The Committee will meet at 10.00 am in the Chamber, Assembly Hall, the Mound, Edinburgh.

1. **Declaration of Interests:** The Convener will invite Paul Martin to declare any relevant interests.

2. **Convention Rights (Compliance) (Scotland) Bill (in private):** The Committee will consider possible lines of questioning on the general principles of the Bill at Stage 1.

3. **Items in Private:** The Committee will decide whether to consider the format and content of its Stage 1 report on the general principles of the Convention Rights (Compliance) (Scotland) Bill in private at its meeting on 14 February, and whether to consider item 6 in private.

4. **Subordinate Legislation:** Iain Gray (Deputy Minister for Justice) to move—

   S1M-1561 Mr Jim Wallace: The Advice and Assistance (Assistance by Way of Representation) (Scotland) (Amendment) (No.2) Regulations 2001—That the Justice 1 Committee recommends that the draft Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment (No.2) Regulations 2001 be approved;

   S1M-1560 Mr Jim Wallace: The Legal Aid (Scotland) Act 1986 Amendment Regulations 2001—That the Justice 1 Committee recommends that the draft Legal Aid (Scotland) Act 1986 Amendment Regulations 2001 be approved.

5. **Convention Rights (Compliance) (Scotland) Bill:** The Committee will take evidence on the general principles of the Bill at Stage 1 from—

   Ian S Smart, Vice Convener of the Legal Aid Committee, Michael McSherry, Member of the Criminal Law Committee, Michael Clancy, Director, and Anne Keenan, Deputy Director of the Law Society of Scotland;
Professor Gane of the University of Aberdeen.

6. **Increasing the Effectiveness of Committees**: The Committee will consider the Conveners’ Liaison Group paper “Increasing the effectiveness of Committees”.

Lynn Tullis  
Clerk to the Committee, Tel 85246

The following papers are attached for this meeting:

**Item 2**  
Note by the Clerk *(private)* – TO FOLLOW  
J1/01/3/7

**Item 4**  
Note by the Clerk (SSI attached)  
J1/01/3/1

Note by the Clerk (SSI attached)  
J1/01/3/2

**Item 5**  
Written submissions from:  
The Law Society of Scotland  
J1/01/3/3

Professor Gane – TO FOLLOW  
J1/01/3/4

Care for Scotland  
J1/01/3/5

Letter from the Convener of the Equal Opportunities Committee  
J1/01/3/6

**Item 6**  
Note by the Clerk *(private)*  
J1/01/3/8

**Papers not circulated:**

**Item 5:**  
Members may wish to refer to the Bill and accompanying documents. These are available at the following location on Scottish Parliament’s website:  
http://www.scottish.parliament.uk/parl_bus/legis.html#25 or from Document Supply.
I attach the following papers:

Agenda Item 2
Note by Clerk (Private) J1/01/3/7

Agenda item 5
Supplementary evidence from the Scottish Executive J1/01/3/9

Agenda item 5
Evidence from Mr David Leighton J1/01/3/10

Agenda item 5
Evidence from the Faculty of Advocates (private) J1/01/3/11

Agenda item 5
Evidence from the Equality Network J1/01/3/12

Agenda item 5
Evidence from Professor Gane TO FOLLOW J1/01/3/4

Clerk to the Committee
1 February 2001
JUSTICE 1 COMMITTEE

Papers for information circulated for the 3rd meeting, 2001

Press cuttings
Minutes of the 2nd Meeting, 2001

Papers not circulated:

A copy of each of the following documents are available to consult from the Clerks in Room 3.7 in Committee Chambers: Scottish Executive Central Research Unit, Legal Studies, Research Findings No.31: An Evaluation of Guardianship under the Mental Health (Scotland) Act 1984; and Legal Studies, Research Findings No.30: An Evaluation of Section 118 of the Mental Health (Scotland) Act 1984, and a Review of Literature Relating to Mental Health Legislation.
The Terrorism Act 2000 ("the 2000 Act") re-enacts and extends the proscription regime which currently exists under the Prevention of Terrorism (Temporary Provisions) Act 1989 and the Northern Ireland (Emergency Provisions) Act 1996. In accordance with the European Convention on Human Rights, the 2000 Act introduces a new route of appeal for a person affected by an organisation's proscription under that regime. The person can first appeal to the Secretary of State for deproscription. If the Secretary for State refuses to deproscribe the organisation, the person can appeal to the Proscribed Organisation Appeal Commission (POAC).

These Regulations add proceedings before the POAC (under the 2000 Act) to Part 1 of Schedule 2 to the Legal Aid (Scotland) Act 1986 (which sets out those civil proceedings for which civil legal aid is available) to make civil legal aid available to individuals who appeal to the POAC.

These Regulations are in line with the 2000 Act’s policy of creating an overall terrorist regime for the UK by creating similar legal aid proceedings for Scotland such as already exist in England, Wales and Northern Ireland.

These Regulations also remove a reference to the Restrictive Practices Court (RPC) from Part 1 of Schedule 2 to the Legal Aid (Scotland) Aid 1986. The Competition Act 1998 reformed competition law which repealed the statutory provisions which established the RPC thus ending the RPC’s existence. All cases referred to the RPC have now been dealt with, and all functions have been transferred or are dealt with by other organisations.

The Regulations also update a reference to the EEC Treaty in Paragraph 2 to Part 1 to Schedule 2 of the Legal Aid (Scotland) Act 1986.

The Subordinate Legislation Committee considered the instrument at its meeting on 16 January 2001 and agreed that no points arose.

Procedure

The instrument was laid on 8 January 2001 and is subject to annulment under the Parliament’s standing orders until 19 February 2001.

Under Rule 10.6, the draft Regulations being subject to affirmative resolution, it is for the lead committee to recommend to the Parliament whether the instrument should come into force. The Minister for Justice has, by motion S1M-1560 (set out in the Agenda), proposed that the Committee recommends the approval of the Regulations. The Deputy Minister will attend to speak to and move the motion.
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 reporting deadline, the text of the Committee’s report will be circulated for approval by e-mail.

23 January 2001
PART 1 - PRISONERS AND PAROLE

Section 1 (Release of Life Prisoners)

In considering these provisions of the Bill, it is important to note that there are a number of categories of life prisoners:

(a) Adult mandatory life prisoners

Those who committed murder when over the age of 18 and who are sentenced to life imprisonment are known as adult mandatory life prisoners (“AMLPs”). The statutory framework regarding their release on life licence is governed by two separate Acts of Parliament; the Prisons (Scotland) Act 1989 (“the 1989 Act”) and the Prisoners and Criminal Proceedings (Scotland) Act 1993 (“the 1993 Act”). The sentencing provisions of the 1989 Act were repealed by the 1993 Act but prisoners sentenced before the 1993 Act came into force (1 October 1993) are still covered by the 1989 Act provisions.

Under the current law, the power to release an AMLP is entirely at the discretion of the Scottish Ministers. An advisory body known as the Preliminary Review Committee (“PRC”) recommends the date of the first parole hearing to review the suitability of an AMLP for release on life licence. Where the PRC considers it appropriate, and the Scottish Ministers agree, the case will be considered by the Parole Board which will carry out a review of an AMLP to assess the suitability for release of the prisoner on life licence. The Parole Board will consider a risk assessment as to the danger which the prisoner presents to the public if he or she were to be released. The Scottish Ministers are not obliged to follow the recommendation of the Parole Board but would in situations where there is a recommendation for release, consult the Lord Justice General, Lord Justice Clerk and if available, the trial judge to ascertain whether or not the requirements of justice and deterrence will have been satisfied on the AMLP’s release. However, the Scottish Ministers can ultimately reject the recommendation of the Parole Board and the advice of the judiciary, when determining whether release is appropriate.

(b) Designated Life Prisoners

A designated life prisoner is:

(i) a person convicted of a crime other than murder where the court has used its discretion to sentence to life or
(ii) one who is convicted of murder whilst under the age of 18 at the time of commission of the crime. The 1993 Act specifies the conditions for sentencing and release of such prisoners.
At present, the court can designate a period, the “designated part” stipulating the period to be served as punishment and deterrence before the prisoner can be released. If the court does not designate such a part, it must give reasons. Case law has established that the court must set a designated part unless it considers that the appropriate “punitive period” is the rest of the prisoner’s natural life.

After the expiry of the designated part (and thereafter at two yearly intervals) the prisoner is entitled under the 1993 Act to require the Scottish Ministers to bring his case before the Parole Board. The Parole Board when considering such an application is constituted as a Designated Life Tribunal (“DLT”). If the Parole Board sitting as a DLT recommends the release of the prisoner on life licence, the Scottish Ministers are bound in these cases to follow that recommendation.

It can be seen therefore that under current law, the Parole Board operates in an advisory capacity for the release of AMLPs but in a directory capacity for the release of discretionary life prisoners.

**Compliance with the European Convention on Human Rights (“ECHR”)**

The case law of the European Court of Human Rights indicates a difference between an AMLP and a discretionary life prisoner. Indeterminate life sentences may be justified on one of two grounds, namely for punitive reasons or for the protection of the public. Mandatory life sentences are generally justified on the basis of the punitive element, the gravity of the offence being proportionate to the sentence imposed.

The discretionary life prisoner is sentenced partly on the basis of the seriousness of the offence and the need for punishment as well as on the grounds of protection of the public.

Article 5(1) of the ECHR provides that “everyone has the right to liberty and security of person”. It goes on to state that no-one should be deprived of his liberty except in certain specified cases, one of which is the lawful detention of a person after conviction by a competent court.

Article 5(4) further provides that everyone who is deprived of their liberty by arrest or detention shall be entitled to take proceedings to bring the lawfulness of the detention before a court for review and where appropriate, release.

In Wynne -v- UK [1994] it was held that Article 5(4) does not entitle an AMLP to bring his or her case before a court for review to determine the continuing legality of the detention.

In that case, the European Court of Human Rights held that the original court and appeals system in cases of mandatory life sentences satisfies the requirements of Article 5(4). There is no additional right to challenge the lawfulness or otherwise of continued detention.

In terms of ECHR case law, therefore, the present arrangements for determining the release of an AMLP would appear to be compliant with the Convention. However, in practice, in considering whether such prisoners are suitable for release, as has been indicated above the discretion lies solely with the Scottish Ministers who will have regard to the risk that the person poses to the public as well as to issues of punishment and deterrence. In effect, therefore, the continued legality of the sentence is under review but not by a court but rather by the Scottish Ministers.

The proposals contained in the Bill acknowledge this fact and seek to adopt for AMLPs the same system of assessment and review as is available for discretionary life prisoners. The mandatory life sentence would then be split into a punishment part and a risk part. The punishment part
would be appealable. On expiry of the punishment part the AMLP would have the same right to apply to the Parole Board thereafter for review as discretionary life prisoners currently have.

The Society therefore welcomes these provisions as they introduce greater clarity for prisoners as to their eventual release whilst allowing the Prison Service to focus the rehabilitation work within clearer timeframes. At the same time the public interest in punishment and deterrence are met by the imposition of a specified period of imprisonment which must be served before a risk assessment could be carried out and considered.

Section 1 and Part I of the Schedule (Transitional Provisions)

In the Society’s view, these provisions seem fair and sensible proposals and will enable the position of those sentenced to indeterminate periods prior to commencement of this measure to be placed on the same footing as those sentenced after the implementation of this Bill.

PART 2 - CONSTITUTION OF THE PAROLE BOARD FOR SCOTLAND

Section 5 (Appointment and Removal of Parole Board Members)

Article 5(4) of the ECHR states “everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful”. It is essential therefore that all decisions in relation to the release of a prisoner from an indeterminate sentence are taken by a court-like body.

Under the new provisions created by this Bill, the Parole Board will fulfil this function for both mandatory and discretionary life prisoners. The Parole Board in making these determinations will have to be an independent and impartial tribunal in terms of Article 6 of the ECHR.

The body which is responsible for reviewing the legality of the continued detention must therefore be (1) independent of the Executive and objectively impartial; and (2) must be able to direct the release of the prisoner if it considers that the continued detention is unlawful.

The Parole Board when sitting as a DLT is currently able to fulfil one of these two requirements. It can order the release of discretionary life prisoners. As has been indicated above, the Scottish Ministers are bound to comply with the recommendations of the DLT. The Parole Board currently performs an advisory function in regard to mandatory life prisoners but this would change to mirror their role with discretionary life prisoners, if the provisions of Part I are applied.

If the Board is to be regarded as an independent and impartial tribunal for the purposes of Article 6 of the Convention, then there must be transparency in the appointments system. Under the current proposals, the terms of appointment would be for no less than 6 and no more than 7 years. Reappointment could only be made once and only after a gap in service of 6 years. The Chairman would be required to ensure that each member works for at least 20 hours per year and a Parole Board member could be removed from office for inability and neglect of duty or misbehaviour but only by an independent tribunal. These provisions mirror the current arrangements which have recently been put in place for part-time sheriffs and would ensure the necessary security of tenure to enable the Parole Board to be described as independent.

There are transitional arrangements in respect of new members and existing members which appear unobjectionable.
In general terms, the Society welcomes these provisions as they introduce transparency, independence and compliance with the ECHR.

**PART 3 – LEGAL AID**

**Section 6  (Extension of Advice and Assistance and Civil Legal Aid under the Legal Aid (Scotland) Act 1986)**

There are three types of legal aid governed by the Legal Aid (Scotland) Act 1986 to which this section applies. The section applies to:-

a) Advice and Assistance;
b) Assistance by Way of Representation; and
c) Civil Legal Aid.

The section only applies to civil cases.

Under the 1986 Act the courts in which civil legal aid is available are limited and these provisions create the power to make civil legal aid or ABWOR available where there is, or may be, an ECHR requirement. In order to do this, the definition of the term “court or tribunal” needs to be extended to include any proceedings before a court or tribunal which determine a person’s “civil rights and obligations”. The provision of section 6 will enable the Legal Aid (Scotland) Act 1986 to be in compliance with the European Convention on Human Rights (ECHR), Article 6(3).

Under Article 6(3) of the ECHR free legal aid in criminal proceedings is required. However there is no automatic provision of legal aid in civil proceedings.

The European Court of Human Rights has decided that a failure to provide legal aid in civil cases has amounted to a breach of Article 6(1). In the case of *Airey v Ireland* [1979] the applicant complained that the unavailability of legal aid for judicial separation proceedings amounted to a violation of her right to access to a court under Article 6(1).

The extension of Advice and Assistance in civil legal aid to all courts, tribunals or statutory inquiries, would include the Tribunals identified in the Annual Report of the Scottish Committee of the Council on Tribunals for 1999-2000 an abstract of which forms the appendix to this paper.

This is a difficult area to interpret and the list is given for illustrative purposes only.

**Section 7  (Fixed Payments for Criminal Legal Assistance: Exceptional Cases)**

Section 33(3A) of the Legal Aid (Scotland) Act 1986 provides for a system of fixed payments in summary criminal proceedings where legal aid has been granted. The fixed payments scheme has applied in Scotland in terms of the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999 which came into effect on 1st April 1999. Under this scheme, a solicitor representing a client in a summary case in either the Sheriff Court of the District Court receives a fixed payment covering his or her fee and certain prescribed outlays.

The fixed payments scheme allows a solicitor to claim for Sheriff Court work £500 from the Scottish Legal Aid Board for acting for an accused in a summary criminal matter. This covers all work up to and including the first 30 minutes of trial. Additional fees can be claimed if a trial lasts
for more than 30 minutes or is particularly lengthy. There is an extra fee of £50 paid if the case occurs in a court in a substantially rural area. A similar scheme of fixed payments at a lower rate applies in the District Court.

The Society made representations to the then Scottish Office about the issue of exceptional cases during the consultation which preceded the introduction of the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations. In particular, the Society drew attention to the need for further exclusions from the fixed payments scheme including:-

a) trials where the accused was remanded in custody;
b) proceedings where any single charge involves a theoretical maximum period of imprisonment of more than six months, leaving out of account any bail aggravations or where there are five or more prosecution witnesses, or where section 16 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 or release on licence provisions apply;
c) cases involving sex offenders, child witnesses or vulnerable witnesses;
d) cases involving foreign or sign language interpretation; and
e) cases where paragraph 14(b) of 14(d) of the Criminal Legal Aid (Scotland) Regulations 1996 apply.

These types of cases can be exceptionally complex and lengthy and in the context of fixed payment regulation, could preclude a solicitor from being paid for work which he or she has properly undertaken in order to ensure that the accused person is given an adequate defence. Article 6(3)(c) of the ECHR requires that everyone charged with a criminal offence who has insufficient means to pay for legal assistance has the right to free legal assistance when the rights of justice so require. There is ECHR case law which requires that these rights should be effective, not merely theoretical. In a number of cases in the summary criminal courts, the fixed payments scheme has been challenged on the basis that the payments which can be made result in the accused not being effectively represented, thereby causing a breach of Article 6.

The Society is aware of the case of Procurator Fiscal, Fort William v. Norman McLean and Peter McLean. In that case, the court considered that in general the fixed payments scheme was compatible with the ECHR, but that it could give rise to cases where there was a breach of Article 6(3)(c). Effectively the court stated that if a breach occurred it would occur in circumstances where an accused person could point to the history of the case against him or her and state that he or she was so disadvantaged that the defence was not effective.

The McLean case is currently under Appeal to the Judicial Committee of the Privy Council.

In the Society’s view, the proposed provisions of section 6 do provide for compliance of the fixed payments scheme with the ECHR. In order to ensure that cases where an accused person would be prejudiced by the fixed payments regime these cases would revert to a time and line payment basis which would take account of the exceptional nature of the case.

Section 8 (Criminal Legal Assistance: Retrospective Revision of Fixed Payments Regulations)

The Society approves of this provision which it considers to be in compliance with the Convention and which will resolve difficulties which have arisen from cases which have already been dealt with.

Section 9 (Employment of Solicitors by Scottish Legal Aid Board: Further Provisions)
This provision is intended to ensure that there will be no accused person in Scotland who will be unrepresented. The Society has been in negotiation with the Scottish Executive and the Scottish Legal Aid Board about the creation of a “safety net” which would be operated through local Faculties or Associations of Solicitors in Scotland, but there may occur circumstances where the safety net cannot operate – for example, where there is a conflict of interest or for other reasons. The Society is of the view that it is a wise precaution to allow the Board the capacity to employ solicitors to undertake this type of work on those rare occasions where a voluntary scheme will not function.

PART 6 – POWER TO MAKE REMEDIAL ORDERS

Section 12 (Remedial Orders)

This provision grants a new power to Scottish Ministers which will extend the range of occasions when they can make Remedial Orders to remedy actual, or perceived, incompatibilities with the ECHR. The Human Rights Act 1998 allows UK Ministers to make Remedial Orders by way of subordinate legislation to remedy defects in legislation which is incompatible with the Convention. The Scotland Act 1998, section 107, allows UK Ministers the power to make Remedial Orders in consequence of any act of the Scottish Parliament or Scottish subordinate legislation or any act of the Scottish Ministers where there is incompatibility. In view of the procedural provisions in section 13, it may be appropriate for there to be further and wider consultation similar to that employed for other items of legislation before making Remedial Orders.
APPENDIX A

A. Tribunals under the direct supervision of the Scottish Committee of the Council on Tribunals

Agriculture:
Agricultural Arbiters, appointed otherwise than by agreement under s.61 of, or schedule 7 to the Agricultural Holdings (Scotland) Act 1991.

Total Number of cases considered in 1999: 163

Banking:
Banking Appeal Tribunal under s.28 of the Banking Act 1987.

Total number of cases considered in 1999: 0

Betting Levy:
Betting Levy Appeal Tribunal for Scotland under s.29 of the Betting, Gaming and Lotteries Act 1963.

Total number of cases considered in 1999: 0

Crofting:
Crofters Commission under s.1 of the Crofters (Scotland) Act 1993.

Total number of cases considered in 1999: 950

Dairy Produce Quotas:
Dairy Produce Quota Tribunal for Scotland under schedule 6 to the Dairy Produce Quota Regulations 1997.

Total number of cases considered in 1999: 0

Education:
Independent Schools Tribunal under s.100 and s.103 of, and schedule 2 to the Education (Scotland) Act 1980.

Total number of cases considered in 1999: 0

Education Appeal Committees under s.280 of the Education (Scotland) Act 1980.

Total number of cases considered in 1999: 572

Food:
Meat Hygiene Appeal Tribunal under s.26 of the Food Safety Act 1990.

Total number of cases considered in 1999: 0

Forestry:
Forestry Committees appointed in Scotland for the purposes of the Forestry Act 1967.

Total number of cases considered in 1999: 0

Local Taxation:

Non-domestic: Total number of cases considered in 1999: 8117
Council Tax: Total number of cases considered in 1999: 2684

Misuse of Drugs:
Misuse of Drugs Tribunal for Scotland under part 1 of schedule 3 to the Misuse of Drugs Act 1971.

Total number of cases considered in 1999: 0

National Health Service:
Discipline Committees of Health Boards or a Joint Committee of Health Boards being Committees in accordance with regulations made under the National Health Service (Scotland) Act 1978.

Total number of cases considered in 1999: 52

National Health Service Tribunal under s.29 of the National Health Service (Scotland) Act 1978.

Total number of cases considered in 1999: 2

National Appeal Panel under schedule 4 of the National Health Service (Pharmaceutical Services)(Scotland) Regulations 1995.

Total number of cases considered in 1999: 16

Pensions:
Pensions Appeal Tribunals for Scotland under s.8 of the War Pensions (Administrative Provisions) Act 1919 or Pensions Appeal Tribunal Act 1943.

**Total number of cases considered in 1999: 529**

Police Pensions Tribunals under s.1 of the Police Pensions Act 1976.

**Total number of cases considered in 1999: 0**

*Rents:* Rent Assessment Committees under schedule 4 to the Rent (Scotland) Act 1984.

**Total number of cases considered in 1999: 272**

*Social Work:*

Children's Hearings under the Children (Scotland) Act 1995

**Total number of cases considered in 1999: 80141**

Residential and Other Establishments Registrations under schedule 5 to the Social Work (Scotland) Act 1968.

**Total number of cases considered in 1999: 5**

*Taxi Fares:*

Traffic Commissioners under the Public Passenger Vehicles Act 1981 for functions concerning taxi fares under s.18 of the Civic Government (Scotland) Act 1982.

**Total number of cases considered in 1999: 5**

*VAT and Duties:*

VAT and Duties Tribunal for Scotland under schedule 12 to the Value Added Tax Act 1994.

**Total number of cases considered in 1999: 850**

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**B. UK Tribunals supervised in Scotland by the Scottish Committee on behalf of the Council on Tribunals**

*Aviation:*

The Civil Aviation Authority in accordance with s.2 of the Civil Aviation Act 1982.

**Total number of cases considered in 1999: 0**

*Building Societies:*

Building Societies Appeal Tribunal under s.47 of the Building Societies Act 1986.

**Total number of cases considered in 1999: 0**

*Copyright:*

Copyright Tribunal under s.145 of the Copyright Designs and Patents Act 1988.

**Total number of cases considered in 1999: 0**

*Criminal Injuries Compensation:*

Adjudicators appointed under s.5 of the Criminal Injuries Compensation Act 1995.

**Total number of cases considered in 1999: 12580**

*Fair Trading:*

The Director General of Fair Trading under schedule 1 to the Fair Trading Act 1973.

**Total number of cases considered in 1999: 0**

*Financial Services:*

Financial Services Tribunal under s.96 of the Financial Services Act 1996.

**Total number of cases considered in 1999: 0**

*Friendly Societies:*


**Total number of cases considered in 1999: 0**

*Insolvency Practitioner:*

Insolvency Practitioners Tribunal under s.396 of the Insolvency Act 1986.

**Total number of cases considered in 1999: 0**

*National Savings Bank and National Savings Stock Register:*

An Adjudicator under s.84 of the Friendly Societies Act 1992.

**Total number of cases considered in 1999: 0**
**Patents, Designs, Trademarks and Service Marks:**
The Comptroller General under s.74 (4) (c) of the Deregulating and Contracting Out Act 1994.

**Total number of cases considered in 1999:** 0

**Reserve Forces:**
Reserve Forces Appeal Tribunal under part IX of the Reserve Forces Act 1996.

**Total number of cases considered in 1999:** 0

**Revenue:**
General Commissioners of Income Tax under s.2 of the Taxes and Management Act 1970.

**Total number of cases considered in 1999:** 94814

Special Commissioners of Income Tax under s.4 of the Taxes and Management Act 1970.

**Total number of cases considered in 1999:** 326

**Road Traffic:**
Scottish Parking Appeals Service under s.73 of the Road Traffic Act 1991.

**Total number of cases considered in 1999:** 617


**Total number of cases considered in 1999:** Not Available

**Social Security:**
Unified Appeal Tribunals under s.4 of the Social Security Act 1998.

**Total number of cases considered in 1999:** 379568 (All UK Figures)


**Total number of cases considered in 1999:** 14649 (All UK Figures)


**Total number of cases considered in 1999:** 264 (All UK Figures)

**Transport:**
Transport Tribunal under schedule 4 of the Transport Act 1985.

**Total number of cases considered in 1999:** 14
Convention Rights (Compliance) (Scotland) Bill

Submission from CARE (Christian Action Research Education)

Introduction

CARE for Scotland welcomes the opportunity to submit evidence in relation to the Convention Rights (Compliance) (Scotland) Bill. We do not comment upon the detailed proposals contained in the Bill, but rather limit our comments here to the principles underlying the Bill and the Scottish Executive’s general approach to marriage.

The Convention and National Morality

The European Convention of Human Rights (ECHR) established a number of basic rights that the citizens of Europe can expect to receive from government. However, most of these rights are not absolute, but rather are qualified. In relation to national morality and health among other areas these rights are qualified. Moreover, in all cases a balance of rights needs to be struck between a right of one individual and a right of another person, within the context of the wider interests of society. We note that Article 8 of the ECHR states:

Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder and crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

CARE for Scotland is concerned that the Scottish Executive is failing to prioritise its responsibility to protect the public morals of Scotland. Through a number of statements and measures the Scottish Executive has sought to change the public morals of Scotland. Moreover, some of these measures are likely to be detrimental to the health of many people. We believe that under the ECHR the Executive has the discretion to introduce or retain national legislation to protect public morality and health. We regret that the Executive seems to be reluctant to use its powers in this way, but rather (at least on occasions) adopts an absolutist and individualistic interpretation of the ECHR. This would appear to be the case in relation to the Convention Rights (Compliance) (Scotland) Bill.
Marriage

CARE for Scotland is extremely concerned by the Scottish Executive’s general approach to marriage and public morality. The Executive’s approach appears to be that marriage is indistinguishable morally from any other form of relationship. The Executive argues that it should not seek to establish a hierarchy of relationships, but interprets this to mean that it should do nothing explicit to encourage or support marriage. This despite the fact that research evidence suggests, and many Ministers and MSPs know from their own personal experience, that marriage is the most fulfilling and stable relationship for adults and undoubtedly the best context within which to raise children. The attached briefing outlines the economic and social benefits of marriage. This briefing was submitted to the Scottish Executive as part of CARE for Scotland’s response to the ‘Parents and Children’ White Paper.

CARE for Scotland believes that in a number of measures the Scottish Executive has sought to change public morals and has failed to recognise adequately the unique and important place of marriage in our society. Moreover, on at least one occasion the Executive has also initiated a measure that is likely to be detrimental to public health and on another occasion the Executive’s failure to act has raised concerns about the effects of a proposal if implemented on the health and morals of our young people. These are:

The Executive’s proposal (subsequently confirmed by the Parliament) to allow Westminster to legislate for Scotland on lowering the homosexual age of consent.
The repeal of Section 2a.
The failure to recognise the importance of marriage on the face of either the Standards in Scotland’s Schools Act, 2000 or the Ethical Standards in Public Life etc. (Scotland) Act, 2000.
The funding of the Healthy Respect project in Lothian which has no moral framework and is likely to encourage early teenage sexual activity leading to consequent health and emotional problems.
The striking absence of references to marriage in the proposed sex education guidance issued for consultation by Learning and Teaching Scotland, despite the conclusions of the Sex Education Working Group and assurances by Ministers that marriage would be recognised at the time of the repeal of Section 2a.
The Executive’s proposals in the Parents and Children White Paper to make divorce easier and its consideration of abolishing adultery as a ground for divorce.
The Executive’s ignorance of Tayside and Borders Health Boards and Lothian University Hospitals NHS Trust’s consideration of making the morning-after-pill available through school nurses. These proposals, if implemented, are likely to encourage early sexual activity with consequent adverse health effects, both in relation to sexually transmitted infections and cervical cancer in the long-term.
The proposal contained in the Convention Rights (Compliance) (Scotland) Bill to legalise homosexual group sex.
We believe that the Scottish Executive's general approach of not using the qualification on the right to a private life under Article 8 of the ECHR is mistaken. We would urge the Parliament to protect public health and morals where the Scottish Executive fails to do so. Notwithstanding these comments, CARE for Scotland does not intend to oppose the specific proposal to legalise homosexual group sex contained in the Convention Rights (Compliance) (Scotland) Bill.

CARE for Scotland (Public Policy)
January 2001
A BRIEFING FROM CARE
FOR THE SCOTTISH EXECUTIVE
ON
THE ECONOMIC AND SOCIAL ROLE OF MARRIAGE

1. CARE has reviewed the research literature on the differences between married adult relationships and others and the impact this difference has for the partners and their children, as well as the wider society. Our findings are published in our report The Merits of Marriage, which is available from CARE. We have also completed a review of the research on the costs of family breakdown. This briefing paper draws on the work of these two projects.

Introduction

2. The role and place of marriage is at the heart of the current family debate. Whilst the Government want to "strengthen marriage" through their proposals in Supporting Families, it is clear from the successive Budgets that marriage is not supported explicitly through the tax and benefits systems. Yet the research shows that marriage brings many social and economic benefits to both society and individuals that other adult relationships do not.

3. Marriage is a publicly made life-long commitment between a man and a woman. This permanent relationship provides the ideal context for the natural desire of men and women to find a companion. It is also the place where sexual expression and fulfilment are best achieved and protected by the security and stability that is provided by the mutual commitment of each partner. In general, families underpinned by lifelong committed marriages provide the most stable and enduring environment in which children can grow, physically, mentally and emotionally. A child's family also provides the model for their own behaviour when they themselves find partners and have children.

4. Marriage is still popular. In 1996-7, 72% of all families in the UK were headed by a married couple, either with or without children.\(^1\) However, CARE believes that the importance of marriage for society should not be taken for granted. Marriage in general needs to be strengthened and encouraged to "help more marriages succeed"\(^2\) - not only during the difficult times which occur in every relationship, but throughout their marriage.

The Role of Marriage in Society

5. Research suggests that society as a whole should have a strong interest in the stability, cohesiveness and financial security of the family. Sadly, "the benefits provided by secure marriage tend to be invisible and taken for granted. They become apparent when relationships are insecure or break down."\(^3\) At present, at least £5 billion is spent by the Exchequer on picking up the pieces from broken marriages compared to just £3 million spent on marriage support services.\(^4\) Yet, it is becoming increasingly apparent that the widespread and pervasive effect of years of family and marriage breakdown is having significant

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\(^1\) Social Trends 28, Central Statistical Office, 1998
\(^4\) Ibid, p8
Aside from the negative effects of family breakdown, which have been raised many times in debates in recent years, there many positive reasons to support marriage. For instance, marriage is good for the economy and employers - married individuals work harder, earn more and save more. They are more likely to want to invest in their future and employers benefit from contented marriages. George Akerlof, an economist, has found that married men: "have higher wages, are more likely to be in the labour force, are less likely to be unemployed because they had quit their job, have lower unemployment rates, are more likely to be full-time, and are less likely to be part-year workers. In each and every dimension the married men have stronger labour market attachment than the unmarried."  

A survey of over 8,000 respondents in the USA confirms that marital distress is directly linked with work productivity. It found that the work loss associated with marital problems was costing approximately $6.8 billion per year "...family interventions targeted at the prevention of marital problems may result in important psycho-social and economic benefits for business and society" and "...marital intervention could be expected to recoup all of the productivity, a benefit that far outweighs the costs of such an intervention."

Research suggests that marriages help build stronger, more stable and less violent communities. It is possible that the tendency away from marriage may be a cause of some sections of society becoming isolated from the mainstream. As one commentator puts it: "The decline in marriage has been a disaster for fatherhood, and the attenuation of fatherhood has been a catastrophe for civic safety."

Other research has shown that married men are less often the victims or perpetrators of crimes: "Married men are less likely than unmarried men to commit crimes as well as to be the victims. The probability of imprisonment is much larger for the single than for the married. Single men have almost six times the probability of being incarcerated as married men, and the multiple relative to divorce is almost as large."

In the current debate on the family, marriages are generally viewed solely as a useful basis for raising children. However, marriages serve society in many ways beyond the 'child rearing phase'. Marriage also provides the most committed relationship within which to share the support and care for a wider group of people, such as the elderly, disabled or other members of the extended family. This commitment is less likely to be found in the looser ties of cohabitation. Furthermore, the main source of care in old age is in fact from a spouse. This creates greater risks of later institutionalisation for those who are not married.

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8 Ooms, Op cit, p9
9 The Invention of Permanent Poverty, Dennis N, IEA, 1997, p169
10 Akerlof, op cit, p296
The Importance of Marriage to the Welfare of Children

11. "Marriage, on average, is good for children economically, socially and psychologically....Marriage strengthens children’s claims to the economic resources, love and affection, nurturing and social capital of both parents. This includes access to both sets of extended families".11

12. It is widely recognised that marriage provides the most stable and enduring environment in which to raise children. In comparison to cohabiting relationships, where half of couples with children part within ten years, just one in eight of married parents with children part after ten years.12 After parental separation children are twice as likely to lose touch with their fathers if their parents had not married than if they had.13

13. In a speech, Patrick Tobin, representing the leading Independent schools, claimed that marital break-up was a more insidious threat than drugs or alcohol to the well-being of young people - "The broken home ranks higher than any other problem in explaining why pupils are struggling at school. If this is what it is like now, what is it going to be like in 10 to 20 years time?"14 He went on to say that although many pupils excelled in spite of the impact of marital breakdown, serious disciplinary problems were invariably traced back to broken homes or the stress of families about to break up.

The Importance of Marriage to the Welfare of Adults

14. Research shows that there is a clear link between marital status and personal well-being. "Numerous investigations, beginning decades ago attest that married people live longer and generally are more emotionally and physically healthy than the unmarried".15

15. Statistics show that married relationships tend to last longer than non-married relationships. For example, cohabiting couples are almost six times as likely to split up as those who are married.16 Marriage also exerts a strong influence on faithfulness within a relationship, with a lower proportion of those who are married reporting sexual affairs outside their relationship than those cohabiting.17

16. Differences in health between married and non-married relationships can be seen in studies of smoking, alcoholism, morbidity, mortality, abortions, suicides and general well-being. For example, physical aggression can occur in all types of intimate relationships, however research has consistently found that physical aggression is more common among cohabiting couples than married couples.18 In another report, 61% of married people said they were satisfied

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12 ESRC Research Centre on Micro-Social Change, reported in Daily Mail 25 June 1997
13 Fatherhood and Apple Pie, Family Policy Bulletin, Family Policy Studies Centre, November 1996,
14 Reported in The Times, 6 October 1998
18 Cohabiting and Marital Aggression: The Role of Social Isolation, Stets, J., Journal of Marriage and the Family, 53,
with life compared to 49% of cohabiting people and 47% of divorced people. Married men also have fewer accidents and are less likely to die of a wide range of diseases than their unmarried peer group. "In most countries divorced individuals have the highest mortality rate, followed by the widowed, those who have never married and finally the married."  

17. Women also appear safer when married: The US Department of Justice conducts a National Crime Victimisation Survey which produces some startling differences between married and non-married women; of all violent crimes against women by relatives or intimate partners between 1979 and 1987, about 65% were committed by either a boyfriend or ex-husband, while only 9% were committed by husbands. 

A Public Policy Response

18. Whilst general Government support for families is welcome, it is important for marriage to be upheld by policy initiatives as a distinctive and beneficial relationship for adults, children and society as a whole.

19. The above research shows that there is a definite public interest in supporting marriage because of, amongst many other reasons, the evidence of the economic cost of marriage breakdown. The aim of strengthening marriage should not just focus on reducing divorce, but rather on improving the quality and stability of marriages, and making marriage more rewarding to enter and remain within.

20. This may be achieved through a number of ways, including:
   • Removing financial disincentives for marriage and introducing incentives that are more supportive of marriage (eg through the tax and benefits legislation)
   • Promoting responsible, committed and involved fatherhood
   • Analysing every relevant area of Government policy to ensure that it strengthens marriage and providing information and public education about marriage
   • Mobilising religious and community support for marriage
   • Creating marriage-friendly work places
   • Portraying marriage positively through the media and using media as an outlet for marriage information, in particular normalising relationship skill training
   • Providing more Government funding for marriage preparation, on-going marriage support and crisis counselling
   • Improving basic marriage and divorce statistics and research

21. All of these measures must be underpinned by a sensitivity to the range of family circumstances in which people find themselves, whether by design or by default. However, if marriage is encouraged, valued and supported in distinctive ways, adults, children and society are likely to benefit and flourish.

CARE for Scotland (Public Policy), December 2000

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19 Economic and Social Research Council Briefing, reported in Bulletinplus, One Plus One, Autumn 1997


A BRIEFING FROM CARE
FOR THE SCOTTISH EXECUTIVE
ON
THE ECONOMIC AND SOCIAL ROLE OF MARRIAGE

1. CARE has reviewed the research literature on the differences between married adult relationships and others and the impact this difference has for the partners and their children, as well as the wider society. Our findings are published in our report *The Merits of Marriage*, which is available from CARE. We have also completed a review of the research on the costs of family breakdown. This briefing paper draws on the work of these two projects.

Introduction

2. The role and place of marriage is at the heart of the current family debate. Whilst the Government want to "strengthen marriage" through their proposals in *Supporting Families*, it is clear from the successive Budgets that marriage is not supported explicitly through the tax and benefits systems. **Yet the research shows that marriage brings many social and economic benefits to both society and individuals that other adult relationships do not.**

3. Marriage is a publicly made life-long commitment between a man and a woman. This permanent relationship provides the ideal context for the natural desire of men and women to find a companion. It is also the place where sexual expression and fulfilment are best achieved and protected by the security and stability that is provided by the mutual commitment of each partner. In general, families underpinned by lifelong committed marriages provide the most stable and enduring environment in which children can grow, physically, mentally and emotionally. A child’s family also provides the model for their own behaviour when they themselves find partners and have children.

4. Marriage is still popular. In 1996-7, **72% of all families in the UK were headed by a married couple, either with or without children**\(^1\) However, CARE believes that the importance of marriage for society should not be taken for granted. Marriage in general needs to be strengthened and encouraged to "help more marriages succeed"\(^2\) - not only during the difficult times which occur in every relationship, but throughout their marriage.

The Role of Marriage in Society

5. Research suggests that society as a whole should have a strong interest in the stability, cohesiveness and financial security of the family. Sadly, "the benefits provided by secure marriage tend to be invisible and taken for granted. They become apparent when relationships are insecure or break down."\(^3\) At present, at least £5 billion is spent by the Exchequer on picking up the pieces from broken marriages compared to just £3 million spent on marriage support services\(^4\). Yet, it is becoming increasingly apparent that the widespread and pervasive effect of years of family and marriage breakdown is having significant consequences on our whole society, not just on our children.

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Aside from the negative effects of family breakdown, which have been raised many times in debates in recent years, there many positive reasons to support marriage. For instance, marriage is good for the economy and employers - married individuals work harder, earn more and save more. They are more likely to want to invest in their future and employers benefit from contented marriages. George Akerlof, an economist, has found that married men: "have higher wages, are more likely to be in the labour force, are less likely to be unemployed because they had quit their job, have lower unemployment rates, are more likely to be full-time, and are less likely to be part-year workers. In each and every dimension the married men have stronger labour market attachment than the unmarried."

A survey of over 8,000 respondents in the USA confirms that marital distress is directly linked with work productivity. It found that the work loss associated with marital problems was costing approximately $6.8 billion per year "...family interventions targeted at the prevention of marital problems may result in important psycho-social and economic benefits for business and society" and "...marital intervention could be expected to recoup all of the productivity, a benefit that far outweighs the costs of such an intervention."

Research suggests that marriages help build stronger, more stable and less violent communities. It is possible that the tendency away from marriage may be a cause of some sections of society becoming isolated from the mainstream. As one commentator puts it: "The decline in marriage has been a disaster for fatherhood, and the attenuation of fatherhood has been a catastrophe for civic safety".

Other research has shown that married men are less often the victims or perpetrators of crimes: "Married men are less likely than unmarried men to commit crimes as well as to be the victims. The probability of imprisonment is much larger for the single than for the married. Single men have almost six times the probability of being incarcerated as married men, and the multiple relative to divorce is almost as large."

In the current debate on the family, marriages are generally viewed solely as a useful basis for raising children. However, marriages serve society in many ways beyond the ‘child rearing phase’. Marriage also provides the most committed relationship within which to share the support and care for a wider group of people, such as the elderly, disabled or other members of the extended family. This commitment is less likely to be found in the looser ties of cohabitation. Furthermore, the main source of care in old age is in fact from a spouse. This creates greater risks of later institutionalisation for those who are not married.

The Importance of Marriage to the Welfare of Children

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\(^{12}\) ESRC Research Centre on Micro-Social Change, reported in Daily Mail 25 June 1997

\(^{13}\) Fatherhood and Apple Pie, Family Policy Bulletin, Family Policy Studies Centre, November 1996,

\(^{14}\) Reported in The Times, 6 October 1998

\(^{15}\) Marital Status and Personal Well-being : A Literature Review, Coombs RH, Family Relations, 40, 1991, p97

\(^{16}\) British Household Panel Survey, Buck N and Ermish J, from the Guardian 1 December 1995 and Family Policy Studies Centre Bulletin 1995


\(^{19}\) Economic and Social Research Council Briefing, reported in Bulletinplus, One Plus One, Autumn 1997
group. "In most countries divorced individuals have the highest mortality rate, followed by the widowed, those who have never married and finally the married."\textsuperscript{20}

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\textit{CARE for Scotland (Public Policy), December 2000}

\textsuperscript{20} \textit{Is Marriage Dissolution Linked to Difference in Mortality Risks for Men and Women?} Hemstrom O. Journal of Marriage and the Family, 58(2), 1996, p366

Dear Jim

Equal Opportunities Committee – Convention Rights (Compliance)(Scotland) Bill

Further to a discussion at the Committee, I am writing with a request for further information on the Convention Rights (Compliance)(Scotland) Bill.

A list of specific questions the Committee wish to receive further information on is attached as Annex A. If the Committee Clerks could receive a reply by noon on Thursday 8 February 2001, it can be circulated to Members to inform the discussion on 13 February 2001 and thus further assist the production of a Committee contribution to the Stage 1 Report.

I recognise that this is a short timescale. If there are any queries from your officials perhaps they could contact Richard Walsh, Senior Assistant Clerk to the Committee, in the first instance.

Copies go to the Clerks of the Equal Opportunities Committee and both of the Justice Committees.

Yours sincerely

Kate MacLean
Convener
Annex A – Equal Opportunities Committee

Policy Development, Implementation, Monitoring and Evaluation

The Committee have noted with interest the intent in the Scottish Executive Equality Strategy (page 11) that, in relation to ‘Recognising different needs’ the work of the Scottish Executive “provides both an overarching approach and specific and focussed measures when required, that are consistent with the mainstreaming approach”.

1. The Committee notes the Executive wish for swift action to minimise the use of emergency legislative procedures. However, looking to the Cabinet Office model of an effective policy making process, the Committee would therefore welcome a brief overview of how the development of the policy behind the Convention Rights (Compliance)(Scotland) Bill, the Bill itself and implementation plans adheres to the 9 features and 3 themes of an effective policy making process. Particular reference may be made separately as to how the overarching themes of vision, effectiveness and continuous improvement interact with the Committee identified concerns issues of race, disability, sexual orientation, gender, religion and age.

Consultation

As you will know, the Committee is currently working on mainstreaming equality issues in the scrutiny of legislation. This is still work in progress. Nonetheless, with regard to all Bills introduced the Committee is keen to ensure that there is no inadvertent demerit on another section. Specifically paragraph 149 et seq. of the Policy Memorandum appears to detail a consultation process, during the policy development stage, of two bodies and three individuals.

Paragraph 151 further states “On introduction, further information was made available to the Scottish Prison Service and all life prisoners affected by the Bill. In addition, the following bodies and individuals were notified of our proposals by letter and sent copies of the draft Bill and accompanying documents:"

2. As it is reasonable to assume from paragraph 151 that the details of the proposals were not sent out in advance of the formal introduction of the Bill, the Committee therefore request a statement on how any views received by the Scottish Executive can be incorporated into the Bill.

Policy Memorandum (SP Bill 25 – PM)

Para 8

“... a review at the expiry of the punishment part to determine whether or not the prisoner should continue to be confined for the protection of the public". In murder cases it is not unknown for specifically targeted individuals or groups to have been involved e.g. ethnic minorities, children, homosexuals etc.

3. The Committee would welcome further details of the definition of “public” and, specifically, whether any review may have due regard to the protection
requirements of certain members, or groups, within society as well as individual cases.

Para 54
“the Bill provides an additional power for the Scottish Ministers to refer the case to the Parole Board sitting as a tribunal....if they considered there was any information that suggested the prisoner would not be safe to release.”

4. The Committee would further welcome clarification on how representation on potential risks to public safety (from those perceiving themselves to be affected by any decision) may be made to those conducting such a review. For example, would victims or their relatives be notified, would there be a single gateway for dialogue and what means of representation could be used.

Para 73
“Currently, all appointments, with the exception of that for the Lord Commissioner of Justiciary, operate essentially in the same way and follow guidance issued by the Commissioner for Public Appointments. Appointments are advertised normally in either national or specialist press and applicants are issued with job and person specification and are invited to complete a standard application form.”

5. The Committee would welcome more detail on why Scottish Ministers consider this process demonstrates that the relevant Scottish Executive Departments “sustain programmes to promote and deliver equal opportunities principles”, as defined under Principle 4 of the Office of the Commissioner for Public Appointments Code of Practice.

The use of national or specialist press appears to ignore the suggestions in paragraphs 3.5 et seq. of the Scottish Executive “Appointments to Public Bodies in Scotland: Modernising the System: Consultation Paper”, issued in February 2000.

“In addition to mainstream publications central adverts could be placed in publications primarily read by women, people from ethnic minorities, and those with disabilities and from other under-represented or target groups.

3.6 Advertisements will be placed with a view to ensuring that people from throughout Scotland have an opportunity to apply. It is important that every part of Scotland is well represented in public life.”

6. The Committee notes the figures (Q15, “FAQ about Public Bodies and Public Appointments” OCPA) that “33% of all public appointments were held by women and 4.7% by members of ethnic minorities”). The Committee would therefore welcome details on the specific action being taken to encourage more women and members of ethnic minorities to serve on the public bodies dealt with in the Bill.

Para 118
“The Scottish Ministers propose to amend the 1986 Act to create the power to make civil legal aid or ABWOR [Assistance by Way of Representation] available where there is, or may be, an ECHR requirement.
Para 119
To achieve this aim, it is intended to widen the understanding of the term “court or tribunal” where it appears in the 1986 Act, so that it includes any proceedings, however described, which determine a person’s civil rights and obligations.\textsuperscript{[s.6(1) and s.6(2)]}

7. The Committee would welcome clarification of the phrase “which determine a person’s civil rights and obligations”. Specifically the Committee would wish to clarify who the “person” is, and whether “determines a person’s civil rights” extends to the provision of legal aid to persons seeking to make representation in a case, e.g. victims, relatives of victims, community groups etc.

Para 123
The Committee notes the proposed power in the Bill for additional regulations for civil legal aid. These appear to include, inter alia, that one criterion for award may be “that the applicant is unable to understand the proceedings”.

8. The Committee would welcome clarification of the extent to which this will apply solely to understanding of legal proceedings. What regard is currently given in the decision whether to award either civil legal aid or ABWOR, of the ability of the applicant to comprehend English.

Explanatory Notes (SP Bill 25 – EN)

Para 88
The Committee notes the general procedure for a remedial order under s.13, and the requirement to give “the public the opportunity to comment on a copy of the draft order by.....giving appropriate public notice of the proposed order, inviting comments in writing. Such comments are to be made within a period of 60 days beginning with the earlier of the day the notice was given or the day the proposed order was laid.....[and].....having regard to any comments made within that period.”

9. The Committee would welcome details of what the Executive consider to be “appropriate public notice”.

Para 115
The Committee notes the issue of licences for released prisoners and the need to comply with supervision requirements.

10. Given the subject matter of the Bill (and with due regard to the developing range of legal precedent on ECHR) the Committee would welcome clarification on what guidance will be given on the use of supervision requirements. Specifically, the extent to which supervision requirements may be used to address the concerns of individual members (or groups) of the public once a prisoner is released.
Anger over Euro2 plan to free most notorious killers

Eddie Barnes

OME of Scotland's most notorious murderers could soon be free as a result of new European legislation.

Ministers are to lose the power to keep dangerous criminals locked up in jail.

Instead, if murderers have already served longer than the minimum amount of time for a sentence, prisoners may be released.

The revelations brought immediate criticism from politicians and support groups, who welcomed the Scottish Executive for accepting European standards for change without delay.

Home Secretary Jack Straw refused to give up similar changes in England, which currently allow him to prevent the release of prisoners such as Moors murderer Myra Hindley.

Scotland, the proposed system is already well under way, with the full blessing of prisoners.

Elizabeth McIntosh, Justice spokesman for the Scottish Lib Dems, said last night: 'You can't put life on hold for her own good'.

'They have to look at Myra Hindley's case; she is being treated for her own good because the families of the children to whom she was convicted have agreed she should die if she ever gets out. There has to be some provision for extreme cases like this.'

But again, you have to wonder why European laws are being imposed on us when our own legal system has always worked perfectly well. 'We have to say well done to Jack Straw for fighting this. I see no reason why Ministers here have allowed this to go ahead.'

The new law will see Scotland's 160 convicted murderers reduced to seven.

Case study

HOWARD WILSON became one of Scotland's most notorious murderers after shooting dead two policemen who cornered him in a Glasgow tenement.

He was later paralysed in the shoot-out, which followed an armed bank raid in December 1969. He only lived because the killer's gun jammed on the second shot.

At the High Court in Glasgow in 1970, Wilson, himself a former policeman, admitted the murder of his former colleagues Constables Edward Barnett and Detective Constable Angus MacKenzie.

Wilson was sentenced to life for the murder of Lord Glenconner and to 14 years for the murder of a police officer. In the 1980s, Wilson was released on parole.

The Scottish Police Federation remains vehemently opposed to Wilson's release. A spokesman said: 'We have a policy that capital punishment should be reinstated for the murder of a police officer. In the absence of this, we insist life should mean life.'

Double murderer: Howard Wilson

reviewed, to bring their convictions in line with the European legislation.

The European Convention on Human Rights outlaws the current practice of Government Ministers deciding when convicted murderers can be released.

In the review, judges will take into account recommendations by the parole board before deciding whether to alter the terms of the sentence.

It could lead to some convicted killers being freed immediately if the judge decides they have already served enough time and no longer pose a threat to the public.

Proponents of the new system say it is designed to clarify the current parole situation, under which the average served for a life sentence is 11 years.

Under the new law, a so-called 'punishment period' will be introduced which will serve as a minimum length of sentence. Professor Alan Miller, head of the Scottish Human Rights Centre, said: 'The new system will make everything more concrete by putting a definite time on how long a life sentence should be.'

It will also see the weakening of the role of Ministers because decisions will be left up to the courts and the parole board.'

Opponents of the plans said the imposition of human rights laws from Brussels made a nonsense of the independence of the Scottish legal system.

Norman Brennan, director of the Victims of Crime Trust, said: 'I find it absolutely disgraceful that this can change a sentence that has already been given. People already think that life sentences mean life and can expect that.

'Weakening of role of Ministers'

inadequate. This will do nothing to help the Bold.

'It is an insult to the people of Scotland. I despise the Human Rights Act keeps sticking its nose in every part of Britain and changing things in most cases for the worse.'

Deputy First Minister and Justice Minister Jim Wallace said the review would not automatically result in prisoners being released earlier.

He said: 'There is no reason for prisoners to be let out earlier. It could be the opposite when the total period is the sentence period in open court at the end of the trial.'

'The key point is that the present system is not behind closed doors. It is not open and it is important in this day and age that justice is done and is seen to be done.'

An Executive spokesman confirmed the review was being carried out, but stressed that it would not automatically lead to shorter sentences.
Bias theory over jailed Catholics

Justice system under scrutiny after figures reveal disproportionate number in prison

LONG-TERM systematic discrimination against Roman Catholics in Scotland may be the reason why they are disproportionately represented in prison, according to a leading academic.

Professor Tom Devine, the director of the Research Institute of Irish and Scottish Studies at the University of Aberdeen, was commenting after figures from the Scottish Prison Service revealed that almost 30% of Scottish prisoners are Catholics – nearly double the percentage of Catholics in the population as a whole.

The statistics also revealed the proportion of Catholics is slightly higher among prisoners serving life sentences. Almost 200 of the country’s 621 lifers are Catholics.

The figures, which are bound to reopen the debate about religious bigotry and discrimination in Scotland, have led to calls for a government investigation.

The Scottish Executive denied discrimination was a factor but agreed that the figures merited further inquiry.

A spokesman for Jim Wallace, the justice minister, said: “There is nothing to suggest that the justice system is biased for or against any particular religion. Historically, the west of Scotland has always had a higher prison population than the rest of the country and a different religious balance and this may well be a factor.

“But there needs to be further investigation into the reasons why Catholics are represented in prison at twice the level they are in society before any meaningful action is taken.

The figures, based on Scotland’s prison population for the second week of January, showed that of the 5,634 prisoners in jail, the largest proportion, 2,515, or 44.6%, were Church of Scotland. Forty-two prisoners described themselves as Muslim, five Jehovah’s Witnesses, five Buddhists and one Hindu. And 1,264 gave no religion or refused to comment.

Professor Devine, the editor of Scotland’s Shame, a book on religious bigotry and sectarianism in Scotland, suggested that the figures reflected the historic discrimination against Roman Catholics in Scotland, but speculated that social class rather than religion itself was the most likely explanation for the disproportionately high number of Catholics in Scotland’s jails today.

“There is strong evidence of systematic discrimination against Catholics in the past. Although it is beginning to disappear these figures are a reflection of that long-term discrimination.

with an Irish Catholic background. Historically this has been a disadvantaged group so it is not surprising that we tend to find a disproportionate number of people before courts.”

He said he did not believe the figures were evidence that Catholics were discriminated against by the judicial system.

“One can speculate about the nature of Scottish society but these figures are not convincing. Although there has not been any serious research done, I suspect it is more to do with social class and disadvantage rather than religion per se.”

Donald Findlay, the leading QC, said any distortion was likely to be due to the strong presence of Catholics in the west of Scotland. “It would be interesting to compare figures for the east and west of Scotland. My own suspicion is that it is nothing to do with religion at all but more to do with, the higher percentage of the population in the west who are of Irish or Catholic origin.”

Joe Beltrami, a leading solicitor advocate, said religious bigotry was “rife” in the judiciary in the past, but virtually non-existent today.

“I do not think you could blame this on bigotry or bias on the part of the judiciary. Fifty years ago, yes, but over recent years that has died a death.”

He suggested the high number of Catholics in prison was more to do with social factors. “I am sure a number of them are Catholics in name only, so it is not all that relevant.”
The Herald

Lifers could be released early

CAMERON SIMPSON

PRISONERS serving life sentences for murder in Scotland are to have their sentences reviewed in the wake of the human rights act.

The Scottish Executive said yesterday the estimated 500 killers would have their cases heard by a judge, who will decide on the "punishment period" to be served before a lifer can be considered for release.

Jim Wallace, the justice minister, said the review would not automatically result in prisoners being released earlier.

"It could be the opposite when the trial judge fixes the punishment period in open court at the end of the trial," he said. "The key point is that the present system happens behind closed doors. It is not open and it is important in this day and age that justice is done and is seen to be done."

It has been prompted by the incorporation of the European convention on human rights into Scots law, which outlaws the current practice of government ministers deciding when convicted murderers can be released.

Judges will take into account the recommendations of the parole board before deciding whether to alter the terms of the sentence.

It could lead to some convicted killers being freed immediately if the judge decides they have already served long enough and no longer pose a threat to the public.

An executive spokeswoman said: "There is no serious risk to the public because in no circumstances would the parole board release prisoners if there were any doubts about public safety."

Meanwhile, south of the border, plans being considered by the Home Office to make prisoners pay for their stay behind bars by confiscating their cars and homes, were last night ridiculed as "unworkable" by prison governors and the independent jails inspector.

The executive said there were no plans to follow the Home Office lead.
Life sentence reviews are over the top, say Tories

BY NICK BRITTEN
SCOTTISH POLITICAL CORRESPONDENT

THE TORIES attacked the Scottish Executive's proposals to review the case of every murderer yesterday, saying that ministers had gone "over the top" with the implementation into law of the European Convention of Human Rights.

Phil Gallie, Tory home affairs spokesman, said that the convention had been rushed into Scots law without enough thought.

Every criminal serving life is to have their case heard by a judge, who will set a "punishment period" which must be served before they can be considered for release.

The judge will take into account the recommendations of the parole board before deciding whether to alter the terms of the sentence, prompting fears that they could be released earlier than under the current arrangements.

The Executive has taken action because the convention effectively prevents ministers from approving the release of criminals serving life sentences.

Ministers want to be sure that current cases are water-tight to prevent convicts from citing the convention during an appeal or parole hearing.

Politicians have frequently been accused of keeping notorious killers in jail, including the Moors murderer Myra Hindley, to avoid a backlash from the electorate.

Mr Gallie said that criminals should serve the sentence imposed on them. "We are going over the top with respect to the European Court of Human Rights. This was hastily incorporated into the Scotland Act — it was the wrong thing to do," he said.

"Where people have been sentenced, they should serve that sentence in line with the court's decision."

He said he hoped that the Executive would not use it as an excuse to relieve prison overcrowding by releasing criminals early, and criticised proposals to remove political influence from parole boards.

There are currently 500 murderers serving life. On average they do 13 years.

Jim Wallace, the Justice Minister, said the Executive had "trawled" over its responsibilities under the European Convention and there was a need for justice to be done and seen to be done.

He defended the decision to take parole judgments out of the Executive's hands. "If you look at the number of cases when Michael Howard, as Home Secretary, pandered to public prejudice, he was struck down, time and again by the courts," he said.

"I believe the safeguards are there. If someone is released on licence, there is the opportunity to recall them." He said the Tories were guilty of "knee-jerk reaction".

John Scott, chairman of the Scottish Human Rights Centre, said it was possible that some lifers could win their release after decades in prison. "Killers have not been considered for release unless they admit their guilt and show remorse. The new system could result in their release regardless of whether they admit it or not."
Civil servants rebuked over human rights law

Civil servants were rebuked yesterday by the head of an influential Holyrood committee for not knowing enough about the impact of new legislation prompted by the European Convention on Human Rights.

Scottish Executive officials pledged to seek more information on the types of tribunals for which it will be possible to get legal aid after the rebuke from Alasdair Morgan, convener of the one of the Parliament's two justice committees.

The move followed the disclosure that it was not yet known which tribunals would be covered by the extension, one of several provisions of the Convention Rights (Compliance) Scotland Bill now being scrutinised by the committee.

Officials said at first they were unable to say what types of tribunals would be covered and which would not, citing bodies as diverse as VAT tribunals and social security tribunals.

"We are going to have to sit down and take legal advice on what the proceedings are, how they operate, and the extent of representations," said Ian Allen, head of the Executive's legal aid branch.

But Mr Morgan retorted: "Isn't it a bit rich to expect Parliament to pass a law and say we are going to take legal advice on what we might do when the legislation is passed?"

He also queried the potential costs involved noting that in some cases the new bill gave ministers the power to change legislation. He added: "I wonder why we need a Parliament at all."

Niall Campbell, head of the Executive's criminal and civil law group, told him: "We will try and find out more information."

Earlier, members of the committee heard that the new bill will bring changes to large areas of life in Scotland, from the sentences imposed on life prisoners to the powers of the Lord Lyon, Scotland's most senior heraldic figure.

In future the Lord Lyon will have to hand over to ministers the power to appoint the procurator fiscal of the Lyon Court.

The bill also contains provisions for changes to parole board appointments, changes to homosexual law reform, and changes in the payment of legal aid for some summary criminal cases.

It also gives Scottish ministers new powers to remedy real or perceived ECHR incompatibilities.

The bill is a consequence of Scotland's, and later the UK's, incorporation of the European Convention into domestic law.

As part of that process, the Executive has been reviewing its legislative procedures to identify any changes needed, Mr Campbell told the committee.

This has already led to new Scottish legislation like the Bail and Judicial Appointments Act last year.

Mr Campbell told the committee that if Scottish legislation was ruled incompatible with the ECHR, it was struck down immediately.

For Westminster legislation, there was a proviso that gave some time for the incompatibility to be corrected.
Euro plan to release killers is savaged by police

By Eddie Barnes

said the new proposals would sap police morale if officers whose investigations had led to life sentences were then to see the killers freed early.

He added: ‘Our view is that, in most cases, there has been a murder of a police officer. Life should mean life. We are concerned that we will not be able to enforce the law any more. In the case of people like Howard Wilson, we believe they should stay in jail for the remainder of their lives.’

The senior officer, who asked not to be named, said: ‘The thrust of the matter is that you are dealing with an overriding liberal regime here.’

The Justice Department in Scotland is surrounded by civil liberties groups who have the ear of the Ministers.

Under the new plans, every murderer in Scotland will have his or her sentence reviewed. If a judge reduces the length of time of the sentence, and the killer has already served more than that time, they could be allowed to walk free.

Ministers will no longer be able to veto the early release of murderers, as they presently do in particularly controversial cases.

The chorus of criticism over the scheme was echoed yesterday by the Scottish Police Federation, which represents more than 14,000 officers in Scotland.

Deputy general secretary Tom Rowatt said: ‘I am sure I would not be alone within our organisation when I say that I have grave reservations that the review of every life sentence in Scotland would not release convicted murderers on to our streets sooner than they should be.’

also voiced fears that police murderers would be freed under the plans, saying: ‘The Scottish Police Federation favours capital punishment for the murder of police officers acting in the execution of their duty but, in its absence, we believe the penalty for such a crime should be life imprisonment — life meaning the remainder of the offender’s life.’

The outrage over the proposals has been given added impetus by the revelation that Ministers in England are resisting pressure from the EU to introduce such measures.

Home Secretary Jack Straw has refused to give up his own powers, which presently enable him to veto the release of infamous killers such as Moors Murderer Myra Hindley.

Yesterday, Mr Wallace remained adamant that he was happy to relinquish his powers, in complete contrast to Mr Straw.

He said: ‘What we are going to do is bring matters out into the open which at present are conducted behind closed doors.

Mr Wallace’s decision will mean that the law on sentencing murderers will be different in England from that in Scotland.

Mr Wallace claims that if he did not change the law, prisoners could challenge their sentences under human rights law.

Despite his decision to abolish the present system, Mr Wallace admitted yesterday that it was a ‘comprehensive’ system which had worked well.

He said the Lord Justice General, Lord Rodger, presently review all early release recommendations from Parole Boards.

Mr Wallace added: ‘It is a comprehensive system, but what is being proposed is no less so.

‘I believe safeguards are there. This is not an easy way to make it easier for criminals, and particularly not for murderers.’

However, Conservative justice spokeswoman Lyndsay McIntosh expressed incredulity over Mr Wallace’s decision last night.

She said: ‘I can completely understand the police’s objection to his plan.

‘We have always maintained that life should mean life.’
CONVENTION RIGHTS (COMPLIANCE) (SCOTLAND) BILL

At today's meeting of the Justice 1 Committee, Mr Campbell undertook to provide the Committee with a copy of the judgement in the "ADT" case (ADT v the United Kingdom (application no. 35765/97)). This was the judgement of the European Court of Human Rights which found the English equivalent of s13 (2)(a) of the Criminal Law (Consolidation) (Scotland) Act 1995 to be incompatible with the Convention. It is on this judgement that the proposals in Part 4 of the Bill are based.

I have enclosed a copy of the judgement for the members' information.

Yours sincerely

CLARE MCBRIDE
CASE OF A.D.T. v. THE UNITED KINGDOM

(Application no. 35765/97)

JUDGMENT

STRASBOURG

31 July 2000

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It is subject to editorial revision before its reproduction in final form in the official reports of selected judgments and decisions of the Court.
In the case of A.D.T. v. the United Kingdom,
The European Court of Human Rights (Third Section), sitting as a Chamber composed of:
Mr J.-P. COSTA, President,
Mr W. FUHRMANN,
Mr L. LOUCAIDES,
Mr P. KÖRIS,
Sir Nicolas BRATZA,
Mrs H.S. GREVE,
Mr K. TRAJA, judges,
and Mrs S. DOLLÉ, Section Registrar,
Having deliberated in private on 30 November 1999 and on 11 July 2000,
Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 35765/97) against the United Kingdom lodged with the European Commission of Human Rights ("the Commission") under former Article 25 by a United Kingdom national "A.D.T." ("the applicant"), on 25 March 1997. The applicant asked the Court not to reveal his identity. The applicant was represented by Mr F. Whitehead, a lawyer practising in Manchester. The Government of the United Kingdom ("the Government") were represented by their Agent, Mrs S. Langrish, Foreign and Commonwealth Office, London.

2. On 23 October 1997 the Commission (First Chamber) decided to give notice of the application to the Government and invited them to submit observations on its admissibility and merits.


4. Following the entry into force of Protocol No. 11 on 1 November 1998, and in accordance with the provisions of Article 5 § 2 thereof, the case falls to be examined by the Court.

5. In accordance with Rule 52 § 1 of the Rules of Court, the President of the Court, Mr L. Wildhaber, assigned the case to the Third Section

6. On 16 March 1999 the Court declared the application admissible and decided to invite the parties to a hearing on the merits.


There appeared before the Court:
(a) for the Government
Mrs S. Langrish,
Mr N. Garnham,
Ms S. Chakrabarti,
Ms D. Grice,

Agent,
Counsel,
Advisers;

(b) for the applicant
Mr B. Emmerson,
Mr F. Whitehead,
Ms A. Mason,
Ms A. Hudson,

Counsel,
Solicitor,
Advisers.

The Court heard addresses by Mr Emmerson and Mr Garnham.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant is a practising homosexual. On 1 April 1996 at approximately 7.50 p.m., police officers conducted a search under warrant of the applicant's home. As a result of the search, various items were seized including photographs and a list of video tapes. The applicant was arrested at about 8.23 p.m. and taken to the local police station. A further search of the applicant's house was conducted the following day and further items, including video tapes, were seized.

9. The applicant was interviewed by the police on 2 April 1996. During the interview the applicant admitted that some of the video tapes found would contain footage of the applicant and up to four other adult men, engaging in acts, mainly of oral sex, in the applicant's home. On 2 April 1996 the applicant was charged with gross indecency between men contrary to Section 13 of the Sexual Offences Act 1956 ("gross indecency"). The charge related to the commission of the sexual acts depicted in one of the video tapes, which consisted of oral sex and mutual masturbation. It did not relate to the making or distribution of the tapes themselves.

10. On 30 October 1996, the applicant appeared before a Magistrates' Court. The principal evidence adduced by the Crown consisted of a single specimen video containing footage of the applicant and up to four other men engaging in acts of oral sex and mutual masturbation. The acts which formed the basis of the charge involved consenting adult men, took place in the applicant's home and were not visible to anyone other than the
participants. There was no element of sado-masochism or physical harm involved in the activities depicted on the video tape. The applicant was convicted of the offence of gross indecency. On 20 November 1996 the applicant was sentenced and conditionally discharged for two years. An order was made for the confiscation and destruction of the seized material.

11. The applicant was subsequently advised by Counsel that an appeal against conviction would enjoy no prospect of success since the provisions of the relevant legislation were clear and mandatory. The applicant did not appeal against the conviction.

II. RELEVANT DOMESTIC LAW AND PRACTICE

12. Section 13 of the Sexual Offences Act 1956 provides:

"It is an offence for a man to commit an act of gross indecency with another man, whether in public or private, or to be a party to the commission by a man of an act of gross indecency with another man, or to procure the commission by a man of an act of gross indecency with another man."

13. By Section 37 of, and paragraph 16 of the Second Schedule to, the Sexual Offences Act 1956 the offence of gross indecency between men is punishable on indictment by up to five years' imprisonment if committed by a man of, or over the age of, twenty-one with a man under the age of eighteen, and otherwise by a maximum of two years' imprisonment.

14. If, as in the present case, the offence is tried summarily by magistrates, the maximum penalty is six months' imprisonment and/or a fine of £5,000 (Magistrates’ Courts Act 1980, sections 17 and 32 and Schedule 1, paragraph 23(b)).

15. There is no statutory definition of “gross indecency”. However in its Report, the Committee on Homosexual Offences and Prostitution (Wolfenden Committee) 1957 noted:

"104. ‘Gross indecency’ is not defined by statute. It appears, however, to cover any act involving sexual indecency between two male persons. If two male persons acting in concert behave in an indecent manner the offence is committed even though there has been no actual physical contact [R. v Hunt 34 Cr App R 135].

105. From the police reports we have seen and the other evidence we have received it appears that the offence usually takes one of three forms; either there is mutual masturbation; or there is some form of intercrural contact; or oral-genital contact (with or without emission) takes place. Occasionally the offence may take a more recondite form; techniques in heterosexual relations vary considerably, and the same is true of homosexual relations."

16. The Sexual Offences Act 1967 introduced a qualification to the legislation regulating male homosexual conduct. It provided that homosexual acts in private between consenting adult men were no longer an offence. Homosexual acts are defined as buggery with another man or gross indecency between men (Section 1(7)). By virtue of Section 1(2), an act is
A. Whether there was an interference

21. By reference to the case of Laskey, Jaggard and Brown (Laskey, Jaggard and Brown v. the United Kingdom judgment of 19 February 1997, Reports of Judgments and Decisions 1997-I, p. 131, § 36), the Government contend that there was no interference with the applicant’s right to respect for his private life as the sexual activity in the present case fell outside the scope of “private life” within the meaning of Article 8 § 1 of the Convention. They point, first, to the number of individuals present and, secondly, to the fact that the sexual activities were recorded on video tape.

22. The applicant sees a dual interference with his right to respect for his private life. First, he refers to the very existence of a criminal law which prohibits homosexual activity in a private place where it involves more than two participants and, secondly, he underlines that that law was applied in the criminal prosecution which was brought against him. On the facts, the applicant notes that there was neither organised activity nor any risk of injury in the present case, and adds that had it not been for the prosecution, the video tape would not have been distributed in any real sense whatever.

23. The Court recalls that the mere existence of legislation prohibiting male homosexual conduct in private may continuously and directly affect a person’s private life (see, as the most recent Court case-law, the Modinos v. Cyprus judgment of 22 April 1993, Series A no. 259, p. 11, § 24).

24. The present applicant was aware that his conduct was in breach of the criminal law, and he was thus continuously and directly affected by the legislation. In addition, he was directly affected in that a criminal prosecution was brought against him which resulted in his conviction for a breach of Section 13 of the Sexual Offences Act 1956.

25. As to the Government’s comments in connection with the scope of “private life” within the meaning of Article 8 of the Convention, the Court recalls that there was no dispute between the parties in the case of Laskey, Jaggard and Brown as to the existence of an interference (see the above-mentioned judgment, p. 131, § 36). In that case, the Court’s comments did not go beyond raising a question “whether the sexual activities of the applicants fell entirely within the notion of ‘private life’”. The sole element in the present case which could give rise to any doubt about whether the applicants’ private lives were involved is the video recording of the activities. No evidence has been put before the Court to indicate that there was any actual likelihood of the contents of the tapes being rendered public, deliberately or inadvertently. In particular, the applicant’s conviction related not to any offence involving the making or distribution of the tapes, but solely to the acts themselves. The Court finds it most unlikely that the applicant, who had gone to some lengths not to reveal his sexual orientation, and who has repeated his desire for anonymity before the Court, would knowingly be involved in any such publication.
26. The Court thus considers that the applicant has been the victim of an interference with his right to respect for his private life both as regards the existence of legislation prohibiting consensual sexual acts between more than two men in private, and as regards the conviction for gross indecency.

B. Whether the interference was justified

27. The Government consider that any interference with the applicant’s right to respect for his private life was in accordance with the law and necessary for the protection of morals or the rights and freedoms of others. They underline that a margin of appreciation is left to national authorities in assessing whether a pressing social need exists, and claim that the margin must be particularly broad where the protection of morals is at issue: the mere fact that intimate aspects of private life generally call for a narrower margin of appreciation cannot prevent the margin in the present case from being a significant one. They draw a distinction between intimate, private and therefore acceptable homosexual activity (between two men), and group, potentially public and therefore unacceptable homosexual activity (between more than two men). At the hearing before the Court, the Government accepted, in the light of a review of sex offences which is taking place in the United Kingdom, that the precise extent of permissible legislative interference with group activities is difficult to define, although they maintained that in the present case the prosecution was compatible with the Convention.

28. The applicant underlines that he was not prosecuted for recording his sexual activities on video tape or for distributing the tapes, but was prosecuted under a law which prohibits the sexual acts themselves, even though they were carried out in the privacy of the bedroom of his own home. The offence was committed not because it was video taped, but because more than two people were participating in the sexual activities. The applicant repeats that there was no evidence to suggest that there was any risk of the tapes finding their way into the public domain.

29. An interference with the exercise of an Article 8 right will not be compatible with Article 8 § 2 unless it is “in accordance with the law”, has an aim or aims that is or are legitimate under that paragraph and is “necessary in a democratic society” for the aforesaid aim or aims (see the Dudgeon v. the United Kingdom judgment of 22 October 1981, Series A no. 45, p. 19, § 43).

30. The applicant does not claim that the legislation in the present case was not “in accordance with the law”, or that its aims were not legitimate. The Court finds that the interference so far as it relates to the legislation was in accordance with the law, in that Section 13 of the 1956 Act and Section 1(2) of the 1967 Act together prescribed the act which was prohibited and the relevant penalty, and that its aims, of protecting morals and protecting the rights and freedoms of others, were legitimate (see, in this context, the above-
A. Whether there was an interference

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22. The applicant sees a dual interference with his right to respect for his private life. First, he refers to the very existence of a criminal law which prohibits homosexual activity in a private place where it involves more than two participants and, secondly, he underlines that that law was applied in the criminal prosecution which was brought against him. On the facts, the applicant notes that there was neither organised activity nor any risk of injury in the present case, and adds that had it not been for the prosecution, the video tape would not have been distributed in any real sense whatever.

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24. The present applicant was aware that his conduct was in breach of the criminal law, and he was thus continuously and directly affected by the legislation. In addition, he was directly affected in that a criminal prosecution was brought against him which resulted in his conviction for a breach of Section 13 of the Sexual Offences Act 1956.

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mentioned Dudgeon judgment, p. 20, § 47). The applicant does, however, submit that his prosecution for gross indecency pursued no legitimate aim as the only aim put forward - the risk that the video recording might be witnessed by the public at large - had nothing to do with the offence of gross indecency, which was committed regardless of the potential audience for the video. In the light of its conclusions below on the question of the proportionality of the interference with any aims pursued, the Court does not consider it necessary to determine this particular point.

31. The cardinal issue in the case is whether existence of the legislation in question, and its application in the prosecution and conviction of the applicant, were “necessary in a democratic society” for these aims.

32. The Court recalls that in the case of Dudgeon, in which the Court was considering the existence of legislation, the Court (at p. 24, § 60) found no “pressing social need” for the criminalisation of homosexual acts between two consenting male adults over the age of 21 years, and that such justifications as there were for retaining the law were outweighed by the

"detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved."

33. Those principles were adopted and repeated in the subsequent cases of Norris v. Ireland (judgment of 26 October 1988, Series A no. 142, p. 20, § 46), Modinos v. Cyprus (judgment of 22 April 1994, Series A no. 259, p. 12, § 25) and Marangos v. Cyprus (No. 31106/96, Comm. Rep. 3 December 1997).

34. There are differences between those decided cases and the present application. The principal point of distinction is that in the present case the sexual activities involved more than two men, and that the applicant was convicted for gross indecency as more than two men had been present.

35. The Government contend that where groups of men gather in order to perform sexual activities, the possibility of such activities being publicised is inevitable, and that this applies all the more where the activities are video taped. They claim that because of the less intimate nature of group activities, the margin of appreciation afforded to the national authorities is a significant one. The applicant underlines that the offence is committed whenever more than two people are present, and does not depend on the involvement of a large number of people.

36. It is not the Court’s role to determine whether legislation complies with the Convention in the abstract. The Court will therefore consider the compatibility of the legislation in the present case with the Convention in the light of the circumstances of the case, that is, that the applicant wished to be
able to engage, in private, in non-violent sexual activities with up to four other men.

37. The Court can agree with the Government that, at some point, sexual activities can be carried out in such a manner that State interference may be justified, either as not amounting to an interference with the right to respect for private life, or as being justified for the protection, for example, of health or morals. The facts of the present case, however, do not indicate any such circumstances. The applicant was involved in sexual activities with a restricted number of friends in circumstances in which it was most unlikely that others would become aware of what was going on. It is true that the activities were recorded on video tape, but the Court notes that the applicant was prosecuted for the activities themselves, and not for the recording, or for any risk of it entering the public domain. The activities were therefore genuinely “private”, and the approach of the Court must be to adopt the same narrow margin of appreciation as it found applicable in other cases involving intimate aspects of private life (as, for example, in the Dudgeon judgment, p. 21, § 52).

38. Given the narrow margin of appreciation afforded to the national authorities in the case, the absence of any public health considerations and the purely private nature of the behaviour in the present case, the Court finds that the reasons submitted for the maintenance in force of legislation criminalising homosexual acts between men in private, and a fortiori the prosecution and conviction in the present case, are not sufficient to justify the legislation and the prosecution.

39. There has therefore been a violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8

40. The applicant alleged a violation of Article 14 of the Convention, taken together with Article 8 of the Convention, on the ground that no provision of domestic law regulated sexual acts between consenting adult heterosexuals or between lesbians. Article 14 of the Convention provides as follows:

“The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

41. The Court recalls that in its above-mentioned Dudgeon judgment, having found a violation of Article 8 of the Convention, it did not deem it necessary to examine the case under Article 14 as well (p. 26, § 70). It reaches the same conclusion in the present case.
III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

42. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damages

43. The applicant claimed a total of GBP 10,929.05 pecuniary loss in respect of the costs of defending the criminal proceedings against him (GBP 1,887.05), travel expenses (GBP 21), prosecution costs (GBP 250) and items confiscated and destroyed at the end of the criminal proceedings (GBP 8,771). He also claimed GBP 10,000 in respect of non-pecuniary loss.

44. The Government were “content for just satisfaction to be set in accordance with the applicant’s proposals”.

45. The Court considers the sums claimed by the applicant to be reasonable and in accordance with the principles laid down by its own case-law under Article 41 of the Convention. It awards the applicant the sum of GBP 20,929.05.

B. Costs and expenses

46. The applicant also claimed a total of GBP 13,771.28 by way of costs and expenses, including value-added tax. Save for arithmetical comments (taken into account in that figure) the Government made no observations on the total.

47. The Court awards the applicant the sum of GBP 13,771.28.

C. Default interest

According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 7.5% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of Article 8 of the Convention;

2. Holds that it is not necessary to examine the case under Article 14 of the Convention;
3. **Holds**

(a) that the respondent Government is to pay the applicant, within three months from the date on which the judgment becomes final, in respect of damages, GBP 20,929.05 (twenty thousand, nine hundred and twenty-nine pounds sterling and five pence) and GBP 13,771.28 (thirteen thousand, seven hundred and seventy-one pounds sterling and twenty-eight pence) for costs and expenses,

(b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement.

Done in English, and notified in writing on 31 July 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ  
Registrar

J.-P. COSTA  
President
I write with reference to the above bill to convey some of the concerns that have been expressed by clients who are life prisoners. There is considerable unease at the way the new system will come into effect. My understanding at the moment (I have not as yet seen a copy of the draft bill) is that a punishment tariff will be set by the sentencing judge, rather than the possibility of a recommendation.

The concerns that I have been encountering focus mainly on seeking reassurance that a recommendation for X years will not simply transform into a tariff of X years. As I understand it the parole board will not even consider prisoners for parole until after the tariff period has passed. At the moment prisoners are considered by the board generally a number of years before their recommendation expires and they are in a position to take the steps the board considers necessary to achieve parole at the end of their recommendation period. If the board will not consider prisoners until the end of the tariff then a change from a recommendation of X years to a tariff of X years will almost certainly result in a considerable increase in the sentences that these men will serve. There is a widespread concern that a judge will just stick on a 15 year tariff where formerly there was a 15 year recommendation.

Another concern encountered relates to the security categorisation of prisoners. My understanding is that the procedures for obtaining D and limited D status are to remain unchanged. These security categories are still subject to the ultimate control of the Scottish Ministers. No prisoner can get D or limited D without the authorisation of the Ministers. D and limited D are however generally seen by the parole board as being essential before a life prisoner can be granted parole. If the purpose of the Convention Rights Bill is to remove any political aspect from the treatment of life prisoners then it seems strange that the Ministers should retain an effective veto over a step which is regarded as so important by the parole board.

The final concern that I would express, though again I have not seen the Bill so it may be dealt with already, is the position of individuals who have had a recommendation reduced on appeal. It seems inequitable to allow a judge who imposed an excessive recommendation to now impose a tariff upon him.
PART 1 - PRISONERS AND PAROLE

Section 1 (Release of Life Prisoners)

In considering these provisions of the Bill, it is important to note that there are a number of categories of life prisoners:-

(a) Adult mandatory life prisoners

Those who committed murder when over the age of 18 and who are sentenced to life imprisonment are known as adult mandatory life prisoners ("AMLPs"). The statutory framework regarding their release on life licence is governed by two separate Acts of Parliament; the Prisons (Scotland) Act 1989 ("the 1989 Act") and the Prisoners and Criminal Proceedings (Scotland) Act 1993 ("the 1993 Act"). The sentencing provisions of the 1989 Act were repealed by the 1993 Act but prisoners sentenced before the 1993 Act came into force (1 October 1993) are still covered by the 1989 Act provisions.

Under the current law, the power to release an AMLP is entirely at the discretion of the Scottish Ministers. An advisory body known as the Preliminary Review Committee ("PRC") recommends the date of the first parole hearing to review the suitability of an AMLP for release on life licence. Where the PRC considers it appropriate, and the Scottish Ministers agree, the case will be considered by the Parole Board which will carry out a review of an AMLP to assess the suitability for release of the prisoner on life licence. The Parole Board will consider a risk assessment as to the danger which the prisoner presents to the public if he or she were to be released. The Scottish Ministers are not obliged to follow the recommendation of the Parole Board but would in situations where there is a recommendation for release, consult the Lord Justice General, Lord Justice Clerk and if available, the trial judge to ascertain whether or not the requirements of justice and deterrence will have been satisfied on the AMLP’s release. However, the Scottish Ministers can ultimately reject the recommendation of the Parole Board and the advice of the judiciary, when determining whether release is appropriate.

(b) Designated Life Prisoners

A designated life prisoner is:-

(i) a person convicted of a crime other than murder where the court has used its discretion to sentence to life or

(ii) one who is convicted of murder whilst under the age of 18 at the time of commission of the crime. The 1993 Act specifies the conditions for sentencing and release of such prisoners.
At present, the court can designate a period, the “designated part” stipulating the period to be served as punishment and deterrence before the prisoner can be released. If the court does not designate such a part, it must give reasons. Case law has established that the court must set a designated part unless it considers that the appropriate “punitive period” is the rest of the prisoner’s natural life.

After the expiry of the designated part (and thereafter at two yearly intervals) the prisoner is entitled under the 1993 Act to require the Scottish Ministers to bring his case before the Parole Board. The Parole Board when considering such an application is constituted as a Designated Life Tribunal (“DLT”). If the Parole Board sitting as a DLT recommends the release of the prisoner on life licence, the Scottish Ministers are bound in these cases to follow that recommendation.

It can be seen therefore that under current law, the Parole Board operates in an advisory capacity for the release of AMLPs but in a directory capacity for the release of discretionary life prisoners.

Compliance with the European Convention on Human Rights (“ECHR”)

The case law of the European Court of Human Rights indicates a difference between an AMLP and a discretionary life prisoner. Indeterminate life sentences may be justified on one of two grounds, namely for punitive reasons or for the protection of the public. Mandatory life sentences are generally justified on the basis of the punitive element, the gravity of the offence being proportionate to the sentence imposed.

The discretionary life prisoner is sentenced partly on the basis of the seriousness of the offence and the need for punishment as well as on the grounds of protection of the public.

Article 5(1) of the ECHR provides that “everyone has the right to liberty and security of person”. It goes on to state that no-one should be deprived of his liberty except in certain specified cases, one of which is the lawful detention of a person after conviction by a competent court.

Article 5(4) further provides that everyone who is deprived of their liberty by arrest or detention shall be entitled to take proceedings to bring the lawfulness of the detention before a court for review and where appropriate, release.

In Wynne -v- UK [1994] it was held that Article 5(4) does not entitle an AMLP to bring his or her case before a court for review to determine the continuing legality of the detention.

In that case, the European Court of Human Rights held that the original court and appeals system in cases of mandatory life sentences satisfies the requirements of Article 5(4). There is no additional right to challenge the lawfulness or otherwise of continued detention.

In terms of ECHR case law, therefore, the present arrangements for determining the release of an AMLP would appear to be compliant with the Convention. However, in practice, in considering whether such prisoners are suitable for release, as has been indicated above the discretion lies solely with the Scottish Ministers who will have regard to the risk that the person poses to the public as well as to issues of punishment and deterrence. In effect, therefore, the continued legality of the sentence is under review but not by a court but rather by the Scottish Ministers.

The proposals contained in the Bill acknowledge this fact and seek to adopt for AMLPs the same system of assessment and review as is available for discretionary life prisoners. The mandatory life sentence would then be split into a punishment part and a risk part. The punishment part
would be appealable. On expiry of the punishment part, the AMLP would have the same right to apply to the Parole Board thereafter for review as discretionary life prisoners currently have.

The Society therefore welcomes these provisions as they introduce greater clarity for prisoners as to their eventual release whilst allowing the Prison Service to focus the rehabilitation work within clearer timeframes. At the same time the public interest in punishment and deterrence are met by the imposition of a specified period of imprisonment which must be served before a risk assessment could be carried out and considered.

Section 1 and Part I of the Schedule (Transitional Provisions)

In the Society’s view, these provisions seem fair and sensible proposals and will enable the position of those sentenced to indeterminate periods prior to commencement of this measure to be placed on the same footing as those sentenced after the implementation of this Bill.

PART 2 - CONSTITUTION OF THE PAROLE BOARD FOR SCOTLAND

Section 5 (Appointment and Removal of Parole Board Members)

Article 5(4) of the ECHR states “everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful”. It is essential therefore that all decisions in relation to the release of a prisoner from an indeterminate sentence are taken by a court-like body.

Under the new provisions created by this Bill, the Parole Board will fulfil this function for both mandatory and discretionary life prisoners. The Parole Board in making these determinations will have to be an independent and impartial tribunal in terms of Article 6 of the ECHR.

The body which is responsible for reviewing the legality of the continued detention must therefore be (1) independent of the Executive and objectively impartial; and (2) must be able to direct the release of the prisoner if it considers that the continued detention is unlawful.

The Parole Board when sitting as a DLT is currently able to fulfil one of these two requirements. It can order the release of discretionary life prisoners. As has been indicated above, the Scottish Ministers are bound to comply with the recommendations of the DLT. The Parole Board currently performs an advisory function in regard to mandatory life prisoners but this would change to mirror their role with discretionary life prisoners, if the provisions of Part I are applied.

If the Board is to be regarded as an independent and impartial tribunal for the purposes of Article 6 of the Convention, then there must be transparency in the appointments system. Under the current proposals, the terms of appointment would be for no less than 6 and no more than 7 years. Reappointment could only be made once and only after a gap in service of 6 years. The Chairman would be required to ensure that each member works for at least 20 hours per year and a Parole Board member could be removed from office for inability and neglect of duty or misbehaviour but only by an independent tribunal. These provisions mirror the current arrangements which have recently been put in place for part-time sheriffs and would ensure the necessary security of tenure to enable the Parole Board to be described as independent.

There are transitional arrangements in respect of new members and existing members which appear unobjectionable.
In general terms, the Society welcomes these provisions as they introduce transparency, independence and compliance with the ECHR.

PART 3 – LEGAL AID

Section 6  (Extension of Advice and Assistance and Civil Legal Aid under the Legal Aid (Scotland) Act 1986)

There are three types of legal aid governed by the Legal Aid (Scotland) Act 1986 to which this section applies. The section applies to:-

a) Advice and Assistance;

b) Assistance by Way of Representation; and

c) Civil Legal Aid.

The section only applies to civil cases.

Under the 1986 Act the courts in which civil legal aid is available are limited and these provisions create the power to make civil legal aid or ABWOR available where there is, or may be, an ECHR requirement. In order to do this, the definition of the term “court or tribunal” needs to be extended to include any proceedings before a court or tribunal which determine a person’s “civil rights and obligations”. The provision of section 6 will enable the Legal Aid (Scotland) Act 1986 to be in compliance with the European Convention on Human Rights (ECHR), Article 6(3).

Under Article 6(3) of the ECHR free legal aid in criminal proceedings is required. However there is no automatic provision of legal aid in civil proceedings.

The European Court of Human Rights has decided that a failure to provide legal aid in civil cases has amounted to a breach of Article 6(1). In the case of Airey v Ireland [1979] the applicant complained that the unavailability of legal aid for judicial separation proceedings amounted to a violation of her right to access to a court under Article 6(1).

The extension of Advice and Assistance in civil legal aid to all courts, tribunals or statutory inquiries, would include the Tribunals identified in the Annual Report of the Scottish Committee of the Council on Tribunals for 1999-2000 an abstract of which forms the appendix to this paper.

This is a difficult area to interpret and the list is given for illustrative purposes only.

Section 7  (Fixed Payments for Criminal Legal Assistance: Exceptional Cases)

Section 33(3A) of the Legal Aid (Scotland) Act 1986 provides for a system of fixed payments in summary criminal proceedings where legal aid has been granted. The fixed payments scheme has applied in Scotland in terms of the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999 which came into effect on 1st April 1999. Under this scheme, a solicitor representing a client in a summary case in either the Sheriff Court of the District Court receives a fixed payment covering his or her fee and certain prescribed outlays.

The fixed payments scheme allows a solicitor to claim for Sheriff Court work £500 from the Scottish Legal Aid Board for acting for an accused in a summary criminal matter. This covers all work up to and including the first 30 minutes of trial. Additional fees can be claimed if a trial lasts
for more than 30 minutes or is particularly lengthy. There is an extra fee of £50 paid if the case occurs in a court in a substantially rural area. A similar scheme of fixed payments at a lower rate applies in the District Court.

The Society made representations to the then Scottish Office about the issue of exceptional cases during the consultation which preceded the introduction of the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations. In particular, the Society drew attention to the need for further exclusions from the fixed payments scheme including:-

a) trials where the accused was remanded in custody;
b) proceedings where any single charge involves a theoretical maximum period of imprisonment of more than six months, leaving out of account any bail aggravations or where there are five or more prosecution witnesses, or where section 16 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 or release on licence provisions apply;
c) cases involving sex offenders, child witnesses or vulnerable witnesses;
d) cases involving foreign or sign language interpretation; and
e) cases where paragraph 14(b) of 14(d) of the Criminal Legal Aid (Scotland) Regulations 1996 apply.

These types of cases can be exceptionally complex and lengthy and in the context of fixed payment regulation, could preclude a solicitor from being paid for work which he or she has properly undertaken in order to ensure that the accused person is given an adequate defence. Article 6(3)(c) of the ECHR requires that everyone charged with a criminal offence who has insufficient means to pay for legal assistance has the right to free legal assistance when the rights of justice so require. There is ECHR case law which requires that these rights should be effective, not merely theoretical. In a number of cases in the summary criminal courts, the fixed payments scheme has been challenged on the basis that the payments which can be made result in the accused not being effectively represented, thereby causing a breach of Article 6.

The Society is aware of the case of *Procurator Fiscal, Fort William v. Norman McLean and Peter McLean*. In that case, the court considered that in general the fixed payments scheme was compatible with the ECHR, but that it could give rise to cases where there was a breach of Article 6(3)(c). Effectively the court stated that if a breach occurred it would occur in circumstances where an accused person could point to the history of the case against him or her and state that he or she was so disadvantaged that the defence was not effective.

The McLean case is currently under Appeal to the Judicial Committee of the Privy Council.

In the Society’s view, the proposed provisions of section 6 do provide for compliance of the fixed payments scheme with the ECHR. In order to ensure that cases where an accused person would be prejudiced by the fixed payments regime these cases would revert to a time and line payment basis which would take account of the exceptional nature of the case.

**Section 8 (Criminal Legal Assistance: Retrospective Revision of Fixed Payments Regulations)**

The Society approves of this provision which it considers to be in compliance with the Convention and which will resolve difficulties which have arisen from cases which have already been dealt with.

**Section 9 (Employment of Solicitors by Scottish Legal Aid Board: Further Provisions)**
This provision is intended to ensure that there will be no accused person in Scotland who will be unrepresented. The Society has been in negotiation with the Scottish Executive and the Scottish Legal Aid Board about the creation of a “safety net” which would be operated through local Faculties or Associations of Solicitors in Scotland, but there may occur circumstances where the safety net cannot operate – for example, where there is a conflict of interest or for other reasons. The Society is of the view that it is a wise precaution to allow the Board the capacity to employ solicitors to undertake this type of work on those rare occasions where a voluntary scheme will not function.

PART 6 – POWER TO MAKE REMEDIAL ORDERS

Section 12 (Remedial Orders)

This provision grants a new power to Scottish Ministers which will extend the range of occasions when they can make Remedial Orders to remedy actual, or perceived, incompatibilities with the ECHR. The Human Rights Act 1998 allows UK Ministers to make Remedial Orders by way of subordinate legislation to remedy defects in legislation which is incompatible with the Convention. The Scotland Act 1998, section 107, allows UK Ministers the power to make Remedial Orders in consequence of any act of the Scottish Parliament or Scottish subordinate legislation or any act of the Scottish Ministers where there is incompatibility. In view of the procedural provisions in section 13, it may be appropriate for there to be further and wider consultation similar to that employed for other items of legislation before making Remedial Orders.
APPENDIX A

A. Tribunals under the direct supervision of the Scottish Committee of the Council on Tribunals

**Agriculture:**
Agricultural Arbiters, appointed otherwise than by agreement under s.61 of, or schedule 7 to the Agricultural Holdings (Scotland) Act 1991.

*Total Number of cases considered in 1999: 163*

**Banking:**
Banking Appeal Tribunal under s.28 of the Banking Act 1987.

*Total number of cases considered in 1999: 0*

**Betting Levy:**
Betting Levy Appeal Tribunal for Scotland under s.29 of the Betting, Gaming and Lotteries Act 1963.

*Total number of cases considered in 1999: 0*

**Crofting:**
Crofters Commission under s.1 of the Crofters (Scotland) Act 1993.

*Total number of cases considered in 1999: 950*

**Dairy Produce Quotas:**
Dairy Produce Quota Tribunal for Scotland under schedule 6 to the Dairy Produce Quota Regulations 1997.

*Total number of cases considered in 1999: 0*

**Education:**
Independent Schools Tribunal under s.100 and s.103 of, and schedule 2 to the Education (Scotland) Act 1980.

*Total number of cases considered in 1999: 0*

Education Appeal Committees under s.280 of the Education (Scotland) Act 1980.

*Total number of cases considered in 1999: 572*

**Food:**
Meat Hygiene Appeal Tribunal under s.26 of the Food Safety Act 1990.

*Total number of cases considered in 1999: 0*

**Forestry:**
Forestry Committees appointed in Scotland for the purposes of the Forestry Act 1967.

*Total number of cases considered in 1999: 0*

**Local Taxation:**

Non-domestic: *Total number of cases considered in 1999: 8117*

Council Tax: *Total number of cases considered in 1999: 2684*

**Misuse of Drugs:**
Misuse of Drugs Tribunal for Scotland under part 1 of schedule 3 to the Misuse of Drugs Act 1971.

*Total number of cases considered in 1999: 0*

**National Health Service:**
Discipline Committees of Health Boards or a Joint Committee of Health Boards being Committees in accordance with regulations made under the National Health Service (Scotland) Act 1978.

*Total number of cases considered in 1999: 52*

National Health Service Tribunal under s.29 of the National Health Service (Scotland) Act 1978.

*Total number of cases considered in 1999: 2*

National Appeal Panel under schedule 4 of the National Health Service (Pharmaceutical Services)(Scotland) Regulations 1995.

*Total number of cases considered in 1999: 16*

**Pensions:**
Pensions Appeal Tribunals for Scotland under s.8 of the War Pensions (Administrative Provisions) Act 1919 or Pensions Appeal Tribunal Act 1943.

**Total number of cases considered in 1999: 529**

Police Pensions Tribunals under s.1 of the Police Pensions Act 1976.

**Total number of cases considered in 1999: 0**

*Rents:* Rent Assessment Committees under schedule 4 to the Rent (Scotland) Act 1984.

**Total number of cases considered in 1999: 272**

*Social Work:*

Children's Hearings under the Children (Scotland) Act 1995

**Total number of cases considered in 1999: 80141**

Residential and Other Establishments Registrations under schedule 5 to the Social Work (Scotland) Act 1968.

**Total number of cases considered in 1999: 5**

*Taxi Fares:*

Traffic Commissioners under the Public Passenger Vehicles Act 1981 for functions concerning taxi fares under s.18 of the Civic Government (Scotland) Act 1982.

**Total number of cases considered in 1999: 5**

*VAT and Duties:*

VAT and Duties Tribunal for Scotland under schedule 12 to the Value Added Tax Act 1994.

**Total number of cases considered in 1999: 850**

**B. UK Tribunals supervised in Scotland by the Scottish Committee on behalf of the Council on Tribunals**

*Aviation:*

The Civil Aviation Authority in accordance with s.2 of the Civil Aviation Act 1982.

**Total number of cases considered in 1999: 0**

*Building Societies:*

Building Societies Appeal Tribunal under s.47 of the Building Societies Act 1986.

**Total number of cases considered in 1999: 0**

*Copyright:*

Copyright Tribunal under s.145 of the Copyright Designs and Patents Act 1988.

**Total number of cases considered in 1999: 0**

*Criminal Injuries Compensation:*

Adjudicators appointed under s.5 of the Criminal Injuries Compensation Act 1995.

**Total number of cases considered in 1999: 12580**

*Fair Trading:*

The Director General of Fair Trading under schedule 1 to the Fair Trading Act 1973.

**Total number of cases considered in 1999: 0**

*Financial Services:*

Financial Services Tribunal under s.96 of the Financial Services Act 1996.

**Total number of cases considered in 1999: 0**

*Friendly Societies:*


**Total number of cases considered in 1999: 0**

*Insolvency Practitioner:*

Insolvency Practitioners Tribunal under s.396 of the Insolvency Act 1986.

**Total number of cases considered in 1999: 0**

*National Savings Bank and National Savings Stock Register:*

An Adjudicator under s.84 of the Friendly Societies Act 1992.

**Total number of cases considered in 1999: 0**
Patents, Designs, Trademarks and Service Marks:
The Comptroller General under s.74 (4) (c) of the Deregulating and Contracting Out Act 1994.
**Total number of cases considered in 1999: 0**

Reserve Forces:
Reserve Forces Appeal Tribunal under part IX of the Reserve Forces Act 1996.
**Total number of cases considered in 1999: 0**

Revenue:
General Commissioners of Income Tax under s.2 of the Taxes and Management Act 1970.
**Total number of cases considered in 1999: 94814**
Special Commissioners of Income Tax under s.4 of the Taxes and Management Act 1970.
**Total number of cases considered in 1999: 326**

Road Traffic:
Scottish Parking Appeals Service under s.73 of the Road Traffic Act 1991.
**Total number of cases considered in 1999: 617**
**Total number of cases considered in 1999: Not Available**

Social Security:
Unified Appeal Tribunals under s.4 of the Social Security Act 1998.
**Total number of cases considered in 1999: 379568 (All UK Figures)**
**Total number of cases considered in 1999: 14649 (All UK Figures)**
**Total number of cases considered in 1999: 264 (All UK Figures)**

Transport:
Transport Tribunal under schedule 4 of the Transport Act 1985.
**Total number of cases considered in 1999: 14**
The Equality Network is the Scottish network of groups and individuals working for an end to discrimination against lesbian, gay, bisexual and transgender (LGBT) people in Scotland.

We would like to comment on Part 4 of the Convention Rights (Compliance) (Scotland) Bill, which repeals section 13(2)(a) of the Criminal Law (Consolidation) (Scotland) Act 1995.

The repeal in Part 4 of the Bill is not only necessary to comply with the Convention, it also removes a clear piece of discrimination, in the law, on grounds of sexual orientation, and the Equality Network welcomes it.

Background


Under the provisions of section 13, homosexual acts are legal if:

- the parties consent;
- the parties are over 16; and
- the act takes place in private.

Section 13(2) currently provides for two circumstances in which a homosexual act can never be “in private” for the purposes of section 13. These circumstances are that:

- (section 13(2)(a)) more than two people take part or are present; or
- (section 13(2)(b)) the act takes place in a lavatory to which the public have, or are permitted to have, access.

In either of these circumstances, a homosexual act is not “in private” and so is always illegal. The Convention Rights (Compliance) Bill repeals section 13(2)(a). Section 13(2)(b) is unchanged, and acts which do not take place in private will remain illegal.

No restriction equivalent to section 13(2)(a) exists for heterosexual acts or for sexual acts between women. If a heterosexual act or sexual act between women takes place in private, and all the people present are consenting adults, the act is legal even if more than two people take part or are present.
The relevant European Court case concerns a man, known as A.D.T., who was charged with “gross indecency” under the effectively identical English legislation, after engaging in sexual activity in private in his own home with other adult men. The sexual activity was fully consensual, and was only a breach of the law because of the special restriction on private homosexual acts, that no more than two people be present or take part. A.D.T. was convicted, and on 20\textsuperscript{th} November 1996 was conditionally discharged for two years.

A.D.T. complained to the European Court of Human Rights that his right to respect for his private life, under article 8 of the Convention, had been breached (application no. 35765/97). The European Court ruled on 11\textsuperscript{th} July 2000 that “the applicant has been the victim of an interference with his right to respect for his private life both as regards the existence of legislation prohibiting consensual sexual acts between more than two men in private, and as regards the conviction for gross indecency”. The Court found that there was no justification for this interference, and therefore that article 8 of the Convention had been breached by both the legislation and the prosecution.

The European Court awarded A.D.T. costs (£12,391) and damages (£20,929) against the UK Government. The seven European Court judges hearing the case were unanimously agreed on all parts of the judgement.

Repeal of section 13(2)(a)

As far as we are aware, even before the A.D.T. judgement, there have been no recent prosecutions in Scotland under the provisions of section 13(2)(a).

Sexual offences law is devolved, and had section 13(2)(a) been Scottish Parliament legislation, the A.D.T. judgement would effectively have rendered it immediately inoperable. As pre-existing Westminster legislation, section 13(2)(a) is not directly overruled by the A.D.T. judgement, but any person prosecuted in Scotland under this law, following A.D.T., could win substantial damages in the European Court.

Section 13(2)(a) is in clear direct breach of article 8 of the Convention, and for that reason should be repealed in the Convention Rights (Compliance) (Scotland) Bill. Repeal is not an issue of approval or disapproval of the activities concerned, but of the right of adults under the Convention to non-interference in these particular private consensual activities. Section 13(2)(a) is also discriminatory, in that no equivalent restriction applies to heterosexual acts or sexual acts between women.

Repeal of section 13(2)(a) affects only fully consensual homosexual acts between men which take place in private. Acts which involve people under the age of consent, acts which do not have the consent of those involved, acts which do not take place in private and acts which take place in a public lavatory will all remain illegal.

Finally, we would like to add that although this repeal removes an example of discrimination, on the basis of sexual orientation, in the criminal law, the form of the various sexual offences laws in Scotland still differs substantially depending on the gender of the people involved. For example, unlike in
England, in Scotland the crime of rape does not include male rape. In our view, sexual offences laws in Scotland should be reviewed to ensure that they effectively protect all people from assault and abuse, while being fair and non-discriminatory.
Present:

Gordon Jackson (Deputy Convener)  Phil Gallie
Maureen Macmillan               Michael Matheson
Alasdair Morgan (Convener)       Euan Robson

Apologies were received from Paul Martin.

The meeting opened at 2.01 pm.

1. Declaration of Interests: No member had any relevant interest to declare.

2. Convention Rights (Compliance) (Scotland) Bill (in private): The Committee considered areas of questioning on the general principles of the Bill at Stage 1.

3. Item in private: The Committee agreed to take item 8 in private.

4. Convention Rights Compliance (Scotland) Bill: The Committee took evidence on the general principles of the Bill at Stage 1 from—

   Niall Campbell, Head of Criminal and Civil Law Group, Ian Allen, Head of Legal Aid Branch, Jacqueline Conlan, Head of the Bill team, Jane Richardson, Criminal Justice Division, Gillian Russell and Stuart Foubister, both of the Solicitor’s Office, Scottish Executive;

   John Scott, Chair, Scottish Human Rights Centre;

   Susan Matheson, Chief Executive, Donald Dickie, Senior Manager (Policy and Standards), SACRO (Safeguarding Communities - Reducing Offending).

5. Proposed Protection from Abuse Bill: The Committee agreed that the Convener should now instruct the Non-Executive Bills Unit to draft its proposed Committee Bill on Protection from Abuse.
6. **Subordinate Legislation**: The Committee considered and noted the following negative instrument —

The Births, Deaths, Marriages and Divorces (Fees) (Scotland) Amendment Regulations 2000 (SSI 2000/447)

7. **Petitions**: The Committee considered the following petitions —

PE89 by Eileen McBride. The Committee agreed to consider whether an individual should be informed that a request to view an enhanced criminal record certificate has been made at its next meeting.

PE265 by George McAulay on behalf of the UK Men’s Movement. The Committee agreed to consult relevant organisations on the issue of anonymity of the accused in cases of rape and sexual offences against children. The Committee agreed that the Clerks should compile a list of organisations to be contacted, and that the list should be circulated to members for approval.

8. **Committee Operation (in private)**: The Committee considered how it will operate, and how it will interact with the Justice 2 Committee. The Committee agreed to a paper on this matter by the Clerk and that this paper should be distributed to members of both Committees.

The meeting closed at 4.08 pm.

Lynn Tullis, Clerk to the Committee
Evidence Submitted to Justice Committee 1 on the Convention Rights (Compliance) (Scotland) Bill

Introduction

CARE for Scotland welcomes the opportunity to submit evidence in relation to the Convention Rights (Compliance) (Scotland) Bill. We do not comment upon the detailed proposals contained in the Bill, but rather limit our comments here to the principles underlying the Bill and the Scottish Executive’s general approach to marriage.

The Convention and National Morality

The European Convention of Human Rights (ECHR) established a number of basic rights that the citizens of Europe can expect to receive from government. However, most of these rights are not absolute, but rather are qualified. In relation to national morality and health among other areas these rights are qualified. Moreover, in all cases a balance of rights needs to be struck between a right of one individual and a right of another person, within the context of the wider interests of society. We note that Article 8 of the ECHR states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder and crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

CARE for Scotland is concerned that the Scottish Executive is failing to prioritise its responsibility to protect the public morals of Scotland. Through a number of statements and measures the Scottish Executive has sought to change the public morals of Scotland. Moreover, some of these measures are likely to be detrimental to the health of many people. We believe that under the ECHR the Executive has the discretion to introduce or retain national legislation to protect public morality and health. We regret that the Executive seems to be reluctant to use its powers in this way, but rather (at least on occasions) adopts an absolutist and individualistic interpretation of the ECHR. This would appear to be the case in relation to the Convention Rights (Compliance) (Scotland) Bill.

Marriage

CARE for Scotland is extremely concerned by the Scottish Executive’s general approach to marriage and public morality. The Executive’s approach appears to be that marriage is indistinguishable morally from any other form of relationship. The Executive argues that it should not seek to establish a hierarchy of relationships, but interprets this to mean that it should do nothing explicit to encourage or support marriage. This despite the fact that research evidence suggests, and many Ministers and MSPs know from their own personal experience, that marriage is the most
fulfilling and stable relationship for adults and undoubtedly the best context within which to raise children. The attached briefing outlines the economic and social benefits of marriage. This briefing was submitted to the Scottish Executive as part of CARE for Scotland’s response to the ‘Parents and Children’ White Paper.

CARE for Scotland believes that in a number of measures the Scottish Executive has sought to change public morals and has failed to recognise adequately the unique and important place of marriage in our society. Moreover, on at least one occasion the Executive has also initiated a measure that is likely to be detrimental to public health and on another occasion the Executive’s failure to act has raised concerns about the effects of a proposal if implemented on the health and morals of our young people. These are:

- The Executive’s proposal (subsequently confirmed by the Parliament) to allow Westminster to legislate for Scotland on lowering the homosexual age of consent.
- The repeal of Section 2a.
- The failure to recognise the importance of marriage on the face of either the Standards in Scotland’s Schools Act, 2000 or the Ethical Standards in Public Life etc. (Scotland) Act, 2000.
- The funding of the Healthy Respect project in Lothian which has no moral framework and is likely to encourage early teenage sexual activity leading to consequent health and emotional problems.
- The striking absence of references to marriage in the proposed sex education guidance issued for consultation by Learning and Teaching Scotland, despite the conclusions of the Sex Education Working Group and assurances by Ministers that marriage would be recognised at the time of the repeal of Section 2a.
- The Executive’s proposals in the Parents and Children White Paper to make divorce easier and its consideration of abolishing adultery as a ground for divorce.
- The Executive’s ignorance of Tayside and Borders Health Boards and Lothian University Hospitals NHS Trust’s consideration of making the morning-after-pill available through school nurses. These proposals, if implemented, are likely to encourage early sexual activity with consequent adverse health effects, both in relation to sexually transmitted infections and cervical cancer in the long-term.
- The proposal contained in the Convention Rights (Compliance) (Scotland) Bill to legalise homosexual group sex.

We believe that the Scottish Executive’s general approach of not using the qualification on the right to a private life under Article 8 of the ECHR is mistaken. We would urge the Parliament to protect public health and morals where the Scottish Executive fails to do so. Notwithstanding these comments, CARE for Scotland does not intend to oppose the specific proposal to legalise homosexual group sex contained in the Convention Rights (Compliance) (Scotland) Bill.

CARE for Scotland (Public Policy)
January 2001
JUSTICE 1 COMMITTEE

The Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment (No. 2) Regulations 2001

Note by the Clerk

Background

Assistance by Way of Representation (ABWOR) is available under the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 1997 (“the principal regulations”) for specified hearings and courts. The principle regulations were amended by the Advice and Assistance (ABWOR) (Scotland) Amendment Regulations 2001 which were considered by the Justice and Home Affairs Committee at its meeting on 12 December, and approved by the Parliament on 14 December. ABWOR is usually available to persons who meet a financial test, and other conditions which may apply in particular proceedings.

The Terrorism Act 2000 (“the 2000 Act”) reforms and extends previous counter-terrorist legislation. In particular, Part V (Counter-terrorist powers) provides the police with powers to arrest and detain suspected terrorists. Criminal legal aid is not available under the Legal Aid (Scotland) Act 1986 for representation in court for detainees under this provision of the 2000 Act as they have not been charged and are not being prosecuted. These proceedings also fall outwith the scope of the duty solicitor scheme.

These Regulations make provision for ABWOR to be made available for proceedings in connection with an application for a warrant of further detention, or for extension of such a warrant under the 2000 Act. The Executive has agreed with the UK Government to amend the legal aid regulations so that terrorist suspects appearing before a Sheriff in a Scottish court of law may receive legal aid if they exercise their right to have representation.

These regulations will make ABWOR available under these circumstances without the solicitor undertaking any form of means assessment (i.e. without reference to the financial eligibility test or the client contribution test). The Executive note explains that as the detainee is in custody, and in view of the immediacy of the proceedings, it is unlikely that a solicitor would be able to verify a client’s financial status.

The Regulations were considered on 16 January by the Subordinate Legislation Committee, which agreed that no points arose.

Procedure

The instrument was laid on 8 January and is due to come into force on 19 February. Under Rule 10.6, the draft Regulations being subject to affirmative resolution, it is for the lead committee to recommend to the Parliament whether the instrument should come into force. The Minister for Justice has, by motion S1M-1561 (set out in the Agenda), proposed that the Committee recommends the approval of the Regulations. The Deputy Minister will attend to speak to and move the motion.
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 reporting deadline, the text of the Committee’s report will be circulated for approval by e-mail.

24 JANUARY 2001