JUSTICE 1 COMMITTEE

AGENDA

15th Meeting, 2003 (Session 2)

Wednesday 3 December 2003

The Committee will meet at 10.00am in Committee Room 2.

1. **Criminal Procedure (Amendment) (Scotland) Bill**: The Committee will take evidence on the general principles of the Bill at Stage 1 from—

   John Ewing, Chief Executive, John Anderson, Principal Clerk of Session and Justiciary, and Norman Dowie, Deputy Principal Clerk of Justiciary, Scottish Court Service;

   Gerard Brown, Convener, Michael Meehan, Member, and Anne Keenan, Secretary, Criminal Law Committee, the Law Society of Scotland;

   Patrick Fordyce, President, Scottish Law Agents Society.

2. **Freedom of Information (Scotland) Act 2002**: Michael Matheson will report to the Committee in relation to the Scottish Executive consultation on the draft code of practice under section 60 of the Act.

Alison Walker
Clerk to the Committee
Tel: 0131 348 5195
The following papers are attached for this meeting—

**Agenda item 1**

Note by the Clerk (private paper) (to follow)  
Written submission from the Law Society of Scotland (to follow)

**Agenda item 2**

Note by the Reporter and the Clerk

**Papers for information circulated for the 12th meeting, 2003 (session 2)—**

Criminal Procedure (Amendment) (Scotland) Bill: Responses—
  - Scottish Legal Aid Board  
  - Society of Writers to Her Majesty’s Signet  
  - Apex Scotland  
  - HM Inspectorate of Constabulary for Scotland

Scottish Executive, *Post-Council Report on the Justice and Home Affairs Council of EU Ministers, 6 November 03*

**Documents not circulated—**

Copies of the following have been provided to the Clerk:

- Scottish Executive Health Department, *Proposed change to the Fitness Requirements for employees of services regulated by the Care Commission – Consultation Paper*;
- Scottish Executive Health Department, *Subordinate legislation relevant to Regulation by the Care Commission of Adoption and Fostering services under the Regulation of Care (Scotland) Act 2001 – Consultation Paper*;

Copies of these documents are available for consultation in room 3.11 CC. They may also be obtainable on request from the Document Supply Centre. Scottish Executive documents are available on the Executive’s website (www.scotland.gov.uk).

**Forthcoming meetings—**

Monday 8 December – joint visit with the Justice 2 Committee to HM Prison Kilmarnock
Wednesday 10 December – Justice 1 Committee
Wednesday 17 December – Justice 1 Committee
Draft Code of Practice Under Section 60 Freedom of Information (Scotland) Act 2002

Note by the Reporter and the Clerk

Background

1. The Freedom of Information Act 2002 received Royal Assent on 28 May 2002. The purpose of the Act is to establish a legal right of access to information held by a broad range of Scottish public authorities; to balance this right with provisions protecting sensitive information; to establish a fully independent Scottish Information Commissioner to promote and enforce the freedom of information regime; to encourage the proactive disclosure of information by Scottish public authorities through a requirement to maintain a publication scheme and to make provision for the application of the freedom of information regime to historical records. The Act provides for two codes of practice to be issued by the Scottish Executive one on records management and one relating to authorities’ functions under the Act.

2. This paper relates to the Scottish Executive’s consultation on the draft Code of Practice under section 60 of the Freedom of Information (Scotland) Act 2002, which sets out how authorities should carry out their functions under the Act.

3. The former Justice 1 Committee scrutinised the Bill and produced a Stage 1 report which contained a number of recommendations relating to the Codes of Practice. At its meeting on 8 October, the Justice 1 Committee agreed to appoint Michael Matheson as reporter, to report to the Committee on whether the Code addresses the issues raised by its predecessor committee.

Code of Practice

4. The Act stipulates that the Code must address:

- Provision of advice and assistance by the authorities to persons who propose to make, or have made, requests for information;
- The transfer of requests by one authority to another by which the information is held;

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1 Consultation on the Draft Code of Practice Under Section 60 of the Freedom of Information (Scotland) Act, Justice 1 Committee paper (J1/S2/03/9/9)
• Consultation with persons to whom information requested relates or with persons whose interests are likely to be affected by the disclosure of such information;
• The inclusion in contracts entered into by authorities of terms relating to the disclosure of information; and
• The collection and recording by authorities of statistics as respects the discharge by them of their functions.

Approach to evidence gathering

5. In order to ascertain whether the recommendations made by the former Justice 1 Committee have been taken on board, it was necessary to undertake a comparison of the Stage 1 Report on the Bill and the draft Code of Practice issued for consultation. In addition to this, it was considered useful to look at the responses provided to the Executive from some of the organisations which gave oral evidence to the former Justice 1 Committee to be informed about of the type of issues being raised at this time. The Scottish Consumer Council and the Campaign for Freedom of Information kindly provided copies of their responses to the Executive. These are attached at Annex A and B respectively.

6. To further inform consideration of the draft Code of Practice within a wider context, it was considered beneficial to speak to Mr Maurice Frankel, Director of the Campaign for Freedom of Information, to gain an insight into how the Scottish Code of Practice compares with the UK Code. This discussion also proved useful in exploring the issues around the Committee’s recommendations as inevitably some time has passed since the consideration of the Bill.

7. The outcomes of these investigations are set out below.

Evidence

Duty to provide advice and assistance

8. The former Justice 1 Committee recommended that the codes of practice should define what it is reasonable to expect the public authority to provide in terms of advice and assistance to the applicant. The Committee expected such a definition to comply with equality legislation.\(^3\)

9. Paragraphs 10 and 11 of the draft Code refers to equalities issues under the heading “means of providing information”. Part II of the draft Code sets out in some detail what it is reasonable to expect the public authority to provide in terms of advice and assistance.\(^4\)

\(^3\) Justice 1 Committee, Stage 1 Report on Freedom of Information (Scotland) Bill, 1st Report, 2002, SP Paper 488, page 5, para 22

\(^4\) Draft Code, page 9, paras 16 - 21
Means of providing information

10. Section 11 provides that, where the applicant expresses a preference for the information held by an authority to be supplied in any of the means specified in that section, the authority must supply it in the format requested, provided it is “reasonably practicable” to do so, giving reasons if it does not. In determining what is reasonably practicable, an authority may have regard to all circumstances, including costs.

11. The Committee was of the view that it would be advantageous to include a reference to the Disability Discrimination Act 1995 (DDA) in the codes of practice when setting out the definition of “reasonably practicable.”

12. It is made clear in the draft Code that authorities should be observant of the DDA legislation, “Authorities should note, when considering the means of providing requested information, that whereas in almost all circumstances a written response will be appropriate, they should have due regard to their existing duties under the Disability Discrimination Act 1995 (DDA) and other legislation.” In addition, the draft Code states that the cost of responding to a request in alternative format should not be passed onto the applicant and the draft Code gives advice on accessibility of authorities’ websites for those people that have disabilities.

13. Although the draft Code deals with the Committee’s recommendation in many respects, there is still a question about what is “reasonably practicable”. It is suggested by Mr Frankel that as the Code stands this aspect could be quite demanding for public authorities to meet. The Committee may wish to seek clarification of potential costs in relation to producing information in an alternative formats and whether this aspect could be made clearer in the guidance.

Excessive cost of compliance

14. The Committee believed that the codes of practice should set out how the ‘excessive cost of compliance’ provision should be interpreted to ensure that it is not abused by public authorities as a convenient way of avoiding providing information. The Committee recommended that the initial request should be dealt with and that the information requested should be made accessible to the public.

Calculation of charges

15. The Committee was concerned that in the absence of clear guidance on how to charge for the production of information, there would be variance between different public authorities. The Committee therefore

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6 Draft Code, page 7, para 10
recommended that guidance on how to charge for the provision of information should be included within the codes of practice.\(^8\)

16. The draft Code refers authorities in the main to the Fees Regulations.\(^9\) It is difficult to determine whether the former Committee’s concerns have been resolved without sight of the Fees Regulations. As such a number of questions have arisen that need to be clarified, such as how to ensure consistency of charging will be maintained across public authorities. Mr Frankel pointed out that one authority may have an efficient records management system, while another may not. It therefore might take one authority longer to retrieve information in relation to a similar request than another. The Scottish Consumer Council also has concerns about uniformity of charging across authorities.\(^10\) **The Committee may wish to recommend that Fees Regulations focus on encouraging consistency of charging. Additionally the Committee may wish to ensure that charging policy is closely tied to the records management draft code of practice and that the Committee has sight of the Fees Regulations before they are laid before Parliament. It might also be useful for the Committee to ask the Executive when the Regulations will be available.**

17. Section 9 of the Act provides that a fee is not to exceed such amount as may be specified in, or determined in accordance with, the Regulations. There may be occasions where the upper cost limit is exceeded but where the release of information would be in the public interest. **The Committee may therefore wish to request that the draft Code provides guidance to public authorities where the cost limit is exceeded, but it is in the public interest to disclose the information requested. In relation to this issue, the Committee may also wish to inquire how the upper cost limit will be determined.**

**Formulation of Scottish Administration policy**

18. The Committee recommended that the codes of practice should encourage the Scottish Administration to disclose background information on the formulation of policy as early in the process as possible.\(^11\)

19. Part III of the draft Code sets out a number of factors which may inform a decision about whether the release of information is in the public interest. For example, one of the factors referred to is that disclosure would enhance scrutiny of decision making processes and thereby improve accountability and participation. It seems therefore that the

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\(^8\) Justice 1 Committee, Stage 1 Report on Freedom of Information (Scotland) Bill, 1\(^{st}\) Report, 2002, SP Paper 488, page 5, para 57
\(^9\) Draft Code, page 16, paras 52-53
\(^11\) Justice 1 Committee, Stage 1 Report on Freedom of Information (Scotland) Bill, 1\(^{st}\) Report, 2002, SP Paper 488, page 5, para 75
section on the public interest test\textsuperscript{12} goes some way to addressing the Committee’s concerns, but it could go further. It is interesting to note the position in Wales with regard to the decision making process. The Welsh Cabinet minutes are published within 6 weeks of the meeting taking place. This policy was introduced by Rhodri Morgan, First Minister of the Welsh Assembly in March 2000\textsuperscript{13} and is still operating today.\textsuperscript{14} The Committee may wish to ask the Executive whether it has considered the Welsh Assembly’s approach to the decision making process in Scotland and why the former Justice Committee’s recommendation has not been addressed in the guidance.

\textit{Commercial interests and the economy}

20. The Committee recommended that a tight definition of what constitutes “commercial interests” should be contained within the codes of practice.\textsuperscript{15}

21. Paragraphs 41 to 49 provide guidance on this issue. Paragraph 46 sets out in clear terms that public authorities should not accept confidentiality clauses when entering into contracts with non-public authorities, wherever possible.

\textit{Interface between the UK Act, the Scottish Legislation and the Data Protection Act 1998 and training}

22. The Committee recommended that clear guidance on the application of these statutes should be contained within the codes of practice and that the Commissioner should play a strong role in ensuring that both public authorities and members of the public are clear on which provisions apply to the information they are seeking.\textsuperscript{16}

23. The Committee also believed that the training of staff within public authorities will be key to the successful operation of the freedom of information regime and strongly recommended that guidance on training staff should be contained within the codes of practice. Without such training, the intentions of the legislation would be undermined.\textsuperscript{17}

24. The introduction to the draft Code states that it is “essential that all relevant personnel are familiar with its provisions, the associated Codes of Practice and any guidance on good practice issued by the Scottish Information Commissioner. Authorities should ensure that

\textsuperscript{12} Draft Code, page 18, paras 64-65
\textsuperscript{13} Newspaper Article, The Guardian, 15 March 2000. Link to article: http://politics.guardian.co.uk/wales/story/0,9061,443776,00.html
\textsuperscript{14} Welsh Cabinet Decision Reports, Open Government. Link to most recent Welsh Cabinet minutes: www.information.wales.gov.uk/process/opengovt-e.asp
\textsuperscript{15} Justice 1 Committee, Stage 1 Report on Freedom of Information (Scotland) Bill, 1\textsuperscript{st} Report, 2002, SP Paper 488, page 5, para 83
\textsuperscript{16} Justice 1 Committee, Stage 1 Report on Freedom of Information (Scotland) Bill, 1\textsuperscript{st} Report, 2002, SP Paper 488, page 5, para 132
\textsuperscript{17} Justice 1 Committee, Stage 1 Report on Freedom of Information (Scotland) Bill, 1\textsuperscript{st} Report, 2002, SP Paper 488, page 5, para 144
appropriate staff training is provided. In planning and delivering training authorities should be aware of other provisions affecting the disclosure of information such as Environmental Information Regulations and the interaction between the Act and the Data Protection Act.¹⁸

25. The campaign for Freedom of Information highlight that those making a request may do so without the knowledge that they have a statutory right to request information.¹⁹ The Committee may wish to consider recommending that the draft Code is strengthened to encourage officials to advise those making requests for information that they have a statutory right to do so.

26. Expanding on this theme to make the disclosure process more transparent, it is also suggested by the Campaign for Freedom of Information in its response to the Executive that a disclosure log would be of assistance to applicants. This would help to publicise important precedents and would also help with consistency across authorities.²⁰ The Committee may wish to consider supporting this recommendation.

27. It is understood from Mr Frankel that in the UK Code of Practice, training is dealt with in the foreword and therefore does not constitute part of the Code. As such, the Committee may wish to confirm that the introduction forms part of the draft Code and should be treated as such by public authorities.

**Freedom of information officer**

28. The Committee recommended that the codes of practice should stipulate that public authorities must designate a freedom of information officer and that this person should have a strong role to play in promoting freedom of information within the public authority.²¹

29. To some extent this has been addressed in the draft Code, “Authorities may wish to consider designating a specific individual as Information Officer, through whom all requests for information could be channelled or, if appropriate, setting up a discrete unit to handle requests. This does not detract in any way from the responsibility of all staff to provide advice and assistance to applicants.”²²

30. The Committee may wish to request the Executive to review the drafting of this paragraph to make clear the principal responsibilities of the Freedom of Information Officer. It is important that a public authority designates a specific freedom of information officer, however in most cases it will be impractical for all

¹⁸ Draft Code, Introduction, page 5
¹⁹ Annex B, The Campaign for Freedom of Information, Response to the Executive, page 1
²⁰ Annex B, The Campaign for Freedom of Information, Response to the Executive, page 1
²² Draft Code, page 7, para 7
requests to be channelled through the freedom of information officer as suggested. The freedom of information officer should have responsibility within the public authority for compliance with the Act and the Code of Practice, be the first contact point for the Commissioner and offer advice to authority officials in relation to more complex requests.

**Conclusion**

31. The draft Code of Practice is welcomed for setting out detailed guidance to assist public authorities in carrying out their functions under the Act. It is further appreciated that the draft Code provides information on how to deal with vexatious requests\(^{23}\) and repeated requests\(^{24}\) which goes beyond what is required by the Act.

32. In relation to the former Justice 1 Committee’s consideration of the Freedom of Information (Scotland) Bill, most of the issues highlighted during its passage through the Parliament have been addressed by the draft Code. There are however a few areas where the draft Code could be strengthened and where further clarification might be necessary.

33. The Committee is invited to write to the Executive requesting that:

- **Alternative formats**
  - the situation regarding potential costs for producing information in alternative formats is clarified and set out in the guidance as appropriate;

- **Charging**
  - consistency of charging is addressed in the guidance and that this section is linked to the records management draft code of practice;
  - guidance is provided for when the cost limit is exceeded, but where the disclosure of the information is in the public interest;
  - information is provided to the Committee on what mechanism will be used to determine the upper cost limit;
  - the Committee has sight the Fees Regulations before they are laid before Parliament and when they will be available;

- **Scottish Administration policy formulation**
  - an explanation is provided as to why the former Justice 1 Committee’s recommendation on disclosure of Scottish Administration policy formulation has not been addressed in the guidance;

\(^{23}\) Draft Code, page 10, para 22
\(^{24}\) Draft Code, page 10, para 23
Training and education

• the draft Code is strengthened to encourage officials to advise those making requests for information that they have a statutory right to do so;
• clarification is provided on whether the introduction forms part of the draft Code for the purposes of ensuring public authorities undertake appropriate training of staff;
• the Executive considers reviewing the paragraph relating to the responsibilities of a freedom of information officer; and
• the Executive includes guidance on setting up a disclosure log.
INTRODUCTION

The Scottish Legal Aid Board (“the Board”) welcomes the opportunity to submit evidence to the Justice Committee on the general principles of the Bill. The Board’s response is restricted to commenting on legal aid issues arising from the Bill. The Board welcomes the modernisation of solemn criminal procedure proposed in the Bill.

SUBMISSION

Cost Implications

The Board has already submitted detailed submissions to the Finance Committee regarding the financial implications of the proposals in the Bill. Those submissions are annexed to this paper. In those submissions, the Board identified that the procedural changes created by the Bill have the potential for cost savings, although the net cost has been estimated to be one million pounds per year for the first 2 years. Minor administrative costs were also identified.

Disclosure of evidence

The Bill has not legislated for the disclosure of Crown statements or evidence. At present, the defence solicitor requires to take statements from Crown witnesses. The Board pays the solicitor for time spent taking the statement, and the number of pages generated. It is believed that substantial sums are currently spent on precognition work in solemn cases. Earlier research by the Board indicated that around 40% of the fees paid to solicitors in solemn criminal cases were attributable to the taking of precognitions.

The Board considers that early disclosure by the Crown is a cornerstone to achieving effective and efficient reform of High Court business. Disclosure will lead to substantial cost-savings in legal aid expenditure, by ensuring that the defence solicitor does not need to take unnecessary statements. The solicitor would also have a clearer picture of the Crown case at an earlier stage. Although it would be hoped that trials could be shortened, a risk of lengthier trials has been identified.

In the absence of any legislative requirement, the Board would hope procedural or operational changes are planned which will lead to early disclosure of greater information by the Crown, reducing the need for replication of work by the defence.

Meeting between Crown and defence

The Bill does not require a mandatory meeting between the Crown and defence prior to the preliminary hearing. The White Paper proposed a managed meeting, a record of which would be lodged in court. Whilst the Bill does require a written record of the state of preparation to be lodged prior to the preliminary hearing, it would appear that discussions between the Crown and defence would not require to take place at a meeting. The Board would hope that meaningful discussions do take place, to focus issues in dispute at as early a stage as possible.

Trial in absence of accused
Section 11 allows for the trial to proceed, even though the accused is not present. The Bill
envisages 2 distinct scenarios. Firstly, the accused may previously have instructed a solicitor, who is still in a position to proceed. If the accused had been in receipt of criminal legal aid, there may still be a valid legal aid certificate still in force. However, the question will arise as to whether a solicitor would be willing to proceed in the absence of a client. Secondly, the court will have the power to appoint a solicitor. It is not clear how such a solicitor and counsel instructed by him, would be remunerated. The Board considers that an amendment is required to Section 22 of the Legal Aid (Scotland) Act 1986, to create automatic criminal legal aid, to cover this situation. Automatic criminal legal aid would allow the court-appointed solicitor to start work immediately he is appointed by the court.

**Reluctant witnesses**

Section 12 makes various provisions to ensure the attendance of reluctant witnesses at trial. The reluctant witness is entitled to be heard by the court, but it is not clear if it is envisaged that this would require representation by a solicitor and counsel. If so, no legal aid provision exists for representation of the reluctant witness. The witness is not a person who is being prosecuted, and therefore criminal legal aid is not available. It is also unclear whether the criminal legal aid provisions for appeals will be applicable to reluctant witnesses. Criminal legal aid can be made available for appeals against “other disposal”. The Board considers that the Scottish Executive should make assistance by way of representation (ABWOR) available for reluctant witnesses. This would not require amendment to primary legislation.

**CONCLUSIONS**

The Board is happy to provide the Committee with any further information it may require.
The Scottish Legal Aid Board

Criminal Procedure (Amendment) (Scotland) Bill

Financial Implications for the Fund: Basis of Costings

The Criminal Procedure (Amendment) (Scotland) Bill contains a number of provisions substantially implementing the recommendations of Lord Bonomy’s Report on the Review of the High Court of Justiciary. Not all of the provisions impact on the Legal Aid Fund. The provisions which are likely to have an impact on the Fund have been identified in the following tables and, to the extent possible, costed. The system envisaged by the Bill will be very different from the current system, requiring certain assumptions to be made. These are annexed to the tables relating to costs and potential savings. Calculations have been based on the experience of Board staff and available statistics.

Provisions impacting on Legal Aid costs

The key areas which, it is anticipated, will impact on legal aid costs are:

1. Introduction of a mandatory preliminary hearing. This does not presently exist and will involve additional costs in the form of fees of solicitors and counsel for attendance at court and preparation.

2. Provision for a managed meeting between the Crown and the defence. Although in some cases such a meeting does take place from time to time prior to the first hearing, the proposals envisage a meeting as a matter of course. This, again, will involve the time of solicitors and counsel and, therefore, additional costs.

3. It is proposed that preliminary hearings should generally be held in Edinburgh and Glasgow rather than elsewhere in Scotland. If preliminary hearings are held in Edinburgh/Glasgow rather than, say, Aberdeen, Inverness or Dumfries, this will involve travelling on the part of the solicitor who will normally be situated near the local court. On the other hand, counsel’s place of business is in Edinburgh and the additional costs of solicitors’ travel are likely to be offset by the savings in counsel’s fees travelling from Edinburgh to the local courts elsewhere in Scotland.

4. New procedures for accelerating diets. The further procedure will involve additional fees payable to solicitors and counsel but only involves written work.

5. Payments to counsel to remain available for fixed trial diet. One of the benefits of the proposals is that trials be set down for a particular day rather than the current system where the trial may proceed at any stage over the period of the “sitting”. To ensure the availability of counsel and to avoid a situation where counsel has commenced a trial in another case, say the day before, some provision may have to be made for payments to counsel to remain available to ensure the trial can proceed.

The areas in which there is potential for savings are:
1. It is proposed that the Sheriff's sentencing powers be increased from three to five years and that there be a corresponding transfer of cases from the high court to the sheriff and jury court. High court cases are more expensive and the transfer of cases to the sheriff court is likely to result in savings to the Fund.
A substantial element in the higher costs of high court proceedings compared to sheriff court solemn cases is the involvement of counsel. Junior counsel is automatically available in terms of the legal aid legislation in high court proceedings. This is not the case in sheriff court proceedings and the prior authority of the Board (referred to in the legal aid legislation as the “sanction” of the Board) would be required before junior counsel would be available in a sheriff and jury case. Counsel will not always be necessary, nor indeed appropriate, in the cases which are being transferred from the high court to the sheriff court. Some cases are raised in the high court not due to any inherent complexity of the case but due to the record of the accused and, therefore, the likely sentence. The additional costs of counsel in the cases to be transferred to the sheriff court where counsel has been sanctioned has been factored in and set against the savings.

2. Pre-trial pleas/early settlement. The proposals anticipate an increase in pre-trial pleas of guilty and early settlement as a result of the earlier availability of information and increased communication between Crown and defence. The avoidance of a trial will produce savings.

3. Reduced number of adjournments. The Report draws attention to the significant number of adjournments in the high court. Any savings on the number of adjournments will result in savings to the Legal Aid Fund given that the payments from the Fund are largely in respect of fees for solicitors and counsel for attendance at court.

The current system where a case is set down for a “sitting” of the high court and can proceed at any time during the period of the sitting will be replaced by a system where a date will be set when the trial will commence. It is likely that this will lead to savings on legal aid costs as there are occasions when solicitors and counsel require to attend the court at various stages throughout the sitting but where the case does not call and is not identified as an adjournment as such.

4. It is intended that cases be adjourned for sentence to the local court. It is considered that this will be cost neutral as the additional costs for counsel to travel to, say, Aberdeen or Dumfries, will be offset by a reduction in solicitor’s travelling time.

**Basis of Costings**

More detail on the assumptions used in the costings are annexed to the appendices.

Calculations have been made on current fees structures and tables. It should be borne in mind, and factored into these figures, that *Graduated Fees* proposals for counsel are under consideration by the Executive and discussions will require to take place at some stage regarding solicitor’s fees in solemn proceedings. Although Lord Bonomy does highlight the issues as to the availability of experienced counsel and the perception that fees do not reflect the work done, these initiatives do not arise from the Bonomy Report or its implementation. Any new fees structures will be subject to separate costings.
Due to the lack of available relevant data a number of assumptions have required to be made to arrive at the “potential” savings. These potential savings assume there would be no other changes to solicitor’s or counsel’s practices of which account has not otherwise been taken.
**Basis of payment of solicitors and counsel**

The costs to the Fund are largely incurred by expenditure on fees for the time of solicitors and counsel. It might be helpful, therefore, to briefly outline the basis on which solicitors and counsel are paid.

For solemn cases in either the high court or the sheriff court solicitors are paid per hour for individual items of work carried out eg. conducting a trial, preparation, perusal of documentation, meeting with client, letters, telephone calls etc.

Counsel are paid per day. This payment subsumes not only the conduct of the trial or hearing but also the preparation for it and other ancillary work, which is not individually chargeable, in connection with correspondence, perusal of documentation etc. No matter where counsel live, their place of business is Edinburgh and there is a prescribed fee for a “trial per day” in Edinburgh. Higher prescribed fees, increasing the further the court is from Edinburgh and subsuming travel, subsistence and accommodation, are laid down for Glasgow, elsewhere within 60 miles from Edinburgh, “Aberdeen, Inverness or Dumfries” and outwith 60 miles from Edinburgh. The cost of counsel, therefore, increases the further the court is from Edinburgh. Counsel are also paid for consultations and for a limited number of individual pieces of work.

Although the legal aid regulations lay down prescribed fees for counsel, there is provision for the fees to be increased because of the particular complexity or difficulty of the work or other particular circumstances.

**Conclusion**

Much of the Bill deals with the introduction of mandatory preliminary hearings in the High Court. Together with the formal exchanges between prosecution and defence which precede them and with other new procedures designed to increase flexibility, and ensure earlier availability of information to the defence, these clearly have cost implications for the Legal Aid Fund. The underlying approach to the costings is that there will be additional costs to the Fund generated by the additional procedures but that there is the potential for savings from the greater efficiencies which the proposals consider can be delivered to the process. The greater the efficiencies and, in particular, reduction in the number of adjournments, more cases settled before trial and shorter trials, the greater will be the savings. However, the greatest source of potential savings will be the transfer of cases to the sheriff court.

The costs outlined in Appendix 1 to the submissions will be incurred from the outset due to the introduction of the various procedures which have been identified. Whilst additional costs will be incurred immediately, especially over the transitional period, the compensating savings are likely to be more gradual. There is, however, the potential for savings from the outset which are
likely to increase as the system develops beyond the transitional stage and the new procedures have the opportunity of bedding in. Earlier provision of information to the defence, more time to prepare, disposal of procedural matters at the preliminary hearing and fixed trial diets can all lead to savings in the time of solicitors and counsel.

It is difficult to be more precise about the level of costs and savings to the Legal Aid Fund. However, the estimate of net costs of £1 million per year for the first two years is prudent although, perhaps, at the higher end of the spectrum and should be able to accommodate unforeseen additional costs which cannot be anticipated at this stage. Thereafter, and assuming that the system operates as intended, the effect on the Legal Aid Fund is likely to be cost neutral.

We think there will be some minor additional staffing requirements in view of the increased number of sanction requests for the employment of counsel in the sheriff court.

JDH/CS
30 October 2003

Appendix 1 Costs
Appendix 2 Savings
APPENDIX 1

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<tr>
<th>Costs</th>
<th>Assumptions</th>
<th>Total £’000</th>
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<tbody>
<tr>
<td>1. A mandatory preliminary hearing</td>
<td>1</td>
<td>575,000</td>
</tr>
<tr>
<td>2. Managed meeting</td>
<td>2</td>
<td>300,000</td>
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<tr>
<td>3. Travel costs for cases where preliminary hearing held in Edinburgh or Glasgow</td>
<td>3</td>
<td>Nil</td>
</tr>
<tr>
<td>4. New Procedures for accelerating diets</td>
<td>4</td>
<td>25,000</td>
</tr>
<tr>
<td>5. Payments to counsel to remain available for fixed trial diet – “retainer fee”.</td>
<td>5</td>
<td>100,000</td>
</tr>
<tr>
<td>6. Estimated Total Costs</td>
<td></td>
<td>1,000,000</td>
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Note: All calculations based on 1,667 cases (Annual Report 2001/02)

Assumptions

1. About one-third of cases currently have either a hearing on a minute of postponement or a preliminary diet. It is understood that the mandatory Preliminary Hearing may be lengthier and could involve greater preparation. We have therefore assumed that this will be an additional cost in 66% of cases and an increased cost in the remaining one-third of cases. All the Board’s assumptions have been based on 1,667 high court cases during the year 2001/2002, taking into account the likely costs of solicitor’s and counsel’s time.

2. We have assumed, on the same number of cases, one managed meeting per case and taking into account the likely costs of solicitors and counsel. A meeting already takes place in some cases so the total additional cost may be lower than stated.

3. Based on the same number of cases we have calculated the likely difference between counsel attending court in Glasgow and Edinburgh as against courts further afield. We have set against this the likely savings in costs incurred by solicitors requiring to travel to Glasgow or Edinburgh. The calculations suggest this provision will have a cost neutral outcome.

4. The procedure it is understood will involve the defence contacting the Crown and being involved in the preparation of a joint written application to the court to accelerate the diet. We have assumed 10% of cases featuring this procedure which is probably an upper figure.

5. It is difficult to assess the likely costs involved. On the basis that the proposals allow for a “stand by” fee to ensure the availability of counsel, calculations have been carried out on the basis of the prescribed fee for a day being paid in 20% of cases. Again this is likely to be an upper figure.
APPENDIX 2

<table>
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<tr>
<th>Savings</th>
<th>Assumptions</th>
<th>Total (£’000)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Cases remitted from High to</td>
<td>1</td>
<td>1,000,000</td>
</tr>
<tr>
<td>Sheriff Court.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2. Pre-trial pleas – early</td>
<td>2</td>
<td>150,000</td>
</tr>
<tr>
<td>settlement</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3. Reduced No. Of adjournments</td>
<td>3</td>
<td>100,000</td>
</tr>
<tr>
<td>4. Adjournments held in same</td>
<td>4</td>
<td>Nil</td>
</tr>
<tr>
<td>court</td>
<td></td>
<td></td>
</tr>
<tr>
<td>5. Total Savings</td>
<td></td>
<td>1,250,000</td>
</tr>
</tbody>
</table>

Note: All calculations based on 1,667 cases (Annual Report 2001/02)

Assumptions

1. High court cases are much more expensive than sheriff court cases. The average cost of a High Court case includes the tranche of cases which are of a very high value. We have assumed these will largely continue to be heard in the High Court. For the purposes of this costing exercise we have therefore taken the average cost of the High Court cases “pushed down” to be at the lower end of High Court cases, and deducted the average costs of a Sheriff Court solemn case.

On the other hand, more cases in the Sheriff Court will involve counsel, a prime element in the cost, and this has to be added back in again. Not all cases moved down to the Sheriff Court will require counsel. We have assumed 20% of High Court cases being pushed down to the Sheriff Court.

2. Our estimations (based on manual sample of cases) are that 75% of the case costs will have been incurred at the pre trial plea stage. Savings have therefore been based on the assumption that 25% of High Court cases may plead x 25% of average case costs (savings to be made) in solemn cases.

3. The savings in the reduced number of adjournments has been arrived at using the tables produced on page 133 of Lord Bonomy’s Report. Cases in excess of 2 adjournments (which has been adopted as a break even point allowing for the new compulsory preliminary hearing and one adjournment, to err on the side of caution) have the ability to produce savings. We assumed that the new provisions will reduce the cases involving 3 or more adjournments by 75%.

4. Counsel’s fees (if sanctioned to appear) are likely to increase as a result of this proposal. The vast majority of cases are adjourned for sentence to Edinburgh/Glasgow at present which means counsel will charge significantly less than they would if adjourned to the “local court” in say Aberdeen/Dumfries. It is, however, likely to be cost neutral overall in any given case as increased costs of counsel will be offset by savings on local solicitor’s costs given the solicitor may not need to travel.
26\textsuperscript{th} November 2003

Douglas Thornton Esq
Assistant Clerk
Justice 1 Committee
The Scottish Parliament
EDINBURGH
EH99 1SP

Dear Mr Thornton

RESPONSE BY THE SOCIETY OF WRITERS TO HER MAJESTY'S SIGNET TO THE CRIMINAL PROCEDURE AMENDMENT (SCOTLAND) BILL

This response is submitted on behalf of the Society of Writers To Her Majesty’s Signet. The response was drafted by a team lead by Vincent Belmonte W.S., Solicitor Advocate.

The Society recognises and welcomes the aims of the Executive in the proposals contained in The Criminal Procedure (Scotland) Bill.

In democratic civilised societies it must however be recognised that the Rule of Law involves the right to a fair trial, and the separation of powers in particular between the Executive and the Judiciary.

1. PRELIMINARY HEARINGS

It is important in understanding the intentions of the Executive to note that the effect of the system of Preliminary Hearings in the High Court will take from the Lord Advocate the responsibility of managing the progress of trials in the High Court. The Crown will not now indict the accused to attend an assize of the court for trial but will indict the accused for a Preliminary Hearing only. Thereafter management of the case is taken over by the Court. Importantly both the Crown and the Defence will be obliged to lodge with the Court not less than 2 days before the Preliminary Hearing a written report of their respective states of preparation.

We are familiar with the operation of Preliminary Diets in the past dealing with historic preliminary pleas and more recently with the disposal of issues and Minutes of Proposed Cross-Examination of Witnesses in cases where Section 274 and Section 288 C of The Criminal Procedure (Scotland) Act 1995 applies.

However a new requirement has been placed on the Defence to advise the Court which of the Crown Witnesses are required to attend the Trial.

It has become clear and was recognised by Lord Bonomy in his Report (5.9/5.16) that the Defence to a large extent are dependant on early disclosure of Witnesses, Productions etc. by the Crown, but that in many cases the issuing of Provisional List of Witnesses and Productions and
indeed the augmentation of these Lists at a late stage under the terms of Section 67 of the 1995 Act inhibit the Defence preparation. The Defence cannot be expected to agree to release Witnesses from their Citation unless they are aware of the evidence which that Witness is expected to give and it is to be hoped that the Court will bear this in mind when conducting Preliminary Hearings.

The Court are to fix the Trial Diet which will be a fixed date and not an Assize.

This is greatly to be welcomed since the Assize system is so far as members of the public are concerned (ie jurors and witnesses) the source of considerable inconvenience.

In general the Society welcomes Preliminary Hearings.

2. TIME LIMITS

These are the most controversial proposals altering the hallowed “Jewel in the Crown” 110 day rule of which the Scottish nation is justifiably proud. Lord Bonomy (9.1et seq.) indicates that the true Jewel in the Crown is the 80 day rule requiring the accused to be liberated forthwith if an Indictment is not served on him within 80 days. Under the present 110 day rule if the accused is not brought to Trial within 110 days he is forever “free from all question or process” for that offence.

To do away with that protection on the basis that it is “an unjust outcome for Human Error” (9.21) or “a technical breach” (Criminal Procedure (Amendment) (Scotland) Bill Police Memorandum paragraph 3 ) is absurd.

Consider the proposed safeguards:-

(a) The Extension of the Time Bar to 140 days from 110 days.

(b) A period of 2 months between service of the indictment and the expiry of the Time Bar.

(c) The necessity of the Crown to consider their state of preparation and provide a written statement thereof to the court 2 days prior to the proposed Preliminary Hearing, which should alert the Crown to time bar difficulties.

(d) The power of the Court at the Preliminary Hearing on cause shown to extend the 140 days.

(e) The fact that breaches of the Time Bar resulting in the accused obtaining the existing relief are rare (9.21).

It is the view of the Society that if the Crown fail to bring a case to trial in the 140 days under the above proposed procedure then it would amount not to a mere technical breach but to unacceptable delay from an objective viewpoint in the interests of the accused or inexcusable oversight by the Crown and should not be sanctioned.
So far as extending the period from 110 days to 140 days the Society, with some hesitation, believe that it may allow for a better and smoother process of preparation and therefore should be agreed. Remand prisoners are presumed innocent and therefore every effort should be made to reduce the period of remand before trial as much as possible rather than to extend it.

3. TRIAL IN THE ABSENCE OF THE ACCUSED

The Society does not accept that it is in the Interests of Justice to proceed to trial in the absence of the accused in serious matters under Solemn Procedure. It has always been recognised that an accused person must be in a position to “instruct his Defence”.

A solicitor, solicitor advocate or advocate appointed by the Court in the absence of the accused could only put the Crown to its probation. Without instructions directly from an accused person how could any of the special defences ie self defence, alibi, incrimination be properly presented? The Executive have not produced details of the number of cases which did not proceed because of the permanent absence of the accused. Where an accused at liberty absconds he will usually be apprehended on warrant and remanded for subsequent trial. This appears to the Society to be an adequate sanction and the Society is not convinced that there is any evidence to support such a radical departure from normal procedure.

4. PRELIMINARY PLEAS AND PRELIMINARY ISSUES

The Society believes that the proposed restrictions under Section 79 (2) (b) (1v) (v) (v1) are too wide and too vague. These are matters which the Society believes are matters which should be left to the trial judge. The Society believes that these provisions conflict with the Judge’s overriding duty to ensure the fairness of the trial.

5. INCREASED POWERS OF THE SHERIFF

Lord Bonomy in his Report indicates that if this proposal is to be brought into effect that there will be consequences in respect of representation of accused persons. The Society believes that if this proposal is to be brought into effect then the Executive should concurrently implement his proposals on sanction for Counsel or Solicitor Advocates in Sheriff Court Cases and should provide a proper level of remuneration therefore.

The Society is generally concerned that Criminal Law and Procedure in Scotland is becoming more draconian and more labyrinthine in its complexity.

The Executive should consider the kind of Society which it wishes to create in Scotland. A free and democratic Society is only the sum of liberties of all its citizens. The Executive should be careful not to regard the criminal justice system as a mere extension of police powers.

The Society would be happy to supplement this response with oral evidence if that was thought to be of assistance to the Committee.
Yours sincerely

R JOHN ELLIOT
DEPUTY KEEPER OF THE SIGNET
Apex Scotland is a national voluntary organisation that aims to reduce (re) offending by working with (ex) offenders and young people at risk to address their employability needs and progress them to a positive outcome.

We welcome the proposals outlined in the Bill to achieve fairness and efficiency in the High Court.

In particular, we welcome the proposal to use existing powers to remove from the High Court cases that could be dealt with by Sheriffs.

We also welcome the proposal to introduce fixed trial dates instead of the present system of sittings, so that victims and witnesses know exactly when they will need to come to court.

In order to be effective, justice and punishment needs to be delivered timeously, as soon as possible after the commission of an offence. Apex staff invest many hours of effort in working with our clients to engage with them and build relationships, to raise their low expectations and to make them aware of employment choices open to them.

All too often, our clients have progressed to employment, training or further education and addressed their needs associated with offending behaviour, when they find themselves summoned to court at short notice and sent to prison for an offence that was committed a long time ago. No account is taken of the progress they have made in resolving their difficulties and moving on in their lives.

This not only affects the future motivation of our clients, but is also disappointing for the staff who work with them.

We believe that tighter timescales will therefore greatly assist the process of effective rehabilitation and social and economic inclusion.

Please do not hesitate to contact us should you require further information or clarification.

Bernadette Monaghan
Director
Apex Scotland.
Dear Mr Thornton

CRIMINAL PROCEDURE (AMENDMENT) (SCOTLAND) BILL

I refer to you letter dated 10 October 2003 regarding the above and having considered the document would offer the following by way of comment.

Section 1 – Preliminary hearings

The introduction of mandatory preliminary hearings as proposed is to be welcomed. However, if such hearings are to succeed in achieving their stated aim of delivering more focussed trials with fewer members of the public and professional witnesses being unnecessarily inconvenienced, I believe it important that there should be measures put in place that will be able to quickly and accurately identify any shortcomings or strengths in these new procedures.

Section 2 – Written record of state of preparation in certain cases

A requirement on prosecutor and the accused’s legal representative to jointly lodge a written record of their state of preparation with the Clerk of the Justiciary two days before the preliminary hearing should be of assistance in the preparation of cases and the appointment of trial diet. I note however, that the Bill allows for later submission and makes no mention of what would happen if there were to be a failure on the part of one or both parties to submit the written record. Is it envisaged that such a failure could lead to the application of sanctions or penalty? Would it be considered a contempt of court?

Section 4 – Prohibition on accused conducting case in person in certain cases

For many people giving evidence in court is a stressful experience. These proposals should provide a degree of additional support and comfort to victims of these crimes.
Section 5 – Engagement, dismissal and withdrawal of solicitor representing the accused

Instances of accused persons either failing to engage the services of a solicitor or dispensing with these services are not uncommon and often lead to delays in the judicial process. Measures that can address this situation are therefore welcome. The proposals within the Bill may be of assistance in this regard but there is a lack of clarity as to whether or not there is a limit to the number of occasions on which such adjournments could or should occur in these circumstances.

Section 9 – Time limits

The proposals to extend time limits and put an end to the situation where an accused person can, for all time, escape prosecution on a particular charge or charges due to a breaching of a time limit are to be welcomed. The provision of a window of an additional 30 days should ensure that there is sufficient time for the parties to complete preparation and address the current situation where a significant number of cases have to be adjourned or re-programmed, inconveniencing those involved in the case and undermining confidence in the criminal justice system. Public confidence in the ‘system’ should also be enhanced by the second abovementioned proposal. However, I do have some concern in relation to the proposal that an accused person be entitled to bail if the 80, 110, or 140 day limits are breached by the Crown. When an accused person first appears in court and is remanded in custody, that decision to deprive them of their liberty is one which is given the fullest consideration by the court with each case judged on its individual merits with due cognisance being given to factors such as the seriousness of the crime and the likelihood of the accused absconding or interfering with witnesses. I believe the same criteria should apply if a time limit is breached and on no account should bail be granted automatically.

Section 11 – Trial in the absence of the accused

I am supportive of this proposal. The mere fact that this power to hold a trial in the absence of an accused person will exist may well encourage potential absconders to attend. As such, it may prove to be the case that the power to proceed in the absence of an accused will rarely be used and, as is well documented, there appears to be no inconsistency with Strasbourg jurisprudence or ECHR.

Section 12 – Reluctant witnesses

Research has shown that witness problems are one of the most common causes of adjournments and as such measures to ensure witness attendance are to be welcomed. There is, however, a lack of clarity within the Bill in regard to the proposed measures.

Clause 12, at subsections 1 and 2, states that a warrant may be issued to apprehend a witness if, “having been duly cited to any diet in the proceedings, fail to appear at the diet; and no just excuse for failing to appear is given by or on behalf of the witness.” The wording is clear and unambiguous, a warrant can be granted when a duly cited witness fails to attend a diet without just excuse. Subsection 3 muddies the water somewhat as it applies “if the court is satisfied...that the witness is not likely to attend.” This appears to go beyond a mere failure to attend and could be taken to imply that action can be taken to deal with future, as opposed to past conduct.

Section 64 of the guidance notes accompanying the Bill indicates that there is an intention within the proposals to deal with those instances where a witness has deliberately avoided citation. I assume
that it is this behaviour that Subsection 3 is intended to address. Clarification is required that this is indeed the case and also in regard to the evidential test that would be applied.

Section 14 – Bail conditions: remote monitoring of restrictions on movements

Should these proposals be implemented in their current form there is a possibility that confusion could occur as a consequence of a two tier system existing in relation to the electronic monitoring of persons as a condition of bail and those subject to Restriction of liberty orders (RLOs).

The proposals within the Bill stipulate that where the monitor becomes aware that a person has breached the condition, the monitor shall immediately notify a constable of the breach. This is somewhat at odds with current procedures relating to RLOs where a breach of the Order is reported to the court by the monitor. My concern is that unless there is clear guidance provided to police staff and monitoring company personnel, allied with effective training and management practices, there is a possibility that people will be unsure or confused as to whether or not they are dealing with a breach of bail conditions or restriction of liberty order, a consequence of which could be a wrongful arrest.

I trust the foregoing will be of assistance to you.

Yours sincerely

SIR ROY CAMERON
HM Chief Inspector of Constabulary

Encl.
Post-Council Report on the Justice and Home Affairs Council of EU Ministers, 6 November 03

Comments by the Executive

Another Council dominated by Asylum and Immigration issues and also the Directive on Compensation to Victims of Crime. Caroline Flint attended for the UK. The UK intervened in the debate on the Procedures Directive to give a wider political context to the debate. There is still a question over the legal base of the Directive on Compensation to Victims of Crime as well as the cost implications for new Member States and those Member States that do not have compensation schemes in place.

Agenda Items

Follow-up of Brussels European Council on Managing the Union’s Common Borders and Controlling Migratory Flows – Readmission Agreements State of Play

The Commission reported that there had been encouraging progress. Agreement had been reached with China and negotiations continued with other countries (Albania, Morocco, Russia and the Ukraine).

Proposal for a Council Directive on the Residence Permit issues to Third-Country Nationals who have been Subjects of an Action to Facilitate Illegal Immigration Who Co-operate with the Competent Authorities

Discussion centred round the residence permits granted under the directive. Agreement was reached on the text subject to French and Dutch scrutiny reserves being lifted.


This Directive is a package of EU measures aimed at establishing minimum standards in procedures for considering the granting of asylum applications in line with the Geneva Convention. The only aspect of the Directive of interest to the Executive is Article 13 which concerns legal aid, a devolved matter. The Article as currently drafted proposes the need to ensure the asylum seeker can effectively consult with a legal advisor and access, under certain circumstances, legal aid for appeal proceedings. The current draft of the Article does not appear to be incompatible with the current legal system. The discussion at Council did not cover Article 13. Member States discussed three key issues: (i) a common EU list of safe countries of origin (ii) a common EU list of safe third countries and (iii) the criteria set for designating a country as safe.

The UK had concerns over the appeals provisions and criteria for the designation of safe countries; the appeals procedure should not give failed asylum seekers multiple
opportunities to frustrate their removal. There was no consensus on the safe third country lists or on border procedures. The dossier was passed to Coreper for further discussion.


This dossier has been slow moving due to the uncertainty as to whether there is the appropriate legal base for the Directive i.e. whether there is an appropriate power in the treaty establishing the EU. The aim of the directive is to ensure that all EU citizens and legally resident third country nationals can receive adequate compensation for the loss suffered if they fall victim to intentional violent crime within the EU. The commitment was given to this proposal at Tampere in 1999. The Directive would require each Member State to establish a state compensation scheme conforming to certain common minimum standards as regards eligibility and the scope and amount of compensation to be awarded. It would also require each Member State to accept applications from its residents or nationals injured in other EU countries and to channel those applications from its residents or nationals in other EU countries and to channel those applications to the Member State where the crime occurred for consideration.

At Council the UK urged caution on the issue of the legal base arguing that it important that Member States did not allow their common desire to help victims to lead to an inappropriate use of the Treaty. The new Member States underlined the financial difficulties that the proposal would cause them as few have compensation schemes. The Presidency concluded that the question of the legal base should be considered along with the substance of the proposal. The Irish suggested that a detailed analysis of the different systems in Member States should be carried out before any attempt to approximate systems could be made. The Presidency agreed that an analysis should be carried out during the Irish Presidency and it was clear that there was a financial problem for Member States which would need to be taken into account.

Follow Up of Brussels European Council on Managing the Union’s Common Borders and Controlling Migratory Flows

The Commission confirmed that the proposal for a European Borders Agency was due to be presented for approval at a Commissioner’s meeting on 11 November. The UK and Ireland were excluded from participating, as the regulation as currently drafted is a Schengen Building measure.

The Borders Agency would have an EU 15 million budget for both 2005 and 2006 and would employ around 30 staff.

Draft Council Framework Decision on the Application of the Ne Bis In Idem Principle

An initiative of the Greek Presidency. The Framework Decision does not require changes to domestic provision; it is about how double jeopardy is recognised between Member States. It sets to update provisions in Schengen and as such does
not do anything to compromise the principles of double jeopardy. The discussion focussed on the scope and exceptions to the Ne Bis In Idem rule. Council failed to reach a consensus on either the scope of reducing the exceptions and inserting a sunset clause. The dossier will return to Working Group for further work.

SEJD –EU JHA ACTION TEAM
24 November 03