The Committee will meet at 9.45am in Committee Room 1.

1. Regulation of the Legal Profession Inquiry (in private): The Committee will consider lines of questioning for witnesses to the inquiry.

2. Regulation of the Legal Profession Inquiry: The Committee will take evidence on the inquiry from—

   Linda Costelloe Baker, Scottish Legal Services Ombudsman and Anne Millan and Carolyn Pithie, Complaints Investigators, Office of the Scottish Legal Services Ombudsman,

   Colin Campbell, Dean of Faculty, Neil Brailsford QC, Treasurer of Faculty, Eugene Creally, Clerk of Faculty and Shona Haldane, Advocate, Member of Faculty, Faculty of Advocates, and

   Alastair Sim, Associate Director, Marsh UK.

3. Item in Private: The Committee will decide whether to consider its final report on the general principles of the Freedom of Information (Scotland) Bill at Stage 1 in private at its next meeting.
4. **Freedom of Information (Scotland) Bill (in private):** The Committee will consider its draft report at Stage 1 of the Bill.

Lynn Tullis
Clerk to the Committee, Tel 85246

The following papers are attached for this meeting:

**Agenda items 1 & 2:**
- Note by the Clerk (private paper)  
- Submissions to the regulation of the legal profession inquiry from:
  - the Scottish Legal Services Ombudsman
  - the Faculty of Advocates
  - Marsh UK
  - Supplementary evidence from Marsh UK

**Agenda item 4:**
- Draft Stage 1 report on the Freedom of Information (Scotland) Bill (private paper)
- Report by the Subordinate Legislation Committee to the Justice 1 Committee on the Freedom of Information (Scotland) Bill

Further submissions for the Freedom of Information (Scotland) Bill on the general principles of the Bill at Stage 1 from:
- The Campaign for Freedom of Information
- The Minister for Justice
- Opening statement from the Lord Advocate for Justice 1 Committee meeting on 5 December 2001
- Correspondence from the Lord President on the Freedom of Information (Scotland) Bill
- Correspondence from the Sheriff’s Association on the Freedom of Information (Scotland) Bill

**Papers not circulated:**

**Agenda item 4:**
Members may wish to consult the Freedom of Information (Scotland) Bill available from document supply or on the Scottish Parliament web-site at the following address: [http://www.scottish.parliament.uk/parl_bus/legis.html#36](http://www.scottish.parliament.uk/parl_bus/legis.html#36)
Papers for information circulated for the 35th meeting, 2001


Minutes of 34th meeting, 2001
Justice 1 Committee

Regulation of the legal profession inquiry

Submission by the Scottish Legal Services Ombudsman

Summary

1. **The Scottish Legal Services Ombudsman’s role and remit:** to investigate complaints about the way the Law Society of Scotland, the Faculty of Advocates and Scottish Conveyancing and Executry Board have handled a complaint about a legal practitioner. In around half of the cases examined, the Ombudsman has found that the professional bodies have not investigated complaints fairly or thoroughly. The Ombudsman can make recommendations, but cannot overturn the decision, nor investigate the complaint about the practitioner. There is no completely independent element in complaint investigations.

2. **The need for review:** consumer expectations of services and complaint handling have changed since the setting up of the current regulatory framework. Some organisations within the justice system have good complaint handling systems, some have none at all.

3. **Regulation:** legal services in Scotland are often referred to as self regulating but the degree of regulation is subject to statute to a greater or lesser degree. Regulation covers a great deal more than responding to complaints and disciplining individuals and firms. Complaint handling is the public face of regulation and acts as an open measure of effectiveness.

4. **Complaint handling principles:** complaint systems should be fair, efficient and effective. They are a form of alternative dispute resolution whereby consumers can obtain redress without the need to use the more formal system of raising an action in the courts. Within the professions, complaint systems are used as part of a disciplinary structure, and there is tension and mismatched expectations between consumer redress and professional discipline.

5. **Facts and figures** - a summary of the size and cost of current complaint handling within the Scottish legal service professions.

6. **Problems with current arrangements.** The length and complexity of current systems leads to a feeling of lawyer-led imbalance. The Law Society takes, on average, 91 weeks to investigate a complaint, and that is unfair on both sides. Many issues raised, such as complaints about the quality of advice, are not accepted as complaints. Complaint procedures are not the appropriate forum for claims of significant loss through negligence, but using the courts is costly, time consuming and subject to delay. If a grievance against a lawyer ends up in court, there can be suspicion that the lawyer led court system will not be fair and impartial.
7. **Solutions.** Complaint handling in a justice framework is a complex issue, and I do not believe that there are easy or simple solutions. One potential approach would be a body to act as a single door for all complaints about legal services, with the power to require a person or organisation to respond to a complaint. Consumer confidence would be increased by amending the powers of the Ombudsman to enable the Ombudsman to make binding orders, and/or to investigate the complaint about the practitioner. There is also a case for a Justice Ombudsman to oversee all complaints about justice issues.

8. **An Ombudsman** – the name and role of an Ombudsman is well understood by the public. In any complaint system, there has to be a final decision, the point at which all appeals are exhausted. Whatever complaint system emerges from the current enquiry, there is value in including the position of an Ombudsman. **And in the meantime.** Although there is a need for change, I confirm that I am able and willing to continue to work within the current system.

**Submission**

9. The Ombudsman’s remit is to investigate complaints about the way the Law Society of Scotland, the Faculty of Advocates and Scottish Conveyancing and Executry Board have handled a complaint about a legal practitioner. If I find that the professional body has not dealt with the complaint fairly and thoroughly, I can recommend that it looks into the complaint again, uses its powers, pays compensation for inconvenience, re-imburses the cost of making the complaint to the Ombudsman. The professional bodies decide if they are willing to accept my recommendations. I cannot overturn the decision made by the professional body, nor can I investigate the complaint about the practitioner.

10. In addition to my experience as Ombudsman, I have prior specialist experience of designing and implementing complaint systems, including systems within a justice framework.

11. There is more to regulation that complaint handling, but complaint handling is the public face of regulation, and acts as an open measure of effectiveness. This submission is focussed on the arrangements for complaint handling.

**The need for review**

12. Consumer expectations of services, service providers, and complaint handling have changed since the setting up of the current regulatory framework. Confident consumers see no difference between their expectations of the service they are given by a high street retailer who is keen to retain custom, and their expectations of the providers of legal services. Consumers expect complaint systems within the professions to keep pace with developments in the commercial world.

13. The focus on a more open government and on access to justice means that users of legal services, and of the justice system more widely, are perhaps more willing to challenge and question.
14. The regulatory regimes of the professions - medicine in particular – have come under greater scrutiny. Concerns about one profession spill over to another. No matter how good an entirely self regulatory regime might be, popular public perception is that it is not acceptable.

15. Across the justice system as a whole, the current arrangements are patchy. Complainants can feel pushed from one organisation to another or dismayed to be told they cannot make a complaint.

16. A thorough review will provide the opportunity to produce a modern, flexible system which balances the needs of complainants with the rights of the providers of legal services.

Regulation

17. The three legal services in Scotland are commonly referred to as self regulating. That is not quite true, as the degree of regulation is subject to statute to a greater or lesser degree. The professional bodies do not have a complete freedom to regulate as they please.

18. Regulation covers a great deal more than responding to complaints and disciplining individuals and firms. The regulating professional bodies, for example, set standards, oversee recruitment and training, control access to the profession, contribute to the development of law, determine an ethical framework.

19. Solicitors in Scotland are also, where appropriate, subject to regulation by other bodies such as the Immigration Services Commissioner and the Financial Services Authority.

20. Whilst complaints about members are generally determined by each of the 3 legal services professional bodies, there are elements of the current complaint systems which are independent of the professional bodies

- Complaints about fees are dealt with by the Auditor of Court in a process called taxation. Making a complaint is not risk and cost free as the Auditor can charge a small percentage of the fee.
- The Scottish Solicitors Discipline Tribunal, a body set up by statute, independent from the Law Society and including non lawyer members, hears allegations of professional misconduct by solicitors and imposes sanctions.

Complaint handling principles

21. Complaint systems should be fair, efficient and effective. They are, in essence, a form of alternative dispute resolution (ADR) whereby consumers can obtain redress without the need to use the more formal system of raising an action in the courts.

22. Good complaint handling should also contribute to ensuring that legal services are of high quality, but can only do that if it is part of an integrated system of quality management. An open and forward looking organisation should
welcome and value complaints as an indicator of the quality of service and as an opportunity to put problems right, for both the individual and for future consumers.

23. The users of legal services need to be confident that their complaints are dealt with fairly, efficiently, independently and impartially.

Problems with the current arrangements

24. No-one knows how many people are dissatisfied with legal services. Only a proportion of those who are dissatisfied make a complaint. Practitioners are not required to keep records, and some (a significant amount) of complaints to the professional bodies are not then classified as “complaints”.

25. The Law Society does not require solicitors and firms of solicitors to have a recognised system to address complaints. Nor do, as far as I know, the Faculty of Advocates or SCESB require their members to address complaints directly. It is generally recognised that a complaint addressed at source is most effective in terms of consumer satisfaction and in driving up service standards.

26. The current system of complaint resolution for solicitors in Scotland has its roots in the Solicitors (Scotland) Act 1980. The system is founded upon a disciplinary Code, which is drawn up by the Law Society of Scotland. In 1988, new legislation meant that the Law Society could investigate a complaint about the quality of service provided by a firm of solicitors. Whilst the Code of Conduct and the Practice Rules are available to the public, there are no formal quality standards against which complaints about the quality of service are tested.

27. Complainants are confused by what seems to be an artificial division of their complaint into complaints about the service provided by a firm of solicitors, and complaints about the conduct of an individual solicitor.

28. A conduct complaint seems to be treated with a greater degree of seriousness by the Law Society, yet at the end of the day there is little or no direct redress for the complainant. There is no facility to award compensation, costs or a refund or abatement of fees if the complaint is about an individual solicitor’s conduct. There is an argument that any solicitor who is found guilty of unsatisfactory conduct or professional misconduct must have provided, at the same time, an inadequate professional service. A complaint classified as IPS would, if upheld, enable the Law Society to order compensation and a refund or abatement of fees.

29. The level of lay (non lawyer) involvement is patchy. There is no lay membership of the Law Society Council, which sets the Code of Conduct and is, at present, required to make the final decision on all fully investigated complaints about the service provided by a firm of solicitors. The Faculty of Advocates is moving very slowly to increase lay involvement in complaint handling, but the Faculty members determine the Code of Conduct.
30. The Law Society “uses” complainants to report on whether a solicitor has breached the Code or Rules. It does not itself undertake service quality or conduct inspections. Despite that, there is no requirement, and no voluntary willingness, to re-imburse the costs of a complainant who makes a complaint which is upheld.

31. Complaints are not seen as an opportunity to learn and improve services. There is no formal feedback mechanism within the professional bodies and little or no opportunity to maximise the benefits of lessons learnt from complaints.

32. The formal professional bodies are subject to regulation within a statutory framework, but there is a wide range of other bodies and organisations within the wider justice and legal advice system with varying degrees of accountability and accessibility. Some advice and claims agencies (both not for profit and commercial) have a regulatory code and complaint handling system, some do not.

33. Whilst there are complaint systems for many of the justice system components, the routes are not widely known and practices vary widely. Complaints about Sheriff’s Officers, Messengers at Arms, Curators ad Litem and similar are, for example, addressed to the relevant Sheriff or Sheriff Principal, complaints about Children’s Panel Members to the local Advisory Committee. It can be difficult finding out to whom a complaint can be made: consumers often think that the justice system is more joined up than it really is.

34. Two Scottish research studies have found a significant level of dissatisfaction with the current arrangements.

   - The Scottish Consumer Council’s 1999 report “Complaints about solicitors” found that 89% of respondents said that when they first went to their solicitor they were not told what to do if they were unhappy with the service provided. Of those who first complained to their solicitor, 16% said that they were completely ignored by the solicitor/firm. Of those who took their complaint to the Law Society 48% thought the time taken to close their complaint was not reasonable. More than half of respondents said that they were unhappy/very unhappy with the outcome of their complaint. Half of all respondents thought their complaint was not handled fairly.

   - In the Central Research Unit’s 2000 Survey of Complainers to the Scottish Legal Services Ombudsman, the main overriding theme to emerge was that the Ombudsman’s powers should be increased: there were no dissenters. Most criticisms were about the Ombudsman’s remit, rather than anything that the Ombudsman and staff did or said. The report said that allowing the Ombudsman to consider the merits of the decision as well as the handling would receive a lot of support from complainers, as would powers to ensure that recommended actions were carried out within a prescribed timetable.
35. Changes to the way the professional bodies deal with complaints have tended to be a result of the Ombudsman (amongst others) pushing and pulling, rather than the professional bodies trailblazing best practice.

**Facts and figures about the legal services professional bodies and complaints**

36. The Law Society of Scotland has (as of October 31 2000) 8609 members with practising certificates. Around 6500 are in private practice.

37. The Law Society Helpline, established in September 1999 following repeated recommendations by the Ombudsman, recorded 7807 calls in 2000. The Law Society recorded that 30% directly related to actual complaints. If each call is from a different member of the public, it suggests that 2342 people felt sufficiently strongly about a complaint to call the Law Society.

38. The Law Society Client Relations Office received 2292 pieces of mail in 2000. After what is describes as careful screening by a Case Manager (qualified and experienced solicitors employed by the Law Society Client Relations Office) 1094 letters were classified as an issue which related to the service provided by a firm of solicitors, written by a person who, under the terms of the legislation, had an interest to complain. In almost half of these complaints (492) the legal business was litigation, and in a third, (325) conveyancing. Just under a quarter (242) included allegations that a solicitor had breached the Code of Conduct.

39. The Law Society aims, wherever appropriate, to refer a complaint about the service provided by a firm of solicitors back to the solicitors to be resolved informally. It calls the process conciliation, and the Client Relations Office staff can be involved to a greater or lesser degree. In 2000, 932 complaints were resolved by conciliation.

40. In 2000, the Law Society completed formal investigations into 383 complaints:

- It dismissed 148 complaints (39%)
- It made a finding that there had been an Inadequate Professional Service in 134 cases (35%) – and imposed sanctions in 114 of those cases, including that the solicitors pay compensation (totalling £25,590 in the year) and/or a provide a refund or an abatement of fees.
- It regretted or deplored the unprofessional or unsatisfactory conduct of a solicitor in 54 cases – the solicitor is written to, but no record of the finding is kept on the solicitor’s record at the Law Society
- It reprimanded the solicitor in the 33 cases where a complaint of professional misconduct was upheld
- It sent 14 cases for prosecution before the Scottish Solicitors Discipline Tribunal

41. In 2000, of the 559 inspections of the books (financial record keeping) of solicitors, the Law Society thought that in 4 cases the circumstances warranted a complaint being made to the Scottish Solicitors Discipline Tribunal.
42. In 2000, the Law Society paid £234,000 in grants from the Scottish Solicitors' Guarantee Fund in respect of losses suffered by clients. The loss is direct financial loss.

43. The Scottish Solicitors Discipline Tribunal heard 10 complaints in 2000. Two solicitors were struck off the Roll of solicitors, 2 suspended from practice and 2 had their practising certificate restricted. Five complaints were made direct by members of the public.

44. The best estimate is that between 10% and 15% of people whose complaint about a solicitor has been fully investigated by the Law Society, then complain to the Scottish Legal Services Ombudsman about the way the investigation was handled. In 2000-01 the Law Society's investigation into a complaint was found to be fair and reasonable in 49% of the cases referred to the Ombudsman. In 36% of the cases referred to the Ombudsman after a full Law Society investigation, I concluded that the Law Society had not investigated the complaint adequately or fairly, and in 26% of cases that there had been mismanagement.

45. In 2000, the Law Society received 1198 pieces of mail which it decided did not require to be investigated. Included in that figure are 23 “complaints” that a solicitor had failed to comply with the Continuous Professional Development regulations. The Law Society does not classify the remaining 1175 letters, but they will include complaints

- about the quality of advice offered by a solicitor;
- about a solicitor's professional judgement, for example the way a case was conducted in court;
- where the allegation is that the solicitor has been negligent;
- about a third party solicitor - a solicitor who acted for another party, for example in a divorce, or for the seller or a property, or the other side in a civil dispute;
- about a solicitor's conduct, where the complaint is made more than 5 years after the event which gave rise to the complaint;
- about the service offered by a firm of solicitors if the complaint is made more than 2 years after the service
- about the fees charged by solicitors.

Members of the public are confused, upset and angry that what they thought was a complaint is classified as a matter which the Law Society either cannot or will not look into.

46. The Faculty of Advocates has 425 members. The Dean of the Faculty recorded 18 complaints as received in 2000, not including letters where the complaint was about fees but there was an incidental reference to the quality of work. The Faculty of Advocates did not uphold any complaint in cases where the final determination was made in 2000.

47. In 2000, two people who were dissatisfied with the way the Faculty had handled their complaint then complained to the Ombudsman. In both, the Ombudsman found that the Faculty had responded fairly and thoroughly. In
earlier years, the Ombudsman has not always found that the Faculty has responded fairly and thoroughly, and has raised concerns about administrative delays and lack of lay involvement.

48. **The Scottish Conveyancing & Executry Services Board** has 11 members, 2 of whom run their own practices. SCESB’s complaint system has a modern feel, and strict time limits for each stage. In 2000, SCESB received one complaint about the service provided by a practitioner, and upheld the complaint. In 2001 I received the first complaint about the way SCESB had handled a complaint, and found that it had not acted fairly or thoroughly.

49. **The Scottish Legal Services Ombudsman’s** office has received 134 complaints in the past 12 months. Over the past 5 years the average number per year has been 123. The Ombudsman receives no more than 2 or 3 complaints a year about the Faculty of Advocates and so, on average, there have been 120 complaints a year about the Law Society.

50. In total, the Ombudsman’s office receives around 400 enquiries a year. Many are from people who want to make a complaint about a legal practitioner, the remainder from people who want to complain about judges, sheriffs, the Legal Aid Board, the Police, Sheriff Officers, and others who work in the broader justice system.

**Costs**

51. The Law Society records that dealing with complaints cost £389,000 in 2000. As far as I am aware, there is no formal accounting of the time given to the complaints process by the 95 legally qualified and non lawyer Reporters who prepare a report on a complaint, or members of the Law Society Committees and Council - all of whom are unpaid.

52. I have not asked, but I suspect that the Faculty of Advocates has not costed its complaints procedures. The Dean is part time and unpaid.

53. The Ombudsman’s office is fully funded from public money and has a budget of £185,000 for the current financial year.

54. In my view, legal services practitioners and the regulatory or similar bodies should bear most, if not all, of the cost of responding to complaints. The service provider has the benefit of the improvement of services through lessons learnt, and holds the responsibility for providing an adequate service in the first place. There is, however, a strong public interest in access to justice, and also in public protection. Given the importance of high quality accessible legal services, it is appropriate that there is a publicly funded contribution through the oversight of the Scottish Legal Services Ombudsman.

**Specific issues**

**the length and complexity of the process**

55. Whilst SCESB’s complaint system has tight time limits, neither the Law Society nor the Faculty of Advocates are similarly time conscious. Of the last 18
Opinions I have completed on complaints which the Law Society had fully investigated, the shortest time taken from making the complaint to the Law Society to being told of the decision was 47 weeks, the longest 178 weeks, and the average was 91 weeks. That is far too long, and unfair on both complainant and complained about solicitor.

56. The process, unsurprisingly, is legalistic and paper heavy. Legal practitioners are comfortable and familiar with wordy, legalistic, paper based systems, complainants generally not so and they tend to feel at a disadvantage. Complainants can and do give up part way, totally fed up with being asked to make yet more representations. The repeated requests for comment and representations makes complainants feel that they have not been listened to the first time.

professional negligence

57. I do not see complaint procedures as being the appropriate forum for claims of significant loss through negligence. The problem is that using the proper forum, the Courts, is costly, time consuming and subject to delay. My view is that the responsibility for putting that right lies with the wider justice system. There is, however, a case for a pragmatic approach and for complaint systems to provide some limited recompense for loss as part of compensation powers. In order for there to be a significant ADR route for loss through negligence, powers to order compensation would need to be increased – perhaps to £5,000, and be capable of simple updating in line with inflation at pre-determined intervals.

lack of an independent element

58. If a grievance against a legal practitioner ends up in court, there can be suspicion that the lawyer led court system will not be fair and impartial.

59. As the Ombudsman has no power to make a binding decision or determine the original complaint, the current complaints system lacks real independence from the legal professions.

Solutions

less practical

60. Those who argue against self-regulation want, at the extreme, for regulation to be effected entirely by non lawyers. I cannot think of any regulatory regime which does not require expert input into whatever is being regulated. It is possible to be independent and impartial whilst being, at the same time, expert. It is difficult to see how the legal professions would learn from complaints if complaint handling, let alone regulation, was completely removed from them.

61. It would, in my view, be inappropriate for regulations and complaint handling to become the sole responsibility of Government. It is vital to ensure that the legal profession are, and are seen to be, independent of Government. In this
country, we take the independence of the legal professions almost for granted but lawyers must be free to discharge their professional duties without any improper restriction, influence, pressure, threats or interference from any quarter or for any reason.

with potential

62. Complaint handling in a justice framework is a complex issue, and I do not believe that there are easy or simple solutions to the problems I have highlighted. There is, however, a variety of regulatory and complaint handling models and the Committee may wish to examine them and perhaps call evidence from those which seem to have relevance to the justice system.

63. One potential approach would be a joint Legal Services Standards Board (or snappier title) which would act as a single door for all complaints about legal services, with the power to require a person or organisation to respond to a complaint. The Board would, for example, be able to refer a complaint to the advocate, solicitor or firm or solicitors, and require them to attempt to resolve the complaint and report back, or refer a complaint to any other relevant body. If the professional bodies want to retain control over complaint handling, they would need to demonstrate that their systems met the standards set by the Board. If the Board had confidence in the professional body, it could require that body to investigate the complaint. In cases where it was not confident that the complaint would be handled competently or fairly if referred on, it would have the power to investigate the complaint itself.

64. There would be significant benefits to a joint approach. In recent months a complainant complained to the Ombudsman both about the way the Law Society handled a complaint about a solicitor, and about the way the Faculty of Advocates handled a complaint about an advocate. The Law Society had found that the fault was by the advocate and not the solicitor. The Faculty of Advocates had found that the fault was by the solicitor and not the advocate. A joint Board could ensure that a Complainant did not fall down the gap between two professional bodies. Rather than the Law Society and Faculty responding to a complaint about fees by closing the door and saying “we don’t do that” (which whilst true can be seen as an unhelpful), the Board would say “we have asked the Auditor of Court to . . .”, thus providing a more positive response.

65. It would be possible to give a joint Board the power of direction over as many “justice” related organisations as Parliament thought to be appropriate.

66. If a complaint is upheld, and brings into question the practitioner’s fitness to practice, then there must continue to be an independent and impartial tribunal which is set up and acts in accord with ECHR. In order to meet the requirement for a prompt hearing, any prior investigation must adhere to an agreed timetable.

67. I acknowledge that my proposal for a joint Board is a radical solution. More simply, amending the powers of the Ombudsman to include binding orders and the investigation of the complaint about the practitioner would introduce a truly independent element. Without having experienced the availability of such
powers, I suspect that I would take a very similar approach to my colleague Legal Services Ombudsman in England and Wales, and use the additional powers rarely rather than routinely. I remain concerned that complainants have little confidence in the fairness or thoroughness of the re-investigation by the professional body, when the professional body did not get it right the first time and still appears reluctant rather than enthusiastic. A Law Society re-investigation typically takes almost a year.

**an Ombudsman**

68. Whatever complaint system emerges from the current enquiry, I believe that there is value in including the position of an Ombudsman as the final arbiter. The concept of an Ombudsman is well understood by the public, the British and Irish Ombudsman’s Association gatekeeps the term, in that only those systems which meet strict criteria can be full voting members of BIOA. In any complaint system, there has to be a final decision, the point at which all appeals are exhausted. I think it helpful that the final point is a narrow tip of a pyramid – a known person, in a small and accessible organisation.

**worth thinking about**

69. There is, in my view, an argument for a Justice Ombudsman to oversee all complaints about justice issues - legal services, legal aid, tribunals, procurators fiscal, Curators, courts and the justiciary, independent of and seen to be independent of Government. Legal services complaints fall within the Scottish Legal Services Ombudsman’s remit, complaints about public bodies within the Parliamentary Ombudsman’s remit. For the sake of clarity, and in order to provide a coherent and cohesive approach, a single Justice Ombudsman would have merit. Given the breadth of the Justice Committee’s remit, I raise the big idea as one worth considering.

**Continuing to work with what we have**

70. The Justice 1 Committee’s enquiry provides the welcome opportunity to review regulation and complaint handling systems. Whilst I have drawn attention to some of the problems with the current arrangements, I do want to make it clear that I can work with the current system, and will continue to do that in a constructive spirit.

Linda M Costelloe Baker MBA
Scottish Legal Services Ombudsman
9 August 2001

Ms. Jenny Goldsmith,
Assistant Clerk,
The Scottish Parliament Justice 1 Committee,
Committee Chambers,
Edinburgh, EH99 1SP

Dear Ms. Goldsmith,

In response to your invitation of 20 June 2001, I have pleasure in enclosing a short Memorandum of Evidence outlining the Faculty’s position on the matter of self-regulation.

I hope that this will assist the Committee in its deliberations. If any clarification is required, we will of course be happy to provide it on request.

Given the potential scope of the Inquiry, it seems unlikely that the Faculty’s oral evidence could be completed within a single sitting. Might the Committee therefore wish to consider the possibility of taking evidence on different topics at different times, or at least the possibility of spreading evidence across more than one sitting so that complex issues can be adequately addressed?

Yours sincerely,

[Signature]

Eugene P. Crealy
MEMORANDUM OF EVIDENCE

by

THE FACULTY OF ADVOCATES

in relation to

(1) Inquiry by the Justice 1 Committee into the Regulation of the Legal Profession

and

(2) Public Petition No: PE361 on behalf of the organisation known as “Scotland against Crooked Lawyers”
INTRODUCTION

1. The Faculty welcomes the opportunity to submit evidence in relation to the above matters. It has already briefed researchers at some length on the former subject, and looks forward to presenting evidence to the Committee on all relevant issues in due course. The purpose of the present Memorandum is to give the Committee a brief preliminary indication of the main points which the Faculty would wish to develop in evidence at a later stage.

2. Comments on the Petition are not set out separately, partly because virtually all of the Petitioners' concerns appear to be directed against the Law Society of Scotland, and partly because the Petitioners have to date produced no evidence adverse to the Faculty. It should, however, be clearly understood that the Petition is strongly opposed; that the Faculty disagrees fundamentally with many of the Petitioners' assertions; and that the outcome sought by the Petitioners is regarded as unworkable, expensive and contrary to the interests of those having legitimate grievances against members of the legal profession.

3. Since the principal focus of the Committee's Inquiry is understood to be the arrangements by which the legal professional bodies deal with complaints against their members, it is proposed to deal with that aspect of self-regulation first. Thereafter, brief comments will be made on the Faculty's role vis-à-vis the admission of new members, and on the professional rules which govern members' conduct.

4. For obvious reasons, this Memorandum concentrates on the position of the Faculty rather than on that of the Law Society of Scotland.

COMPLAINTS AND DISCIPLINE
The proper role of a complaints system

5. There are two options open to a person who feels aggrieved by the conduct of a lawyer. In the first place, where professional negligence is alleged, he may claim compensatory damages for any resultant loss. And in the second place, he may complain to the relevant professional body.
These are, it is submitted, distinct actions which should not overlap or duplicate each other.

6. The appropriate way to recover compensatory for alleged professional negligence is by Court action. For claimants who are eligible, Legal Aid is available for such proceedings. Other alternatives to private funding may also be open. Judicial expenses are normally recovered from the opposing party on success.

7. Where stateable grounds of claim exist, qualified legal advice and representation, from both solicitors and Counsel, will always be available. For obvious reasons, however, it is a breach of professional duty for a lawyer to take on a case which is not judged to be stateable, particularly where public funds are involved. As the President of the Law Society of Scotland pointed out when giving evidence to the Committee on 19 June 2001 (at page 40 of the Official Report), someone whose case has no merit may have difficulty finding a lawyer prepared to take it on.

8. Exactly the same considerations apply to the recovery of compensatory damages from non-lawyers on the ground of alleged negligence.

9. A highly-developed professional disciplinary system should therefore be seen as additional to, and different from, judicial remedies available to aggrieved consumers of goods or services. As has been recognised by the Scottish Legal Services Ombudsman in the past, the complaints system administered by the Faculty, or for that matter by any other professional body, is not a back-door alternative to Court proceedings for compensatory damages. On the contrary, the system serves (i) as a means whereby the grievances of individual complainers can be examined and adjudicated on, and (ii) in the wider public interest, as a means of policing professional standards and of disciplining lawyers who fail to attain them.

10. Under the Faculty's Disciplinary Rules, the penalties available on a finding of professional misconduct, or of inadequate professional service, include a substantial fine, suspension and expulsion. In some cases, an
order for repayment of fees may be appropriate. For two main reasons, compensatory damages cannot be awarded. First, the legal tests for professional misconduct and inadequate professional service are materially different from those applicable to negligence at common law. Second, complaint proceedings are intrinsically unsuitable for determining adversarial pecuniary claims. For example, the professional body in complaint proceedings normally undertakes an active investigatory role, whereas for the purposes of an adversarial claim it would be for the complainer to lead all necessary factual and expert evidence. In addition, the professional body in complaint proceedings is in a position to demand the full co-operation and assistance of the member complained against, whereas no such entitlement could properly be exercised by a claims adjudicator.

11. If an external regulatory body were to be substituted, it is conceived that these features, with their obvious advantages, would be lost. This would act to the detriment, not only of individual complainers, but also of the wider public interest in the maintenance and improvement of professional standards. It would become necessary for a complainer to shoulder the full evidential burden of establishing his complaint including the provision of all necessary factual and expert evidence. At the same time, the person complained against could legitimately rely on the presumption of innocence and treat the proceedings as fully adversarial. Formal evidence in defence would almost certainly be required. The increased cost and complexity of the exercise would, it is conceived, benefit no-one, least of all the complainer. Account would also require to be taken of the cost and difficulty involved in making any new regime fully ECHR compliant.

Independence

12. In a free society the administration of justice must be independent of the executive arm of Government. The legal profession is an important part of the machinery of the administration of justice. The Courts decide disputes not only between citizen and citizen, but also between citizen and Government. In the latter context members of the legal profession become involved in upholding the rights and privileges of the individual citizen against public authority in all its forms, and in protecting the
citizen against threatened abuse or excess of power. Absolute independence from both central and local government is vital if lawyers are to be able to fulfil this critical role, and to provide an impartial service to clients in fields such as judicial review, devolution issues and claims against government departments and public agencies. Any diminution in that independence would be harmful to the rights and freedoms of individual citizens, and would have important constitutional implications. There would be no purpose in having an independent judiciary if the lawyers practising before Courts and Tribunals were, directly or indirectly, subject to any degree of governmental influence or control. It is submitted that the long-standing principle of self-regulation is a primary guarantee of the necessary independence of the legal profession, and must be jealously protected.

13. In the course of her evidence to the Committee on 5 June 2001 (at page 4 of the Official Report), the Scottish Legal Services Ombudsman stated that she was "...the only truly independent person in the whole complaints process". The accuracy of this claim is questioned. The Ombudsman is appointed by the Scottish Executive for a limited term, and she and her staff receive administrative assistance and, it is believed, legal advice from that source. In addition, the Ombudsman is accountable to the Parliament, and requires to submit an Annual Report justifying her activities. In relation to the Parliament and the Executive, therefore, the Ombudsman does not share the independence of any self-employed member of the legal profession. As regards the treatment of complaints, the Ombudsman is no more and no less independent than (i) a member of the Faculty’s lay panel or (ii) the Dean or any other member of Faculty participating in the disciplinary process. In particular, it would be wrong to treat the Dean, who is (like every other advocate) a self-employed individual practitioner, as in any way lacking in independence or impartiality when dealing with complaints against members of Faculty. Advocates act independently against each other on a daily basis in Courts and Tribunals throughout Scotland. Far from diminishing that individual independence, membership of the Faculty enhances it through the strict professional rules to which all advocates are subject. Complaints against advocates are investigated and determined with the same professional
independence and detachment, and subject to the same professional rules.

The Faculty’s Disciplinary System

14. Despite the fact that its membership has more than doubled over the past decade, the level of complaints received by the Faculty against its members is consistently at a very low level. The average annual number of complaints against advocates is of the order of 20, and the fairness and thoroughness of the Faculty’s handling of these complaints has been acknowledged by successive Ombudsmen.

15. Leaving aside the renowned training, full-time commitment and professionalism of advocates, one important reason why the number of these complaints is so low is that under the Faculty’s professional conduct rules any member faced with an ethical problem is expected to seek, and act upon, advice from the Dean, failing whom from another Officebearer. Such advice is sought and given on virtually every day of the year, and it is conceived that this substantially reduces the potential for complaints, whether of misconduct or of inadequate service. Another reason is that advocates are not permitted to handle clients’ money, or to deal with clients direct. Instead, they carry out particular items of work on a referral basis, that is, on the instructions of a qualified solicitor or, in certain circumstances, a qualified member of some other profession. There is thus always a “gatekeeper” between client and advocate who may be expected (i) to make an informed selection of the Counsel to be instructed, and (ii) to terminate instructions if it appears that the clients’ interests are not being properly served.

16. In the course of their evidence to the Committee on 5 June 2001, the Ombudsmen and a member of her staff suggested (at page 14 of the Official Report) that the legal relationship between an advocate and client is open to doubt and is under review. This is not so. It is well-settled that the relationship of an advocate with his client, or with his instructing solicitor, is not in law contractual. On the contrary, by accepting instructions, the advocate takes on a mandate to act as he thinks best in the client’s interest. The lack of a contractual relationship affords the
advocate an extra degree of independence from the client by comparison with the client's solicitor. It is also a principal reason why advocates cannot, in law, sue for their fees, and must instead rely on the professional obligation of the instructing solicitor.

17. The Ombudsman also suggested in her evidence (at page 6 of the Official Report) that *inter alia* the Faculty's complaints system was "...based on disciplinary measures and not on dealing with complaints". She also suggested that every complaint had to be "...broken up and translated into a list of alleged disciplinary failings". Whatever may be the position regarding other professional bodies, these comments do not apply to the Faculty. Under the Faculty complaints system all complaints are considered fairly on their merits.

18. Again, contrary to the Ombudsman's suggestion in evidence (at page 7 of the Official Report), the Faculty does not automatically reject complaints where some element of professional judgment is involved. For obvious reasons, where the advocate's professional judgment appears to have been exercised within reasonable limits, it would be wrong for any investigator to try to substitute his own judgment on circumstances in which he was not involved, and the precise nature of which can no longer be re-created. On the other hand, where it is clear that the advocate's professional judgment has been exercised so unreasonably as to fall outwith permissible tolerances, the service provided to the client may legitimately be held to fall on the inadequate, as opposed to the adequate, side of the line. Similarly, for the avoidance of doubt, it should be made clear that the potential for a Court action based on negligence is not of itself a bar to complaint proceedings under the Faculty's Rules. As explained in paragraph 10 above, the legal tests for professional misconduct and inadequate professional service are different from those applicable to negligence.

19. In recent years, the Faculty's disciplinary procedures have been altered and improved in various respects. Such changes have often been made in discussion with, or with the approval of, the Scottish Legal Services Ombudsman. In particular, the exchange of correspondence during
investigation of a complaint has been standard practice for years, although successive Ombudsmen have accepted that in some circumstances transmission of the gist of a statement or response is sufficient. Further, certain complaints have, in the past, been determined after consultation with a Committee including lay membership. In tripartite discussions last year with the former Ombudsman and the Minister for Justice the Faculty agreed to amend its Rules to provide for such a Committee to determine all cases in place of the Dean alone. At that time, the former Ombudsman dropped his long-standing insistence that the Committee must have not less than two lay members – an insistence for which no convincing reason had ever been put forward and which had impeded more extensive trials of a consultative complaints Committee. It is believed that the present Ombudsman, and the Minister for Justice, are content with the agreed changes to the Faculty’s Rules.

20. The fact that complaints are pursued at all demonstrates a measure of public confidence in the system, although it has to be said that some complainers (wrongly) see a complaint as a means of obtaining compensatory damages without going to Court, and others (wrongly) pursue a complaint as a means of obtaining information and evidence in connection with pending Court proceedings such as criminal appeals. In addition, perhaps, the fact that only a very small proportion of complaints are referred to the Ombudsman – rarely more than two in a year – suggests that most complainers are content with the way in which their complaint has been handled. Moreover, successive Ombudsmen have acknowledged the fairness and thoroughness with which complaints against advocates are dealt with, and few cases result in a recommendation of any kind. The present Ombudsman has made no recommendation to the Faculty in relation to any of the complaints referred to her. In these circumstances there would appear to be no sound reason why public confidence in the Faculty’s complaints system should not be maintained and enhanced. The public at large are, of course, in the happy position of having no involvement with Courts or lawyers in any context, and it is believed that the great majority of those who do are satisfied with the services which they receive. This may in itself seem surprising, given that there is likely to be a disappointed party
in every contested litigation or similar dispute, but it is believed that clients generally recognise (i) that success or failure often depends on their own conduct, the performance of their opponents or the attitude of the Court; and (ii) that in engaging a lawyer they are not contracting for an end result like the rewiring of a house, but merely securing for their claim or defence (whether valid or invalid) the benefit of professional competence, skill and experience.

ADMISSION OF INTRANTS

21. Among the principal factors to be understood in this context are the following:-

- While the Faculty as a professional body is responsible for the admission of its own members, the office of advocate is bestowed by the Court.

- From time immemorial the Court has delegated to the Faculty the task of confirming that prospective intrants are appropriately qualified for admission to the office of advocate.

- In discharging this delegated function, the Faculty takes steps to verify that each intrant has the requisite good standing, intellectual ability and legal scholarship, and also that each intrant has undergone appropriate professional training in preparation for practice at the Bar.

- Subject to discretionary exemptions, an upper second class honours degree in law, coupled with the Diploma in Legal Practice, constitute the basic requirements in terms of legal scholarship.

- So far as professional training is concerned, the Faculty requires all intrants to work for a substantial period (normally at least 21 months) in a solicitor’s office, before undergoing the further training offered by the Faculty itself.

- The Faculty’s training comprises two elements. The first of these is a total of 9-10 weeks of full-time intensive training in advocacy skills.
This is run by the Faculty’s Training and Education Department, and is widely regarded as among the best available in the English-speaking legal world. In addition, intrants undertake more than six months of pupillage or “devilling”, during which they are attached to experienced junior counsel and participate actively in their masters’ practice. Training for trainers is also provided, and the Department also arranges a wide range of seminars, conferences and other events for practising advocates as well as for intrants.

- It is only on satisfactory completion of training and pupillage that an intrant may be admitted to individual, self-employed practice at the Bar. The admission ceremony, consistent with the facts stated above, falls into two parts, the first being admission to membership of the Faculty as a professional body, and the second being admission to the office of advocate by the Court.

- Apart from confirming, in the public interest, and without discrimination, that intrants possess the necessary qualifications and training, the Faculty does not recruit or select individuals for membership nor does it erect any barriers to entry. Provided that an intrant fulfils the necessary formal requirements, he or she is welcomed to membership irrespective of nationality, gender, sexual orientation, or social background and may then commence individual practice on his or her own account.

PROFESSIONAL CONDUCT RULES

22. The main points to note are summarised below:-

- All members of Faculty are expected to abide by the Rules promulgated for their guidance.

- The cardinal principle of professional conduct, based on the Declaration of Perugia (1977), is that an advocate must at all times show himself to be worthy of the trust of those who deal with him: his client, his instructing solicitor, judges, other members of the legal profession (especially those who act for an opposing party), and the public generally.
Many chapters of the Rules, for example the chapter dealing with the need to avoid actual or potential conflicts of interest, are in the nature of elaborations or developments of that cardinal principle. Similarly, the complex technical rules governing the acceptance or return of instructions, or the advocate’s duties towards the Court and other third parties, are designed to assist advocates to deal fairly and responsibly with situations in which they may owe conflicting professional duties towards more than one party.

As previously indicated, if an advocate encounters a problem concerning the interpretation or application of these Rules, he is expected to seek, and act upon, the advice of the Dean, whom failing one of the other Officebearers. As a result of the small size and centralised collegiate structure of the Faculty, this arrangement works well in practice.

CONCLUSION

23. For the foregoing reasons, the Faculty strongly opposes any departure from the principle of self-regulation, and suggests that no evidence capable of justifying such a departure has been produced.

24. As pointed out by the Scottish Executive in paragraph 3 of their response to the above Petition, “...Any move to prohibit the regulation of the legal professions by the relevant professional bodies would have to be justified by very clear evidence that existing arrangements were unsatisfactory. Major questions would be raised about what alternative arrangements should be put in place, whether they would really be more effective and beneficial to clients, and how much they might cost the taxpayer.” The Faculty respectfully agrees with and adopts these remarks.
FREEDOM OF INFORMATION (SCOTLAND) BILL:
USE OF MINISTERIAL CERTIFICATES IN OTHER FOI REGIMES

At the 29th session of the Justice 1 Committee on Tuesday 30 October, Executive officials gave evidence at Stage 1 on the Freedom of Information (Scotland) Bill. Members indicated that they would find it helpful to be provided with examples of the use of Ministerial certificates in other Freedom of Information regimes and we agreed to try and assist in this regard. I sent you a holding reply on 30 November.

It might be helpful if I begin by summarising the approach in the Bill to Ministerial certificates. Section 52 provides for the circumstances when a certificate could be issued to make void a decision notice or enforcement notice issued by the Scottish Information Commissioner requiring the disclosure of exempt information. Section 52 applies to 6 (of 17) exemption categories (as specified in that section). If such a certificate is not issued within 30 working days of the giving of the Commissioner’s notice, the notice would have effect. The Executive’s policy is that a decision to issue a certificate overriding a Commissioner’s notice should be taken by collective decision of the Scottish Ministers. The approach to confer on the First Minister the function of signing a certificate – after consulting the other Members of the Executive – delivers this policy insofar as it is possible to do within the terms of the Scotland Act (Section 52). After issuing a certificate to the Commissioner, the First Minister would be required to lay a copy before the Parliament and, in relation to a decision notice, advise the applicant making the request for information (to which the Commissioner’s notice relates) of the reasons for the First Minister deciding to issue the certificate.

I would direct Members to the Policy Memorandum which accompanied the Bill (paragraphs 129 – 131) for further commentary on section 52. As is the case generally with Ministers’ decisions, the First Minister’s decision to issue a certificate could, of course, be subject to judicial review.
To complete the picture, I would refer to the national security element of the exemption at section 31, where provision is made for a certificate to be issued by a member of the Scottish Executive certifying conclusively that exemption is required for the purpose of safeguarding national security. It is the Executive’s policy to provide for appeals against a section 31 certificate to be considered by the special national security panel of the Information Tribunal (as established by the UK Freedom of Information Act 2000). This would deliver common appeal arrangements for national security material, as found in Section 60 of the UK Freedom of Information Act 2000. It is intended to deliver this aspect of policy by means of an order under Section 104 of the Scotland Act 1998 (paragraphs 77-79 of the Policy Memorandum refer).

In relation to overseas experience of Ministerial ‘override’ or ‘veto’ certificates, the attached Annex provides information on the arrangements in Ireland, New Zealand, Australia and Canada. I apologise for the time it has taken to obtain this information. Our colleagues in New Zealand in particular have experienced difficulty tracking down details about the use of certificates in New Zealand between 1982 and 1987 (simply because of the passage of time and movement of personnel). The equivalent ‘conclusive certificate’ under the Australian FOI Act appears to have been used more frequently than in New Zealand (though less so recently), although our colleagues in Australia have not provided the total number of certificates issued. It will be noted that in Australia such ‘conclusive certificates’ are issued by individual Ministers.

I hope this is helpful.

Yours sincerely

KEITH CONNAL
Head, Freedom of Information Unit
MINISTERIAL CERTIFICATES IN OVERSEAS REGIMES

Ireland

The Irish Freedom of Information Act came into effect in April 1998. The Irish legislation provides for an Information Commissioner with powers to order disclosure of information, but for certificates to be issued by individual Ministers precluding consideration of an appeal by the Commissioner. Such certificates can be exercised only in relation to a limited number of exempted categories of information and, as they can be issued by Ministers individually, must be reviewed by the Taoiseach and two other specified Ministers after 6 months (and before 12 months).

There have been 3 Ministerial certificates issued to-date, each signed by the Minister for Justice. Two of these were reported in the Information Commissioner’s Annual Report for 2000 (Chapter 2 and Appendix 2 of the Report) and the third was signed in the past few months.

The first certificate concerned an FOI request for records relating to a joint Department of Justice / Garda Siochana Implementation Strategy Group which was looking at the question of enhanced cooperation between the Garda Siochana and the police authorities in Northern Ireland (in the context of the Patten Report on policing in Northern Ireland). The second concerned a request for records related to a review for a continuing need for the Special Criminal Court. The third concerned records relating to telephone intercepts.

New Zealand

The Official Information Act was introduced in 1982. The Act included provisions on Ministerial certificates, exercisable by Ministers individually. In a revision to the Act in 1987 the use of such certificates was limited to a collective decision of the New Zealand Government. The Official Information Act is overseen by the Parliamentary Ombudsman, who has power to recommend that information should be disclosed. In general, Ombudsman recommendations are accepted and a decision to reject the Ombudsman’s recommendation needs to be made by an Order in Council.

We have been advised that prior to 1987 Ministers individually issued 14 certificates. Examples provided to us of the type of information withheld include unemployment forecasts, tender prices, information about a geothermal field, printout of the electoral roll and notes of discussions relating to a district rural water supply scheme. Reasons given for the information being withheld included protection of the political neutrality of officials, confidentiality of advice tendered to Ministers, maintenance of the effective conduct of public affairs, protection of free and frank expression of opinions and advice, information supplied in confidence and protection of information about commercial activities of Ministers.

Since 1987, when the Act was amended to require a collective decision, no certificates have been issued.
Australia

The Freedom of Information Act 1982 (which operates at a federal level) contains provisions for ‘conclusive certificates’ to be issued by individual Ministers for a range of exemptions, including: national security, defence and international relations; relations with states; Cabinet documents; Executive Council documents; and internal working documents (where to withhold information is in the public interest).

Examples provided to us of the type of information for which certificates have been issued include:

- Treasury estimates of budget receipts for future years;
- briefings to a Minister on an ongoing investigation into alleged conspiracy to defraud the Government;
- advice to a Minister on proposed policy for World Heritage listing of certain land;
- advice to and deliberations of the Foreign Investments Review Board (FIRB); proposals for changes to Government's foreign investment policy; FIRB deliberations on a proposed take-over by a foreign corporation;
- economic forecasts and projections of government revenue and expenditure;
- submissions to and deliberations of Cabinet e.g.; policy options for dealing with politically motivated violence; replacement and location of nuclear reactor; proposals for waterfront reform; and
- documents containing negotiations between Ministers concerning an application for a tax exempt status for a medical practitioner’s representative body.

The Act has been reviewed recently but we understand that any amendments made in 2002 will not affect the exemption provisions or the provision for ‘conclusive certificates’.

Canada

The Access to Information Act 1982 (which operates at a federal level) is overseen by an Ombudsman, who can make recommendations about disclosure of information. As such recommendations can be rejected, the Act has no provision for Ministerial certificates.

(We understand that the Canadian Government has introduced a Bill to deal with the threat of terrorism, and that this Bill will allow certificates to be issued prohibiting the disclosure of information required to protect international relations, national defence or security. The new Bill will provide that the Access to Information Act would not apply to such information).
Submission

to

The Justice 1 Committee of the Scottish Parliament

by

Marsh UK Limited

Regulation of Legal Profession Inquiry
Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Scope of submission</td>
<td>1</td>
</tr>
<tr>
<td>2. Introduction and General Overview</td>
<td>2</td>
</tr>
<tr>
<td>3. Regulatory Framework</td>
<td>3</td>
</tr>
<tr>
<td>4. Master Policy Cover</td>
<td>5</td>
</tr>
<tr>
<td>Appendices</td>
<td>7</td>
</tr>
</tbody>
</table>
1. Scope of submission

In response to letter of 24 July 2001 from the Assistant Clerk to the Justice Committee, this submission of evidence is made by Marsh UK Limited as brokers to The Law Society of Scotland Master Policy for Professional Indemnity Insurance (‘the Master Policy’).

In this capacity, evidence can only be provided with reference to:-

- Solicitors in private practice in Scotland
- The practical administration of the Master Policy

Claims against solicitors dealt with under the Master Policy are handled and paid by the insurers of the Master Policy and not by the brokers.

For ease of reference, extracts from the relevant statutory provisions and Practice Rules are set out in the Appendices to this submission.

The brokers’ role, as agents, precludes comment upon the effectiveness of the current regulatory framework.

In accordance with the terms of the Assistant Clerk’s letter of 24 July, this submission is confined to matters concerning compensation for solicitors’ negligence under the Master Policy. It should be noted that the Master Policy also provides compensation for certain instances of fraud/dishonesty on the part of solicitors or their staff.

Prepared by Alistair J Sim
Marsh UK Limited
Orchard Brae House
30 Queensferry Road
2. Introduction and General Overview

2.1 Since 1978, all solicitors in private practice have been required to have cover under a Professional Indemnity Insurance arrangement, ‘the Master Policy’. This ensures that all solicitors in private practice in Scotland have insurance against losses arising out of their negligence. Section 3 of this submission describes the regulatory framework.

2.2 The automatic and continuous availability of cover on an annual basis guarantees that any claim validly established against a solicitor arising from that solicitor’s negligence will be paid even if the solicitor’s practice has ceased to exist and the solicitor is unable to pay a claim or premium or excess.

2.3 Section 4 of this submission briefly describes the cover which is currently provided under the Master Policy to a Limit of Indemnity of £1,000,000 each and every claim.

2.4 Claims are handled by the Master Policy Insurers in accordance with a claims handling philosophy (Appendix III) which has the approval of the Law Society of Scotland (‘the Society’). The claims handling procedure is outlined within the description of the role of Insurers in Section 3 (Regulatory Framework). The Society is not involved in the handling or resolution of individual claims.
3. Regulatory Framework

3.1 In accordance with S.44 (1) of the Solicitors (Scotland) Act 1980 and the pursuant Solicitors (Scotland) Professional Indemnity Insurance Rules 1995 the Society maintains a Master Policy on behalf of Solicitors in private practice. Appendices I and II detail exact provisions.

3.2 As agents to the Society, the Brokers act, under instruction, to place the Master Policy for the entire profession with a common set of Insurers and with a common set of terms and conditions.

3.3 The respective roles of the Society, the Brokers and the Insurers are briefly described, as follows:

3.4 The role of the Society

3.4.1 Establish the terms and conditions of cover to be provided by the Master Policy insurers on behalf of all Solicitors’ practices.

3.4.2. Appoint a broker to the Master Policy

3.4.3 Whilst the Society has no involvement in the conduct of individual claims it does –

- Approve the Claims Handling Philosophy to be complied with by the Insurers in the conduct of claims under the Master Policy
- Determine criteria for appointment of panel solicitors
- Approve Guidelines to be complied with by the Panel Solicitors in the conduct of claims under the Master Policy

3.5 The primary role of the Brokers to the Master Policy

3.5.1 Arrange for the Master Policy to be underwritten by appropriate insurers

3.5.2 Monitor the performance of insurers

3.5.3. Accept notification of claims in accordance with terms of Master Policy

3.5.4 Refer claim to appropriate Master Policy Insurers after checking for any conflict of interest on part of that Insurer. The Brokers do
not become directly involved in the conduct of individual claims.

3.5.5 Investigate complaints concerning the insurers’ conduct of claims.

The Brokers attend to other matters on an ad hoc basis.
3.6. The role of Insurers

3.6.1. Assume agreed proportion of risk

3.6.2. Handle claims allocated by Brokers

3.6.3 Operate in accordance with the Master Policy Claims Handling Philosophy (see Appendix III)

3.6.4. Establish panel of solicitors in accordance with criteria agreed with Society and appoint a panel solicitor in cases of complex or high value claims or those in which proceedings are raised against a solicitor [practice].

3.6.5. Ensure panel solicitors’ compliance with the Claims Handling Philosophy. Check progress reports submitted by panel solicitors to instructing insurers and conduct random audit of files.

3.6.6 Address complaints in accordance with formal complaints procedure in the event that an insured solicitor or claimant or claimant’s agent has a grievance in respect of the handling of a claim by insurers or panel solicitors. In the latter case, if a matter of client service or conduct is concerned it is understood that there is recourse to the Law Society of Scotland in accordance with the Society’s standard complaints procedures.

Notes: Since inception of the Master Policy Scheme the Master Policy has been co-insured. Therefore no single insurer underwrites 100% of risk or pays 100% of claims. Moreover the various insurers have no liability for the proportion underwritten by their fellow co-insurers in any circumstances.

Claims are handled by Insurers with largest percentage participation – the lead insurer. In event of conflict of interest, claim will be handled by one of the co-insurers.

3.7 This division of roles and responsibilities clearly establishes responsibility and accountability for delivery of a Master Policy to solicitors in private practice and for the protection of their clients.

The final section of this submission briefly describes the basic parameters of cover under the Master Policy.
4. Master Policy Cover

4.1 This section is intended to highlight facts which are considered pertinent to the Committee’s Inquiry. It is not intended as a précis of policy cover

4.1.1 The Master Policy is a policy of Professional Indemnity Insurance renewable annually on 1 November

4.1.2 The general purpose of a policy of Professional Indemnity Insurance is to protect the professional person against legal liability to pay damages to persons who have sustained financial loss arising from his own professional negligence or that of his employees in the conduct of the professional practice. Policies offer indemnity strictly on a legal liability basis and moral liability is not covered.

4.1.3 The scope of cover under the Master Policy is wider than the cover provided under standard Professional Indemnity Insurance policies. Extensions are designed specifically to respond to the types of claim that may arise out of the conduct of solicitors’ practices.

4.1.4 For the further protection of members of the profession and of the profession’s clients, the Master Policy incorporates the following features:

- automatic run-off cover – this is continuing cover under the Master Policy on broadly the same terms and conditions as those applicable to a current/active solicitor’s practice

Note: Professional Indemnity Insurance operates on a ‘claims made’ basis which means that there is cover only for claims first made during the period of the policy. If a professional practice ceases on account of eg. retiral or insolvency, ordinarily there is no continuing professional indemnity insurance protection unless the principals of the practice or their representatives arrange ‘run-off’ cover on an ongoing basis. The Master Policy provides automatic run-off cover.

- no right to avoid or repudiate – under the policy terms and conditions, insurers waive their rights to avoid providing cover for non-disclosure or misrepresentation

Note: Policies of Professional Indemnity Insurance make it a ‘condition precedent’ to cover that claims are notified within strict time limits and failure to comply entitles the insurers to repudiate and avoid providing cover for the claim. The terms of the Master Policy prevent the insurers from taking
such punitive action.
• waiver of the excess (self-insured contribution) in the event an insured solicitor is insolvent at the time a claim against the solicitor is settled

Note: Policies of Professional Indemnity Insurance are normally subject to an excess and the excess requires to be paid by the insured party at the stage the insurers have agreed settlement with the claimant and are actually paying the claim. In the event that the insured party has become insolvent prior to settlement of the claim, ordinarily that part of the claim will not be met by the insurers. The claimant may be unable to recover payment of that amount depending, for instance, on the funds available in the insured party’s sequestration. The Master Policy prevents claimants finding themselves in that position by requiring the insurers to pay/waive the excess in the event of a solicitor’s insolvency.

4.2 The Master Policy operates as a protection for members of the public by guaranteeing that any claim validly established against a solicitor arising from that solicitor’s negligence will be paid even if the solicitor’s practice has ceased to exist and the solicitor is unable to pay. Limit of Indemnity of £1,000,000 applies in this respect.

4.3 In any claim for alleged professional negligence, the party asserting the claim will require to establish –

• whether a duty of care was owed
• whether the duty has been breached, and how
• what loss has arisen as a direct result of the breach

accordingly, those pursuing claims against solicitors are advised to seek legal representation in pursuing claims

Notes:

The onus of proof is unaltered by the existence of Professional Indemnity Insurance.

If a claim cannot be resolved by negotiation, the claimant will require to raise court proceedings.

The majority of claims dealt with under the Master Policy are settled or otherwise resolved without court proceedings.
APPENDIX I

The Solicitors (Scotland) Act 1980, Section 44 (1)

'The Council may make rules with the concurrence of the Lord President concerning indemnity for solicitors and incorporated practices and former solicitors against any class of professional liability, and the rules may for the purpose of providing such indemnity do all or any of the following things, namely -

(a) authorise or require the Society to establish and maintain a fund or funds;

(b) authorise or require the Society to take out and maintain insurance with any person permitted under the Insurance Companies Act 1974 to carry on liability insurance business or pecuniary loss insurance business;

(c) require solicitors or any specified class of solicitors and incorporated practices or any specified class thereof to take out and maintain insurance with any person permitted under the Insurance Companies Act 1974 to carry on liability insurance business or pecuniary loss insurance business'.
APPENDIX II

Solicitors (Scotland) Professional Indemnity Insurance Rules 1995 (Extracts)

- the Society to

“take out and maintain with authorised insurers to be determined from time to time by the Council a master policy in terms to be approved by the Council to provide indemnity against such classes of professional liability as the Council may decide. The Council at its discretion may amend the terms of the master policy from time to time.”

- every solicitor in private practice to

“be insured under the master policy and:-

(i) to comply with the terms of the master policy and of any certificate of insurance issued to him thereunder; and

(ii) to produce along with each application for a practising certificate a certificate from the brokers certifying that the solicitor in question is insured under the master policy for the practice year then commencing or the part thereof still to run as the case may be, or such other evidence as may be acceptable to the Council.”
The Master Policy Claims Handling Philosophy

‘Claims Handling
Our standards of integrity and service must be clearly demonstrated through:

♦ Speed of action
♦ Sound and clear advice
♦ Promptly and expertly establishing the circumstances and amount of the claim which recognises both our responsibility to the insured Practice Unit and the Legal System within which we operate.
♦ Providing a clear and early response to the Third Party claim ie., pay, reject, negotiate.
♦ Keeping the insured Practice continuously advised of progress.
♦ Pro-active positive claims handling. The litigation process to be a “last resort” and should only be followed after exhausting all other options to resolve the claim amicably (including ADR).

The Positive Approach:
The Insurers perceive this as:

“An attitude of mind committed to timely and cost effective resolution of claims” by:

♦ Being pro-active in forcing the pace towards a satisfactory conclusion.
♦ Clearly setting out quantum and causation points to Claimants’ Solicitors where the claim is presented on an incorrect basis.

Keeping file continually under review.’
CAMPAIGN FOR FREEDOM OF INFORMATION IN SCOTLAND

Further evidence to the Justice 1 Committee

The Ministerial Veto Overseas.

The Veto

FOI laws, such as those in the USA, Canada and South Africa have no veto provisions. They are enforced by the courts whose decisions cannot be overridden by ministers.\(^1\) However, a ministerial veto does exist in Australia, New Zealand and Ireland. This paper describes the use of the veto in those jurisdictions.

Australia

The Commonwealth Freedom of Information Act 1982 provides a ministerial veto in relation to the exemptions for:

- security, defence and international relations (s. 33)
- relations between the Commonwealth and the States (s. 33A)
- Cabinet documents (s. 34)
- Executive Council documents (s. 35)
- Internal working documents (s. 36)

These exemptions can be used either with or without a veto. If a veto is used, it prevents the appeals tribunal from reviewing the exemption claim on its merits.\(^2\) The veto was frequently used particularly in the Act’s early years, often for internal

\(^1\) Canada combines an Information Commissioner, who can only recommend disclosure, with a second layer of appeal to the federal court.

\(^2\) There is no Information Commissioner under the Australian Commonwealth Act. Complaints go either to the Ombudsman, who has no powers to compel disclosure, or to the Administrative Appeals Tribunal.
working documents. There were 7 vetoes in the Act’s first 7 months, 6 of them for internal working documents. In the second year of the Act’s operation, there were 20 vetoes, 14 based on the internal working documents exemption. In the following two years the veto was exercised 28 times. The Treasury alone was responsible for some 40% of all vetoes during this period.

Information whose disclosure was vetoed included:

- Information about the expected costs to the private sector of a proposed national identity card
- Documents relating to the Australian Bicentennial Authority
- Information about the projected size of Government revenue and expenditure.
- Cabinet documents relating to an alleged social security benefits conspiracy.
- A submission to the Cabinet about a review of the effectiveness of certain Aboriginal health programs.
- Internal working documents about the transfer of taxation administration policy from one minister to another
- Internal working documents about the establishment of a government working party on superannuation
- Government decisions to increase the excise on spirits in the 1978-79 budget (ie some years before the 1982 FOI Act came into force)

Where a certificate has been issued, the Administrative Appeals Tribunal is limited to considering the narrow question of whether there were reasonable grounds for

---

3 The internal working documents exemption applies to opinion, advice, recommendations, consultations or deliberations relating to an agency’s deliberative processes, whose disclosure would be contrary to the public interest. Factual information and scientific or technical reports cannot be withheld under the exemption. [Freedom of Information Act 1982 [Australia], section 36]
the certificate. If it finds none, the minister must reconsider the decision – but is free to confirm the original veto.

The tribunal has explained:

‘To be “reasonable” it is requisite only that they be not fanciful, imaginary or contrived, rather that they be reasonable; that is to say based on reason, namely agreeable to reason, not irrational, absurd or ridiculous…It follows that it is a heavy thing for the Tribunal to reject a certified claim…’

Where a certificate is issued in relation to the internal working documents exemption, where the test is whether disclosure would be “contrary to the public interest”:

“I am not to consider whether the public interest considerations in favour of disclosure outweigh public interest considerations in favour of non disclosure. I am not to consider whether, in issuing the certificate, the Minister displayed an undue level of sensitivity. I am only concerned, as I have said, to establish whether there exist reasonable grounds for the claims”

This is relevant to the Freedom of Information (Scotland) Bill, where a government veto is available for the policy formulation exemption (amongst others) which is also based on a public interest test. The veto could be judicially reviewed, but only on similarly restrictive grounds.

The conclusive certificate provisions have always been contentious. The Parliamentary committee which considered the Freedom of Information Bill in 1978 concluded:

“There is no justification for such a system tailored to the convenience of ministers and senior officers in a Freedom of Information Bill that purports to be enacted for the benefit of, and to confer rights of access upon, members of the public. This can only confirm the opinion of some critics that the bill is dedicated to preserving the doctrine of executive

---

8 Deputy President of the Administrative Appeals Tribunal, B J McMahan, 25/7/94, in the case of Gary Charles Corr v Department of the Prime Minister and Cabinet, No A93/140 AAT No 9655.

9 Section 29(1)
autocracy."^{10}
In 1994 two officials from the Attorney General’s department, writing in a personal capacity, concluded:

“The provisions for conclusive certificates are now anachronisms with little if any relevance to the contemporary world of FOI decisions. Time has proven that the substantive exemption provisions, without the added strength of certificates, are in fact more than adequate to the task of the exemption of genuinely sensitive documents.

To some extent, the certificate provisions are a hangover from the days before FOI, when the feared impact of the legislation was clearly exaggerated. With reference to the FOI maturity gained by 1994, rather than he FOI terrors apprehended in 1982, we may conclude that the certificate provisions have outlived whatever usefulness they may once have had. The provisions should be removed from the Act, enabling the AAT to reach a determinative decision on the merits of the exempt status of documents.”

The Australian Law Reform Commission concluded in 1995 that:

“it is inappropriate that a Minister is able to issue a conclusive certificate in respect of deliberative process documents. Decisions to withhold documents revealing deliberative processes, which are in the majority of cases the decisions of officials, should always be reviewable.”

New Zealand

A veto under New Zealand’s Official Information Act 1982 can be exercised in relation to all classes of exempt information. When the legislation was introduced, the then Minister of Justice suggested that:

‘it would be a very brave Minister indeed who resorted to this device save in the most exceptional circumstances’.

As in Australia, the veto was used several times in the Act’s first few months. After the Act’s first four years, the Ombudsman (who is the enforcement body) had
made 92 formal recommendations, 14 of which had been vetoed.\textsuperscript{14}

Vetoed information included:

- the successful tender price of wall plugs
- labour market forecasts
- estimates of unregistered unemployed
- an evaluation on the use of computers in schools
- evaluation reports and a contract relating to a Post Office switching tender
- a proposal to establish an investment bank as part of the Development Finance Corporation\textsuperscript{15}

According to a leading commentary on the New Zealand Act, the initial experience:

‘showed that public criticism of the responsible Minister by the Opposition was easily stigmatized as political point scoring, and, in any event, easily weathered. In truth, members of Parliament do not ordinarily cross the floor on such issues nor, as the Danks Committee [whose report led to the Act] thought, are incidents of non-disclosure by veto punished by the electorate at the next election.’\textsuperscript{16}

Most vetoes during the early years were issued during the National Government administration. Although technically exercised by an individual minister, in fact these vetoes were all notified to the Cabinet first.\textsuperscript{17}

The Labour government which came to power in 1984 was committed to removing the veto. However, the change was strongly resisted by the Chief Ombudsman, who argued that to allow the Ombudsman to overrule ministers would fundamentally undermine the nature of his office.\textsuperscript{18} As a result, the veto was retained but the procedures for its use were tightened up. Amendments introduced
in 1987 require that:

- the veto can only be exercised by the Governor General by Order in Council – which in effect requires the decision to be taken by the cabinet collectively;\(^{19}\)
- the veto cannot be exercised on grounds not raised at the time of the Ombudsman’s investigation;\(^{20}\)
- the veto and reasons for it must be published in the *Gazette*,\(^{21}\)
- the veto can be reviewed by the High Court on the grounds that the government exceeded its powers was otherwise wrong in law;\(^{22}\)
- the applicant’s costs in bringing a High Court review, be paid for by the Crown, regardless of whether or not the challenge is successful.\(^{23}\)

Since these changes, the veto has not been used.

**Ireland**

Ireland’s Freedom of Information Act 1997 contains a veto for exemptions for law enforcement, confidential informants, security, defence, international relations or matters relating to Northern Ireland.\(^{24}\)

Other exemptions, such as that for policy advice, are not subject to any veto. The Information Commissioner’s decisions in these areas is final, subject to appeal to the High Court on a point of law.\(^{25}\)

To exercise the veto, a cabinet minister issues a certificate stating that he satisfied that:

- the information is exempt under one of the specified exemptions, most of which contain harm tests, and
- the record is “of sufficient sensitivity or seriousness to justify” a veto.\(^{26}\)
A certificate must be reviewed by the Taoiseach (prime minister) jointly with prescribed other ministers no later than every 6-12 months.

The certificate can be reviewed by the High Court on a point of law.\(^{27}\)

The High Court can order the public body to pay the costs of an unsuccessful applicant if it considers that the point of law was of ‘exceptional public importance’ or in other circumstances.\(^{28}\)

Only two certificates have been issued since the Act came into force, both by the Minister for Justice, Equality and Law Reform during 2000. The first certified that information was covered by exemption relating to Northern Ireland and international relations, the other was issued on grounds of the security of the state.\(^{29}\)

**Conclusion**

Both the Australian and New Zealand governments made significant use of the veto, particularly in the early years. On the face of it, the vetoed documents were not exceptionally sensitive. The veto has been rarely used in Ireland, though this may partly be explained by the fact that its use is restricted to key state interests (defence, international relations, security and law enforcement) and is not available in other areas (such as policy advice) where it has proved most difficult for ministers to resist.

The prospect of Parliamentary criticism does not appear to have deterred ministers from exercising the veto. (In the UK context, a decision by ministers to overrule the Parliamentary Ombudsman under the open government code recently attracted little comment in Parliament, despite the fact that it was the first time such a recommendation had been rejected.\(^{30}\))

Some overseas FOI laws operate perfectly well without a veto. We hope the Scotland bill will be amended to remove the veto provision.
If it is retained:

- it should not be available in relation to policy formulation (as in Ireland);

- ministers should have to demonstrate that the consequences of disclosure would be exceptionally serious (as in Ireland). This would be in line with the statement in *An Open Scotland* that the veto was intended for use in relation to "information of exceptional sensitivity or seriousness". The veto should not be available merely because the First Minister disagrees with the Commissioner’s findings.

- the costs of any judicial review of a certificate should be met from public funds (as in New Zealand and as permitted in Ireland). This is justified by the fact that ministers are overturning a legal right to information, after it has been upheld by the Information Commissioner.

December 28 2001
Statement by Marsh UK Limited

relative to

Submission
(dated 14 August 2001)

to

The Justice 1 Committee of the Scottish Parliament

Regulation of Legal Profession Inquiry
Reference is made to the Submission by Marsh UK Limited dated 14 August 2001.

Marsh UK Limited are pleased to have been invited to give evidence to the Committee to describe the practical operation of the Master Policy.

The Committee’s attention is drawn to the following matters:-

• The Limit of Indemnity under the Master Policy was increased from £1,000,000 to £1,250,000 for all practices with effect from 1 November 2001 (2.3 of Submission dated 14 August 2001)

• In acting as brokers to and administrators of the Master Policy, Marsh are acting as agents of The Law Society of Scotland and, as such, the Committee will no doubt understand that Marsh are not at liberty to discuss certain matters of detail concerning the Master Policy without the Society’s prior authority. If the Committee requires information concerning any confidential matter, Marsh will, of course, require to submit that information in writing at a later date after obtaining the Society’s authority in order to avoid any possibility of commercial prejudice.

• It may be appropriate for the Committee to be aware that Alistair Sim who heads the team (‘the Marsh Master Policy team’) in Marsh UK Limited responsible for the practical administration of the Master Policy was formerly a solicitor in private practice (October 1981 to October 1991) and remains on the Roll of Solicitors as a non-practising member. No other member of the Marsh Master Policy team is or has been a solicitor.

Prepared by Alistair J Sim
Marsh UK Limited
Orchard Brae House
30 Queensferry Road
Edinburgh EH4 2HS
13 December 2001
Subordinate Legislation Committee

Freedom of Information (Scotland) Bill

Delegated Powers Scrutiny

Stage 1 Report

1. The Committee considered the delegated powers provisions in the Freedom of Information (Scotland) on 27th November and 4th December. The Committee submits this report to the Justice 1 Committee, as the lead committee for the Bill, under Rule 9.6.2 of Standing Orders.
Freedom of Information (Scotland) Bill

Report of the Subordinate Legislation Committee

Stage 1

Committee remit
1. Under the terms of its remit, the Committee considers and reports on proposed powers to make subordinate legislation in particular Bills or other proposed legislation and on whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation.

2. The term “subordinate legislation” carries the same definition in the Standing Orders as in the Interpretation Act 1978. Section 21(1) of that Act defines subordinate legislation as meaning “Orders in Council, orders, rules, regulations, schemes, warrants, bye-laws and other instruments made or to be made under any Act”. “Act” for this purpose includes an Act of the Scottish Parliament. The Committee therefore considers not only powers to make statutory instruments as such contained in a Bill but also all other proposed provisions conferring delegated powers of a legislative nature.

Introduction
3. This Bill, which is in 7 parts, establishes a statutory right of access to information held by a wide range of Scottish public authorities. It provides for the establishment of an independent Scottish Information Commissioner (SIC) to promote and enforce the legislation and for the treatment of “historical records”. The Scottish Ministers will be required to issue codes of practice regarding the operation of the Act and on records management. The Bill also allows provision to be made relating to environmental information with a view to implementing in Scotland certain parts of the Aarhus Convention.

4. The Bill contains numerous delegated powers and the Executive has provided the usual memorandum, reproduced at Appendix A, to assist the Committee. Having considered the following delegated powers with the assistance of the memorandum, the Committee approves them without further comment: sections 5(1), 10(4), 13(1), 20(7), 21(6), 23, 24, 47(6), and 72.

5. In addition to powers to make delegated legislation as such, the Bill also delegates powers of an administrative or directive nature such as sections 43 and 44 in relation to the functions of the SIC. These powers are not of concern to the Committee, appearing to be appropriate in the context in which they are used.

6. The Committee welcomes provision, in Part 6 of the Bill, for the issue of codes of practice to public authorities in connection with their functions under the Act. The Committee makes no further comment on that provision.
7. The Committee also welcomes the existing provision for consultation in the Bill but takes the view that a statutory requirement for consultation should also be included in relation to other sections of the Bill such as sections 9(4) and 12.

8. Three Scottish Executive officials attended the Committee’s meeting on 4th December to give evidence on a number of points of interest to the Committee. They were Keith Connal and Geoff Owenson of the Freedom of Information Unit and Stuart Foubister from the Office of the Solicitor to the Scottish Executive.

Delegated powers

Part 1: Access to information held by Scottish public authorities

Section 4 (1) Amendment of schedule 1

9. Schedule 1 contains a detailed list of the Scottish public authorities to be subject to the disclosure provisions in the Bill. Section 4(1) enables the Scottish Ministers, by order, to add or remove bodies or holders of certain offices to the list in schedule 1. By virtue of section (7)(1), an order under this section may also list an authority only in relation to information of a specified description. The Order is subject to negative procedure.

10. In the Committee’s view, it is evident that, as the Executive claims, the list of public authorities in schedule 1 will be subject to change over time. The Committee is aware, for example, that a recent review of public bodies has already necessitated changes to the schedule in the draft Bill issued for consultation. The Executive expects that the provision will be used in such cases where public bodies cease to exist, are created, or change title. Although the power will be used to amend primary legislation and could be used to undermine the purposes of the Bill, given the stated intentions of the Executive, the Committee is prepared to accept that negative procedure is sufficient in the circumstances. The Committee therefore approves the provision and the procedure chosen.

Section 7 (subsections (2) and (4)(b)) Public authorities to which the Bill has limited application

11. Section 7(2) empowers the Scottish Ministers to make an order limiting the obligations under the Bill of an authority listed in schedule 1 so that these would apply only in respect of information relating to a specific function or activity. The authority’s obligations under the Bill would not extend to any other information held by that authority. The Scottish Ministers may also make an order removing or amending any such limitation for the time being listed in schedule 1. Subsection (4)(b) provides similar powers in relation to information held by a publicly owned company (as defined in section 6 of the Bill).

12. The Executive explains that, in some circumstances, it will not be appropriate for the Bill to provide a right of access to all information held by authorities and other
persons subject to the Bill. For example, a private company brought under the legislation as a consequence of entering into a PPP/PFI contract should not be required to provide information in relation to other areas of its business. The Executive submits that this is an appropriate matter for subordinate legislation as this offers the flexibility to enable the Scottish Ministers to refine the Bill's coverage in response to changes in the pattern of public service delivery.

13. The order will be subject to affirmative resolution.

14. This appeared to the Committee to be a not uncontroversial power. In the illustration given there would be little problem in accepting the reasonableness of the Executive’s position. Indeed, from the point of view of ECHR compatibility such a power would be essential on legal grounds. However, in the Committee’s view, it is not difficult to see that in other circumstances tensions might arise because of a difference between the information that a body is willing to release and that which the public might wish to be disclosed.

15. To allow for flexibility, subordinate legislation is appropriate but the Committee is pleased to see that affirmative procedure is proposed. Given the subject matter this seems right. The Committee therefore approves the power, noting that affirmative procedure is particularly appropriate in this case.

16. The Committee noted, with reference to the comments on section 4 above, that section 7(1) permits an order under section 4 to limit the information that must be disclosed by a body added to schedule 1 under that power. At the moment, only negative procedure is proposed for the exercise of the power under section 4. The Committee noted that this is out of line with the procedure proposed for powers of a similar nature under section 7(2) and (4)(b) and, in its view, might argue a case for the powers under section 4 to be subject also to affirmative procedure.

17. The Committee therefore asked the Executive witnesses to comment on this apparent inconsistency. Stuart Foubister accepted that the Committee had indeed identified an inconsistency in the proposed use of negative procedure for an order made under section 4 where section 7(1) permits limitation of the information that must be disclosed by a body added to schedule 1. Keith Connal undertook to take the matter back to Ministers and to recommend a review of the procedure proposed in the Bill. The Committee welcomes this undertaking by the Executive, which it draws to the attention of the lead committee. On that basis the Committee approves the power, recommending the use of affirmative procedure.

Section 9 (4) Fees

18. Subsection (4) provides the Scottish Ministers with powers to make regulations setting out the fee structure in accordance with which charges may be made for the provision of information under the Bill. Such regulations would not affect either existing statutory rights to charge a fee for the disclosure of information or any charges for the supply of information identified in an authority's approved publication scheme.
19. As with other legislation within which fee structures are provided, it is considered most appropriate that this is done by way of subordinate legislation. Clearly, fee levels may need to be varied over time and a degree of flexibility must be provided to allow the fee structure to evolve in the light of experience of operating the regime or in response to inflation or other matters.

20. In the Committee’s view, the risk here might be that the fees could be set so high as to undermine the right of access to information. The Committee notes that the lead committee has also raised similar concerns relating to this and the other provisions in the Bill, such as section 12, relating to the setting of monetary limits.

21. However, the Committee notes that the provision as drafted is consistent with usual practice in such matters. It will obviously be necessary to amend the fees from time to time to take account of changes in the value of money. Subordinate legislation is the normal vehicle for effecting such changes.

22. Moreover the Committee considers that any fees would have to relate to the cost of the service, as otherwise there might be issues of competence. Also, if the fees were set so high as to inhibit access to information, there would be doubt as to vires as a recent English case involving Stockport County Council has illustrated.

23. The Committee observes that, as with most other delegated powers in the Bill there is no formal requirement to consult before regulations are made under this power. The Committee, however, considers that before making regulations under this power the Executive should be subject to a statutory requirement to consult with interested parties, for example, the listed authorities. Whilst the Committee is aware of the practice of the Executive to consult as a matter of course on proposals for subordinate legislation, the Committee considers that there is merit in this case, given the sensitivities surrounding the level of fees, in creating a formal requirement to consult.

24. The Committee asked the witnesses for the Executive’s view on placing a requirement to consult before the exercise of the power in this section. However, given that the provisions could be in force for many years, the Committee did not consider it practical to identify in the legislation the public bodies that should be consulted. Although such a requirement placed on the Scottish Ministers would therefore need to be generally stated, the Committee nevertheless saw merit in the requirement, in the case of this section in particular, as the proper operation of the power is crucial to the overall operation of the Bill. Stuart Foubister, for the Executive, undertook to take the matter back to Ministers.

25. The Committee therefore draws this undertaking to the attention of the lead committee, recommending that this provision should be subject to a statutory requirement to consult.

Section 12 Excessive Cost of Compliance

26. Section 12 enables the Scottish Ministers to make regulations that specify an upper cost threshold for complying with applications for information, above which
public authorities would not be obliged to comply with a request for information. The power to make such regulations is entirely discretionary. If the Scottish Ministers consider that such threshold provisions would support the effective operation of the legislation, then regulations may be made.

27. It was not considered appropriate to specify thresholds in the Bill, as it is not currently known at what level these may be set. If such thresholds were set, it will be necessary to review those levels over time, in the light of experience or to reflect inflation or other matters. Consequently, it was considered most appropriate that this was done by subordinate legislation. Negative procedure is proposed.

28. It appears that the Executive is not sure whether provision under this section will be required. Much will depend on experience once the Bill is operational. Nevertheless, it is possible that, notwithstanding the legal constraints on the exercise of delegated powers referred to above, if levels were set too low they might undermine the principles of the Bill. For this reason, the Committee considers that making the power subject to affirmative procedure would provide an important potential safeguard for the principles of the Bill. The Committee therefore recommends to the lead committee that the power be subject to affirmative procedure.

29. The Committee noted that the Bill does not contain a statutory obligation on Ministers to consult before making the regulations. However, the Committee considers that, given the nature of this power, there should be such a requirement and recommends to the lead committee that it be inserted in the Bill.

Part 5: Historical records

Section 59 (1) Power to vary periods mentioned in section 57 and 58

30. The section allows the Scottish Ministers to vary by regulations the period in section 57(1) after which a record becomes a historical record (and consequently cannot be considered exempt under the provisions listed at section 58(1)). It also allows Ministers to vary the periods in section 58(2) that determine when certain exemptions fall away and no longer need to be considered. Any alteration to these periods cannot increase them beyond the levels at which they are set at enactment of the Bill.

31. The Executive explains that, over time, opinions may change regarding the period during which it is appropriate that exemptions should continue to apply, so provision is made to allow such dates to be varied. Whilst it is not considered likely that such periods will change regularly, it was considered sensible to provide that any alterations could be made without recourse to primary legislation. The power is exercisable by affirmative instrument.

32. The Committee considers that this seems an appropriate use of delegated powers. It is important that the time limits cannot be extended by the regulations.
This is a welcome limit on the use of the power. The Committee therefore approves the power and the procedure chosen.

Part 7: Miscellaneous and supplemental

Section 62 (3) Power to make provision relating to environmental information

33. The section will enable the Scottish Ministers to make regulations to implement the Aarhus Convention (details of which are outlined in paragraphs 141-146 of the Policy Memorandum). The UK Government has signed the Convention and wish to ratify as soon as possible. The Convention goes further than the existing EC Environmental Information Regulations (EIRs) in some areas, and these are not sufficient to enable the United Kingdom to meet the requirements of the Convention. New regulations must therefore be made. The Convention is not an EC instrument and, as a result, the power to make regulations under section 2(2) of the European Communities Act 1972 cannot be utilised.

34. To give effect to the information provisions of the Convention, the Scottish Executive could have waited for European Community ratification, and implemented by means of regulations under section 2(2) of the 1972 Act. However, to do so would have delayed Scottish (and hence UK) compliance with the Aarhus Convention. The decision was therefore made to use the Bill to support the implementation of the provisions in Aarhus relating to access to information.

35. The Executive considered implementing the Convention in the Bill itself but decided this would be too complex. Consequently, it was decided it would be more straightforward and appropriate to provide for a power in the Bill to introduce regulations compliant with the Convention. The regulations will be subject to negative resolution.

36. The Committee notes that, although the powers under this section are very sweeping, they are consistent with those given to Ministers in other legislation for the purpose of implementing international Conventions. The committee considers that, in the circumstances, the power is reasonable. The Committee notes that subsection (4)(f) provides that the regulations can modify primary legislation. However, in this case the exercise of the power is limited to consequential amendments and this seems acceptable. The Committee therefore approves the power and the procedure chosen.

Section 63(1) Power to amend or repeal enactments prohibiting the disclosure of information

37. The section enables the Scottish Ministers, by order subject to affirmative procedure, to repeal or amend a relevant enactment if it appears that, by virtue of section 26(a), it is capable of preventing a Scottish public authority from disclosing information. An order under this section may make consequential modifications and transitional provisions, as well as different provision for different cases.
38. In its memorandum to the Committee, the Executive states that it is committed to ensuring that as much information as possible is publicly available, but did not consider it appropriate automatically to disapply all existing statutory bars. Rather, it was considered more appropriate to include provision to allow the Scottish Ministers to amend or relax existing legislation, should it become clear that a provision was frustrating the effective operation of the FOI regime.

39. However, in recognition of the issues raised by using subordinate legislation to repeal or amend primary legislation, the Bill proposes that any order under the section should be subject to affirmative resolution procedure.

40. The Committee considered that this is a very wide power, needing careful consideration. The Committee noted that it goes much wider than the usual power to make consequential or incidental amendments with which there need be less concern. In this instance, by contrast, provision made by subordinate legislation would be a matter of substance. The Committee observes that the power is not confined to older statutes but extends even to legislation presently before the Parliament or which receives Royal Assent in the same year as the Bill.

41. The Committee doubted whether even affirmative procedure would be sufficient in these circumstances and thought there might be a case for the substantive changes envisaged more properly being made in the Bill or in primary legislation. The Committee therefore asked the witnesses to explain further the Executive's thinking in proposing this power.

42. For the Executive, Stuart Foubister explained that statutory bars on public bodies against the disclosure of information are relatively common. There are bars, for example, on the disclosure of commercial secrets, in the environmental area and in the interests of national security. The bars that the Executive is aware of do not prevent the disclosure of information as envisaged under the Bill.

43. Although the Executive has not undertaken a thorough trawl of the statute book, it has not yet identified anything that it considers should be amended or repealed. To be able to remove a bar that it may identify in the future, therefore, the Executive believes that it needs the flexibility, as the regime beds down, to be able to remove or restrict prohibitions that would inhibit it from working properly.

44. Another part of the argument for the power as proposed is that the Executive would expect to learn from the experience of operating the freedom of information regime. Further, any power to be taken under the Bill would be a power to liberalise the disclosure of information. Without the power proposed under section 63(1), the Executive would need to take a stricter view now than it would with the knowledge that it had the flexibility to liberalise at a later date. Keith Connal noted that, although it is not an argument for the Executive's approach in itself, it is similar to the approach used in other jurisdictions, which have introduced a freedom of information regime.

45. The Committee noted that the purpose of the proposed power is to remove or to limit restrictions on the availability of information. It therefore concluded that it was minded to accept the Executive's further explanation and
arguments and approves the power and procedure chosen as appropriate in all the circumstances set out by the Executive.

46. There are no further delegated powers in the Bill of interest to the Committee.
MEMORANDUM TO SUBORDINATE LEGISLATION COMMITTEE BY THE SCOTTISH EXECUTIVE

FREEDOM OF INFORMATION (SCOTLAND) BILL

Purpose
1. This Memorandum has been prepared by the Scottish Executive to assist consideration by the Subordinate Legislation Committee of the provisions in the Freedom of Information (Scotland) Bill under Rule 9.6.2 of the Parliament’s Standing Orders. It describes the purpose of each provision in the Bill, which confers a power to make subordinate legislation, explains the reasons for seeking the proposed powers and explains why the matter is left to subordinate legislation.

Outline and scope of the Bill
2. The Bill would, if enacted, establish a statutory right of access to information held by a wide range of Scottish public authorities; balance the right of access with provisions protecting sensitive information; provide for the establishment of an independent Scottish Information Commissioner (SIC) to promote and enforce the legislation; provide for the treatment of “historical records”; require the Scottish Ministers to issue codes of practice regarding the operation of the Act and on records management; and allows provision to be made relating to environmental information to implement in Scotland certain parts of the Aarhus Convention.

3. The Bill comprises seven Parts.

4. **Part 1: Access to information held by Scottish public authorities** - provides a right of access to information held by Scottish public authorities, subject to the exemptions in Part 2 and the public interest test; outlines the approach to the handling of requests and the timescales involved; makes provision for a charging regime and as to requirements for internal review; and requires public authorities to maintain a publication scheme.

5. **Part 2: Exempt information** - details the exemptions to the right of access provided in Part 1.
6. **Part 3: The Scottish Information Commissioner** - establishes the office of the SIC and outlines that officer’s functions and responsibilities.

7. **Part 4: Enforcement** – provides for the conduct of appeals and the enforcement of decisions by the SIC.

8. **Part 5: Historical records** - provides that certain exemptions will cease to apply when information reaches a specified age.


10. **Part 7: Miscellaneous and supplemental** – makes miscellaneous provision, including for the making of regulations to implement provisions of the Aarhus Convention and for commencement.

**DELEGATED POWERS**

11. All the powers contained in this Bill to make subordinate legislation are new. No existing powers are amended or repealed. The Parliamentary procedure which instruments under the Bill will be subject to is specified at section 69.

**Section 4 (subsection (1)) Amendment of schedule 1**

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>The Scottish Ministers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Order made by statutory instrument</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Negative resolution</td>
</tr>
</tbody>
</table>

12. Section 4(1) provides that the Scottish Ministers may, by order, amend schedule 1 by adding a body or the holder of any office which is either a part of the Scottish Administration or is a Scottish public authority within competence (ie with
mixed functions or no reserved functions). An order under this subsection may also remove an authority from schedule 1. By virtue of section (7)(1), an order under this section may also list an authority only in relation to information of a specified description.

13. The list of public authorities in schedule 1 will be subject to change over time – for example, the recent review of public bodies has already necessitated changes to the schedule in the draft Bill issued for consultation. It is submitted that the amendment of this schedule would be an appropriate matter for subordinate legislation as this offers the flexibility to respond swiftly and efficiently to changing circumstances.

Section 5 (subsection (1)) Further power to designate Scottish public authorities

Power conferred on: The Scottish Ministers

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Affirmative resolution

14. This section provides that the Scottish Ministers may, by order, designate as a Scottish public authority for the purposes of the Bill any person who is neither listed in schedule 1 (nor capable of being added to that schedule under section 4(1)); is neither a public body nor the holder of a public office; and who appears to the Scottish Ministers to exercise functions of a public nature or is providing, under contract to a Scottish public authority, any service whose provision is a function of that authority. Under subsection (4), any order made under this section must either specify the functions of a public nature being exercised or the particular service being provided. In short, this provision will allow the Scottish Ministers to bring bodies, including private companies and voluntary organisations, within the scope of the Bill.
15. It is submitted that extending the scope of the Bill to such persons would be an appropriate matter for subordinate legislation as this offers the flexibility to respond to changes in the pattern of public service delivery – for example, the allocation of PPP/PFI contracts. Any changes under this section will have the effect of extending the scope of the Bill to bodies outside the traditional public sector and to reflect this, the Scottish Parliament would have the opportunity to debate fully any order made by the Scottish Ministers before a body is designated under section 5 as a Scottish public authority for the purposes of this Bill.

Section 7 (subsections (2) and (4)(b)) Public authorities to which the Act has limited application

Power conferred on: The Scottish Ministers

Power exercisable by: Orders made by statutory instrument

Parliamentary procedure: Affirmative resolution

16. Under subsection (2), the Scottish Ministers may make an order limiting the obligations under the Bill of an authority listed in schedule 1 so that these would apply only in respect of information relating to a specific function or activity. The authority’s obligations under the Bill would not extend to any other information held by that authority. The Scottish Ministers may also make an order removing or amending any such limitation for the time being listed in schedule 1. Subsection (4)(b) provides similar powers in relation to information held by a publicly-owned company (as defined in section 6 of the Bill).

17. In some circumstances it will not be appropriate for the Bill to provide a right of access to all information held by authorities and other persons subject to the Bill. For example, a private company brought under the legislation as a consequence of entering into a PPP/PFI contract should not be required to provide information in relation to other areas of its business. It is submitted that this is an appropriate matter for subordinate legislation as this offers the flexibility to enable the Scottish
Ministers to refine the Bill’s coverage in response to changes in the pattern of public service delivery.

**Section 9 (subsection (4)) Fees**

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative resolution

18. Subsection (4) provides the Scottish Ministers with powers to make regulations setting out the fee structure in accordance with which charges may be made for the provision of information under this Bill. Such regulations would not affect either existing statutory rights to charge a fee for the disclosure of information or any charges for the supply of information identified in an authority’s approved publication scheme.

19. As with other legislation within which fee structures are provided, it is considered most appropriate that this is done by way of subordinate legislation. Clearly, fee levels may need to be varied over time and a degree of flexibility must be provided to allow the fee structure to evolve in the light of experience of operating the regime or in response to inflation or other matters.

**Section 10 (subsection (4)) Time for compliance**

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative resolution

20. This section provides that the Scottish Ministers may make regulations to vary the period (up to a maximum of 60 working days) within which a Scottish public
authority must comply with a request for information. Such regulations could provide
different periods in different cases or give discretion to the SIC.

21. Any alteration to these timescales would be made by the Scottish Ministers in
light of experience of operating the legislation and it was considered unnecessary
and disproportionate to require recourse to primary legislation on such a matter.

Section 12 Excessive cost of compliance

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative resolution

22. This section provides that the Scottish Ministers may make regulations which
specify an upper cost threshold for complying with applications for information,
above which public authorities would not be obliged to comply with a request for
information. These regulations may specify different amounts in different cases.
Subsection (3) provides that the regulations may make provision as to the manner in
which costs are estimated. It should be noted that the Scottish Ministers are not
required to make these regulations – should the Scottish Ministers consider that
such threshold provisions would support the effective operation of the legislation,
then regulations may be made.

23. It was not considered appropriate to specify thresholds in the Bill, as it is not
currently known at what level these may be set. If such thresholds were set, it will be
necessary to review those levels over time, in the light of experience or to reflect
inflation or other matters. Consequently, it was considered most appropriate that this
was done by subordinate legislation.
Section 13 (subsection (1)) Fees for disclosure in certain circumstances

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative resolution

24. If a Scottish public authority wishes to consider disclosing information which it is not required to disclose because the cost of doing so would exceed a maximum cost threshold set in regulations under section 12, the public authority will be entitled to charge a fee for the disclosure of that information in accordance with regulations issued under this section. Subsection (2) sets out that regulations may provide that such a fee is not to exceed a particular amount and is to be calculated in a manner specified in those regulations.

25. Clearly, as for the other provisions relating to the charging of fees, it may be necessary to vary these arrangements over time, to reflect changing circumstances. As a result, it was considered most appropriate that this provision be made by way of subordinate legislation.

Section 20 (subsection (7)) Provision to vary timescales within which an applicant can ask a Scottish public authority to review its response to a request

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative resolution

26. Section 20(7) provides that the Scottish Ministers may make regulations varying the timescale within which an applicant can require a Scottish public authority to review its original response to a request for information.
27. Any alteration to these timescales would be made by the Scottish Ministers in light of experience of operating the legislation and it was considered unnecessary and disproportionate to require recourse to primary legislation on such a matter.

Section 21 (subsection (6)) Provision to vary timescales within which a Scottish public authority must undertake a review of a request

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative resolution

28. In a manner similar to section 20, this section provides that the Scottish Ministers may make regulations varying the timescale within which a Scottish public authority must undertake a review of its response to a request for information. For the same reasons, any change will be made in the light of experience and it was considered inappropriate and disproportionate to require this to be done by way of primary legislation.

Section 47 (subsection (6)) Power to vary timescales for decision by the Scottish Information Commissioner

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative resolution

29. This section provides that the Scottish Ministers may make regulations to vary the time limits within which the SIC must reach a decision on an appeal. Such regulations may prescribe different periods for different cases, or confer a discretion on the SIC. As above, any change would be made in light of experience of operating
the legislation and it was considered inappropriate and disproportionate to require this to be done by way of primary legislation.

Section 59 (subsection (1))  Power to vary periods mentioned in section 57 and 58

Power conferred on: The Scottish Ministers

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Affirmative resolution

30. This section allows the Scottish Ministers to vary the period in section 57(1) after which a record becomes a historical record (and consequently cannot be considered exempt under the provisions listed at section 58(1)), or the periods in section 58(2), which determine when certain exemptions fall away and no longer need to be considered. Any alteration to these periods cannot increase them beyond the levels at which they are set at enactment of the Bill.

31. Over time, opinions may change regarding the period during which it is appropriate that exemptions should continue to apply, so provision is made to allow such dates to be varied. Whilst it is not considered likely that such periods will change regularly, it was considered sensible to provide that any alterations could be made without recourse to primary legislation.

Section 62 (subsection (3))  Power to make provision relating to environmental information

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative resolution
32. The regulations made under section 62 will implement certain provisions of the Aarhus Convention (details of which are outlined in paragraphs 141-146 of the Policy Memorandum). The UK Government have signed the Convention and wish to ratify as soon as possible. As the Convention goes further than the existing EC Environmental Information Regulations (EIRs) in some areas, and these are not sufficient to enable the United Kingdom to meet the requirements of the Convention, new regulations must be made. The Convention is not an EC instrument and, as a result, the power to make regulations under section 2(2) of the European Communities Act 1972 cannot be utilised – therefore, a new power to make regulations is required, and this is included here.

33. To give effect to the information provisions of the Convention, the Scottish Executive could have waited for European Community ratification, and implemented by means of regulations under section 2(2) of the 1972 Act. However, to do so would have delayed Scottish (and hence UK) compliance with the Aarhus Convention. The decision was therefore made to use the Bill to support the implementation of the provisions in Aarhus relating to access to information.

34. Two possible approaches were considered. Consideration was also given to making the Bill fully Aarhus-compliant, which would have obviated the need for any secondary Environmental Information Regulations. However, it was concluded that it would have been a very complex exercise to attempt to modify the right of access provided by the Bill to meet the requirements of the Convention, and that it could result in tensions within the Bill itself. Consequently, it was decided it would be more straightforward and appropriate to provide for a power in the Bill to introduce regulations compliant with the Convention.

**Section 63 (subsection (1)) Power to amend or repeal enactments prohibiting the disclosure of information**

Power conferred on: The Scottish Ministers

Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Affirmative resolution

35. Under this section, the Scottish Ministers may, by order, repeal or amend a relevant enactment if it appears that, by virtue of section 26(a), it is capable of preventing a Scottish public authority from disclosing information. An order under this section may make consequential modifications and transitional provisions, as well as different provision for different cases.

36. The Executive is committed to ensuring that as much information as possible is publicly available, but did not consider it appropriate to automatically disapply all existing statutory bars. Rather it was considered more appropriate to include provision to allow the Scottish Ministers to amend or relax existing legislation, should it become clear that the provision was frustrating the effective operation of the FOI regime. The use of subordinate legislation will allow any amendments to be made swiftly, and it was considered unnecessary and disproportionate to require that such changes be made by way of primary legislation. However, the Executive recognises the issues raised by using subordinate legislation to repeal or amend primary legislation and accordingly provided that any order under this section should be subject to affirmative resolution procedure.

Section 72 Commencement

Power conferred on: The Scottish Ministers

Power exercisable by: Order made by statutory instrument

37. Subsection (1) provides for the possibility of provisions in the Bill being brought into force by way of an order made by the Scottish Ministers. Such an order would be a statutory instrument (section 69(1)) but, as is normal practice with commencement orders, it would not be subject to any Parliamentary procedure.

CODES OF PRACTICE

38. Having regard to Rule 6.11.1(d) of the Standing Orders, the following provisions may also be of interest to the Subordinate Legislation Committee.
Section 60 obliges the Scottish Ministers to issue a code of practice providing guidance to public authorities as to the practice to be followed in connection with discharge of their functions under the Act. Any code under this section must be laid before the Parliament. Section 61 obliges the Scottish Ministers to issue a code providing guidance to public authorities in connection with the keeping, management and destruction of their records. Again, any code under this section must be laid before the Scottish Parliament. The Scottish Ministers may also, from time to time, revise these codes.

39. It was considered that the codes of practice under sections 60 and 61 provide an appropriate mechanism to set the standards of conduct which will be expected of public authorities operating under the Bill. The Bill will, if enacted, apply to a broad and diverse range of Scottish public authorities and it might be inappropriate to require two very different public authorities (for example, in terms of size) to behave in identical manners in some circumstances. Setting out the general standards of conduct in codes of practices will provide the SIC with the flexibility to disregard the codes, if that is considered appropriate in the circumstances. In addition, setting out this information in codes of practice ensures that these can be updated regularly and efficiently.

Scottish Executive Freedom of Information Unit
October 2001
The Campaign for Freedom of Information

Suite 102, 16 Baldwins Gardens, London EC1N 7RJ
Tel: 020 7813 7477
Fax: 020 7813 7461
Email: admin@cfio.demon.co.uk
Web: www.cfio.org.uk

Jenny Goldsmith
Clerk, Justice 1 Committee
Scottish Parliament
Committee Chambers
George IV Bridge
Edinburgh EH99 1SP

5 December, 2001

Dear Jenny,

During our recent evidence to the Justice 1 committee, David Goldberg offered to send the committee the Campaign’s response to the UK Information Commissioner’s consultation paper on publication schemes.

I enclose a copy, which I hope may be helpful.

Yours sincerely

Maurice Frankel
Director

Hon. President: Godfrey Bradman
Co-Chair: James Corfield, Neil McIntosh
Director: Maurice Frankel

Parliamentary Co-Chair: Helen Jackson MP
Andy Kirkwood MP
Richard Shepherd MP

Response to the Information Commissioner's consultation paper on Publication Schemes

October 2001
1. Introduction

Many freedom of information laws require public authorities to actively publish certain information. The information is usually clearly defined – typically covering matters such as a description of the authority’s structure and functions, its internal guidance to staff, a guide to the classes of the records it holds and information about the arrangements it has made for implementing the Act.¹

Uniquely, the UK legislation, adopts an entirely non-prescriptive approach. Authorities are required to produce a ‘publication scheme’ describing classes of information which they publish or intend to publish and any charges. The Act has nothing to say about the specific contents of these schemes, except that they must be drawn up with regard to the public interest in allowing access to information and in publishing reasons for decisions.²

The substance of an authority’s scheme would be left to authorities’ own discretion, subject to the Commissioner’s guidance or requirements. Since every scheme must be approved by the Commissioner, she could require authorities to publish particular information as a condition of approval. The potential use of this power was highlighted by ministers as the Freedom of Information Bill went through Parliament.³

The consultation paper outlines the criteria that the Commissioner proposes to use for approval.⁴ We were taken aback to find that none of these deal with the contents of a scheme. Approval will apparently be based on factors such as whether the scheme is easily understood, contains clear definitions, is indexed, accessible to the disabled,

¹ See for example Freedom of Information Act 1997 [Ireland], sections 15-16; Official Information Act 1982 [New Zealand], sections 20-22; Access to Information Act [Canada], sections 5 and 71.
² Section 19(3)
³ Thus, During the House of Lords committee stage, in response to an amendment proposing that all authorities be required to publish their internal guidance, Home Office minister Lord Bassam said: “The publication schemes can be expected to require in their detail the inclusion of information of the kind referred to…in the noble Lord’s amendment particularly where she [the Commissioner] sees that as serving a useful and purposeful end” (emphasis added) Official Report, 19/10/00, col 1238
⁴ Consultation paper, pages 23-4
describes its purpose, permits feedback, will be monitored and, if internet based, loads quickly, contains a search facility and can be read on a 15" screen. None of the criteria deal with adequacy of the scheme’s contents.

The questions on which consultees’ views are sought reinforce this impression. None of the questions raises the issue of how the Commissioner should assess the contents of a scheme. Nor do they ask what, if any information, authorities should be required to publish. These are striking omissions.

It may be that these issues are being deferred until a later stage in the policy process. However, the impression from what is available at this stage is that although authorities may be encouraged to consider including a wide range of materials in their schemes they will determine the contents themselves.

Encouraging authorities to develop schemes in light of the potential benefits to themselves may result in some progress. As the consultation paper says, publishing information can save authorities the time and expense of dealing with individual requests for that information. There may be other advantages. Disclosures which reveal the complexity of decisions, the practical constraints under which authorities operate, and the efforts which they have made to overcome these, may make the public more ready to accept difficult decisions, counter any tendency to ascribe bias or bad faith to authorities and promote greater confidence in the authority’s work.

But if publication schemes are to be effective, the Commissioner will also have to give clear directions about their contents. Otherwise authorities will simply concentrate on the information which they find easy to manage or helpful to publish, at the expense of more difficult but perhaps more important material.

Indeed, they may positively avoid such material. Once a class of information is listed, an authority will be obliged to publish all future documents in that class, losing any discretion over publication. The possibility that a future document may contain a fragment of information which the authority prefers not to publish, may lead it to exclude the entire class of records. They may adopt the most limited schemes, dealing only with
classes of information that they feel safest publishing.

In the absence of explicit requirements to go further, we fear that schemes will focus largely on information which is already publicly available, probably on authorities' websites. A publication scheme could be little more than a new 'front end' to such a site, coupled with a formal commitment to publish information which in practice is already published. This prospect is given weight by the fact that most of the classes of information specified on the Commissioner's own draft publication scheme, can already be found on Commissioner's web site.

In central government, at least, authorities' web sites have developed into sophisticated tools for disseminating published information, driven by their practical benefits, new technical developments, the commitment of those who run them and continuing government initiatives to promote the electronic dissemination of information. This process has acquired substantial momentum, without the Freedom of Information Act, and continues to develop. Unless publication schemes are consciously directed towards the release of new types of information, we wonder whether they will be worth having.

2. Possible functions

One approach to publication schemes is to consider their various functions. A scheme may serve as:

(a) a publications guide, explaining the types of records which an authority already makes publicly available;

(b) a way of reducing workload by recognising that classes of records which do not contain exempt information can be most efficiently dealt with by publishing them in advance of requests, thus also providing speedier access by users to that information.

(d) a means of allowing authorities to sell publications or information at higher prices than the FOI charging regime otherwise permits;

(d) a source of guidance on the FOI Act
(e) the focus of a declassification process which moves previously undisclosed information into the public domain

(f) a source of access tools that will help users overcome some of the hurdles they will otherwise face.

Some of these functions will be more attractive to, or easily accommodated by, authorities than others. For example authorities will have a strong interest in describing the classes of publication which they sell – otherwise they will be limited to relatively modest charges permitted under the Act’s fees regime. Authorities will be under a statutory duty to provide advice and assistance to applicants, so any written guidance which they produce clearly belongs in the scheme. Classes of currently published information, whose future publication is likely to be uncontroversial, will also be obvious candidates.

But other information – whose disclosure would require a more significant challenge to existing norms - may be overlooked altogether. We hope the Commissioner will direct publication schemes towards some of these and in particular to the disclosure of (a) previously unpublished information and (b) materials which will help users make effective use of the Act.

3. Declassification

Publication schemes should be used, where possible, to ‘declassify’ information - bring about the release of information which has previously been unpublished and perhaps undisclosed.

The Constitution Unit paper’s proposed ‘approval checklist’ suggests that an authority should identify any unpublished classes of information which it scheme proposes to include.\(^5\) This is a helpful first step, but we think the Commissioner should go considerably further. Schemes should not be approved unless they reveal substantial

\(^5\) Consultation paper page 10, para 8.2.3
progress towards the release of previously unpublished information.

Something of this kind must be what the minister, Lord Falconer, had in mind when he described publication schemes as "probably the most powerful push for openness in the Bill". ⁶

In seeking approval, an authority should specify not only the classes of information which it proposes to include in its scheme but also the classes of information which it has considered, but decided against, including and its reasons. That analysis should itself appear on the scheme, a prospect which may stimulate more thorough consideration.

In considering what information to make available under this heading, authorities might consider:

- Whether there is evidence of public demand for that class of information;
- Whether publication would allay significant public concerns relating to the authority’s responsibilities;
- Whether information would be of practical use to the public in their dealings with the authority or other bodies (such as those regulated by the authority);
- Whether publication will improve the public’s opportunity to influence the authority’s decisions;
- Whether publication will promote greater accountability by the authority, for example, by exposing the basis of decisions to scrutiny or reducing the scope for arbitrariness in decisions;
- Whether publication would be of symbolic importance, signalling to staff the importance attached to greater openness within the authority and encouraging a positive approach to disclosure under the Act.

The open government code of practice set significant precedents for proactive disclosure,

⁶ Quoted on page 1 of the consultation paper.
requiring authorities to (a) publish the facts and analysis behind proposals and decisions; (b) give reasons to people affected by decisions (c) make public their own internal guidance, and (d) publish details of compliance with service standards.

These could be regarded as 'culture changing' requirements. With the exception of the final category, they involved information that at the time was not only unpublished, but frequently confidential. Publication schemes should be no less radical. They should seek to bring about similar innovations, perhaps in relation to information about contracts or the publication of minutes of meetings.

Publication schemes should also retain existing code requirements for those bodies currently subject to them (it would hardly be in the public interest to withdraw existing disclosure requirements) and extend them to other authorities:

- The publication of internal guidance, in particular, is a requirement of many FOI laws, including those of the USA, Australia, Canada, New Zealand, Ireland and Thailand.
- The FOI Act itself contains a strong steer towards the publication of reasons for decisions.
- The Freedom of Information (Scotland) Bill requires Scottish authorities to have regard to the public interest in allowing access to the facts and analysis underlying

---

1 Whose disclosure was already required under the 'Citizens Charter'
2 Freedom of Information Act [USA], 5.U.S.C. Section 552(a)(1)
3 Freedom of Information Act 1982 [Australia], section 9(1)
4 Access to Information Act 1982 [Canada], sections 5(1)(c) and 71(1)
5 Official Information Act 1982 [New Zealand], sections 20(1)(c) and 22(1)
6 Freedom of Information Act 1997 [Ireland], section 16(1)
7 Official Information Act 1997 [Thailand], section 9.
8 The Act's emphasis is slightly different from the code's. A publication scheme must be drawn up with regard to the public interest in the 'publication' of reasons for decisions - implying the publication of reasons to the world at large. The code requires authorities to "give reasons for administrative decisions to those affected" which includes the provision of reasons to individuals who are personally affected, even where those reasons cannot be 'published' without breaching privacy. The Commissioner could presumably combine both requirements by drawing on s 19(3)(b) to require the publication of reasons for decisions of general applicability and on s 19(3)(a) to require authorities to give (without publishing) reasons to those whose personal affairs are involved.
important decisions. Importing this requirement would make a small but helpful contribution to the Act’s opaque provisions on access to the factual background to policy-making.

4. Access tools

The public’s unfamiliarity with official records is likely to be a major obstacle to the effective use of the new access rights. Most people have little idea of the records that public authorities generate for their own use. They do not know what files exist, what information they contain, who contributes to them and in what circumstances. An insider may appreciate the types of assessments, projections, workplans, costings, legal opinions, monitoring data, research findings, internal consultation and other documents likely to feature in official files. Ordinary users will be completely in the dark. It may not occur to them to even ask for material to which they could be entitled. Or they may accept a refusal at face value without appreciating how implausible it is given the nature of the record in question. A key objective of publication schemes should be to provide users with the ‘access tools’ that address this problem. The three types of tools that could be provided include indexes, disclosure logs and sample files.

(a) Indexes to records

Many FOI laws require authorities to publish information about the kinds of records they hold. The most far reaching approach is found in FOI laws in Sweden, Finland and Norway, which require authorities to maintain public registers of all documents completed or received by them. A similar but more focussed approach is found in Trinidad and Tobago’s FOI Act which requires authorities to publish an annual index of all documents which contain (a) policy advice received from internal, external or interdepartmental bodies and paid consultants (b) scientific and technical expert studies and advice (c) reports on the authority’s performance, efficiency or proposed

---

15 Freedom of Information (Scotland) Bill, section 23(3)(a)(ii)
16 Eg reference to the public interest test in section 19(3)(a) or the Commissioner’s duty to promote good practice under section 47.
17 Freedom of Information Act 2000, sections 35(1) and (2)
restricting, (d) and legislative drafting instructions.¹⁸

In the UK context such a comprehensive approach might be most feasible if built into the records management system from an early stage. We hope the opportunity for such an approach provided by current plans for electronic records management will be examined. A less comprehensive and more targeted index, such as that in the Trinidad Act, may however, be practical.

Several FOI laws (including those of Canada, New Zealand, Ireland, Hungary, South Africa and Bosnia and Herzegovina) require authorities to publish a general description of the classes of records they hold. These are of variable quality, sometimes providing descriptions so broad as to be of little value.¹⁹ The Canadian InfoSource publication, may be a more helpful model, with its emphasis on descriptions of databases and series of records. InfoSource distinguishes between their holdings of official records and personal records - a useful distinction given the high proportion of requests for personal files found under most FOI laws.

However, a more useful step would be to build on the UK's Information Asset Register, an initiative which the government itself has described as fulfilling the same aims as Canada's InfoSource.²⁰ It provides details of unpublished information holdings of central government through a searchable Internet database. At present, the scope of the Register, which is still in its early days, is extremely limited. However, some of its entries provide genuine insight into unpublished records, and if publication schemes were used to develop this into a comprehensive source would be an invaluable tool.

¹⁸ Freedom of Information Act 1999 [Trinidad & Tobago], section 9. Documents do not have to be included in the index where to do so would itself reveal exempt information.
¹⁹ For example, the New Zealand Directory of Official Information lists the file categories used by the New Zealand Ministry for the Environment under these broad headings “energy: production and use; climate change; ozone depletion; noise pollution; air pollution; water pollution; nuclear issues; waste management; hazardous substances; natural hazards; Resource Management Act; products and processes; effects of electromagnetic radiation and sustainable management fund”: www.justice.govt.nz/pubs/reports/1999/dir_of_info/list_e/environment_min.html
²⁰ The Future Management of Crown Copyright, Stationery Office, March 1999, Cm 4300, para 8.5
In the meantime, authorities could wherever possible give the public direct access to their existing indexes. They might be required to:

- describe their existing indexes and catalogues, identifying those to which the public already has access (whether online by visiting the department in person),
- describe the obstacles which prevent direct public access to the remaining indexes and the feasibility of overcoming these (eg by restructuring the indexes or barring access to database fields which may contain exempt information), and
- produce a periodic report on progress towards this goal.

(b) Disclosure logs
A log of records disclosed as a result of FOI requests, coupled with easy access to the records themselves, would probably be the single most useful access tool that could be provided. A disclosure log would:

- illustrate the information that is in practice disclosable under the Act. Over time, as more records are disclosed under the Act, the log will become a unique guide to what can be obtained — as opposed to records which could be requested only to be refused. The fact that a particular record has been disclosed will often indicate that similar records will also be available. Instead of trying to work out for themselves how the Act might help them, users will thus be able to learn from the experience of others.
- facilitate access to the same documents by others. Once a record has been released to one user, perhaps with exempt information deleted, it could immediately be disclosed, in that form, to anyone else interested in it. Where there is clear interest from others, authorities may want to publish the document on their web sites directly. (The US Freedom of Information Act requires the Internet publication of such documents.②)
- help to publicise precedents. If one requester succeeds in eliciting previously confidential document, the log will help to publicise this — reducing the chances that someone else will have to argue the same case from first principles over a similar

② Freedom of Information Act [USA], 5.U.S.C. section 552(a)(2)
document or with another authority.

- help to educate users in the operation of exemptions. Many documents will be released with particular types of exempt information (e.g., personal data about third parties, or the volume of a factory's production) deleted. Examining these records will help users understand that this information is also likely to be withheld from them. They may be less suspicious when this later happens and less likely to mount unnecessary appeals, or be better placed to recognise and question inconsistent decisions.

- ensure that the public generally benefits from previously released information. Some requesters may not be able to use the information disclosed to them. It may arrive too late for their purpose or be too complex for them to handle, they may not recognise its significance, choose to ignore it or lack the ability to publicise it. Yet its release may have involved substantial work on the part of the authority. For the information to disappear without trace may not only be wasteful but demoralising to officials who have worked hard to process the material or overcome obstacles to its disclosure. A disclosure log will make this information available to the public generally, increasing the chances that a public benefit will result.

- help authorities to identify 'disclosable' information. A log of disclosed information will be useful to officials handling requests, making it easier for them to determine whether similar information has been released in the past, and helping them avoid follow-on requests for previously disclosed information being treated as new requests.22

What disclosures should be listed? Since all written requests for information will be FOI requests, some criteria for deciding what to log may be needed. These could include information (a) released in response to an request which mentions the FOI Act (b) from which exempt information has been withheld (c) for which a fee has been charged under the Act (d) after consulting the authority's FOI specialists (e) of a kind which would not

22 A decentralised organisation, which does not handle FOI requests centrally, may not realise that requested information has already been released by another division. Alternatively, an authority may receive a request for a document which is held by several authorities and which has already been released by one of them.
have been disclosed before the Act (f) as a result of an appeal under the Act.\textsuperscript{23}

(c) Sample files

A further access tool would be guides to the kinds of information found in specific kinds of files. These might describe the contents of typical files, explaining what types of documents they contain, who creates or contributes to them, for what purpose, at what stage, what information they provide, what if any third party information would be involved and to whom they would normally be circulated.

Guides might be prepared for files created during certain typical operations, such as policy making, the passage of legislation, implementation of new requirements, administration of particular schemes, investigation of complaints, enforcement of statutory requirements, etc.

The object would be to give the diligent requester some of the insight that an ‘insider’ might have. This might also be achieved by making some actual files available online, for example, records which have been or could be released early (ie before 30 years) in the Public Record Office. These should be selected not for their historical or political significance but because of their value in illustrating the types of information found in current files.

5. Monitoring data

Publication schemes could also provide monitoring data, indicating what proportion of requests had been fulfilled or refused, how often the Act’s time limits had been complied with and which exemptions were most often relied on.

Requiring such information under the publication scheme may be the only way of ensuring that the statistics are collected. The Act itself does not require monitoring, and the draft of the Secretary of State’s code of practice encourages authorities to monitor

\textsuperscript{23} ie under the authority’s complaints process, following informal mediation by the Commissioner, or as a result of a formal notice from the Commissioner or Tribunal.
complaints only, not requests.

Without this information it will be difficult for anyone, including the Commissioner, to know how the Act is being implemented. Complaints data alone will give an inadequate picture. Under the open government code, only a small percentage of refused requests lead to internal review (the equivalent of a complaint). Monitoring these will provide no information about the number of requests which are abandoned after an initial refusal, perhaps because requesters have been treated unhelpfully or have no confidence in an internal complaints process and are not prepared to exhaust this before applying to the Commissioner. Serious and systematic failures to comply with the Act requirements may go undetected.

Central government bodies are currently required to monitor code requests\textsuperscript{24} and we hope that such existing requirements will not be relaxed by the Act. The need for improved monitoring has recently been highlighted by the Information Commissioners of both Canada\textsuperscript{25} and Ireland.\textsuperscript{26}

\textsuperscript{24} Since the code, like the FOI Act, applies to all written requests, monitoring is based on a working definition of a ‘code request’, that is, one which specifically mentions the code, or for which a charge is made or where information is withheld under a code exemption.

\textsuperscript{25} “As described in these reports year after year, the problem of delay in answering access requests is pervasive, serious and chronic. To a large extent, the problem has been hidden below radar detection because the government does not collect and report the damning statistics to Parliament, though the Access Act says it should.

For his part, the Information Commissioner can only monitor and report his own statistics on the number of complaints of delay. Departments chastised by him, on the basis of high numbers of complaints, have defended themselves by comparing the number of complaints with the total number of requests they had received. Using this comparison, the magnitude of the delay problem always looked manageable, if not insignificant. After all, only about 10 per cent of requests become complaints. Perhaps Canadians are really not complainers. Last year the Information Commissioner decided to get to the heart of the matter: to find out exactly how often departments met deadlines, complaint or no complaint. The results of a study of six departments established that the extent of non-compliance with the law was alarming. The departments studied last year were Privy Council Office, National Defence, Revenue Canada, Citizenship and Immigration, Foreign Affairs and International Trade and Canadian Heritage. From 44 per cent to 74 per cent of requests received by those departments were not answered within statutory deadlines.” Information Commissioner of Canada, Annual Report 1997-98, pages 12-13

\textsuperscript{26} “I point to the apparently high rate of refusal of requests and I recommend that public bodies gather further statistics to enable the most common reasons for refusals to be identified and, if possible, further action taken to increase the release of information.” Information Commissioner of Ireland, ‘The Freedom of Information Act - Compliance by Public Bodies’ July 2001, page 5
Monitoring of requests as well as complaints would be in line with the recommendations of the Home Secretary’s Advisory Group on Openness in the Public Sector, which stated:

"the essence of monitoring on Freedom of Information is to identify cases in which information is not provided in response to an application, and establish whether the reasons for not doing so are sound and the number of decisions overturned.

Monitoring should be undertaken... within an authority so that senior managers can determine whether requests for information are being dealt with satisfactorily. This can be done by requiring staff who refuse a request for information to forward details to a central point in the organisation and also monitoring the complaints received about applications for information that have been refused...

It would be useful to have a regional or national picture of requests for information that are refused by authorities and allowed after consideration by an authority’s own complaints system. This would enable targets to be set for improving performance."\textsuperscript{27}

6. Consultation questions

These points relate mainly the questions in Part II of the consultation paper.

‘Classes’ of information (Q1)
The consultation paper asks how a ‘class’ of information should be defined. We are not sure that a definition is necessary. What is important is that a class should be described in terms which unequivocally describe the series of documents in question. There should be as little scope as possible for subsequent disputes about what is covered.

\textsuperscript{27} Advisory Group on Openness in the Public Sector, Report to the Home Secretary, December 1999, Paragraphs 2.45 to 2.47
Published information and exemptions (Q3 & Q4)
The consultation paper asks whether a published class of information should allow the occasional withholding of parts of documents which contain exempt information, or whether all documents must be published in full.

The difficulty of an 'all-or-none' approach is that it may lead authorities to adopt narrow schemes, excluding those classes of records which they anticipate may occasionally include any fragment of exempt information. On the other hand, expressly allowing exempt information to be withheld may reduce pressure to reconsider existing norms.

If allowing exempt information to be withheld would lead to the inclusion of classes of records that would not otherwise be published, we think that on balance this would be worthwhile. FOI laws which require the publication of internal manuals, usually allow exempt information within them to be withheld\textsuperscript{28} as does the open government code,\textsuperscript{29} which may have been important in overcoming fears about the feasibility of that exercise.

However, decisions about what to withhold must be made as the document is prepared, so that the document is published, either in full or in edited version, before any request for it is received.

Methods of publishing a publication scheme (Q6)
Although web publication will often be the most convenient form of publication for those with Internet access, both the publication scheme itself, and the records referred to in them, should also be made available in paper form. We are not clear whether the Commissioner can insist on this, in light of section 19(4),\textsuperscript{30} but it would be undesirable for schemes to be available solely in one form (except in the case of small authorities which do not have web sites).

\textsuperscript{28} Eg Freedom of Information Act 1982 [Australia], section 9(4)
\textsuperscript{29} Code of Practice on Access to Government Information, Part I, paragraph 3(ii)
\textsuperscript{30} This states that "A public authority shall publish its publication scheme in such manner as it thinks fit"
Duration of approval (Q8)

The consultation paper asks how long an approval should remain in force and for views on the Constitution Unit’s suggestion that this could be for up to five years.21 We think this is much too long and would lead to stagnation. Authorities would be likely to forget about their schemes for the next four and a half years, returning to them only when the renewal date approached. Far shorter periods are found under overseas proactive requirements. The publication required under New Zealand’s FOI law must be updated every two years,22 proactive publications under the South African and Canadian laws must be updated annually,23 and every six months,24 respectively.

Phasing in of classes (Q9)

The consultation paper asks whether phasing-in of classes should be permitted “given that the Act makes no provision for phasing-in classes”.25 We question whether this statement is correct. A publication scheme must specify classes of information which the authority publishes “or intends to publish”26 – and this must refer to classes of information to be published in future. The suggestion that “approval will be given for a scheme that defines classes of information which will be published from the date of approval”27 also seems likely to unnecessarily restrict the scope of a scheme.

We think the phasing-in of classes is not only envisaged in the Act but desirable. It may encourage authorities to actively develop their schemes in light of actual experience with the Act. Authorities may not be able to predict which classes of information will be regularly requested until the right of access is in force, and should be encouraged to add to their schemes in light of such experience.

---

21 Consultation paper, page 9
22 Official Information Act 1982 [New Zealand], section 20(2)
23 Promotion of Access to Information Act 1999 [South Africa], section 14(2)
24 Access to Information Act 1982 [Canada], section 5(2)
25 Consultation paper, page 10
26 Section 19(2)(a)
27 Paragraph 7, page 9
Approval process (Q11)

The Constitution Unit paper suggests that approvals could be given largely on the basis of self-certification by authorities, guided by a checklist. Our concern is whether this, or any alternative, system of approval can be effective without more explicit indications of what the Commissioner expects of authorities. For example, it would leave the crucial issue of the adequacy of the scheme's contents to the following undifferentiated question:

"Has the authority presented reasonable evidence that it has considered carefully the requirements of Section 19(3)? Has it had regard to the public interest in allowing (i) public access to information; and (ii) in publication of reasons for decisions?"

In the absence of explicit guidance against which to measure their progress, it is hard to see how such a question can be meaningfully put. The statutory threshold in section 19(3)(a) is so low as to be almost undetectable. For example, almost all public authority web sites could reasonably be said to have been drawn up with regard to the public interest in allowing access to information. Only the dimmest authority (ie one whose scheme was directed at serving the needs of suppliers, contractors and job applicants, but not the public) could fail this test.

The more explicit statutory reference, to the public interest in giving of reasons for decisions, could be elaborated more easily. Questions which might be asked include: which of an authority's decisions are to subject to this obligation? Or, are any types of decisions excluded from it, and if so on what basis? Does the duty extend to the giving of reasons in cases involving personal data which where the decisions themselves are not "published"? Does it fully cover the circumstances in which a common law duty to give reasons exists? Do the 'reasons' include findings of fact? Is the basis for the exercise of any discretion made clear (which may in itself presuppose the disclosure of relevant internal guidance)? And how does a duty to give reasons for decisions compare to the code's duty to publish the facts and analysis of facts on which proposals and decisions are based?

---

38 Consultation paper, page 10, para 8.2.1.b
7. Other issues

Publication dates
On occasions the publication of an apparently completed document has been significantly delayed on the grounds that it is still being edited or awaiting 'approval'. The publication of material covered by a publication scheme should not be subject to elastic delays, and wherever possible, the expected length of time between completion of a document and its publication should be specified.

Charges for Information
Authorities will be able to charge more for information than the Act itself allows provided that the information and the fact is sold are described in the publication scheme. The Commissioner will presumably not approve a scheme which appears to involve unreasonable charges. However, it may not always be possible to predict how charging criteria will be applied and an apparently reasonable charging regime may lead to excessive charges in particular circumstances. The Commissioner should make clear that any approval for a scheme that includes charging provisions is conditional on charges being reasonable in the circumstances — and that where they are not she retains the right to require them to be amended, or to revoke approval.

8. The Commissioner's Draft Scheme

The Commissioner's own draft scheme gives the impression of having been prepared by considering how the information already on the Commissioner's web site could best be presented in the context of a publication scheme. This may help to make that information accessible to people who do not have Internet access. However, it is not clear whether or how questions about content, of the kind we think most important, have been addressed (such as what presently unpublished information should be included in the scheme, or which types of decisions should be the subject of a duty to publish reasons).

One important area not covered by the scheme relates to enforcement action by the Commissioner. Overseas Information Commissioners generally publish their decisions. It
is essential that the UK Commissioner should do so too, and the scheme should reflect this. We hope details of cases resolved by mediation, without a formal enforcement or decision notice, will also be published. These may be numerically more significant than formal decisions, and their publication should be of practical value to users and authorities, and contribute to the accountability of the Commissioner’s office.

Published details might be made available without the names of complainants. If so, this would illustrate the value of allowing exempt information (ie the identifying personal details) to be withheld in order to permit disclosure of a class of which might otherwise not be published.
Dear Christine,

FREEDOM OF INFORMATION (SCOTLAND) BILL

Thank you for your letter of 6 December in which you seek, further to my appearance before the Committee on 5 December, information on the charging arrangements to be set out in Regulations under the Bill.

I can confirm that we are, in light of the consultation on the draft Bill and points raised with us since the Bill was published in September, looking again at the FOI charging arrangements. I am aware of the concern with the proposed approach to the raising of fees for requests incurring costs above a lower threshold, of the wide welcome expressed for a lower threshold, and of the comparisons drawn with the proposed approach to charging under the Freedom of Information Act 2000.

You will understand that we need to consider carefully a number of competing views on this issue, and so have, at this stage, not yet decided whether, and if so how, to amend our proposals. The Committee members can be assured, however, that if any adjustments are to be proposed I will make these known at the earliest opportunity during the passage of the Bill.

Notwithstanding that the details of the charging scheme might be adjusted, I remain committed to the principles underpinning our initial proposals - that the charging arrangements should neither discourage applicants nor impose unreasonable or limitless burdens on Scottish public authorities. In other words, a balance needs to be struck and I would expect, therefore, that we would retain the lower threshold - below which the vast majority of straightforward requests should continue to fall - and an upper cost threshold. International experience has demonstrated that very large or very complex FOI requests have the potential to disrupt unreasonably the work of public authorities. Of course, authorities would not be prohibited from exercising their discretion to comply with a request falling above the upper threshold.

Yours sincerely,

[Signature]

[Date]

10 December 2001
I would note, by way of background, that the present charging proposals - made known when we published the draft Bill in March for consultation - reflected a consensus (albeit from a wide range of views) on the three charging options set out in the consultation document *An Open Scotland*. Also, it is important to note that the charging arrangements to be set out in Regulations (under sections 9 and 12 of the Bill) would apply neither to information covered by a statutory Fees arrangement (section 9(6) of the Bill refers) nor to information covered by an approved publication scheme. Under section 23(2)(c) of the Bill a publication scheme must specify whether published information is, or is intended to be, available to the public free of charge or on payment, and section 23(1)(a) refers to the approval of such schemes by the Scottish Information Commissioner. Further details on the policy underpinning these schemes and the approach to charging can be found at paragraphs 34 to 46 of the Policy Memorandum.

I hope that this is helpful and I would be happy to provide further information on any other aspect of the Bill should this be required by the Committee.

Yours sincerely,

JIM WALLACE
Convener, and members of the committee, I am grateful to you for your invitation to give evidence on the Freedom of Information Bill and more particularly how I perceive that it will impact on the functions of Crown Office and the Procurator Fiscal Service.

As a Scottish public authority we recognise the need for an effective statutory freedom of information regime and the right of the public under that regime to access information held by such authorities.

Crown Office and Procurator Fiscal Service will have a statutory duty to comply with the provisions of Freedom of Information legislation. This includes complying with positive obligations imposed on public authorities including the requirement to publish certain information, to respond to requests within particular time periods and to comply with any codes of practice issued by the Scottish Information Commissioner. It is only in relation to the matters that fall within Section 48(5) of the Scotland Act that the Scottish Information Commission is excluded from reviewing any decision of the Lord Advocate.

In relation to decisions made in response to a request under Freedom of Information legislation, I as Lord Advocate am obliged in all cases to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing information. Further to invoke the exemption provided by Section 35 (law enforcement) there is a requirement to satisfy the harm test of substantial prejudice in relation to any of the purposes specified.
I am aware that there has been a great deal of discussion regarding the exemptions currently afforded in terms of the Bill and how they might be invoked by the Prosecution authorities and I would like to take this opportunity to comment upon them.

**Section 34**

Insofar as Crown Office and the Procurator Fiscal Service is concerned, this exemption will encompass all investigations made for the purpose of submitting a report to the Procurator Fiscal and investigations carried out or instructed on behalf of the Procurator Fiscal.

From a law enforcement perspective the retention of a class-based exemption in perpetuity is essential for an effective criminal justice system. There are a number of reasons for this and I propose to highlight some of them:

- Information provided by witnesses or victims is for the purposes of a criminal investigation and possible proceedings. Subsequent disclosure for another purpose would undermine public confidence in the criminal justice system. Witnesses and people under investigation should not be inhibited from cooperating in criminal investigations by the possibility that information provided may be disclosed and that their identity is revealed to the public outwith the protection of the court.

- The possibility of disclosure would undermine the informant system, and with so much serious crime being detected via confidential information and undercover sources, these intelligence sources must be protected.

- There is a need for uniformity and consistency in order to maintain cross border co-operation in relation to the investigation and prosecution of crime. Many of the law enforcement agencies that submit reports to the PF are subject to the FOI Act 2000:
  - HM Customs
- Health and Safety Executive
- Benefits Agency

The UK Act provides a general class exemption to last in perpetuity. Such an exemption requires to be compatible between the two jurisdictions to avoid operational difficulties for such agencies and to provide certainty and consistency.

- Disclosure of any aspect of a criminal investigation may prejudice or bar future criminal procedure

**Victims of crime**

Freedom of Information legislation provides a general right to any person to seek information and does not therefore restrict access to persons with a legitimate interest.

I recognise that victims and witnesses have a right to be given information about criminal proceedings and Crown Office and the Procurator Fiscal Service is committed to providing information to victims and witnesses about the progress of a case in response to individual requests. The recently established Victim Liaison Office will provide victims and witnesses with case progress information and general information regarding the criminal justice system.
Provision of reasons for decisions not to initiate (or to discontinue) proceedings

The long standing policy of the Crown not to provide reasons is based upon the fact that statements and reports are confidential. Crown Office and the Procurator Fiscal Service is however sympathetic to victims who may wish more information for reasons for decisions taken by the Crown and there may be situations where information can be made available, in private, to victims of crime. Disclosure in these circumstances will be assessed on a case by case basis.

For example, what if a girl under the age of 16 made an allegation of rape, but the Crown subsequently discontinued proceedings because she withdrew the allegation but also asked that this was not disclosed to her parents. The Crown would be bound by such a decision and there would be a duty of confidentiality to the complainer.

It is difficult to legislate in advance but the Crown must also consider the protection of individuals.

Section 34(2)(a) - Exemption for FAI until the conclusion of the proceedings

The purpose and role of the Fatal Accident Inquiry would be seriously undermined if information obtained and generated for the purposes of such inquiry was not covered by a class based exemption. The holding of a Fatal Accident Inquiry does not preclude criminal proceedings and an exemption of this nature is necessary to avoid any possible prejudice to a criminal trial.

Section 34(2)(b) - Exemption for investigation to ascertain the cause of death of a person
The right of the family and relatives to maintain privacy in relation to information of a personal and medical nature of deceased persons is considered to outweigh any public interest.

A class exemption is required to protect the Article 8 rights of relatives and the family of deceased persons. Information concerning the circumstances of the death including copies of post mortem reports will be provided to those with a legitimate interest including relatives and medical practitioners.

**Section 48**

I am aware that there are criticisms of the following:

- The scope and extent of the exclusion.
- Lack of accountability of the Lord Advocate.
- The exclusion is “out of line” with UK Law Officers.

There are legal, constitutional and policy reasons underpinning the need for such a provision.

**Constitutional position**

- In terms of the Scotland Act 1998, the Lord Advocate in his capacity as head of the Systems of Criminal Prosecution and investigation of deaths in Scotland is to take any decision independently of any other person.

- In terms of section 27(3) of the Scotland Act 1998 in any proceedings of Parliament, the Law Officers may decline to answer any question or produce any document relating to the operation of the system of criminal prosecutions, in any particular case, if answering the question or producing the documents
might prejudice criminal proceedings or would otherwise be contrary to the public interest.

The fact that Parliament is itself precluded from questioning the Lord Advocate or requiring the production of any document in the circumstances provided by Section 27(3) acknowledges that it is inappropriate for any person or any body to intervene or interfere with the independent exercise of the Lord Advocate’s discretion in relation to his prosecution functions. It is clear that the intention of the Scotland Act was that final decisions for such matters should rest solely with the Lord Advocate.

**UK Position**

Section 30 of the Freedom of Information Act 2000 provides a general exemption for investigation and proceedings conducted by public authorities in similar terms to that proposed in the Scottish legislation.

Section 31 provides an exemption if disclosure would be likely to prejudice various aspects of law enforcement as specified in Section 31(1) and (2). This is a lower threshold than is applicable in Scotland where the Law Officers would require satisfy a harm test of substantial prejudice before relying on the exemption.

In terms of Section 53(2) of the Freedom of Information Act 2000, any decision, notice or enforcement notice issued by the Commissioner shall cease to have effect if an accountable person provides the Commissioner with a Certificate signed by him stating that he has on reasonable grounds formed the opinion that in respect of the request or requests concerned, there was no failure to comply with the general requirement to provide information.

An accountable person includes the Attorney General and the Advocate General for Scotland. Thus in any dispute between the Commissioner and the Attorney
General as to whether disclosure would be in the public interest, the Attorney General may invoke the procedure outlined in Section 53 to exempt himself from complying with the decision or notice or enforcement notice. Accordingly, in relation to both Scottish and UK Law Officers, there is provision to ensure that independence in relation to prosecutorial functions is maintained.

5 December 2001
11 December 2001

Ms. Christine Grahame, MSP,
Convener,
Justice 1 Committee,
The Scottish Parliament,
Room 3.11,
Committee Chambers,
Edinburgh EH99 1SP

Dear Ms. Grahame,

Freedom of Information (Scotland) Bill

Thank you for your letter dated 5 December.

You have asked for my comments on the establishment of a procedure for an appeal against a certificate issued under clause 52. I should point out that such a certificate could be challenged by the Commissioner under the existing process of judicial review in the Court of Session. One of the grounds for judicial review is the unreasonableness of the decision which is challenged. In this connection I note that a certificate under clause 52 has to be based on "reasonable grounds". In these circumstances your committee may consider that existing procedures provide an adequate safeguard.

As regards a general right of appeal to the Court of Session, I have some reservations. It is one thing for the Court to have the power to strike down a certificate. It is another for it to be asked to say for itself where the public interest lies, in accordance with clause 2(1) of the Bill.

Yours sincerely,

[Signature]

Telephone 0131 225 2595        Fax 0131 240 6704       DX549206 Edinburgh 36
Dear Ms Grahame

FREEDOM OF INFORMATION (SCOTLAND) BILL

I thank you for your letter of 5 December 2001 which, in view of the short time available, has been considered only by the Office Bearers of the Sheriffs’ Association.

Whether there should be a specific appellate procedure set out in the Bill whereby the Scottish Commissioner could appeal to the court if he or she disagrees with the use of the Ministerial Certificate, and whether that appeal should be to the Court of Session or the Sheriff Court, are of course matters for the Parliament.

The Lord President has shown to us his response to your letter to him which was in identical terms to your letter to the Sheriffs’ Association. We would respectfully agree that any Certificate issued by the First Minister under Clause 52 could properly be challenged by the Scottish Commissioner under the existing process of judicial review in the Court of Session. A Certificate under Section 52 has to be based on “reasonable grounds”, and one of the grounds of judicial review is the unreasonableness of the decision which is challenged. Any challenge to a Certificate, we would have thought, would be on the basis that reasonable grounds did not exist when it was issued.

In these circumstances your committee may feel there is no necessity in this instance to establish a separate appellate procedure.

Yours sincerely

SHERIFF B A LOCKHART