JH/00/35/A

The Scottish Parliament

JUSTICE AND HOME AFFAIRS COMMITTEE

AGENDA

35th Meeting, 2000 (Session 1)

Tuesday 28 November 2000

The Committee will meet at 9.30 am in Committee Room 2, Committee Chambers, George IV Bridge, Edinburgh (**Note: change of venue**)

1. **Subordinate legislation:** Iain Gray (Deputy Minister for Justice) to move (S1M-1339)—

   Mr Jim Wallace: The Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc. (No.2) Order 2000—That the Justice and Home Affairs Committee recommends that the draft Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) (No. 2) Order 2000 be approved.

2. **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;

   1600: Revised draft Framework Decision on the standing of victims in criminal procedure (formerly 1190).

   1224: Note from the incoming Presidency on a programme of measures to implement the principle of mutual recognition of decisions in criminal matters;

   1259: Communication from Portugal, France, Sweden and Belgium seeking the adoption by the Council of a Decision setting up a provisional judicial co-operation 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 co-operation 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);

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).

3. **Visit to courts in Glasgow:** Members will report on a visit to the courts in Glasgow organised by the Glasgow Bar Association.

4. **Delegate for European visit:** The Committee will choose a member to represent the Committee on a study visit to the European Parliament.

Andrew Mylne
Clerk to the Committee, Tel 85206

****

The following papers are attached for this meeting:

Agenda item 1	
Note by the Assistant Clerk (SSI attached)	JH/00/35/2
Agenda item 2	
Response from the Law Society of Scotland re: European Draft Framework on Victims	JH/00/35/1
Note by the Clerk to the European Committee – TO FOLLOW	JH/00/35/4
Note by the Senior Assistant Clerk on document 972	JH/00/35/5
Note by the Senior Assistant Clerk on document 1600 (European document attached)	JH/00/35/6
Note by the Senior Assistant Clerk on documents 1224, 1259, 1260, 1385, 1300 and 1390 – TO FOLLOW	JH/00/35/7
Agenda item 3	
Correspondence between the Convener and the Sheriff Principal of Glasgow and Strathkelvin about the visit **(private papers – members only)**	JH/00/35/3
Agenda item 4	
Note by the Clerk	JH/00/35/8

Papers not circulated:

Agenda item 2
Members should bring with them Notes by the Senior Assistant Clerk and European Documents 972 and 1190 which were circulated for the 34th meeting on 20 November (JH/00/34/2 and JH/00/34/3 – incorrectly numbered in that circulation as 33/2 and 33/3).

Legal Aid Briefing:

Members are reminded that there will be an informal briefing on legal aid immediately after the above Committee meeting. The briefing will not be part of the meeting, and no Minutes or Official Report of it will be produced.

The briefing will be attended by officials from the Scottish Legal Aid Board and the Scottish Executive Justice Department. The aim is to allow these officials to explain some of the relevant law and procedure associated with the legal aid system, and to allow members to ask questions on the structural and practical aspects of the system. There will be a separate opportunity to take oral evidence from SLAB and the Executive during the course of the inquiry.

The briefing will take place in Committee Room 2. It is expected to last for around an hour to an hour and a half, depending on when the Committee meeting ends.

JUSTICE AND HOME AFFAIRS COMMITTEE

Papers for information circulated for the 35th meeting, 2000

Note by the Clerk on changes to the clerking team (members only)

Note by the Clerk on possible meeting on 18 December (members only)

Written Answer (S1W-8474) on Scottish Courts budget

Extracts from the *Press and Journal* on prisons, from the *Scotsman* on legal aid for tribunals, from the *Daily Express* on the proposed Protection from Abuse Bill, and from the *Herald* on a proposed criminal law code

Minutes of the 34th Meeting, 2000 JH/00/34/M

Subordinate legislation:

The following SSIs have been referred to the Committee and are expected to be considered at the meeting on Tuesday 12 December:

- The draft Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2001;

- The Advice and Assistance (Scotland) Amendment (No 2) Regulations 2000 (SSI 2000/339)

Both instruments relate to the Executive's proposals to make "assistance by way of representation" (ABWOR) to be made available for employment tribunals.

Prisons

Copies of HM Prisons Inspectorate intermediate inspection of HMP Barlinnie (6-7 November 2000) have been sent to the Clerks. Copies will be sent to members who attended the visit. A further copy is available for consultation from the Clerks.

Executive documents:

Members may wish to note that a Statistical Bulletin (Criminal Justice Series) on Prison Statistics Scotland, 1999 (CrJ/2000/7) is now available from the Document Supply Centre.

The Clerk has received copies of the following publications of the Scottish Executive Central Research Unit:

- *Solicitor Advocates in Scotland: A Statistical Analysis*, research report;

- *Solicitor Advocates in Scotland: A Statistical Analysis*, Legal Studies Research Findings No. 32
- *Solicitor Advocates in Scotland: The Impact on Clients*, research report;
- *Solicitor Advocates in Scotland: The Impact on Clients*, Legal Studies Research Findings No. 33
- *Solicitor Advocates in Scotland: The Impact on the Legal Profession*, research report;
- *Solicitor Advocates in Scotland: The Impact on the Legal Profession*, Legal Studies Research Findings No. 34
- *Solicitor Advocates in Scotland: A Research Overview*, Legal Studies Research Findings No. 35

These documents are available for inspection in Room 3.2 CC. Copies may also be obtained on the Scottish Executive website (www.scotland.gov.uk) or from the Document Supply Centre.

JUSTICE AND HOME AFFAIRS COMMITTEE

LATE PAPERS FOR MEETING ON 28 NOVEMBER 2000

Item 2 – European Documents

Note by the Clerks	JH/00/35/4
Note by the Senior Assistant Clerk on documents 1224, 1259, 1260, 1385, 1300 and 1390	JH/00/35/7

Andrew Mylne
24 November 2000

JUSTICE AND HOME AFFAIRS COMMITTEE

The Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) (No.2) Order 2000 (SI 2000/draft)

Note by the Assistant Clerk

Background

Under section 30(3) of the Scotland Act 1998, an Order in Council can be made to specify functions to be exercisable in or as regards Scotland. Section 63 of the Scotland Act enables an Order in Council to provide for the transfer of functions from a Minister of the Crown to the Scottish Ministers. This draft Order transfers functions exercisable by the Secretary of State to the Scottish Ministers in relation to the issuing of warrants under the Regulation of Investigatory Powers Act 2000 (the UK Act, not the Act of this Parliament considered by the Committee).

The Order will transfer to the Scottish Ministers the functions of the Secretary of State, under section 5 of the UK Act, to issue warrants authorising interception of communications by the police and HM Customs and Excise. The Order will also transfer to the Scottish Ministers the functions of the Secretary of State, under sections 32 and 42 of the UK Act, to issue warrants authorising intrusive surveillance by intelligence services for the purpose of preventing or detecting serious crime. In addition, functions relating to the duration, cancellation, modification and renewal of the warrants and authorisations are transferred to the Scottish Ministers. The transferred powers will be applicable where the interception of communications or authorisation of intrusive surveillance is in respect of a person, premises or a vehicle located in Scotland at the time the warrant is issued.

In consequence of the transfer of functions, Part 2 of Schedule 3 of the Order makes technical modifications to the Regulation of Investigatory Powers Act 2000.

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

Procedure

The instrument was laid on 2 November. 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 come into force. The relevant Minister has, by motion S1M-1339 (set out in the Agenda), proposed that the Committee recommends the approval of the Order. The Deputy Minister will attend to speak to and move the motion. The debate may last for up to 90 minutes.

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. Given that the Committee will

not meet again until after the 4 December deadline, the text of the Committee's report will be circulated for approval by email.

23 November 2000 FIONA GROVES

EXECUTIVE NOTE

The draft Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) No. 2 Order 2000

Introduction

1. Section 63 of the Scotland Act 1998 confers a power on Her Majesty to provide by Order in Council for any function of a UK Minister of the Crown, so far as they are exercisable in or as regards Scotland, to be exercisable by the Scottish Ministers instead of, or concurrently with, the UK Minister of the Crown.

2. Any function, whether statutory or non statutory, of a UK Minister of the Crown, including a power to make subordinate legislation, so far as it is exercisable in or as regards Scotland, can be the subject of an Order under section 63. The UK Minister of the Crown will continue to exercise these functions as regards the rest of the UK.

3. This Order provides for the transfer of functions to the Scottish Ministers so far as they are exercisable in or as regards Scotland.

4. Section 30(3) of the Scotland Act 1998 provides that Her Majesty may by Order in Council specify functions which are to be treated, for such purposes of the Act as may be specified, as being, or as not being, functions which are exercisable in or as regards Scotland. This power exists to deal with cases of doubt about whether a function is exercisable in or as regards Scotland. It has been used elsewhere, for example, to clarify the status of functions concerned with the regulation of fisheries. In the present case, its relevance is in defining the status of certain functions under the Regulation of Investigatory Powers Act 2000 and certain functions in relation to pipe-lines.

Content of the Order

Gas Act 1986, Electricity Act 1989, The Public Gas Transporter Pipe-line Works (Environmental Impact Assessment) Regulations 1999 and the Pipe-line Works (Environmental Impact Assessment) Regulations 2000

5. This draft Order transfers functions to the Scottish Ministers enabling them to give consent to developers to lay certain gas pipelines that begin and end in Scotland and for the Scottish Ministers to approve where necessary, compulsory purchase orders associated with these pipelines. Powers to issue pipeline consents have already been executively devolved, but this excluded Transco pipelines and the environmental impact assessment procedures relating to all pipeline developments. This Order regularises the situation and also transfers powers in the Pipe-line Works (Environmental Impact Assessment) Regulations, which came into force on 1 September 2000. The Order also transfers powers under the Utilities Act 2000, when it comes into force, to permit the Scottish Ministers to make orders to put in place a renewables obligation in Scotland.

Regulation of Investigatory Powers Act 2000

6. This draft Order transfers to the Scottish Ministers certain functions exercisable by the Secretary of State in or as regards Scotland in relation to the issue of warrants authorising the interception of communications by the police and HM Customs and Excise under section 5 of the Regulation of Investigatory Powers Act 2000 and the issue of warrants authorising intrusive surveillance by the intelligence services under section 32 (as read with section 42) of that Act for the purpose of preventing or detecting serious crime. Similar functions under the Interception of Communications Act 1985 and the Intelligence Services Act 1994 were previously exercised by Scottish Ministers by virtue of the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 (SI 1999/1750)

7. The Order provides that the functions exercisable by the Secretary of State under sections 5 and 32 of the Regulation of Investigatory Powers Act 2000 are exercisable in or as regards Scotland for the purpose of preventing or detecting serious crime. In effect, only the Scottish Ministers will be able to issue warrants authorising

- The interception of communications in respect of a person or set of premises located, or believed to be located, in Scotland at the time the warrant is issued.
- Intrusive surveillance by the intelligence services in relation to residential premises situated in Scotland, or a private vehicle which is, or is believed to be, located in Scotland at the time the warrant is issued.

Poisons Rules

8. The subject matter of the Poisons Act 1972 is a reserved matter, therefore, any ministerial function under that Act or under the 1982 Poisons Rules (as amended) have not transferred to the Scottish Ministers. Schedule 12 to the 1982 Rules allows "the Secretary of State to authorise persons to purchase Strychnine for the killing of moles and to authorise officers of DAFS to purchase Strychnine for the killing of foxes (paragraphs 4 and 5 respectively) In order to have the power to continue to carry out these functions they need to be executively devolved to the Scottish Ministers. In addition, references to officers of DAFS will be changed to "members of the Scottish Administration" The Strychnine permits are issued by SERAD Area Office staff predominantly for the control of moles, and less frequently, of foxes. These animals can constitute an agricultural pest. This order executively devolves the aforementioned functions.

9. Schedule 1 specifies the functions to be treated as being, or as not being, functions which are exercisable in or as regards Scotland. These are to facilitate the transfer, to the appropriate extent as described above, of functions under the Regulation of Investigatory Powers Act 2000, the Gas Act 1986, the Public Gas Transporter Pipe-line Works (Enviromnental Impact Assessment) Regulations 1999 and the Pipe-line Works (Environmental Impact Assessment) Regulations 2000.

Schedule 2 specifies those functions as described above which are conferred on a Minister of the Crown, so far as they are exercisable by him in or as regards Scotland, which will now be exercisable by the Scottish Ministers.

Article 6 provides for modification of particular enactments and Schedule 3 specifies the modifications to be made to the Regulation of Investigatory Powers Act 2000.

31st October 2000
EXECUTIVE SECRETARIAT

Draft Order in Council laid before Parliament and the Scottish Parliament under paragraphs 1 and 2 of Schedule 7 to the Scotland Act 1998, for approval by resolution of each House of Parliament and of the Scottish Parliament.

DRAFT STATUTORY INSTRUMENTS

2000 No.

CONSTITUTIONAL LAW
DEVOLUTION, SCOTLAND

The Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) (No. 2) Order 2000

Made *December 2000*

Coming into force in accordance with article 1

At the Court at Buckingham Palace, the day of December 2000

Present,

The Queen's Most Excellent Majesty in Council

Whereas a draft of this Order has been laid before and approved by a resolution of each House of Parliament and of the Scottish Parliament;

Now therefore, Her Majesty, in exercise of the powers conferred upon Her by sections 30(3), 63, 113 and 124(2) of the Scotland Act 1998(a) and of all other powers enabling Her in that behalf, is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, as follows:

Citation, commencement and interpretation

1.—(1) This Order may be cited as the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) (No. 2) Order 2000 and, except as provided in paragraphs (2) and (3) below, shall come into force on the second day after the day on which it is made.

(2) Article 2 of, and Schedule 1 to, this Order shall come into force on the day after the day on which it is made.

(3) In Schedule 2 to this Order, the entry relating to the Electricity Act 1989(b) shall come into force–

(a) so far as relating to section 32 of that Act, when section 62 of the Utilities Act 2000(c) comes into force; and

(b) so far as relating to section 32A of the Electricity Act 1989, when section 63 of the Utilities Act 2000 comes into force.

(4) In this Order "the 1998 Act" means the Scotland Act 1998.

(5) In this Order, any word or expression used in referring to any enactment and which is also used in the enactment has the same meaning as it has in the enactment.

(a) 1998 c.46.
(b) 1989 c.29.
(c) 2000 c.27.

Functions to be treated as being, or not being, exercisable in or as regards Scotland

2. Schedule 1 to this Order (which makes provision for certain functions to be treated for the purposes of section 63 of the 1998 Act as being, or as not being, functions which are exercisable in or as regards Scotland) shall have effect.

Transfer of functions to the Scottish Ministers

3. The functions which are conferred on a Minister of the Crown by the enactments specified in column 1 of Schedule 2 to this Order shall–

(a) so far as they are exercisable by him in or as regards Scotland; and

(b) subject to any restriction in the corresponding entry in column 2 of the Schedule,

be exercisable by the Scottish Ministers instead of by the Minister of the Crown.

Modifications of particular enactments

4.—(1) Schedule 3 to this Order (which makes modifications to the Wireless Telegraphy Act 1949(**a**) and the Regulation of Investigatory Powers Act 2000(**b**)) shall have effect.

(2) The Scotland Act 1998 (Functions Exercisable in or as Regards Scotland) Order 1999(**c**) is amended as follows:–

(a) in article 2(1), the definition of "the 1985 Act" is omitted;

(b) in paragraph 1 of Schedule 1–

(i) in sub-paragraph (1), for "section 5(b)" there is substituted "section 5(1)(b)";

(ii) in sub-paragraph (2), for "section 5(b)" there is substituted "section 5(1)(b)";

(iii) in sub-paragraph (2)(a), for "which neither the person using the apparatus nor any person on whose behalf he is acting is authorised by the Secretary of State to receive" there is substituted "of which neither the person using the apparatus nor a person on whose behalf he is acting is an intended recipient"; and

(c) paragraph 6 of Schedule 1 is omitted.

(3) The Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999(**d**) is amended as follows:–

(a) in Schedule 1 (enactments conferring functions transferred to the Scottish Ministers)–

(i) for the entry relating to the Wireless Telegraphy Act 1949 there is substituted the following:–

"The Wireless Telegraphy Act 1949 (c.54), section 5(1)(b).	Only so far as the function is exercisable for the purpose of preventing or detecting crime (within the meaning of the Regulation of Investigatory Powers Act 2000) or of preventing disorder"; and

(ii) the entry relating to the Interception of Communications Act 1985 is omitted; and

(b) in Schedule 5, paragraphs 6 and 14(3) and (4) are omitted.

General modifications of enactments etc.

5.—(1) Sections 117 and 118 of the 1998 Act shall apply in relation to the exercise of functions by the Scottish Ministers by virtue of article 3 of this Order as they apply in relation to the exercise of functions by the Scottish Ministers within devolved competence.

(2) Sections 119 to 121 of the 1998 Act shall apply in relation to functions exercisable by the Scottish Ministers by virtue of that article as they apply in relation to functions of the Scottish Ministers exercisable within devolved competence.

(3) In the application of those sections by virtue of this article, any reference in them to a pre-commencement enactment is to be read as if it were a reference to any enactment.

(**a**) 1949 c.54.
(**b**) 2000 c.23.
(**c**) S.I. 1999/1748.
(**d**) S.I. 1999/1750.

(4) Any reference in any enactment or prerogative instrument or in any other instrument or document–

(a) to government departments; or

(b) to, or to any part or officer of, any government department,

(however described) is to be read, so far as the effect of this Order makes it necessary or expedient to do so, as including or being a reference to, or to any corresponding part or member of the staff of, the Scottish Administration.

Transitional and saving provision

6.—(1) The transfer, by virtue of this Order, of any function exercisable by a Minister of the Crown to the Scottish Ministers shall not affect the validity of anything done (or having effect as if done) by or in relation to a Minister of the Crown before the date on which the transfer takes effect.

(2) Anything (including legal proceedings) which, at the time when that transfer takes effect, is in the process of being done by or in relation to a Minister of the Crown may, so far as it relates to any function transferred, be continued by or in relation to the Scottish Ministers.

(3) Anything done (or having effect as if done) by or in relation to a Minister of the Crown for the purposes of or in connection with any function transferred to the Scottish Ministers by virtue of this Order shall, if in force at the time when that transfer takes effect, have effect as if done by or in relation to the Scottish Ministers in so far as that is required for continuing its effect after that time.

(4) Despite the transfer to the Scottish Ministers of functions by virtue of this Order, any function of a Minister of the Crown in relation to any matter shall continue to be exercisable by him as regards Scotland for the purposes specified in section 2(2) of the European Communities Act 1972(a).

Clerk of the Privy Council

(a) 1972 c.68.

SCHEDULE 1

FUNCTIONS TO BE TREATED AS BEING, OR NOT BEING, EXERCISABLE IN OR AS REGARDS SCOTLAND

Interpretation

1. In this Schedule, "the 2000 Act" means the Regulation of Investigatory Powers Act 2000(a).

Functions under the 2000 Act

2.—(1) The functions of the Secretary of State under section 5 of the 2000 Act (interception with a warrant) are, for the purposes of section 63 of the 1998 Act, to be treated–

(a) as being exercisable in or as regards Scotland if they are exercisable in the class of case mentioned in sub-paragraph (2) below; but

(b) as otherwise not being exercisable in or as regards Scotland.

(2) The class of case mentioned in this sub-paragraph constitutes any case where the warrant under section 5 of the 2000 Act–

(a) authorises or requires the person to whom it is addressed to secure interception in accordance with paragraph (a) of section 5(1), or interception in accordance with that paragraph and disclosure in accordance with section 5(1)(d); and

(b) names or describes, in accordance with section 8(1), a person who is, or a set of premises which is (or, in either case, is reasonably believed by the Secretary of State to be) located in Scotland at the time when the warrant is issued.

3.—(1) The functions of the Secretary of State under sections 9(1)(b) and (3), 10(1)(a) and (2) and 15(1) of the 2000 Act (duration, cancellation, modification and renewal of warrants etc. and general safeguards) are, for the purposes of section 63 of the 1998 Act, to be treated–

(a) as being exercisable in or as regards Scotland if they are exercisable in the class of case mentioned in sub-paragraph (2) below; but

(b) as otherwise not being exercisable in or as regards Scotland.

(2) The class of case mentioned in this sub-paragraph constitutes any case where–

(a) the function is exercisable in relation to a warrant issued under section 5 of the 2000 Act; and

(b) the function of issuing such a warrant is, under paragraph 2 above, to be treated for the purposes of section 63 of the 1998 Act as a case where the function is, for those purposes, treated as being exercisable in or as regards Scotland.

4.—(1) The functions of the Secretary of State under sections 32 (authorisation of intrusive surveillance) and 42 (intelligence services authorisations) of the 2000 Act are, for the purposes of section 63 of the 1998 Act, to be treated–

(a) as being exercisable in or as regards Scotland if they are exercisable in the class of case mentioned in sub-paragraph (2) below; but

(b) as otherwise not being exercisable in or as regards Scotland.

(2) The class of case mentioned in this sub-paragraph constitutes any case where the grant by the Secretary of State of an authorisation for the carrying out of intrusive surveillance under section 32 of the 2000 Act is made by a warrant issued under section 42 of that Act and would authorise conduct that is carried out in relation to residential premises or any private vehicle which is (or, in either case, reasonably believed by the Secretary of State to be) located in Scotland at the time when the warrant is issued.

5.—(1) The functions of the Secretary of State under sections 44(1) and (2)(b) and 45(1)(a) (special rules for issue and renewal of intelligence services authorisations, cancellation of authorisations) of the 2000 Act are, for the purposes of section 63 of the 1998 Act, to be treated–

(a) 2000 c.23.

(a) as being exercisable in or as regards Scotland if they are exercisable in the class of case mentioned in sub-paragraph (2) below; but

(b) as otherwise not being exercisable in or as regards Scotland.

(2) The class of case mentioned in this sub-paragraph constitutes any case where–

(a) the function is exercisable in relation to the grant by the Secretary of State of an authorisation for the carrying out of intrusive surveillance under section 32 of the 2000 Act which is made by a warrant issued under section 42 of that Act; and

(b) the function of issuing such a warrant is, under paragraph 4 above, to be treated for the purposes of section 63 of the 1998 Act as a case where the function is, for those purposes, treated as being exercisable in or as regards Scotland.

Functions in relation to pipe-lines

6.—(1) Functions under the enactments mentioned in sub-paragraph (2) below shall, for the purposes of section 63 of the 1998 Act, be treated–

(a) as being exercisable in or as regards Scotland so far as they relate to pipe-lines which begin and end in Scotland, but

(b) as otherwise not exercisable in or as regards Scotland.

(2) Those enactments are–

(a) section 9(3)(a) of, and Parts I and III of Schedule 3 to, the Gas Act 1986(a);

(b) the Public Gas Transporter Pipe-line Works (Environmental Impact Assessment) Regulations 1999(b); and

(c) the Pipe-line Works (Environmental Impact Assessment) Regulations 2000(c).

(a) 1986 c.44.
(b) S.I. 1999/1672.
(c) S.I. 2000/1928.

SCHEDULE 2

ENACTMENTS CONFERRING FUNCTIONS TRANSFERRED TO THE SCOTTISH MINISTERS

Column 1 *Enactment*	*Column 2* *Restrictions*
The Gas Act 1986 (c.44), section 9(3)(a) and Schedule 3, Parts I and III(**a**).	
The Electricity Act 1989 (c.29), sections 32 and 32A(**b**).	
The Regulation of Investigatory Powers Act 2000 (c.23)(**c**)–	
(a) section 5	Only so far as the functions are exercisable for the purpose of preventing or detecting serious crime.
(b) sections 9(1)(b) and (3), 10(1)(a) and (2) and 15(1)	Only so far as the functions are exercisable in relation to a warrant issued under section 5 by the Scottish Ministers by virtue of this Order.
(c) sections 32 and 42	Only so far as the function is exercisable– (a) in relation to an application made by a member of the Security Service; and (b) where the granting of an authorisation for the carrying out of intrusive surveillance is necessary for the purpose of preventing or detecting serious crime.
(d) sections 44(1) and (2)(b) and 45(1)	Only so far as the functions are exercisable in relation to the grant of an authorisation for the carrying out of intrusive surveillance under section 32 that is made by a warrant issued under section 42 by the Scottish Ministers by virtue of this Order.
The Poisons Rules 1982 (S.I. 1982/218), Schedule 12, Part 1, paragraphs 4 and 5(**b**).	
The Public Gas Transporter Pipe-line Works (Environmental Impact Assessment) Regulations 1999 (S.I. 1999/1672)(**d**).	

(a) Functions under these enactments are treated as being exercisable in or as regards Scotland for the purposes of section 63 of the 1998 Act by virtue of article 2 of, and paragraph 6 of Schedule 1 to, this Order.
(b) Section 32 of the 1989 Act is substituted, prospectively, by section 62 of the Utilities Act 2000 and section 32A of the 1989 Act is inserted, prospectively, by section 63 of the Utilities Act 2000.
(c) Functions under these enactments are treated as being exercisable in or as regards Scotland for the purposes of section 63 of the 1998 Act by virtue of article 2 of, and paragraphs 2 to 5 of Schedule 1 to, this Order.
(d) Functions under these enactments are treated as being exercisable in or as regards Scotland for the purposes of section 63 of the 1998 Act by virtue of article 2 of, and paragraph 6 of Schedule 1 to, this Order.

Column 1 *Enactment*	*Column 2* *Restrictions*
The Pipe-line Works (Environmental Impact Assessment) Regulations 2000 (S.I. 2000/1928)(a).	

(a) Functions under these enactments are treated as being exercisable in or as regards Scotland for the purposes of section 63 of the 1998 Act by virtue of article 2 of, and paragraph 6 of Schedule 1 to, this Order.

SCHEDULE 3

PART I

MODIFICATIONS OF THE WIRELESS TELEGRAPHY ACT 1949

1. The Wireless Telegraphy Act 1949(a) is amended as follows.

2. In section 5 (misleading messages and interception and disclosure of wireless telegraphy messages), in subsection (7)(b), after paragraph (a) there is inserted the following paragraph:–

"(aa) in the case of an authority given by the Scottish Ministers (by virtue of provision made under section 63 of the Scotland Act 1998), a member of the Scottish Executive;".

PART II

MODIFICATIONS OF THE REGULATION OF INVESTIGATORY POWERS ACT 2000

3. The Regulation of Investigatory Powers Act 2000(c) is amended as follows.

4. In section 7 (issue of warrants)–

(a) in paragraph (a) of subsection (1), after "Secretary of State" there is inserted "or, in the case of a warrant issued by the Scottish Ministers (by virtue of provision made under section 63 of the Scotland Act 1998), a member of the Scottish Executive";

(b) in paragraph (b) of that subsection, after "(2)" there is inserted "(a) or (b)";

(c) at the end of paragraph (b) there is inserted the following paragraph:–

"; or

(c) in a case falling within subsection (2)(aa), under the hand of a member of the staff of the Scottish Administration who is a member of the Senior Civil Service and who is designated by the Scottish Ministers as a person under whose hand a warrant may be issued in such a case."; and

(d) in subsection (2) after paragraph (a) there is inserted–

"(aa) an urgent case in which the Scottish Ministers have themselves (by virtue of provision made under section 63 of the Scotland Act 1998) expressly authorised the use of the warrant in that case and a statement of that fact is endorsed on the warrant; and".

5. In section 9 (duration, cancellation and renewal of warrants), in subsection (1)(b), after "Secretary of State" there is inserted "or, in the case of a warrant issued by the Scottish Ministers (by virtue of provision made under section 63 of the Scotland Act 1998), a member of the Scottish Executive".

6. In section 10 (modification of warrants and certificates)–

(a) after subsection (4) there is inserted the following subsection:–

"(4A) Subject to subsections (5A), (6) and (8), a warrant issued by the Scottish Ministers (by virtue of provision made under section 63 of the Scotland Act 1998) shall not be modified under this section except by an instrument under the hand of a member of the Scottish Executive or a member of the staff of the Scottish Administration who is a member of the Senior Civil Service and is designated by the Scottish Ministers as a person under whose hand an instrument may be issued in such a case (in this section referred to as "a designated official")";

(b) after subsection (5) there is inserted the following subsection:–

"(5A) Unscheduled parts of an interception warrant issued by the Scottish Ministers shall not be modified under the hand of a designated official except in an urgent case in which–

(a) 1949 c.54.
(b) Subsection (7) was inserted by the Regulation of Investigatory Powers Act 2000 (c.23), section 73(3).
(c) 2000 c.23.

(a) they have themselves (by virtue of provision made under section 63 of the Scotland Act 1998) expressly authorised the modification; and

(b) a statement of that fact is endorsed on the modifying instrument";

(c) in subsection (6), after "subsection (4)" there is inserted "or (4A)"; and

(d) in subsection (9)–

(i) in paragraph (a), after "Secretary of State" there is inserted "or, as the case may be, the Scottish Ministers (by virtue of provision made under section 63 of the Scotland Act 1998)"; and

(ii) in paragraph (b), after "subsection (5)(b)" there is inserted ", (5A)(b)".

7. In section 42 (intelligence services authorisations)–

(a) in subsection (1), after "Secretary of State" there is inserted "or, the Scottish Ministers (by virtue of provision under section 63 of the Scotland Act 1998)"; and

(b) in subsection (2), after "Secretary of State" there is inserted "or, the Scottish Ministers (by virtue of provision under section 63 of the Scotland Act 1998)";

8. In section 44 (special rules for intelligence service authorisations)–

(a) in subsection (1), after "Secretary of State" there is inserted "or, in the case of a warrant issued by the Scottish Ministers (by virtue of provision made under section 63 of the Scotland Act 1998), a member of the Scottish Executive";

(b) in subsection (2)–

(i) in paragraph (b), after "himself" there is inserted "or the Scottish Ministers (by virtue of provision made under section 63 of the Scotland Act 1998) have themselves"; and

(ii) at the end, there is inserted–

"or, as the case may be, a member of the staff of the Scottish Administration who is a member of the Senior Civil Service and is designated by the Scottish Ministers as a person under whose hand a warrant may be issued in such a case (in this section referred to as "a designated official")"; and

(c) in subsection (3)–

(i) in paragraph (a), after "senior official" there is inserted "or, as the case may be, a designated official"; and

(ii) in paragraph (b), after "Secretary of State" there is inserted "or, in the case of a warrant issued by the Scottish Ministers (by virtue of provision made under section 63 of the Scotland Act 1998), a member of the Scottish Executive".

9. In section 57 (Interception of Communications Commissioner)–

(a) after subsection (2)(a) there is inserted:–

"(aa) the exercise and performance by the Scottish Ministers (by virtue of provision made under section 63 of the Scotland Act 1998) of the powers and duties conferred or imposed on them by or under sections 5, 9 and 10;"; and

(b) in subsection (2)(d)(i), after "Secretary of State" there is inserted ",or the Scottish Ministers (by virtue of provision under section 63 of the Scotland Act 1998),".

10. In section 58 (co-operation with and reports by s.57 Commissioner)–

(a) after subsection (5), there is inserted the following subsection:–

"(5A) The Interception of Communications Commissioner may also, at any time, make any such other report to the First Minister on any matter relating to the carrying out of the Commissioner's functions so far as they relate to the exercise by the Scottish Ministers (by virtue of provision made under section 63 of the Scotland Act 1998) of their powers under sections 5, 9(1)(b) and (3), 10(1)(a) and (2) and 15(1) of this Act, as the Commissioner thinks fit.";

(b) after subsection (6), there is inserted the following subsection:–

"(6A) The Prime Minister shall send a copy of every annual report made by the Interception of Communications Commissioner under subsection (4) which he lays in terms of subsection (6), together with a copy of the statement referred to in subsection (6), to the First Minister who shall forthwith lay that copy report and statement before the Scottish Parliament."; and

(c) in subsection (7), after "Commissioner", there is inserted "and, if it appears relevant to do so, with the First Minister".

11. In section 59 (Intelligence Service Commissioner)–

(a) in paragraph (a) of subsection (2), after "5 to 7 of", there is inserted ", or the Scottish Ministers (by virtue of provision made under section 63 of the Scotland Act 1998) of their powers under sections 5 and 6(3) and (4) of,"; and

(b) in paragraph (b) of subsection (2)–

(i) after "Secretary of State," there is inserted "or the Scottish Ministers (by virtue of provision made under section 63 of the Scotland Act 1998),"; and

(ii) after "of this Act" there is inserted "or on them by Part II of this Act".

12. In section 60 (co-operation with and reports by s.59 Commissioner)–

(a) in paragraph (b) of subsection (1), after "Secretary of State" there is inserted "and every member of staff of the Scottish Administration (by virtue of provision under section 63 of the Scotland Act 1998)";

(b) after subsection (3), there is inserted the following subsection:–

"(3A) The Intelligence Services Commissioner may also, at any time, make any such other report to the First Minister on any matter relating to the carrying out of the Commissioner's functions so far as they relate to the exercise by the Scottish Ministers (by virtue of provision made under section 63 of the Scotland Act 1998) of their powers under sections 5 and 6(3) and (4) of the Intelligence Services Act 1994(a) or under Parts I and II of this Act, as the Commissioner thinks fit.";

(c) after subsection (4), there is inserted the following subsection:–

"(4A) The Prime Minister shall send a copy of every annual report made by the Intelligence Services Commissioner under subsection (2) which he lays in terms of subsection (4), together with a copy of the statement referred to in subsection (4), to the First Minister who shall forthwith lay that copy report and statement before the Scottish Parliament."; and

(d) in subsection (5), after "Commissioner", there is inserted "and, if it appears relevant to do so, with the First Minister".

(a) 1994 c.13.

EXPLANATORY NOTE

(This note is not part of the Order)

This Order, made under the Scotland Act 1998 (c.46) ("the 1998 Act"), provides for certain specified functions of a Minister of the Crown, so far as they are exercisable by him in or as regards Scotland, to be exercisable by the Scottish Ministers instead of by the Minister of the Crown.

Article 2 of, and Schedule 1 to, the Order provide for certain specified functions to be treated, to the extent specified in that Schedule, as being, or as not being, exercisable in or as regards Scotland for the purposes of section 63 of the 1998 Act. This is to facilitate the transfer of functions under this Order.

Article 3 of the Order provides that the functions conferred on a Minister of the Crown by the enactments specified in Schedule 2 to the Order and set out below shall be exercisable in or as regards Scotland by the Scottish Ministers instead of a Minister of the Crown. In some cases the exercise of the function is subject to the restrictions specified in that Schedule.

In relation to the Gas Act 1986 (c.44) and the Public Gas Transporter Pipe-Line Works (Environmental Impact Assessment) Regulations 1999 (S.I. 1999/1672) the Order transfers functions to the Scottish Ministers enabling them to give consent to developers to lay certain gas pipe-lines that begin and end in Scotland, and for the Scottish Ministers to approve where necessary Compulsory Purchase Orders associated with these pipelines. In relation to the Pipe-Line Works (Environmental Impact Assessment) Regulations 2000 (S.I. 2000/1928), the Order transfers to the Scottish Ministers powers to grant consent to general pipe-lines which begin and end in Scotland. In relation to the Electricity Act 1989 (c.29), the Order transfers to the Scottish Ministers the powers contained in sections 32 and 32A, as inserted by the Utilities Act 2000, to make orders specifying the amount of electricity to be produced from renewable sources.

In relation to the Regulation of Investigatory Powers Act 2000 (c.23) ("the 2000 Act") the Order transfers to the Scottish Ministers certain functions exercisable by the Secretary of State in or as regards Scotland in relation to the issue of warrants authorising the interception of communications under section 5 of that Act. This Order also transfers the issue of warrants authorising the carrying out of intrusive surveillance under sections 32 and 42 of the 2000 Act where the application is by the Security Service for the purpose of preventing or detecting serious crime.

The Poisons Rules 1982 (S.I. 1982/218) are made under the Poisons Act 1972 (c.66), the subject matter of which is reserved. The Order executively devolves to the Scottish Ministers the powers of the Secretary of State to authorise persons to purchase the poison strychnine.

Article 4(1) of, and Schedule 3 to, the Order provide for modifications of the Wireless Telegraphy Act 1949 and the Regulation of Investigatory Powers Act 2000 in connection with provision made by the Order. Article 4(2) and (3) makes consequential modifications of the Scotland Act 1998 (Functions Exercisable in or as Regards Scotland) Order 1999 (S.I. 1999/1748) and the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999. Article 5 provides for certain general modifications of enactments in connection with provision made by the Order.

Article 6 makes transitional and saving provision.

DRAFT STATUTORY INSTRUMENTS

2000 No.

CONSTITUTIONAL LAW

DEVOLUTION, SCOTLAND

The Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) (No. 2) Order 2000

JH/00/35/1

0131 476 8203

The Deputy General
Justice and Home Affairs Task Force
General Secretariat
European Commission
200 rue de la Loi
B-1049 Brussels
Belgium

0131 225 4243

LS/74/10/agk/eb

29 December, 1999

Dear Mr Fortescue

Consultation Paper "Crime Victims of the European Union – Reflections on Standards and Action"

The communication to the European Parliament, entitled "Crime Victims in the European Union – Reflections on Standards and Action" invites discussion and comment on a proposed rationalisation across the European Union of the approach by member states to the victims of crime.

The Law Society of Scotland has considered the Commission's recommendations in this communication and broadly supports the proposals, which ought to improve the treatment of victims of crime including foreign nationals who have become victims when travelling through or residing in Scotland.

The communication fully sets out the sub-heads with regard to (a) prevention of victimisation; (b) assistance to victims; (c) standing of victims in the criminal procedure; and (d) compensation issues.

(a) Prevention of Victimisation

The Society endorses the suggestion that member states should exchange best practices on crime prevention. Much can be learned from the transfer of information between states and the Society is particularly interested in the Special Police Operations Unit operated in Spain. There may be merit in considering the establishment of a specialised unit dedicated to dealing with cases involving foreign victims. However, it must be acknowledged that the success of such a project would depend on sufficient resources being available to train appropriate personnel.

(b) Assistance to Victims

The Society agrees that efforts should be made to reduce the risk of secondary victimisation and that support systems should be put in place to ensure that the trauma experienced by victims of crime is kept to a minimum. Consideration should be given to the publication of a booklet, in several languages, which would identify essential agencies to assist in particular circumstances. The Society, for example, whilst not being able to provide legal advice, may be the appropriate body to direct victims to the source of legal advice and support.

Direct E-mail: lawsoc1@nildram.co.uk

Similarly, a telephone hot-line bringing together assistance services in the EU is also worthy of further consideration.

(c) Standing of Victims in Criminal Procedure

It should be recognised by all member states that victims should be treated with respect and dignity, when participating in the legal system of the country involved.

Whilst the Society agrees that in achieving this end, efforts should be made to provide sufficient support to victims, safeguards must be put in place to ensure that the victims evidence is not contaminated in any way. Adequate training would require to be given to those providing support to ensure that the circumstances of the case are not discussed at any time before evidence is led in the trial.

The Society also believes that the rights and interests of the accused person should not be forgotten. There is a proposal that statements from the victim could be noted and used in evidence. However, there is concern that this would represent a significant inroad into the right of the defence to cross examine witnesses, thereby removing the right to test credibility and reliability. Whilst the interests of the victim are important, the right of the accused to a fair trial must be protected.

(d) Compensation Issues

The Society welcomes the initiative to assess the compensation schemes of European member states and evaluate the feasibility of taking civil actions within the Union.

It is hoped that these comments will be of some assistance to those participating in this debate and Society looks forward to receiving details of the outcome of the consultation process.

Yours sincerely

Anne G Keenan
Deputy Director

Direct E-mail: lawsoc1@nildram.co.uk

JH/00/35/4

Justice and Home Affairs Committee

Scrutiny of European Documents

Note by the Clerks

Background

In the last few weeks, a series of documents relating to European Union activities in the field of Justice and Home Affairs (JHA) have been sent to the Committee, either for interest only, or seeking a formal response.

This note sets out the background to why the Committee may decide to have a greater interaction with EU initiatives in this field, what is the historical and policy background which has led the EU to legislate in JHA areas, as well as a short comment on the status of each of the documents given to the Committee. The note also sets out some recommendations on how all the above should be addressed.

The EU and JHA

JHA is now an important and increasingly active area of Union activities. It is a cluster of very different policy areas. These are:

- Charter on Fundamental Rights
- Police and Customs co-operation
- Free Movement of persons
- Fight against Organised Crime
- Immigration and Asylum
- Judicial Co-operation in criminal matters
- Judicial Co-operation in civil matters
- External relations and Enlargement
- Drugs Co-ordination

For more information on each of the above areas, see:
http://www.europa.eu.int/comm/justice_home/index_en.htm

The Committee may, in time, seek to take a view on which of the above areas represents a priority in terms of Parliamentary scrutiny, or choose to do this on a case-by-case basis depending on the measure.

Some of the policies listed above are carried out under the “third pillar” (Police and judicial co-operation in criminal matters) and some are carried out under the “first pillar” (Visas asylum and other policies related to the free movement of persons). The pillar under which these policies fall has implications for the decision-making process, and the types of instruments adopted.

JHA: A Short History

The first attempts to formulate a coherent EU policy on justice and home affairs was made at Maastricht in 1991. The Treaty of Maastricht placed asylum, immigration, border controls and co-operation between customs, police and judicial authorities in a new "third pillar". Accordingly JHA policy making takes place within the EU framework, but remains intergovernmental (in other words, not subject to Community decision making methods, and not with Community instruments).

With the Treaty of Amsterdam, free-movement issues and Judicial co-operation in civil matters entered the Community pillar (i.e. the "first pillar"). However, not all the first pillar procedures apply. Policy making on free movement issues is now subject to better judicial control and slightly more parliamentary oversight. The European Parliament is now consulted. The instruments adopted are the same as those for the mainstream EC Treaty and will have the same legal effect.

Police and judicial co-operation in criminal matter were left in a revised and renamed third pillar. Police and judicial co-operation on criminal matters remains intergovernmental and subject to unanimity. The European Parliament has a consultative role.

At the European Council meeting at Tampere (Finland) in October 1999 the European Council on JHA formulated a more coherent political strategy which gave a significant impetus to this new area of EU policy making. However the need for unanimity and a small staff of under 150 in the Commission's new justice and home affairs directorate may make the programme still over-ambitious.

The decision-making process

The various documents referred to the Committee by the European Committee are produced under these different pillars. Some of them are proposed legislative instruments others are policy documents..

A number of instruments will require implementation. In some cases it will be for the Executive to implement the new measures and deal with the practical details of how the objectives of the legislation will be met.

Status of the documents

A short note attached gives further information on the European documents referred to the Committee for information. In essence, the Committee should ask itself, for each of the documents:

1. Assuming there is still time, whether it would like to try to influence the decision-making process .
2. Whether to have a dialogue with the Executive about the practical implementation of the initiatives when the time comes for the matters to become part and parcel of law in the UK and Scotland.
3. Whether to seek more information on the Executive's policy positions the key documents only.

The Clerks to the European Committee and their Legal Advisor have offered to provide more advice on how 1 and 2 above can best be realised.

Other options

There are various general ways in which the issue of effective scrutiny of European documents by the Committee could be developed.

1. The Clerks could arrange for a wider briefing session or evidence, from the Executive and/or academics, on the new powers of the EU Community institutions on JHA matters, an idea of the emerging and future issues, their importance to Scotland etc.
2. At its last meeting, the Committee agreed that the Convener should write to the Minister for Justice on how the JHA Committee can have earlier warning of emerging issues and draft legislation. Such a letter could be followed by improved contact at official level with the aim of allowing the Committee to respond effectively to any document then referred by the European Committee.
3. The Committee could consider appointing a reporter (as mentioned in paper JH/00/35/8)

JH/00/35/5

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 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 the 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.

Framework decisions are one of the instruments the Council may adopt under Title VI of the EU Treaty "Provisions on Police and judicial co-operation in criminal matters (ex JHA)." Framework decisions are comparable to EC Directives insofar as they are only binding as to the result, but leave the Member States the choice of form and method. In short, they require implementation. In this case separate implementation may be required in Scotland.

Policy Implications

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.

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.

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.

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. There is also a question of Scottish jurisdiction which is raised by Article 7(1) of the framework.

Scottish Interest – Extracts from the Scottish Covering Note

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.

As far as procurement is concerned, the framework initiative seems to be 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.

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 Section C3 of Schedule 5 to the Scotland Act 1998.

However, criminal law is devolved, and the common law offence of fraud is significantly broader in Scotland 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).

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.

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. In summary, the current provisions in criminal law appear to be compliant with Articles 2 and 3.

Article 7(1) requires that each Member State establish its jurisdiction over (a) anyone within its territory, (b) its nationals overseas and (c) on those acting on behalf of a legal person with its head office in the Member State.

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 provisions, 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.

Status of the Document

This document has not yet been considered by the two Houses at Westminster, and it is understood that a "scrutiny reserve" is in place (this being a non-binding agreement that the Government does not normally adopt a formal UK position on an EU proposal until clearance from the two Houses has been obtained). If the Committee wishes to make representations regarding the document, it therefore has time to do so.

23 NOVEMBER 2000 ALISON E TAYLOR

JH/00/35/6

JUSTICE AND HOME AFFAIRS COMMITTEE

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

Note by the Senior Assistant Clerk

Background

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.

Framework decisions are one of the instruments the Council may adopt under Title VI "Provisions on Police and judicial co-operation in criminal matters (ex JHA)." Framework decisions are comparable to EC Directives in so far as they are only binding as to the result, but leave the Member States the choice of form and method. In short, they require implementation.

The draft Framework Decision consists of 15 articles of substance and three articles of procedure, all of which remain subject to further discussion and negotiation. The substantive items fall broadly into the following categories:

- Mutual co-operation to ensure that someone victimised in another Member State is not disadvantaged - this would include the provision of free advice, interpretation facilities and victim support;
- Protection of vulnerable or intimidated witnesses during court proceedings;
- The right to compensation;
- The exploration and promotion of mediation between offenders and victims.

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, the Member States 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.

Scottish Interest – Extracts from the Scottish Covering Note

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. 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 that kind and arrangements for compensation are handled differently, and effectively, by a distinct scheme.

However, the intention of the majority of articles is met by existing procedures and services or by planned changes which have already been announced. Examples include the extension of existing provision of information to victims; the roll out of the witness service to all sheriff courts; the Crown Office based victim and witness service; training in victim awareness for staff in criminal justice agencies; special facilities provided by the police for victims of sexual offences; actions to improve the lot of vulnerable and intimidated witnesses stemming from the report *Towards a Just Conclusion*; the provision of compensation; and the forthcoming Evidence (Sexual Offences) Bill. The Executive will continue to work to ensure that the final drafting of the document reflects realistic and attainable objectives achievable within the distinctive Scottish system of justice.

It is not yet clear what the financial implications will be, but the Executive is already working towards, and has budgeted to meet, substantial improvements for services to victims and witnesses.

Status of the Document

It is expected that this document will be discussed by the Council of Ministers at its meeting on 30 and 31 November and the hope is to secure agreement on this document at this meeting. There is therefore very little time for the Committee to make any input.

23 NOVEMBER 2000 ALISON E TAYLOR

Council Logo

COUNCIL OF THE EUROPEAN UNION

Brussels, 22 September 2000 (26.09) (OR. fr)

10387/2/00 REV 2

LIMITE

COPEN 54

NOTE

from :	COREPER
dated :	22 September 2000
to :	COUNCIL
No. prev. doc.:	10387/1/00 COPEN 54 REV 1
Subject:	Draft Framework Decision on the standing of victims in criminal procedure

Delegations will find attached the text resulting from the meeting of COREPER on 21 September 2000.

Substantial reservations remain on Article 9(1). Point 32 of the Tampere conclusions refers to "drawing up minimum standards on the protection of the victims of crime, in particular on crime victims' access to justice and on their rights to compensation for damages (…)". The question therefore arises as to whether Article 9(1) meets this requirement, or whether the wording currently proposed would merely maintain the *status quo*.

The German, United Kingdom, Danish, Netherlands and Swedish delegations have entered parliamentary scrutiny reservations.

Ireland and Belgium have entered a general scrutiny reservation on the text.

It should be pointed out that the European Parliament is to give an opinion on this draft in mid-November. The recitals have not yet been examined.

Finally, the United Kingdom is currently consulting its authorities with regard to application of the Framework Decision to the Channel Islands and Gibraltar.

The Council is asked, on the basis of the proceedings in Coreper, to settle the issues outstanding so that this Decision may be adopted as soon as possible once the European Parliament has given its opinion.

ANNEX I

DRAFT FRAMEWORK DECISION ON THE STANDING OF VICTIMS IN CRIMINAL PROCEDURE

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the initiative by the Portuguese Republic,

Having regard to the Opinion of the European Parliament,

In accordance with the Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, in particular point 51(c), stipulating that, within five years following entry into force of the Treaty, the question of victim support should be addressed, by making a comparative survey of victim compensation schemes, and the feasibility of taking action within the Union assessed,

Bearing in mind the content of the Commission communication of 14 July 1999 to the Council, the European Parliament and the Economic and Social Committee concerning crime victims in the European Union: reflections on standards and action (COM(1999) 349 final),

In the light of the European Parliament Resolution of … concerning the Commission communication of 14 July 1999,

In the light of the conclusions of the European Council meeting in Tampere on 15 and 16 October 1999, especially point 32, stating that minimum standards should be drawn up on the protection of the victims of crimes, in particular on crime victims' access to justice and on their right to compensation for damages, including legal costs. In addition, national programmes should be set up to finance measures, public and non-governmental, for assistance to and protection of victims,

With reference to the Joint Action of 24 February 1997, adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning action to combat trafficking in human beings and sexual exploitation of children,

With reference to the Council Resolution of 23 November 1995 on the protection of witnesses in the fight against organised crime,

With reference to Recommendation No R (85) 11 of the Council of Europe on the position of the victim in the framework of criminal law and procedure,

With reference to the European Convention on Compensation to Victims of Violent Crimes (Strasbourg, 1983),

With reference to Recommendation No R (99) 19 of the Committee of Ministers to Member States concerning mediation in penal matters,

With reference to the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,

With reference to the work of the European Forum for Victim Services, in particular the Statement of Victims' Rights in the Process of Criminal Justice,

With particular regard to the need for Member States to approximate laws and regulations concerning criminal procedure in the light of the following points:

(a) the importance of considering and addressing victims' needs in an integrated, comprehensive, interrelated manner and avoiding partial or inconsistent solutions which may give rise to secondary victimisation;

(b) the need for "procedure" therefore to be construed as including victims' contacts with authorities, public services and victim support groups whose involvement, albeit not required under the criminal justice system, is essential in looking after victims' interests, both before and during or after criminal proceedings proper;

(c) the fact that the provisions of this Framework Decision are confined to looking after victims' interests under criminal procedure;

(d) the fact that, for that reason, leaving aside any future addressing of the whole issue of compensation for crime victims within the EU, the provisions of this Framework Decision regarding compensation, as well as those regarding mediation, relate to criminal procedure and thus do not concern arrangements under civil procedure;

(e) the need for alignment of arrangements under criminal procedure as regards the standing and main rights of victims, with particular regard to the right to be treated with respect for their dignity, the right to provide and receive information, the right to understand and be understood, the right to be protected at the various stages of procedure, the right to have allowance made for the disadvantage of living in a different Member State from the one in which they were a victim, etc.;

(f) the importance of affording victims the best legal protection and defence of their interests, irrespective of the country in which they are present;

(g) the importance, in criminal procedure, of the involvement of victim support groups before, during and after proceedings;

(h) the need for personnel coming into contact with victims to receive suitable proper training, as is essential both for victims and for achieving the purposes of procedure;

(i) the value, in upholding victims' interests in procedure, of making use of existing contact point networking arrangements in Member States, whether under the judicial system or based on victim support group networks,

HAS ADOPTED THIS FRAMEWORK DECISION:

Article 1

Definitions

For the purposes of this Framework Decision:

(a) "victim" shall mean a natural person who has suffered harm, including physical or mental injury, emotional suffering, economic loss through acts or omissions that are in violation of the criminal law of a Member State;

(b) "victim support organisation" shall mean a non-governmental organisation, legally established in a Member State, whose support to victims of crime is provided free of charge and, conducted under appropriate conditions, complements the action of the State in this area;

(c) "criminal proceedings" shall be understood in accordance with the national law applicable;

(d) "proceedings" shall be broadly construed to include, in addition to criminal proceedings, all contacts of victims as such with any authority, public service or victim support organisation in connection with their case, before, during, or after criminal process [1];

[1] The English version of this paragraph needs to be reviewed, so as to correspond more closely to the French.

(e) "mediation in criminal cases" shall be understood as the search, prior to or during criminal proceedings, for a negotiated solution between the victim and the author of the offence, mediated by a competent person.

Article 2

Respect and recognition

1. Each Member State shall ensure that victims have a real and appropriate role in its criminal legal system. It shall continue to make every effort to ensure that victims are treated with due respect for the dignity of the individual during proceedings and shall recognise the rights and legitimate interests of victims with particular reference to criminal proceedings.

2. Each Member State shall ensure that victims who are particularly vulnerable can benefit from specific treatment best suited to their circumstances.

Article 3

Hearings, and provision of evidence

Each Member State shall safeguard the possibility for victims to be heard during proceedings and to supply evidence.

Each Member State shall take appropriate measures to ensure that its authorities question victims only insofar as necessary for the purpose of criminal proceedings.

Article 4

Right to receive information

1. Each Member State shall ensure that victims in particular have access, as of their first contact with law enforcement agencies, by any means it deems appropriate and as far as possible in languages commonly understood, to information of relevance for the protection of their interests. Such information shall be at least as follows:

(a) the type of services or organisations to which they can turn for support;

(b) the type of support which they can obtain;

(c) where and how victims can report an offence;

(d) procedures following such a report and the role of the victim in connection with such procedures;

(e) how and under what conditions they can obtain protection;

(f) to what extent and on what terms victims have access to:

(i) legal advice or
(ii) legal aid, or
(iii) any other sort of advice,

if, in the cases envisaged under (i) and (ii), victims are entitled to receive it.

(g) requirements and preconditions in order for victims to be entitled to compensation;

(h) if they are resident in another State, any special arrangements available to them in order to protect their interests.

2. Each Member State shall ensure that victims who have expressed a wish to this effect are kept informed of:

(a) the outcome of their complaint;

(b) relevant factors enabling them, in the event of prosecution, to know the conduct of the criminal proceedings regarding the person prosecuted for offences concerning them, except in exceptional cases where the proper handling of the case may be adversely affected;

(c) the court's sentence;

3. Member States shall take the necessary measures to ensure that, at least in cases where there might be danger to the victims, when the person prosecuted or sentenced for an offence is released, a decision may be taken to notify the victim if necessary.

4. Insofar as a Member State forwards on its own initiative the information referred to in paragraphs 2 and 3, it must ensure that victims have the right not to receive it, unless communication thereof is compulsory under the terms of the relevant criminal proceedings.

Article 5

Communication safeguards

Each Member State shall, in respect of victims having the status of witnesses or parties to the proceedings, take the necessary measures to minimise as far as possible communication difficulties as regards their understanding of or involvement in the relevant steps of the criminal proceedings in question, to an extent comparable with the measures of this type which it takes in respect of defendants.

Article 6

Specific assistance to the victim

Each Member State shall ensure that victims have access to advice as in Article 4(1)(f)(iii), provided free of charge where warranted, concerning their role in the proceedings and, where appropriate, legal aid as in Article 4(1)(f)(ii), when they are able to have the status of parties to criminal proceedings.

Article 7

Victim's expenses with respect to criminal proceedings

Each Member State shall afford victims, if they have the status of parties or witnesses, the possibility, according to the applicable national provisions, of reimbursement of expenses incurred as a result of their legitimate participation in criminal proceedings.

Article 8

Right to protection

1. Each Member State shall ensure a suitable level of protection for victims and, where appropriate, their families or persons in a similar position, particularly as regards their safety and protection of their privacy, where the competent authorities consider that there is a serious risk of reprisals or firm evidence of serious intent to intrude upon their privacy.

2. To that end, and without prejudice to paragraph 4, each Member State shall guarantee that it is possible to adopt, if necessary, as part of the court proceedings, appropriate measures to protect the privacy and photographic image of victims and their families or persons in a similar position.

3. Each Member State shall further ensure that contact between victims and offenders within court premises may be avoided, unless criminal proceedings require such contact. Where appropriate for that purpose, each Member State shall progressively provide that court premises have special waiting areas for victims.

4. Each Member State shall ensure that, where there is a need to protect victims – particularly those most vulnerable – from the effects of giving evidence in open court, victims may, by decision taken by the court, be entitled to testify in a manner which will enable this objective to be achieved, by any appropriate means compatible with its basic legal principles.

Article 9

Right to compensation in the course of criminal proceedings

1. Each Member State shall ensure that victims of criminal acts have the right to obtain a decision within reasonable time limits on compensation by the offender in the course of criminal proceedings, except where, in certain (…) cases, national law provides for compensation to be awarded in another manner[1]. [2]

2. Each Member State shall take appropriate measures to encourage the offender to provide adequate compensation to victims.

3. Unless urgently required for the purpose of criminal proceedings, recoverable property belonging to victims which is seized in the course of criminal proceedings shall be returned to them without delay.

---

[1] Scrutiny reservations by the Belgian, Netherlands and Spanish delegations.

[2] See also the draft statement by the Council in Annex II.

Article 10

Penal mediation in the course of criminal proceedings

1. Each Member State shall seek to promote mediation where appropriate in criminal cases for offences which it considers appropriate for this sort of measure.

2. Each Member State shall ensure that any agreement between the victim and the offender reached in the course of such mediation in criminal cases can be taken into account.

Article 11

Victims resident in another Member State

1. Each Member State shall ensure that its competent authorities can take appropriate measures to minimise the difficulties faced where the victim is a resident of a State other than the one where the offence has occurred, particularly with regard to the organisation of the proceedings. For this purpose, its authorities should, in particular, be in a position to:

– be able to decide whether the victim may make a statement immediately after the commission of an offence;

– have recourse as far as possible to the provisions on video conferencing and telephone conference calls laid down in Articles 10 and 11 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000 for the purpose of hearing victims resident abroad.

2. Each Member State shall ensure that the victim of an offence in a Member State other than the one where he resides may make a complaint before the competent authorities of his State of residence if he was unable to do so in the Member State where the offence was committed or, in the event of a serious offence, if he did not wish to do so.

The competent authority to which the complaint is made, insofar as it does not itself have competence in this respect, shall transmit it without delay to the competent authority in the territory in which the offence was committed. The complaint shall be dealt with in accordance with the national law of the State in which the offence was committed.

Article 12

Cooperation between Member States

Each Member State shall foster, develop and improve cooperation between Member States in order to facilitate the more effective protection of victims' interests in criminal proceedings, whether in the form of networks directly linked to the judicial system or of links between victim support organisations [1].

Article 13

Specialist services and victim support organisations

1. Each Member State shall, in the context of proceedings, promote the involvement of victim support systems responsible for organising the initial reception of victims and for victim support and assistance thereafter, whether through the provision of specially trained personnel within its public services or through recognition and funding of victim support organisations.

2. Each Member State shall encourage action taken in proceedings by such personnel or by victim support organisations, particularly as regards:

(a) providing victims with information;

[1] Scrutiny reservation by Belgium.

(b) assisting victims according to their immediate needs;

(c) accompanying victims, if necessary and possible during criminal proceedings;

(d) assisting victims, at their request, after criminal proceedings have ended.

Article 14

Training for personnel involved in proceedings or otherwise in contact with victims

1. Through its public services or by funding victim support organisations, each Member State shall encourage initiatives enabling personnel involved in proceedings or otherwise in contact with victims to receive suitable training.

2. The preceding paragraph shall apply in particular to police officers and legal practitioners.

Article 15

Practical conditions regarding the position of victims in proceedings

1. Each Member State shall support the progressive creation, in respect of proceedings in general, and particularly in venues where criminal proceedings may be initiated, of the necessary conditions for attempting to prevent secondary victimisation and avoiding placing victims under unnecessary pressure. This shall apply particularly as regards proper initial reception of victims, and the establishment of conditions appropriate to their situation in the venues in question.

2. For the purposes of paragraph 1, each Member State shall in particular have regard to facilities within courts, police stations, public services and victim support organisations.

Article 16

Implementation

Each Member State shall bring into force the laws, regulations and administrative provisions necessary to comply with this Framework Decision:

– regarding Article 10, within five years from the entry into force of this Framework Decision;

– regarding Articles 5 and 6, within three years from the entry into force of this Framework Decision;

– regarding the other provisions, within one year from the entry into force of this Framework Decision.

Article 17

Assessment

As of the dates referred to in Article 16, each Member State shall forward to the General Secretariat of the Council and to the Commission of the European Communities the text of the provisions enacting into national law the requirements laid down by this Framework Decision. The Council shall assess, within one year following each of these dates, the measures taken by Member States to comply with the provisions of this Framework Decision, by means of a report drawn up by the General Secretariat on the basis of the information received from Member States and a report in writing submitted by the Commission.

Article 18

Entry into force

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

ANNEX II

Draft statement by the Council regarding Article 9(1):

"The Council declares that the decision on the compensation of the victim by the offender in the course of criminal proceedings may be limited in its substance or to part of the claim".

JH/00/35/7

JUSTICE AND HOME AFFAIRS COMMITTEE

European Documents

Note by the Senior Assistant Clerk (prepared with the assistance of the European Committee clerks and advisers)

At its last meeting, the Committee asked for further information on European documents which had been referred to it for information. Further details are outlined below. Copies of the full documents may be obtained from the Clerks.

1224: Note from the incoming Presidency on a programme of measures to implement the principle of mutual recognition of decisions in criminal matters

At Tampere (venue of the European Council meeting in Finland, at the end of 1999) the Council and the Commission were invited to adopt, by December 2000, a programme of measures to implement the principle of mutual recognition of discussions in criminal matters. Mutual recognition is designed to strengthen co-operation between Member States but also to enhance the protection of individual rights. Implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States have trust in each others' criminal justice systems.

Some forms of mutual recognition are already embodied in the instruments of judicial co-operation adopted, before the Maastricht Treaty, e.g. the Convention between the Member States of the European Communities on the enforcement of foreign criminal sentences of 13 November 1991; the Convention of the European Union on driving disqualification of 17 June 1998; and the Convention on the protection of the European Communities' financial interests of 26 July 1995.

The programme of measures, which is designed as a package, maps out the different areas in which Member States should focus their efforts in the years ahead in order gradually to achieve mutual recognition of criminal decisions in the European Union. It should not be seen as a definitive programme.

The paper proposes that a Programme of Measures should cover four broad areas and includes:

- taking account of final criminal judgements already delivered by the courts in another Member State, i.e. ensuring that most judicial decisions cannot be challenged in other Member States;
- enforcement of pre-trial orders, e.g. orders for the purpose of obtaining evidence, arrest warrants, etc;
- post-sentencing follow-up decisions, e.g. parole supervision for serious offenders returning the UK after serving sentences abroad; and
- peer evaluation, i.e. to establish a mechanism for peer evaluation of the recognition of criminal decisions in order to measure Member States' progress in implementing the proposed measures.

The Programme of Measures should be adopted by the Council of the European Union by 31 December 2000. The French Presidency therefore intends to submit the document for approval by the Justice and Home Affairs Council on 30 November. Further details have been sought from the Executive on the potential impact of these proposals on Scottish criminal law and procedure. In particular information on the existing provisions or the area of existing law likely to be affected, and whether or not new or amending legislation will be required.

1300: Communication from the Commission to the Council and the European Parliament on Mutual Recognition of Final Decisions in Criminal Matters

This is a policy document which outlines the background thinking to the programme of measures to implement the principle of mutual recognition of decisions in criminal matters (see 1224 above).

1260: Initiative by Portugal, France, Sweden and Belgium seeking the adoption by the Council of two Decisions, one setting up a provisional co-operation unit and the other setting up EUROJUST with a view to reinforcing the fight against serious organised crime (EUROJUST 6)

This proposal for legislation seeks to improve judicial co-operation between Member States of the European Union, in particular in combating forms of serious crime often perpetrated by transnational organisations. It seeks to establish a European judicial co-ordination unit (entitled EUROJUST) which shall be composed of one national prosecutor, magistrate or police officer of equivalent competence per Member State. It is proposed that members of EUROJUST will co-operate in relation to crimes such as acts of terrorism, computer crime, laundering of the proceeds of crime, etc.

According to the explanatory memorandum supplied by the Home Office, the precise impact on UK and Scots law of implementing the Decision has yet to be determined, but it is unlikely to have a significant impact because national members of EUROJUST are largely mandated to act within the limits of their respective national powers. It is envisaged that EUROJUST would co-ordinate and facilitate cross-border investigations, without directing the national authorities involved.

1259: Initiative by the Governments of Portugal, France, Sweden and Belgium seeking the adoption by the Council of a Decision setting up a provisional judicial co-operation unit (EUROJUST 5)

1385: Initiative of Portugal, France, Sweden and Belgium with a view to the adoption of a Council Decision setting up EUROJUST with a view to reinforcing the fight against serious organised crime

These documents relate to the same subject matter as the above (see 1260).

1390: Proposed Council Regulation extending the programme of incentives and exchanges for legal practitioners in the area of civil law (Grotius – civil):

This is a proposal for legislation. The Grotius programme was adopted by the Council of Ministers in 1996. The purpose of the programme is to facilitate judicial

co-operation between Member States by fostering mutual knowledge of legal and judicial systems. It provides funding for training, exchange, work-experience programmes, etc. This regulation provides for the extension of certain aspects of this programme.

Procedure

All the above documents have been referred to the Committee for information. The Committee is not required to take any further action in relation to these documents. It could, however, decide to seek further information from the Executive on what implications these documents have for Scotland, or ask to be kept informed of the progress of any of the above.

23 NOVEMBER 2000 ALISON E TAYLOR

JH/00/35/8

JUSTICE AND HOME AFFAIRS COMMITTEE

Nomination of Committee Member for European Parliament Familiarisation Programme

Note by the Clerk

The Committee is invited to nominate at this meeting a member of the Committee, which may be the Convener or another member, to take part in a European Parliament-funded familiarisation programme.

Background

The European Parliament has agreed to fund a short familiarisation programme for a group of Scottish Parliament Committee Conveners and members. This is likely to take place in the Spring of 2001. The other committees from whom a delegate is being sought are:

- Audit
- Education, Culture and Sport
- Enterprise and Lifelong Learning
- Equal Opportunities
- Finance
- Health and Community Care
- Public Petitions
- Rural Affairs
- Social Inclusion, Housing and the Voluntary Sector
- Transport and the Environment
- Local Government

The aim is to familiarise members with the European legislative process and the operation of the European Parliament.

The EU is the single external (non-UK) entity with the greatest impact on Scotland. EU business touches every area of the Parliament's competence. A significant part of the newly created Scottish institutions' capacity to legislate or act is determined by Community law. In many areas, primary or secondary legislation has to be made for the sole purpose of giving effect, applying or implementing Community obligations. EC and EU law can also act as a restraint on the newly acquired powers since it is outside the legislative competence of the Scottish Parliament to enact legislation which is incompatible with EU law. There are also strong Scottish interests in reserved matters that are subject to EU legislation or policy. The Parliament needs to be able to feed its views into the UK machinery responsible for negotiating on and implementing these matters.

The Parliament has a fundamental interest in taking an active part in Europe, to understand how EU law interacts with its responsibilities and to promote Scotland's influence in decision-making.

Central to the Parliament's activity on European Union matters is the European Committee. Standing Orders give the Committee a remit to consider and report to the Parliament on European Community proposals and legislation and on any European Union issues. The Committee has the key task of scrutinising documents and proposals emanating from Brussels and must take a leading role in developing the Parliament's approach to European Union matters.

Europe, however, impacts more widely on the Parliament than just its European Committee. It is right that other Committees are able to develop the European aspects of matters within their remits; some have already begun to do so. The issues with which subject Committees deal are often inextricably linked with policy development in Europe.

Appointment of Reporter

The Committee may wish to consider also appointing the delegate as a Reporter on European matters. That would enable the experience gained from the study visit to be put to longer-term effect. A Reporter might, for example, attend meetings of the European Committee where relevant documents were being considered, and take the lead on consideration of such documents which are referred to the Committee.

A decision on whether to appoint a Reporter need not be taken at the same meeting as the decision on choosing a delegate for the above visit.

23 November 2000 ANDREW MYLNE

15/11/00

Justice

David McLetchie (Lothians) (Con): To ask the Scottish Executive what the end-year balance in each sub-heading of the Scottish Courts budget was in 1999-2000.

(S1W-8474)

Mr Jim Wallace: The information requested in contained in the following table.

Subheading	Provision £000	Actual £000	(Under)/overspend £000
Running costs	34,816	30,584	(4,232)
Capital	12,000	11,131	(869)
Appropriations in aid	(17,781)	(17,829)	(48)
Operational	5,035	4,119	(916)
Lockerbie	11,259	10,049	(1,210)
Total	45,329	38,054	(7,275)

LEGAL AID

2

THE SCOTSMAN

Chancers' charter for the sacked

Tanya Thompson
Home Affairs Correspondent

THE executive has buckled under the threat of the latest human rights challenge by granting legal aid at employment tribunals in a move which could cost the taxpayer millions of pounds.

Legal experts described the decision as a "pre-emptive strike" by government ministers to prevent another embarrassing legal battle in Scotland's courts.

Thousands of employees who are fighting their bosses at tribunals will now be given funding to pay for a solicitor to represent them.

The plans will lead to a soaring number of tribunal cases as people are granted state aid to sue their employers over a range of grievances including wrongful dismissal, sex discrimination and race discrimination.

The legal aid provisions are expected to come into force on 15 January in Scotland, but they will not apply in England and Wales.

Last night the Confederation of British Industries Scotland, which represents employers, reacted angrily to the news and said it would increase their costs and make them less competitive.

Allan Hogarth, from CBI Scotland, said: "This is a chancer's charter and will only encourage more spurious tribunal cases.

"If this only applies in Scotland it will put us at a huge disadvantage compared to businesses down south. This is another reason why many companies may decide not to come to Scotland.

"Employers are already facing an increase in the number of tribunals which involve a great deal of management time and expense."

Under current laws, those who choose to take their case to a tribunal are not eligible for legal assistance and have to represent themselves.

The executive has been forced to act because of a potential challenge under the European Convention on Human Rights.

Lawyers argue that the current tribunal system is a breach of Article 6 of ECHR, which states that everyone is entitled to a fair hearing.

> The right to due process in civil cases is obvious, but the right to be funded by the public purse in order to seek a remedy is far less clear
> **Editorial Comment, Page 15**

Ken Hogg, a Livingston-based solicitor who had been preparing a test case to fight for legal aid at tribunals, said he was delighted by the news.

He said: "This will help a significant number of people who are not in a position to pay for a solicitor.

"Employment law can be incredibly complex and many employees are at a disadvantage if they try to represent themselves without a solicitor.

"Potentially, every case could result in legal aid. It will undoubtedly increase the legal aid bill."

Recent figures suggest the number of applications to employment tribunals in Britain has more than doubled in the past decade.

There were more than 104,000 applications in 1999 compared to 44,000 in 1990.

The Scottish executive paid out more than £130 million in legal aid last year – £69 million in criminal cases, £30 million in civil cases and the rest on advice and assistance.

A spokeswoman for the Law Society of Scotland welcomed the plans and said it would open up access to justice for thousands of people who have received a raw deal.

She said: "It is important for people to have legal aid for employment tribunals because this area of law is getting more and more complicated. It is a question of access to justice."

Cameron Fyfe, an employment lawyer who was also planning to challenge the executive, said: "Lawyers will be paid about £50 an hour and there will be literally thousands of cases. It could run to millions of pounds."

Sources claim that the executive has already set aside £10 million to pay for ECHR challenges. Elements of ECHR were incorporated into Scots law in May last year and it quickly caused havoc in the courts.

A spokesman said: "This is really intended for the most complicated legal cases."

Flying put our unborn babies at risk, Page 8

9

LEGAL AID

2

THE SCOTSMAN

Personal grievances and the public purse

15

THANKS to a move by the Scottish executive, as of next January people in Scotland will be able to apply for legal aid as of right in order to pursue personal grievances at employment tribunals. The introduction of this facility, which does not exist in England and Wales, is by way of a pre-emptive strike on the part of the executive, which fears that otherwise it would be open to a successful complaint under the European Convention on Human Rights (ECHR). The ECHR, now directly incorporated into Scots law, insists on fair hearings by public bodies, including a right to legal aid if such a fair hearing is otherwise imperilled. However, this extension of legal aid to cover employment tribunals opens up a veritable can of legal and political worms.

The argument in favour of legal aid in such cases is sound in theory: individuals should not be prohibited from seeking legal redress because they lack funds. But it is a moot point, and certainly a contentious one in terms of the ECHR wording, whether or not this right extends to the use of public funds to enable individuals to pursue matters of private grievance against private employers with whom they were voluntarily contractually bound.

The right to due process in civil cases is obvious, but the right to be funded from the public purse in order to seek a remedy, actual or perceived, is far less clear. Indeed, it has dangerous consequences. The number of tribunal cases has doubled in the past decade despite full employment. Funding people to undertake more may well open the floodgates in a way that actively discourages firms from hiring. And the cost to the taxpayer – already running at £130 million a year – can only rise.

But surely we should not put a price tag on justice? No, we should not. However, the motives of the Scottish executive in promoting this change are profoundly suspect and have little to do with the ends of justice. The incorporation of the ECHR into Scots law was a botched job. It was done hurriedly as an appendage of the Scotland Act that created Holyrood. The result is that, if the courts find Scottish legal practice in contravention of the ECHR, the practice must desist instantly (as seen in the case of the firing of Scotland's lay sheriffs). This does not happen in England and Wales where, in a similar situation, the matter is held in abeyance till Parliament has considered the issue. Thus, in the case of employment tribunals, the executive has acted precipitately – indeed, perhaps unnecessarily – rather than risk instant chaos again.

These events happen as the European Union is discussing extending the human rights agenda even further through incorporating the new and more far-reaching Charter of Fundamental Human Rights into the EU treaties (and hence into the laws of member states). After Sunday's ministerial meetings in Paris, it seems that British Government pressure may yet delay the advent of the Charter. But at best this will only be a delay as the Charter is a fundamental building block of the creation of a social dimension to the EU as designated in the Maastricht and Amsterdam treaties. And the Charter very definitely does extend employee rights in the direction of pursuing civil cases against employers.

Peer From Abuse

Scottish
Daily Express

Protection from Abuse Bill would help society's new vulnerable

The law must recognise the way we now live

12

JULIA CLARKE

WHEN the Matrimonial Homes Act was introduced in 1981, it was intended to protect the rights of women and children, but few could have foreseen the huge growth in the numbers of couples living together. Far from being an anti-social splinter group, the great mass are now understood to be "married" in every respect except for the piece of paper. They have mortgages, joint credit cards, and, most binding of all in the long term, children, with a third of all our offspring now born to unmarried parents.

Despite the seismic social changes we have seen over the past two decades, the law has been slow to keep up with the circumstances of many families practically ignored by the judiciary, which is in danger of appearing out of touch with real life.

Sadly, one of the few constants in family life over the years has been the level of violence against women, which has probably changed little, though certainly more is being reported. With an estimated one in four Scotswomen said to suffer abuse at some stage, and only seven per cent of reported rapes ending in a conviction, groups have been campaigning and lobbying the parliament for action since its re-birth last year.

With all that in mind, one member of the parliament's Justice and Home Affairs Committee, Maureen McMillan, has come up with the idea of a Protection from Abuse Bill, which could well be the first Committee Bill to become law if it's not pipped to the post by the Standards Committee and its plans for an Ombudsman.

Beefing up the protection for unmarried women with violent partners would be a popular move, although doubtless there will be the usual gnashing of teeth by those who consider it the devil's work to recognise relationships not blessed by state or church. It seems fruitless to try to turn this tide of change, though and the Matrimonial Homes Act simply needs more teeth to do the job for which it was set up.

Yesterday the Justice Committee examined a draft report on the proposed Bill, and will publish its conclusions at the end of this week. Basically, the legislation is intended to plug the gap for co-habitees, with some protection for women who may have had a long-term relationship, but never actually shared the same roof as their partner; something becoming increasingly common, as many divorcees decide to maintain their own independence and continue a relationship from the comfort and security of their own home, rather than trust their future to another relationship.

A case of once bitten? Possibly, but there's no doubt that the big growth in social living is the singleton, whether never-married, or now-divorced. Single women in relationships are also demanding protection from violent partners, and are increasingly likely to have children to protect too. Currently, sheriffs may grant an interdict to protect the victim of abuse in this circumstance, but there are no powers of arrest.

Many women's organisations feel it's been a long time coming but welcome the proposals as a big step towards protecting women – and children – currently slipping through the net. And with the new Family Law legislation set to provide more rights for unmarried fathers, it's high time the whole area was brought up to date.

Ironically enough, some of those well-meant proposals may be the cause of further violence for women in themselves, as a minority of unmarried fathers use their newfound rights to their children to harass their separated partners in a way that was less likely in the past. It's a hard point to argue though, especially under the new Human Rights Act, and it's hoped that a Protection from Abuse Bill would answer some of these potential problems.

Women's Aid says much of the abuse happens to women after they've left a relationship, and insufficient legal protection keeps many shackled in misery because of threat of serious violence, or even death, against themselves or their children. In a case like that, a woman who had been battered and had her self-esteem ground into the dust for years would need to be very sure the law was going to be there for her when she needed it. Who says slavery is dead?

THE crux of the debate rests on how women suffering abuse from partners – although there are a minority of men in the same intolerable situation – can be protected, while defending the perfectly reasonable rights of unmarried fathers to have access to their children. As balancing acts go, this one could grace the Moscow State Circus, since the one thing every side agrees on is that angry, embittered adults have a sad tendency to use their children as weapons of war.

The law cannot, after all, be about how we should live, but must take account of how we do live. And they don't come much more diverse than the modern family, with its step-children, second and third marriages, and complex extended relationships. To keep up, the law will have to become faster on its feet, taking account of trends as they develop, rather than trailing behind in the wake of them. Only then can it be the real protection for the vulnerable that we need.

The Herald

LAW REFORM 2

Case put for total reform of law

RAYMOND DUNCAN 2

SCOTTISH law is based on court decisions and old books, one of which was written just after the French Revolution.

It has not been updated since the mid 19th century, but is still relied on, says a Scots academic.

Professor Eric Clive of Edinburgh University is one of a "star chamber" of four which feels that the country's criminal justice system is outdated and needs a radical shake-up.

The reform proposals are contained in a draft criminal code for Scotland to be put on the table at a "consultation" conference by law professors from Edinburgh, Dundee, and Aberdeen.

They want the Scottish Parliament to act and it is intended that the draft code be passed to Justice Minister Jim Wallace.

Professor Christopher Gane, of Aberdeen University, argues the code will be particularly useful in relation to offences against the person.

It would bring male rape within the category of rape, introduce an offence of stalking, and would get rid of the rule that a man was not guilty of rape if he believed, wrongly and unreasonably, that the victim was consenting.

Professor Pamela Ferguson, of Dundee University, claims the crime of breach of the peace is particularly ill-defined, with the result that any behaviour which annoys, alarms or even embarrasses other people has the potential to be prosecuted as a breach of the peace. The code, she will tell an audience which will include sheriffs, Crown Office officials and senior police officers, would narrow the ambit of breach of the peace and at the same time provide specific offences of harassment and stalking.

Professor Clive will suggest that it is a basic rule of fairness that a person should not be prosecuted for a crime unless there is an existing law making what was done a crime, and unless the person is told clearly what crime he or she is supposed to have committed.

"That basic rule is generally observed in the present criminal law of Scotland," says Professor Clive, "but it is still possible for a person to be charged with doing something without being told the name of the offence alleged to have been committed or even the name of the law creating the offence.

"In the case of many crimes there is no readily accessible law to which people can be referred. The law is contained in old books and court decisions. One of the books still relied on was first published not long after the French Revolution and was last updated in the middle of the 19th century. These sources are often difficult to interpet and sometimes contradictory."

Professor Clive, who will open the conference in Edinburgh, will claim that Scotland is unusual in the extent to which some of the most basic crimes – such as murder, rape, assault, theft or fraud – depend on statements made by judges rather than on provisions enacted by Parliament.

"Most developed countries have a criminal code where the legislature has set out the major crimes as clearly as possible."

Professor Sandy McCall Smith, of Edinburgh University, will tell delegates the way in which the draft code would deal with the law on defences to criminal charges – including of involuntary conduct, mental disorder, intoxication, and coercion.

He will also explain how the code would rationalise the law on maximum penalties.

Among the organisations attending the conference will be the Scottish Association for the Study of Delinquency, SACRO, and Victim Support Scotland.

Professors want proposals for Scottish justice changes to go to Parliament

SCOTLAND'S first advocates were corrupt opportunists who set out to complicate the legal process in order to exclude ordinary people from the courts, according to research by a Glasgow lecturer, to be published today.

Educated abroad, they mixed with royalty and created legal dynasties with their inflated earnings.

In Men of Law in Pre-Reformation Scotland, Glasgow University law lecturer Dr John Finlay says that the antics of the early advocates made assaults upon them so common that the king proclaimed that such attacks would be treated as treason.

But Donald Findlay QC, perhaps Scotland's most controversial present-day advocate said: "I don't think that advocates, or lawyers in general, are any more popular these days.

"There are still various sections of the public who regard an attack on an advocate as an act of social work."

12

Press and Journal

Female prisoners reach record levels

by **Paul Gallagher** 7

THE number of female prisoners in Scotland reached a new record last year, according to figures published yesterday.

The average daily population of women in prison stood at 212 last year, up 10% on the previous year.

Female inmates have risen from 137 in 1990 to 175 in 1995 and 189 in 1996. The number fell to 184 in 1997, but has risen each year since.

The figures also showed that Scotland's total average daily prison population was 6,029 last year, a rise of under 0.5% from 1998 and slightly down from 1997's high of 6,084.

The total consisted of 4,205 adult prisoners, 1,012 remand prisoners, 56 female and 692 sentenced young offenders. The number of remand prisoners was up 8% on 1998's total.

The number of sentenced adults was down 2% from the previous year and the total of sentenced young offenders fell by 3%. There were 19 young offenders serving life sentences – two more than in 1998.

There was a 6% rise in the number of adults sentenced to life, from 500 to 538. Adults serving less than six months were down by 13%, from 530 to 460.

A total of 8,565 fine defaulters were jailed last year, 9% fewer than the previous year.

There was a decrease of 8% in male fine defaulters, from 8,676 to 7,939, following a drop of 13% the previous year. The number of female defaulters was also down, by 20% from 783 to 626, after the total had risen by 6% in 1998.

Just over 20,000 breaches of discipline occurred in Scottish jails last year. Of these, nearly a third involved disobeying orders, 14% concerned with drugs and 8% arose from threatening, abusive or insulting words or deeds.

More than a third of punishments for the breaches took the form of forfeiture of privileges. Days were added to sentences in 18% of cases and earnings were stopped or cut in 27% of cases.

THE SCOTSMAN

Governors criticise jail privatisation

Tanya Thompson 4

SCOTLAND'S prison governors launched an unprecedented attack yesterday on plans to privatise a third of the country's jails.

It follows a leaked memo, reported in *The Scotsman* last week, which revealed that the chief executive of the Scottish Prison Service (SPS) believes 30 per cent of prisons should be run by the private sector.

The controversial move could result in at least two more private prisons in Scotland, in addition to HMP Kilmarnock, which is run by a US firm.

Dan Gunn, the chairman of the Scottish Prison Governors and Managers Branch, said: "We firmly believe that the provision of custodial services in Scotland is the legitimate business of the public sector and should remain so."

Mr Gunn, the governor of Polmont Young Offenders' Institution, said: "There is a question mark about the profit motive of running prisons privately.

"We want to give prisoners the opportunity to change. A recent report questioned the extent to which rehabilitation and change is available for prisoners in the private sector."

Mr Gunn added: "State-run prisons are open to scrutiny by the public and the media.

"The impression we get is that privatised prisons are not as open and not willing to subject themselves to public assessment and accountability."

First Minister Henry McLeish was opposed to private prisons before the 1997 general election. Jack Straw described them as "morally repugnant".

The proposals could result in at least 2,000 inmates being held in private prisons.

Kilmarnock Prison has been much criticised since it opened in March last year. The prison, run by Premier Prison Services, faced hefty fines for failing to deliver standards set down by the SPS.

It was reported following concerns about the number of violent attacks among prisoners and the level of drug use.

The institution was also at the centre of a political row after managers refused to reveal how much it cost to run.

Meanwhile, a report by Clive Fairweather, Scotland's Chief Inspector of Prisons, found 91 per cent of Kilmarnock's staff had not worked in a prison before.

Fines totalling more than £1.6 million have already been imposed on four privately run prisons in England which failed to meet requirements laid down by the Home Office.

In the memo to governors and senior members of staff, Tony Cameron, the chief executive of the SPS, set out his vision for the future of the service which he hopes will consist of a "mixed economy of public and private service providers".

Privatisation is the biggest issue facing the SPS.

In July, prison officers walked out of a meeting with the chief executive when union rights and private prisons were raised. Morale has reached an all-time low following the loss of 400 jobs from the service and the closure of four jails.

The unions have been on a collision course with management since the decision last year to take £13 million from the prison budget as part of cost-cutting by the executive.

Prison officers threatened strike action for the second time in their history earlier this year when relations between staff and management broke down.

Last night, a spokeswoman for the SPS said it would be inappropriate to comment on privatisation plans before ministers had made a final decision.

Prisons

2

13 NOV 2000

14

JH/00/34/M

The Scottish Parliament

JUSTICE AND HOME AFFAIRS COMMITTEE

MINUTES

34th Meeting, 2000 (Session 1)

Monday 20 November 2000

Present:

Scott Barrie
Michael Matheson
Pauline McNeill
Euan Robson
Phil Gallie
Mrs Lyndsay McIntosh
Alasdair Morgan (Convener)

Apologies were received from Christine Grahame, Gordon Jackson and Maureen Macmillan.

The meeting opened at 2.04 pm.

1. **Item in private**: The Committee decided to take item 6 in private.

2. **Restorative Justice:** The Committee took evidence on the report by the Scottish Consortium on Crime and Criminal Justice, *Rethinking Criminal Justice in Scotland*, from—

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

3. **Subordinate Legislation:** The Committee considered the draft Scotland Act 1998 (Cross-Border Public Authorities) (Adaptation of Functions etc.) (No.2) Order 2000 and agreed that it had no comment to make.

4. **European Documents:** The Committee considered 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.

The Committee agreed to defer detailed consideration of these documents until its next meeting and to seek further information on other European documents which have been sent recently to the Committee by the European Committee for information. It also agreed that the Convener would write to the Minister for Justice on improving Parliamentary scrutiny of European documents with significant implications for the Scottish justice system.

5. **Visit to HMP Barlinnie:** The Committee considered a draft letter to the Minister for Justice. Subject to four amendments, the letter was agreed to.

6. **Proposed Protection from Abuse Bill (in private):** The Committee considered and agreed to a revised draft report.

The meeting closed at 4.19 pm.

Andrew Mylne, Clerk to the Committee