intended to create in the EU Member States a uniform minimum standard of judicial protection against unfair and potentially harmful agreements in the European Union-wide award of contracts. The aim is to offer greater protection for the financial interests of purchasers – including those of the European Communities.

The background to the initiative is the fact that, in line with EC Directives, large contracts are awarded mainly on the basis of calls for tender throughout the EU, by conventional public contracting authorities (the State, regional or local authorities, bodies governed by public law and associations formed by one or more of such authorities or bodies governed by public law)¹ and by public and private undertakings operating in the water, energy, transport and telecommunications sectors (public contracting authorities in the functional sense)². There need to be effective penalties to ensure that EC law on the award of contracts is enforced. In this respect the legal situation in the Member States has not been consistent up till now. As regards criminal law, the Member States' existing fraud offences can have only limited effect, as in practice the prosecution of such offences is often frustrated for lack of evidence of financial loss. Experience in Germany has shown that, with regard to the conduct of natural persons, mere fines are not sufficient to curb serious offences against the law on the award of contracts.

¹ Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts [OJ L 199 of 9 August 1993, p. 1], as amended by Directive 97/52/EC of 13 October 1997 [OJ L 328 of 28 November 1997, p. 1]; Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts [OJ L 199 of 9 August 1993, p. 54], as amended by Directive 97/52/EC of 13 October 1997 [OJ L 328 of 28 November 1997, p. 1]; Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures on the award of public service contracts [OJ L 209 of 24 July 1992, p. 1] as amended by Directive 97/52/EC of 13 October 1997, [OJ L 328 of 28 November 1997, p. 1].

² Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [OJ L 199 of 9 August 1993, p. 84], as amended by Directive 98/4/EC of 16 February 1998 [OJ L 101 of 1 April 1998, p. 1].

This led in 1997 to the act set out in § 298 of the Penal Code (agreements to restrict competition in invitations to tender) being made a criminal offence, also enabling custodial sentences to be imposed. Criminal law provisions also exist in France (Article 313-6, Code Pénal) and Spain (Article 262, Código Penal). The study by a professor for a Corpus Juris of criminal-law provisions for the protection of the European Union's financial interests also proposes that fraud in connection with the award of contracts be made a criminal offence, although this is limited to the protection of the European Communities' financial interests.

In addition to the scope of EC law on the award of contracts, the framework decision will also cover the award of contracts by the European Communities and by the institutions set up by the EC. Although the latter are not subject to EC law on the award of contracts, the provisions are in practice applied by analogy.

3. The draft framework decision lays down the following provisions:

- Definitions (Article 1),
- Offence of fraudulent or unfair anti-competitive conduct on the award of contracts in the internal market (Article 2),
- Obligation to treat such actions as a criminal offence (Article 3),
- Liability of legal persons (Articles 4 to 6),
- Jurisdiction (Article 7) and
- Final provisions concerning the implementation of the legal instrument (Articles 8 and 9).

II. Comments on the individual Articles

Article 1 - Definitions

The definition of "public contract" in (a) and that of "undertaking" in (b) are based on the EC Directives governing the award of contracts ¹. In this way, it is intended to achieve synchronisation with EC law on the award of contracts and, in particular, ensure that the legal instrument covers only those contracts equivalent to or exceeding the thresholds designated therein (minimum sums for the estimated contract value). In addition to this, however, it also covers contracts awarded by the EC itself and by the institutions set up by the EC.

The definition of "legal person" in (c) is identical to that in the Second Protocol of 19 June 1997 to the Convention on the protection of the European Communities' financial interests ².

Article 2 - Fraudulent or unfair anti-competitive conduct on the award of public contracts

This provision describes the practices which are to be made a criminal offence by the framework decision.

¹ See footnotes 1 and 2.

² OJ C 221, 19 June 1997, p. 11.

There has to be a collusive combination of undertakings, an offer based on this combination of undertakings must be made and the supplier's objective must be to influence the acceptance of the offer by bribery, collusive combination with the person deciding on the award of the contract or by concealing the unlawful combination of undertakings. An unlawful agreement between undertakings alone is not yet covered by the provision. An offer based on such an agreement must always be made. Therefore, at least three parties have to be involved: two undertakings which formally or informally coordinate their market conduct and the person responsible for awarding the contract, who knows of the undertakings' agreement in the cases set out in the first two indents of paragraph (1), while in the third case it is precisely ignorance of the agreement which will allow the contract to be awarded.

The provision covers those cases occurring frequently in practice, in which undertakings divide the contracts between them at exorbitant prices. For example, two (or usually more) building contractors determine, with reference to a particular building project or in general, which of them is to be awarded the contract. For this purpose they coordinate the prices at which they offer their construction work and make their offers on that basis. Such price-fixing is effected either by a formal agreement or tacitly. If all the suppliers are involved in coordinating prices, the one designated in advance will be awarded the contract, since he made the cheapest offer. In this case, competition is completely eliminated. The contracting authority runs the risk at least of suffering financial loss, as it must pay a price which was not determined by competition, but may have been forced up artificially. If there are other suppliers on the market, the undertakings involved in fixing prices will endeavour to influence the person responsible for awarding the contract, by corruption or other means, in order to be awarded the contract at the exorbitant price. A possible further objective of influencing that person is to obtain information about the other suppliers' offers so that they can adjust their offer accordingly. In the short term this harms the unfairly eliminated competitor. However,

if the undertakings belonging to the cartel succeed, by repeated actions along such lines, in bankrupting the competitor or at least prompting it to withdraw from the market, they can dictate prices in the long term and thus harm the contracting authority.

Paragraph (2) stipulates that the acts described in paragraph (1) must constitute criminal offences and thus contains the key message of the framework decision. Experience in Germany has shown that the conduct described cannot be countered effectively with the other criminal-law instruments and in particular fraud provisions. In practice criminal proceedings in Germany were often frustrated for lack of evidence of financial loss. This can be explained by the fact that, on the basis of the undertakings' agreements, it is not always possible to determine for certain a hypothetical market price (i.e. competitive price) for the services provided, and thus the financial loss, in order to obtain a criminal conviction. The valuation of an asset and the price obtainable in a specific case vary according to the time, place, content and object of the transaction. A reduction in prospects of a better price is not generally sufficient, however, for acceptance of financial loss. Preventive measures in the tender procedure, which should continue to be sought at EU level too, have also proved inadequate, even in combination with fines. Non-criminal fines imposed on those responsible in the undertaking for coordinating prices cannot have the same effect as criminal penalties, particularly the threat of deprivation of liberty, for which Article 3 makes provision, at least for serious cases.

There is a need for regulating such cases under criminal law at EU level only where they are significant. This restriction is achieved by means of the thresholds laid down in the EU Directives governing the award of contracts¹.

¹ Article 5 Directive coordinating supply contracts (footnote 1 above); Art. 6 Directive coordinating works contracts (footnote 1 above); Article 7 Directive coordinating service contracts (footnote 1 above); Article 14 Directive coordinating procedures of water and other sectors (footnote 2 above).

Article 3 – Penalties

This provision is based on relevant provisions in existing EU legal instruments¹. It again clarifies the basic principle that the penalties must be of a criminal-law nature. However, Member States have some room for manoeuvre in determining the type and extent thereof. At least in serious cases, it must however be possible to impose a custodial sentence on a scale which, generally speaking, may give rise to extradition.

In all cases Member States are free to impose penalties other than those of a criminal-law nature as well.

Articles 4 and 5 – Liability of legal persons and penalties for legal persons

These provisions take over *mutatis mutandis* Articles 3 and 4 of the Second Protocol to the Convention on the protection of the European Communities' financial interests² and Articles 5 and 6 of the Joint Action on corruption in the private sector³. In this respect, reference may be made to the corresponding remarks in the Explanatory Report on the Second Protocol⁴.

¹ Article 2 of the Convention of 26 July 1995 on the protection of the European Communities' financial interests (OJ C 316 of 27 November 1995, p. 48); Article 5 of the (First) Protocol of 27 September 1996 of this Convention (OJ C 313 of 23 October 1996, p. 1); Article 5 of the Convention of 26 May 1997 on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (OJ C 195 of 25 June 1997, p. 1); Article 4 of the Joint Action of 22 December 1998 on corruption in the private sector (OJ C 358 of 31 December 1998, p. 2).

² See footnote 4 above.

³ OJ C 358, 31 December 1998, p. 2.

⁴ OJ C 91, 31 March 1999, p. 8 (p. 10 et seq.).

Article 6 – Subsidiarity of Articles 4 and 5

This provision governs the relationship between possible penalties under the framework decision and those available under European cartel law. Insofar as penalties may be imposed on legal persons under European cartel law – penalties against natural persons are not possible on this legal basis – no Member State should be forced to have to impose penalties under national law in addition.

Article 7 – Jurisdiction

The provision is based on the relevant provisions in existing EU legal instruments¹.

Paragraph 1(a) lays down the principle of territoriality and 1(b) the active personality principle. 1(c) makes it possible, irrespective of the place of the offence, to pass sentence on offences committed for the benefit of a legal person established in the State in which the court is located.

Paragraph 2 provides for the possibility of reservations with regard to the jurisdiction stipulated in paragraph 1 in the case of the State's own nationals and legal persons established in their own country. Paragraph 3 governs the notification of the reservation.

Paragraph 4 stipulates that States which do not extradite their own nationals must provide for the possibility of passing sentence on their offences committed abroad ("aut dedere aut iudicare"). In this respect paragraph 4 restricts the possibility of reservation with regard to the active personality principle laid down in Article 1(b).

¹ See, most recently, Article 7 of the Joint Action on corruption in the private sector (see footnote 6 above).

Articles 8 and 9 – Implementation of the framework decision and entry into force

Articles 8 and 9 contain as final provisions, inter alia, the rules governing the deadline for implementation (Article 8(1)) and evaluation of implementation (Article 8(3)). The latter follows the example set by Article 8(2) of the Joint Action on corruption in the private sector¹.

A provision on publication in the Official Journal is unnecessary, as this point has already been dealt with in Article 15(1)(d) of the Council's Rules of Procedure, as established in the Decision of 31 May 1999².

¹ See footnote 6 above.

² OJ L 147, 12 June 1999, p. 13.



972

COUNCIL OF
THE EUROPEAN UNION

Brussels, 20 March 2000 (04.04)
(OR. de)

6920/00

LIMITE

DROIPEN 9

COVER NOTE

from : Dr Wilhelm Schönfelder, Permanent Representative of the Federal Republic of Germany
date of receipt : 9 March 2000
to : Mr Javier SOLANA, Secretary-General/High Representative
Subject : Communication from the Federal Republic of Germany
- Initiative by the Federal Republic of Germany for a framework Decision on criminal law protection against fraudulent or unfair anti-competitive conduct in relation to the award of public contracts in the common market

Sir,

In accordance with Article 31(e) and Article 34(2)(b) of the Treaty on European Union, I attach an initiative by the Federal Republic of Germany for a framework Decision on criminal law protection against fraudulent or unfair anti-competitive conduct in relation to the award of public contracts in the common market.¹

(Complimentary close).

(s.) Dr Wilhelm Schönfelder

¹ A statement by the Federal Republic of Germany regarding the initiative can be found in ADD 1 to this document.

DRAFT
COUNCIL FRAMEWORK DECISION .../...JHA
of

on criminal law protection against fraudulent or unfair anti-competitive conduct
in relation to the award of public contracts in the common market

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Articles 31(e) and 34(2)(b) thereof,

On the initiative of the Federal Republic of Germany,

After consultation of the European Parliament,

Whereas:

- (1) It is necessary to strengthen the protection of both the financial interests of contracting entities and of fair competition.
- (2) Contracts concluded in Member States by public entities, including entities operating in the water, energy, transport and telecommunications sectors, are awarded above certain thresholds in accordance with the requirements of Community law.
- (3) The general offences of fraud in Member States have only a limited effect in enforcing Community law on awarding contracts in this field.

- (4) The established possibilities under Community law for imposing competition law sanctions are aimed only at undertakings.
- (5) The enforcement of Community law on the award of contracts must be secured by additional effective sanctions which, in the case of fraudulent or unfair anti-competitive conduct by natural persons, should form part of criminal law.
- (6) In practice the provisions of Community law on procurement are applied mutatis mutandis to the awarding of contracts by Community institutions and their protection by the criminal law will therefore also serve to safeguard the financial interests of the European Communities,

HAS ADOPTED THIS FRAMEWORK DECISION:

Article 1

Definitions

For the purposes of this framework Decision:

- (a) "public contract" shall mean a supply, works, or service contract falling within the scope of the Directives of the Council coordinating procurement procedures for such contracts insofar as their value is not less than the thresholds designated in each of these Directives; it shall cover a corresponding contract awarded by the European Communities or by the institutions set up in accordance with the Treaties establishing the European Communities;
- (b) "undertaking" shall mean a tenderer or candidate pursuant to the Directives of the Council coordinating procurement procedures for the award of public contracts;

- (c) "legal person" shall mean any entity having such status under the applicable national law, except for States or other public bodies acting in the exercise of State authority and for public international organisations.

Article 2

Fraudulent or unfair anti-competitive conduct in relation to the award of public contracts in the Common Market

1. For the purposes of this framework Decision the offence of fraudulent or unfair anti-competitive conduct in relation to the award of public contracts shall have been committed if a person acting for an undertaking intentionally makes an offer based on an unlawful agreement or collusive practice between undertakings aimed at causing the contracting entity to accept a particular offer:

- (a) as a result of a direct or indirect promise, offer or grant of an advantage to a person, for that person himself or for a third person, in return for the award of a public contract in breach of duty or
- (b) as a result of other collusive combination with the person responsible for the award of the contract or
- (c) by concealing such an agreement for acceptance of a specific offer.

2. Every Member State shall take the necessary measures to ensure that the conduct referred to in paragraph 1 shall be a criminal offence.

Article 3

Penalties

Each Member State shall take the necessary measures to ensure that the criminal offence referred to in Article 2, and the acting as an accessory to, or instigator of, such an offence, are punishable by effective, proportionate and dissuasive criminal penalties including, at least in serious cases, penalties involving deprivation of liberty which can give rise to extradition.

Article 4

Liability of legal persons

1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable, pursuant to Article 5(2), for a criminal offence within the meaning of Article 2 committed for their benefit by any person acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

- (a) a power of representation of the legal person, or
- (b) an authority to take decisions on behalf of the legal person, or
- (c) an authority to exercise control within the legal person, as well as for involvement as accessories to, or instigators of, the commission of such a criminal offence.

2. Apart from the cases provided for in paragraph 1, each Member State shall take the necessary measures to ensure that a legal person can be held liable, pursuant to Article 5(2), where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of a criminal offence pursuant to Article 2 for the benefit of that legal person by a person under its authority.

3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are involved as perpetrators or instigators of, or accessories to, a criminal offence pursuant to Article 2.

Article 5

Penalties for legal persons

1. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 4(1) is punishable by effective, proportionate and dissuasive penalties, which shall include criminal or non-criminal fines and may include other penalties such as:

- (a) exclusion from entitlement to public aid;
- (b) temporary or permanent disqualification from the practice of commercial activities;
- (c) placing under judicial supervision;
- (d) a judicial winding-up order.

2. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 4(1) is punishable by effective, proportionate and dissuasive penalties and measures.

Article 6

Subsidiarity of Articles 4 and 5

Articles 4 and 5 shall not apply to the extent that provisions under the law of the European Communities concerning the liability of legal persons and penalties for legal persons apply to a criminal offence pursuant to Article 2.

Article 7

Jurisdiction

1. Each Member State shall take the necessary measures to establish its jurisdiction with regard to a criminal offence pursuant to Article 2 where the criminal offence has been committed:

- (a) in whole or in part within its territory; or
- (b) by one of its nationals, provided that the law of that Member State may require the offence to be punishable also in the country where it occurred; or
- (c) for the benefit of a legal person that has its head office in the territory of that Member State.

2. Any Member State may decide that it will not apply, or will apply only in specific cases or circumstances, the rule set out in paragraph 1(b) and paragraph 1(c).

3. Member States shall inform the General Secretariat of the Council where they decide to invoke paragraph 2, where appropriate with an indication of the specific cases or circumstances in which that decision applies.

4. Any Member State which, under its law, does not extradite its own nationals shall take the necessary measures to establish its jurisdiction with regard to the criminal offences referred to in Article 2, when committed by its own nationals outside its territory.

Article 8

Implementation of this framework Decision

1. Member States shall adopt the necessary measures to comply with the provisions of this framework Decision by ...¹.

2. Member States shall send the General Secretariat of the Council and the Commission of the European Communities the text of the provisions by means of which their obligations under this framework Decision have been transposed into national law.

3. The Council will assess, on the basis of appropriate information, the fulfilment by Member States of their obligations under this framework Decision by ...².

Article 9

Entry into force

This framework Decision shall enter into force on the date of its publication in the Official Journal.

¹ 3 years after entry into force of this framework Decision.

² 4 years after entry into force of this framework Decision.

D R A F T

Justice and Home Affairs Committee
From: the Convener, Alasdair Morgan MSP

Committee Chambers
George IV Bridge
EDINBURGH EH99 1SP
Tel (clerk): 0131 348 5206
Fax: 0131 348 5600

e-mail (clerk): andrew.mylne@scottish.parliament.uk

Jim Wallace MSP
Minister for Justice
Scottish Executive
St. Andrew's House
Regent Road
Edinburgh EH1 3DG

November 2000

Dear Mr Wallace,

HMP Barlinnie

I am writing on behalf of the Committee to express its concerns about conditions at HMP Barlinnie.

As you may be aware, four members of the Committee (Christine Grahame, Lyndsay McIntosh, Maureen Macmillan and Pauline McNeill) accompanied HM Chief Inspector of Prisons for Scotland and members of his team on an interim inspection of HMP Barlinnie Prison on 6 November. The reactions of three of those members were reported to the Committee at its meeting on 8 November, and I attach for your information an extract from the Official Report of that meeting (cols 1866-1873).

As you know, there is continuing speculation in the press over the future of HMP Barlinnie, and the Committee remains concerned that the results of the Scottish Prisons Service's Estates Review, originally expected in the spring of this year, has still not been announced. The Committee does not consider it acceptable that the delay in that review process should be allowed to hold up other priority expenditure. In particular, we are strongly of the view that the Executive and SPS should commit themselves to eradicating "slopping out" in all Scottish prisons by no later than 2004-05. As you will be aware, that is the timescale that had been indicated prior to the decision in October 1999 to re-allocate from SPS of £13 million of accumulated end-year flexibility.

The Committee is also very concerned, based on the report from the above three members, about conditions for remand prisoners at Barlinnie. The areas within the prison in which remand prisoners are housed were described by members who took

part in the visit as “Victorian” and as “prisoner-of-war conditions”. Sanitation was clearly inadequate. We believe that there can be no justification for keeping any prisoner, and certainly not someone who has not yet been found guilty of an offence, in such conditions. We also do not regard them as acceptable for the prison staff.

Given the Committee’s strong views on these matters, I would be grateful if you could let me know as soon as practicable what steps are being taken to address the concerns raised, particularly in relation to conditions for remand prisoners.

Yours sincerely,

ALASDAIR MORGAN MSP
Convener

Justice and Home Affairs Committee

**Public Attitudes to sentencing and alternatives to custody: Public
Opinion Survey**

Note by Senior Assistant Clerk

The Scottish Crime Survey (SCS) is the largest victimisation survey conducted in Scotland with a sample size of 5,000 for the main survey. Two versions of a follow-up questionnaire (versions A and B) are used in the SCS each covering different topic areas and each attracting a sample of 2,500. The version A questionnaire contains 10 questions which address the following issues:

- the factors which influence sentencing decisions (Q48)
- the appropriate sentence for a specified crime (housebreaking) (Qs 49-50)
- the use of imprisonment for specified crimes (rape and housebreaking) (Qs 51-54)
- personal experience of the prison system (Qs 55-56), and
- the role of prisons (Qs 57-58)

A copy of the relevant section of the questionnaire is attached. The results of the survey have not yet been published but it is expected that they will be available early in the New Year.

15 NOVEMBER 2000

ALISON E TAYLOR

- 46 Are you aware of any of these consultation methods having been undertaken by the police in your area?

SHOWCARD A5

- Public consultation meetings 1
- Public surveys 2
- Meetings with Community Constables 3
- Publication of consultation documents 4
- Other, please specify 5
- None of these 6

- 47 Taking everything into account, would you say the police in this area do a good job or a poor job?

- IF GOOD ASK:** Very good or fairly good?
- Very good 1
 - Fairly good 2
- IF POOR ASK:** Fairly poor or very poor?
- Fairly poor 3
 - Very poor 4
 - Don't know 8

READ OUT

- 48 I am now going to ask some questions about the way people are sentenced when they have committed a crime.

SHOWCARD A6

There are several factors that the courts take into account when sentencing somebody they find guilty. How much importance do you think a court should give to ...

READ OUT

	None	A Little	A Lot	Don't know
48.1 The age of the offender	0	1	2	8
48.2 The offender's family background	0	1	2	8
48.3 The offender's mental health	0	1	2	8
48.4 Whether or not it was a first offence	0	1	2	8
48.5 The offender's income	0	1	2	8
48.6 Severity of the offence	0	1	2	8
48.7 Impact of offence on the victim	0	1	2	8
48.8 Injuries sustained by the victim	0	1	2	8
48.9 The offender's attitude (eg remorseful, unapologetic, etc)	0	1	2	8

READ OUT

I now want to describe an imaginary case to you, and ask you what you think the various authorities should do? Imagine a man, aged 25 and with one previous conviction for theft, caught by the police after he has broken into a house and taken a video recorder and a television.

SHOWCARD A7

49 *What do you think should happen to him when he goes to court?*

- | | | | |
|--|---|-----------------------------------|----------------|
| Be made to pay compensation | 1 | Be sent to prison for more | 7 |
| Be made to do community service | 2 | than a year | |
| Be put on probation | 3 | Get a warning from the court | 8 |
| Be fined | 4 | It depends | 9 GO TO |
| Be sent to prison for under a year | 5 | Don't know | 10 Q55 |
| Be subject to electronic tagging | 6 | | |
| (ie confined to home for part of the day and monitored electronically) | | Other (RING AND SPECIFY) | 0 |
-

50 *If this was a real situation, how do you think this man would actually have been dealt with ?*
READ OUT

- | | | | |
|-------------------------------------|---|------------|---|
| ...more severely | 1 | It depends | 4 |
| ...more lightly | 2 | Don't know | 8 |
| ...or, in the way that you describe | 3 | | |

51 *Now I would like to ask you about the kinds of sentences that are imposed for rape and house breaking. First of all, out of every 100 adults aged 21 or over who are convicted of rape how many do you think go to prison? **PROBE FOR BEST GUESS.***

Number sent to prison

52 *How many do you think should be sent to prison ?*

Number sent to prison

53 *Now turning to house breaking. Out of every 100 adults aged 21 or over who are convicted of house breaking, how many do you think are sent to prison? **PROBE FOR BEST GUESS***

Number sent to prison

54 *How many do you think should be sent to prison ?*

Number sent to prison

55 *I would now like to ask you some questions about prisons. Do you know anyone who has been on remand or served a sentence in Scotland in ... **READ OUT ...***

- | | |
|-----------------------------------|---|
| ...a Young Offenders' Institution | 1 |
| ...or Prison | 2 |
| None of these | 3 |

- 56 *And have you personally ever been on remand or served a sentence in Scotland in.. READ OUT*

...a Young Offenders' Institution	1
...or Prison	2
None of these	3

- 57 *I would like to ask you to rank in order of importance what you feel the main role of prisons should be.*

SHOWCARD A8

Main role of prisons	RANK (1st, 2nd, 3rd and 4th)
1 to punish offenders for their crimes
2 to rehabilitate offenders back into the community
3 to help offenders with problems such as drug use, illiteracy and mental health issues
4 to hold offenders securely in custody and protect the community
5 to deter others from offending

SHOWCARD A9

- 58 *Using the responses on the card, can you tell me whether you agree or disagree with the following statements ? READ OUT*

	Strongly Agree	Agree	Neither Agree/disagree	Disagree	Strongly disagree
Home leave is vital for long-term offenders to reintegrate them back into the community	1	2	3	4	5
In prison, offenders learn new ways to commit crime	1	2	3	4	5
Newspapers and television give an accurate picture of life in prison	1	2	3	4	5
The courts send too many people to prison	1	2	3	4	5
Prisoners should be allowed televisions in their cells if they contribute to the cost	1	2	3	4	5

**SCOTTISH EXECUTIVE**

Deputy First Minister & Minister for Justice
Jim Wallace QC MSP

St Andrew's House
Regent Road
Edinburgh EH1 3DG

Alasdair Morgan MSP
Convener
Justice and Home Affairs Committee
Scottish Parliament
George IV Bridge
EDINBURGH

Telephone: 0131-556 8400
scottish.ministers@scotland.gsi.gov.uk
<http://www.scotland.gov.uk>

13 November 2000

Dear Alasdair,

CONVENTION RIGHTS (COMPLIANCE) (SCOTLAND) BILL

I am writing to confirm that introduction of the Convention Rights (Compliance) (Scotland) Bill has been delayed for a short period.

This Bill has raised some complex ECHR issues that have required a great deal of thought. We have decided to delay its introduction for what I hope will amount to no more than two or three weeks. During that time we will be giving further detailed attention to some provisions.

I am aware that officials were due to present evidence to the Committee on Tuesday and apologise for this disruption to the Committee's timetable. However, I feel it is preferable to spend a little more time now on the Bill and so we should not take up the Committee's time with unnecessary and complicated amendments at stage 2.

I am copying this letter to the Convener of the Subordinate Legislation Committee for his information and to the Clerks to both Committees.

JIM WALLACE



JUSTICE AND HOME AFFAIRS COMMITTEE

MINUTES

33rd Meeting, 2000 (Session 1)

Tuesday 14 November 2000

Present:

Scott Barrie
Christine Grahame
Kate MacLean
Mrs Lyndsay McIntosh
Euan Robson

Phil Gallie
Gordon Jackson (Deputy Convener)
Maureen Macmillan
Alasdair Morgan (Convener)

Apologies were received from Michael Matheson.

The meeting opened at 10.00 am.

- 1. Item in private:** The Committee decided to take item 4 in private.
- 2. Subordinate Legislation:** The Committee considered and noted the Gaming Clubs (Hours) (Scotland) Regulations 2000 (SSI 2000/371).
- 3. Social Partnership Funding:** The Committee considered draft applications to the Conveners' Group for funding a civic participation event and external research relating to attitudes to sentencing and alternatives to custody. Subject to two minor amendments, the applications were agreed to.
- 4. Proposed Protection from Abuse Bill (in private):** The Committee considered a draft report. Various changes were agreed to. The report was agreed to, subject to further changes to paragraphs 45 and 48. It was agreed that revised versions of those paragraphs would be circulated by e-mail for approval. David Cullum, Head of the Non-Executive Bills Unit (NEBU), explained how the Unit would assist in the preparation of a Bill to give effect to the proposal, if the report is agreed to by the Parliament. It was agreed that NEBU would liaise with the Convener and Maureen Macmillan regarding the preparation of drafting instructions.
- 5. Future Business (in private):** The Committee agreed to conduct a short inquiry on self-regulation of the police. The Committee also agreed, when time permits,

to conduct a short inquiry on self-regulation of the legal profession. Other options for future consideration were the confiscation of criminal assets and the rehabilitation of sex offenders.

The meeting closed at 11.08 am.

Andrew Mylne, Clerk to the Committee