The Committee will meet at 1.45pm in Committee Room 1.

1. **Item in private:** The Committee will consider whether to consider item 4 in private.

2. **Freedom of Information (Scotland) Bill:** The Convener to move (S1M-2667)—

   That the Justice 1 Committee consider the Freedom of Information (Scotland) Bill at Stage 2 in the following order: sections 1 to 3, schedule 1, sections 4 to 8, sections 10 and 11, sections 14 to 42, schedule 2, sections 43 to 54, schedule 3, sections 55 to 61, section 9, sections 12 and 13, sections 62 to 73.

3. **Freedom of Information (Scotland) Bill:** The Committee will consider the Bill at Stage 2 (Day 1).

4. **Work programme:** The Committee will consider its forward work programme.

Lynn Tullis
Clerk to the Committee, Tel 85246
The following papers are attached for this meeting:

**Items 2 & 3:**
Draft Codes of Practice and correspondence from the Minister for Justice for the Freedom of Information (Scotland) Bill at Stage 2  
J1/02/4/1

**Item 4:**
Note by the Clerk (private paper)  
J1/02/4/2

**Papers not circulated:**

**Items 2 & 3:**
Committee members may wish to consult the Bill and accompanying documents (available from Document Supply or on the Scottish Parliament website at: [www.scottish.parliament.uk/parl_bus/legis.html#36](http://www.scottish.parliament.uk/parl_bus/legis.html#36)). Copies of the marshalled list will be available from Document Supply, and groupings will be available from the Committee Clerks in Room 3.11, Committee Chambers (both available on Monday 4 February).

Committee members may wish to consult the drafts of the Marriage (Scotland) Regulations and Registrar General’s Guidance for the Marriage (Scotland) Bill at Stage 1 which are available from the Committee Clerks in Room 3.11, Committee Chambers.

**Papers for information circulated for the 4th meeting, 2002**

Supplementary written evidence for the regulation of the legal profession inquiry from the Scottish Legal Services Ombudsman (introductory leaflet on the Scottish Legal Services Ombudsman available for Committee members only – information available from the Scottish Legal Services Ombudsman website at [www.slso.org.uk](http://www.slso.org.uk)).  
J1/02/4/3

Supplementary written evidence for the regulation of the legal profession inquiry from the [Scottish Consumer Council](http://www.scottishconsumer.org.uk)  
J1/02/4/4

Committee correspondence (private paper)  
J1/02/4/5

Response from the Minister for Justice to the Justice 1 Committee’s legal aid inquiry report  
J1/02/4/6

Minutes of 3rd meeting, 2002  
J1/02/3/M
FREEDOM OF INFORMATION (SCOTLAND) BILL - DRAFT CODES OF PRACTICE

You will recall from the Stage 1 debate on the Freedom of Information (Scotland) Bill on 17 January that the Deputy Minister for Justice, Dr Simpson, informed the Parliament that we would furnish, by 30 January, a working draft of the section 60 and section 61 Codes of Practice. These are attached and are being provided to support your Committee's scrutiny of the Bill at Stage 2.

You will understand that the focus of our attention has been on the development of the Bill, hence the Codes are, necessarily, very much working drafts. Indeed, it would be premature to regard either as being ready for wider public examination - it is only our commitment to support the scrutiny of the Bill that leads us to provide these drafts at this stage.

The Codes are being drawn from, though will not be identical to, the equivalent Codes to be issued under the (UK) Freedom of Information Act 2000 – the enabling sections are broadly the same. Indeed, when my officials gave evidence on 30 October (and indicated that draft Codes would be made available to support Stage 2), they suggested the Committee could gain an appreciation for the likely content of our Codes by looking at the comparable UK Codes, available on the Lord Chancellor's website.

In developing our Codes we are taking note of points raised during the consultations and the early scrutiny of the Bill, and we will of course take account of any further points raised during Stage 2.

Moreover, we will, as is required by the Bill, consult in due course with the Scottish Information Commissioner (and for the section 61 Code also with the Keeper of the Records of Scotland) before the Codes are finalised and issued.

The drafting of the section 61 Code - on Records Management - has already been assisted greatly by the Keeper of the Records of Scotland and his staff at the National Archives of Scotland. The attached draft draws on the Lord Chancellor's equivalent Code, but there are a number of substantial differences - in part to take account of the different legal base in Scotland to the public records.
system. Part 1 of the Code details practices which public authorities should undertake in the management of their records, and Part 2 deals with actions to be undertaken by those authorities who transmit records to the Keeper.

The section 60 Code - as to functions under the Act - is a little less developed than the section 61 Code, and you will observe that there are 'drafting notes' indicating where additional text is to be prepared. We will consider carefully suggestions to add yet further material to this Code, but it is important to recognise that some matters will perhaps better be set out in other guidance - in particular that to be issued by the Scottish Information Commissioner. An example would be guidance for authorities on when it is appropriate to regard an application for information as 'vexatious'. Also, we intend working closely with the statutory equality bodies on the development of guidance for authorities on the operation of the FOI legislation in relation to obligations under existing equality legislation.

I trust the Committee will find the working drafts of the Codes helpful in their scrutiny of the Bill at Stage 2.
FREEDOM OF INFORMATION (SCOTLAND) ACT [2002]

CODE OF PRACTICE ON RECORDS MANAGEMENT

WORKING DRAFT PROVIDED TO THE JUSTICE 1 COMMITTEE OF THE SCOTTISH PARLIAMENT TO SUPPORT STAGE 2 SCRUTINY OF THE FREEDOM OF INFORMATION (SCOTLAND) BILL

Laid before the Scottish Parliament on [ ] pursuant to section 61(6) of the Freedom of Information (Scotland) Act [2002]

Prepared in consultation with the Scottish Information Commissioner and the Keeper of the Records of Scotland
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Preface

General

(i) This Code of Practice (hereafter referred to as ‘the Code’) provides guidance to all Scottish public authorities (as defined in schedule 1 of the Freedom of Information (Scotland) Act [2002]) as to the practice which it would, in the opinion of the Scottish Ministers, be desirable for them to follow in connection with the keeping, management and destruction of their records. Part Two of the Code describes the arrangements which apply to those authorities which transfer records to the Keeper of the Records of Scotland at the National Archives of Scotland.


(iii) Any freedom of information legislation is only as good as the quality of the records to which it provides a right of access. Such rights are of limited use if reliable records are not created in the first place, if they cannot be found when needed or if the arrangements for their eventual archiving or destruction are inadequate. Consequently, all Scottish public authorities are expected to have regard to the guidance in this Code to ensure they are managing their records effectively.

(iv) The Code is a supplement to the provisions in the Freedom of Information (Scotland) Act [2002] and its adoption will help authorities to comply with their duties under that Act. It is not a substitute for legislation. Authorities should seek legal advice as appropriate on general issues relating to the implementation of the Act, or its application to individual cases.

(v) The Scottish Information Commissioner will promote the observance of the Code by authorities, acting as appropriate under the terms prescribed in the Act, including, from time to time, consulting the Keeper of the Records of Scotland. If it appears to the Commissioner that the practice of an authority in the exercise of its functions under the Act does not conform with that set out in the Code, he/she may issue a practice recommendation as prescribed under section 44 of the Act. A practice recommendation must be in writing and must specify the provisions of the Code which have not been met and the steps which should, in the Commissioner’s opinion, be taken to promote conformity with the Code. The Commissioner must consult the Keeper before issuing a practice recommendation for these purposes.

(vi) If the Commissioner reasonably requires any information for the purpose of determining whether the practice of an authority in relation to the exercise of its functions under the Act conforms with that proposed in this Code, he/she may give the authority notice in writing (known as an ‘information notice’) under the provisions of section 50 of the Act. This requires the authority, within such time as is specified
in the notice, to furnish the Commissioner, in such form as may be so specified, with such information relating to conformity with the Code as is so specified.

(vii) An information notice must contain a statement that the Commissioner regards the specified information as relevant for the purpose of deciding whether the practice of the authority conforms with that proposed in the Code and of his/her reasons for regarding that information as relevant for that purpose. It must also contain particulars of the rights of appeal conferred by section 56 of the Act. In the event of an authority not complying with a notice issued by the Commissioner, the Commissioner may apply the sanctions set out in section 53 of the Act.

(viii) The content of this Code has been prepared in consultation with the Scottish Information Commissioner and the Keeper of the Records of Scotland.

Main features of the Freedom of Information (Scotland) Act [2002]

(ix) The main features of the Act are:

- the establishment of a general right of access to recorded information of any age held by a wide range of bodies across the public sector in Scotland, subject to certain conditions and exemptions;

- in relation to most exempt information, the information must nonetheless be disclosed where the public interest in disclosure outweighs the public interest in maintaining the exemption;

- a duty on each Scottish public authority to adopt and maintain a ‘publication scheme’, approved by the Scottish Information Commissioner. Publication schemes must specify the classes and manner in which information is, or is intended to be, published together with an indication of whether the information will be available free of charge or on payment;

- the creation of a new office of Scottish Information Commissioner, with wide powers to promote good practice and to enforce the rights created in the Act; and

- a duty on the Scottish Ministers to promulgate Codes of Practice containing guidance on specific issues (under sections 60 and 61 of the Act).

Training

(x) All written (and electronic) requests for information, submitted to Scottish public authorities, should be dealt with in accordance with the provisions of the Act. It is therefore essential that all relevant personnel are familiar with the provisions of the Act, the Codes of Practice prepared under it, and any guidance on good practice issued by the Scottish Information Commissioner. Authorities should ensure that appropriate staff training is provided.
Scottish Public Authorities subject to the Scottish Public Records Acts (or other legislation with record-keeping provisions)

(xii) The guidance on records management and on the transfer of public records contained in this Code should be read in the context of existing legislation on record keeping which may apply to some or all of the authorities covered by the Freedom of Information (Scotland) Act [2002]. In the main, this legislation is represented by the Public Records (Scotland) Act 1937 (as amended), the Public Registers and Records (Scotland) Act 1948, the Local Government (Access to Information) Act 1985 and the Local Government etc (Scotland) Act 1994. The 1994 Act complements the objectives of this Code by requiring local authorities to:

- make proper arrangements for the preservation and management of their records;
- consult the Keeper of the Records of Scotland before putting any such arrangements into effect or making any material change to such arrangements; and
- have regard to any comments which the Keeper may make on their proposed arrangements or changes to such arrangements.

The 1994 Act also permits local authorities to make provision for persons to inspect or obtain copies of their records, and for a local authority to carry out an activity with or on behalf of another local authority. It is therefore open to local authorities to enter into a mutually beneficial agreement concerning the storage, management or access arrangements for their records.

(xii) Authorities covered by the Acts mentioned above (and/or any other legislation with record keeping provisions) should note that if they are failing to comply with the Code, they may also be failing to comply with the aforementioned legislation. Neither should it be assumed that compliance with the Code relieves an authority from any additional duties it may have, which are not included in the Code, under statutory provisions on record keeping contained elsewhere.
FREEDOM OF INFORMATION (SCOTLAND) ACT [2002]
CODE OF PRACTICE ON RECORDS MANAGEMENT

Introduction

1. The Scottish Ministers, having consulted the Scottish Information Commissioner and the Keeper of the Records of Scotland, issue the following Code of Practice pursuant to section 61 of the Freedom of Information (Scotland) Act [2002].

2. The aims of the Code are:
   - to set out practices which Scottish public authorities should follow in relation to the creation, keeping, management and final disposition of their records (Part One); and
   - to describe the particular arrangements which apply to those authorities which transfer their records to the National Archives of Scotland (Part Two);

3. This Code refers to records in all technical or physical formats.

4. In addition to this Code, more detailed guidance may be obtained from published standards on records management. Those which support the objectives of this Code most directly are listed at Annex A.

5. Words and expressions used in this Code have the same meaning as the same words and expressions used in the Freedom of Information (Scotland) Act [2002].
Part One: Records Management

6. Responsibility for Records Management

6.1 The records management function should be recognised as a specific corporate programme within the authority and should receive the necessary levels of organisational support to ensure effectiveness. It should bring together responsibilities for records in all formats, including electronic records, throughout their life cycle, from planning and creation through to ultimate disposition. It should have clearly defined responsibilities and objectives, and the resources to achieve them. It is desirable that the person, or persons, responsible for the records management function should also have either direct responsibility for, or a formal working relationship with the person or persons responsible for, freedom of information, data protection and other information management issues.

7. Human Resources

7.1 A designated member of staff of appropriate seniority should have lead responsibility for records management within each authority. This lead role should be acknowledged formally and made known throughout the authority.

7.2 Staff responsible for records management should have the appropriate skills and knowledge needed to achieve the aims of the records management programme. Responsibility for all aspects of record keeping should be defined specifically and incorporated in job descriptions or similar documents.

7.3 The human resource policies and practices of authorities should address the need to recruit and retain good quality staff and should, accordingly, support the records management function in the following areas:

- the provision of appropriate resources to enable the records management function to be maintained across all of the authority’s activities;
- the establishment and maintenance of a scheme, such as a competency framework, to identify the knowledge and skills required by records and information management staff;
- the regular review of selection criteria for records management posts to ensure currency and compliance with best practice;
- the regular analysis of training needs;
- the establishment of a professional development programme for records management staff;
- the inclusion, in induction training programmes for all new staff, of an awareness of records management issues and practices.
8. Main Elements of a Records Management Programme

8.1 An authority’s records management programme should contain the following elements (for both paper and electronic records):

- a records management policy;
- a registration and tracking system;
- guidelines on when records should be closed to further additions;
- a system for appraising the authority’s records and for deciding their long-term future;
- a selection policy stating, in broad terms, the functions from which records are likely to be selected for permanent preservation and the periods for which other records should be retained;
- disposal schedules for each business area, based on selection policies, indicating the appropriate disposition action for each record (including, where appropriate, destruction);
- a permanent record of any records destroyed, showing why they were destroyed, when, and on whose authority; and
- adequate storage for current, semi-current and historical records following appropriate building, environmental and security standards.

These elements are discussed in greater detail in the following paragraphs.

9. Policy

9.1 An authority should have in place an overall policy statement on how it manages its records, including electronic records. This policy should be endorsed by senior management and should be made readily available to staff at all levels within the organisation.

9.2 The policy statement should provide a mandate for the performance of all records and information management functions. In particular, it should set out the authority’s commitment to create, keep and manage records which document its principal activities. The policy should also:

- outline the role of records management and its relationship to the authority’s overall strategy;
- define roles and responsibilities including:
  - the responsibility of individuals to document their actions and decisions in the authority’s records as defined in sub-section 10.2 of this Code;
and the responsibility of individuals to dispose of authority records, having regard to section 11 of this Code;

- provide a framework for supporting standards, procedures and guidelines; and

- indicate the way in which compliance with the policy and its supporting standards, procedures and guidelines will be monitored.

9.3 The policy statement should be reviewed at regular intervals (at least once every three years) and, if appropriate, amended to maintain its relevance.

10. Active Records Management

Record Creation

10.1 Each business area of the authority should have in place an adequate system for documenting its activities. This system should take into account the legislative and regulatory environments in which the authority operates.

10.2 Records of a business activity should be complete and accurate enough to allow employees and their successors to undertake appropriate actions in the context of their responsibilities, to:

- facilitate an audit or examination of the business by anyone so authorised;

- protect the legal and other rights of the authority, its clients and any other person affected by its actions; and

- provide proof of the authenticity of the records so that the evidence derived from them is shown to be credible and authoritative;

- [Drafting note: consider obligation to provide true and accurate picture of events for future public/historic scrutiny.]

10.3 Records created by the authority should be arranged in a record keeping system that will enable it to obtain the maximum benefit from the quick and easy retrieval of information.

Information Survey

10.4 A prerequisite for achieving effective record keeping systems is the information survey or record audit. This gives an objective view of the authority’s records and their relationships to organisational functions, it helps to determine what is required to install and maintain a records management programme, and promotes control of the records.

Record Keeping Systems

10.5 Paper and electronic record keeping systems should provide metadata (descriptive and technical documentation) to enable the system and the records to be understood and to be operated efficiently, and to provide an administrative context for effective management of the records.
10.6 The record-keeping system, whether paper or electronic, should include a set of rules for referencing, titling, indexing and security marking of records. These should be easily understood and should enable the efficient retrieval of information.

Record Maintenance

10.7 A tracking system should be used to control the movement and location of records. This should be sufficient to ensure that:

- a record can be easily retrieved at any time;
- any outstanding issues can be dealt with; and
- there is an auditable trail of record transactions.

10.8 Storage accommodation for current records should be clean and tidy, and it should prevent damage to the records. Equipment used for current records should provide storage which is safe from unauthorised access and which meets fire regulations, but which allows maximum accessibility to the information commensurate with its frequency of use. When records are no longer required for the conduct of current business, it is normally more economical and efficient to store them in a designated records centre rather than in offices. Procedures for handling records should take full account of the need to preserve important information.

10.9 A contingency or business recovery plan should be in place to provide protection for records which are vital to the continued functioning of the authority.

11. Disposal Arrangements

11.1 It is particularly important under Freedom of Information that the disposal, or final disposition, of records - which is here defined as the point in their lifecycle when they are either transferred to an archive or destroyed - is undertaken in accordance with clearly established policies, which:

- have been drawn up with advice from the authority’s own professional archives/records management staff or following advice from the Keeper of the Records of Scotland;
- have been formally adopted by the authority; and
- are enforced by properly authorised staff.

Record Closure

11.2 Records must be closed as soon as they have ceased to be of active use other than for reference purposes. As a general rule, files should be closed after five years and, if action continues, a further file should be opened. An indication that a file of paper records or folder of electronic records has been closed should be shown on the record itself as well as noted in the index or database of the files/folders. Wherever possible, information on the intended final disposition of electronic records should be included in the metadata when the record is created.
11.3 The storage of closed records awaiting final disposition should follow accepted standards relating to environment, security and physical organisation.

Appraisal Planning and Documentation

11.4 In order to make their disposal policies work effectively to provide the information required under the Freedom of Information (Scotland) Act [2002], authorities need to have in place systems for managing appraisal and for recording the final disposition decisions made. An assessment of the following will provide information to support the authority’s resource planning and workflow arrangements:

- the volume and nature of records due for final disposition;
- the time taken to appraise records; and
- the risks associated with destruction or delay in appraisal.

11.5 An appraisal documentation system will ensure consistency in records appraisal and final disposition. It must show:

- what records are designated for destruction;
- the reason for their destruction;
- by whose authority destruction has been approved; and
- when they are to be destroyed.

It should also provide background information on the records, such as legislative provisions, functional context and physical arrangement. This information will provide valuable data for placing records selected for preservation into context and will enable future records managers to provide evidence of the operation of their selection policies.

Record Selection

11.6 Each authority should maintain a selection policy which states in broad terms the functions from which records are likely to be selected for permanent preservation and the periods for which other records should be retained. (Annex B lists some of the key considerations when deciding how long records should be retained.) The policy should be supported by, or linked to, disposal schedules. These should be drawn up for each business area within an authority and should cover all records created within that area, including electronic records. The schedules should be arranged on the basis of series or collection and should indicate the appropriate disposition action for all records (e.g. review after \( x \) years; destroy after \( y \) years; archive after \( z \) years).

11.7 Records selected for permanent preservation and no longer in regular use by the authority should be transferred as soon as possible to an archival institution that has adequate storage and public access facilities (see Part Two for the arrangements for those authorities which transfer their records to the National Archives of Scotland).
11.8 Records not selected for permanent preservation and which have reached the end of their administrative life should be destroyed in as secure a manner as is necessary for the level of confidentiality or security markings they bear. A record of the destruction of records, showing their reference, description, reason for and date of destruction should be maintained and preserved by the records manager. Disposal schedules would constitute the basis of such a record.

11.9 If a record due for destruction is known to be the subject of a request for information under the Freedom of Information (Scotland) Act [2002], destruction should be delayed until disclosure has taken place or, if the authority has decided not to disclose the information, until the review and appeal provisions of the Act have been exhausted.

12. Management of Electronic Records

12.1 The principal issues for the management of electronic records are the same as those for the management of any record. They include, for example, the creation of authentic records, the tracking of records and final disposition arrangements. However, the means by which these issues are addressed in the electronic environment will be different.

12.2 Effective electronic record keeping requires:

- a clear understanding of the nature of electronic records;
- the creation of records and metadata necessary to document business processes - this should be part of the systems which hold the records;
- the maintenance of a structure of folders to reflect logical groupings of records;
- the secure maintenance of the integrity of electronic records;
- the accessibility and use of electronic records for as long as required (which may include their migration across systems);
- the application of appropriate disposal procedures, including procedures for archiving; and
- the ability to cross reference electronic records to their paper counterparts in a mixed environment.

12.3 Generic requirements for electronic record management (ERM) systems are set out in the 1999 Public Record Office (PRO) statement Functional Requirements and Testing of Electronic Records Management Systems. Authorities are encouraged to have regard to these requirements when developing their specifications for such systems. The Public Record Office has also issued a List of Approved ERM Systems, identifying commercially available systems which comply with their functional requirements. (A full copy of the statement and list of ERM systems can be obtained from the PRO or from their website at http://www.pro.gov.uk/recordsmanagement/eros/invest/sorcontents.htm).
12.4 Audit trails should be provided for all electronic information and documents. They should be kept securely and should be available for inspection by authorised personnel. The BSI document, *Principles of Good Practice for Information Management* (PD0010), recommends audits at predetermined intervals for particular aspects of electronic records management.

12.5 Authorities should seek to conform to the provisions of BSI DISC PD0008 - *A Code of Practice for Legal Admissibility and Evidential Weight of Information Stored Electronically (2nd edn)* – especially for those records likely to be required as evidence.
Part Two: Review and Transfer of Public Records
to the National Archives of Scotland

13. This part of the Code applies to those authorities which transfer records to the Keeper of the Records of Scotland at the National Archives of Scotland (NAS) under the Public Records (Scotland) Act 1937 and the Public Registers and Records (Scotland) Act 1948 (hereafter referred to as 'the Scottish Public Records Acts'). The general purpose of Part Two is to facilitate the performance by the National Archives of Scotland and the authorities concerned of their functions under the Freedom of Information (Scotland) Act [2002].

14. Under the Scottish Public Records Acts, certain authorities are either obligated or permitted to transfer records selected for preservation into the custody of the Keeper. This part of the Code applies to all such transfers.

15. Authorities which transfer records to NAS should establish a programme for reviewing regularly their records to ensure that they become available to the public at the earliest possible time in accordance with the Freedom of Information (Scotland) Act [2002].

16. In carrying out their review, authorities should observe the following points:
   - transfer to the National Archives of Scotland should normally take place by the time the records are 30 years old. By agreement with the National Archives of Scotland, transfer may take place before 30 years; and
   - review - for selection and transfer to NAS - should therefore occur before the records in question are 30 years old.

17. The purpose of the review of records is to:
   - identify those records which should, on transfer to NAS, be placed on public access, because no exemptions under the Freedom of Information (Scotland) Act [2002] apply; and
   - identify those records which, on transfer to NAS, should not be placed on public access, because the records are presently exempt under the terms of the Act.

18. If the review results in the identification of information which an authority considers is covered by an exemption under the terms of the Freedom of Information (Scotland) Act [2002], it should prepare a schedule:
   - identifying this information precisely;
   - citing the relevant exemption(s) and explaining why it applies; and
   - identifying a date at which release would be appropriate (because of the falling away of an exemption at 30 years or some later juncture – section 58 of the Act refers). Alternatively, where an exemption does not fall away at a specified juncture, the authority should, in conjunction with NAS, identify a
date at which consideration might be given to whether the record remains exempt.

19. In preparing a schedule, the authority should consider whether parts of records might be released if it is possible to withhold the sensitive information in some way. Any method of blanking out information should not, however, damage the document and should be fully reversible.

20. If circumstances, or the passage of time, change the content of a schedule, the authority should submit the revised schedule to the Keeper highlighting the adjustments.

21. Authorities should liaise with the Keeper in the preparation of the schedule described in paragraph 18 and submit the schedule to NAS at the time the record is transferred. NAS will use the schedules received from transferring authorities to identify those records which are covered by section 22 of the Freedom of Information (Scotland) Act [2002]. Under this section, where the Keeper of the Records of Scotland receives a request for information in an exempt record transferred to him from a Scottish public authority, he will seek a decision from that authority on whether an exemption still applies and, if so, whether the record should, nonetheless, be disclosed in the public interest (under the terms of section 2 of the Act).

22. When, under section 58 of the Act, an exemption ceases to apply, the record in question will automatically become available to the public.

23. The arrangements in paragraphs 16 to 22 should be established and operated in close liaison with the National Archives of Scotland.

24. Existing agreed transfer arrangements between a Public Authority and the National Archives of Scotland are unaffected, provided these comply with this Code and remain acceptable to the Keeper.

[Drafting note: consider guidance for public archives, other than the National Archives for Scotland, on transfer arrangements - held by or on behalf of another public authority.]
ANNEX A

Records Management Standards & Specifications

British and International Standards

BS ISO 15489-1:2001  Information and documentation - Records management
Part 1: General

PD ISO/TR 15489-2:2001  Information and documentation - Records management
Part 2: Guidelines

BS 4783  Storage, transportation and maintenance of media for
use in data processing and information storage

BS 7799  Code of practice for information security management

BSI DISC PD0008  Code of practice for legal admissibility and evidential
weight of information stored on electronic document
management systems

BSI DISC PD0010  Principles of good practice for information management

BSI DISC PD0012  Guide to the practical implications of the Data
Protection Act 1998

BSI DISC PD5000  Code of practice for electronic documents and
e-commerce transactions as legally admissible
evidence.

Public Record Office Standards for the Management of Public Records

The Public Record Office (PRO) publishes standards, guidance and toolkits on the
management of public records in all formats. These standards reflect the legislative
and administrative arrangements which apply to UK public records. However, in so
far as they are applicable to Scotland, they contain helpful, practical advice which is
commended to Scottish public authorities. They are available from the PRO and on
their website at:  http://www.pro.gov.uk/recordsmanagement

(Note: At the time of writing, the PRO are reviewing their aforementioned standards
and a revised set is expected to be made available later in 2002.)
Retention of Records

Retention Periods

Public authorities should consider the following questions when deciding how long to retain a record before final disposition:

- Is the record still required for the day-to-day running of the authority?
- Is it required for legal purposes (e.g. contracts)?
- Does any legislation or official regulation govern how long it must be kept?
- Is there current guidance on record retention in your sector?

Retaining Records for Permanent Preservation

Records are designated as 'archival' for many reasons, the main ones being that:

- they are still essential to the authority (e.g. title deeds which, although only very occasionally required, provide proof of land ownership); and
- they document the authority’s policies, structures and processes so that its activities may be accountable to the present generation and understood by future generations.

In general, this means keeping records which provide evidence of the following matters:

- top-level decision making and policy formulation within the authority;
- policy making within the major functions of the authority;
- important aspects of the interactions between the authority and individuals, businesses, civic institutions, and the environment;
- principle administrative processes of the authority;
- structure and remit of the authority, and any major changes to this;

and which demonstrate adherence to:

- the authority's statutory obligations in respect of permanent record preservation.
FREEDOM OF INFORMATION (SCOTLAND) ACT [2002]

CODE OF PRACTICE AS TO FUNCTIONS UNDER THIS ACT

WORKING DRAFT PROVIDED TO THE JUSTICE 1 COMMITTEE OF THE SCOTTISH PARLIAMENT TO SUPPORT STAGE 2 SCRUTINY OF THE FREEDOM OF INFORMATION (SCOTLAND) BILL

Laid before the Scottish Parliament on [ ] pursuant to section 60(5) of the Freedom of Information (Scotland) Act [2002]
INTRODUCTION

1. The Code of Practice, to which this is a foreword, fulfils the duty on the Scottish Ministers set out in section 60 of the Freedom of Information (Scotland) Act [2002], to provide guidance to public authorities as to the practice which it would, in the opinion of the Scottish Ministers, be desirable for them to follow in connection with the discharge of their functions under this Act. This foreword does not form part of the Code itself.

2. It is the Scottish Executive’s intention that the Freedom of Information (Scotland) Act will further the stated aim of greater openness and transparency across the Scottish public sector. Wherever appropriate, the disclosure of information, both proactively and in response to specific requests, serves to strengthen government and increase public involvement in decision-making. Conformity with the Code will assist this.

3. The Code is a supplement to the provisions in the Act. It is not a substitute for legislation. Public authorities should seek legal advice as considered necessary on general issues relating to the implementation of the Act, or its application to individual cases.

Practice Recommendations

4. Under the provisions of section 43 of the Act, the Scottish Information Commissioner has a duty to promote the observance of this Code by public authorities. If it appears to the Commissioner that the practice of a public authority in the exercise of its functions under the Act does not conform with that proposed in the Code of Practice, he or she may give to the authority a recommendation (known as a "practice recommendation") specifying the steps which should, in his or her opinion, be taken to promote such conformity.

5. A practice recommendation must be given in writing and must refer to the particular provisions of the Code of Practice with which, in the Commissioner’s opinion, the public authority’s practice does not conform. A practice recommendation is simply a recommendation, designed to assist an authority to improve its procedures under the legislation, and consequently cannot be directly enforced by the Information Commissioner. However, a failure to comply with a practice recommendation may lead to a failure to comply with the Act. A failure to take account of a practice recommendation may also be the subject of specific comment in a report to the Parliament by the Commissioner.

Information Notices

6. If the Commissioner reasonably requires any information for the purpose of determining whether the practice of a public authority conforms with that proposed in
this Code, under section 50 of the Act he or she may serve on the authority a notice (known as an "information notice") requiring it to furnish him or her with such information relating to conformity with the Code of Practice as is specified.

7. Under the provisions of section 53 of the Act, if a public authority fails to comply with an information notice, the Commissioner may certify in writing to the court that the public authority has failed to comply with that notice. The court may then inquire into the matter and, after hearing any witnesses who may be produced against or on behalf of, the public authority, and after hearing any statement that may be offered in defence, deal with the authority as if it had committed a contempt of court.

Duty to provide advice and assistance

8. Section 15 of the Act places a duty on public authorities to provide advice and assistance to applicants, so far as it is reasonable to expect an authority to do so. A public authority is deemed to have complied with this duty if it has conformed with the Code in relation to the provision of advice and assistance.

9. Consequently, where an authority departs from the Code’s provisions relating to the provision of advice and assistance, it should be prepared to explain to the Commissioner that the advice and assistance provided was reasonable in the circumstances. Where an authority cannot do so, the Commissioner may consider that authority to have failed to meet its obligations under section 15 to provide advice and assistance. Where this is the case, the Commissioner may issue a decision notice under section 49 or an enforcement notice under section 51. If an authority fails to comply with a decision notice or an enforcement notice, the Commissioner may certify this to the court, inviting the court to inquire into the matter and determine whether the authority should be deemed to have committed a contempt of court.

MAIN FEATURES OF THE ACT

10. The main features of the Freedom of Information (Scotland) Act [2002] are:

i) the establishment of a general right of access to recorded information of any age held by a wide range of bodies across the public sector in Scotland, subject to certain conditions and exemptions;

ii) in relation to most exempt information, the information must nonetheless be disclosed where the public interest in disclosure outweighs the public interest in maintaining the exemption;

iii) a duty on each Scottish public authority to adopt and maintain a ‘publication scheme’, approved by the Scottish Information Commissioner. Publication schemes must specify the classes and manner in which information is, or is intended to be, published together with an indication of whether the information will be available free of charge or on payment;
iv) the creation of a new office of Scottish Information Commissioner, with wide powers to promote good practice and to enforce the rights created in the Act; and

v) a duty on the Scottish Ministers to promulgate Codes of Practice containing guidance on specific issues (under sections 60 and 61 of the Act).

TRAINING

11. All communications in writing to a public authority potentially fall within the scope of the Act, if they seek information, and must be dealt with in accordance with the provisions of the Act. It is therefore essential that everyone working in a public authority, who deals with correspondence, or who otherwise may be required to provide information, is familiar with the provisions of the Act, of the Codes of Practice issued under its provisions, and any relevant guidance on good practice issued by the Commissioner.

[Drafting note: Reference to be made to the Training Strategy being developed by the cross-sector Freedom of Information Implementation Group. Nb. further guidance may also be issued by the Scottish Information Commissioner, public authorities and other bodies.]
INTRODUCTION

1. This Code of Practice provides guidance to public authorities as to the practice which it would, in the opinion of the Scottish Ministers, be desirable for them to follow in connection with the discharge of their functions under the Freedom of Information (Scotland) Act ("the Act").

2. The aims of the Code are to:

   - facilitate the disclosure of information under the Act by setting out good administrative practice that it is desirable for public authorities to follow when handling requests for information, including, where appropriate, the transfer of a request to a different authority;
   - protect the interests of applicants by setting out standards for the provision of advice which it would be good practice to make available to them and to encourage the development of effective means of handling complaints about decisions taken under the Act;
   - ensure that the interests of third parties who may be affected by any decision to disclose information are considered by the authority, by setting standards for consultation; and
   - ensure that authorities consider the implications for Freedom of Information before agreeing to confidentiality provisions in contracts and accepting information in confidence from a third party more generally.

3. Although there is a statutory duty on the Scottish Ministers to issue the Code, the provisions of the Code themselves do not have statutory force. The statutory requirements for dealing with requests for information are contained in the Act and the regulations made under it, and public authorities must comply with these statutory provisions at all times. Additionally, public authorities will need to ensure that they comply with their existing duties under other legislation, including the Disability Discrimination Act 1995.

   [Drafting note: Refer to additional guidance developed to help public authorities meet their obligations under this and other legislation, for example equal opportunities legislation.]

4. Section 43 of the Act places a duty on the Scottish Information Commissioner to promote the following of good practice by public authorities ("good practice" includes compliance with the provisions of the Code), and section 44 of the Act
enables the Scottish Information Commissioner to issue a "practice recommendation" to a public authority if it appears to him or her that the practice of the authority does not conform with that proposed in the Code. Further, section 15 of the Act places a duty on public authorities to provide advice and assistance to applicants and potential applicants. Authorities will have complied with this duty in any particular case if they have conformed with the Code in relation to the provision of advice or assistance in that case.

5. Words and expressions used in this Code have the same meaning as the same words and expressions used in the Act.

THE PROVISION OF ADVICE TO PERSONS MAKING REQUESTS FOR INFORMATION

6. Every public authority should provide advice and assistance (as set out below) to those who propose to make, or who have made, requests for information to it, in order to facilitate their use of the Act.

7. Public authorities should publish their procedures for dealing with requests for information, which should include an address (including an e-mail address where possible) to which applicants may direct requests for information or for assistance. These procedures should be referred to in the authority’s publication scheme.

8. A request for information must be made in writing (which includes a request transmitted by electronic means which is received in legible form and is capable of being used for subsequent reference). Where a person is unable to frame their request in writing, the public authority should ensure that appropriate assistance is given to enable that person to make a request for information. In particular, public authorities should ensure that advice and assistance is available to help those with a disability or with literacy difficulties.

9. Appropriate assistance could include offering to take a note of the application over the telephone and then send the note to the applicant for confirmation (in which case the written note of the telephone request, once verified by the applicant and returned, would constitute a written request for information and the statutory time limit for reply would begin when the written confirmation was received).

10. Where insufficient information is provided by the applicant to enable the authority to identify and locate the information sought, or the request is ambiguous, the authority should, as far as practicable, provide assistance to the applicant to enable him or her to describe more clearly the information requested. The aim of such assistance is to clarify the nature of the information sought, not to determine the aims or motivation of the applicant. Appropriate assistance could include:

- the provision of an outline of the different kinds of information which might meet the terms of the request;
- the provision of detailed catalogues and indexes, where these are available, to help the applicant ascertain the nature and extent of the information held by the authority;
DRAFT

- the provision of a general response to the request setting out options for further information which could be provided on request; or
- where a request would be refused on cost grounds, an indication of what information could be provided within the cost ceiling.

This list is not exhaustive and authorities should be flexible in offering advice and assistance to applicants, and in particular to those with a disability or literacy difficulties.

11. If, following the provision of such assistance, the applicant has failed to describe the information requested in a way which would enable the authority to identify and locate it, the authority is not expected to seek further clarification, though it must disclose any information relating to the application, which has been successfully identified and found, and which is disclosable under the provisions of the Act, and should explain to the applicant why it cannot take the request any further.

12. An authority cannot seek information from an applicant which he [or she] cannot reasonably be expected to possess, such as a file reference number, or a description of a particular record, unless this information is made available by the authority for the use of applicants.

HANDLING REQUESTS CONSIDERED TO BE PART OF AN ORGANISED CAMPAIGN UNDER SECTION 12

13. Where an authority is not required to comply with a number of related requests because, under section 12, the cumulative cost of meeting the requests would exceed an upper threshold set in regulations, and where the requested information would have been disclosed, had the cost of responding not exceeded the upper cost threshold, the authority should consider whether the requested information can be disclosed in another, more cost-effective, manner. Where a number of requests have been received for the same information, authorities should give particular consideration to the general dissemination of the information, for example by way of publication on the Internet.

14. Where an authority does not disclose the information in another, more cost-effective manner, it should be prepared to explain to the Commissioner why it did not consider it reasonable to do so.

TRANSFERRING REQUESTS FOR INFORMATION

[Drafting note: consider adding opening paragraph noting that the transfer of requests, whilst not legally required, is in the spirit of the legislation. Particularly applicable in relation to authorities holding records on behalf of another authority.]

15. A request for information can be transferred only where the public authority in receipt of the request does not hold all the requested information (within the meaning of section 3(2) of the Act). If the authority in receipt of the request does hold the
requested information, it should process the request in compliance with the Act. If the request is for information, some of which is held by the authority and some of which is not, the provisions in respect of the transfer of requests in the Code only apply to that part of the request which relates to information which the authority does not hold.

16. Where a public authority receives a request for information which it does not hold, but which it believes is held by another public authority, it should consider whether to consult that authority with a view to ascertaining whether it does hold the information and, if so, whether it should transfer the request to it. In considering whether to consult another public authority, the authority in receipt of the request should consider whether the applicant would have any grounds to object. If the authority reasonably concludes that an applicant would object, it should not consult the authority or transfer the request without the applicant’s prior consent. Where the authority considers that the applicant’s consent should be sought, this should be done as soon as is practicable.

17. The process of consulting another authority does not relieve the first authority of its obligations under the Act. It will still be required to respond to the applicant within the 20 working day period, providing to the applicant, where appropriate, the requested information which it does hold, and advising the applicant about the requested information which it does not hold. If the applicant has not consented to the transfer of the request to another authority, it may be appropriate at this stage to advise the applicant that the requested information may be held by another specified public authority.

18. A request or part of a request transferred to another public authority, with the agreement of the receiving authority, would be a request within the meaning of the Act to receiving authority. Consequently, the receiving authority must comply with its obligations under the Act in the same way as it would for a request which it received directly from an applicant. The receiving authority’s obligations would begin on receipt of the request from the transferring authority and it would have 20 working days in which to respond to the applicant.

19. All transfers of requests should take place promptly.

20. Where a public authority is unable to facilitate the transfer of a request for information to another authority or considers it inappropriate to do so, it should consider what advice, if any, it can provide to the applicant to enable them to pursue their request.

21. In summary, before consulting another public authority about the transfer of a request for information to that authority, the authority should consider:

- whether it holds the requested information;
- if it does not, the authority should consider whether the applicant would have any grounds to object to the transfer;
- where the authority considers that the applicant may object, it should seek the applicant’s consent before consulting another authority – if the applicant does not
consent, the authority should not consult the other authority and should simply respond to the applicant in compliance with the Act;

- if the authority reasonably concludes that the applicant would not object, it may consult the authority and transfer the request without seeking the applicant’s prior consent, but should tell him it has done so (as well as complying with its obligations under the Act).

[Drafting note: consider guidance for public archives, other than the National Archives for Scotland, on handling requests for information, where that information is held on behalf of another public authority.]

**CONSULTATION WITH THIRD PARTIES**

22. In some cases the disclosure of information pursuant to a request may affect the legal rights of a third party such as the right to have certain information treated in confidence or rights under Article 8 of the European Convention on Human Rights. Where the consent of the third party would enable a disclosure to be made, an authority should consult that party prior to reaching a decision, unless it is clear to the authority that the consent would not be forthcoming. The need for some information to be treated as confidential may lessen with time and, where this may reasonably be the case, authorities should consider with the third party whether it continues to be necessary that the information is confidential.

23. Where the interests of the third party which may be affected by a disclosure do not give rise to legal rights, the public authority should consider whether to consult the third party. Consultation will be unnecessary where:

- the public authority does not intend to disclose the information, relying on some other legitimate ground;
- the views of the third party can have no effect on the decision of the authority, for example, where there is other legislation preventing or requiring the disclosure of this information; or
- A public authority may consider that consultation is not appropriate where the cost of consulting with third parties would be disproportionate.

24. Consultation should take place where:

- the views of the third party may assist the authority to determine whether information is exempt from disclosure under the Act; or
- the views of the third party may assist the authority to determine under section 2 of the Act where the public interest lies.

25. Where the interests (but not the legal rights) of a number of third parties may be affected by a disclosure, and those parties have a representative organisation which can express views on behalf of those parties, the authority may, if it considers consultation appropriate, consider that it would be sufficient to consult that representative organisation. If there is no representative organisation, the authority may consider that it would be sufficient to consult a representative sample of the third parties in question.
26. The fact that the third party has not responded to consultation does not relieve the authority of its duty to disclose information under the Act, or its duty to reply within the time specified in the Act.

[Drafting Note: consideration also being given to the inclusion of a section setting out when it will be appropriate for the Scottish Executive to consult the UK Government (and vice versa) on issues surrounding the disclosure of information.]

[Drafting Note: consider guidance for public authorities withholding information intended for future publication under section 27, where publication has not taken place at the expected date.]

FREEDOM OF INFORMATION AND PUBLIC SECTOR CONTRACTS

27. When entering into contracts, public authorities should refuse to include contractual terms which purport to unreasonably restrict the disclosure of information held by the authority and relating to the contract. Public authorities should not agree to hold information ‘in confidence’ which is not in fact confidential in nature.

28. When entering into contracts with non-public authority contractors, public authorities may be under pressure to accept confidentiality clauses so that information relating to the terms of the contract, its value and performance will be exempt from disclosure. Public authorities should not accept such clauses where this is commercially viable.

29. Any acceptance of such confidentiality provisions must be for good reasons and capable of being justified to the Commissioner.

30. Similarly, public authorities should not impose unnecessary duties of confidence on contractors. However, a public authority may need to use appropriate contractual terms to protect from disclosure, by the contractor, information which would be exempt from disclosure under the Act. The use of such confidentiality provisions must be for good reason and capable of being justified to the Commissioner. Apart from such cases, public authorities should not impose terms of confidentiality on contractors.

ACCEPTING INFORMATION IN CONFIDENCE FROM THIRD PARTIES

31. A public authority should only accept information from third parties in confidence if it is necessary to obtain that information in connection with the exercise of any of the authority’s functions. In addition, public authorities should not agree to hold information received from third parties “in confidence” which is not confidential in nature. And again, acceptance of any confidentiality provisions must be for good reasons, capable of being justified to the Commissioner.

REQUIREMENT FOR REVIEW - PROCEDURES
32. Public authorities are required under section 21 of the Act to have in place a procedure for dealing with requirements for review from people who consider that their request has not been properly handled, or who are otherwise dissatisfied with the outcome of the consideration of their request, and the issue cannot be resolved in discussion with the official dealing with the request. Under section 19, a refusal notice issued to an applicant must set out the details of this procedure.

33. The review procedure should be a fair and impartial means of dealing with handling problems and reviewing decisions taken pursuant to the Act, including decisions taken about where the public interest lies in respect of exempt information. It should be possible to reverse or otherwise amend decisions previously taken.

34. Where practicable, an internal review should be handled by a person who was not a party to the original decision.

35. Records should be kept of all reviews and of their outcome. Authorities should have procedures in place for monitoring complaints and for reviewing, and, if necessary, amending, policies where such action is indicated by regular reversals of initial decisions.

36. Where the outcome of a review is that the procedures within an authority have not been properly followed by an individual within an authority, the authority should apologise to the applicant and take appropriate steps to reduce the likelihood of errors of this type occurring in future. The authority should be prepared to explain what these steps will be to the Commissioner.

37. Where the outcome of a review is that an initial decision to withhold information is upheld, or is otherwise in the authority’s favour, the authority is required, under section 21, to inform the applicant of their right to apply to the Commissioner. Authorities should also ensure that applicants are made aware of how to exercise their right of appeal to the Commissioner.
Dear Convenor

Re: Enquiry into the Legal Professions

I realised that I had not sent the Committee copies of our recently reprinted information leaflet, and now enclose copies as promised.

Having read the transcript of my evidence to the Committee, I can see that in only answering one half of a two part question, I may have been misleading. Whilst I consider that an uprated £1,000 is adequate compensation for any mishandling of a complaint by a professional body, my view on compensation by the practitioner is in my written evidence. It depends on what is seen to be the purpose of a complaints system: if it is an alternative form of dispute resolution, then an appropriate (and easily amendable) limit can be set.

Finally, whilst I would like Scotland to benefit from starting with a clean sheet of paper rather than copying what happens elsewhere, I would like to note that the Immigration Services Commissioner already operates the type of arrangement I am recommending. The Commissioner, in addition to approving non legally qualified providers of immigration advice, investigates complaints. Where the complaint is about a member of one of the legal services professional bodies (as most complaints are) the Commissioner may investigate the complaint directly, but more commonly passes it to the professional body. He has the right to monitor the investigation, and can set standards for complaint handling.
I would, of course be happy to respond to any queries.

Yours sincerely

L M Costelloe Baker (Mrs)
Scottish Legal Services Ombudsman

Enc leaflet 10
The Ombudsman is independent of the legal professions and is not a lawyer. She is also independent of Government: the Ombudsman's findings and recommendations are not reviewed by Scottish Ministers or the Scottish Executive. The Scottish Legal Services Ombudsman is appointed by Scottish Ministers after open public advertisement and independent selection. The current Ombudsman is Mrs. Linda Costelloe Baker.

The Ombudsman's duties are decided by Parliament and Scottish Ministers. The Ombudsman's job is to look into complaints about the way a professional body, (The Law Society of Scotland, The Faculty of Advocates, or The Scottish Conveyancing and Executry Services Board) has handled a complaint against a legal practitioner. Her job is to decide:

- if the professional body has given each complaint proper attention
- if it has taken appropriate action on the basis of a fair and thorough examination of all the evidence
- if it has acted reasonably, impartially and effectively.

What does the Ombudsman do?

- Investigates complaints about the way in which a professional body (Law Society of Scotland, Faculty of Advocates or Scottish Conveyancing & Executry Services Board) has handled a complaint against a legal practitioner.

- Investigates complaints about the unwillingness of a professional body to investigate a complaint against a legal practitioner.

- Prepares Opinions which are reports on whether complaints have been handled fairly, thoroughly and impartially. Opinions can be sent out in large print or on audiotape on request.

- Makes recommendations to the professional bodies and to Scottish Ministers.

- May refer a solicitor to the Scottish Solicitors Discipline Tribunal.

- Prepares a report each year for Scottish Ministers. The report is published and can be bought from Stationery Office Bookshops and most booksellers, obtained via a library or read on the Scottish Legal Services Ombudsman's website.

Which professional bodies can the Ombudsman investigate?

- The Law Society of Scotland - complaints against solicitors who are members of the Society.
Faculty of Advocates - complaints against advocates who are members of the Faculty.

Scottish Conveyancing & Executry Services Board - complaints against qualified conveyancers or executry practitioners who are members of the Board.

**What can the Ombudsman not do?**

- Investigate the original complaint about a legal practitioner
- Look into complaints about the Scottish Legal Aid Board, Judges, Sheriffs or the Scottish Court Service.

**How do you make a complaint to the Ombudsman?**

- You need to make a complaint within six months of the professional body telling you its final decision, when it will also tell you that you can write to the Ombudsman if you do not think your complaint has been handled properly.
- A complaint has to be in writing. In your letter you need to tell us:
  1. the name of the firm or practitioner you complained about,
  2. the professional body’s case reference number,
  3. the date of the professional body’s final decision letter.
     and
  4. what concerns you about the way your complaint was handled.

- If writing would be difficult, please phone us or call in and we will do our best to help.

**What happens next?**

- We will write back to you straightaway
- If your complaint is about the way the Law Society of Scotland, the Faculty of Advocates or the Scottish Conveyancing and Executry Services Board handled a complaint, we will ask the professional body to send the file and we will begin to prepare a written Opinion.
- If your complaint is not one which the Ombudsman can investigate, we will explain why and if possible, give guidance about who might be able to help.
- We cannot look into a complaint which was first made to one of the professional bodies before 3 June 1991
- We cannot look into a complaint which is made more than six months after the date of the professional body’s final decision letter.
- We cannot normally re-investigate a complaint which the Ombudsman has already investigated.

**How long does an investigation take?**

We will let you know how long the investigation will take. We aim to complete a written Opinion within three to thirteen weeks depending on the work involved.
**Does it cost anything to make a complaint to the Ombudsman?**

The Ombudsman’s office is funded by Scottish Ministers from taxpayers money. We do not charge complainants at all.

**What can the Ombudsman do?**

If the Ombudsman finds that the professional body has not investigated the complaint properly, she can recommend that it:

- provides more information to the Complainant
- exercises its powers in relation to the practitioner
- investigates the complaint further
- looks at the complaint again
- If the Ombudsman finds that the investigation was mismanaged, she can recommend that the professional body pays a modest amount of compensation for inconvenience. She can also recommend that the professional body reimburses part or all of the costs of the Complainant making the complaint to the Ombudsman.

**Do the professional bodies have to follow the Ombudsman’s recommendations?**

- No. A professional body has three months to decide if it will accept the Ombudsman’s recommendations. If it does not accept, the Ombudsman can publish an Announcement giving her views and the professional body’s views. Neither the complainant nor the legal practitioner is identified.

**What else can the Ombudsman do?**

- The Ombudsman may make recommendations to the professional bodies about the way they handle complaints, either in an Annual Report to Scottish Ministers or at any other time. The Ombudsman includes a summary of a sample of cases in the Annual Report. Neither the Complainant nor the legal practitioner may be identified. You can read the most recent Annual Report on our website www.slsq.org.uk

- The Ombudsman may report to Scottish Ministers at any time on matters which are of concern.
**How do you get in touch with the Ombudsman?**

In writing: Scottish Legal Services Ombudsman  
17 Waterloo Place  
EDINBURGH  
EH1 3DL

By phone: 0131 244 3055  
By fax: 0131 244 3056  
Email: Ombudsman@slso.org.uk  
Website: www.slso.org.uk

The Office is normally open from 9.00 until  
12.00 a.m. and 2.00 to 4.00 p.m. Monday to  
Friday and has access for wheelchair users.

Please ask if you would like this leaflet in  
another language or in large print or audiotape.

**Where do I write to if I want to complain to one of the professional bodies?**

Client Relations Office  
The Law Society of Scotland  
26 Drumsheugh Gardens  
EDINBURGH  
EH3 7YR  
Tel: 0845 113 0018  
cro@nildram.co.uk  
www.lawscot.org.uk

Faculty of Advocates  
Advocates Library  
EDINBURGH  
EH1 1RF  
Tel. 0131 226 5071  
www.advocates.org.uk

Scottish Conveyancing  
& Executry Services Board  
1 John’s Place  
Leith  
EH6 7EL  
Tel 0131 555 6525  
info@scesb.co.uk  
www.scesb.co.uk
regulation of the legal profession

Supplementary Briefing Paper for Justice 1 Committee on its Inquiry into Regulation of the Legal Profession
About the Scottish Consumer Council

The Scottish Consumer Council (SCC) was set up by government in 1975. Our purpose is to promote the interests of consumers in Scotland, with particular regard to those people who experience disadvantage in society. While producers of goods and services are usually well-organised and articulate when protecting their own interests, individual consumers very often are not. The people whose interests we represent are consumers of all kinds: they may be patients, tenants, parents, solicitors’ clients, public transport users, or simply shoppers in a supermarket.

Consumers benefit from efficient and effective services in the public and private sectors. Service-providers benefit from discriminating consumers. A balanced partnership between the two is essential and the SCC seeks to develop this partnership by:

· carrying out research into consumer issues and concerns;
· informing key policy and decision-makers about consumer concerns and issues;
· influencing key policy and decision-making processes;
· informing and raising awareness among consumers.

The SCC is part of the National Consumer Council (NCC) and is sponsored by the Department of Trade and Industry. The SCC’s Chairman and Council members are appointed by the Secretary of State for Trade and Industry in consultation with the Secretary of State for Scotland. Future appointments will be in consultation with the First Minister. Martyn Evans, the SCC’s Director, leads the staff team.

Please check our web site at www.scotconsumer.org.uk for news about our publications.

The SCC assesses the consumer perspective in any situation by analysing the position of consumers against a set of consumer principles.

These are:

ACCESS
Can consumers actually get the goods or services they need or want?

CHOICE
Can consumers affect the way the goods and services are provided through their own choice?

INFORMATION
Do consumers have the information they need, presented in the way they want, to make informed choices?

REDRESS
If something goes wrong, can it be put right?

SAFETY
Are standards as high as they can reasonably be?

FAIRNESS
Are consumers subject to arbitrary discrimination for reasons unconnected with their characteristics as consumers?

REPRESENTATION
If consumers cannot affect what is provided through their own choices, are there other effective means for their views to be represented?

Published by the Scottish Consumer Council
January 2002

We can often make our publications available in braille or large print, on audio tape or computer disk. Please contact us for details.
SELF-REGULATION

We have a particular interest in the principles of self-regulation, and our colleagues at the National Consumer Council have done a considerable amount of work on self-regulation from the consumer perspective.

We believe that self-regulation of trades and professions can have a number of strengths. In particular, it is important that the trade or professional body has a clear role in dealing with complaints. This helps it to be aware of the problems which exist in the sector, and to address these in order to improve services to customers.

However, self-regulation can equally have many weaknesses, which must be weighed up against its strengths. The most serious potential weakness from a consumer perspective is a lack of public confidence in the system. This may be due to real and/or perceived doubts about the ability of a professional or trade body to both represent the interest of their members and aspire to a public interest role. Doubts about impartiality are especially acute where the self-regulator is also responsible for enforcement.

We consider that the Law Society of Scotland is the appropriate body to deal with some aspects of regulation of the legal profession. These include regulating admission to the profession and setting and maintaining professional standards. We are concerned specifically with the other main aspect of self-regulation – the Society’s complaints handling function.

COMPLAINTS SYSTEMS

Any system of complaints handling must be founded on 2 key principles:

1. local resolution

Consumer complaints should be dealt with quickly and effectively, at a local level, by the business or professional involved, so far as possible. Many complaints can be resolved by way of an apology or informal agreement at this stage. Where local resolution fails, there should be a review of the local decision, by the trade or professional body.

2. consumer confidence
Consumers who use the complaints system must be confident that their complaint will be dealt with effectively, fairly and impartially by the complaints handling body.

We do not believe that the present system for handling complaints against solicitors in Scotland follows these basic principles. In 1999, we published the results of a study of the experiences of consumers who had complained to the Law Society of Scotland. The research suggested a number of problems with the present system.

**Local resolution:** the research suggested that procedures for complaints handling within some solicitors’ firms leave much to be desired. It was apparent from our findings that many problems which end up as complaints to the Law Society could well have been resolved at an earlier stage.

**Consumer confidence:** the research uncovered problems with various specific aspects of the procedure. More significantly, we found that there was widespread concern that the body that represents the interests of solicitors, the Law Society of Scotland, also has statutory responsibility for investigating complaints against its members. Half of all complainers in our survey said they considered that their complaint had not been handled fairly.

**OPTIONS FOR CHANGE**

Since we published our research, the Law Society has made a number of improvements to the system in line with our recommendations, which we have welcomed. However, despite these changes, the system remains fundamentally the same. We do not believe that consumers have confidence in the system as it stands. There is accordingly a need for change.

We consider that there are 2 possible options for change:

1. **maintaining the status quo, with further improvements to the system**

Further internal changes might include enhancing the role of lay people in the complaints process, and providing for delegation of decision making from the full Council to the client relations committees. These would be changes to the current procedure, rather than the powers of the complaints body.

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1 Complaints about Solicitors, Scottish Consumer Council, 1999
2. establishing an independent complaints body

This might be done in a number of different ways. Possible options are:

a) giving increased powers to the Scottish Legal Services Ombudsman to
   oversee the whole system and take independent action where necessary

b) creating a new independent board or other body to
   oversee the whole system and take independent action where necessary

There may be a number of possible models for such a new body. One example might be the Scottish Conveyancing and Executry Services Board, which regulates licensed conveyancers and executry practitioners. Another possible model might be along the lines of the Legal Services Complaints Council, for England and Wales proposed by the National Consumer Council in 1994. The proposed Council consisted of a majority of lay members appointed by the Lord Chancellor, together with independently appointed solicitor members, and chaired by a non-lawyer.

THE WAY FORWARD

The key consideration is that any system of regulation must be independent, whether it is a new body or not. We do not consider that option 1 would provide a sufficiently independent system. Such changes would not address the fundamental problem with the system, the conflict of interest between the Law Society’s representative and complaints-handling roles. It is this conflict which leads to the public perception that the system favours the solicitor. Changes to the present system will not inspire public confidence in it.

There is therefore a need for an independent complaints body. The question then remains as to what form such a body might take. We can see strengths and weaknesses in both of the possible options outlined above.

A completely new independent body would have the advantage of providing a fresh start. This would dispel the public perception inherent in the present system that the system is there for solicitors rather than consumers. However, this would take longer to put in place than an enhanced ombudsman’s office.
One advantage of increasing the powers of the ombudsman would be that it could be set up more quickly. While the ombudsman is independent, she does not currently command full consumer confidence as a result of her limited powers. Both our own research and research carried out for the Scottish Executive suggest that many complainers feel the ombudsman does not have sufficient ‘teeth’, and should be given increased powers.

However, the ombudsman is part of the present system, and retaining that office may not alter public perception that the system is against them. A change of name might go some way towards increasing public confidence.

HOW A NEW SYSTEM MIGHT WORK

Whatever form the overseeing body takes, there should be three stages to the complaints process, following the outline recommended by Service First, the successor to the Citizen’s Charter Unit.

We believe that the process set out below achieves the necessary balance between ensuring consumer confidence in the system, and ensuring that the professional body has responsibility for maintaining standards and improving services within the profession.

1. Local resolution by the solicitors’ firm involved

At the first stage, there should be an attempt to resolve the matter informally, perhaps by way of an apology, before it becomes a formal complaint. Our research showed that many solicitors did not deal effectively with complaints at the outset. Four in ten respondents who approached their solicitor first with their complaint said they either refused to investigate the matter, or completely ignored the complaint.

Solicitors’ firms should be required by a practice rule to put effective complaints procedures in place, including designating a specific person to deal with complaints. This should ensure that many more potential

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2 Complaints about Solicitors, Scottish Consumer Council, 1999
3 Survey of Complainers to the Scottish Legal Services Ombudsman; Scottish Executive Central Research Unit, 2000
complaints are resolved at an early stage, before the matter escalates further.

These local resolution procedures should be conducted under the close supervision and scrutiny of the Law Society of Scotland, which would have responsibility to enforce and monitor compliance with the complaints rules.

2. review

Where a complaint cannot be resolved by local resolution, the complainer would be entitled to go direct to the independent body, or alternatively to the Law Society. Where the complaint went straight to the independent body, that body would have the power to refer the complaint back to the Law Society for review.

It would be the Law Society’s responsibility to review the firm’s handling of the complaint, and refer the case back to the firm to be reviewed if necessary. This would ensure that all complaints are investigated, which is not the case at present. In her evidence to the committee, the Scottish Legal Services Ombudsman stated that in about 10 per cent of the cases that come to her, the Law Society had refused to investigate the complaint.

3. independent review by the independent complaints body

If the complaint cannot be resolved by formal resolution, or the complainer is unhappy with the outcome, the complaint should then be referred to the independent body.

The powers of the independent body should include the following:-

- to investigate the complaint itself, where appropriate
- to review the firm’s or the Law Society’s handling of the complaint, to overturn its decision, and/or refer it back to be re-investigated where appropriate.
- to oblige the firm and/or the Law Society to review the complaint
- to carry out random checks of the Law Society’s complaints handling procedures
- to look at complaints decisions, whether or not the body has been asked to do so by a complainer
• to provide guidance to the Law Society on good complaints handling

• to keep the Law Society’s complaints procedure under review

• to compel the Law Society to issue practice rules on matters relating to complaints

• to monitor operation of the master policy and the guarantee fund

We believe that the way forward must be a system of co-regulation, perhaps along the lines of the system which operates in New South Wales. Under the proposed system, partnership working between the Law Society and the independent body would be vital.
Dear [Name],

I read with great interest your Committee's report on its recent inquiry into the operation of the legal aid system in Scotland. I would like to thank the members of the Committee for their contribution to discussion on a complex and important area of policy.

The Committee's report covers a wide range of issues, some of them technical and specific, and others much broader. The recommendations the Committee addresses to the Scottish Executive, the Scottish Legal Aid Board, and the Law Society of Scotland are similarly wide in scope. Many of them call for a considerable amount of further research or technical work. My officials have been considering, together with the Board, how to take forward such work.

In these circumstances, I hope you will understand that I do not propose at this stage to go into detail in responding to the Committee's report. Nor do I intend here to address each of the specific recommendations in turn. I understand that it is proposed that we should have an opportunity to discuss the report in detail in Parliament. In the meantime, I propose to respond to the report in fairly broad terms.

In the perspective of the Executive, the Committee's recommendations fall into four broad categories. Firstly, some recommendations address issues where action has, in fact, already been taken:

- Following a review by the Board, we have agreed changes to the urgency provisions to make it easier to get emergency help;
- We have announced a further extension of the contribution period for civil legal aid;
- In addition to providing legal aid for proceedings before employment tribunals, we have announced our intention to extend legal aid to proceedings before the Social Security Commissioners, the Child Support Commissioners and the VAT tribunal; and we have restated our commitment to consider the position for other bodies on a case-by-case basis;
- We have sent the Committee the report by the Scottish Legal Aid Board on its research into the reduction in applications for civil legal aid;
- We have also sent you the report by the working group on a Community Legal Service.
A second group of recommendations concern issues on which work is already in hand. In this category, I would draw attention to the following:

- My officials and the Board are considering the interaction of the benefits system and the legal aid system, bearing in mind the forthcoming benefit changes announced by the UK Government;
- My officials and the Board will also be reviewing eligibility for legal aid, in relation to both capital and income;
- We understand that the Law Society is finalising proposals for an increase in fees for civil legal aid work, linked to the introduction of a quality assurance mechanism and to other improvements in the operation of the civil legal aid regime. We hope to receive them before long, and will consider them carefully but promptly when we do. We attach particular importance to the issue of developing appropriate and rigorous quality assurance mechanisms;
- We also understand that the Faculty of Advocates has been working on the possible development of a system of graduated fees, and look forward to seeing its proposals in this respect;
- We plan to commission independent research into the impact of the fixed fee regime for summary criminal legal aid in the course of the coming year.

I will report back to the Committee on all of these issues in due course.

A third group of recommendations are broader and more far-reaching in nature, and will require very careful consideration before policy conclusions can be reached – notably, but not solely, in the context of developing a Community Legal Service for Scotland. This is the case in relation to:

- The suggestion to extend legal aid to cover representative bodies;
- The general wish expressed in the report to simplify the legal aid system (as opposed to consolidating recent changes, which is a different and essentially technical issue);
- The proposal to give wider powers to the Scottish Legal Aid Board to take strategic decisions on the provision of legal services;
- The question of whether to launch a broad review of the civil justice system in Scotland.

I should note in passing that some of the changes which the Committee would appear to envisage would require substantial amendments to primary legislation. As you will appreciate, the Executive will have to bear that fact in mind in deciding whether and how to proceed in the short term.

Finally, I think it only fair to say that there are one or two points on which we do not agree with the views expressed in the Committee's report:

- We do not think that the way to address any perceived difficulties in the operation of the small claims procedure is by making legal aid available;
- We do not see any persuasive evidence of anomalies or incoherences in the merits tests;
- We are not persuaded that there is a case for making legal aid available for the very limited number of excepted proceedings.

As I have indicated, my officials are working with the Board on a number of the issues raised in the report. One essential component of that work will be costing possible changes to the system. I expect this to be a resource-intensive exercise, which will take some time to complete. I will of course report to the Committee on financial aspects together with the relevant policy conclusions – and, where appropriate, any relevant proposals for reform. However, it is not possible at this stage to
produce any reliable cost estimates on the basis of the broad recommendations in the Committee’s report.

I should also underline the fact that there are a range of competing demands for the resources available in the Legal Aid Fund – as the Committee’s report itself illustrates. There are also a number of existing pressures on current levels of provision: although, as you are aware, the Legal Aid Fund is not cash-limited. I will have to take careful account of the financial impact of any changes to the legal aid system, as well as their impact on improving access to justice for those who need it, in deciding how to proceed. In that context, it would be most helpful to have an idea of the Committee’s key priorities for change among its numerous recommendations. I shall look forward to discussing this and other issues with the Committee in due course.

Yours sincerely,

Jim

JIM WALLACE