JUSTICE 1 COMMITTEE

AGENDA

43rd Meeting, 2002 (Session 1)

Tuesday 17 December 2002

The Committee will meet at 1.30pm in the Hub, Castlehill, Edinburgh.

1. **Item in private:** The Committee will consider whether to discuss agenda item 5 in private.

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

3. **Title Conditions (Scotland) Bill:** The Committee will consider the Bill at Stage 2 (Day 2).

4. **Petitions:** The Committee will consider the following petitions—

   Petition PE124 by Grandparents Apart Self Help Group on grandparents’ rights to contact with their grandchildren, and

   Petition PE200 by Mr Andrew Watt on the working methods of the Scottish Legal Aid Board.

5. **Inquiry into legal aid:** The Committee will consider an options paper.

6. **Council of the Law Society of Scotland Bill (in private):** The Committee will consider a draft Stage 1 report.

Alison Taylor
Clerk to the Committee, Tel 85195
The following papers are attached for this meeting:

**Agenda item 2**
Correspondence from Standards Committee regarding unauthorised disclosure of draft report J1/02/43/1

**Agenda item 4**
Note by the Clerk (petition, J1/02/32/06 & SPICe note attached) J1/02/43/2
Note by the Clerk (petition & JH/00/32/8 attached) J1/02/43/3

**Agenda item 5**
Note by the Clerk (private paper) J1/02/43/4
Correspondence from Scottish Women’s Aid regarding legal aid J1/02/43/5
Correspondence from Open Secret regarding legal aid J1/02/43/6

**Agenda item 6**
Note by the Clerk (private paper) J1/02/43/7

**Papers not circulated:**

**Agenda item 3**
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](http://www.scottish.parliament.uk/parl_bus/legis.html)

Copies of the marshalled list will be available from Document Supply, and groupings will be available from the Committee Clerks in Room 3.11, Committee Chambers (both available on Monday 16 December).

**Agenda item 5**
Documents accompanying the correspondence from Scottish Women’s Aid regarding legal aid (Committee paper J1/02/43/5) are available from the Committee Clerks in Room 3.11, Committee Chambers.

**Agenda item 6**
I attach the following papers:

**Agenda item 5**

Evidence from The Law Society of Scotland on Legal Aid  

16 December 2002  

Tony Reilly
Thank you for your letter of 3 December 2002 concerning the alleged unauthorised disclosure of the Justice 1 Committee’s draft report on the Inquiry into the Regulation of the Legal Profession.

The Code of Conduct requires that complaints submitted to the Standards Committee should, inter alia, identify a Member. This requirement in the Code makes the formulation of a complaint of breach of confidentiality problematic where a disclosure has taken place but there is no indication of the source of the alleged ‘leak’. Paragraph 10.2.3 of the Code, however, gives the Standards Committee the discretion to investigate complaints which are not submitted in the prescribed format.

In our 8th Report 2001, The Investigation of Unauthorised Disclosures, we reviewed the current provisions in the Code on confidentiality and the arrangements for investigating ‘leaks’. The Committee noted at paragraph 24 of the Report that in considering whether to exercise its discretion under the Code, it would be useful in the first instance to have the views of the Committee concerned as to the seriousness of the alleged ‘leak’. Paragraph 25 stated

In order to ensure that the Committee concerned plays a key role in the response to an alleged ‘leak’, the Standards Committee has agreed that on receipt of a complaint relating to an unauthorised disclosure which does not name an individual MSP, it will invite the views of the Committee concerned. The Committee’s response will be an important factor in the Standards Committee’s decision as to whether the circumstances of the alleged ‘leak’ warrant a Stage 2 investigation and hence a referral to the temporary Adviser.

I will place your letter on the agenda for the Committee’s next meeting on 18 December 2002. In the interim period, it would be helpful if you could let me have any additional information concerning this matter which you feel the Standards Committee
Committee may find useful in deciding whether or not the alleged unauthorised disclosure should be investigated. In particular, it would be helpful if you are able to obtain the Justice 1 Committee’s views on the following:

- An assessment of whether a full investigation is likely to be productive.

- Information on the circumstances of the alleged unauthorised disclosure. This should include details of attendees at private sessions, details of the timings of the meetings and the timings when Committee members became aware that the media appeared to have access to the information. The Committee should also take a view on the possible sources of the alleged ‘leak’. Are there indications that an MSP was responsible? You will, of course, be aware that the Standards Committee and its Adviser can only examine the conduct of MSPs in relation to an unauthorised disclosure.

- Confirmation that an unauthorised disclosure has actually taken place. An assessment of whether this was a ‘leak’ of confidential information or whether the press coverage could have been put together by a journalist following what had been said in public sessions together with some ‘lucky’ guesswork. A comparison of the material contained in the press coverage with the contents of the actual report would be useful. The assessment should also include confirmation that all those present at the relevant Committee meetings understood that the material was confidential.

Please do not hesitate to contact me if you wish to discuss this further.

Mike Rumbles, MSP  
Convener, Standards Committee
JUSTICE 1 COMMITTEE

Petition PE124 by Grandparents Apart Self Help Groups (GASH)

Note by the Clerk

Background

1. Grandparents Apart Self Help Group (GASH), which had 115 members on 8 March 2000, was set up in 1996 to provide support for grandparents across Scotland who have lost contact with their grandchildren. GASH is a registered charity and aims to promote a network of support groups across Scotland, promote a “buddy” network and to network with other support services.

2. This petition (attached) calls for the Scottish Parliament to amend the Children (Scotland) Act 1995 to name grandparents in the Act as having an important role to play in the lives of their grandchildren. At the moment grandparents are not mentioned in the Children (Scotland) Act 1995.

3. The Committee previously considered the petition at its meeting on 1 October 2002. Committee members may wish to consult both Committee paper J1/02/32/6 and the SPICe briefing from that meeting (both attached) on grandparents’ rights in relation to grandchildren for further background on the current position as regards the petitioner’s request.

4. On the basis of this information, the Committee agreed to write to the Sheriffs’ Association asking them whether they could provide information on the number of applications received and granted to grandparents under section 11 of the Children (Scotland) Act 1995 (‘the 1995 Act’). The Committee also agreed to write to children’s organisations in order to understand the effect that such applications have on the children involved. In addition, the Committee agreed to write to the Minister for Justice to ask for an explanation of policy guidelines regarding the treatment of grandparents in relevant court proceedings and to ask him to outline other options for addressing the issues outlined in the petition if the Scottish Executive does not intend to amend the Children (Scotland) Act 1995 through the forthcoming Family Law Bill.

5. The Committee has now received responses from the Minister for Justice, the Sheriffs’ Association, Children 1st and NCH Scotland (attached). Barnado’s and Children in Scotland were also consulted but advise that they will not be able to respond.

Summary of responses

Number of applications received and granted under the 1995 Act

6. The Sheriffs’ Association replied that they did not know the number of applications received and granted to grandparents under section 11 of the Children (Scotland) Act 1995. From an anecdotal point of view, they suggested that applications by grandparents for residence and contact were frequently
granted. This opinion was supported by Children 1st who suggested that grandparents (especially grandmothers) often sought contact or sought to maintain contact. They suggested that the Committee could consult the Scottish Court Service although they cautioned that this would probably involve the Court Service examining a large number of particular processes. Children 1st stated that they provide reports to courts where care arrangements for children are disputed and state that many of these reports involve grandparents.

Applications for contact rights and effects on children from these applications
7. Overall, the child’s welfare was emphasised by all respondents as the most important factor as regards contact rights to children. Children 1st also felt that children’s rights and interests are of high importance. The Sheriffs’ Association and NCH Scotland believed that that the 1995 Act worked well in this regard when decisions on care and contact for children were made and the Sheriffs’ Association thought that it had revolutionised court procedures with particular mention given to the Child Welfare Hearing procedure.

8. The Sheriffs’ Association stated that parents are often unable to look after their children for various reasons and grandparents can step into this breach although problems over custody often arise when parents resolve their problems and want their children back. This obviously can be an emotional issue with an imperfect compromise eventually reached and family members may be disappointed with the outcome.

9. Children 1st thought that the issue of the role of grandparents is complex. They stated that children may express distress at lack of contact with grandparents and equally with other family members. Conversely, children also may not want contact with grandparents due to lack of a relationship or other relationship problems. Another point raised by Children 1st is that grandparents can play a role in facilitating contact between parents and their children in number of ways, some beneficial and some not.

Grandparents rights to contact with children and court proceedings
10. The Sheriffs’ Association believes that there would be difficulties in introducing grandparental rights stating that it would be difficult to impose ‘grandparental rights’ without corresponding ‘grandparental responsibilities’. The Minister for Justice and the Sheriffs’ Association both highlight that grandparents are currently in same position as any other party, e.g. parents, as regards actions for residence and contact with children in that they must demonstrate that it is in the child’s best interests that such rights be given.

11. NCH Scotland and Children 1st also do not think it appropriate to change legislation to give grandparents automatic rights and responsibilities to their grandchildren as it is currently given to parents under the 1995 Act. Children 1st highlight the importance of giving the children involved priority in decisions regarding contact rights. Both children’s organisations who responded emphasised the desirability of continuity and a family environment for the childrens’ development. NCH Scotland mentioned that first degree members of the extended family (such as grandparents) are often not always contacted when decisions are made regarding care for children. They emphasise the importance
of doing this as they consider care by relatives to be less detrimental to the child than reception into care although they highlight care should be taken with every individual case to ensure this is the correct situation. NCH Scotland suggest that the interests of grandparents should be more explicitly acknowledged and promoted in guidance to sheriffs and social workers and that any guidance should also apply to Children’s Hearings as these have the power to remove children from their homes.

Other methods of responding to petitioner’s requests
12. The Minister states that the proposed Family Law Bill will seek to promote joint parenting where appropriate and in the interests of the child which he hopes will reduce conflict and promote contact between children and their wider family. The Minister has also undertaken to ensure that contact between children and family will be re-examined in the context of the Bill.

13. The Minister, NCH Scotland and Children 1st all suggest mediation as an existing method of facilitating contact between children and their grandparents without introducing a change to the law. The Minister believes that mediation is invaluable for reaching agreement on matters of contact with children without going to court and can be used for different parties including grandparents. Children 1st use Family Group Conferencing in six of their projects as a method of bringing families together which includes grandparents. NCH Scotland believe that court should be the last resort for such cases involving rights to children and are of the view that more assistance should be given to children and their guardians to achieve agreements over contact rights. They suggest much more could be done to promote informal agreement between parents and carers before cases are taken to court. They also suggest more funding should be offered to family mediation services so grandparents and other key family members can access these services without charge and gain extra support in these matters.

Procedure

14. 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

15. In summary, all respondents are content with the current legislation and do not believe the petitioner’s requests (to name grandparents in the 1995 Act as having an important role to play in the lives of their grandchildren) is the way forward. However, various wider issues have been raised and the Committee may wish to finalise their consideration of this petition by:

- forwarding the suggestions of NCH Scotland on the importance of the interests of grandparents in cases involving rights to children to the Sheriff Court Rules Council and the British Association of Social Workers (Scotland)
• writing to the Minister for Justice to suggest that arrangements for grandparents and the wider family circle to be included in family mediation and increased resources for such mediation should be considered in the proposed Family Law Bill or any other similar future legislation and
• writing to the petitioner to advise what action has been taken (copying all recent correspondence) and therefore concluding the Committee’s consideration of the petition.
Dear Christine,

Thank you for your letter of 10 October, inviting my views on a petition submitted to the Committee by Grandparents Apart Self Help (GASH).

The petition calls on the Scottish Parliament to amend the Children (Scotland) Act 1995 to name grandparents as having an important role to play in the lives of their grandchildren. I agree that the wider family can play an important role in the lives of children, and I have great sympathy for those grandparents who, through no fault of their own, do not have the contact they would like. I also appreciate the strength of feeling on this subject.

Families come in many forms, and difficulties usually arise not from people having or not having automatic legal rights, but from disagreements about what to do in practice. I fear that it might lead to confusion and disputes if grandparents or other family members were named in law as having a role to play. Under the current law, grandparents can apply to the courts for an order regulating contact with their grandchildren. This is a more favourable position than that of grandparents in England and Wales who have to seek leave of the court to apply for such rights. I am not convinced that it is necessary or desirable to change the law in this area.

In any court proceedings, grandparents would be treated the same as any other party. If it is apparent in an application to the court that the grandparents have an interest in the matter then they should be given notice of the proceedings. However, this is a matter for the court to decide.

My officials have been looking at ways in which contact between grandparents and grandchildren could be facilitated without a change to the law. I believe that mediation can be invaluable in helping parties to reach agreement about matters such as contact without going to court. Although usually a service for separating or divorcing parents, it can be used by grandparents and others with an interest in the future of the children involved.
The proposed Family Law Bill will seek to promote joint parenting, where this is appropriate and in the best interests of the child. It is hoped that this will reduce conflict and promote continuing contact between children and their wider family. Contact between children and other family members, including grandparents, is one of the many issues that will be looked at again when taking the Bill forward.

I hope that this is helpful to the Committee.

Sincerely,

[Signature]

HM WALLACE
Dear Ms Grahame

PETITION PE124 BY GRANDPARENTS APART SELF HELP (GASH)

You ask for information on the number of applications received and granted to grandparents under Section 11 of the Children (Scotland) Act.

The short answer is that we do not know. You could ask the Scottish Court Service, though we doubt whether they could provide the information you seek without examining a large number of particular processes.

From our own experience, we can say that applications by grandparents for residence and contact orders are fairly common and that when made they are frequently granted. It is often the case, sadly, that the parents of children cannot look after them properly, typically as a result of drug or mental health problems, and the court is often relieved to find that there are grandparents who can step into the breach. Difficulties often arise when the parent or parents claim that they have solved their problems and ask the court to restore children to their care.

You also ask, more generally, for our comments on the matter.

The Children (Scotland) Act is firmly based on the UN Convention on the Rights of the Child. It is a good Act and works well. It has led to a quiet revolution in court procedures, with its emphasis on its overarching principles that the child's interests are paramount, that attention must be given to the views of the child and that orders should only be made if it be better that they be made than that there should be no order at all. In addition, the flexibility of the Child Welfare Hearing procedure enables courts to deal with cases in a pro-active and constructive way, in contrast to the antagonistic procedures that were
Cases involving children are associated with strong emotions and attitudes on the part of the people involved, including members of extended families. The outcome is often a compromise that is less than ideal. It is unfortunately the case that people who are disappointed with the outcome feel that they have been unfairly treated.

Parental rights are associated in the Act with parental responsibilities. It is difficult to see how a statute could confer "grandparental rights" on all grandparents without imposing on all grandparents corresponding "grandparental responsibilities". The position of grandparents, in actions for residence and contact, is no different from that of a natural parent who has not taken the appropriate steps to obtain parental rights. They too have to show that it in the child's best interests that an order should be made. Even where an applicant has parental rights, the application of the overarching principles may operate to cut down or deprive them of such rights.

We have read the transcript you kindly sent us. We regret that there appears to be some fairly serious misunderstanding on the part of some of the members of the committee of the nature and function of the court in dealing with these matters. For that reason, we would like to make certain matters clear. These are points that should be generally understood, not just in relation to cases under the Children (Scotland) Act.

Sheriffs do not have "policy guidelines". Sheriffs apply the law, as set out in legislation and in authoritative decisions of higher courts. Each case is decided on its own merits, in accordance with law and on the facts of the particular case. Where there is a dispute about the facts, the facts of each case may be decided solely on the evidence in the case.

Anyone appearing before a sheriff is guaranteed a "fair and public hearing...before an independent and impartial tribunal established by law" (Article 6 of the European Convention on Human Rights). The constitutional guarantee of fairness, independence and impartiality of courts is supported by the rule that the court must not proceed on personal or private knowledge of matters in issue. The litigant must be confident that his case is being decided on the evidence of witnesses whom he himself has seen and heard in open court, not by "experts" relying on their private opinions or prejudices, or on undisclosed policy, rather than on opinions and evidence openly stated and capable of being tested in cross-examination or other questioning.

The principle of judicial independence is a corollary of the constitutional guarantee of fairness, independence and impartiality. No member of the Executive can impose policy or guidance on members of the judiciary. "Guidelines" may only be imposed by law, appropriately enacted or interpreted in authoritative decisions.
The role of the sheriff principal appears also to be misunderstood. The sheriff principal, sitting as a judge, may issue judgments in which his statements of the law, where they are part of the reason for his decision, are binding on sheriffs within his jurisdiction. Apart from that, he has no right to tell sheriffs how to decide their cases. That, too, would infringe judicial independence and the constitutional guarantee of a “fair and public hearing...before an independent and impartial tribunal”. The sheriff principal has important administrative functions to perform, to secure speedy and efficient disposal of sheriff court business, but his power to instruct sheriffs is limited to “instructions of an administrative nature” (section 15 of the Sheriff Courts (Scotland) Act 1971).

The court can always order intimation of actions to be made to persons who appear to have an interest to join in the action as a party. It is not necessary, and undesirable, that the categories of persons on whom intimation is automatically made should be extended, especially if it involved intimation to large numbers of people who most likely would not want to be involved.

Finally, we would respectfully remind the committee that most sheriffs have almost daily experience of the workings of the Children (Scotland) Act with all its ramifications. They have frequent opportunities to discuss the way in which these cases are dealt with, often under the auspices of the Judicial Studies Committee (which also produces material “by judges and for judges”). They also keep themselves informed by inviting collaboration at seminars and the like from persons with expert knowledge of children and children’s issues. But the decisions they take in individual cases are matters for them and them alone.

Yours sincerely

[Signature]

SHERIFF H MATTHEWS QC
Information for the Justice 1 Committee  
Petition PE124 by Grandparents Apart Self Help (GASH)

For over 100 years, CHILDREN 1ST has been working to give every child in Scotland a safe and secure childhood. CHILDREN 1ST supports families under stress, protects children from harm and neglect, helps them recover from abuse and promotes children’s rights and interests. We currently run 22 projects throughout Scotland in which our staff and volunteers work with children and their families to overcome difficulties in their lives. Our other activities include ParentLine Scotland, the national telephone helpline for any parent with any concern in caring for their children.

Grandparents

1. We believe that this issue should properly be viewed in terms of children’s rights and interests. We recognise the important role grandparents and, indeed, other significant adults, play in the lives of many children. We use Family Group Conferencing in 6 of our projects as a method of bringing together the extended family to work together and find a way through problems in children’s best interests, and grandparents are often involved in our Family Group Conferences.

2. Our Children and Families Project in Falkirk helps children who are seriously affected by their parents' separation. As well as helping children to explore their thoughts and feelings, we provide reports to courts where care arrangements for children are disputed. Many of our reports feature grandparents, who may be involved in a range of ways. For example, grandparents can often play a role in facilitating contact between children and their parents – ‘handovers’ of children between one parent and the other may take place in the grandparents' house and this can avoid the need for parents to see each other. Alternatively, a parent may object to the child or children spending time with a grandparent out of concern that visits are being used as a ‘back-door’ way of enabling contact for the parent’s ex-partner, rather because the parent wishes to deny children and grandparents contact with each other.

3. In our experience, grandparents – particularly grandmothers – often seek contact or seek to maintain contact. They can do this as part of an existing court action, rather than raising an action in their own right, and this alerts the sheriff to their interest.

4. In our work with children, some do express distress that they no longer see their grandparents. However, in our experience it is equally true that loss of contact with other significant adults following parental separation – such as aunts and uncles, ex-second partners of parents and even neighbours – can also be very difficult for children we work with. Children we work with at the Falkirk project do
not always want to continue to see their grandparents – either because their grandparents were not significantly involved with them prior to their parents’ separation and the relationship is not a close one, or because of some other problem with the relationship. Children may not feel able to express their desire to see, or not to see, their grandparents because they are worried about upsetting one or other of the parents.

5. The role of grandparents thus raises very complex issues. In all our work we try to ensure that the child’s own views and wishes are heard by adults making decisions about them. The children we work with may find it difficult to talk to parents for fear of upsetting one or the other. Children often feel they have no say in decisions being made about them by adults, and arguments and bad feelings between parents and other family members cause children huge distress and anxiety. We therefore believe it is of vital importance that children’s views are not only prioritised in proceedings relating to their care and their contact with other adults, but taken in an appropriate way, separately and confidentially from those of the adults involved. The Falkirk Children and Families Project supports children in expressing their views, but not all children receive such support.

6. We believe that, as a matter of good practice, children’s views should be sought and due consideration should be given to the potentially stabilising and positive role that grandparents (and indeed, other significant adults) may play in a child’s life, when decisions are being made about the care and supervision of children in their best interests – whether following parental separation or in the context of child protection. The UN Convention on the Rights of the Child recognises the desirability of continuity in a child’s upbringing and the importance of a family environment to the full and harmonious development of a child’s personality.

7. In view of the above, we do not feel that it is appropriate to give grandparents automatic rights and responsibilities – that is, parental responsibilities and rights. The involvement of grandparents in the lives of their grandchildren must be contingent on this being in the best interests and wishes of the children involved.
Dear Christine Grahame

Petition PE 124 by Granparents Apart Self Help

Thank you for asking us to comment on this petition in relation to the interests of children involved in these situations. NCH manages a number of family mediation services UK wide and also hosts a government funded website ‘It'snotyourfault’ for children involved in divorce and separation. In addition to our mediation work, we are involved with children in the middle of family conflict, divorce and separation, and with children in the care system. In Scotland, our mediation services, which are accredited by the UK College of Mediators and affiliated to Family Mediation Scotland, work towards the child/ren’s best interests by direct work with children and with their parents and other significant adults.

It is our view that much more help should be given to parents and children and other key carers/relatives where they cannot amicably agree arrangements for care of and contact with their children. Court should be the last resort and is not the best place to resolve any but the most intractable of cases. However, where the courts are involved in making decisions about care and contact, we believe
that the Children (Scotland) Act 1995 does provide a good foundation for decision making.

We do believe that grandparents and other members of the extended family can be very important in protecting children and enhancing their welfare and that their participation in children’s lives should be encouraged, except in very rare cases.

However, we would not favour extending to grandparents the same rights and responsibilities that are accorded to parents under the Children Act. Grandparents and other family members can currently apply for contact orders and for parental responsibility and residence orders. We do appreciate the difficulties and expense that this can involve and believe that instead of a change in the law, the interests of grandparents should be more explicitly acknowledged and promoted in guidance to both Sheriffs and to social workers.

Firstly, grandparents should be notified of any applications in relation to a child/children, so that they can be represented. Secondly, guidance to social workers and others advising the courts should explicitly require that grandparents and other first degree members of the extended family should be notified of applications and their views and wishes sought and formally recorded.

It is even more important that contact is made with grandparents and primary members of the extended family in cases where the child/ren are subject to care proceedings. Any guidance should also apply to Children’s Hearings, which have the power to remove children from home. Too often, grandparents are not traced or contacted when children come into care and when subsequent decisions are made about their future care, which can include the termination of their parents’ rights and responsibilities and/or the granting of adoption applications.

It is quite clearly in a child’s interests that, where their birth parent/s are not able or willing to look after them, key relatives are informed of any proceedings and of decisions about their care. Care by relatives is nearly always better than reception into care, and should therefore always be pursued in the child’s best interests. The child’s best interests can be very difficult to decide, where there is strong family conflict, including violence. However, we would urge that the complexity of family conflicts does not absolve decision makers and their advisors from making the fullest possible enquiry in order to arrive at the best possible arrangement for the children’s future care and contacts. No assessment is complete without a full exploration of the wider family potential to meet the child/ren’s needs.

The child/ren’s views are important, and it is usually wrong to go against a child’s strong and clearly expressed wishes, but it is equally important that children are not made to carry the responsibility of decision making.
In our view much more could be done to promote informal agreement between parents and carers before cases are taken to court. The children’s interests should be strongly represented and advocated. This is often only possible where the child has been engaged in a process which allows them to know and to express their own views and to be helped to convey these to parents and others who are ‘fighting over them’ without listening to them.

Cases usually only go to court when informal agreement can not be reached between the parents/main carers. Positions are often entrenched and conflict between two parents can and does often extend to the wider family on both sides. Orders made can be resented by one or more of the parties and this is not the best basis to promote the welfare of the children involved.

Grandparents should have access to free advice and to mediation services in relation to contact with their grandchildren. The Committee might therefore consider asking the Justice Department what arrangements they make for the wider family to be considered within family mediation, which they fund.

In summary, therefore we do not believe that the law itself needs to be changed, but that guidance should be so that in practice grandparents are notified and involved. We also support extra funding for family mediation services and for these services to explicitly be offered to grandparents and other key relatives.

Yours sincerely

Maggie Mellon
Head of Public Policy
NCH Scotland
Background

1. Petition PE200 (attached) by Andrew Watt calls for the Scottish Parliament to review the working methods of the Scottish Legal Aid Board (SLAB) particularly in relation to the collection and disbursement of compensation monies collected. The petition is prompted by the petitioner's own difficulties in obtaining compensation monies awarded to him. The petition is supported by Patricia Ferguson MSP and was referred to the Justice and Home Affairs Committee on 31 May 2000.

Consideration by the Justice and Home Affairs Committee

2. The JHA Committee first considered the petition at a meeting on 13 June 2000 and agreed to write to SLAB asking for clarification of current working practices in relation to reimbursement of compensation, and to write to the petitioner informing him that the Committee intended to conduct an inquiry on legal aid and access to justice in due course.

3. In its response of November 2000 (see letter attached), SLAB explained the legal framework within which the Board operates and set out the process followed in this regard. It stated that any contribution, which a person assisted by legal aid requires to pay, is paid into the Board’s fund. Fees to solicitors and other outlays are paid out of this Fund and any expenses or property received from the other party to the proceedings is paid into the Fund. Under the relevant Regulations, subject to prescribed exemptions, the Board has a statutory duty to ensure that any net liability or loss to the Fund is met. The Board stated that the purpose of the rule is to avoid the taxpayer carrying the expense of a case and to ensure a legally aided party is not in a better or worse position than a privately paying litigant. It also stated that it will collect and hold funds recovered only until the net liability to the Fund has been discharged. After that, any funds received by the Board will be distributed as soon as practicable to the assisted person.

4. The JHA Committee considered this response at its meeting on 8 November 2000 and agreed to write again to SLAB noting its intention to review its Treasury management arrangements and associated regulations to establish whether there are ways to ensure the earlier release of funds to assisted persons, welcoming the Board’s commitment to publish improved guidance, and asking that the Committee be kept informed of progress made in this regard.

Consideration by the Justice 1 Committee

5. SLAB wrote to the Justice 1 Committee on 30 May 2001 (see letter attached). In its letter it states that it has now carried out a detailed review of its policies and
practices relating to how it should deal with property preserved or recovered in the course of legally aided proceedings. It explains that these policies and procedures are based on statute, case law and opinion of counsel and that it has found that a number of issues arose under each heading. In March 2001, the Board decided to consult with appropriate representatives of practitioners in relevant areas of legal practice and then to seek opinion of counsel on the areas identified. Once that opinion has been received, SLAB would be able to issue guidance for the public and the legal profession on its current practices relating to how property recovered or preserved is dealt with in legally aided cases. It hoped to issue the guidance in the Autumn 2001.

_Justice 1 Committee’s Report on Legal Aid_

6. On 19 June 2001, the Committee decided to defer consideration of the petition until SLAB issued guidance on how property recovered or preserved is dealt with in legal aid cases. Further consideration was given to the issues raised in the petition during the Committee’s inquiry into legal aid. The Committee published its report on Legal Aid Inquiry on 7 November 2001 (Justice 1 Committee, 8th Report 2001, Report on Legal Aid Inquiry SP Paper 437). The Committee made a commitment to examine the guidance to be issued by SLAB on property recovered or preserved in due course and decide whether to make any recommendations on this issue at that time.

_Current Position_

7. SLAB wrote to the Committee on 4 May 2002 enclosing a copy of the ‘Guidance on Property Recovered or Preserved’ which was issued to all legal aid practitioners on 18 April 2002 (attached). In addition, SLAB wrote to the Committee on 24 May advising that senior counsel had confirmed that “the Board’s practice was essentially correct and consistent with the approach taken by the Legal Services Commission” (indicating that there is a unanimity of approach in relation to clawback across the UK). This guidance clarifies the position regarding property recovered and preserved and aims to ensure that solicitors understand and follow the procedures set out. Such guidance might help to speed up the process by providing the right information to SLAB at an early stage. However, it does not mean that cases such as Andrew Watt’s will necessarily be settled more quickly as this depends on factors such as the cost of the case, whether expenses have been awarded (and paid), whether any capital sum awarded has been paid and how. It is also worth noting that the guidance is aimed at practitioners, and that SLAB hopes to issue guidance for applicants “in due course”.

8. Measures which may address the issues raised by the petition include the introduction of legislation to sever the link between net liability and disbursement of monies or property awarded to the court. Alternatively, in cases such as Mr Watt’s, the Executive could change the exemptions in section 33 of the 1996 Regulations to include compensation payments or introduce hardship payments in such cases.
Procedure

9. 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

10. The Committee may wish to consider whether the issuing of guidance to practitioners and the effect of senior counsel’s opinion addresses the petitioners concerns about delay in disbursement of monies. The Committee may wish to:

   • write to SLAB to establish timescales for the production of guidance on property recovered and preserved aimed at applicants;
   
   • write to the Executive asking if it has any proposals to change the law in this area to allow SLAB to disburse compensation monies faster;
   
   • take the opportunity to pursue SLAB procedures and possible changes in law relating to property recovered or preserved within the context of the follow-up to its legal aid report; or
   
   • write to the petitioner informing him that SLAB has reviewed its procedures and taken steps to ensure that the regulations are understood and applied correctly and efficiently, advising that the Committee has concluded its consideration of the petition.
Dear Ms Grahame

Re: Legal Aid Inquiry

I refer to my telephone conversation with Jenny Goldsmith regarding the enclosed papers. As discussed, I am writing on behalf of Scottish Women’s Aid to ask that, as a matter of urgency, your Committee re-open its enquiry into the Legal Aid System in Scotland.

As you are no doubt aware, there are currently discussions taking place regarding a new fee structure for solicitors and we believe that a proposal to introduce block fees for civil Legal Aid cases is due to be agreed by the Law Society. While we do not disagree with a review to consider uprating the fees solicitors receive for the work they do, it is imperative that any decisions taken regarding changes be open and transparent and that the interests of consumers should be at the centre of these changes. The Law Society were asked for a copy of the proposals, in order to assess the impact on our service users, but they advised that they were unable to provide us with this information. We are, therefore, gravely concerned that the current process is not transparent and that the proposals will, amongst other issues, result in a lack of accountability, lessen the likelihood of contributions being returned to applicants, and reduce the amount of non-court work paid for, all of which will be seriously detrimental to the vulnerable women, children and young people who use our service.

We believe that this issue is due to be decided by the end of the year and would ask that your Committee re-open its inquiry into the Legal Aid system, to ensure that these changes can be properly scrutinised. As stated, the way the proposals currently stand, many vulnerable people are likely to be disadvantaged, or even excluded outright, from accessing the help that solicitors currently provide. We understand that the Cross Party Group on Men’s Violence Against Women have also written to the Committee to voice their concerns over this matter.

We have enclosed, for your information, various papers, including the Law Society’s Draft Proposal To Members, submitted to us by the Association of Independent Legal Accountants. Also enclosed are their own briefings on the matter, which highlight many of our own concerns.

We thank you in anticipation of your assistance and look forward to hearing from you.

Yours sincerely,

H. Louise Johnson  National Worker (Legal Issues)
For Scottish Women’s Aid

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Scottish Women’s Aid Company No. 129433. Registered in Edinburgh at Norton Park, 57 Albion Road, Edinburgh EH7 5QY
Recognised by the Inland Revenue in Scotland as an organisation with charitable status, which offers information, support and refuge to abused women and their children.
Scottish Women’s Aid is the national office for Women’s Aid in Scotland. We are a feminist organisation and we aim to end violence against women. With all affiliated local Women’s Aid groups in Scotland, we exist to promote the interests of abused women and their children and provide an accessible and effective network and service. If you are not already a supporter, please help us by making a donation, or contact us for information about other ways of supporting our work.
15 November 2002

Christine Graham MSP
Convenor Justice 1 Committee
Committee Chambers
George IV Bridge
Edinburgh
EH99 1SP

Dear Christine

Legal Aid Inquiry

I am writing on behalf of Open Secret to ask that your committee reopen its enquiry into the Legal Aid System in Scotland.

As you are no doubt aware there are currently discussions taking place regarding a new fee structure for solicitors. We believe that a proposal to introduce block fees for civil legal aid cases is due to be agreed by the law society. While we agree that there needs to be some uprating of the money solicitors receive for the work they do we believe that any decisions taken regarding changes should be open and transparent and that the interests of consumers should be at the centre of these changes.

We believe that this issue is due to be decided by the end of the year and would ask that your committee reopen its inquiry into the legal aid system so that these changes can be properly scrutinised. The way the proposals currently stand many vulnerable people could end up losing out on the help that solicitors currently provide.

Yours sincerely,

Pauline McGee
Development Officer
Ms. Jenny Goldsmith,
Assistant Clerk, Justice 1 Committee,
The Scottish Parliament,
Room 3.11 Committee Chambers,
EDINBURGH EH99 1SP

By e-mail

Dear Ms. Goldsmith,

JUSTICE 1 COMMITTEE MEETING 17th DECEMBER - LEGAL AID

The Society has just seen the letters from Scottish Women’s Aid and Open Secret to the Convener of Justice 1 seeking a re-opening of the Legal Aid Inquiry.

There are a number of inaccuracies both in the premises and conclusions in the letters submitted to the Committee. At such short notice it is difficult to provide you with a comprehensive picture of the civil legal aid reform proposal, which has emerged as a result of 18 months of consultation and negotiations between the Society, the Scottish Executive and the Scottish Legal Aid Board.

As it transpires however, there is a scheduled meeting between the Society’s negotiators, the Executive and the Board tomorrow afternoon at 3 p.m. and in consequence we would be in a position to offer a short briefing to the Committee at, or prior to, their next meeting.

However, we are conscious of the constraints on the Committee’s time as they will be of ours given the scheduled meeting referred to. Nonetheless, if you do wish to meet with us tomorrow please let us know as soon as possible in the morning.

Yours sincerely,

Mrs. Moira Shearer
Law Reform Assistant