JUSTICE 1 COMMITTEE

AGENDA

17th Meeting, 2003 (Session 2)

Wednesday 17 December 2003

The Committee will meet at 10.00am in Committee Room 1.

1. **Item in private**: The Committee will consider whether to take item 6 in private.

2. **Criminal Procedure (Amendment) (Scotland) Bill**: The Committee will take evidence on the general principles of the Bill at Stage 1 from—
   
   John Scott, Chair, Scottish Human Rights Centre;

   Professor Peter Duff, School of Law, University of Aberdeen;

   Lindsay Montgomery, Chief Executive, and Douglas Haggarty, Solicitor, Scottish Legal Aid Board.

3. **Alternative dispute resolution**: The Committee will consider its response to the European Commission’s green paper on alternative dispute resolution in civil and commercial law.

4. **Civil partnership registration**: Margaret Smith will report to the Committee in relation to the Equal Opportunities Committee’s consideration of the Scottish Executive’s consultation on civil partnership registration.

5. **Inquiry into the effectiveness of rehabilitation programmes in prisons**: The Committee will consider a proposal for a civic participation event.

6. **Inquiry into the effectiveness of rehabilitation programmes in prisons**: The Committee will consider a specification for the appointment of adviser in relation to the inquiry and possible candidates for appointment.

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

**Agenda item 2**

Note by the clerk (private paper) (TO FOLLOW) J1/S2/03/17/1  
Written submission from the Scottish Human Rights Centre J1/S2/03/17/2  
Written submission from Professor Peter Duff J1/S2/03/17/3  
Written submission from the Scottish Legal Aid Board (already circulated for the 15th meeting 2003) J1/S2/03/17/4  
Scottish Legal Aid Board J1/S2/03/17/4

**Agenda item 3**

Note by the clerk J1/S2/03/17/5  
Professor John Sturrock QC, *Effective Management of Differences in Non-Family Civil and Commercial Matters* J1/S2/03/17/6  
Additional reference documents provided by Professor John Sturrock QC—  
*Mediation in the UK*  
*Experiences of Court-ordered Mediation from around the world*  
*Developments within the European Union*  
*Dispute-wise Management "Improving Economic and Non-Economic Outcomes in Managing Business Conflicts": an American Arbitration Association Sponsored Research Study*  
*Mediation Training*  
*Commercial and Civil Mediation Statistics for Scotland: Pie Charts*  
Department for Constitutional Affairs, *Report for the period April 2002—Monitoring the effectiveness of the Government’s commitment to using Alternative Dispute Resolution (ADR)* J1/S2/03/17/8  
European Parliament resolution on the Commission's green paper on alternative dispute resolution in civil and commercial law J1/S2/03/17/9  
Letter from the Scottish Consumer Council J1/S2/03/17/10  
Scottish Consumer Council, *Consensus Without Court – Encouraging mediation in non-family civil disputes in Scotland* (circulated to members only – available online at http://www.scotconsumer.org.uk/reps01/reps10.pdf) J1/S2/03/17/11

**Agenda item 4**

Note by the clerk J1/S2/03/17/13

**Agenda item 5**

Note by the clerk J1/S2/03/17/14

**Agenda item 6**

Note by the clerk (private paper) J1/S2/03/17/15
Papers for information circulated for the 12th meeting, 2003 (session 2)—

Criminal Procedure (Amendment) (Scotland) Bill: Responses—
   John Scott on behalf of the Edinburgh Bar Association  J1/S2/03/17/16
Sheriffs' Association  J1/S2/03/17/17
Sentencing Advisory Panel, Reduction in Sentence for a Guilty Plea: Consultation Paper  J1/S2/03/17/18
Sentencing Advisory Panel, Annual Report 2002/2003—Summary  J1/S2/03/17/19
Scottish Executive, Post-Council Report on the Justice and Home Affairs Council of EU Ministers, 27 – 28 November 03  J1/S2/03/17/20
Visit to the High Court of Justiciary in Glasgow – note by the clerk  J1/S2/03/17/21
(TO FOLLOW)

Forthcoming meetings—

Wednesday 7 January 2004
Wednesday 14 January 2004
Wednesday 28 January 2004
I attach the following papers:

**Agenda item 1**

Note by Clerk (Private Paper)  J1/S2/03/17/1

**Agenda item 2**

Note by Clerk on the European Commission’s Green Paper on Alternative Dispute Resolution in Civil and Criminal Law  J1/S2/03/17/5

Written submission from John Wright  J1/S2/03/17/12

15 December 2003  Tony Reilly
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 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

<table>
<thead>
<tr>
<th>Costs</th>
<th>Assumptions</th>
<th>Total £'000</th>
</tr>
</thead>
<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>
</tr>
<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>
</tr>
</tbody>
</table>

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>
<thead>
<tr>
<th>Savings</th>
<th>Assumptions</th>
<th>Total (£’000)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Cases remitted from High to Sheriff Court.</td>
<td>1</td>
<td>1,000,000</td>
</tr>
<tr>
<td>2. Pre-trial pleas – early settlement</td>
<td>2</td>
<td>150,000</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 court</td>
<td>4</td>
<td>Nil</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.
Justice 1 Committee

Criminal Procedure (Amendment) (Scotland) Bill

Submission by the Scottish Human Rights Council

Introduction

The Scottish Human Rights Centre (SHRC) welcomes the introduction of the Criminal Procedure (Amendment) Bill as most of the provisions in this Bill are sensible and unobjectionable. The Parliament should not, however, be mistaken about the major change to a peculiarly Scottish safeguard to ensure a fair trial.

The 110-day rule (for starting trials in serious cases where the accused is in custody) IS the jewel in the Crown of Scottish justice, despite attempts to suggest that the jewel is the 80-day rule for service of the indictment.

It is well known within and outwith Scotland. It should not be forgotten that it has worked well for centuries and has resulted in problems relatively rarely. In short, the Crown complied with the time-limit because it had to. Although there has been an increase in the number of adjournments and postponements this is indicative of the increased complexity in many serious prosecutions. Many trials DO proceed without adjournment or postponement. The 110 days is often NOT extended. It would be wrong to describe a trial diet as just a "procedural diet"(P.4 of Executive’s Policy Memorandum).

It seems rather an admission of defeat to say that those cases where delay occurs should determine the rules for all cases. It is an erosion of principle for the sake of practice. If there is an adjournment culture will an extra 30 days really change it?

The benefits of the 110 day rule extend not only to an innocent person wrongly accused of serious crime but also to the victims and witnesses who also avoid prolonged uncertainty. The sooner a trial takes place the better the chances of good recollection. The public also sees the results at a time when they can still be related to the initial criminal act.

Other measures in this Bill, especially the effective management of cases at the new Preliminary diets, offer a chance to tackle some of the problems that currently lead to delay. They should be given a chance to work alone before any tinkering with an established an effective safeguard. We disagree with the suggestion in the Executive’s policy memorandum that “the proposals in the Bill are a package from which it is impossible to detach individual proposals without seriously undermining the effectiveness of the measures as a whole”(P.9). The claim of “additional complexities” in the High Court is a very sweeping statement.
Criminal law is now much more complex than it ever was in the past but this is so in the Sheriff Court too. Many cases are now prosecuted in the Sheriff Court which, until very recently would only have been seen in the High Court. The Executive’s Explanatory Notes are very misleading when they say that “the types of cases to be transferred to the Sheriff Court will not only be less serious, but also less complex and of the type more likely to result in a guilty plea”. (P.28). This is a reference to the proposal to implement the increase in Sheriff Court sentencing powers. It seems that little thought has been given to the impact of these changes on the Sheriff Court.

Of greatest importance is early contact and co-operation between Crown and defence. If properly managed in court thereafter there is every prospect of the aims of this Bill being achieved without the need for such a radical dilution of the 110 day rule. It is as well to remember that, once removed, rights are very rarely returned to us.

We do not demur from the assessment of minimum compliance with Human Rights obligations in the Policy Memorandum. Achieving minimum compliance is not sufficient if we already do better than that.

Rosemarie McIlwhan
Director
Scottish Human Rights Centre
1 December 2003
Justice 1 Committee

The Criminal Procedure (Amendment) (Scotland) Bill

Submission from Professor Peter Duff

I am Professor of Criminal Justice in the Law School at Aberdeen University. In recent years, I have carried out research on behalf of Scottish Executive on *inter alia*: Intermediate Diets and the Agreement of Evidence; Adjournments in Summary Criminal Cases in the Sheriff Court; and Bail. These projects have all resulted in Research Reports published by the Scottish Executive. In addition, I am a member of the Committee on Summary Justice, under the Chairmanship of Sheriff Principal John McInnes, set up by Scottish Executive and due to report at the end of this year. As I am sure you already know, we have been considering very similar issues to those dealt with by Lord Bonomy in relation to solemn procedure.

I strongly support the general thrust of the Bill and agree with the reforms which will be brought about as a result. Broadly speaking, I have no problems with the fine detail of the Bill but there are three points I should like to raise.

**Mandatory Preliminary Hearings (s 1)**

I fully support the introduction of mandatory preliminary hearings in the High Court which will generally reflect the present position as regards mandatory first diets in solemn cases in the Sheriff Court. I would observe, however, that the key to making preliminary diets work as intended is judicial culture rather than the specific legislative framework. If judges do not adopt a pro-active approach to case management, this initiative will fail and create an extra court appearance which achieves little or no benefit, with a resulting waste of resources. The judiciary has to accept that it has a responsibility to oversee and enforce the effective management of cases. If the High Court, or even just some of the judges, adopts a passive role, as has happened in some Sheriff Courts, very little will change despite the new legislative regime.

One particular point is that I think it has to be made absolutely clear in the legislation that a judge does not have to grant an adjournment even where there is a joint application to this effect from both parties or where one party is seeking an adjournment and the other party does not object. On the contrary, in either of these situations, the judge should enquire strenuously into the reasons for the request for an adjournment and should not grant the request unless he is satisfied that it is absolutely necessary in the interests of justice. As I understand it, the case law on this point is not particularly clear, thus at present most of the judiciary will simply accede to such requests without any, or much in the way of, enquiry. Again, this is largely an issue of judicial culture but the legislative framework does need 'tweaking' in order to encourage a pro-active approach towards case management.
Setting a date for trial (s 10)

While I agree with the suggestion that the trial be set for a specific date rather than starting at any time within a two-week hearing, I can foresee a problem for defence counsel who, I am sure, are opposed this move. Their worry will be that if they have to commit themselves to a specific date and, presumably, several succeeding days, for a trial then they will be left with a blank diary if the trial fails to go ahead for any reason, e.g. last minute guilty plea (which is still bound to happen), absence of crucial witness, failure to appear by accused (where trial cannot go ahead in his absence) etc. In that case, they will not get paid for that period. For that reason, there might even be a disincentive to accept a last minute offer by a client to plead guilty, which would clearly be undesirable. At present, counsel may have several cases running and they will 'juggle' the timing of these as necessary, as well as persuading accused to plead guilty, negotiating with the prosecution etc. This, of course, leads to problems but it does minimise problems of unpaid gaps in counsel's diaries. I do not have a solution to the problem of the advocate, who suddenly finds themselves with several free - and unpaid - days because a trial has collapsed, but it clearly needs to be taken up with SLAB and the Faculty of Advocates.

Trial in absence (s 11)

I support the proposal enabling the court to try an accused in his absence and note that in the recent English case of Jones [2002] 2 All ER 113, the House of Lords held that trial in absence, even in a serious case, was permissible and was not contrary to the ECHR. However, I think an extra sub-section needs to be added to s 11 to allow the court to re-open the matter speedily if it turns out the accused had a legitimate reason for not attending, e.g. he was whisked into hospital with appendicitis the night before his trial. In this situation, the accused should not be required to use the normal appeal structure if he wishes to dispute his conviction and/or sentence but should quickly be granted the appropriate remedy, for instance, a re-trial or a hearing regarding sentence. In England, s 142 of the Magistrates Court Act 1980 allows such a case to be re-opened in the interests of justice. This also has the attraction of being administratively simpler than pursuing a formal appeal.

I hope these brief comments are of some assistance.

Professor Peter Duff
Professor of Criminal Justice
University of Aberdeen
21 November 2003
JUSTICE 1 COMMITTEE

FURTHER SUBMISSIONS FOR THE SCOTTISH LEGAL AID BOARD ON THE CRIMINAL PROCEDURE (AMENDMENT) (SCOTLAND) BILL

SHERIFF COURT PROCEEDINGS/AVAILABILITY OF COUNSEL

Sentencing Power of the Sheriff

Lord Bonomy in his Review of the Practices and Procedure of the High Court of Justiciary dealt with the caseload of the High Court [Chapter 13] and having dealt with the matters over which the High Court has exclusive jurisdiction, dealt with the division of business between the High Court and the Sheriff Court. It was generally accepted that the appropriate rationale for defining the respective roles of the Sheriff Court and the High Court is sentencing power. There would still be the opportunity for important cases, which may well attract lesser sentences, to be heard in the High Court and also for such cases as are reserved to the High Court in practice as the result of policies of the Lord Advocate [13.6]. The Report discussed the issues surrounding an increase in the sentencing power of the Sheriff [13.8 – 13.12] and the appropriate limit [13.13 – 13.17]. In the course of discussion it was pointed out that:

- there is often little to choose between the circumstances of the cases for which sentences of four and five years in custody are presently imposed in the High Court and cases currently before the Sheriff Court [13.13];
- it is the experience of most High Court Judges that there are many marginal cases, current prosecuted in the High Court, where a sentence that a Sheriff could impose would be adequate [13.13];
- due to a major change in the type of crime prosecuted in the High Court some indictments involving trafficking in moderate amount of drugs and robberies where weapons are used to threaten and not cause injury do not in general require to be presided over by Judges of the High Court [13.14]; and
- 39% of persons indicted to the High Court currently attract sentences that could competently have been imposed in the Sheriff Court [13.20 – 13.21].

It is apparent from the discussion in the Report that there is no clear, identifiable group of cases which can be considered to be “serious crime” which has to be dealt with in the High Court. Rather, there are cases at the high end of the Sheriff Court and the low end of the High Court which are very similar and the boundary between the two jurisdictions is a fluid one.

These cases, if shifted to the Sheriff Court, would not be readily identifiable and the Board will require to apply its regulations according to whether cases are before the High Court or the Sheriff Court.

Availability of Counsel
In terms of the legal aid legislation, junior counsel is automatically available in proceedings before the High Court. The reason for this is not any inherent complexity of indictments before the High Court but because at the time the regulations were drafted only counsel (a member of
the Faculty of Advocates) could appear in the High Court. There would be little point in obliging solicitors to seek prior authority to employ junior counsel in a situation where to refuse such authority would result in no representation at all. Authority from the Board is required to employ senior counsel or senior and junior in the High Court (except in cases relating to murder). Since the Act and Regulations came into force, solicitor advocates have come into being (see below).

Counsel is not automatically available in the Sheriff Court. If a solicitor wishes to employ junior counsel, senior or senior and junior in the sheriff court, prior authority has to be obtained from the Board. A copy of the current Board Guidance is attached. (“Authority” is referred to as “sanction” in the Guidance).

The Board is very aware that in the event that the sentencing power of the Sheriff is increased, more serious cases will be allocated to the Sheriff Court. There is no doubt that counsel will be required in some of these cases and will be available on a request for prior authority being made to the Board. Equally, there will be cases where the nominated solicitor is quite happy to conduct the case without reference to counsel or where, alternatively, the Board does not consider the employment of counsel to be justified, in terms of its guidance.

As indicated, some cases are marked to the High Court not because of any complexity or difficulty but simply because of the likely level of sentence in the event of conviction due to the accused person’s criminal record. These and other cases only feature counsel because junior counsel is automatically available in the High Court. The measure of complexity is not the automatic availability of counsel but the nature of the proceedings.

**Solicitor Advocates**

A piece of legislation in 1990 introduced solicitors with extended rights of audience in the Supreme Courts (for the purposes of the Committee’s deliberations, the High Court of Justiciary). These are solicitors like any other when practising in the Sheriff Court but because of their experience and expertise are entitled to appear before the High Court. They are now termed solicitor advocates and are recognised as such in the legal aid legislation. They are deemed to be “counsel” for legal aid purposes and are entitled to conduct cases in the High Court as counsel. However, the legal aid regulations provide that a solicitor advocate is to be treated as counsel (in the words of the regulations) “when and only when he is exercising his right of audience...”.

Solicitors, who are also solicitor advocates and are instructed as counsel in the High Court, regularly conduct solemn cases before a Sheriff and Jury in the Sheriff Court as solicitors.

**Relative Costs of Sheriff Court/High Court Proceedings**

In its submissions to the Finance Committee, which met on 4 November 2003 [11th Meeting, Session 2], it was observed by the Board that there is a potential for savings in the event of an increase in the Sheriff’s sentencing powers and the 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. Although a substantial element in the higher costs of High Court proceedings compared to Sheriff Court solemn cases is the involvement of counsel, that is by no means the sole or even the primary element. Some Sheriff Court cases are conducted by counsel.
Costs will be saved because of the greater efficiency of the Sheriff Court and the relative inefficiencies of the current High Court structure which prompted the review and are highlighted in Lord Bonomy’s Report. Cases call several times during the course of a “sitting” and are frequently continued from sitting to sitting. Each calling results in a payment to the instructing solicitor and counsel. These adjournments can involve hearings simply to extend the statutory time limits. Counsel are paid for the day regardless of the length or purpose of the hearing. The Sheriff Court already has a “First Diet”, the equivalent of the preliminary hearing to be introduced in the High Court. The Sheriff Court does not, to the same extent, have the difficulties of lack of accommodation, availability of Judges etc. as does the High Court. Proceedings in the Sheriff Court will tend to start earlier and will finish due to the continued availability of the Sheriff as distinct from the High Court where the same Judge may not be available the following week. Trials in the Sheriff Court even when counsel are involved do not take as long as trials in the High Court.

It is the Scottish Legal Aid Board that has to pay the additional costs of all these hearings. The potential for savings can be seen from the additional costs likely to be incurred simply by the introduction of the new mandatory preliminary hearing in the High Court.

Accordingly an identical case in the High Court and the Sheriff Court can cost more in the High Court even where counsel is involved in both cases due to the way in which the proceedings are conducted in the respective courts.

An extract from the appendices (relating to costs and savings) attached to the submissions to the Finance Committee are enclosed to the extent of the costing and assumptions relating to:

- a mandatory preliminary hearing (costs); and
- cases remitted from High Court to Sheriff Court (savings).

JDH/cs

11 December 2003

Enc. Extract from Appendices to submission to Finance Committee
Guidelines for sanction of counsel
APPENDIX 1

<table>
<thead>
<tr>
<th>Costs</th>
<th>Assumptions</th>
<th>Total £’000</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. A mandatory preliminary hearing</td>
<td>1</td>
<td>575,000</td>
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</table>

**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.

APPENDIX 2

<table>
<thead>
<tr>
<th>Savings</th>
<th>Assumptions</th>
<th>Total (£’000)</th>
</tr>
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<tbody>
<tr>
<td>1. Cases remitted from High Court to Sheriff Court.</td>
<td>1</td>
<td>1,000,000</td>
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</tbody>
</table>

**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.
THE SCOTTISH LEGAL AID BOARD
EMPLOYMENT OF COUNSEL IN CRIMINAL APPLICATIONS

1. BACKGROUND

Regulation 14 of the Criminal Legal Aid (Scotland) Regulations 1996 details the situations where the prior approval of the Board is required for the employment of senior and junior counsel. The regulation does not lay down any criteria for approval.

1.1 Cases where sanction is required

The solicitor must apply to the Board for sanction
• where the proceedings are in the Judicial Committee of the Privy Council or the High Court and are not proceedings relating to a prosecution or conviction for murder, for the employment of senior counsel alone, of senior counsel with junior counsel, or of more than one junior counsel
• where proceedings are in the sheriff court, whether under solemn or summary procedure, or in the district court. If representation by counsel is sought in the district court, we will expect the solicitor to show that there are exceptional circumstances.

1.2 Cases where sanction is not required

In a few circumstances, the Board's authority is not required –
• in proceedings relating to a prosecution for murder, or conviction for murder where the person is already receiving criminal legal aid
• to employ one junior counsel only, in proceedings before the Judicial Committee of the Privy Council or in the High Court (whether at first instance or an appeal).

There is no equivalent in the criminal regulations to the provision in the civil regulations requiring sanction for the employment of counsel other than Scottish counsel. However, the solicitor would still need to obtain sanction if the employment of non-Scottish counsel resulted in the availability of more than one senior etc.

Where the Board's prior approval is not required, the solicitor will still have to satisfy the Board at the accounts stage that employing counsel was reasonable in all the circumstances, having due regard to economy (the usual test for remuneration of counsel).

2. PROCEDURE

2.1 Information to be provided by the solicitor

Requests for sanction to employ counsel must be made on the form SANC/APP, as soon as possible once the need for counsel has been identified. The solicitor should give us
• full reasons why employment of counsel is necessary
• a detailed explanation of the background and any complex, novel or unusual issues
• details to show that the problem is beyond the competence of either a practising solicitor or junior counsel acting alone as appropriate.
Requests for sanction for counsel must be supported by
- a full explanation of the reasons to justify the employment of counsel
- a copy of the indictment, petition, complaint or note of appeal, as appropriate – the solicitor should highlight or otherwise identify sections being relied on in the sanction request
- a full, detailed explanation of the pertinent circumstances, rather than a mere list of abstract factors, or a broad reference to the proceedings being complex, difficult or novel.

2.2 Identification of factors

All the circumstances of the individual case must be considered.

The solicitor must give us sufficient information to enable us to weigh up any factors present. The existence of a factor or factors will not automatically trigger a grant of sanction (for example, the sheer volume of witnesses or productions may not, of itself, justify counsel but counsel might well be justified in a serious fraud case where the volume of evidence creates evidential complexity).

Where the request is for the employment of senior counsel, the Board must be satisfied that relevant factors are present to an exceptional degree.

Factors to be considered include –
- Where the volume of evidence renders a case complex, sanction for leading junior assisted by junior might be more appropriate than senior and junior. On the other hand, a novel or significant issue of law might indicate the need for senior counsel.
- In general, parity of representation will not, by itself, be sufficient basis for the employment of counsel. However, it may tend to show the importance placed on the matter by the Crown and should be persuasive in the decision to allow counsel and at what level of seniority.
- In a criminal case in the sheriff court, we will not generally sanction employment of counsel solely because of severity of sentence, but it will be taken into account where other factors are present.
- Similarly, where a remit may be made to the High Court for sentence, this is not in itself sufficient reason to sanction the employment of counsel at any early stage. It must be borne in mind that junior counsel can be employed without the need for Board approval in the High Court. (Often, the only factor put forward is that the case might be remitted to the High Court for sentencing in the event of a finding of guilt. This would rarely be sufficient to justify the employment of counsel for the conduct of the trial itself.)
- Where a case is likely to require cross-examination of another solicitor practising in the same locality, or of a procurator fiscal, or a sheriff, or a court official, a request should be given sympathetic consideration.
- A request for counsel simply because it will be necessary to lead the evidence of an expert witness would not normally be justified without reference to other salient circumstances.
- From time to time, applications for sanction may refer to an individual solicitor’s circumstances. These could include any of the following.
- The inability of the nominated solicitor to attend a diet personally due to personal, business or professional circumstances may justify the employment of counsel. The circumstances would need to be exceptional and with no possibility that the case
could be dealt with on an agency basis, or by adjournment. A mere clash of dates would not normally justify the employment of counsel.

- However, sympathetic consideration may be given to the use of counsel where, just before the diet, the solicitor has suddenly become ill, or a partner or key member of staff has died or become ill. In that situation, the Board should be told what other arrangements the solicitor has attempted to put in place, and how the client may be prejudiced if s/he is not represented by either the nominated solicitor or by counsel.
- Generally, solicitors should not take instructions for work they are not in a position to undertake. However, the lack of availability of an experienced local bar in smaller, more rurally based courts may mean that solicitors may, from time to time, need to take on casework involving matters they are not familiar with and assistance might be needed to run the case. In more populated areas where there is a wide range of solicitors' firms, lack of experience would not be viewed as a supportive factor.

2.3 Requests for senior counsel

Many of the factors already detailed would apply to the employment of senior counsel as well as junior counsel. In situations where a request for senior counsel is being made, you should consider whether

- the case is the type where the court would normally expect to see representation by senior counsel
- there are exceptional factors which show a need for the experience of senior counsel – these could relate to the consequences of the case for the individual or others likely to be affected by the decision and the gravity of the case
- the law applicable to the case is particularly complex or there are issues to be raised which have not previously been raised before the court
- a decision has previously been taken in a case with similar circumstances which does not support the case or there is difficult expert evidence to be led – cases in which previous case law may be distinguished or which will be pled before a full bench are examples of situations where senior counsel may be appropriate
- the Crown has allocated the case to senior counsel or a law officer.

2.4 Senior and junior counsel

It may be appropriate to grant sanction for junior counsel to support senior in a case which is not only novel but also lengthy or involving substantial documentation. Where senior counsel is instructed and insists on the availability of junior, this request should be considered persuasive but you should still form a balanced view in granting sanction for junior. The request should be accompanied by sufficient information to identify the reasons why junior is needed and what their involvement would bring to the case.

2.5 Solicitor advocates

Regulation 2 of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 defines a solicitor advocate as a solicitor, whether instructed by another solicitor or not, “when and only when he is exercising his right of audience or acting in connection with the exercise of such a right …”. It is not competent for the Board to sanction the employment of a solicitor advocate for a case in the sheriff court or district court, or to meet any charges for this.

Where the proceedings are in the High Court and the Board has given approval for the employment of counsel (whether junior or senior), or where counsel may be employed
without such approval, the nominated solicitor may, without reference to the Board, employ a solicitor advocate in place of counsel. Because of the way the regulations have been framed, even where the nominated solicitor intends to instruct a solicitor advocate, any request to the Board should be for the employment of counsel rather than a solicitor advocate.

2.6 **Extent of counsel’s involvement**

Sanction for the employment of counsel can be requested, and granted, for various purposes short of conducting the case – for example, simply for an opinion or a consultation. Where sanction is granted for counsel to conduct the proceedings, this includes consultations, notes etc at the discretion of counsel subject only to the scrutiny of the Accounts Division at the conclusion of the proceedings.

2.7 **Retrospective grants of sanction**

Where the Board approval is required, the solicitor must apply to us before counsel is employed. We may sanction employment of counsel retrospectively if we would have done so had prior approval been sought, but only if we consider there was special reason why prior approval was not applied for. We do not regard oversight as a special reason. If there has been a change of solicitor, it may be that counsel has been employed without sanction and that this may temporarily escape the notice of the incoming solicitor. Although best practice would be for an incoming solicitor to check that sanction had been granted for counsel and expert witnesses, we might consider this a special reason.

The provisions for retrospective authority do not apply where application for prior approval was made but was refused.
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.

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.

Philip Shearer
Solicitor
Scottish Legal Aid Board
27 November 2003
Background

1. The European Commission launched its green paper on alternative dispute resolution in civil and commercial law in April 2002. Alternative dispute resolution (ADR) methods are extra-judicial procedures used for resolving civil or commercial disputes. These usually involve the collaboration of disputing parties in finding a solution to their dispute with the help of a neutral third party. The deadline for comment on the green paper was 15 October 2002.

2. On the basis of the outcome of the consultation, the Commission has decided to launch two initiatives: to develop a European plan for best practice in mediation; and a proposal for a directive to promote mediation.

3. The UK responded to the green paper, which reflected the Scottish Executive’s views. It stressed strongly that the UK would prefer not to have a high level of regulation of ADR at EU level, primarily because ADR is voluntary by nature.

Committee’s scrutiny of the EU proposal on ADR

4. The Committee agreed at its meeting on 17 September 2003 to give further consideration to the European Commission’s green paper on ADR. At a subsequent meeting on 8 October the Committee agreed to seek written evidence on the European Commission's green paper from relevant organisations and oral evidence from the relevant EU official and from an academic with an interest in ADR.

Written evidence

5. Written submissions were received from the Scottish Executive, The Law Society of Scotland, The Chartered Institute of Arbitrators Scottish Branch, Family Mediation Scotland, SACRO and the Scottish Mediation Network.

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2 Background on the green paper is available on the EU website at: [http://europa.eu.int/comm/justice_home/fsj/civil/dispute/wai/fsj_civil_dispute_en.htm](http://europa.eu.int/comm/justice_home/fsj/civil/dispute/wai/fsj_civil_dispute_en.htm)

3 Directives are binding in the result to be achieved but leave national authorities to choose the form and method of achieving the result.

4 [Official Report, Justice 1 Committee, 17 September 2003; c 46.](#)

5 J1/S2/03/12/4, J1/S2/03/12/3, J1/S2/03/12/8, J1/S2/03/12/5, J1/S2/03/12/2 respectively.
6. Guaranteed confidentiality of mediation negotiations and agreements, so that they cannot be used in later court proceedings, was considered by the Chartered Institute of Arbitrators Scottish Branch to be essential to encourage greater use of ADR. The institute also considered that mediators should be prohibited from appearing in court proceedings even if called by either party. Other respondents thought that if both parties agreed then this was acceptable. Most of the submissions received believed that a code of conduct and quality standards must underpin practitioners offering ADR services. Family mediation was highlighted by the Law Society of Scotland and Family Mediation Scotland as being distinct from other areas where dispute resolution was used. It was suggested that a major development to family mediation would be to add a requirement in the procedural framework for contentious family matters in member states that parties have to show they have actively considered and discussed with the other party the possibility of mediation. Although there should be no compulsion to mediate.

Oral evidence

7. On 12 November 2003, the Committee took oral evidence from Professor John Sturrock QC, Core Consulting and Core Mediation and, via video conference with Brussels, from Henrik Nielsen, Administrator at the European Commission. Professor Sturrock gave a short presentation to the Committee on the context in which mediation and ADR arise, the process of mediation and ADR in Scotland and elsewhere. Mr Nielsen explained to members the background to the Commission’s proposal and about the responses received from other member states. He also advised the Committee that, although the consultation deadline had passed, the Commission was content to receive comments as the legislative proposal was not finalised.6

Further evidence

8. Since the oral evidence session, the Committee has received further written evidence. This evidence is outlined below.

Professor Sturrock and Henrik Nielsen

9. Professor Sturrock has provided a submission on the main issues and also given the Committee a collection of reference material which provides further detail on the current situation in the UK, court-related mediation experience around the world, developments in the EU, some research by the American Arbitration Association, training issues and statistics for commercial mediation in Scotland. A copy of the Department for Constitutional Affairs’ report Monitoring the effectiveness of the Government’s commitment to using Alternative Dispute Resolution, referred to by Professor Sturrock in his evidence, has been obtained. The European Parliament’s resolution on the

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green paper, as referred to in Mr Nielsen’s evidence, has also been obtained.

Maryland USA
10. Members were interested in receiving further information on the ADR system in Maryland. Interested parties have responded to this request and submitted the following information. The Scottish Consumer Council undertook a study trip to Maryland and a copy of the list of delegates and an article published in SCOLAG Legal Journal in 2003 which provides an overview of the visit and possible lessons for Scotland. In addition the Council has provided the Committee with its report published in 2001, Consensus Without Court. The Scottish Mediation Network has advised that Chief Judge Bell, who established the Maryland ADR Commission, was one of the keynote speakers at a conference that it organised this year. The Network comments that it has forged some useful contacts in Maryland and could offer the Committee further assistance if considered appropriate.

Family mediation
11. As the oral evidence focused mainly on non-family civil disputes, the Committee was keen to gather further information on family mediation in Scotland. A letter from Mr John Wright QC has been forwarded to the Committee by Margaret Smith MSP which expresses a view on the provision and funding of family mediation in Scotland.

Debate on modernising access to legal advice, information and representation
12. It is also worthwhile recording that, during the debate in the Chamber on modernising access to legal advice, information and representation on 3 December 2003, a number of members raised some of the issues that had been covered by the Committee’s evidence session, such as the use of mediation and alternative dispute resolution as a way of diverting people away from the court system and the potential saving to the Scottish Administration by reducing litigation costs. In relation to family dispute resolution, the Deputy Minister for Justice stated that £700,000 had been committed to Family Mediation Scotland and £246,000 to SACRO over 3 years.

Action
13. At its meeting on 12 November, the Justice 1 Committee decided to submit a response to the European Commission. The Committee is invited to consider and agree a response to European Commission’s green paper on alternative dispute resolution in civil and commercial law.

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7 Scottish Consumer Council, Consensus Without Court – Encouraging mediation in non-family civil dispute in Scotland.
Available online at: http://www.scotconsumer.org.uk/reps01/reps10.pdf
8 Official Report, 3 December 2003; c 3832 & 3870.
9 Official Report, 3 December 2003; c 3857 & 3873.
10 Official Report, 3 December 2003; c 3873.
Draft Response to the Commission

Introduction

14. The Justice 1 Committee of the Scottish Parliament welcomes the opportunity to comment on the European Commission’s proposal to legislate in the area of alternative dispute resolution in civil and commercial law and thanks the Commission for its openness in inviting the Committee to submit comments even though the formal consultation period has ended.

15. In considering the Commission’s green paper, the Committee gathered a sizeable amount of evidence from a range of relevant individuals and organisations in the limited time available. This is attached for information (excluding those submissions which have already been submitted to the Commission directly in response to the consultation on the green paper).

Benefits and disadvantages of ADR

16. The Committee was struck by the potential benefits of mediation and other forms of dispute resolution. Mediation offered advantages over the court process. The mediator could implement non-legal solutions to meet the needs and interests of the parties. Court is geared towards reaching a financial settlement and does not offer one party a chance to apologise to another. Mediation is in a less formal environment than court and therefore assists in communication between the parties. The Committee heard evidence that mediation offered savings over the court process.11

17. Members did express some concern about the potential loss of opportunity to set a legal precedent.12 Another issue that members explored with witnesses was whether parties reached lower settlement figures than if the dispute had been settled in court.

18. On balance, the Committee considers that the arguments in favour of non-court dispute resolution outweigh those against, principally because mediation is a voluntary process so, if parties wished to have their case heard in court, they could do so.

Further scrutiny of ADR in Scotland

19. During this short inquiry it has become evident that ADR could offer substantial benefits and savings for the people of Scotland, commerce and public bodies if utilised consistently throughout the country. This subject would therefore benefit from further detailed scrutiny within Scotland, focussing on funding arrangements, mainstreaming of mediation in the civil justice system, self-regulation, training,

11 Professor John Sturrock QC, Official Report, Justice 1 Committee, 12 November 2003; c 106 & 108
12 Stewart Maxwell MSP, Official Report, Justice 1 Committee, 12 November 2003; c 118-9 & 129-30
accreditation and education. The Committee has written to the Scottish Executive requesting further information on some of these aspects.

Proposal for European legislation

20. It is clear from the evidence gathered by the Committee that mandatory regulation at EU level is not the appropriate course of action for ADR services because it is essentially a consensual and voluntary process in which parties make informed choices about the process. All of the organisations that submitted evidence expressed similar views about how regulation would stifle the growth of mediation in Scotland which is still in its infancy in comparison with other parts of the United Kingdom. We therefore concur with the view expressed in the UK response with regard to regulation.

21. However, the Committee does understand the benefits of minimum standards, particularly in relation to resolution of cross-border disputes. Although the Committee considers that there are some distinctions between the various sectors, such as family mediation, and therefore any legislation should reflect this.

22. The Justice 1 Committee would prefer a legislative instrument that provides flexibility for member states to translate European legislation into domestic law, particularly given that ADR is at very different stages of development within the European Union and within the United Kingdom. It is noted by the Committee that there is a potential side benefit to legislation in that it may help policy makers within the field of dispute resolution take a more nationally cohesive approach.

Proposal for a European Code of Conduct

23. There are a few areas highlighted by the evidence considered by the Committee that might more properly fall under the code of conduct. Within Scotland, there is no uniform approach to training and accreditation of ADR practitioners. The Committee is attracted to the establishment of an umbrella body and believes that this body could have a role to play in ensuring practitioners are properly supported and in maintaining standards. It is hoped that a European code will place a spotlight on the benefits of ADR and help to establish trust between member states.

Conclusion

24. The Justice 1 Committee of the Scottish Parliament is keen to be involved with justice and home affairs matters in Europe. This has been the Committee’s first opportunity to comment directly on a European proposal. The Committee will continue to monitor progress of both the legislation and the code of conduct while pursuing its national justice and home affairs work programme.

13 Professor John Sturrock QC, Written Submission, Effective Management of Differences in Non-Family and Commercial Matters, November 2003, para 10.
14 Scottish Mediation Network, Written Submission, Justice 1 Committee paper J1/S2/03/12/2.
25. The Committee has gained knowledge about the European process and the various institutions in considering the Commission’s green paper and looks forward to further engagement with European colleagues on other justice and home affairs matters.
Effective Management of Differences in Non-Family Civil and Commercial Matters

A submission to the Justice 1 Committee
by Professor John Sturrock QC

Introduction

1. Mediation, as the most commonly used form of "ADR", is a very powerful process for the effective management of differences. Its use extends beyond the kind of disputes which are found in court. The techniques and skills associated with excellent mediation are now used around the world as the means to help find solutions in a range of issues, from environmental to planning, major industrial claims to equal opportunities, human resources to human rights, public sector to private sector, national to international. The emphasis in mediation is on collaboration, cooperation and consensus.

Changing the Culture

2. The underlying principle on which mediation and other similar approaches are based is that of finding solutions by agreement. Research (Paths to Justice, Paterson and Genn) shows that most people wish to resolve their differences and disputes by reaching an outcome which is satisfactory to all concerned. Often, what people want is an outcome which goes beyond the remedies available in the court, such as further business or other continuing relationship, an expression of regret, or a reassurance about future conduct. The problem at present, especially in the justice system, can be reliance on the adversarial approach, both in litigation and in the confrontational culture which often affects negotiations. Recent research by the accountants BDO Sloy Hayward reveals that the direct and indirect cost of this to commerce and business is substantial. In the civil justice system, statistics show that 95% or more of cases in the courts are not decided by a judge but settled, often late in the day, at significant cost to the parties and the court system in time, delay and money. The results can be less than satisfactory. This raises questions about the most effective use of limited resources for the funding of courts and further questions about access for those (a) who really need to use the courts but are denied the opportunity through lack of court resources or (b) who need to find a solution to their dispute but cannot now do so.

3. It is suggested that much would be gained by shifting the focus, at least in part, from the litigation system and supporting initiatives to help parties with disputes find the means to resolve them earlier and more effectively. Substantial savings in judicial time and Legal Aid expenditure have already been made through the use of mediation in family matters. Of course, the courts have a vital role to play in cases where issues of public policy arise, where legal precedent is sought, where points of principle require to be adjudicated upon, or where matters require an urgent remedy. Access to the courts is vital for these matters. Otherwise, courts should be seen as the last resort in resolution of conflict. Few judges and lawyers would disagree with this. English judges and policy-makers have emphasised this view of the court system in that jurisdiction. A report by the Royal Society of Edinburgh (2002) into mediation in health service claims in Scotland expressed the same view. The recent report on ADR by the Department of Constitutional Affairs (August 2003) shows the extent of savings and other benefits achieved with this approach, while giving thought-provoking examples of where mediation has worked in significant cases in the past year. On 20 November 2003, Government minister David Lammy MP indicated that a £17 million saving in projected legal costs had been achieved across all government departments from June 2001 to July 2003 following the UK Government’s pledge to use ADR.

John Sturrock QC, November 2003
Raising Awareness

4. The greatest need in Scotland is to promote mediation as a valuable process to help resolve a wide range of disputes and other differences. Within the community, schools, universities, business, the judiciary and the legal profession, there is insufficient understanding of mediation and willingness to encourage it. In the civil justice system, it is vital that more lawyers gain knowledge and practical experience to enable them to advise about and represent their clients in mediation. It is also important for judges and sheriffs to be sufficiently informed to be able to encourage parties, where appropriate, to try mediation. Initiatives through the professional bodies and the Judicial Studies Committee will assist this process.

The Role of the Courts

5. There is a need to introduce court rules in both the Sheriff Court and Court of Session to enable judges and sheriffs to encourage greater use of mediation. There are examples of these from many jurisdictions around the world (and in family matters in Scotland). The influence of judges in the growth of mediation has been profound elsewhere As part of a changing culture, the introduction of procedures, like the pre-action protocols in England, which require parties to try to resolve disputes by agreement before using the court option, is likely to be beneficial. The Sheriff Court Rules Council has already established a committee to examine these issues in that court. There is scope for introducing mediation in the commercial court rules in the Court of Session and in cases of personal injury, perhaps in connection with the pre-proof meetings introduced recently. Willingness to participate in mediation should be a factor in any determination on expenses. The courts could keep a list of recognised mediators or mediation providers which could be made available to parties. Examples of this practice can be found in other jurisdictions. Pilot court schemes have been used in England, Wales and Northern Ireland to build confidence in, and experience of, mediation. The same approach should be taken in Scotland (the Edinburgh Sheriff Court CAB scheme is an example, on a small scale, of the potential here). Research into the savings and other benefits could then be carried out in order to assess the value of mediation.

The Executive

6. The Scottish Executive could assist the promotion and use of mediation by making a public pledge along the lines of that issued in 2001 by the Lord Chancellor’s Department and reinforced this year by the DCA. It could incorporate mediation clauses as standard clauses in procurement contracts and encourage concepts of partnering and collaboration at all stages of contracts in which it is engaged. These would underline its commitment to using consensual approaches wherever possible. The Executive can actively support the use of mediation in a range of disputes in which it has an interest, such as those in the health sector (which it is currently considering) planning, education and the environment. As in England, initiatives to train government legal staff in the use of mediation are likely to underpin the success of such developments.

Mediation Clauses

7. Industry and commerce should be encouraged to incorporate mediation clauses within contracts generally. This would help build a culture of co-operation and avoid an immediate recourse to court when disputes arise. Local Government and other public agencies should take a similar approach.

Legislation

8. Legislation (similar to that already in place for family mediation) should be introduced to provide protection for confidential discussions in mediation and to protect the mediator from being compelled to attend court as a witness. Again, this is common around the world. Other primary
legislation may, as elsewhere, be used to support the drive to find co-operative means to solve problems. There are examples of this already in recent bills before the Scottish Parliament.

Standards

9. The competence of the mediator lies at the heart of successful mediation. It is vital that mediators are trained to a high standard. Potential users should have access to the criteria used to accredit mediators and other information to enable an assessment to be made of the quality of training the mediator has undergone. In a free market, however, subject to transparency in respect of qualifications, training and experience (and special circumstances such as the welfare of children), users should be free to select the mediator of their choice. Best practice in mediation should be disseminated widely so that there is a continual aspiration to achieve more than minimum standards. Not only is the competence of an individual mediator of importance, but the service provided by the agency, body or organisation providing the mediator’s services requires to be of a high standard so that appropriate preparation in advance of mediation is carried out. This can make all the difference to the outcome. All mediators and providers should carry professional indemnity insurance cover and operate a publicly accessible Code of Conduct covering conflicts of interest, ethics and confidentiality.

Regulation?

10. There are few recorded examples of difficulties in mediation which suggest that regulation is required. It is essentially a consensual and voluntary process in which parties make informed choices about the process, the mediator and what they wish to do. Different disputes and circumstances call for different approaches. Flexibility and creativity are the key to its success. Regulation could easily stifle not only the growth of mediation in Scotland but the ability of mediators to meet the needs of diverse parties with diverse needs in diverse situations. However, quality control is essential. Leading training organisations and mediation providers place emphasis on high standards, a code of conduct, transparent accreditation procedures, CPD, excellent pre- and post-mediation arrangements, complaints procedures and information to users about the credentials of mediators. This approach should be encouraged and supported throughout.

Reinventing the Wheel?

There is considerable evidence of the successful implementation of mediation in many countries in many ways in recent years. It will be good to draw on the examples of best practice from elsewhere and shape these to Scotland’s own needs and aspirations. The documents which are attached to this brief summary seek to outline a number of these developments and to identify various sources.

John Sturrock QC, Core Mediation and Core Consulting, 21 November 2003
Alternative dispute resolution in civil and commercial law


The European Parliament,

- having regard to the Commission's Green Paper on alternative dispute resolution in civil and commercial law (hereinafter referred to as "ADR") of 19 April 2002 (COM(2002) 196 – C5-0284/2002),

- having regard, in particular, to Articles 65 and 155 of the Treaty,

- having regard to the Vienna Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, adopted by the Justice and Home Affairs Council on 3 December 1998\(^1\), in particular paragraph 41(b) thereof,

- having regard to the conclusions of the Tampere European Council calling for the creation of alternative extrajudicial procedures\(^2\),

- having regard to the conclusions of the Lisbon European Council of 23 and 24 March 2000, in particular paragraph 11 thereof,

- having regard to the conclusions of the Santa María da Feira European Council of 19 and 20 June 2000, in particular paragraph 22 thereof, endorsing the "eEurope 2002 Action Plan",

- having regard to the conclusions of the Laeken European Council of 14 and 15 December 2001, in particular paragraph 25 thereof,

- having regard to the Commission's recommendations of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes\(^3\) and of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes\(^4\),

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2 Conclusions, point 30.
having regard to its resolution of 21 September 2000\(^1\) on the proposal subsequently adopted as Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters\(^2\),

having regard to European Extra-Judicial Network (EEJ-Net) launched on 16 October 2001,

having regard to Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market\(^3\), in particular Article 17 thereof,

having regard to the Communication from the Commission to the Council and the European Parliament on the biannual update of the scoreboard to review progress on the creation of an area of "freedom, security and justice" in the European Union, in particular chapter 3.1 thereof, of 16 December 2002 (COM(2002) 738),

having regard to the Opinion of the European Economic and Social Committee,

having regard to Rule 47(1) of its Rules of Procedure,

having regard to the report of the Committee on Legal Affairs and the Internal Market and the opinion of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (A5-0058/2003),

A. whereas access to justice is a fundamental right enshrined in Article 6 of the European Convention on Human Rights and Fundamental Freedoms and proclaimed in Article 47 of the Charter of Fundamental Rights of the European Union,

B. whereas the Union should guarantee that its citizens may enjoy the right of freedom of movement throughout the Union in conditions of safety and justice accessible to all,

C. whereas a true European area of justice must enable European citizens and businesses access to the courts and to the authorities of all the Member States as easily as in their own country, without the incompatibility or complexity of the legal and administrative systems of the Member States preventing or discouraging them from exercising their rights,

D. whereas European citizens in certain Member States find it difficult to gain access to justice, since disputes before the courts have increased in number and procedures have tended to become longer and, in consequence, more expensive,

E. whereas European citizens are increasingly faced with a growing volume of legislative texts, the complexity and technical nature of which make it difficult for them to have access to justice,

\(^{1}\) OJ C 146, 17.5.2001, p. 94.


F. whereas ADR (particularly on-line) forms part of the whole access-to-justice agenda, especially in the context of cross-border disputes and e-commerce, where it is seen as having the potential to cut through difficult issues of differing law and jurisdiction,

G. whereas, however, "justice" as delivered by the traditional, formal court system is normally regarded as a public good which is an inherent part of the order, values and culture of each society and hence covered by the principle of subsidiarity,

H. whereas, although cross-border disputes are increasing in importance, ADR should not be seen as detracting from the traditional judicial system or from the sacrosanct principle of access to justice as enshrined especially in Article 6 of the European Convention on Human Rights, and must not constitute a means of depriving citizens of access to the traditional judicial system,

I. whereas, notwithstanding this caveat, as far as cross-border disputes are concerned ADR affords the same advantages as it does for the settlement of disputes arising within a single Member State, inasmuch as it is a potentially cheaper option than traditional legal services and takes some cases out of the mainstream system, thereby reducing waiting time in courts and affording earlier access to other litigants and, as far as litigants are concerned, it is potentially cheaper, quicker and less stressful and may also afford them a remedy in that the cost and anxiety of proceedings brought in the judicial system may dissuade consumers from asserting claims,

J. whereas ADR is going through a phase of expansion, experimentation and innovation across Europe and this should not be needlessly hampered by the imposition of burdensome legislation,

K. whereas, however, in keeping with the principle of legal certainty, the enforceability of ADR decisions should either depend on approval by the courts or be established in a notarial act,

L. whereas the advantage of ADR lies in its flexibility, and this should not be compromised by regulation; whereas, nonetheless, there is a need for coherence, common procedural guarantees and common quality standards in order to protect consumers and avoid a proliferation of differing systems as between the Member States, and this could be secured through soft-law solutions, including the issuance of guidelines and codes of conduct, and through the promotion of best practice,

M. whereas dispute settlement in the public courts based on laws enacted by parliaments is one of the contributions to civilisation made by a society based on the rule of law, and ADR serves only to complement this process,

1. Welcomes the fact that the Commission, exercising its right of initiative, has submitted a Green Paper on alternative dispute resolution in civil and commercial law;

2. Notes that the Member States of the Union do not have detailed framework legislation on ADR, and that their legal systems differ greatly in this area;

3. Takes the view that ADR should be permitted as a non-binding option to be encouraged, on the basis, however, that Member States may propose ADR to both parties as a
preliminary option to access to the courts, whilst not undermining the parties’ rights to take action through the courts if necessary;

4. Advises the Commission that, whilst some degree of coherence and coordination in the provision of cross-border ADR is desirable, it should adopt a cautious approach and undertake in-depth studies and wide-ranging consultations before proposing any legislative initiatives; it should promote self-regulatory initiatives and avoid any approach which would reduce the flexibility and autonomy of the parties or create new trade barriers vis-à-vis third countries; however, the Commission might consider the further development of the principles applicable to extrajudicial bodies involved in the consensual resolution of consumer disputes in the light of the follow-up given to the present recommendation; in the first instance the Commission should prepare a follow-up Green Paper concentrating on the goal of building up capacity in the field of ADR, developing standards for ADR, improving quality and benchmarking, so as to achieve both coherence and consumer confidence in the use of ADR;

5. Considers that there is a need for a common definition of terms and that differing approaches and principles will have to be adopted in respect of ADR, depending on the area of law concerned (commercial law, family law, labour law), those having recourse thereto and the context in which they do so (business/consumer transactions, business to business transactions), whether it is court-induced or takes place by agreement between the parties, whether it is conducted on-line or off-line and whether it is appropriate and relevant in the light of, inter alia, national practices and procedures;

6. Proposes that a follow-up Green Paper should consider a future Europe-wide model code encompassing at least the following minimum procedural guarantees:

(a) the use of ADR in cross-border disputes should not prejudice access to justice in any way;

(b) both parties, in particular where they come from different Member States, should recognise the dispute-settlement procedure;

(c) the third party conciliator or mediator should be independent and impartial; it should be established that the neutral third party has a duty to assist the parties where necessary, while maintaining his or her impartiality;

(d) there should be a duty of confidentiality in so far as matters disclosed by party A to the dispute to the mediator/conciliator should be disclosed to party B or a third party only with party A’s consent;

(e) the principle of fairness (principles of natural justice) must be sacrosanct;

(f) ADR should be consensual and the parties should be fully informed of the scope of the ADR and of the enforceability of decisions; in certain cases, the parties should be guaranteed a minimum cooling-off or reflection period before agreeing to the results of mediation; expiry of a time-limit for recourse to ADR should not result in a denial of access to the courts;
(g) in general, consumers should always be able to go to court if they are dissatisfied with the result of - even mandatory - ADR, even if only to have the legality of the ADR clause reviewed in accordance with the ratio decidendi of the judgment of the Court of Justice of 27 June 2000 in Joined Cases C-240/98 to C-244/98 Océano Grupo Editorial SA;

(h) formalities should be kept to a minimum and legal jargon eschewed;

(i) records should be kept of ADR decisions and, in principle, published, provided that the parties agree and having due regard to the protection of personal data;

(j) there should be no penalties in the form of costs orders for parties reasonably refusing to have recourse to ADR;

7. Calls on the Commission to encourage the development of a pan-European network of practitioners, professional bodies and other interested parties, involving meetings and the exchange of best practice;

8. Urges the Commission and the Member States to raise public awareness and promote the use of ADR through information campaigns and by involving consumer organisations;

9. Recommends the Commission to improve and reinforce the EEJ Net so as to encourage Member States to make proper provision for good quality ADR and fill the gaps currently existing in this field;

10. Believes that the Union's approach to ADR should be globally oriented and take account of solutions such as the model law proposed by UNCITRAL (United Nations Commission on International Trade Law);

11. Calls on the Commission to keep the whole sector under review and envisage launching an action programme involving funding for research, the monitoring of pilot projects and the organisation of conferences;

12. Instructs its President to forward this resolution to the Council and Commission and the parliaments of the Member States.
Alison Walker  
Clerk, Justice 1 Committee  
Committee Chambers  
The Scottish Parliament  
Edinburgh EH99 1SP

24 November 2003

Dear Ms Walker

Alternative Dispute Resolution

I read with considerable interest the report of the committee’s meeting on 12 November, when it took evidence on alternative dispute resolution. I note that the committee wished to obtain further information on mediation outwith the family arena, and in relation to the position in Maryland, USA.

The Scottish Consumer Council has a considerable interest in the advancement of mediation as a means of increasing access to justice for the people of Scotland. In 2001, we published Consensus Without Court, a policy report which considered how the use of mediation to resolve non-family civil disputes might be encouraged in Scotland. In 2002, we held a seminar for key stakeholders on the issues, where there was general agreement that mediation should be encouraged in Scotland.

We felt that, if mediation was really to take hold in Scotland in any meaningful way, there was a need for those involved in the civil justice system to see how those in a similar jurisdiction managed the pathway from the theory of mediation to its practical and cost-effective introduction.

We therefore decided to fund a study visit by a group of influential individuals to a location where mediation could be seen to work well in practice, in order to convince them of its potential usefulness in Scotland. The state of Maryland, USA, with a population size roughly equivalent to that of Scotland, was identified as the most relevant jurisdiction for our visit.

In February 2003, we took a delegation of 10 key stakeholders – including members of the judiciary, the legal profession, policy-makers, legislators and mediators - on a short study visit to Baltimore, Maryland. We had arranged, in
conjunction with the Maryland Mediation and Conflict Resolution Office, an intensive programme of visits to a wide variety of mediation initiatives within the greater Baltimore area. We hoped this would help delegates gain some insight into how mediation could be employed across a diverse range of subject areas in a Scottish context.

To assist the committee in its discussions, I enclose the following for information:

1. A copy of our report *Consensus Without Court*.

2. A copy of an article published in SCOLAG Legal Journal in June 2003, which provides an overview of the visit and suggests possible lessons for Scotland from what we had seen in Maryland.

3. A list of the delegates who accompanied us on the Maryland visit.

I hope that these documents are of assistance. We would welcome the opportunity to assist the committee further in any way we can. Please do not hesitate to contact me should you wish to discuss this matter further.

Yours sincerely

Sarah O'Neil
Legal Officer
JOIN THE RESOLUTION: LESSONS IN MEDIATION FROM MARYLAND, USA

In recent years it has been increasingly acknowledged across the world that the traditional adversarial court system may not always be the best way to resolve a civil dispute. The court system highlights the conflict between the parties, it is slow and prone to delays. Moreover, the level of legal fees and court expenses, together with the limited availability of legal aid and the intimidating nature of court proceedings conspire to deter people from taking their disputes to court.

A growing awareness of the disadvantages of the court system has led to increased interest in alternative dispute resolution, or ADR. The most commonly used form of ADR is mediation, where a neutral third party helps the parties in dispute to reach an agreement which is acceptable to both sides.

Mediation is flexible, and focuses on what the parties want to achieve, rather than their strict legal rights. It gives the parties a chance to be heard and put forward their case, in an environment which is less formal and more private than a court. Mediation is also likely to lead to the faster and cheaper settlement of a dispute than going to court.

Mediation can offer to a whole range of people – consumers, tenants, patients, schoolchildren and their parents, neighbours, families, juvenile offenders and their victims - an accessible, affordable means of resolving their disputes in appropriate cases. However, while mediation is quite widely used in some parts of the world, it has been slow to develop in Scotland.

To date, mediation has largely been practised in Scotland by commercial mediators in business disputes, and by specialist family and community mediators. The only publicly funded mediation service dealing with civil and consumer disputes in Scotland is the Edinburgh sheriff court mediation project.

That said, interest in mediation is currently picking up some momentum in Scotland. There have, for example, been recent moves towards introducing mediation in fields as diverse as medical negligence, education and planning. However, change is not happening at a fast pace, and while the Scottish Executive supports the promotion of mediation in principle, the issue does not currently appear to be high on its civil justice agenda.

The Scottish Consumer Council (SCC) has long been keen to promote the increased use of mediation. In late 2001, we produced a report looking at how the use of mediation might be encouraged in civil and consumer disputes in Scotland.1 In 2002, we held a seminar on the issues, where there was general agreement that mediation should be encouraged in Scotland. The problem was that no-one seemed to have a clear idea about how to take the issue forward.

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1 Consensus Without Court, Scottish Consumer Council, 2001. See also Mediation and Non-Family Civil Disputes by Sarah O’Neill in SCOLAG May 2002
We tried to think of a novel way to pursue the matter, and came up with a proposal to tackle matters from a different angle. We decided to fund a study visit by a group of influential individuals to a location where mediation could be seen to work well in practice, in order to convince them of its potential usefulness in Scotland.

We felt that, if mediation was really to take hold in Scotland in any meaningful way, there was a need for those involved in the civil justice system to see how those in a similar jurisdiction managed the pathway from the theory of mediation to its practical and cost-effective introduction.

**Mediation in the state of Maryland, USA**

The state of Maryland, USA, with a population size roughly equivalent to that of Scotland, was identified as the most relevant jurisdiction for our visit. Mediation services have developed rapidly in Maryland over the past five years from a standing start. Maryland is now at the forefront of mediation development in the United States, and a number of other states are looking to it for assistance with developing their own comprehensive mediation strategies.

The recent development of mediation in Maryland can be traced back to 1998, when the Honourable Robert Bell, Chief Judge of the Maryland Court of Appeals, established a Maryland ADR Commission. The 40 member, multi-disciplinary commission was charged with advancing the use of ADR state-wide, not only in the courts, but also in communities, schools, businesses, government agencies, the criminal and juvenile justice systems and other settings.

To carry out this task, the Commission ‘took the innovative approach of using ADR to advance ADR by conducting a state-wide consensus building process’.

This involved setting up six subject committees, and appointing four regional advisory boards to involve all those with an interest in a dialogue about how best to advance ADR state-wide. The Commission also formed a National Advisory Board made up of ADR experts in different fields across the entire USA.

After much discussion, research and consensus building, the Commission issued its *Practical Action Plan* in late 1999, which set out its strategy to improve the management of conflict throughout the state. To implement this strategy, the Commission recommended the establishment of the Maryland Mediation and Conflict Resolution Office (MACRO), which is funded by the state judiciary and chaired by Chief Judge Bell. MACRO now works in collaboration with eight separate ADR initiatives across a range of areas, including business disputes, criminal and juvenile justice, education and schools, and family cases.

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2 Join the Resolution: the Maryland ADR Commission’s Practical Action Plan, December 1999 at page 2
The vision of MACRO in carrying out its work is to ensure that ‘thriving ADR services and education will increase the public’s access to justice, make the courts more user-friendly, empower more people to control the outcomes of their own disputes, and promote a more peaceful and civil society.’

The lessons for Scotland

In February 2003, the SCC took a delegation of 10 key stakeholders – including members of the judiciary, the legal profession, policy-makers, legislators and mediators - on a short study visit to Baltimore, Maryland. We had arranged, in conjunction with MACRO, an intensive programme of visits to a wide variety of mediation initiatives within the greater Baltimore area. We hoped this would help delegates gain some insight into how mediation could be employed across a diverse range of subject areas in a Scottish context.

The most striking message which we took back from the visit was that mediation is not just about court-related disputes, but has the potential to be used in a great variety of settings, as a means of resolving conflict at an early stage. What MACRO is trying to do is to gradually change the entire ethos across both the public and private sectors, to encourage everyone to begin thinking about using mediation at an early stage as a matter of course in any potential dispute situation.

One means of achieving such cultural change is the encouragement of school pupils to learn and use mediation skills from an early age, through peer mediation projects. Such schemes involve training pupils to mediate among their peers, and have been proven to reduce office referrals, dropout rates and absenteeism. They also equip pupils with mediation skills, which they can continue to use whenever they encounter conflict throughout their lives.

University students, too, are encouraged to learn about mediation, and not just law students. While the University of Maryland does have a Centre for Dispute Resolution within its law school, there are also plans to introduce a conflict resolution course for students across various vocational disciplines - medicine, nursing, dentistry and social work, as well as law. Students are also encouraged to use what they have learned in a practical way, by becoming actively involved in mediating small claims cases in the district court.

As a result of MACRO’s efforts, mediation is now being used by a very wide range of organisations throughout the state of Maryland. In the private sector, business people and commercial mediators were enthusiastic about the benefits of resolving business disputes by mediation rather than going to court. In addition to saving time and money, there was a clear recognition that mediation can pay dividends in terms of customer relations.
The extent and variety of mediation schemes across the public sector was particularly striking. We met representatives of a wide range of government departments and other public sector organisations that are using mediation to resolve disputes. In many cases, mediation is used to resolve both internal disputes with employees and external disputes with individuals and other bodies.

While some of the public-sector initiatives, such as the State Department of Education's mediation service for parents of children with special educational needs, do have some parallels with Scotland, mediation is also being employed in some novel contexts.

The Maryland Department of Agriculture, for example, has established a mediation programme, Farm Sense, to deal with agricultural disputes, whether they involve producers, regulatory agencies, lending institutions, citizens' groups, or any other individual or organisation.

Mediation is also used by the relevant state departments to resolve planning and environmental disputes. The consumer protection division of the Maryland Attorney General's office hosts one of the longest running mediation programmes in Maryland, which resolves consumer disputes between individuals and businesses. The division also runs a separate programme for healthcare consumers, dealing with disputes on such issues as billing problems, access to medical records, faulty medical equipment and health insurance.

Mediation is also used by equalities bodies such as the federal Equal Employment Opportunity Commission, and the Maryland Commission on Human Relations, which attempt to resolve complaints through mediation and conciliation where appropriate, resorting to litigation only where this is considered to be strictly necessary.

Among the most enlightening mediation initiatives we visited were those in the criminal and juvenile justice, and community mediation fields. These programmes demonstrated clearly how the concept of mediation can be adapted to suit different cultures and societal problems. The emphasis throughout was on the reduction of conflict and violence within a society which was in many ways very different from ours, with a different set of social problems.

We heard from the Baltimore City School Police, a division of the public school system, rather than the police department. The job of school police officers is to ensure that staff and pupils have a safe and secure environment, which includes ensuring the prevention of violence by helping to build good relationships between pupils.

One scheme with perhaps more obvious lessons for Scotland is the mediation programme run by the Baltimore County Police Department. This scheme mediates between juvenile minor offenders committing 'quality of life' crimes and
those, such as neighbours, who are affected by their behaviour. While the scheme is very resource intensive, it has resulted in a huge drop in re-offending rates, saving police time and improving the quality of life for local residents.

We also witnessed, by means of a case-study videotape, the immense potential of a process known as community conferencing, which can be used to resolve neighbourhood disputes involving a large group of people. We were shown how the process could be employed to transform a local community rife with in-fighting, accusations and mistrust into one where everyone worked together to improve the quality of life of all residents.

Given that MACRO is funded by the judiciary, it may have seemed strange at first that our last port of call was a session on mediation and the courts. However, by the time we got there, it seemed entirely logical. We had seen a myriad of scenarios in which disputes were resolved at an early stage, and therefore did not reach the courts, the last port of call within the justice system.

Over time, increased use of mediation should reduce the number of cases, both civil and criminal, reaching the courts. There will, however, always be some matters which require to be decided by a court, such as serious crimes and civil cases requiring a ruling on an important point of law.

There will also be some disputes that may be suitable for mediation which slip through the mediation net and end up in court. Maryland has mediation initiatives in a number of courts, at all levels of the justice system. In the district court (the lowest level court), mediations in small claims cases are conducted by volunteer mediators, often on the day of the court hearing.

Mediation is also used in the circuit court (which is roughly equivalent to our sheriff court) for workers' compensation cases, business and contract disputes, and is now beginning to feature in medical negligence cases. A recent study carried out into the effects of mediation in workers' compensation cases found that mediated cases settled earlier than those that were not mediated, saving time and money for the parties involved.

There are also a number of family mediation schemes in the circuit court. As in Scotland, a large proportion (around 50%) of civil cases are family cases, although unlike Scotland, legal aid is not generally available for family cases. As a result, family mediation often involves unrepresented parties on both sides.

Most of the court-based mediation schemes are run by a mediation co-ordinator. This is consistent with research on court-based schemes in England and Wales, which suggests that dedicated administrative support is central to ensuring that take-up of such a scheme is as high as possible. These co-ordinators are

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3 Court-based ADR Initiatives for Non-Family Civil Disputes: the Commercial Court and the Court of Appeal, Professor Hazel Genn, published by the Lord Chancellor’s Department, 2002
employed by the courts, and are viewed as part of a team led by the judiciary, the primary aim of this team being to resolve disputes without a court hearing so far as possible.

The way forward

So how can the lessons learned from Maryland be used to further the mediation message in Scotland? We hope that those who accompanied us and saw the real potential of mediation across a diverse range of initiatives, will explore together how we might try to find a way forward in a collaborative and consensual way, as the Maryland Commission did.

The key, as we were constantly reminded by everyone we met during our visit, is to find a mediation ‘champion’, and to start a collaborative process which includes all stakeholders, including those who are sceptical about mediation. Our hosts in Maryland have shown that it can be done given the necessary support and enthusiasm from the right quarters.

That said, those in Maryland don’t have all the answers by any means, and there are some issues which remain to be resolved. There is an ongoing debate about standards of quality assurance for mediators, for example. Also, many of the mediation programmes rely heavily on volunteer mediators, who give their time in return for training and experience, and there must be concerns as to whether they can sustain themselves on that basis in the long term. Such concerns have already begun to surface in Scotland.

While some issues may not yet have been resolved, however, the state of Maryland has achieved a tremendous amount in just five short years, and is undoubtedly a clear leader in mediation within the US. The Chief Judge was recently honoured with a national award for leadership in the ADR field by the American Bar Association, in recognition of the work which he has done in creating a model state office of dispute resolution. Scotland now has the chance to follow his example, and become a leader in mediation within the UK and Europe, potentially even on the world stage. If this is to be achieved, however, it will require the necessary commitment by those who have the power to make it happen.

Sarah O’Neill
Legal Officer
Scottish Consumer Council

April 2003
Margaret Smith, MSP,
The Scottish Parliament,
George IV Bridge,
Edinburgh

27th November 2003

Dear Ms. Smith,

Justice Committee 1 : Alternative Dispute Resolution

I attended the Committee’s recent session considering the EC Green Paper on ADR. I would like to explore in slightly more detail, particularly in relation to family mediation, an issue that was raised by a member of the Committee.

My interests in ADR are in two areas:
(i) I am an accredited civil, non-family, mediator and am on the panel of mediators of Core Mediation, the commercial mediation provider which John Sturrock chairs. I am occasionally therefore involved in mediation on a commercial basis. I would endorse everything John Sturrock said much more clearly and cogently than I could, and I particularly welcomed the Committee’s view that it would be appropriate to find out more about the Executive’s position.
(ii) I also, however, have an entirely voluntary involvement in family mediation. I was involved in the original establishment of the service in Edinburgh nearly twenty years ago, and I am currently a Board member and in fact Chair of the Lothian service. I write, however, in a personal capacity out of my interest and concern in the development of family mediation services throughout Scotland.

John Sturrock was asked whether there were still any resource and funding issues to be resolved. He indicated that he was not in a position to speak about family mediation, and his answer quite properly referred only to ‘pump priming’, education and research. Very
obviously, public funding would not be expected for commercial mediation providers.

In relation to family mediation, however, I think there is an important funding issue which requires further attention. Put very shortly, I believe the principle of full public funding for not-for-profit family mediation services, as an adjunct of the justice system as well as an important part of support services for children and families, requires to be recognised. Access to mediation is as important as access to justice.

Family mediation does receive quite substantial funding from the Executive, but on a basis and at a level which, so far as I can see, do not recognise the clear benefits which the services produce for the justice system. Until very recently, this funding was administered by the Civil Law Division, but as part of that department’s support for a number of support services for children and parents. Within the last few months, the Executive has decided to transfer the funding for these ‘family support bodies’ to a new unified fund handled by the Education Department, the ‘Children, Young People and Families unified Voluntary Sector Fund’, although still apparently to be in some way under the Civil Law Division.

Supporting children and families certainly is close to the heart of family mediation, but it should plainly also be recognised as at least an adjunct of the justice system which not only promotes far more satisfactory resolutions but also on any view saves very substantial judicial and Legal Aid resources.

The actual funding position of family mediation across the country is patchy. Some local authorities support it; others do not. Executive funding assists local services in varying degrees. The result is:-
(a) the service has not been developed fully across the country and the level of provision varies widely;
(b) some mediators are not paid at all, others at rates which do not reflect their high level of skill; and
(c) staff and volunteer Board members have to devote a large proportion of their efforts fending off financial crises and to casting around other sources of funding, which is often based on ‘add-on’ rather than core services.

I should mention that the Lothian service has, through the years, had substantial local authority support (and in fact currently only receives a relatively low level of Executive support). It has also been largely successful in its own efforts to build up what I think anyone would regard as a highly impressive and professional service, but as it happens is
presently, like some of the other local services and not for the first time, looking at a serious financial position.

It is of course clear that if there were to be full public funding, and indeed so long as there is any public funding, there should be full accountability. Questions raised by Committee members about training, quality assurance and regulation are appropriate and important. Proper financial accountability is of course also required. Without going into details, I believe that the family mediation services under the auspices of Family Mediation Scotland would meet any scrutiny in such areas – in particular, the standards of training and accreditation (which is to the standards of the U.K. College of Family Mediators), are, I believe, extremely impressive. In a response which I prepared to the Green Paper, I suggested that the training of family mediators in Scotland may be far ahead of that of the judiciary in this area.

I would just add that I think the two particular questions raised by Committee members – about avoiding public legal precedents and lowering the level of settlements – are not particular issues in family mediation. Questions of power imbalance can certainly arise, but you can be assured that an important part of family mediators' training is to be able to recognise that, work so far as possible to neutralise it, and in an extreme case not allow the mediation to proceed further. These potential problems of course arise, and usually go unchecked, in the ordinary forms of negotiation of out-of-court settlements.

It would be idle to expect some immediate change in the public funding position, but I believe MSP's would want to raise with the Executive the principle of full public funding of properly developed, but also fully accountable, family mediation services. I felt it appropriate to write to members of the Committee on this because the question was asked in the Committee. I am sorry to have written at such length! I would be happy to discuss these matters further, as would Carol Barrett, the director of the Lothian service, and of course both Family Mediation Scotland and ourselves can provide further information about the services.

I do hope that the Committee, and the Executive, will be able to come back to this topic. I would also like to express my appreciation of the thorough and careful way in which members of the Committee were obviously considering this issue, which I appreciate is only one of many which come before you. The electronic arrangements, including the screens which enabled members of the public to follow even the teleconferencing, were also impressive!
Justice 1 Committee

Civil Partnership Registration

Note by the Reporter and the Clerk

Background

UK legislation
1. In June 2003, the UK Government published a consultation paper outlining proposals for civil partnership registration legislation creating a scheme under which same-sex couples in England and Wales would be able to register their partnership. Couples who registered would have a new legal status as “registered civil partners” and would “…acquire a package of rights and responsibilities that would reflect the commitment they had made…”1.

The Scottish Executive
2. On 10 September 2003, the Scottish Executive gave its position in respect of civil partnership registration in a written answer to a parliamentary question—

S2W-2419 - Michael Matheson (Central Scotland) (SNP) : To ask the Scottish Executive when it will start consultation on civil partnership registration.

Answered by Cathy Jamieson (10 September 2003): The Scottish Executive has been carefully considering the issue of civil partnership registration in recent months. The Department of Trade and Industry published a consultation paper at the end of June on a possible civil partnership registration scheme for same-sex couples. The scheme is a mixture of reserved policies such as pensions, benefits, taxation and immigration issues and devolved matters such as registration, family law issues on the breakdown of a relationship or the death of one party, and detailed considerations such as prison visiting and who can register a death or consent to medical treatment for an ill partner.

We have been considering how best to handle the implications of the UK Government’s proposals should they decide to proceed with legislation.

The Scottish Executive has also been mindful of the legal rights of same-sex couples. The creation of a civil partnership registration scheme to provide same-sex couples with the opportunity to register their partnership and trigger access to some employment benefits is the approach taken by the UK Government to ensure compliance with the EU Employment Directive (2000/78/EC). In the absence of Scottish provisions, couples will have to travel down south to get some of the rights of their counterparts in England and Wales. There could be a

1 Department of Trade and Industry, Women and Equality Unit, Civil Partnership—A framework for the legal recognition of same-sex couples, page 11
legal challenge by a Scottish same-sex couple on grounds of discrimination.

In examining the options for Scottish legislation, key considerations have been the intertwining of devolved and reserved policy issues, our desire to avoid a complex web of differing rights emerging between Scotland and England and Wales, and the advantages which parity offers in relation to cross-border issues. Separate legislation north and south of the border would lead to a complicated set of arrangements understood by few people. We have therefore concluded that a Sewel motion to include Scottish provisions in any future UK legislation offers the most effective and sensible means of delivering a package of rights and responsibilities for committed same-sex couples.

The DTI is already consulting with Scottish interests on the reserved elements of their civil partnership scheme. It is our intention to consult on the devolved elements and to publish a short paper around the end of this month.

The Equal Opportunities Committee

3. The Executive subsequently published its consultation paper, Civil Partnership Registration: A legal status for committed same-sex couples in Scotland. This paper has been considered by the Equal Opportunities Committee, which has taken oral evidence on the matter and submitted a response to the consultation. The Equal Opportunities Committee’s response is attached for information (annex A).

4. The principal purpose of the proposed legislation, namely to address civil inequalities between same-sex and mixed-sex couples, falls within the remit of the Equal Opportunities Committee.

The Justice 1 Committee

5. At its meeting on 8 October 2003, the Justice 1 Committee agreed to appoint Margaret Smith as reporter in relation to proposed UK legislation on civil partnership registration, to be considered by the Equal Opportunities Committee.

6. The impact of the proposed legislation on devolved areas outlined below falls principally within the remit of the Justice 1 Committee.

The proposed legislation

Devolved matters affected by civil partnership registration

7. In its consultation paper, the Scottish Executive set out the reserved and devolved aspects of policy that would be affected by civil partnership legislation. The devolved aspects are—
   •   Creation of the new legal status; eligibility for participation;
   •   Registration and dissolution of civil partnerships;

2 The full text of the response, including written submissions of evidence, is available online at http://www.scottish.parliament.uk/equal/reports/eoc03-resp-01-01.htm.
Family law: parental responsibility, residence and contact with children, aliment, intestacy, inheritance, damages, adoption, property division on dissolution and registering of a civil partner’s death;

Recognition of the relationship: council tax, local government elections, hospital visiting and medical treatment, giving evidence in court, prison visiting, fatal accident inquiry, burial and post mortems, organ retention, tenancy succession, public funding (legal aid) in respect of dissolutions;

Survivor pensions: public service pension schemes and injury benefits.

**Impact of civil partnership legislation on devolved matters**

8. In evidence submitted to the Equal Opportunities Committee, some concerns were expressed about the impact that civil partnership legislation may have on these devolved areas and it was suggested that “a careful audit of both statutory and common law needs to be undertaken in order to identify every single marital consequence in law”\(^3\). This was put to the Deputy Minister for Justice:

*Marilyn Livingstone:* Witnesses...have suggested that there is a need for a thorough audit of the required legislative changes in Scotland. What plans—if any—do you have to carry out such an audit?

*Hugh Henry:* We think that that is a useful idea. We are aware that there are some gaps, as you outlined, and it is our intention to ensure that what we propose is as comprehensive and effective as possible. We welcome the identification of gaps through the consultation. If the committee or others have anything else to contribute, we will listen and act accordingly.\(^4\)

9. The Committee may wish to recommend that the Scottish Executive undertake a detailed review of the impact of the proposed legislation on other legislation.

**Basis of the proposed legislation**

10. Evidence taken by the Equal Opportunities Committee also revealed concerns relating to provisions affecting Scotland in the proposed legislation being based on English, rather than Scots, law. These were also raised with the Deputy Minister for Justice, who responded as follows:

*Hugh Henry:* We are aware that there were some errors, and we have stated clearly that we will address those. We will rectify the problem and anything that we do will be firmly based on Scots law, as I said earlier, and will not be an importation of English law.\(^5\)

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\(^3\) Written submission by Professor Kenneth Norrie, paper EO/S2/03/6/03

\(^4\) *Official Report, Equal Opportunities Committee*, 11 November 2003; c 198.

\(^5\) *Official Report, Equal Opportunities Committee*, 11 November 2003; c 198.
11. The Committee may wish to recommend that it be allowed sufficient parliamentary time to scrutinise fully any bill on civil partnership registration once introduced to the UK Parliament, before a Sewel motion is considered by the Parliament.

Conclusion

Scottish Executive consultation

12. The proposals for the creation of civil partnership registration in Scotland are welcomed; however, any legislation passed by the UK Parliament in respect of Scotland should be based in Scots, not English, law. Moreover, any Sewel motion in respect of such legislation should only be agreed once a detailed review of its impact on other devolved matters has been undertaken.

13. The Committee is invited to respond to the Executive’s consultation on this matter, requesting that—
   - A detailed review of the impact of legislation in this area on other devolved areas be undertaken;
   - Sufficient parliamentary time be allocated to allow detailed scrutiny of the provisions of the legislation affecting Scotland, in order to ensure that the legislation is based in Scots law.

Future scrutiny

14. Scrutiny of legislation in this area will fall within the remits of two parliamentary committees: the Equal Opportunities Committee, in terms of whether the legislation fulfils its purpose, and the Justice Committee, in relation to the impact on other devolved areas.

15. The Committee is invited to recommend that the conveners of both committees discuss the division of work between the two committees.
Introduction

1. The Equal Opportunities Committee agreed to take evidence on civil partnership registration at its meeting on 9 September 2003 and published a call for evidence on the Scottish Executive’s consultation on its proposals for civil partnership registration on 3 October 2003. The Committee took oral evidence from the following organisations and individuals at its meetings on 28 October and 4 November:

   The Equality Network
   Stonewall Scotland
   Couple Counselling Scotland
   Lesbian Mothers Scotland
   LGBT Youth Scotland
   Outright Scotland/Granite Sisters
   The Catholic Church in Scotland
   The Church of Scotland
   The UK Islamic Mission
   Professor Kenneth Norrie
   The Law Society of Scotland

2. The Committee also heard oral evidence from the Deputy Minister for Justice, Mr Hugh Henry MSP, on 11 November and has received a total of 37 written submissions. Written submissions for which we have permission to publish are reproduced in Annex A.

3. The Committee agreed its response to the Scottish Executive at its meeting on 25 November 2003 and further agreed to publish the response on the Equal Opportunities Committee web page.

4. The Committee would like to thank all those organisations and individuals who responded to the consultation.

General Principle

5. The Equal Opportunities Committee welcomes proposals for legislation to allow same-sex couples to register their partnerships in Scotland as outlined in the Scottish Executive’s consultation document: Civil Partnership Registration, A Legal Status for Committed Same-sex Couples in Scotland.
6. This general principle achieved considerable support from those responding to the Committee’s call for evidence and those giving oral evidence before the Committee.

7. In the context of a two and a half year long consultation of LGBT communities, Tim Hopkins of the Equality Network noted:

“It was clear that people felt that the solution to the big problems faced by same-sex couples and their families was to introduce civil partnership with a similar range of secular obligations, protections and rights as marriage has.”6

8. Further support was expressed by Morag Driscoll of the Law Society of Scotland:

“The Law Society of Scotland welcomes the proposed changes to legislation. We, too, believe that they have been necessary for a considerable period.”7

9. However, the Committee also recognises that there is some opposition to the proposals. For example, the UK Islamic Mission and the Catholic Church in Scotland both expressed the view that the proposed legislation would undermine marriage. John Deighan from the Catholic Church in Scotland said, for example:

“… we believe that the proposal will undermine marriage and would constitute a basic redefinition of marriage, which is the basic cell of society.”8

10. Stuart Lynch of the Church of Scotland Board of Social Responsibility said in evidence to the Committee:

“A section of society – people in same-sex relationships – are, basically, disenfranchised at the moment and the legislative process that we are engaged in is an attempt to put that right. ... We support the principles in the document.”9

11. The Reverend Eric Foggett of the Church of Scotland Board of Social Responsibility expressed the following view:

“Those of us who are pastors, ministers and parish priests know many families in which, for instance, a niece cares for an elderly aunt. In my view and that of many people in the church, such cases are a far more pressing matter than the group that we are discussing.”10

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6 Equal Opportunities Committee Official Report, 28 October 2003, col 116
7 Equal Opportunities Committee Official Report, 4 November 2003, col 181
8 Equal Opportunities Committee Official Report, 4 November 2003, col 154
9 Ibid, col 155
10 Equal Opportunities Committee Official Report, 4 November 2003, col 156
12. The Committee also received evidence from the Holy Trinity Metropolitan Community Church in Edinburgh, which both supported the general principle, and requested that religious organisations be empowered to officiate at civil partnership registrations as is currently the case with marriage in Scotland.

13. The Committee notes the evidence from the Law Society of Scotland that there is a risk of Scotland being in breach of European human rights legislation in the absence of such legislation. However, the Committee primarily welcomes the proposed legislation as a means of addressing current legal discrimination and as a step towards combating social discrimination against same-sex couples and their families and LGBT communities in general.

14. The Committee is in agreement with Professor Norrie, Head of the Law School, University of Strathclyde, who said in evidence: “Civil partnership registration is very much an equality issue, a human rights issue and a dignity issue.”

**Recommendation 1**
The Committee wishes to emphasise its support for the general principle of the proposals and to recommend that the proposals are introduced at the earliest opportunity.

**Scottish Executive Commitment to the Legislation**

15. The Committee expressed its concerns at its meeting on 23 September with regard to the Minister’s press statement on the publication of its consultation and it notes concerns raised in evidence concerning the tone of the Executive’s consultation and the perception of its commitment to the legislation that this has created.

16. A number of respondents to the Committee’s call for evidence were disappointed at the apparent lack of commitment shown in the language used by the Executive in relation to civil partnership registration. The written submission from the STUC notes, for example:

   “It is unfortunate that the Executive has chosen to present this important and positive legislation in such tentative fashion. The consultation document suffers from the lack of a clear statement from Ministers recognising the inherent value and importance of Civil Partnerships.”

17. Michael Norbury says in his written submission: “I also hope that the reason for following the consultation through is not, as suggested in paragraph 3.6, to avoid ‘difficulties north and south of the border’, but rather that Equality is the driving force behind the consultation.” Sarah Dundas, in

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11 Ibid, col 181 (Morag Driscoll)
12 Ibid, col 189
her written submission, mentions the need to “… redress some of the
damage done by Ms Cathy Jamieson’s mean-spirited speech when
announcing the intention to legislate in this area.”

18. The Committee is concerned at this perception of a lack of commitment on
the part of the Executive and the message the language chosen by the
Executive sends out to the people of Scotland about its commitment to
equality and the need to combat discrimination. However, the Committee
welcomes the following comment from the Deputy Minister for Justice:

“We clearly support the principle.”13

19. A further concern raised in respect of the wording of the consultation
relates to the Executive Summary on page 1, where the Executive states:

“In the event that the UK Government brings forward legislation,
Scottish Ministers propose that same-sex couples in Scotland should
be able to register their partnerships in Scotland.”

20. This raises the question of what Scottish Ministers will do in the event that
either the UK Government does not bring forward legislation or the legislation
fails as has been the case in the past at Westminster. Whilst the Committee
recognises that a bill brought solely in Scotland would not be able to “deliver
on issues around benefits, pensions or taxation”14, it also recognises that
“there is potential for issues to be considered with regard to Scots law”15 and
there is much to be said in the Scottish Parliament taking the lead as many
respondents have urged.

21. Areas under the legislative competence of the Scottish Parliament include,
for example, creation of the new legal status itself, registration and
dissolution, parental responsibility, children – residence and contact,
inheritance, damages, adoption, hospital visiting and medical treatment,
domestic violence protection, tenancy succession, the law of evidence and
legal aid.

**Recommendation 2**
The Committee recommends that in the event that legislation on civil
partnership registration is either not brought forward or fails at
Westminster, the Scottish Executive make clear its commitment to
bringing forward legislation within Scotland.

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13 Equal Opportunities Committee Official Report, 11 November 2003, col 194
14 Deputy Minister for Justice, Equal Opportunities Committee Official Report, 11
November 2003, col 200
15 Ibid
22. The Committee notes that the decision to legislate for civil partnerships in Scotland by means of a Sewel motion has met with a range of reactions.

23. The Equality Network comments in its submission that civil partnership registration is likely to represent the largest piece of devolved legislation dealt with by means of a Sewel motion, that the expertise for devolved family law now lies at Holyrood, not at Westminster and that Holyrood uses more open and consultative methods of scrutiny.\footnote{Written Submission, Equality Network, page 9}

24. The Committee also notes the views of the Law Society of Scotland as expressed by Michael Clancy:

“The Law Society takes the view that when dealing with issues that cross devolved and reserved areas, it is more appropriate for them to be contained within the bounds of one piece of legislation.”\footnote{Equal Opportunities Committee Official Report, 4 November 2003, col 183}

25. The Committee accepts that there are practical benefits associated with this approach and that the Scottish Executive is keen to “provide sensible, pragmatic UK consistency in the law that avoids a ‘postcode lottery’ of rights developing.”\footnote{Scottish Executive, Civil Partnership Registration, A Legal Status for Committed Same-sex partnerships, paragraph 3.9}

26. The Committee also recognises that for many of those who will be directly affected by the legislation enacted on the basis of the proposals, the key issue is how soon the discrimination they currently suffer can be addressed. As Ali Jarvis of Stonewall noted in evidence:

“… many of our supporters in Scotland who have been in touch with us have told us that they do not care where the legislation is dealt with, as long as it is dealt with quickly and correctly.”\footnote{Equal Opportunities Committee Official Report, 28 October 2003, col 130}

27. The following view was also expressed:

“This proposal bears all the hallmarks of fudge. The inescapable conclusion is that Civil Partnership is a ‘hot potato’ which should be fired off to Westminster at the earliest opportunity.”\footnote{Written submission, Ellen Galford and Ellen Kelly.}

28. The Committee welcomes the assurances by the Scottish Executive that legislation relating to devolved areas will be drafted in Scotland. However, a number of witnesses have identified errors and omissions in the consultation document with respect to Scots law highlighting the need for careful scrutiny of the draft legislation by the Scottish Parliament.
29. Elizabeth McFarlane of the Law Society of Scotland notes, for example:

“We agree with the procedures in the proposals, except the ones that have been snuck in from English law, such as having to wait six weeks or a year before applying for a divorce.”  

30. Morag Driscoll of the Law Society of Scotland also highlights the following omission:

“The other interesting omission is that of the simplified-procedure divorce that is available to opposite-sex couples who have no children or who do not require a financial settlement.”

31. Morag Driscoll of the Law Society of Scotland further underlines the need for careful scrutiny of the draft legislation:

“The problem is that any bill would be intimately intertwined with many different areas of Scots law. To ensure that such a bill were compatible with Scots law, the drafting would have to be considered thoroughly and carefully.”

32. Professor Kenneth Norrie of the University of Strathclyde Law School echoes this point when he notes:

“There are various other consequences of marriage than those listed in the discussion paper and a careful audit of both statutory and common law needs to be undertaken in order to identify every single marital consequence in law.”

33. The Committee seeks assurances from the Executive that sufficient time will be made available for the Scottish Parliament to scrutinise the draft legislation before a debate on a Sewel motion. The Equality Network estimates that “a minimum of six weeks is required between the Scottish Parliament getting access to the proposed Scottish legislation, and the Sewel motion debate itself.”

34. The Committee notes the assurances of the Deputy Minister for Justice in this respect: “We hope that Members will have an opportunity – by whatever route – to examine the detail of the legislation and to reflect on that.”

21 Equal Opportunities Committee Official Report, 4 November 2003, col 190
22 Ibid, col 190
23 Equal Opportunities Committee Official Report, 4 November 2003, col 191
24 Written Submission, Professor Kenneth Norrie
25 Written Submission, Equality Network
26 Equal Opportunities Committee Official Report, 11 November 2003, col 196
35. The Committee welcomes the following undertaking by the Deputy Minister for Justice:

“We will do whatever we can to keep the Parliament and its committees fully informed of what is being discussed and of any changes that are made to the legislation.”

**Recommendation 3**
The Committee recommends that the Scottish Executive ensure that sufficient time is made available for the Scottish Parliament to scrutinise the Scottish provisions of the draft legislation before a debate on a Sewel motion.

**Recommendation 4**
Pursuant to Recommendation 3, the Committee recommends that the Scottish Executive (i) inform the Committee as soon as draft devolved legislation on civil partnership registration has been prepared, (ii) forward a copy of the draft devolved legislation to the Parliament and (iii) inform the Committee of any other arrangements for consultation on the draft legislation the Scottish Executive plans to undertake.

36. In its written submission to the Committee, the Equality Network additionally notes:

"Many LGBT people are concerned that, however good the legislation drafted by the Scottish Executive, the Westminster Parliament might significantly amend the Scottish devolved provisions."

37. The Committee welcomes the following commitment from the Deputy Minister for Justice:

“If changes were made to the bill that impacted on devolved areas and exceeded the terms of the Sewel motion that the Scottish Parliament had agreed, we would refer the matter back to the Parliament and, if necessary, lodge a further Sewel motion for debate.”

38. The Committee notes the view expressed by Stuart Lynch of the Church of Scotland Board of Social Responsibility that: “... if things go a bit pear shaped, it will be possible to rectify matters when the Scottish Parliament considers the family law bill.”

39. However, the Committee would prefer that the legislation be introduced effectively in one piece and requests that the Scottish Executive ensure, where possible, that sufficient time is also made available for the Scottish

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27 Ibid, col 197
28 Ibid, col 197
29 Equal Opportunities Committee Official Report, 4 November 2003, col 168
Parliament to scrutinise any substantive amendments made at Westminster to the draft devolved legislation.

40. The Committee recognises the challenges for the Scottish Executive in working closely with Westminster on the introduction of this legislation but acknowledges from the evidence received that the majority of groups responding wish to see this legislation brought forward as a key equality issue.

Recommendation 5
The Committee strongly recommends that the Scottish Executive ensure that the Scottish Parliament is given as much notice as possible of substantive amendments to the draft devolved legislation to facilitate effective scrutiny.

Discrimination and public attitudes

41. The Committee heard in evidence that there are two key elements to the discrimination suffered by LGBT communities and their children. Firstly there is the legal discrimination that the proposed legislation is intended to address, namely that same-sex couples cannot formally register their partnerships and access the same package of rights and responsibilities that married couples have. Secondly, there is the issue of social attitudes towards members of the LGBT communities.

42. That there can be a link between the two is highlighted in evidence from Matthew Middler of LGBT Youth Scotland, who noted that:

"... some of the young people who were consulted mentioned ... the fact that the outside world does not acknowledge how important or serious LGBT relationships are - people believe that those relationships are less committed."\(^{30}\)

43. Sue Robertson of Lesbian Mothers Scotland welcomed the proposed legislation "as a long overdue public recognition of same-sex couples", and noted: "I emphasise the public aspect, because this is vital for parents and children."\(^{31}\) She also mentioned a difficulty faced by the children of gay parents:

"...as long as there are discriminatory attitudes, our children will not feel safe for us to come out and talk about being in a lesbian relationship."\(^{32}\)

44. The Committee agrees with the majority of those submitting evidence that, in addition to addressing the main legal aspects of discrimination against

\(^{30}\) Equal Opportunities Committee Official Report, 28 October 2003, col 139

\(^{31}\) Equal Opportunities Committee Official Report, 28 October 2003, col 136

\(^{32}\) Ibid, col 139
same-sex couples, the proposed legislation will send out a clear message about the need both to tackle discrimination and to value stable relationships, a message which the Committee hopes will lead to a positive change in public attitudes.

45. Ali Jarvis of Stonewall notes:

"Although we still need to recognise that social attitudes take a little bit of time to catch up, legislation is without doubt the gateway to social change."\(^{33}\)

46. In light of the current attitudes in Scotland to discrimination against LGBT communities as evidenced in the recent Scottish Social Attitudes Survey\(^{34}\) and to further combat the perception highlighted in evidence to the Committee concerning the Executive’s commitment to this legislation, the Committee would welcome further reinforcement of this anti-discriminatory message by the Executive in future statements and policies.

**Recommendation 6**

The Committee recommends that the Scottish Executive emphasise the positive message given by the proposals to allow same-sex couples to register their partnerships as part of its wider strategy on mainstreaming equality and combating discrimination.

**Adoption and Fostering**

47. The Equality Network points out in evidence an area not included in the proposals in terms of legal discrimination:

"The proposals as they stand are not complete. For example, certain issues – in particular, parenting issues in Scotland, adoption and fostering roles – are being dealt with through separate consultation."\(^{35}\)

48. The Scottish Executive recognises this omission, stating at paragraph 6.40 of the consultation document:

"We have recently launched the second phase of the Adoption Policy Review. … We plan to wait for the review’s findings before considering how the law on adoption and fostering might be amended to reflect the new status of civil registered partners."

49. The Committee has received conflicting opinions in evidence in relation to this decision and recognises that until such times as the gap in treatment not only between different and same-sex couples in Scotland, but between same-

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\(^{33}\) Equal Opportunities Committee Official Report, 28 October 2003, col 118

\(^{34}\) Scottish Executive Social Research publication 2003: Attitudes to Discrimination in Scotland, ISBN 0 7559 36124

\(^{35}\) Equal Opportunities Committee Official Report, 28 October 2003, col 118
sex couples in England and Wales and same-sex couples in Scotland that this is a continuing example of discriminatory treatment.

50. The Committee notes that the findings of the Executive’s Adoption Policy Review are expected towards the end of 2004 and requests that the Scottish Executive inform the Committee as soon as the findings are available. The Committee further urges that the Executive take steps as early as possible to address any remaining discriminatory treatment in relation to same-sex couples.

**Impact on marriage**

51. The Committee notes the viewpoint which has been expressed that the proposals would undermine marriage. This view as expressed by the Catholic Church in Scotland is, for example, quoted in paragraph 9 above.

52. The Committee also recognises that many people are of the opinion that, in order to offer equality to same-sex couples, same-sex couples should be allowed to marry. Valerie Quigley notes in written evidence, for example:

> “We should be able to celebrate our partnership in the same legally recognised way that any heterosexual couple can if we chose to do so.”

53. The Committee accepts, however, that the intention of the proposals is to create a new legal status to afford to same-sex couples rights and responsibilities they are currently denied. The Committee is in agreement with the Deputy Minister for Justice when he says:

> “I do not see how giving legal rights on benefits, taxation and pensions to people who cannot get married can undermine marriage.”

54. The Committee welcomes the support that the proposed legislation, if enacted, will offer to same-sex couples and their children.

**Coverage of legislation**

55. Much of the evidence received by the Committee has supported the view that civil registered partnerships should also be open to different-sex couples. The submission from the Scottish Youth Parliament Equal Opportunities Committee states for example:

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36 The Deputy Minister for Justice has sent the Convener a correction to this effect regarding the statement in evidence that the report would be completed towards the end of 2005 (Equal Opportunities Committee Official Report, 11 November, col 204)

37 Written Submission, Valerie Quigley

38 Equal Opportunities Committee Official Report, 11 November 2003, col 203
“All citizens should have the option of registering their relationship in a civil partnership regardless of sexuality. We urge the Scottish Parliament and Executive to extend provision of civil partnership registration to all committed couples.”

56. Further concerns were raised in this context in another submission:

“By offering civil registration to same-sex couples only the Scottish Executive is endorsing INEQUALITY and discrimination. By definition, a civil partnership will therefore only be for ‘gays’. the Executive will perpetuate a culture of homophobia and perhaps discourage some same-sex couples from participating in the new ‘gay only’ registration procedure.”

57. The Committee recognises, however, as noted in paragraph 42 above that the intention of the proposed legislation is to address the legal discrimination currently affecting same-sex couples who do not have the choice to marry. The Committee further recognises the potential difficulties in legislating for different-sex couples in Scotland when this would not be recognised for reserved purposes as discussed in the Executive’s consultation document at paragraph 4.3.

58. The Committee accepts that the debate on whether to open up civil partnership registration to different-sex couples will continue and is of the view that this should not stand in the way of the implementation of currently proposed legislation for same-sex couples.

59. The evidence to the Committee, did, however, highlight a significant level of concern regarding not only the rights and responsibilities of unmarried, different-sex couples but also common misperceptions regarding those rights and responsibilities.

Recommendation 7
The Committee recommends that equality issues in relation to different-sex couples are included in any consultation on the Executive’s forthcoming Family Law Bill.

Rights and responsibilities

60. In response to the principle discussed at paragraph 5.4 of the Executive’s consultation document, namely that “partnerships registered by same-sex couples in Scotland should trigger access to a comprehensive package of rights and responsibilities in devolved areas that largely mirrors those available to civil registered partnerships in England and Wales.”, the Committee notes the following comments.

39 Written submission, Scottish Youth Parliament Equal Opportunities Committee
40 Written submission, Michael Norbury
61. Stuart Lynch of the Church of Scotland Board of Social Responsibility states:

“Perhaps the question is not about giving people in same-sex relationships the same rights as they would have in England – we should not simply mirror England and Wales – but about giving the same package of rights that are enjoyed by married people to people in same-sex relationships.” ⁴¹

62. Professor Norrie, Head of the Law School at the University of Strathclyde is of the same opinion:

“The Scottish legislation should not aim to mirror the rights and responsibilities conferred on same-sex couples in England but rather on opposite-sex couples in Scotland.” ⁴²

63. The Committee notes the following response from the Deputy Minister for Justice when questioned on this issue:

“The consistency would be within the framework of what the UK Government proposes to legislate on.” ⁴³

64. Whilst recognising the benefits of consistency with UK legislation, the Committee feels that the principle underpinning the proposed legislation is that of equality and this principle is best served by establishing parity between registered same-sex and married different-sex couples in Scotland.

Recommendation 8
The Committee recommends that the Scottish Executive ensure in its drafting of the Scottish provisions that the package of rights and responsibilities to be accessed by registered same-sex couples in Scotland mirrors the rights and responsibilities of married different-sex couples in Scotland, including in respect of provisions for adoption and fostering.

Formal procedures

65. The Committee agrees with the proposal of the Scottish Executive that the Scottish provisions of the proposed legislation should be based in Scots law and notes that there was no opposition to this proposal in the evidence received.

66. The Committee has noted that there are errors and omissions in the Scottish Executive consultation document and welcomes the commitment of the Deputy Minister for Justice to rectify these:

⁴¹ Equal Opportunities Committee Official Report, 4 November 2003, col 155
⁴² Written submission, Professor Kenneth Norrie
⁴³ Equal Opportunities Committee Official Report, 11 November 2003, col 194
“We are aware that there were some errors, and we have stated clearly that we will address those. We will rectify the problem and anything that we do will be firmly based in Scots law, as I said earlier, and will not be an importation of English law.”

67. The Committee supports the views of both Professor Norrie and of the Law Society of Scotland that the procedures for civil partnership registration in Scotland should mirror the appropriate Scottish legislation, namely the Marriage (Scotland) Act 1977 and that the procedures for dissolution should mirror the Divorce (Scotland) Act 1976.

68. The Committee further agrees that, whilst these pieces of legislation should form the basis of the procedures for civil partnerships, the legislation will need careful analysis to ensure that the resulting provisions are suitable for same-sex rather than different-sex couples.

69. The Committee notes, for example, the conflicting evidence it received with regard to the inclusion of adultery and desertion as grounds for dissolution and on the applicability of the forbidden degrees of relationship.

**Recommendation 9**
The Committee recommends that the Scottish Executive use the Marriage (Scotland) Act 1977 and the Divorce (Scotland) Act 1976 as the basis for the procedures for civil partnership registration and dissolution in Scotland and adapt the specific rules as required to reflect the realities of same-sex relationships.

**Conclusion**

70. The Committee welcomes the opportunity to respond to the Scottish Executive consultation on proposals for civil partnership registration in Scotland and further welcomes the potential benefits the proposed legislation can offer same-sex couples. In this respect, the Committee is mindful of the following statement from Maria Clark of Granite Sisters on behalf of Outright Scotland:

> “… gay couples are not regarded as being the same. We pay taxes; we are doctors, firemen, nurses and police officers; we do things for other people – yet we are not recognised as being the same. Civil registration would be a step forward.”

71. The Committee invites the Executive to respond to the issues raised above prior to the Parliament’s consideration of a Sewel motion on civil partnership registration.

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44 Equal Opportunities Committee Official Report, 11 November 2003, col 198
45 Equal Opportunities Committee Official Report, 28 October 2003, col 138
Justice 1 Committee

Inquiry on rehabilitation in prisons

Note by the Clerk

Background

1. At its meeting on 19 November, the Committee agreed to hold an inquiry into the effectiveness of rehabilitation programmes in prisons. The Committee will discuss the appointment of an adviser at its meeting, and will discuss the remit of the inquiry early in 2004.

2. The Conveners’ Group is considering bids for funding for civic participation initiatives at its meeting in early January. The Committee is invited to consider whether it wishes to bid for funding to consult prisoners on rehabilitation programmes in prison.

3. If the Committee agrees to take forward such an initiative, it is invited to consider the attached draft bid to the Conveners’ Group.

Title of Initiative

4. Consultation of prisoners on rehabilitation in prisons.

Proposed date for the civic participation initiative to take place

5. March 2004 with a pilot in late February 2004

Summary of the proposed civic participation initiative

6. At its meeting on 19 November 2003 the Justice 1 Committee agreed to hold an inquiry into the effectiveness of rehabilitation programmes in prisons. As part of this inquiry, the Committee proposes to organise a civic participation initiative to seek the views of prisoners on the role of prisons in delivering rehabilitation programmes. It is proposed that the Committee will commission a facilitator to organise focus groups in a number of different prisons, with different groups of prisoners (approximately 10 focus groups). The outcomes of this work will be considered by the Committee as evidence to the inquiry and will help to inform the Committee’s final report and conclusions.

7. It is intended that the facilitator will organise a pilot focus group in advance of the others to test the approach used. This will allow for modification of the approach (if necessary) before embarking on the full programme of focus groups. It is envisaged that the pilot focus group will take place in February, with the full focus groups taking place in March.
Background to the proposed initiative and its relevance in the Committee’s workplan

8. At its meeting on 19 November 2003 the Justice 1 Committee agreed to hold an inquiry into the effectiveness of rehabilitation programmes in prisons. The Committee wishes to address the question of what is expected of prisons when people are given custodial sentences. The Committee is aware that prisoner numbers are rising and that overcrowding in prisons continues to be a problem in Scotland. In evidence to the Committee on 4 November 2003 Dr Andrew McLellan, Her Majesty’s Chief Inspector of Prisons for Scotland, told the Committee that overcrowding is at an all-time high this year. In that context, the Committee wishes to consider the extent to which prisons are able to perform a role in rehabilitation and to examine the effectiveness of particular rehabilitation programmes in prisons. The Committee has agreed to appoint an adviser who, once in post, will assist the Committee in refining the remit of the inquiry. The Committee is making a bid for funding for civic participation at this early stage, as the next deadline for bids will be too late for the consultation to fit with the timescale of the inquiry.

9. In that context, the Committee wishes to bid for funding for a civic participation initiative to seek the views of prisoners on the role of prisons in delivering rehabilitation programmes.

Purpose of the civic participation initiative

10. It is clear that the views of prisoners will be vital to the Committee in carrying out its inquiry into rehabilitation in prisons. Given that prisoners are a difficult group of people to consult, it is proposed that the most productive way of gathering their views will be by running focus groups within prisons.

11. It is proposed that the Committee will commission an organisation or individual to organise and facilitate focus groups of prisoners to gather their views on rehabilitation in prisons. Before embarking on a full programme of focus groups, the facilitator will be required to carry out a pilot focus group to test the method of consultation and modify it if necessary. It is envisaged that this work will be carried out in a number of different prisons, with different types of prisoners. The Committee will agree which types of prisoner it wishes to consult once it has finalised the exact remit of the inquiry. In identifying types of prisons in which to consult, the Committee will consider factors such as the availability of particular programmes and whether the establishment caters for male/female inmates. In relation to selecting prisoner groups to consult, factors taken into account are likely to include the age of prisoners, length of sentence, prisoners with drug/alcohol problems, etc. The outcomes of this work will be considered by the Committee as evidence to the inquiry and will help to inform the Committee’s final report and conclusions.

1 Joint Justice Committee meeting, 4 Nov, OR, col 95
What are the expected outputs of the project and how will these be used?

12. It is expected that some members of the Committee will attend the focus groups and will be able to report back the views of the prisoners on the record at Committee meetings. It is also anticipated that the facilitators of the focus groups will produce a report outlining the views expressed in the focus groups. It is expected that the facilitators will make a presentation on the findings of the focus groups to the Committee.

When are the outputs (e.g. a report on event/initiative) required?

13. The report on the focus groups will be required by the end of April 2004.

State the specific expertise required for the initiative not available in the Parliament i.e. a consultant or organisation:

14. A consultant will be required to organise, pilot and facilitate the focus groups. The consultant will be experienced in the focus group method of consultation and able to facilitate full and frank discussion among prisoners. The consultant will also be able to report information gathered through the focus groups in a clear and concise way.

Is there a favoured venue(s) for the event?

15. It is anticipated that the focus groups will take place in a number of different prisons in Scotland. The exact venues will be determined once the Committee has agreed which types of prisoners it wishes to consult.
Justice 1 Committee

Criminal Procedure (Amendment) (Scotland) Bill

Submission by the Edinburgh Bar Association

Members of the Edinburgh Bar Association are well aware of the problems in High Court prosecutions. We are regularly instructed in such cases. Consequently we welcome some of the measures in this Bill which are designed to avoid unnecessary delay.

Delay benefits no one in the system. Despite claims to the contrary (including those made by the First Minister in the Signet Library recently) it is not in our interests for there to be delays. Suggestions to the contrary are either misguided or dishonest. We are paid only at the conclusion of cases and then only if work was reasonable and necessary, due regard being had to economy. Our legal aid rates remain unchanged in 10 years.

Our clients do not wish to be left for too long in a state of uncertainty about their fate. It is not easy to maintain normality at home and work with a High Court case hanging over their heads.

We are concerned that the introduction of 5 year sentences in the Sheriff Court is simply a way of transferring the current problems from the High Court to the Sheriff Court. We are not convinced that there is spare capacity in the Sheriff Court. Indeed there are problems coping with the existing workload. It is an oversimplification to say that “the type of cases to be transferred to the sheriff court will not only be less serious, but also less complex and of the type more likely to result in a guilty plea.” (EXPLANATORY NOTES, p.28). That does not mean that these cases are either simple or trivial.

It is unfortunate that there has not been co-ordination of these measures with any proposals from the McInnes report which we understand to be due out early in 2004.

Consideration should also be given to the planned use of experienced Sheriffs as temporary High Court judges. This will rob Sheriff Courts of some of those Sheriffs who should be involved in conducting trials before juries when the new 5 year sentence is available. Again the Sheriff Court is simply used as a facility for reducing pressure on the High Court, without recognition of the importance of its work or of the effect on Sheriff Court business.

We welcome most of the proposals in this Bill. We are not convinced by the need to change the 110-day rule. It is an ancient safeguard which helps to protect
witnesses and victims as well as an innocent accused. We believe that the other measures in the Bill should be given an opportunity to work before any such drastic change is tried. When a right is removed or watered down it rarely returns. To change the rule seems to be an abandonment of principle for the sake of acknowledging the reality of some but not all cases. Many trials do go ahead within current time-limits.

We do not accept what is said by the Executive in its Policy Memorandum for the Bill – “the proposals in the Bill are a package from which it is impossible to detach individual proposals without seriously undermining the effectiveness of the measures as a whole”. Indeed the Executive has cherry-picked from Lord Bonomy’s report to come up with the measures in the Bill despite a similar warning. For example, Lord Bonomy mentioned the need for earlier co-operation by the Crown, with greater disclosure to the defence. He also mentioned the fact that legal aid rates for this work have not been changed for over 10 years. This Bill makes no explicit mention of these factors. The letter of the Bill is not enough on its own to make any difference at all. The other factors identified by Lord Bonomy require urgent attention. The Executive should be pressed for answers on these areas too.

The idea of Preliminary Hearings is a good one. Indeed some of our older members remember when such diets used to exist and were heard in the Sheriff Court for High Court cases. Proper management is obviously the key to their success. We have experience of such diets for solemn cases at Sheriff and Jury level. Interestingly there appears to be no equivalent provision in this Bill to s.71 (7) of the Criminal Procedure (Scotland )Act 1995.

“(7) Where at a first diet the court concludes that the case is unlikely to proceed to trial on the date assigned for the trial diet, the court—

(a) shall, unless having regard to previous proceedings in the case it considers it inappropriate to do so, postpone the trial diet; and
(b) may fix a further first diet.”

Such a section might assist with case-management.

The provision in section 17 of the Bill has been anticipated in a recent decision of our Appeal Court in the case of Du Plooy and others. It means that in practice the courts are already giving and stating a discount for early pleas. When this approach is universally adopted it is likely to have an impact on the number of trials.

Despite an unnecessary and unjustified attack on the legal profession by the First Minister we are aware of the problems in this area and have been seeking change for longer than he has. We are prepared to help to make any necessary changes work. That applies to any changes from the McInnes report. Our “vested interest” is also in seeing a speedy and efficient delivery of justice.

Edinburgh Bar Association
Thank you for your letter of 10 October 2003 and for your invitation to submit written evidence in relation to the above Bill.

The Council of the Sheriffs’ Association commented on the original “Improving Practice” Paper by Lord Bonomy and we also considered the terms of the White Paper “Modernising Justice in Scotland” which followed it. Since then we have had a useful meeting with the Bill Team and exchanged views with them.

Your letter of 10 October indicates that the written evidence should relate to the general principles of the Bill and, in that connection we refer to our original response to Lord Bonomy’s Paper. Essentially our position was, and remains one of support and agreement with the aims and objectives of this legislation, particularly where it relates to the procedural changes to solemn procedure. Accordingly, in this submission we restrict ourselves to practical observations in the hope that consideration of these matters by Justice 1 Committee may assist the administration of the Sheriff Court Solemn caseload, which is, you will understand our main concern.

There are perhaps three separate areas where we would make comment.

**Trials in Absence**

This matter is dealt with at section 11 of the Bill and it is a relatively straightforward section that applies to both Sheriff and High Court solemn trials, substantially amending the existing section 92 of the Criminal Procedure (Scotland) Act 1995. Section 92 presently allows for the removal of an accused person from Court during his trial only in the case where he misconducts himself and only for as long as his conduct makes that necessary. That is a useful section and although rarely used its existence is important as a curb and a disincentive to accused persons to misbehave in the course of trial.

What is envisaged by the new provision is very different and is drafted so widely as to allow for an entire trial to take place in the absence of an accused simply on the basis that he has failed to appear after due citation and that it is in the interests of justice to proceed with the trial and with the sentencing process in his absence.

This is not a matter upon which we have had a real opportunity to comment at an earlier stage since the matter was dealt with only peripherally in Lord Bonomy’s Report (a nine line paragraph at 11.20) and in the White Paper.
was referred to at paragraph 133 in such a way as to give some confidence that the strong reservations expressed during consultation would result in further consideration. Accordingly, we have never stated a view on this matter in relation to jury trials although we have no difficulty with the existing law in relation to summary cases. It does appear to us however that trial in absence in a jury case is an entirely different and more serious matter and we have very clear reservations about the whole issue, particularly in the situation envisaged in the Bill where the whole trial could take place in the absence of the accused. We consider that that would effectively be a waste of time in many cases since it appears to us inevitable that in those cases where a trial so proceeds and where a conviction follows, the convicted person will eventually be arrested following upon conviction and will then be in a position to appeal on the basis that he has not had his defence heard by the Jury. We consider that in the normal situation the Appeal Court would find such submissions to be irresistible and would order a re-trial thus obliging all of the witnesses to give their evidence again at a time where their memory of the events may well have diminished. The better course would surely have been the pursuit of arrest warrants followed by a remand in custody for trial.

The only circumstance in which we consider that a trial in absence would have relevance is where an accused absconds at a point after he had given his own evidence but before the Jury return their verdict, and in these very rare circumstances we can see some benefit in having a provision which would avoid a re-run of the whole trial.

For the avoidance of doubt we should also say that we are opposed to the holding of what may be termed "show trials" where the accused person has left the jurisdiction of the Court and has no intention of ever returning voluntarily. Such trials are meaningless and are, in any event, now actively disapproved of in recent European Court decisions.

Finally, the existence of this a provision would, in our view, lead in some cases to the possibility of active misuse of the system by accused persons to achieve tactical advantage. Having had the benefit of legal advice on the issue, they may wilfully absent themselves from trial in the belief that the trial will continue in absence and thus use the provision for their own purposes and.

It is also extremely difficult to see how the court could “dispose of” the case, i.e. sentence, in the absence of the accused. There are a number of statutory restrictions on sentences of imprisonment, particularly in the case of young persons and person who have not been sentenced to imprisonment before. The sentencing of mentally ill offenders requires special attention.

Accordingly, while we have not had the fullest opportunity to consider all of the implications of trial in absence in solemn business we take the view that the very few occasions where we see benefit in a small part of a case being dealt with in the absence of the accused far outweigh the disadvantages which this provision will produce.
Bail Issues

We welcome the provisions of Part III of the Bill effectively extending electronic monitoring into the area of conditional bail. The observation which follows is something which we mentioned to the Bill Team in greater detail and it will therefore doubtless be brought to your attention at Committee. There are existing provisions of the Criminal Procedure (Scotland) Act which set time limits in relation to disposal by the Sheriff of a Bail Application (1995 Act, section 23), and similarly strict provisions apply to the timing of Bail Review Applications (section 30 of the 1995 Act). The provisions of sections 14 and 15 of the Bill will, we think, require to be altered to take cognisance of those provisions either by amendment or by exception.

Preliminary Hearings and other Procedural alterations

We deal in this section with the main provisions of the Bill and of course these were the matters that were recommended by Lord Bonomy and adopted by the Executive. As indicated above we are in full support of these provisions and you will recall that the only area in which the Association originally disagreed with Lord Bonomy was, as explained in our submission at the time, our desire to keep as close by as possible to our current first diet procedure and specifically to avoid the parts of the proposed High Court Preliminary Diet Procedure which involved fixing the date for the trial and for the citation of witnesses.

We note that the Bill achieves that objective and we are of the view that our current First Diet procedure is flexible enough to deal with some of the matters which the proposed amendments allow the High Court to deal with at its Preliminary Diet. To that extent we are content to adopt a position of not making any detailed comment on the proposed changes to High Court procedure but, of course, certain of the provisions of the Bill are common to both Courts and it is perhaps proper that we specifically mention those. Largely they are the various sections of parts II, III and IV of the Bill and we have already dealt with section 11 (trial in absence) and sections 14 and 15 (bail). So far as the remaining sections are concerned we have no difficulty whatsoever with the new proposed provisions and indeed support them.

We have one observation to make in relation to section 17 and again this is a matter which we raised with the Bill Team. It does appear to us that the alteration to section 196 of the 1995 Act was made before the High Court produced its Opinion in the case of *Du plooy -v- HMA*, 3 October 2003. That case deals exhaustively with the issue of “sentence-discount” discount and the proposed amendment is perhaps unnecessary and possibly confusing. It may be thought that the new case regulates the position very fully.

Sections 4 and 5 of the Bill are sections which *ex facie* relate to the High Court only, but this is a situation in which we think that there would be advantage in having those sections extended to deal with proceedings at the
First or other Preliminary Diets in the Sheriff Court also. The present sections 288C, 288D and 288E of the 1995 Act (which would be amended by Bill sections 4 and 5), are sections which currently relates only to proceedings at the trial diet. It would be extremely worthwhile to give the Sheriff Court the same procedure as the High Court in those cases of sexual offending in which the Court decides that an unrepresented accused should compulsorily have a solicitor appointed to deal with the case. The existing provisions mean that an accused person is not able to cross-examine the victim of his alleged crime at trial and there would be advantage in extending that position to the preliminary procedures in case any of those preliminary procedures involving the taking of evidence from witnesses. It would be as important to avoid the possibility of such an accused being able to indulge in cross-examination of witnesses at any pre-trial procedures as it would be at trial. It seems to us that the extension of those sections to Sheriff Court procedure would not be difficult in logistic terms, nor would it upset the underlying principles of Part I of the Bill. Similarly, the provisions introduced by section 5 could, with adaptations, be extended to sheriff court procedure.

There is one issue of drafting which we consider should be brought to your attention since we anticipate some difficulty in interpretation if the matter remains in its present form. In the Bonomy Report ( paras 8.15/8.20) the author deals in some detail with the particular issue of admissibility which has long been a difficulty in both High Court and Sheriff Court trials. The issue is the lengthy, cumbersome and inconvenient “trial within a trial” situation and Lord Bonomy clearly indicates that those issues of admissibility should be dealt with at a preliminary diet. We respectfully agree with that entirely and have already said so in our submissions. Lord Bonomy suggests (at 8.18) an addition to the list of issues to be dealt with at preliminary diet and you have taken account of that in the Bill. Our concern is simply this: that the present law on this matter is contained within the Judgment in the case of Thomson -v- Crowe, 2000 JC 173 and accordingly any legislation which is passed must deal very fully with the decision of the Court in that case. In particular it may be necessary to consider giving the Court specific authority at a preliminary stage to deal with matters such as admissibility by hearing evidence, if necessary, since the whole basis of the Thomson -v- Crowe decision was that where there were disputed issues of fact the Court should hear evidence in that area before making the admissibility ruling. This is vital since the main reason for having that new provision added to section 79 was Lord Bonomy’s desire to prevent the interruption of trials and the consequent inconvenience to witnesses and jurors which is currently occasioned by the necessity, in terms of Thomson -v- Crowe, to hold a trial within a trial in the course of the trial itself.

Finally we have one very significant matter which we feel must be drawn to your attention and which relates to implementation rather than content. It is our understanding that when Sheriffs Principal have agreed that the Sheriff Courts are able to accept the increased workload which would be brought to them by the implementation of section 13(1) of the 1997 Act, that section will be immediately brought into effect. From that point on, prosecutors will indict in the Sheriff Court a significant number of cases which they may previously
have indicted in the High Court prior to the increased powers of sentencing. We further understand that this will have the effect of reducing the existing High Court workload to a level where the High Court will be able to deal with its workload in the way envisaged by Lord Bonomy. When that point is reached, and it may be many months after the implementation of section 13, the provisions of the then-amended 1995 Act which are inserted by this Bill, will then be brought into operation. The effect of this timetable will be that for an extended period the Sheriff Court will have an increased workload at the top end of its range of criminal business and the additional cases will be precisely the type of business which has been causing the High Court such difficulty over the years. During that period the Sheriff Court will not have the amended provisions of the 1995 Act to assist it in dealing with these matters and that will undoubtedly create both difficulty and anomaly. To provide a simple example of this; the Sheriff would have a sentencing power up to five years’ imprisonment but would not have along with it the extended sentence which is envisaged in section 18 of the Bill.

Accordingly we recommend that immediately the Sheriff Courts powers are increased to allow sentencing up to five years’ imprisonment the provisions of Parts II, III and IV of the Act should be brought into immediate effect in relation to Sheriff Court cases. As indicated above this is not, in our view, an insignificant issue since the cases which will descend upon the solemn jurisdiction of the Sheriff are serious and important matters which will require to be managed from the outset and not simply from a later point in time when the High Court receives its new case management provisions. Some of these changes are in any event long overdue such as the ability of the Sheriff to extend the 110 day period in Sheriff Court cases and the provision for dealing with an increased range of preliminary issues at the First Diet, but they do become more pressing with the arrival of cases of considerably higher gravity and complexity.

We trust that the above observations will be of some assistance to you and will be happy to assist further if required.

Sheriff Richard J D Scott
President
The Sheriffs’ Association
8 December 2003
Justice 1 Committee


Comments by the Executive

The UK was represented by Baroness Scotland. The first day of the Council was once again dominated by Asylum and Immigration issues. The second day focussed on Judicial Co-operation and Police items. On the Procedures Directive the amendments tabled by the UK were agreed including clarification that Member States are not obliged to provide free legal aid prior to appeal. This dossier and the Qualification Directive will be passed to the Irish Presidency for completion. On judicial co-operation the Framework Decision on drug trafficking was finally agreed having previously been blocked by the Netherlands for 18 months. A general agreement was reached on the European Enforcement Order. Five Member States flagged up possible delays with the implementation of the European Arrest Warrant.

Agenda Items


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. At Council there was discussion and agreement to the UK’s amendment clarifying that Member States are not obliged to provide free legal aid prior to appeal.

There are still 37 outstanding reservations to be resolved and these relate to issues of political difficulty and the Presidency concluded that Member States would not be able to agree the Directive by the end of 2003. The dossier was passed to the Irish Presidency with the objective to conclude by the deadline set by the Amsterdam Treaty – May 2004.


Germany could not agree the draft directive and the Presidency passed the dossier to the Irish Presidency which would aim to agree the Directive before 1 May 2004.

There was no consensus reached between Member States. The Presidency asked the Commission to consider the future handling of the Directive.

Draft Council Conclusions on European External Borders Agency

Mixed Committee discussion and general approach reached with the Conclusions adopted by the Council. UK wished to participate as fully as possible in the work of the agency even although the UK (and Ireland) has an opt-out from certain Schengen measures.


A general approach was finally agreed on this dossier which had stalled for 18 months. The Netherlands had difficulty with Article 4 (penalties) as they wished to apply lower penalties in cases involving small quantities of drugs. The Netherlands still has outstanding parliamentary reserves in place. The European Parliament will be reconsulted on the dossier.

Proposal for a Regulation of the European Parliament and of the Council Creating a European Enforcement Order for Uncontested Claims

The Presidency concluded a general approach on the text although it was impossible to reach a political agreement. Agreement of the proposal if adopted would speed up and simplify the recognition and enforcement of decisions in uncontested civil and commercial cases. The impact would be on court rules.

SEJD–EU JHA ACTION TEAM
8 December 03