The Committee will meet at 1.30pm in Committee Room 4.

1. **Items in private:** The Committee will consider whether to discuss agenda items 2 and 8 in private. The Committee will also consider whether to discuss its draft report for the Mental Health (Scotland) Bill in private at future meetings.

2. **Mental Health (Scotland) Bill:** The Committee will discuss lines of questioning for the witnesses.

3. **Convener’s report:** The Committee will consider the Convener’s report.

4. **Mental Health (Scotland) Bill:** The Committee will take evidence on the general principles of the Bill at Stage 1 from—

   Alastair Brown, Senior Procurator Fiscal Depute, the Crown Office and Procurator Fiscal Service, and

   Pat Christie, Chairperson, Nicola Smith, Solicitor, Assistant Legal Adviser and Norman Dunning, Chief Executive, Enable.
5. **Petitions:** The Committee will consider the following petitions on dangerous driving—

- **PE29** by Alex and Margaret Dekker,
- **PE55, PE299** and **PE331** by Ms Tricia Donegan and
- **PE111** by Mr Frank Harvey.

6. **Title Conditions (Scotland) Bill (in private):** The Committee will consider its draft report on the general principles of the Bill at Stage 1.

7. **Regulation of the legal profession inquiry (in private):** The Committee will consider its draft report.

8. **Witness expenses:** The Committee will consider whether to approve travelling expenses for witnesses.

Alison Taylor
Clerk to the Committee, Tel 85195

The following papers are attached for this meeting:

**Agenda items 2 and 4**
Note by the Clerk (private paper) J1/02/37/1
Submission for the Mental Health (Scotland) Bill from: Scottish Association for Mental Health (SAMH) (TO FOLLOW) J1/02/37/2
Claire Connelly (‘Mentally Disordered Offenders and the Use of Hospital Directions and Interim Hospital Orders’, Crime and Criminal Justice Research Findings No. 56, Scottish Executive Central Research Unit) Enable J1/02/37/3

**Agenda item 5**
Note by the Clerk (petitions attached) J1/02/37/4

**Agenda item 6**
Note by the Clerk (private paper) J1/02/37/5
Report from the Subordinate Legislation Committee J1/02/37/6
Supplementary submissions on the general principles of the Title Conditions (Scotland) Bill at Stage 1 from:
Bruce Merchant J1/02/37/7
Scottish Land Federation J1/02/37/8
Ronald R Smith J1/02/37/9
Correspondence from the Minister for Justice regarding the Title Conditions (Scotland) Bill and the Abolition of Feudal J1/02/37/10
Tenure Etc. (Scotland) Act 2000

Agenda item 7
Note by the Clerk (private paper) (TO FOLLOW) J1/02/37/11

Agenda item 8
Note by the Clerk (private paper) J1/02/37/12
Note by the Clerk (private paper) J1/02/37/13

Papers not circulated:

Agenda items 2 and 4
The Mental Health (Scotland) Bill (and Explanatory Notes and Policy Memorandum for the Bill) are available from Document Supply or on the Scottish Parliament website at: http://www.scottish.parliament.uk/parl_bus/legis.html

Agenda item 6
The Title Conditions (Scotland) Bill (and Explanatory Notes and Policy Memorandum for the Bill) are available from Document Supply or on the Scottish Parliament website at: http://www.scottish.parliament.uk/parl_bus/legis.html#54

Papers for information circulated for the 37th meeting, 2002

Correspondence to the Justice Committees from the Minister for Justice regarding follow-up questions from the joint Justice Committees meeting on 17 September 2002 J1/02/37/14
Correspondence from Alec Spencer, Director of Rehabilitation and Care Directorate, Scottish Prison Service regarding sex offenders at HM Prison Cornton Vale J1/02/37/15
General Comment

The Scottish Association for Mental Health (SAMH) welcomes the opportunity to submit our comments to the Justice 1 Committee on Parts 8 – 12 and Part 17 of the Bill. SAMH has already submitted evidence, both oral and written, to the Health and Community Care Committee on other parts of the Bill. We should make it clear that whilst our remit encompasses all people with mental health and related problems, we have no special expertise in relation to users of forensic mental health services.

We appreciate that the nature of legislation, particularly when dealing with an area as complex as mental health, means that it is unlikely to be expressed wholly in plain English. However, as we have already indicated to the Health and Community Care Committee, we believe that the Bill could (and should) have been drafted to make it more accessible. We are concerned that there appears to be an overuse of subparagraphs and cross-references. The complexity of the Bill, and its tight procedural time-scale, may well have the effect of excluding groups and individuals who would otherwise have wished to input into the Parliamentary process.

Subject to our comments below, we are broadly satisfied with parts 8 – 12 and part 17 of the Bill.

Part 1 - Principles

SAMH believes that it is unclear whether it is intended that forensic patients should be covered by the principles contained in part 1 of the Bill. The Scottish Executive’s policy statement, *Renewing Mental Health Law*, seemed to imply that the statement of principles proposed by the Millan Committee would apply to mentally disordered offenders, albeit in a modified form.

We are extremely disappointed that the statement of principles proposed by the Millan Committee has not been incorporated in any recognisable form in the Bill. The importance of having a sound and comprehensive set of guiding principles cannot be overstated. Millan’s principles would give this legislation an ethical underpinning, which would help to ensure that the rights of those who will be made subject to compulsory measures, are properly respected. We believe that the Bill should be amended to include all ten of Millan’s principles. So far as it is possible, these principles should apply to forensic patients.
Part 8, Chapter 2 – Compulsion orders

We note that a compulsion order may be based in hospital or in the community, as with a compulsory treatment order under part 7 of the Bill. SAMH has submitted evidence to the Health and Community Care Committee outlining our opposition to the introduction of community based compulsory treatment orders. Our views are shared by 62 organisations in Scotland which have signed up to a campaign on the Bill led by SAMH. In short, we believe that:

- there is a serious lack of research evidence to support the introduction of community orders;
- the research evidence that exists does not show that community orders provide any better outcomes than well-resourced community services;
- community orders will lead to an increase in compulsion;
- they will be unworkable in practice; and
- the lack of services in the community means that they would be more aptly described as 'community medication orders'.

We appreciate that there may be different considerations in a forensic context. We do not have sufficient expertise in this area to give an informed view as to potential benefits, or risks, of the use of community based compulsion specifically for offenders with mental disorder. We are concerned, however, that it is important to maintain a clear distinction between punishment and treatment and we are unsure whether this is achieved in the Bill.

SAMH is uncertain as to what will be the practical differences between community based compulsion orders, and probation with a requirement of treatment for mental disorder.

Part 8, Chapter 3 – Mentally disordered prisoners

SAMH believes that it is essential that prisoners who require treatment for mental disorder are transferred to hospital as soon as possible. We are concerned about the increasing rate of suicide in prisons.

We believe that s96(6)(d) is rather vague. It enables the Scottish Ministers to prescribe in regulations “any other requirement which may be placed on the prisoner” who is subject to a transfer for treatment direction. SAMH has expressed concern to the Health and Community Care Committee about the extent to which the Bill enables further details to be specified in regulations, the majority of which will be negative instruments.

Part 10 – Patients subject to compulsion orders and restriction orders

SAMH is disappointed that the Bill retains the effect of s1 of the Mental Health (Public Safety and Appeals) (Scotland) Act 1999: that a restricted patient may not be discharged, if the effect of his mental disorder is that it is necessary that he continue to be detained in hospital to protect the public, even if he is not benefiting from treatment. Despite the decision of the Privy Council, we believe that it is wrong in principle that a person be detained in hospital for the purpose of containment, rather than treatment.

We welcome the new right for restricted patients, or their named persons, to apply to the Tribunal to have the restriction order revoked.
Appeals against levels of security

SAMH is concerned that the Bill does not contain a right for patients held in high or medium secure hospital units, to apply to the Tribunal to be transferred to conditions of lower security, as recommended by the Millan Committee. We believe that it is wholly unacceptable that patients, particularly those ‘entrapped’ at the state hospital, are facing unduly severe restrictions on their liberty and freedom because of a failure by the state to provide appropriate facilities.

We note from the Policy Memorandum that the Executive is currently giving consideration to “what further steps might be taken to improve the position” following the recent consultation on the governance of the State Hospital in *The Right Place, the Right Time*. In our response to that paper, SAMH welcomed the recognition that there is a real need for robust measures to facilitate the implementation of the national policy for mentally disordered offenders. However, we also said that we did not believe that the measures proposed in that paper alone would be sufficient to resolve the issue. We firmly believe that Millan’s recommendation should be implemented in the Bill.

Part 17 – Sexual offences

We welcome the new offences in the part of the Bill. Whilst we appreciate that the *Watt* case provided an important clarification of the law, we believe that specific statutory offences should be retained as an additional protection for mentally disordered persons.

Financial Memorandum

We note that the Financial Memorandum does not appear to given any specific consideration to the forensic elements of the Bill. We are unaware of any reason as to why this has not been addressed.
Justice 1 Committee

Dangerous Driving and the Law

Petitions PE29 by Alex and Margaret Dekker, PE55, PE299 and PE331 by Ms Tricia Donegan and PE111 by Mr Frank Harvey

Note by the Clerk

Background

1. The Committee (and the former Justice and Home Affairs Committee) has previously considered these five petitions about road traffic offences resulting in a fatality (see Committee paper J1/02/28/8 attached for full history of previous considerations). The Committee last considered these petitions at its meeting on 3 September 2002 when it agreed to write to the Minister for Justice seeking additional information on the official steering group on the Department of Transport, Local Government and the Regions (DTLR) report on dangerous driving and law. A response has now been received from the Minister (attached). The Committee has also received correspondence from one of the petitioners, Margaret Dekker of Scotland’s Campaign against Irresponsible Drivers (SCID) (also attached).

2. Three of the petitions are concerned about drivers being charged with the seemingly lesser offence of careless driving rather than causing death by dangerous driving.

   PE29 – Alex and Margaret Dekker calling for action to be taken in relation to the Crown Office’s decisions and considerations in prosecuting road traffic deaths;

   PE55 - Tricia Donegan calling for the Scottish Parliament to conduct an investigation to establish why the full powers of the law are not enforced in all cases which involve death by dangerous driving;

   PE 331 – Tricia Donegan calling for the Scottish Parliament to investigate why drivers who have made deliberate decisions when driving which cause risk to the lives of others are classed as careless drivers when prosecuted, even in the event of a fatality.

3. Another of the petitions concerns a case where a driver had knowingly broken the law by driving without insurance, a current MOT and whilst holding only a provisional licence, and had caused the death of another driver:

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1 Dangerous Driving and the Law: Report by the Department of Transport, Local Government and the Regions (DTLR) was published in January 2002. The Justice 1 Committee considered the recommendations in the report at its meeting on 16 April 2002.
PE 299 – Tricia Donegan calling for the Scottish Parliament to investigate whether the additional driving offences of failure to possess the correct licence, MOT or insurance documentation should be taken into consideration at court hearings concerning a fatality caused by dangerous driving.

4. The fifth petition concerns road accidents which may be caused by the police while responding to emergency calls:

PE 111 - Mr Frank Harvey calling for the Scottish Parliament to order a public inquiry into road accidents involving police responding to 999 calls.

Correspondence received by the Committee

Steering group on the DTLR report

5. In his response to the Committee, the Minister for Justice states that the steering group comprises representatives from the Home Office, Department for Transport, Lord Chancellor’s Department, Crown Prosecution Service and the Scottish Executive’s Justice Department and Crown Office as well as the author of the DTLR report. He also states that the group met five times when research was in progress and once since the publication of the report in January 2002. The Minister does not give specific timescales for the steering group’s future and past work or meetings or how often various representatives of the group, e.g. the Crown Office, attended the meetings or who precisely the representatives were and their qualifications for this work. However, he does mention that after the next meeting of the group, he expects to receive a report of the progress made in considering the report’s recommendations, the further work in hand and a timetable for this work which he undertakes to keep the Committee informed of.

6. In their response to the Committee, SCID express enthusiasm for the Committee to hold this group to account and state that they have had great difficulty in obtaining any information about the steering group, e.g. timescales, and also who and which department represented the Scottish Executive at the group’s meetings.

Collection of data

7. SCID also welcome the Lord Advocate’s recent instigation of changes for collection of data regarding fatal road traffic accidents and ask the Committee to inquire when this data will be publicly available. SCID highlight that there is no practical method of collecting similar data for serious injuries caused by careless driving thus knowing how many incidents like this there are. They suggest that ‘the Integration of Scottish Criminal Justice Information Systems (ISCJIS)’ be

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2 In his response to the Committee for its previous consideration of the petitions on 3 September (see attached Committee paper J1/02/28/8), the Lord Advocate explained that changes have been made to the computer system which will enable all fatal road traffic cases to be identified but “at present there is no straightforward technical solution to keep track of careless driving prosecutions where there has been a serious injury”.

3 As its name suggests, the Integration of Scottish Criminal Justice Information Systems project (ISCJIS) aims to integrate the IT systems of Scottish criminal justice organisations and to improve efficiency and effectiveness by allowing the transfer of specific data from system to system.
modified to enable the collection of serious injury data’. They also propose that the existing classification for serious assault as used by the Scottish Executive Justice Department in the publication ‘Statistical Bulletin CrJ/2002/1 Recorded Crime in Scotland, 2001’ could be used to identify serious injury cases. The classification is ‘an assault is classified as serious if the victim sustained an injury resulting in detention in hospital as an in-patient or any of the following injuries whether or not he was detained in hospital: fractures, concussion, internal injuries, crushing, severe cuts or lacerations or severe general shock requiring medical treatment’.

Other SCID proposals

8. SCID also argue that there is not consistency in sentencing offences of causing death by dangerous driving and propose that all such offences be heard in the High Court as they believe that the public expect this of the justice system. SCID also propose various other measures regarding dangerous driving offences including an investigation of the application of road traffic law specifically in Scotland via an inquiry or a commissioner. They call for the implementation of all the 80 recommendations in the Crown Office and Procurator Fiscal Service’s ‘Review of the Investigation of Road Deaths in Scotland’ of which only 58 recommendations were published. The Solicitor General has stated that there were no plans to publish a progress report at that stage and that the unpublished recommendations were of an internal administrative nature only.

Parliamentary debate on dangerous driving

9. Members may recall that the topic of death by dangerous driving was debated recently in plenary debate on 12 September 2002 for motion S1M-32104, in the name of Cathie Craigie. The Minister states in his reply that the Solicitor General said in this debate that the Crown Office was providing prosecutors with detailed and extensive training on homicide, road traffic deaths and specifically on section 1 offences in 2002. The Minister also noted that the Solicitor General mentioned that detailed guidelines have been implemented for the police, ensuring that there is a consistent and thorough approach to the investigations of road traffic deaths.

Procedure

10. The Standing Orders make clear that, where the Public Petitions Committee refers a petition to another committee, it is for that committee then to take “such action as they consider appropriate” (Rule 15.6.2(a)).
Options

11. Having received responses from the Minister and SCID, the Committee may wish to pursue one or more of the following options:

- to defer considerations of the petitions until the Minister for Justice has provided more comprehensive timescales and further details for the steering group on the DTLR report (which he has indicated that he will provide after the next meeting of the steering group);

- write to Lord Advocate regarding the collection of data regarding fatal road traffic accidents and ask him when this data will be publicly available;

- write to the Minister for Justice to ask whether SCID’s request that the Integration of Scottish Criminal Justice Information Systems (ISCJIS) be modified to enable the collection of data on serious injury by dangerous driving could be implemented and

- write to the Crown Office to ask for timescales for publishing a progress report on implementing the recommendations outlined in its Review of the Investigation of Road Deaths in Scotland.

12. Alternatively, the Committee could decide copy the responses from the Minister and SCID to the petitioners and to end its consideration of these petitions at this stage.
Thank you for your letter of 6 September following your Committee's further consideration of a number of petitions on dangerous driving. I have written to you on this subject before - most recently on 19 June. I know that you and other members of the Committee participated in Cathie Craigie's recent members' debate on dangerous driving and you raised the subject when I spoke to the Justice Committees on 17 September.

Most road traffic legislation is reserved. It is therefore the Home Office and the Department for Transport who are taking the lead in responding to the recommendations contained in the TRL research report although the Justice Department is working closely with them to ensure that any particular Scottish issues are addressed. The steering group which you mention in your letter provides a focus for the Executive's involvement in this area although work continues outside of formal meetings. The steering group met five times during the research project and has met once since the report was published. I understand that the Home Office and Department for Transport intend to convene another formal meeting of the group before the end of the year.

The Steering Group comprises representatives from the Home Office, Department for Transport, Lord Chancellor's Department, Crown Prosecution Service and the Scottish Executive's Justice Department and Crown Office. The author of the TRL Report is also a member of the Group.

The TRL research developed a series of recommendations with a view across to related areas of work, including the review of road traffic penalties and the Home Office review of offences against the person. Following the next meeting of the steering group, I expect to receive, along with Westminster Ministers, a report of the progress made in considering the TRL recommendations, the
further work in hand and a timetable for this work. I will of course keep your Committee informed of developments.

I appreciate the Justice Committee’s concerns as expressed both in your letter and in Parliament and we will ensure that they are taken into consideration. In the meantime, as the Solicitor General said in Parliament last month, the Crown Office will provide extensive training this year for its prosecutors on homicide, road traffic deaths, and specifically on ‘causing death by dangerous driving’ offences. The Crown Office has also issued detailed guidance for the police to ensure that there is a consistent and thorough approach to the investigation of road traffic deaths. In addition the Lord Advocate is considering further action to enhance Crown Office performance in this area.

Yours sincerely,

JIM WALLACE
JUSTICE 1 COMMITTEE
DANGEROUS DRIVING AND THE LAW

Petitions

Note by the Clerk

Background

1. The Committee (and the former Justice and Home Affairs Committee) has considered 5 petitions about road traffic offences resulting in a fatality. In its initial consideration of these petitions, the Committee agreed to defer consideration of these petitions until the publication by the Department of Transport, Local Government and the Regions of a report into the application of road traffic legislation by the police, prosecutors and courts.

2. Three of the petitions were concerned about drivers being charged with the seemingly lesser offence of careless driving rather than causing death by dangerous driving. The former Justice and Home Affairs Committee considered PE29 and PE55 on 2 May 2000. Justice 1 Committee considered PE331 on 27 February 2001:

   PE29 – Alex and Margaret Dekker calling for action to be taken in relation to the Crown Office’s decisions and considerations in prosecuting road traffic deaths;

   PE55 - Tricia Donegan calling for the Scottish Parliament to conduct an investigation to establish why the full powers of the law are not enforced in all cases which involve death by dangerous driving;

   PE 331 – Tricia Donegan calling for the Scottish Parliament to investigate why drivers who have made deliberate decisions when driving which cause risk to the lives of others are classed as careless drivers when prosecuted, even in the event of a fatality.

3. The Committee considered another petition on 27 February 2001 concerning a case where a driver had knowingly broken the law by driving without insurance, a current MOT and whilst holding only a provisional licence, and had caused the death of another driver:

   PE 299 – Tricia Donegan calling for the Scottish Parliament to investigate whether the additional driving offences of failure to possess the correct licence, MOT or insurance documentation should be taken into consideration at court hearings concerning a fatality caused by dangerous driving.
4. On 7 June 2000, the former Justice and Home Affairs Committee considered a petition that concerned road accidents which may be caused by the police while responding to emergency calls:

PE 111 - Mr Frank Harvey calling for the Scottish Parliament to order a public inquiry into road accidents involving police responding to 999 calls.

Dangerous Driving and the Law: Report by the Department of Transport, Local Government and the Regions (DTLR)

5. Dangerous Driving and the Law: Report by the Department of Transport, Local Government and the Regions (DTLR) was published in January 2002. The Justice 1 Committee considered the recommendations in the report at its meeting on 16 April 2002. At that meeting, the Committee agreed to write to the Minister for Justice regarding the following:

- seeking confirmation as to whether the Minister had discussed the recommendations contained within the report with colleagues at Westminster and if so, the outcome of these discussions;

- expressing the Committee’s support for the recommendation that a consultation exercise be undertaken to assess how the introduction of an intermediate offence, to sit between the current offences of dangerous driving and careless driving, would be received by agencies responsible for implementing road traffic legislation and other concerned groups;

- stating that the Committee supports the recommendation that the current offence of causing death by dangerous driving should be extended to include severe injuries and asking that the Minister make representations to the UK Government that this recommendation be implemented;

- seeking to establish whether the Minister is content that the situation in Scotland has been adequately investigated or whether there is a need for specific research to be carried out in Scotland, and

- expressing its support for there to be a requirement for convictions for bad driving offences to be kept by the DVLA to assist in monitoring re-offending.

6. In his response (attached), the Minister noted the points raised by the Committee and explained that the policy and legal implications of the recommendations in the DTLR report are being considered by an official steering group (comprising representatives of relevant Government and Executive Departments), which will provide advice to Ministers ahead of a wider consideration of the report by other Government departments and the Judiciary. The Minister has passed on the views of the Committee to the steering group.

7. In relation to the need for specific research to be carried out in Scotland, the Minister wrote that “while experience in Scotland was an important part of the study, and of particular interest to us, it was never the intention to give it specific prominence in the context of this research”.
8. The Committee also agreed to write to the Lord Advocate outlining the following:

- the Committee's support for the suggestion that all causing death by dangerous driving cases should be tried in the High Court (given that the majority of driving offences, including that of causing death by dangerous driving, are currently dealt with in the sheriff court);

- the Committee's view that statistical information should be kept on the outcome of cases involving fatalities and serious injuries where these do not form part of the charge.

9. In his response (attached), the Lord Advocate explained that where a case is being considered in the sheriff court, the sheriff has power to remit a case to the High Court for sentence if he considers that his powers are inadequate. The Lord Advocate considers that the current prosecution policy allows for a flexible approach to the selection of the appropriate forum for proceedings.

10. The Lord Advocate also explained that changes have been made to the computer system which will enable all fatal road traffic cases to be identified but "at present there is no straightforward technical solution to keep track of careless driving prosecutions where there has been a serious injury".

Options

11. Having received responses from the Minister and the Lord Advocate, the Committee may wish to pursue one of the following options:

- write back to the Minister or Lord Advocate seeking additional information (such as timescales for the work of the steering group on the DTLR report);

- wait for an announcement on the outcomes of the steering group on the DTLR report and consider the petitions again at that stage;

- alternatively, the Committee could decide copy the responses from the Minister and the Lord Advocate to the petitioners and to end its consideration of these petitions at this stage.
Dear Coalition,

Thank you for your letter of 15 May about a number of issues arising from the Transport Research Laboratory (TRL) Report on Dangerous Driving and the Law and your Committee's consideration of several related petitions. You ask for my views on these issues prior to any further consideration by the Committee of the law in this area.

The policy and legal implications of the recommendations of the TRL report are being considered by an official Steering Group, comprising representatives of relevant Government and Executive Departments. The Scottish Executive Justice Department is included in this Group. The Group will provide advice to Ministers ahead of a wider consideration of the report by other Government Departments and the Judiciary. I will discuss the outcome of this consideration with Westminster colleagues prior to any decisions being taken on legislative change.

I note that the Committee:

(i) supports the recommendation to undertake a consultation exercise to assess how the introduction of an intermediate offence, to sit between the current offences of dangerous driving and careless driving would be received by the agencies responsible for implementing road traffic legislation and other concerned groups;

(ii) is attracted to the recommendations that the current offence of causing death by dangerous driving should be extended to include severe injuries;

(iii) is persuaded by the recommendation that there should be a requirement for convictions for dangerous driving offences to be kept by the DVLA to assist in monitoring re-offending.
I am grateful to you for passing on these initial views from the Committee on the TRL Report and look forward to receiving your substantive views in due course. In the meantime I have asked officials here to ensure that the views of the Committee are passed on to the Steering Group. I will, of course, pay particular attention to your views when Ministers come to consider the report and changes to road traffic law and its administration.

The TRL research was commissioned as a Great Britain wide project examining the use and application of the law on dangerous and careless driving throughout England, Scotland and Wales. While experience in Scotland was an important part of the study, and of particular interest to us, it was never the intention to give it specific prominence in the context of this research. The research project has been useful in developing a series of recommendations for consideration by Government and others. While I know that the Scottish Campaign against Irresponsible Driving (SCID) has some concerns about the level of Scottish participation in the TRL research project, I am not convinced that separate research in Scotland is necessary or appropriate at this stage. I believe that it would be more productive for the Scottish Executive to ensure that we are fully involved in the consideration of the TRL report and the subsequent follow up work. Any specific Scottish issues will be taken into account as an integral part of this work and will help to inform the development of Government legislative proposals.

Yours sincerely,

[Signature]

JIM WALLACE
Dear Christine,

Thank you for your letter of 15 May 2002.

I am aware of the view of the Scottish Campaign against Irresponsible Driving that all prosecutions for causing death by dangerous driving should take place in the High Court. Such cases are thoroughly investigated by the procurator fiscal before being reported to Crown Counsel for instructions. They are considered carefully by Crown Counsel who will decide whether proceedings should take place before a sheriff and jury or in the High Court, having regard to the particular circumstances of the case under consideration. Although the maximum sentence available to a sheriff for such an offence is 3 years, the sheriff has power to remit a case to the High Court for sentence if he considers that his powers are inadequate. This happened recently in the case of Robert Sharp which was remitted from the Sheriff Court in Hamilton to the High Court and where a sentence of 7 years detention was imposed.

I consider that the current prosecution policy allows for a flexible approach to the selection of the appropriate forum for proceedings and is consistent with the legislative intent of the Road Traffic Act 1988.

We have made changes to our computer system which will enable all fatal road traffic cases to be identified. This includes cases involving causing death by dangerous driving, causing death by careless driving when under the influence of drink or drugs, and prosecutions for careless driving/
driving where there has been a fatality. At present there is no straightforward technical solution to keep track of careless driving prosecutions where there has been a serious injury.

I hope these comments are of assistance.

\[Signature\]

COLIN D BOYD

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The Scottish Executive
Scotland’s Campaign against Irresponsible Drivers

Christine Grahame MSP
Convener
Justice 1 Committee
Committee Chambers
EDINBURGH
EH99 1SP

27th September 2002

Dear Mrs Grahame,

PE29, PE55, PE281, PE299 and PE331 – Road Deaths

SCID wishes to thank Justice 1 Committee for the support given on Criminal Justice matters arising from innocent victims’ road deaths. We welcome the Committee’s strength of feeling to expedite the issues by holding the Executive to account before the end of this session of Parliament. Additionally we would like to thank sincerely those committee members who took the time to add their very valuable support to Cathie Craigie’s motion #3210 on Dangerous Driving and the Law.

Following the recent replies given to Justice 1 Committee by the Minister for Justice and the Lord Advocate on issues arising from the Transport Research Laboratory (TRL) report and the response given by the Solicitor General to the debate on motion #3210; several points arise which SCID must make comment on;

1. Scottish Executive representation on official steering group.
SCID welcomes Justice 1 Committee recommendation to hold the official Steering Group to account. Since the inception of the TRL study in May 1998 SCID has campaigned on a number of matters, not least Scottish participation in the study. SCID cannot accept what the Justice Minister has stated on a number of occasions that; “While experience in Scotland was an important part of the study, and of particular interest to us, it was never the intention to give it specific prominence in the context of this research.” Clearly this was not the remit or the view held by the TRL research team.

SCID has tried unsuccessfully on numerous occasions to obtain information on dates, who and which department/s represented the Scottish Executive at the meetings of the Steering Group. The only information we were able to access, and we are grateful to the persistence of John McAllion MSP for it, were the dates of the Steering group meetings, viz; 9th September 1999, December 1999, April 2000 and November 2000.
It is our hope that by use of the Committee’s influence, the forthcoming official Steering Group meeting referred to in the Minister of Justice’s letter of 19th June to the Committee, will have a degree of transparency in terms of participation and substance.

2. **Collection of Data**

SCID welcomes the Lord Advocate’s statement on the collection of data of all careless driving offences where there has been a fatality. We look forward to the publication of this data which will, for the first time, give information to Parliament on the magnitude of this crime. Is the Committee in a position to ask when these statistics will be available to Parliament?

The collection of data on driving offences which result in serious injuries are also vital to provide Parliament and the wider community with the information which is necessary to stimulate research, inform debate and assist in decision and policy making strategies. Following representation made on SCID’s behalf by Mr Gorrie MSP, the Solicitor General has put forward the view that as there is no separate category of offence of causing serious injury by careless or dangerous driving there are practical barriers to identifying and collecting this information.

SCID would put forward the suggestion that as for fatal road crashes caused by careless drivers, the Integration of Scottish Criminal Justice Information Systems (ISCJIS) be modified to enable the collection of serious injury data. In identifying serious injury cases SCID would suggest the application of the classification of crimes and offences already in use by the statistical division for the collection of this statistical information. The crime category ‘Violence’ already encompasses the causing death offences i.e. Section 1 and Section 3a of the Road Traffic Act and defines: “an assault is classified as serious if the victim sustained an injury resulting in detention in hospital as an in-patient or any of the following injuries whether or not he was detained in hospital: fractures, concussion, internal injuries, crushing, severe cuts or lacerations or severe general shock requiring medical treatment.” It is SCID’s view and we believe a shared view with the Committee that the consequences of any crime of “assault” whatever the intention or the weapon should be regarded as equal and as such statistics should be available to Parliament.

3. **High Court v Sheriff Court**

The Lord Advocate states that current prosecution policy allows a “flexible” approach to the selection of forum for proceedings for offences of causing death by dangerous driving. From the sentence available to the court and the gravity of the offence – statutory homicide, the public expectation of the justice system is that this crime would always be heard in the High Court.

The Lord Advocate cites the recent case against Robert Sharp which was remitted from the Sheriff Court in Hamilton, to the High Court in Edinburgh, as an illustration of Crown Office and sheriffs ‘getting it right.’ The Solicitor General in her reply to motion #3210 also cited this case. From the latest reported figures and confirmed by the TRL study, the last occasion when a Causing death by dangerous driving offence was remitted to the High Court, was in 1999.
However, the case against Robert Sharp illustrates the long-standing disquiet about the treatment of like cases.

Compare the case against Robert Sharp with the like case against Douglas Ramsey also heard in Hamilton Sheriff Court in May 2000.

PF v Robert Sharp
Robert Sharp, a 18 year old postman, denied the charge of speeding, playing "chicken" with another driver and causing the death of a 15 year old girl by dangerous driving. Two girls aged 12 and 13 were also seriously injured in the crash. All three girls were waiting for a school bus. The defence agent, Mr Coll QC rightly pointed out to the jury that there is no charge of causing injury by dangerous driving and that for the purposes of the court this must be discounted in their deliberation. Sheriff Walsh presided over the proceedings and Mr Leck was the prosecuting fiscal. The charge of "playing chicken" was deleted and the jury found Sharp guilty of speeding in a 30mph zone (although the speed was not able to be determined) and causing the death of 15 year old Fiona McGill by dangerous driving. As stated by the Lord Advocate, the Sheriff took the view that his sentencing powers were inadequate and referred the case to the High Court for sentencing. The Judge took the view that a seven year custodial sentence was appropriate as was a mandatory driving ban.

PF v Douglas Ramsey
Douglas Ramsey, aged 19, a store worker, denied the charges of driving at 52 mph in a 30 mph zone, "tailgating" with another motorist and causing the deaths of two girls aged 15 and 16 by dangerous driving. Co-accused, 19 year old Scott Compton was charged with driving dangerously but was discharged after his case was found not proven. The jury found Ramsey guilty of speeding at 52 mph (determined from skid marks) and causing the deaths of Emma Shaw and Laura Haney. Defence agent Mr Crawley QC experienced in defending serious driving charges, stated in his mitigation plea, "The driving has been described as dangerous by the jury, but it must be at the edge of dangerous driving. This was a terrible accident." Sheriff Powrie took the view that an appropriate sentence was 300 hours community service, one year probation and a five year driving ban. The driver appealed against the severity of his sentence and it was SCID's understanding that the Crown was to appeal against the leniency of the sentence.

How can bad drivers take bad driving seriously when the Crown Office and the courts do not treat these offences with the gravity as legislated?

For families bereaved by bad drivers and knowing the available law, their expectation of the justice System is not being delivered – leaving them victims for a second time.
SCID proposes:

- As the petitions before Justice 1 Committee have not been addressed in the publication of the TRL research, the Scottish Parliament set up its own inquiry/commissioner to examine the application of the Road Traffic Law in Scotland.
- All Causing Death by Dangerous Driving offences to be heard in the High Court.
- The use of specialist fisca/advocates to prosecute road death or serious injury cases, i.e. Equality of arms and from the perspective of victim families – the right to a fair trial.
- Clear guidelines for Sheriffs in interpreting Road Traffic Law, particularly that the key elements of cases to be summarised in the clearest terms to direct a jury.
- Routine use of crash investigation experts in court to aid prosecutions of fatal road crashes.
- The implementation of all 80 recommendations in the Quality and Practice Review Unit’s review *Investigation of Road Deaths in Scotland*.
- Nationally agreed Charging Standards and Sentencing guidelines.
- The Scottish Parliament to make representation to the Parliament at Westminster to support the view that death or serious injury be uppermost in the charge of driving offences.
- Recognition throughout the criminal justice system that victims have distinct needs and rights, by giving them legal status.

On behalf of families who have been bereaved and who continue to be bereaved by bad drivers we sincerely thank the Committee for their long standing and continuing support.

Yours sincerely,

_Margaret Dekker_
SCID researcher/secretary

cc  Wendy Alexander  
Lord James Douglas-Hamilton  
Donald Gorrie  
Maureen Macmillan (Deputy Convener)  
Paul Martin  
Michael Matheson
1. The Subordinate Legislation Committee considered the delegated powers provisions in the Title Conditions (Scotland) Bill at its meetings on 1st and 8th October 2002. 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.
Title Conditions (Scotland) Bill

Report of the Subordinate Legislation Committee

At 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. The Bill forms the second part of the Executive’s programme to reform the land law of Scotland. The Abolition of Feudal Tenure etc. (Scotland) Act 2000 made provision for the abolition of the feudal system of landholding. This Bill completes the process by providing a restatement and clarification of the law relating to conditions that run with the land independently of ownership, known as “real burdens”. It makes it easier to vary or discharge outdated burdens.

4. Although the Bill will affect practically everyone who owns property in Scotland it is, as the Policy Memorandum states, highly technical. Like the 2000 Act, it is the result of work carried out by the Law Commission of Scotland and is based on a Report of that body published in October 2000. Feudal tenure provided for the basic foundation for the law of real burdens in Scotland. It is, therefore, apparent that this Bill and the 2000 Act are very closely related. It is understood they will be implemented together.

Delegated Powers
5. The Bill has 6 sections that contain a total of 8 order- rule- or regulation-making powers: sections 37(3), 37(6), 93(1), 103(6)(b)(ii), 103(7), 110(1), 114 and 116(3)(a) and (b).

6. The Executive has produced the usual helpful Memorandum on the delegated powers in the Bill to assist the Committee that spells out the purpose and effect of the provisions in detail. It is reproduced at Appendix 1.
Having considered the following provisions with the assistance of the Memorandum, the Committee approves them without further comment: 93(1), 103(6)(b)(ii) and (7), 110(1) and 114.

7. The Committee notes with approval that the Bill uses delegated powers sparingly and only for matters of largely technical detail.

Section 37(3) and (6): Conservation burdens

Background
8. This section makes it competent to create “conservation burdens” (burdens created in the public interest to protect built or natural heritage) in favour of a conservation body or the Scottish Ministers. Subsection (3) gives the Scottish Ministers power, by regulations, to prescribe such body as they think fit to be a conservation body. Subsection (6) gives the Scottish Ministers power, by regulations, to determine that a body shall cease to be a conservation body.

Reason for taking power
9. The Executive explains that the power is necessary in order to respond to changing circumstances, in that bodies will come into existence and others will disappear or might no longer be appropriate to remain as a conservation body.

Report
10. In the Committee’s view, there is obviously a need for flexibility here since conservation bodies must meet certain characteristics and, no doubt, the potential group of bodies will change over time. The use of the power is constrained by subsection (4), which limits the type of body that can be specified in the regulations. In principle, therefore, the power seems acceptable. The regulations will be subject to annulment, which again seems to the Committee to provide the right level of Parliamentary scrutiny of the exercise of the power.

11. The Committee was, however, a little puzzled by subsection (6), which gives power to determine that a body shall cease to be a conservation body. It is not evident why the Bill does not simply rely on the implied power to amend or revoke regulations. The Executive could simply use that power to amend or revoke the regulations made under subsection (3) which would achieve the result of removing, or adding, bodies to the list.

12. The Committee notes that the power comes from paragraph 11 of Schedule 1 to the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 (SI 1999/1379). That paragraph provides that where an ASP confers power to make (among other things) rules, regulations, orders, or other subordinate legislation, it implies, unless the contrary intention appears, a power to revoke, amend or re-enact any instrument made under the power.

13. The Committee therefore asked the Executive why the power in subsection (6) is considered necessary.

14. In its reply, reproduced at Appendix 2, the Scottish Executive Justice Department replied that section 37(6) replicates and replaces section 26(4) of the
Abolition of Feudal Tenure etc. (Scotland) Act 2000. That piece of legislation was originally drafted as a Bill, which was annexed to the Scottish Law Commission Report on Abolition of the Feudal System (Scot Law Com No 168) and which was submitted to the Lord Advocate in December 1998. The subsection was therefore originally drafted before the 1999 Order which implies that, unless the contrary intention appears, a power to revoke, amend or re-enact any instrument made under a power conferred by an ASP.

15. The Department does accept that subsection (6) may be regarded as superfluous, but thinks that it might be helpful to make it clear, as in section 26(4) of the 2000 Act, that conservation bodies could be removed by Scottish Ministers from the prescribed list.

16. The Committee does not fully understand the Department’s response. The Transitional Order under the Scotland Act was not, of course, in force in 1998. However, any Act following on the Bill annexed to the Report of the Scottish Law Commission, if enacted before devolution, would have been subject to the Interpretation Act 1978, section 14 of which is in the same terms as paragraph 11 of Schedule 1 to the Order. It therefore appears to the Committee that there is no difference in the legal position before or after 1999.

17. The use of delegated powers is not, however, at issue. The Committee observes that the provision in question is not wrong, only unnecessary, as the Department acknowledges. It is simply a drafting point, which the Committee is content not to press further.

18. The Committee also asked the Executive whether, given the nature of the provision, subordinate legislation in the form of an order rather than regulations might be more appropriate.

19. The Department acknowledges that it is more usual that, when a power is given to prescribe matters of this nature, this is done by order rather than by regulations. Accordingly, the Department proposes to bring forward an amendment at Stage 2 of the Bill’s proceedings before the Parliament to amend the reference in section 37(3) from “by regulations” to “by order”.

Report

20. The Committee welcomes the Department’s undertaking to bring forward an appropriate amendment and approves the power and procedure chosen. Although the distinction between different types of instrument is not always clear-cut, the Committee observes that it is generally, and properly, adhered to in enabling Acts where clarity exists.

Section 116(3): Minor and consequential amendments, repeals and power to amend forms

Background

21. This subsection gives the Scottish Ministers power to amend, by order, the various forms of notice in schedules 2 to 9 and 11 to the Bill and schedule 1 to 11A to the 2000 Act. Ministers can make such incidental or transitional provision as they consider expedient. The order will be subject to annulment procedure.
Reason for taking power
22. The Department states that this power to amend is needed so that if there are problems in practice with the forms, or they become outdated, it will not be necessary to amend the Bill through primary legislation. The Executive submits that it is not necessary or desirable for the design or content of these technical forms to be the subject of primary legislation.

Report
23. The Committee notes that, in allowing for amendment of the Act itself and other primary legislation by order, this is a "Henry VIII" power and its usual expectation is that such powers would be subject to affirmative procedure. However, the Committee observes that the power is restricted in that it only allows for amendment of forms and incidental and transitional provision in that regard and the forms are of a technical nature. The Committee therefore approves the delegation of power and the use of negative procedure as appropriate in these circumstances.

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

TITLE CONDITIONS (SCOTLAND) BILL
At Stage 1

Provisions Conferring Power To Make Subordinate Legislation

Purpose

1. This Memorandum has been prepared by the Scottish Executive to assist consideration by the Subordinate Legislation Committee, in accordance with Rule 9.6.2 of the Parliament’s Standing Orders, of provisions in the Title Conditions (Scotland) Bill conferring power to make subordinate legislation. It describes the purpose of each such provision, explains why the matter is to be left to subordinate legislation and the reasons for seeking the proposed powers.

Outline and scope of the Bill

2. The Bill has two main objectives. The first is to achieve greater clarity in the law. The Bill therefore restates the current law in a clear, codified form. This will make it more accessible. In places, where the common law is uncertain or unsatisfactory, the Bill reforms or enhances the law. The second objective is to reduce the number of outdated conditions on land by making it easier to discharge or vary them. The Bill will complete the process of feudal abolition and provide a modern and simplified framework for ownership of property in Scotland. The reform will make the process of conveyancing simpler and will make life easier for those who wish to alter the conditions on their property. An underlying theme of the whole package is to ensure that people who live at a great distance from property they have sold should not be able to use property law to exercise control over it.

3. Title conditions affect most land. They are imposed on a plot of land (or an individual house) in the relevant title deeds, almost invariably when it is first sold. The conditions form part of the agreement of sale: they are stipulated by the sellers and are accepted by the buyers who should be advised of their content by their solicitors. The conditions may, for example, oblige the buyer to contribute to the cost of a service; or to maintain the property; or he or she may be prohibited from carrying out certain activities on the property.

4. This private regulation of land ownership is parallel to, and separate from, the public regulation of land which operates through planning and environmental legislation. The planning system does not, however, provide the same degree of control achieved by title conditions. For example, planning law does not oblige owners to maintain their own property. There are systems of private regulation of...
land (in differing forms) in England, the United States, Canada, Australia and New Zealand, as well as across continental Europe.

5. The Bill is based on the draft produced by the Scottish Law Commission and published with its Report on Real Burdens (Scot Law Com No 181) in October 2000. (Real burdens are the most common kind of title condition.) This work followed the Commission’s Report on Abolition of the Feudal System (Scot Law Com No 168) which led to the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (“the 2000 Act”). The two pieces of legislation are very closely related and they will be implemented together, on a day which is referred to in the legislation as the appointed day. Land which was previously held under feudal tenure will then be absorbed into the system of ordinary ownership.

6. The general law on title conditions – both feudal and non-feudal - is common law. It has built up as a result of decisions taken in the courts on individual cases and then been interpreted and applied more generally. While the Commission was carrying out its work on abolition of the feudal system, it became aware that the general law of title conditions was unclear and confusing. As a result, the Commission recommended that the law on title conditions should be clarified and set out in a new statutory law.

1. The Bill is in 10 Parts.

**Part 1: Real Burdens: General**
This Part codifies the existing law and introduces some changes such as a ‘sunset rule’ (with the option of renewal) for burdens over 100 years old. It sets out how to create a real burden, what its contents may be, and how it may be terminated. These rules apply to existing burdens as well as burdens to be created in the future.

**Part 2: Community Burdens**
This Part deals with burdens which apply to communities in the sense of groups of properties which have a common scheme of burdens. These communities have common or similar burdens which apply to all the units within them, and which can be mutually enforced.

**Part 3: Conservation and Maritime Burdens**
This Part sets out the rules for conservation and maritime burdens. These burdens are of public benefit.

**Part 4: Transitional: Implied Rights of Enforcement**
Part 4 abolishes enforcement rights implied by common law but provides a preservation procedure and re-creates some of these rights with a statutory basis. In future it will not be possible to create implied rights.

**Part 5: Real Burdens: Miscellaneous**
This Part deals with a variety of different issues. Amongst the most important is the power to create a new legal category of burden called a manager burden. This burden will allow a developer to keep control of a group of properties while they are being developed.
Part 6: Servitudes
This Part of the Bill realigns the boundary between servitudes and real burdens.

Part 7: Pre-emption and Reversion
This Part of the Bill modifies the rules for pre-emption, and rights of reversion arising under various statutory provisions.

Part 8: Title Conditions: Powers of the Lands Tribunal
This Part of the Bill sets out the powers of the Lands Tribunal. The existing jurisdiction is restated, with some modifications.

Part 9: Miscellaneous
This Part of the Bill contains miscellaneous provisions, the most important of which concerns compulsory purchase powers. It also amends the existing legislation on the ranking of standard securities.

Part 10: Savings, Transitional and General
This Part of the Bill lists the various savings and transitional arrangements pertaining to the draft Bill, and the interpretation, short title and commencement provisions.

Vocabulary and existing rules of the common law

1. The contents of the Bill are highly technical and the following explanation is intended to assist readers of this Subordinate Legislation Memorandum to understand the main terms which are used in this area of law.

2. A title condition is a condition which applies to ownership of land. The most common type of title condition is the real burden. Other types of title condition include servitudes and conditions in long leases. The draft Bill is primarily concerned with the law of real burdens. A real burden restricts an owner’s use of his land or obliges him to do something.

3. Burdens bind the owners of property and they are set out in title deeds which are recorded in the Register of Sasines or registered in the Land Register of Scotland. These registers are open to public inspection and are maintained by the Keeper of the Registers of Scotland who is the Chief Executive of the Registers of Scotland Executive Agency. The burdens regulate the way property is used and the obligations they impose are conditions of ownership. Following abolition of the feudal system, the owner of the property will be the outright owner but he has accepted that he owns it subject to conditions. When he sells the property, the burdens will still apply to it. Burdens are perpetual and are said to run with the land notwithstanding that it has been sold on, possibly on numerous occasions, after the first owner.

4. The law of real burdens is clear that a burden is to benefit land rather than a person. For a condition on land to be a real burden, it must benefit other land. Thus there must be two plots of land and one plot must benefit from the burden placed on the other. The first plot is called the benefited property and the second is called the burdened property.
5. If an owner of a property does not observe the title conditions applying to his property, that is not a matter for the police or public authorities. The person who can take action to make the owner observe his conditions is the owner of the benefited land. He is the **benefited proprietor** and he is said to have **enforcement rights**. In order to enforce the burden, the benefited proprietor must have **title to enforce** – in other words, it must be apparent (expressly or implicitly) from the deed creating the burden that he has the right to enforce the burden. But the common law also requires that he must also have **interest to enforce** – in other words, his property must genuinely benefit from the burden. Otherwise he cannot enforce it.

6. Sometimes the owner of the burdened property (the **burdened proprietor**) will wish to get rid of the burden or to vary it: this is achieved by a **discharge** or a **variation**. This can be done by applying to the **Lands Tribunal for Scotland** for a discharge or a variation of the burden. Alternatively, the owner can ask the benefited proprietor, who, if he agrees, will grant a **minute of waiver**. Very often the benefited proprietor will charge a fee for this. If the burdened proprietor ignores the burden and acts in contravention of it without consent, this is known as a **breach**.

**Delegated powers**

1. The Bill has 6 sections which contain powers to make subordinate legislation (including commencement powers). They are provided for in section 115.

**Section 37:** Conservation burdens

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative resolution of the Scottish Parliament

1. Burdens may occasionally be imposed by sellers of land at least partly in the public interest where the intention is to protect the built or natural heritage. Bodies which might do this include the National Trust for Scotland and conservation trusts, as well as local authorities. For example, in selling a building which it has recently restored, a conservation trust might wish to impose real burdens in order to prevent inappropriate alteration and to ensure future standards of maintenance. The general policy of the Bill (and the 2000 Act) is that burdens should benefit the amenity of other, nearby property. Since a conservation trust will only rarely own neighbouring land where it is selling restored property, the 2000 Act allowed some feudal burdens to be saved as a new class of burden to be called conservation burdens, even though there is no neighbouring benefited land. Section 37 will allow conservation burdens to be created in the future.

2. Section 37(3) gives Scottish Ministers the power to prescribe by subordinate legislation a list of conservation bodies who will be entitled to create conservation burdens and section 37(6) provides that they may remove bodies from the list. Section 115 requires that any regulations made under this section must be made by statutory instrument which is subject to annulment in pursuance of a resolution of the Scottish Parliament.
3. Subsection (4) sets out the criteria for a body to be included on the list. Clearly, as time goes on, some such bodies will come into existence and others will disappear or it may no longer be appropriate for the body to remain a conservation body. It is therefore necessary to give Scottish Ministers the power to respond to changing circumstances. It is also submitted that it would not be appropriate to prescribe these bodies in primary legislation.

Section 93: Taking effect of orders of Lands Tribunal etc.

Power conferred on: Scottish Ministers, after consultation with the Scottish Committee of the Council on Tribunals

Power exercisable by: Rules made by Statutory Instrument

Parliamentary procedure: Negative resolution of the Scottish Parliament

1. Section 81 of the Bill restates and extends the jurisdiction of the Lands Tribunal for Scotland in relation to the discharge of real burdens, servitudes and other title conditions. Its current powers are set out in the Conveyancing and Feudal Reform (Scotland) Act 1970. The main changes to the existing law are to allow the Tribunal to determine the validity, enforceability or interpretation of a burden, and to extend its jurisdiction so that it can deal with the new termination procedures in Parts 1, 2 and 9 of the Bill.

2. Section 82 makes special provision to allow the owners of 25% of the units in a community to apply to the Lands Tribunal to vary or discharge a community burden or the community burdens as they affect the whole community. A “community” in terms of the Bill means four or more units which are subject to mutually enforceable burdens (a “unit” means land designed to be held in separate ownership whether it is so held or not). This jurisdiction conferred on the Tribunal allows it to vary or discharge community burdens as they affect all or part of the community.

3. Section 93(1) of the Bill permits Scottish Ministers to make rules as to when an order of the Tribunal will take effect. This provision replaces section 2(3) of the Conveyancing and Feudal Reform (Scotland) Act 1970 which is repealed by section 116(2) and Schedule 14. The current rules are to be found in Rule 5 of the Lands Tribunal for Scotland Rules 1971 (SI 1971/218).

4. It is submitted that the current flexibility should be retained, particularly as the circumstances in which the Tribunal can make orders are significantly increased by the Bill, and that the rules on when an order under section 81 or 82 should take effect should more appropriately be set in subordinate legislation. It is possible that the timescales might need to be amended over time depending on the experience and use of these provisions. Scottish Ministers should therefore have the ability to set these rules without having to amend the primary legislation.

Section 103: Further provision as respects notices of preservation or of converted servitude
Power conferred on: The Scottish Ministers

Power exercisable by: Order made by Statutory Instrument

Parliamentary procedure: Negative resolution of the Scottish Parliament

1. Section 46 of the Bill permits an owner of land who has an implied right under the current law (rather than an express right set out in the title deeds) to enforce a non-reciprocal burden on a neighbouring property to preserve that right by executing and registering a notice against both the property which is subject to the burden and the property which benefits from it. This must be done within 10 years of the appointed day otherwise the right is extinguished.

2. Section 71 converts negative servitudes (such as a restriction on building for the protection of light or prospect) into real burdens on the appointed day. If these are not expressly conferred but merely arise by legal implication, they will, however, be extinguished 10 years later unless a notice is registered. Section 71 permits an owner of land who has a right to enforce a negative servitude to register a notice of converted servitude which will preserve the converted servitude beyond the 10 year period. The notice of converted servitude must be registered against both the benefited and burdened properties.

3. Section 103 (6) makes provision for circumstances where a notice which is incomplete or inaccurate is rejected for registration by the Keeper of the Registers. Such a rejection might be challenged either in the Lands Tribunal or the ordinary courts if the owner considers that the notice has been wrongly rejected by the Keeper. If the challenge is successful, an owner will be able to register the notice even if the 10 year period has expired, provided this is done within a reasonable period. Sub-section (6) stipulates that two months should be sufficient, but subparagraph (ii) provides that Scottish Ministers should be able to prescribe a final date after which registration would cease to be possible. A judgement can only be taken on the duration of the period for registration after the expiry of the 10 year period in the light of the numbers of cases falling within this category and it is submitted that, on a practical basis, this matter is better suited to subordinate legislation. Sub-section (6) is based on section 45(1) of the 2000 Act which dealt with notices or agreements submitted for registration in relation to abolition of the feudal system, and is intended to provide flexibility.

4. Sub-section (7) gives Scottish Ministers the power to prescribe the period within which the application to the Lands Tribunal (or to the court) for a determination that the notice or agreement rejected by the Keeper is registrable, must be made. This sub-section is based on section 45(2) of the 2000 Act. The intention in applying such a period is to ensure that any person proposing to apply to the courts does not delay unduly in doing so. This will achieve certainty in the burdens which have been preserved or the servitudes which have been converted as quickly as possible. Again, a judgement can only be taken on the duration of the period in the light of the numbers of cases falling within this category and it is submitted therefore again that, on a practical basis, this matter is better suited to subordinate legislation.
Section 110: Interpretation

Power conferred on: The Scottish Ministers

Power exercisable by: Order made by Statutory Instrument

Parliamentary procedure: Negative resolution of the Scottish Parliament

1. Section 110(1) of the Bill defines (unless the context otherwise requires) a large number of expressions used in the Bill to assist in future interpretation of the legislation. It makes it clear that the expression “title condition” will apply to a range of obligations which are binding on land, including real burdens, servitudes and conditions in registrable leases. The policy of the Bill is to identify those land obligations which are to be considered “title conditions”: they will then, subject to some exceptions, be subject to the jurisdiction of the Lands Tribunal for Scotland for the purposes of variation or discharge.

2. It is clearly possible that new kinds of restrictions on land may be developed in the future which should be subject to the jurisdiction of the Lands Tribunal and that these should fall within the definition of a title condition. Paragraph (g) allows Scottish Ministers to add to the list. It might also be decided that it would be suitable for the Lands Tribunal to deal with further existing land restrictions such as planning agreements under section 75 of the Town and Country Planning (Scotland) Act 1975 and other similar local restrictions. The mechanism provided in section 110 would allow Scottish Ministers to extend the Lands Tribunal jurisdiction to such restrictions at some later date.

Section 114: Fees chargeable by Lands Tribunal in relation to functions under this Act

Power conferred on: The Scottish Ministers, after consultation with the Scottish Committee of the Council on Tribunals

Power exercisable by: Rules made by Statutory Instrument

Parliamentary procedure: Negative resolution of the Scottish Parliament

1. The Bill introduces several new functions for the Lands Tribunal for Scotland. It also amends the grounds for the disposal of applications to the Tribunal. The main changes are to allow the Tribunal to determine the validity of a real burden and to extend its jurisdiction so that it can deal with the new termination procedures. The Bill also provides a new fast-track procedure for applications to the Tribunal which are not opposed. Some of the changes will place additional administrative functions on the Tribunal.

2. Clearly a framework of rules will have to be put in place covering these additional functions so that the Tribunal can levy appropriate fees from users of the new procedures. It is submitted that it would not be appropriate to provide for the Tribunal’s feeing structure in primary legislation and that subordinate legislation will
provide greater practical flexibility to adapt to changing circumstances as time goes on.

Section 116: Minor and consequential amendments, repeals and power to amend forms

Power conferred on: The Scottish Ministers

Power exercisable by: Order made by Statutory Instrument

Parliamentary procedure: Negative resolution of the Scottish Parliament

1. The Scottish Law Commission suggested that it would be useful for the Scottish Ministers to have the power to amend the various forms of notice contained in schedules 2 to 9 and 11 of this Bill and schedules 1 to 11A of the 2000 Act so that if problems arise in practice with these forms or they eventually become outdated, it will not be necessary to amend the Bill. These forms are mainly concerned with the preservation or termination of rights to enforce real burdens. Section 116(3) will allow the Scottish Ministers to make such incidental or transitional provision as they consider expedient. It is submitted that it is not necessary or desirable for the design or content of these technical forms to be the subject of primary legislation and that, on a practical basis, this matter is better suited to subordinate legislation.
Appendix 2

TITLE CONDITIONS (SCOTLAND) BILL

On 2 October 2002 the Committee asked for an explanation of the following matters.

Section 37 (3) and (6): Conservation burdens

The Committee asked:

“Subsection (6) grants a power to determine that a body shall cease to be a conservation body. It appears to the Committee that the Executive could simply use that power to amend or revoke the regulations made under subsection (3) and so achieve the result of removing or adding bodies to the list. It is unclear to the Committee why the Bill does not simply rely on that implied power to amend or revoke the regulations.

The Committee notes that the power referred to comes from paragraph 11 of Schedule 1 to the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 (1999/1379). That paragraph provides that where an ASP confers power to make (among other things) rules, regulations, orders, or other subordinate legislation, it implies, unless the contrary intention appears, a power to revoke, amend or re-enact any instrument made under the power.

The Committee therefore asks why the power in subsection (6) is considered necessary.”

The Scottish Executive Justice Department responds as follows:

Section 37(6) replicates and replaces section 26(4) of the Abolition of Feudal Tenure etc. (Scotland) Act 2000. That piece of legislation was originally drafted as a Bill which was annexed to the Scottish Law Commission Report on Abolition of the Feudal System (Scot Law Com No 168) which was submitted to the Lord Advocate in December 1998. The subsection was therefore originally drafted before the 1999 Order which implies that, unless the contrary intention appears, a power to revoke, amend or re-enact any instrument made under a power conferred by an ASP.

While the Department do acknowledge that subsection (6) may be regarded as superfluous, it was thought that it might be helpful to make it clear, as in section 26(4) of the 2000 Act, that conservation bodies could be removed by Scottish Ministers from the prescribed list.

The Committee also asked:

“The Committee also wonders whether perhaps subordinate legislation in the form of an order rather than regulations might be more appropriate.”
The Scottish Executive Justice Department responds as follows:

The Department acknowledges that it is more usual that when a power is given to prescribe matters then this is done by order rather than by regulations. Accordingly, the Department proposes to bring forward an amendment at Stage 2 of the Bill’s proceedings before the Parliament to amend the reference in section 37(3) from “by regulations” to “by order”.

For the Scottish Executive Justice Department

3rd October 2002
ADDITIONAL EVIDENCE TO
JUSTICE 1 COMMITTEE
of
THE SCOTTISH PARLIAMENT
on
TITLE CONDITIONS (SCOTLAND) BILL

Bruce Merchant
South Forrest
Solicitors
Inverness
October 2002
I refer to my written evidence of 6 August 2002 and the oral evidence which I had the privilege of giving to the Committee on 24 September. I very much appreciated the opportunity of being heard.

I have followed with interest reports of subsequent meetings of the Committee and from these it is apparent that I failed adequately to explain the difficulties which will face house buyers and sellers in Scotland and their advisers if the Bill is brought into law in its present form.

I would refer particularly to the evidence given by the Deputy First Minister and Minister for Justice, Mr Jim Wallace, on 1 October. As he pointed out, there is no reason why the owner of a house should be prejudiced because his non-entitled spouse or his tenant enforces some of the conditions to which he is entitled as the benefited owner; the conditions will not be enforced against the spouse or the landlord but rather against the proprietor of another house in the development.

That is not the problem. It is rare for anyone in right of a real burden to take active steps to enforce it against another owner. For example, under the present law, it is unusual for a superior to take the initiative in enforcing a condition.

It is commonly only when people come to sell their houses that it is realised by the solicitors acting for purchaser and seller that alterations have been made (or other acts have occurred) for which the consent of the superior should have been obtained. Typical wording in the title might be:-

“no external alterations or additions shall be made to the dwellinghouse without the written consent of the superiors”.
Retrospective consent of the superior can usually be obtained relatively easily (although at a cost of about £100-£200) as the solicitors acting for the larger superiors are well known and used to granting such consents.

However, under the new regime, the wording of the Deed of Conditions would in effect be re-written to provide:-

“no external alterations or additions shall be made to the dwellinghouse without the written consent of every owner, non-entitled spouse of an owner, tenant and liferenter of a house within the development”.

If that becomes the law, then instead of getting consent from one person (the superior) it will be necessary to approach every one of, say, the hundred owners in a development and their tenants, spouses etc. It just cannot be done.

As Mr Wallace pointed out in his evidence, if a tenant or non-entitled spouse were themselves trying to enforce a condition, they would require to demonstrate that they were entitled to do so. That would be a relatively straightforward matter. However it is entirely different from the point of view of somebody trying to get a consent from every owner, non-entitled spouse, tenant etc. It is difficult enough to find out who all the owners are although this could be done by searching the Registers in Edinburgh albeit at significant cost. However there is no way of finding out who the tenants and non-entitled spouses might be and so one could never be certain that one had obtained all necessary consents.

Nor does it appear to be what the public expects or wants. In its Report on Real Burdens (No 181) the Scottish Law Commission included a “Survey of Owner/Occupiers’ Understanding of Title Conditions” as Appendix C at page 465ff. It is interesting to see that, while some 90% of those consulted thought that they should obtain consent from next door neighbours where there were enforcement rights, only 2% thought that they should require to get consents from everyone in the development. This was a material part of the reasoning of the Commission (page 243) when it recommended the four metre rule in relation to implied rights.
This is not a small problem. In more than half the developments in Scotland where there are Deeds of Conditions (which means virtually every private development of significance in the last 30 or 40 years) house owners do not have conditions in their titles which can be enforced by other owners (SLC Report on Real Burdens Appendix D p.502)

Mr Wallace also made the point that consents as such will be of little value. However as will be seen from the example quoted there is often a provision which says that something can be done but only with consent.

The Bill has the potential to create real problems which would strike at the heart of the process of buying and selling houses in Scotland. I find it very difficult to believe that this is desirable, particularly in view of the efforts of HITF. I believe that it would operate to the significant disadvantage of the people of Scotland.

I have given some thought to how one would address these problems if I were acting for the seller of a house who had carried out an extension without getting all necessary consents. I attach a separate note setting out in order the seven steps which I would follow. I fear that in many instances one would be left with the remedy of an application to the Lands Tribunal. In the context of a sale of a house that is an alarming prospect because of the substantial delay, not to mention the cost which would be involved.

The purpose of the Abolition of Feudal Tenure Act combined with the Title Conditions Act is to rid our society of archaic and unnecessary restrictions upon the use of one's property. If the Bill is passed in its present form, I fear that it will substitute a multiplicity of new problems and will in many instances actually make the position worse. I accordingly remain of the view that the Bill in its present form could be immeasurably improved by three relatively simple steps:-

1. Amend Section 8 to provide that only owners should be entitled to enforce land conditions;
2. Where there are already implied rights of enforcement, as opposed to express rights, these should be restricted to properties within four metres of the burdened property; and

3. Where there are no implied rights of enforcement at present in a Deed of Conditions these should not be created now.

BAM/CJM
16 October 2002
ANNEXATION

I have considered how a solicitor might advise the seller of a house who has carried out works such as an extension where the Deed of Conditions contains words such as “no external alterations shall be carried out without the written consent of the superior”.

If the conditions were enforceable by other house owners in terms of the Title Conditions (Scotland) Bill then I would suggest that the points for consideration would be as follows:-

1. **Was the work done more than 5 years ago?**

   If so, there is no problem because of the new five year negative prescription introduced by s.17.

   **If not:-**

2. **Did everyone who could enforce the burden either consent to it or did they fail to object to it?**

   **If they simply failed to object, were they or should they have been aware of it?**

   This would require that every owner, tenant, liferenter and non-entitled spouse in the development knew or ought to have known of the work. If so, the acquiescence provisions in s.16 come into play. Eight weeks after the substantial completion of activity involving expenditure there is a presumption that each such person knew or ought to have known of the carrying on of the works. However that presumption is rebuttable. If there were a development of, say, one hundred houses it would not be difficult for a proprietor, tenant, non-entitled spouse etc. at the other end of the development to claim that there was no way that he or she could have known of the work being carried out.
Can one therefore rely on s.16?

If not:-

3. **Can you argue that some of the owners and tenants have no interest to enforce even if they have title?**

This depends upon an interpretation of s.8 of the Bill which provides that “a real burden is enforceable by any person who has both title and interest to enforce it”.

In general there has been no willingness to restrict interest to those within, say, a four metre radius. The Executive has taken the view that in certain circumstances more remote owners might have an interest to do so. It is stated in s.8 (3)(a) that there is an interest to enforce if “in the circumstances of any case, failure to comply with the real burden is resulting in, or will result in, material detriment to the value or enjoyment of the person’s ownership of, or right in, the benefited property”.

The difficulty with that is that it is a subjective test and it is difficult to know how, for example, the Keeper will interpret it in relation to entries in the Land Register. Is a purchaser’s solicitor prepared, for example, to accept consents from nearby neighbours, tenants etc. and take a view that those who live one or two houses further away will not be prejudiced and therefore have no interest to enforce?

If not:-

4. **Can you get consent from all owners, tenants, liferenters, non-entitled spouses etc. covered by the Deed of Conditions?**

How does one know who the tenants etc. are? This might just be possible in smaller developments but would be impractical in larger ones.
If not:-

5. **Can one get a Discharge from a majority of all entitled owners?**

There is provision for this in s.32 of the Bill. The characteristics of this are:-

- Owners only are involved – they cut out tenants, liferenters and non-entitled spouses.
- The Discharge is a formal deed (not a consent) and has to be registered against each of the titles. It would appear to involve seeing all the titles of those involved which, even if it were practical, could be very expensive.
- Even if one can surmount this obstacle one then has to send a Statutory Notice and an explanatory note to all the owners who have not granted the deed. Any of them can object to the Lands Tribunal within eight weeks.

Would this ever be practical in the context of a normal house sale?

If not:-

6. **Can one get a Discharge from the owners of all adjacent units?**

There is provision for this in s.34 of the Bill. Again we are dealing with owners only. The requirements here are:-

- Every owner within a four metre radius (ignoring roads so that it includes properties on the other side of the road) must grant a formal Discharge.
- This also requires to be registered against every property so there are the same problems about seeing all title deeds.
• After you have got all the neighbouring proprietors to sign, you must send a copy of the deed and a Statutory Notice to every other owner in the development who has not granted the deed. Alternatively, one must post a Notice on the house and on one or two nearby lamp posts. If there are no lamp posts one must advertise in a newspaper.

• Again there is an entitlement for anyone receiving Notice to go to the Lands Tribunal.

If not:-

7. Application to the Lands Tribunal
Dear

Meeting of Justice 1 Committee 24 September 2002
Title Conditions (Scotland) Bill

We much appreciated the opportunity to give evidence to the Committee about the way in which the provisions of the Bill would work in practice in a rural context. We hope that what we said helps the Committee in its consideration; if there is any point in our evidence the Committee would like us to clarify or simplify, we would be pleased to hear from the Clerk.

One issue on which we spoke in our evidence was the way in which feudal real burdens should be dealt with following the "appointed day". As we said, we have serious reservations about the mechanism in the Abolition of Feudal Tenure etc (Scotland) Act and we believe that the Bill ought to adjust it before it is brought in to force.

In our evidence, we made the proposal that preservation ought to be automatic provided that the benefit of the burden is attached (by a notice procedure) to a significant amount of land adjacent to the burdened property.

The amount of land we had in mind was 1 hectare. That would give a very substantial potential basis to any "interest" to enforce, which, after all, anyone wanting to enforce will have to demonstrate in Court.

However, having thought very carefully over the questions we were asked, and the evidence given by other witnesses, we realised that our proposal would unfairly exclude the situation in which a plot has been sold off at the bottom of a garden. We now think that preservation ought to be automatic where either the benefit of the burden can be attached to 1 hectare or more of land, or in the case of less than 1 hectare of land, there is a dwellinghouse (or some other buildings which is occupied) on it. In a rural context, the impact of the arbitrary nature of the "100 metre" rule would be magnified simply because circumstances and conditions vary so widely. An "area" rule, with the addition of protection for (in the main) houses in which people

Christine Grahame MSP
Convener
Justice 1 Committee
The Scottish Parliament
George IV Bridge
Edinburgh
EH99 1SP

Your Ref:
Our Ref: NLP/S/TC
Date: 11 October 2002
actually live, as we now propose would offer the flexibility which is needed to remove the discriminatory effects which will otherwise result.

We think it is worth saying again that in many cases it is a matter of choice, which did not have the significance at the time it now has, whether a burden was created as a feudal burden or as an ordinary burden. We consider the modified solution we have suggested in this letter would make it much less likely that people who benefited from a feudal real burden which could have been created as an ordinary real burden in the first place will be disadvantaged. That would be an important improvement to the Act and we hope the Committee will take the view that it is one that should be made by the Bill.

We would be pleased to answer any questions the Committee may have about our proposal.

I am writing in similar terms to the Deputy Convener of the Committee. Copies of this letter go to the Clerk to Justice 1 Committee and Mrs Joyce Lugton, the Scottish Executive Civil Justice Department Bill Team Leader.

Yours sincerely

R W Balfour
Convener

cc: Alison Taylor, Clerk to Justice 1 Committee
Mrs Joyce Lugton, Scottish Executive Civil Justice Department Bill Team Leader
Justice 1 Committee

Mental Health (Scotland) Bill

Submission from Enable

Summary

ENABLE welcomes the inclusion of new sexual offences in Sections 213 – 217 of the Mental Health Bill. We note the recent comment that separate offences are not required because of changes in the common law and have considered the various views carefully. ENABLE’s position, as detailed in the body of this submission, is broadly in line with both the Millan Committee Review and the proposals in the Mental Health Bill. ENABLE is of the view that on balance a separate statutory offence is necessary and justified.

ENABLE’s position can be summarised as follows: -

- The proposed new statutory offence, which protects men and woman equally and applies to all forms of sexual behaviour provides a necessary additional protection for people with learning disabilities.

- The proposed new statutory offence rightly recognises the seriousness of the offence in that it carries a penalty equivalent to similar common law offences.

- It is a welcome development that the proposed new statutory offence is based on ability to consent. This helps to ensure that the law does not infringe on the rights of people capable of making decisions about sexual activity and relationships.

- It should be recognized that in many instances, even where the new statutory charge is used, a common law charge of indecent assault or rape may also be appropriate.

- It is desirable that it remains a statutory offence for a carer to engage in sexual activity with a person with a learning disability regardless of consent.

- The uses and effectiveness of the proposed new statutory offence should be carefully monitored.
• Consideration should be given to additional measures such as improving access to sex education programmes for people with learning disabilities to increase understanding and reduce vulnerability to abuse

ENABLE also wishes to draw attention to Sections 21 – 23 of the Mental Health Bill which we believe (probably inadvertently) removes a benefit from people with learning disability to day services and transport provided free of charge. We ask that changes are made to these section of the bill to continues the current benefits.

Introduction

The Scottish Executive’s review of learning disability in 2000 – “The Same as You?” – estimated that:

• there are 120,000 children and adults with learning disabilities in Scotland
• of these 15-20,000 need a lot of help to cope with daily living
• the number will rise by 1% per year over next 10 years and that people living longer

ENABLE is the largest voluntary organisation in Scotland of and for people with learning disabilities. ENABLE has a voluntary network of members throughout Scotland with over 500 national members of whom around two thirds have a learning disability. ENABLE also has around 4 000 members in 68 local branches throughout Scotland. It provides an Information and Legal Advice Service and campaigns on behalf of people with learning disabilities and their carers. ENABLE also has a charitable limited company, ENABLE Scotland, which provides a range of services for children and adults with learning disabilities including supported employment, small care homes, community day services and short breaks and out-of-school care for children.

ENABLE has participated in consultations throughout the Millan Committee Review and acknowledges and welcomes the thorough reform of the Mental Health (Scotland) Act 1984. ENABLE continues to be of the view that people with learning disabilities have distinct needs and that they would be better served by specific legislation separate from the legislation dealing with those with mental health problems. However, ENABLE notes that certain sections in the Mental Health Bill are needed now to protect people with learning disabilities until such time as new legislation specifically to address their needs can be introduced.

Existing Sections 106 and 107 of the Mental Health (Scotland) Act 1984
ENABLE agrees with the view of the Millan Committee that the existing offences under sections 106 and 107 of the Mental Health (Scotland) Act 1984 are in need of review and reform. In particular, the existing offences are not gender neutral, as they relate only to women, and apply only to sexual intercourse rather than all forms of sexual abuse. Also the definitions and descriptions contained within the sections are extremely outdated. Finally, the maximum punishment is less than is applicable for common law assaults indicating offences against people with learning disabilities are considered less serious.

There has been comment recently that these provisions are no longer required because of changes in the common law. We have considered this very carefully and the proposals in the Mental Health Bill.

Our understanding of the current legal position in relation to sexual offences

In March 2002, following a reference by the Lord Advocate, the High Court issued an Opinion clarifying the law of rape in Scotland. The reference was made in response to the trial decision in the Watt case. In that case the accused was acquitted on the basis that establishing sexual intercourse took place without consent was not sufficient to prove a charge of rape. It was also necessary to show that there had been some degree of force or the threat of force. The Court was asked whether or not this decision correctly represented the law of Scotland. It has long been accepted that lack of consent is an essential element of the crime of rape. The question was whether or not something more than the absence of consent was required i.e. actual or constructive force. The Court held that force was not an essential requirement in Scotland.

In the leading judgement the Lord Justice General held that the law of Scotland is as follows: -

“(i) the general rule is that the actus reus of rape is constituted by the man having sexual intercourse with the woman without her consent;
(ii) in the case of females who are under the age of 12 or who for any other reason are incapable of giving such consent, the absence of consent should, as at present, be presumed; and
(iii) mens rea on the part of the man is present where he knows that the woman is not consenting or at any rate is reckless as to whether she is consenting”.

The Opinion essentially relates to cases involving the rape of a capable woman over the age of consent. In such cases it is now clear that force is not an essential element. The Opinion contains a comprehensive discussion on the development of the law on rape in Scotland. From these discussions it is clear that the law is well settled in Scotland. Where there is no capacity to consent
then the act of sexual intercourse in itself constitutes rape. Other forms of sexual activity falling short of penetration will be indecent assault.

Despite dissenting with the majority on the issue of force, Lord McCluskey provided a useful and concise summary of the law as follows:

“Thus we find the judges and legal writers of the 18th and 19th centuries discussing what the law as to Rape was in relation to a man’s having sexual intercourse with a very young female child or with a woman whose mental age is that of a very young child. In such cases the judges were well aware that it would be utterly obnoxious to enable the man to say “she consented” or “I did not overcome her will”. So the common law had adopted a familiar legal device: it creates a non-rebuttable presumption that such a female could not “consent” to sexual intercourse. So, in such a case, the issue of consent in fact could not arise: the fact that any such female had agreed to have intercourse was entirely irrelevant: the legal rule was that, regardless of the facts such a person could neither give nor even withhold “consent” in law: actual consent had nothing to do with it… it is the absence of the need to prove that consent was withheld”

These changes to the law may tend to indicate that the common law is sufficient to deal with the circumstances covered by Section 106 of the current Act.

**SUBMISSION IN RELATION TO SEXUAL OFFENCES**

ENABLE recognises the difficulties in using the law to regulate sexual relationships between adults. Vulnerable members of society should of course be protected from exploitation and abuse. However, the law should also be careful not to infringe on the personal freedoms and rights of those with capacity to make decisions about sexual activity and relationships.

ENABLE is of the view that the difficulties in cases involving people with learning disabilities are not restricted to the question of capacity to consent. There are also issues regarding vulnerability. There is considerable evidence that people with learning disabilities are especially at risk of sexual abuse. In particular people with learning disabilities may be more open to persuasion or to being coerced into sexual activities that they may not in fact want or understand. This may be partly because they are often in relationships or situations where others are in a position of power and partly due to a lack of awareness. Children and adults with learning disabilities may have had limited access to sex education and their ignorance of sexual matters and appropriate relationships can compound their vulnerability. Measures additional to a new criminal law such as increased education should also be considered. ENABLE is currently running a pilot sex education project specifically to tackle this issue but much wider access to this kind of education is needed.
As recognised by the Millan Committee the principles of Non-discrimination and Equality should be borne in mind. These principles mean that legislation specifically directed at protecting people with some level of incapacity should be justified with reference to a particular difficulty that cannot be met by the normal provisions of the criminal law. It is recognised that ideally the common law as stated in the Watt case may in theory protect those with learning disabilities. However, it is the view of ENABLE that given the additional vulnerability of people with learning disabilities it is desirable to put the position beyond doubt by the creation of a new statutory offence. Accordingly, ENABLE is of the view that, despite the need to respect the human rights and sexual freedom of those with learning disabilities, special protection is needed.

ENABLE recognises a potential danger that the existence of a separate statutory offence may mean that sexual offences against those with learning disabilities are seen as less serious than the same offences against those with capacity. This should, of course, not be the case. ENABLE welcomes the fact that the seriousness such offences has been recognised by the increase in penalties which in the proposals are in line with comparable serious sexual assaults. It is considered appropriate that the increased penalties bring these offences into line with the common law offences.

ENABLE is of the view that in the vast majority of cases a common law charge of rape or sexual assault may be appropriate as well the statutory offence. ENABLE notes the lack of availability of statistical evidence that convictions are more common or likely where a person is charged with a separate statutory offence rather than the common law. Accordingly it is suggested that any replacement of the current statutory offence requires to be backed with sufficient resources and measures to allow monitoring of implementation and effectiveness to take place.

Currently carers who are involved in sexual activity with those in their care are committing a criminal offence regardless of capacity to consent. Of course an absence of consent may meant they can also be charged under the common law with rape or indecent assault. ENABLE are of the view that for social and moral reasons it is desirable this remains an offence. Carers are a defined class that can easily identified in relation to their job or position. Accordingly, it is clear to them that certain activities will be considered a criminal offence regardless of capacity. ENABLE agrees with the findings of the Millan Committee that this should remain a criminal offence.

Conclusion

ENABLE recognises that the regulation of sexual behaviour using the criminal law is a contentious and difficult matter. ENABLE can see merit in the argument that if the common law position as set out in the Watt judgement is properly applied then the rights of people with learning disabilities should be adequately
protected. It is also crucial that any new statutory offence should not infringe on the rights of people capable of making decisions about sexual activity and relationships. However, given the increased vulnerability of those with learning disabilities and the difficulties obtaining convictions ENABLE is of the view that it is desirable to put the matter beyond doubt and make the legal position absolutely clear. Accordingly, ENABLE welcomes the inclusion of new criminal offences in the Bill and continues to support the findings of the Millan Committee that the new criminal offences with increased penalties that are gender-neutral and apply to all forms of sexual activity and abuse are a necessary development.

Services designed to promote well-being and social development and assistance with transport

ENABLE notes that section 11 of the 1984 Act has been revised and new provisions included under sections 21 and 22 of the Bill. Section 11 deals with the provision of suitable training and occupation for people with learning disabilities and concomitant transport. We welcome the revised provision and its recognition of the range of activities and day services that are now offered to adults with learning disabilities to aid their ongoing development including assistance with gaining employment. We note also, however, that sections 21 and 22 have been widened to include anyone who has or who has had a mental disorder (thus covering a much wider group of people).

As a result, ENABLE is concerned to note that section 23 of the Bill will make it possible for the first time for local authorities to charge for day services for people with learning disabilities and accompanying transport. Section 11 of the 1984 Act is not included in current charging legislation and regulations which means that such services and transport to such services do not incur charges for service users. Despite this, local authorities have tried to introduce such charges from time to time. On at least 3 occasions, ENABLE has challenged local authorities over charges for day services and transport and charges have been withdrawn.

People with learning disabilities are a disadvantaged group of people, amongst the poorest members of society, and the majority of whom rely on benefit income. Although people always have the potential to continue to learn and develop, by the very nature of their disability, people with learning disabilities will never be 'cured' and are unlikely to move on from requiring specialised support. The pace of their maturity is also slower. People with learning disabilities have a need for continuing education and training long after school if they are ever to reach anything like their true potential.

Many adults with learning disabilities would like to work given the opportunity to do so - both to earn a wage and for the social inclusion it brings. To achieve this goal, most will need assistance from specialist employment services such as those envisaged in section 21(2)(c) of the Bill. If charges are able to be made against the wages or benefit income of someone with a learning disability then
this would be an enormous disincentive to trying out or taking up employment. Other people are not charged for assistance with getting into work through schemes such as New Deal so we regard this as iniquitous. It may also prevent people from using day services and obtaining the support that they need to continue their learning and development and will cause further stress to carers.

**SUBMISSION IN RELATION TO SERVICES DESIGNED TO PROMOTE WELL-BEING AND SOCIAL DEVELOPMENT AND ASSISTANCE WITH TRANSPORT**

ENABLE asks that changes are made to sections 21-23 of the Bill (and if appropriate to section 20) to restore the existing rights which people with learning disabilities have to day services and transport without charge.
Deputy First Minister & Minister for Justice  
The Rt Hon Jim Wallace QC MSP

Ms Christine Grahame MSP  
Convenor  
Justice 1 Committee  
Scottish Parliament  
Edinburgh  
EH99 1SP

St Andrew's House  
Regent Road  
Edinburgh EH3 3DG

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http://www.scotland.gov.uk

25th October 2002

Dear Christine,

ABOLITION OF FEUDAL TENURE ETC. (SCOTLAND) ACT 2000  
TITLE CONDITIONS (SCOTLAND) BILL  
COMMENCEMENT OF SUBORDINATE LEGISLATION

I am writing to give you advance notice that the Executive intends to introduce amendments which will affect the commencement of Part 4 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 ("the 2000 Act") and various provisions in the Title Conditions (Scotland) Bill. I am copying this letter to Margo MacDonald, the Convenor of the Subordinate Legislation Committee, and I am addressing a further point (in the penultimate paragraph of this letter) directly to her.

Part 4 of the 2000 Act: Feudal real burdens

It may be helpful first if I remind you that these two pieces of legislation are interlinked, and that there are various commencement provisions which are intended to ensure a smooth transition from the feudal system to the new system of land tenure. The main date to which we are working is the “appointed day” when the feudal system will finally be abolished. The 2000 Act provides that Scottish Ministers may appoint the day by order, and I hope to be able to announce soon when we expect that date to be. During my evidence to the Committee, you expressed concern that there should not be too much of a delay. I can assure you that I am as committed as you to the speedy abolition of the feudal system - but I am equally committed to ensuring that the move from one system of land tenure to another should be achieved in an orderly fashion. That is a principle which the Committee has fully taken on board in the past.
would propose that this power should be subject to affirmative resolution. I hope that the Subordinate Legislation Committee will feel able to support this.

I am copying this letter to the Convenor and the Clerk of the Subordinate Legislation Committee, to the Clerk of Justice 1 Committee and to the Departmental Committee Liaison Officer.

Sincerely,

[Signature]

JIM WALLACE
Dear

Meeting of Justice 1 Committee 24 September 2002
Title Conditions (Scotland) Bill

We much appreciated the opportunity to give evidence to the Committee about the way in which the provisions of the Bill would work in practice in a rural context. We hope that what we said helps the Committee in its consideration; if there is any point in our evidence the Committee would like us to clarify or simplify, we would be pleased to hear from the Clerk.

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Yours sincerely

R W Balfour
Convener

cc: Alison Taylor, Clerk to Justice 1 Committee
    Mrs Joyce Lugton, Scottish Executive Civil Justice Department Bill Team Leader
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• the number will rise by 1% per year over next 10 years and that people living longer

ENABLE is the largest voluntary organisation in Scotland of and for people with learning disabilities. ENABLE has a voluntary network of members throughout Scotland with over 500 national members of whom around two thirds have a learning disability. ENABLE also has around 4 000 members in 68 local branches throughout Scotland. It provides an Information and Legal Advice Service and campaigns on behalf of people with learning disabilities and their carers. ENABLE also has a charitable limited company, ENABLE Scotland, which provides a range of services for children and adults with learning disabilities including supported employment, small care homes, community day services and short breaks and out-of-school care for children.

ENABLE has participated in consultations throughout the Millan Committee Review and acknowledges and welcomes the thorough reform of the Mental Health (Scotland) Act 1984. ENABLE continues to be of the view that people with learning disabilities have distinct needs and that they would be better served by specific legislation separate from the legislation dealing with those with mental health problems. However, ENABLE notes that certain sections in the Mental Health Bill are needed now to protect people with learning disabilities until such time as new legislation specifically to address their needs can be introduced.

Existing Sections 106 and 107 of the Mental Health (Scotland) Act 1984

ENABLE – submission to Justice Committee 28 October 2002
Mental Health (Scotland) Bill
ENABLE agrees with the view of the Millan Committee that the existing offences under sections 106 and 107 of the Mental Health (Scotland) Act 1984 are in need of review and reform. In particular, the existing offences are not gender neutral, as they relate only to women, and apply only to sexual intercourse rather than all forms of sexual abuse. Also the definitions and descriptions contained within the sections are extremely outdated. Finally, the maximum punishment is less than is applicable for common law assaults indicating offences against people with learning disabilities are considered less serious.

There has been comment recently that these provisions are no longer required because of changes in the common law. We have considered this very carefully and the proposals in the Mental Health Bill.

**Our understanding of the current legal position in relation to sexual offences**

In March 2002, following a reference by the Lord Advocate, the High Court issued an Opinion clarifying the law of rape in Scotland. The reference was made in response to the trial decision in the Watt case. In that case the accused was acquitted on the basis that establishing sexual intercourse took place without consent was not sufficient to prove a charge of rape. It was also necessary to show that there had been some degree of force or the threat of force. The Court was asked whether or not this decision correctly represented the law of Scotland. It has long been accepted that lack of consent is an essential element of the crime of rape. The question was whether or not something more than the absence of consent was required i.e. actual or constructive force. The Court held that force was not an essential requirement in Scotland.

In the leading judgement the Lord Justice General held that the law of Scotland is as follows:

“(i) the general rule is that the actus reus of rape is constituted by the man having sexual intercourse with the woman without her consent;
(ii) in the case of females who are under the age of 12 or who for any other reason are incapable of giving such consent, the absence of consent should, as at present, be presumed; and
(iii) mens rea on the part of the man is present where he knows that the woman is not consenting or at any rate is reckless as to whether she is consenting”.

The Opinion essentially relates to cases involving the rape of a capable woman over the age of consent. In such cases it is now clear that force is not an essential element. The Opinion contains a comprehensive discussion on the development of the law on rape in Scotland. From these discussions it is clear that the law is well settled in Scotland. Where there is no capacity to consent
then the act of sexual intercourse in itself constitutes rape. Other forms of sexual activity falling short of penetration will be indecent assault.

Despite dissenting with the majority on the issue of force, Lord McCluskey provided a useful and concise summary of the law as follows:

“Thus we find the judges and legal writers of the 18th and 19th centuries discussing what the law as to Rape was in relation to a man’s having sexual intercourse with a very young female child or with a woman whose mental age is that of a very young child. In such cases the judges were well aware that it would be utterly obnoxious to enable the man to say “she consented” or “I did not overcome her will”. So the common law had adopted a familiar legal device: it creates a non-rebuttable presumption that such a female could not “consent” to sexual intercourse. So, in such a case, the issue of consent in fact could not arise: the fact that any such female had agreed to have intercourse was entirely irrelevant: the legal rule was that, regardless of the facts such a person could neither give nor even withhold “consent” in law: actual consent had nothing to do with it…it is the absence of the need to prove that consent was withheld”

These changes to the law may tend to indicate that the common law is sufficient to deal with the circumstances covered by Section 106 of the current Act.

SUBMISSION IN RELATION TO SEXUAL OFFENCES

ENABLE recognises the difficulties in using the law to regulate sexual relationships between adults. Vulnerable members of society should of course be protected from exploitation and abuse. However, the law should also be careful not to infringe on the personal freedoms and rights of those with capacity to make decisions about sexual activity and relationships.

ENABLE is of the view that the difficulties in cases involving people with learning disabilities are not restricted to the question of capacity to consent. There are also issues regarding vulnerability. There is considerable evidence that people with learning disabilities are especially at risk of sexual abuse. In particular people with learning disabilities may be more open to persuasion or to being coerced into sexual activities that they may not in fact want or understand. This may be partly because they are often in relationships or situations where others are in a position of power and partly due to a lack of awareness. Children and adults with learning disabilities may have had limited access to sex education and their ignorance of sexual matters and appropriate relationships can compound their vulnerability. Measures additional to a new criminal law such as increased education should also be considered. ENABLE is currently running a pilot sex education project specifically to tackle this issue but much wider access to this kind of education is needed.
As recognised by the Millan Committee the principles of Non-discrimination and Equality should be borne in mind. These principles mean that legislation specifically directed at protecting people with some level of incapacity should be justified with reference to a particular difficulty that cannot be met by the normal provisions of the criminal law. It is recognised that ideally the common law as stated in the Watt case may in theory protect those with learning disabilities. However, it is the view of ENABLE that given the additional vulnerability of people with learning disabilities it is desirable to put the position beyond doubt by the creation of a new statutory offence. Accordingly, ENABLE is of the view that, despite the need to respect the human rights and sexual freedom of those with learning disabilities, special protection is needed.

ENABLE recognises a potential danger that the existence of a separate statutory offence may mean that sexual offences against those with learning disabilities are seen as less serious than the same offences against those with capacity. This should, of course, not be the case. ENABLE welcomes the fact that the seriousness such offences has been recognised by the increase in penalties which in the proposals are in line with comparable serious sexual assaults. It is considered appropriate that the increased penalties bring these offences into line with the common law offences.

ENABLE is of the view that in the vast majority of cases a common law charge of rape or sexual assault may be appropriate as well the statutory offence. ENABLE notes the lack of availability of statistical evidence that convictions are more common or likely where a person is charged with a separate statutory offence rather than the common law. Accordingly it is suggested that any replacement of the current statutory offence requires to be backed with sufficient resources and measures to allow monitoring of implementation and effectiveness to take place.

Currently carers who are involved in sexual activity with those in their care are committing a criminal offence regardless of capacity to consent. Of course an absence of consent may meant they can also be charged under the common law with rape or indecent assault. ENABLE are of the view that for social and moral reasons it is desirable this remains an offence. Carers are a defined class that can easily identified in relation to their job or position. Accordingly, it is clear to them that certain activities will be considered a criminal offence regardless of capacity. ENABLE agrees with the findings of the Millan Committee that this should remain a criminal offence.

Conclusion

ENABLE recognises that the regulation of sexual behaviour using the criminal law is a contentious and difficult matter. ENABLE can see merit in the argument that if the common law position as set out in the Watt judgement is properly applied then the rights of people with learning disabilities should be adequately
protected. It is also crucial that any new statutory offence should not infringe on the rights of people capable of making decisions about sexual activity and relationships. However, given the increased vulnerability of those with learning disabilities and the difficulties obtaining convictions ENABLE is of the view that it is desirable to put the matter beyond doubt and make the legal position absolutely clear. Accordingly, ENABLE welcomes the inclusion of new criminal offences in the Bill and continues to support the findings of the Millan Committee that the new criminal offences with increased penalties that are gender-neutral and apply to all forms of sexual activity and abuse are a necessary development.

Services designed to promote well-being and social development and assistance with transport

ENABLE notes that section 11 of the 1984 Act has been revised and new provisions included under sections 21 and 22 of the Bill. Section 11 deals with the provision of suitable training and occupation for people with learning disabilities and concomitant transport. We welcome the revised provision and its recognition of the range of activities and day services that are now offered to adults with learning disabilities to aid their ongoing development including assistance with gaining employment. We note also, however, that sections 21 and 22 have been widened to include anyone who has or who has had a mental disorder (thus covering a much wider group of people).

As a result, ENABLE is concerned to note that section 23 of the Bill will make it possible for the first time for local authorities to charge for day services for people with learning disabilities and accompanying transport. Section 11 of the 1984 Act is not included in current charging legislation and regulations which means that such services and transport to such services do not incur charges for service users. Despite this, local authorities have tried to introduce such charges from time to time. On at least 3 occasions, ENABLE has challenged local authorities over charges for day services and transport and charges have been withdrawn.

People with learning disabilities are a disadvantaged group of people, amongst the poorest members of society, and the majority of whom rely on benefit income. Although people always have the potential to continue to learn and develop, by the very nature of their disability, people with learning disabilities will never be 'cured' and are unlikely to move on from requiring specialised support. The pace of their maturity is also slower. People with learning disabilities have a need for continuing education and training long after school if they are ever to reach anything like their true potential.

Many adults with learning disabilities would like to work given the opportunity to do so - both to earn a wage and for the social inclusion it brings. To achieve this goal, most will need assistance from specialist employment services such as those envisaged in section 21(2)(c) of the Bill. If charges are able to be made against the wages or benefit income of someone with a learning disability then
this would be an enormous disincentive to trying out or taking up employment. Other people are not charged for assistance with getting into work through schemes such as New Deal so we regard this as iniquitous. It may also prevent people from using day services and obtaining the support that they need to continue their learning and development and will cause further stress to carers.

**SUBMISSION IN RELATION TO SERVICES DESIGNED TO PROMOTE WELL-BEING AND SOCIAL DEVELOPMENT AND ASSISTANCE WITH TRANSPORT**

ENABLE asks that changes are made to sections 21-23 of the Bill (and if appropriate to section 20) to restore the existing rights which people with learning disabilities have to day services and transport without charge.
I attach the following papers:

**Agenda Items 2 & 4**
Scottish Association for Mental Health (SAMH)  
J1.02.37.02

**Agenda item 7**
Note by the Clerk (Private Paper)  
J1.02.37.11

1st November 2002  
Tony Reilly
General Comment

The Scottish Association for Mental Health (SAMH) welcomes the opportunity to submit our comments to the Justice 1 Committee on Parts 8 – 12 and Part 17 of the Bill. SAMH has already submitted evidence, both oral and written, to the Health and Community Care Committee on other parts of the Bill. We should make it clear that whilst our remit encompasses all people with mental health and related problems, we have no special expertise in relation to users of forensic mental health services.

We appreciate that the nature of legislation, particularly when dealing with an area as complex as mental health, means that it is unlikely to be expressed wholly in plain English. However, as we have already indicated to the Health and Community Care Committee, we believe that the Bill could (and should) have been drafted to make it more accessible. We are concerned that there appears to be an overuse of subparagraphs and cross-references. The complexity of the Bill, and its tight procedural time-scale, may well have the effect of excluding groups and individuals who would otherwise have wished to input into the Parliamentary process.

Subject to our comments below, we are broadly satisfied with parts 8 – 12 and part 17 of the Bill.

Part 1 - Principles

SAMH believes that it is unclear whether it is intended that forensic patients should be covered by the principles contained in part 1 of the Bill. The Scottish Executive’s policy statement, *Renewing Mental Health Law*, seemed to imply that the statement of principles proposed by the Millan Committee would apply to mentally disordered offenders, albeit in a modified form.

We are extremely disappointed that the statement of principles proposed by the Millan Committee has not been incorporated in any recognisable form in the Bill. The importance of having a sound and comprehensive set of guiding principles cannot be overstated. Millan’s principles would give this legislation an ethical underpinning, which would help to ensure that the rights of those who will be made subject to compulsory measures, are properly respected. We believe that the Bill should be amended to include all ten of Millan’s principles. So far as it is possible, these principles should apply to forensic patients.
Part 8, Chapter 2 – Compulsion orders

We note that a compulsion order may be based in hospital or in the community, as with a compulsory treatment order under part 7 of the Bill. SAMH has submitted evidence to the Health and Community Care Committee outlining our opposition to the introduction of community based compulsory treatment orders. Our views are shared by 62 organisations in Scotland which have signed up to a campaign on the Bill led by SAMH. In short, we believe that:

- there is a serious lack of research evidence to support the introduction of community orders;
- the research evidence that exists does not show that community orders provide any better outcomes than well-resourced community services;
- community orders will lead to an increase in compulsion;
- they will be unworkable in practice; and
- the lack of services in the community means that they would be more aptly described as 'community medication orders'.

We appreciate that there may be different considerations in a forensic context. We do not have sufficient expertise in this area to give an informed view as to potential benefits, or risks, of the use of community based compulsion specifically for offenders with mental disorder. We are concerned, however, that it is important to maintain a clear distinction between punishment and treatment and we are unsure whether this is achieved in the Bill.

SAMH is uncertain as to what will be the practical differences between community based compulsion orders, and probation with a requirement of treatment for mental disorder.

Part 8, Chapter 3 – Mentally disordered prisoners

SAMH believes that it is essential that prisoners who require treatment for mental disorder are transferred to hospital as soon as possible. We are concerned about the increasing rate of suicide in prisons.

We believe that s96(6)(d) is rather vague. It enables the Scottish Ministers to prescribe in regulations “any other requirement which may be placed on the prisoner” who is subject to a transfer for treatment direction. SAMH has expressed concern to the Health and Community Care Committee about the extent to which the Bill enables further details to be specified in regulations, the majority of which will be negative instruments.

Part 10 – Patients subject to compulsion orders and restriction orders

SAMH is disappointed that the Bill retains the effect of s1 of the Mental Health (Public Safety and Appeals) (Scotland) Act 1999: that a restricted patient may not be discharged, if the effect of his mental disorder is that it is necessary that he continue to be detained in hospital to protect the public, even if he is not benefiting from treatment. Despite the decision of the Privy Council, we believe that it is wrong in principle that a person be detained in hospital for the purpose of containment, rather than treatment.

We welcome the new right for restricted patients, or their named persons, to apply to the Tribunal to have the restriction order revoked.
Appeals against levels of security

SAMH is concerned that the Bill does not contain a right for patients held in high or medium secure hospital units, to apply to the Tribunal to be transferred to conditions of lower security, as recommended by the Millan Committee. We believe that it is wholly unacceptable that patients, particularly those ‘entrapped’ at the state hospital, are facing unduly severe restrictions on their liberty and freedom because of a failure by the state to provide appropriate facilities.

We note from the Policy Memorandum that the Executive is currently giving consideration to “what further steps might be taken to improve the position” following the recent consultation on the governance of the State Hospital in The Right Place, the Right Time. In our response to that paper, SAMH welcomed the recognition that there is a real need for robust measures to facilitate the implementation of the national policy for mentally disordered offenders. However, we also said that we did not believe that the measures proposed in that paper alone would be sufficient to resolve the issue. We firmly believe that Millan’s recommendation should be implemented in the Bill.

Part 17 – Sexual offences

We welcome the new offences in the part of the Bill. Whilst we appreciate that the Watt case provided an important clarification of the law, we believe that specific statutory offences should be retained as an additional protection for mentally disordered persons.

Financial Memorandum

We note that the Financial Memorandum does not appear to given any specific consideration to the forensic elements of the Bill. We are unaware of any reason as to why this has not been addressed.
Deputy First Minister & Minister for Justice  
The Rt Hon Jim Wallace QC MSP

Christine Grahame  
Convenor  
Justice Committee I  
Scottish Parliament  
George IV Bridge  
Edinburgh  
EH99 1SP

Reserved in Justice 1 Committee  
25 OCT 2002  
(1)  
The Scottish Parliament

22nd October 2002

Dear Minister,

JOINT J1/J2 MEETING ON 17 SEPTEMBER

In the course of the joint meeting on 17 September I offered to follow-up a number of questions which members asked about legal aid and the Protection from Abuse (Scotland) Act 2001.

The Committees raised two particular issues in relation to legal aid: the state of play on research into the impact of the fixed fee system for summary criminal cases; and the arrangements for sanction by the Scottish Legal Aid Board for expert witnesses in civil cases. On the former, my officials sought expressions of interest from the research community at the beginning of the year. Now that the final building blocks of the fixed payments regime – the arrangements for dealing with exceptional cases – are in place, they are drafting the detailed specification for the research project. I cannot yet say when it will begin – much will depend on discussions with the researchers – but I will keep the Committees informed of significant developments.

As far as sanction for experts is concerned, I would certainly be worried if there were significant delays under current arrangements. However, the Scottish Legal Aid Board’s performance is quite good in this respect: last year, some 83 per cent of applications from solicitors were processed within fourteen days. Of course, some applications take longer – often because the Board has to seek further information in support of a request; and sometimes applications are refused. The Board has a duty to satisfy itself that real need exists, and that the proposed course of action represents value for money. In doing so, it has to take proper account of the expense of employing expert witnesses, whether local or from further afield; and of the individual circumstances of the case. That is only right and proper. It is not, however, correct to suggest that there is an absolute cap on what expenditure the Board may authorise in an individual case.

SFA16263
Turning to the Protection from Abuse (Scotland) Act 2001, I have always been clear that the responsibility for implementing this Act was the Executive’s. We issued press releases at the passing of the bill and the coming into force of the Act, so as to give general publicity to the new measure. However, it does not seem to us that it would be useful to have a public campaign which focuses narrowly on the ability in some circumstances to attach power of arrest to interdicts. Rather, we think that we should try to ensure that those giving advice to the public in a wide range of issues should be aware of the Act and be able to give balanced advice on the circumstances in which it may be of help.

I am naturally concerned to hear that knowledge of the Act has not disseminated as widely as we had hoped. I have therefore asked my officials to write to major organisations offering advice in the field, to remind them of the range of legislation available and to offer assistance in preparing training material for their staff. I have also asked officials to consider whether there would be benefit in commissioning articles in legal and voluntary sector journals. While we do not have a specific budget for publicising this Act, we can draw from our budgets for general publicity on Civil Law matters and on domestic abuse.

We will update our domestic abuse leaflets as planned and ensure that they are widely distributed as you suggested. In the context of playground bullying, I am not sure that the use of interdicts with powers of arrest will always be a suitable remedy to suggest. Serious matters should be dealt with by the police or child protection authorities. However, we will liaise with the Anti-Bullying Network to ensure that education authorities and schools are aware of the potential of the Act in exceptional circumstances.

I hope this is helpful. I have written also to Pauline McNeil.
Christine Grahame  
Convenor  
Justice 1 Committee  
Room 3.11  
Committee Chambers  
Edinburgh EH99 1SP

Dear Christine,

SEX OFFENDERS AT CORNTON VALE

At your meeting of 8 October I undertook to advise you of the numbers of females held at Cornton Vale convicted of sexual offences.

I am advised by Cornton Vale that on Friday 25 October 2002 the number convicted for sexual offences (as opposed to Schedule I offences) is currently 1. This prisoner is housed in single cell accommodation.

I hope this information is of use to you.

Yours sincerely,

ALEC SPENCER  
Director Rehabilitation and Care

An Agency of the Scottish Executive Justice Department
To the Scottish Parliament.

**Stow Station Petition**

We, the undersigned, declare that we are concerned that the current proposals for reinstatement of the Borders Railway do not include a stop at Stow. In our view it is essential that the towns and villages of the Borders should be properly served by the railway, and communities such as Stow should have proper access by way of a railway stop on social inclusion, economic and environmental grounds.

The petitioners therefore request that the Scottish Parliament remit the petition to the appropriate committees for consideration, given that the Parliamentary Bill to enable the line to proceed is due before parliament early next year.

We the petitioners have already approached (via Stow Community Council and the Campaign for Borders Rail) the Scottish Borders Council and the Waverley Railway Project for assistance in resolving the issues contained in our petition. Copies of the correspondence are included in Annex 1 of the attached submission.

30th October 2002

Contact details of principal petitioners:

Mr. W.J.L. Jamieson, ‘Sparrow Castle’, 91 Galashiels Road, Stow, TD1 2RQ Tel. 01578 730262

Mrs. Jean Stock, Haypark Lodge, Earlston Road, Stow, TD1 2QT Tel. 01578 730236

Mr. A. Buchan, 209 Galashiels Road, Stow, TD1 2RE Tel. 01578 730237