JUSTICE 1 COMMITTEE

AGENDA

3rd Meeting, 2004 (Session 2)

Wednesday 21 January 2004

The Committee will meet at 10.00am in Committee Room 3.

1. **Criminal Procedure (Amendment) (Scotland) Bill (in private):** The Committee will consider a draft Stage 1 report.

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

Agenda item 1

Draft Stage 1 report (PRIVATE PAPER) (to follow) J1/S2/04/3/1

Papers for information circulated for the 2nd meeting, 2004 (session 2)—

Correspondence from the Minister for Justice relating to Support for Victims of Crime and Criminal Injuries Compensation Scheme J1/S2/04/3/2
Correspondence from the Deputy Minister for Finance and Parliamentary Business relating to the draft Code of Practice under Section 60 of the Freedom of Information (Scotland) Act 2002 J1/S2/04/3/3
Criminal Procedure (Amendment) (Scotland) Bill – further submission from the Scottish Law Agents Society J1/S2/04/3/4
Criminal Procedure (Amendment) (Scotland) Bill – submission from the Procurators Fiscal Society J1/S2/04/3/5
Correspondence from Scottish Prison Service Operations Director (South & West) relating to HM Prison Greenock J1/S2/04/3/6
Correspondence from the President of the Society of Messengers-At-Arms and Sheriff Officers relating to citation of witnesses in respect of the Criminal Procedure (Amendment) (Scotland) Bill J1/S2/04/3/7

Forthcoming business—
Monday 26 January 2004 – joint visit with the Justice 2 Committee to HM YOI Polmont
Wednesday 4 February 2004 – Justice 1 Committee meeting
Wednesday 11 February 2004 – Justice 1 Committee meeting
SUPPORT FOR VICTIMS OF CRIME & CRIMINAL INJURIES COMPENSATION SCHEME

I am writing to let you know of the publication today by the Home Secretary of a consultation paper on compensation and support for victims of crime.

The majority of the proposals in the consultation paper are about better services for victims of crime and relate to England and Wales only. Where the Criminal Injuries Compensation Scheme is affected, there will be some impact in Scotland, as it is a GB scheme, but this will be minor. There will be no impact on the awards to individual victims except in certain very unusual cases.

As you will be aware, the Executive has already put in place services for victims of crime in Scotland. We introduced our Strategy for Victims in Scotland in 2001 with the clear aim of providing a wide range of effective services for the victims of crime. To date we have made very considerable progress and devoted substantial sums of money to implementing the Strategy. In 2003-04, this totalled over £6 million. In 2004-05 this figure will rise to almost £11 million.

I support the principle underlying a number of proposals in the consultation paper, namely that wherever possible the perpetrator of the crime should be made to pay towards compensating the victim. I will therefore look closely at the merits of imposing a surcharge on offenders in Scotland - in light of the forthcoming report by Sheriff Principal Mclnnes on summary justice, and the work of the Sentencing Commission. I will also seek to encourage our courts to make more use of compensation orders.
The proposals in the consultation paper affecting the Criminal Injuries Compensation Scheme relate to payment of compensation to those traumatised on seeing people commit suicide on a railway line and those injured accidentally in taking an exceptional risk in dealing with crime (in 2002-03 out of a total of 4,912 successful cases handled by the CICS, 11 were in relation to railway suicides).

The paper also consults on where responsibility should lie for compensation of workers injured in the course of employment, but you will note also that the intent of the proposals is that such workers should remain entitled to the same levels of compensation from other sources. I must stress that the Executive remains wholly committed to the protection of workers in the workplace and to legislation to protect, in particular, emergency workers.

I trust that the Committee will find this information helpful.

CATHY JAMIESON
DRAFT CODE OF PRACTICE UNDER SECTION 60 OF THE FREEDOM OF INFORMATION (SCOTLAND) ACT 2002

Thank you for your letter of 4 December 2003, setting out a number of comments arising from the Justice 1 Committee’s consideration of Michael Matheson MSP’s paper on the draft Section 60 Code of Practice. I appreciate the work that the Committee, in both its current and previous guises, has put into consideration of Freedom of Information (FOI) issues and am glad that the consultation draft of the Code of Practice seems generally to have met with the Committee’s approval.

We will of course be taking the Committee’s comments into account as we revise the Code in the early part of this year, and you may be interested to see the summary of the other comments we received in response to the consultation. However, it might be helpful if I set out some brief initial comments on the points in your letter.

Fees and Charges

The Committee asked a number of questions about the way in which the fees and charges regimes will work for FOI requests generally and for information produced in alternative formats in particular. I am very conscious of the need to get this area right, and you will be aware that the key provisions, including the upper cost limit, will be set out in separate Fees Regulations and in associated guidance. Work on this is being taken forward by a small group under the auspices of the Scottish Freedom of Information Implementation Group – the group helpfully includes both representatives of public authorities and of consumer interests – and my intention is that a set of draft regulations should be available for consultation around the end of this month. I will certainly ensure that Justice 1 Committee is given opportunity to comment on the regulations in draft.
On the particular issue of alternative formats, officials have been working closely with the Disability Rights Commission and other equality bodies to try to ensure that the Code is properly equality-proofed, and responses to the consultation from such bodies are generally positive. However, I accept that the Code needs to draw out more clearly the distinction between the duties in section 11 of the FOI (Sc) Act, where authorities are required to meet, “so far as is reasonably practicable”, the preferences of any requester as to the means in which information is provided, and the additional provisions of the Disability Discrimination Act (DDA). The FOI (Sc) Act makes clear (in section 12) that the cost of complying with the DDA cannot be passed on to applicants, and the draft Code reflects that, but we will look to see what further clarification can usefully be provided.

Formulation of Scottish Administration Policy

I note the Committee’s comments about the desirability of the release of background information on the formulation of Scottish Administration policy as soon as possible and I am happy to reassure you that the Executive is and will remain committed to doing so. This commitment is already built into the voluntary Code of Practice on Access to Scottish Executive Information, and will be built into the Executive’s Publication Scheme (which will of course need to be approved by the Scottish Information Commissioner). The section 60 Code of Practice is intended to provide high level guidance of general applicability across the whole of the Scottish public sector rather than to any one particular sector, and I therefore believe that the approach we are taking will prove to be the most effective one.

Cultural and Organisational Issues

Your letter also raised a number of points about what I may summarise as cultural and organisational issues (such as training; the responsibilities of designated FOI officers; the scope for disclosure logs; etc) and with some helpful suggestions for ways in which the draft Code might be strengthened in this respect. We are looking at how we might best take these suggestions on board, bearing in mind that the Code needs to be pitched at a relatively high level and that there will be scope for the Scottish Information Commissioner (or indeed Scottish Ministers) to provide supplementary and more detailed guidance to authorities in due course.

Conclusion

I am grateful for the Committee’s consideration of the draft Code of Practice and hope that this letter and its enclosure will provide you with a helpful update pending our finalisation of the Code over the next few weeks.
SUMMARY REPORT ON RESPONSES TO THE CONSULTATION ON THE DRAFT CODE OF PRACTICE UNDER SECTION 60 OF THE FREEDOM OF INFORMATION (SCOTLAND) ACT 2002

Introduction

1.1 The Freedom of Information (Scotland) Act 2002 ("the Act") was passed by the Scottish Parliament on 24 April 2002 and received Royal Assent on 28 May 2002. It will come into force on 1 January 2005 and will introduce a general right of access to information held by public authorities. Subject to certain conditions and exemptions, any person who makes a request in writing (or some other permanent form) to a public authority will be entitled to receive it. The Act will be promoted and enforced by a fully independent Scottish Information Commissioner ("the Commissioner").

1.2 Under section 60 of the Act, and after consultation with the Scottish Information Commissioner, the Scottish Ministers must issue, and from time to time revise, a Code of Practice ("the Section 60 Code") which will provide best practice guidance to authorities on how to carry out their functions under the Act.

Consultation on a draft Code

2.1 With the assistance of the Scottish Freedom of Information Implementation Group (SFOIG) and others, the Scottish Executive drew up a draft Code which it issued for consultation in July 2003. The draft was issued to a wide range of bodies which had previously expressed interest in FOI and to Scottish public authorities covered by the Act (other than certain categories of local primary health care bodies), as well as being available on the Scottish Executive’s FOI web-pages. A list of initial consultees is included at Annex A, although the draft Code was subsequently sent to a number of other individuals and organisations as well.

2.2 As well as seeking general comments on the draft Code the Executive sought answers to 6 particular questions:

1. How well does the draft Code meet your expectations and/or requirements?
2. Does the Code provide sufficiently clear guidance to authorities on their responsibilities under the Act?
3. Is there more that authorities might reasonably do to enable applicants to access the information they seek?
4. How well does the Code deal with any concerns you may have about social inclusion/equality mainstreaming?
5. Are there other areas on which it would be helpful to provide guidance?
6. Is the tone appropriate?

2.3 The consultation period finished formally on 31 October 2003, although some responses were received after this date and have also been included within the following summary. A total of 123 responses to the Consultation were received; five of the respondents specifically requested that their responses be treated in confidence and a further six of the responses did not complete the relevant sections indicating their approval for their responses to be published, despite specific reminders from the Executive. We must therefore assume that those responses should also be treated as being in confidence, although their comments
are included in the summaries that follow in this paper. Responses came from a wide variety of people and organisations including individual members of the public, local authorities, health bodies and environmental organisations. A chart summarising respondents by sector is included below (Figure 1). Annex B provides a full list of non-confidential responses.

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- Individuals
- Community Council
- Local Authorities
- College/University
- Health Sector
- Public Authorities
- Others
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Fig 1: Responses to consultation on draft S60 Code by category of respondent.

**Summary of Responses**

3.1 In general, respondents welcomed the Code and the guidance it provides. The implementation of Freedom of Information raises many complex issues, especially for the public authorities who will have to abide by the legislation. The responses cover many of these issues. Many of the responses also cover issues which arise from those who will wish to use the rights to be afforded to them by the legislation.

3.2 The FOI Unit is continuing to analyse the points made and to consider the scope for possible amendments to the draft Code in the light of these. However, on the basis of an initial survey, the key issues and the number of responses in which they were specifically raised are set out below (Figure 2).

3.3 The table provides a broad indication of the level of interest in a particular issue; it does not, of course, provide any indication of the range or depth of views, nor of the level or nature of the detailed points made. Equally, several respondents took the opportunity to comment on the text of the legislation itself, or on matters which are outside the scope of the Code itself. Some respondents recognised explicitly that the Code was a high-level document which would be, and would need to be, enforceable by the Commissioner, while others made a plea for more detailed or focused guidance than could be provided by a formal Code of Practice of this nature. For example, there is now separate guidance on publication schemes issued by the Commissioner, and there will be separate regulations and associated guidance on fees in due course.

3.4 However, it is clear that the main areas in which respondents as a whole felt the draft Code itself could be improved are:
1. Definition of vexatious/repeated request
2. Interface between data protection and FOI
3. Practicabilities of handling transfers of requests
4. Monitoring
5. Copyright
6. Confidentiality and commercial confidentiality

Fig 2: Main issues raised by respondents to the consultation

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<tr>
<th>Issue</th>
<th>No. of Responses</th>
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<td>Confidentiality clauses</td>
<td>8</td>
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<tr>
<td>Copyright issues</td>
<td>10</td>
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<tr>
<td>Cost of implementation</td>
<td>13</td>
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<tr>
<td>DPA/FOI interface</td>
<td>26</td>
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<td>Exemptions</td>
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<td>Fees</td>
<td>13</td>
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<tr>
<td>Gender bias</td>
<td>1</td>
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<tr>
<td>Hindsight (Impossible to judge code now)</td>
<td>7</td>
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<tr>
<td>Language/Tone</td>
<td>6</td>
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<tr>
<td>Monitoring of requests</td>
<td>15</td>
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<tr>
<td>Publication schemes</td>
<td>2</td>
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<tr>
<td>Definition of public interest</td>
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<td>Response time (20 working days)</td>
<td>2</td>
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<tr>
<td>Telephone requests</td>
<td>3</td>
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<tr>
<td>3rd Party permission non response</td>
<td>2</td>
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<tr>
<td>Provision of training</td>
<td>8</td>
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<td>Transfer of applications</td>
<td>15</td>
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<td>Translation</td>
<td>6</td>
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<tr>
<td>Twelve week exemption</td>
<td>6</td>
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<tr>
<td>Definition of vexatious/repeated request</td>
<td>32</td>
</tr>
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Responses to core consultation questions

4.1 In terms of the 6 core questions posed in the consultation, respondents felt broadly as set out in Figure 3. (It should be noted that this is very much an impressionistic summary of responses which does not fully do justice to the points made.)

Fig 3: Core consultation questions and broad summary of responses

<p>| Q1. How well does the draft Code meet your expectations and/or requirements? | On the whole, both public authorities and others were satisfied that the draft Code gave the right messages and provided the level of guidance and support that they had expected. Some public authorities sought more or less detail on particular issues, or across the draft as a whole, but most were content that the draft Code had got the balance about right. |
| Q2. Does the Code provide sufficiently | Most authorities were positive about the |</p>
<table>
<thead>
<tr>
<th>Question</th>
<th>Response</th>
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<tr>
<td>Q3. Is there more that authorities might</td>
<td>Most respondents were satisfied that the draft Code went about as far as it was reasonable to go, although several noted that there might be a distinction between the aspirations and principles of the Code and what would happen in practice.</td>
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<td>reasonably do to enable applicants to access</td>
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<td>the information they seek?</td>
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<td>Q4. How well does the Code deal with any</td>
<td>Most respondents who answered this question were positive about the Code's contribution to social inclusion and equality mainstreaming, in particular the references to, and inclusion of an Annex on, the Disability Discrimination Act. Some respondents sought greater clarity around the provision of documents in alternative languages and formats; some noted the potential costs of these; and others were concerned that there should be appropriate recognition of the distinctive needs of some particular groups of actual or potential requesters.</td>
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<td>concerns you may have about social</td>
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<td>inclusion/equality mainstreaming?</td>
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<td>Q5. Are there other areas on which it would</td>
<td>There were a number of areas where respondents felt there could be more, or more detailed, guidance than the draft Code currently offered; these are set out in Figure 2 above. Other than on the exemptions (either in general or on specific exemptions) there were very few suggestions for guidance outside the areas already covered by the Code.</td>
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<td>be helpful to provide guidance?</td>
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<td>Q6. Is the tone appropriate?</td>
<td>Most respondents were content with the tone of the Code. Some thought the tone patronising; some thought it too simplistic; some thought both the language and content were too complicated. On the whole, however, respondents were complimentary about the tone and language of the draft.</td>
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Next steps

5.1 The responses to the consultation on the Draft Code of Practice under Section 60 of the Freedom of Information (Scotland) Act 2002 will be further analysed and considered by the Scottish Executive Freedom of Information Unit during the redrafting of the Code of Practice. Proposed revisions to the Code will be put to the Scottish FOI Implementation Group and recommended to Ministers. Ministers will then need to formally consult the Commissioner before the Code can be finalised and laid before Parliament.
5.2 Copies of this paper can be obtained from the Scottish Executive Freedom of Information Unit. The paper is also available on the Scottish Executive website at:

http://www.scotland.gov.uk/foi

The Scottish Executive Freedom of Information Unit can be contacted at:

Freedom of Information Unit
Scottish Executive
G-A (North)
Victoria Quay
EDINBURGH
EH6 6QQ

Telephone 0131-244 4615
Fax 0131-244 2582
E-mail foi@scotland.gov.uk

5.3 Copies of the full responses (other then those who requested confidentiality) are available for viewing on the Executive’s FOI web pages, noted above, and at:

Scottish Executive Library
Saughton House
Broomhouse Drive
EDINBURGH
EH11 3XD

Telephone 0131 244-4564
CONSULTATION ON THE DRAFT CODE OF PRACTICE UNDER SECTION 60 OF THE FREEDOM OF INFORMATION (SCOTLAND) ACT 2002

SUMMARY LIST OF CONSULTEES

Scottish Executive Agencies
The Scottish Parliament
The Scottish Parliamentary Corporate Body

NON MINISTERIAL OFFICE HOLDERS IN THE SCOTTISH ADMINISTRATION

The Chief Dental Officer of the Scottish Administration
The Chief Medical Officer of the Scottish Administration
Her Majesty’s Chief Inspector of Constabulary
Her Majesty’s Chief Inspector of Prisons for Scotland
Her Majesty’s Inspector of Anatomy for Scotland
Her Majesty’s Inspector of Fire Services for Scotland
Her Majesty’s Inspector of Schools
The Keeper of the Records of Scotland
The Keeper of the Registers of Scotland
Procurators fiscal (Crown Office contact to disseminate)
The Queen’s and Lord Treasurer’s Remembrancer
The Queen’s Printer for Scotland
The Registrar General of Births, Deaths and Marriages for Scotland
The Registrar of Independent Schools in Scotland
Chief Rent Officer
Chief Inspector of Social Work Services in Scotland

LOCAL GOVERNMENT

Assessors (Valuation Joint Boards)
Councils (Local Authorities)
Joint boards (Joint Fire Boards and Tay Road Bridge Joint Board)
Licensing Boards
The Strathclyde Passenger Transport Authority

THE NATIONAL HEALTH SERVICE

The Clinical Standards Board for Scotland
The Common services Agency for the Scottish Health Service
Health Boards
The Health Education Board for Scotland
The Health Technology Board for Scotland
Local Health Councils
National Health Service Trusts
NHS 24
The Post Qualification Education board for Health Service Pharmacists in Scotland
The Scottish Advisory Committee on Distinction Awards
The Scottish Advisory Committee on the Medical Workforce
The Scottish Ambulance Service Board
The Scottish Council for Post Graduate Medical and Dental Education
The Scottish Dental Practice Board
The Scottish Health Advisory Service
The Scottish Hospital Endowments Research Trust
The State Hospitals Board for Scotland

HIGHER & FURTHER EDUCATION INSTITUTIONS

Colleges of Further Education
Universities of Higher Education

POLICE

Chief Constables of all Police Forces in Scotland
Joint Police Boards
The Police Advisory Board for Scotland

OTHERS (Schedule 1)

The Accounts Commission for Scotland
The Advisory Committee on Sites of Special Scientific Interest
Area Tourist Boards
Audit Scotland
The Auditor General for Scotland
The Board of Trustees for the National Galleries of Scotland
The Board of Trustees for the National Museums of Scotland
The Board of Trustees of the Royal Botanic Garden, Edinburgh
The Central Advisory Committee on Justices of the Peace
The Crofters Commission
The Deer Commission for Scotland
The Fisheries Committee
The General Teaching Council for Scotland
Highlands and Islands Enterprise
The Historic Buildings Council for Scotland
Justice of the Peace Advisory Committees
Learning and Teaching Scotland
The Local Government Boundary Commission for Scotland
The Mental Welfare Commission for Scotland
National Park Authorities
The Parole Board for Scotland
The Royal Commission on the Ancient and Historical Monuments of Scotland
The Scottish Agricultural Wages board
The Scottish Arts Council
The Scottish Charities Nominee
The Scottish Children’s Reporter Administration
The Scottish Commission for the Regulation of Care
The Scottish Criminal Cases Review Commission
Scottish Enterprise
The Scottish Environment Protection Agency
The Scottish Further Education Funding Council
The Scottish Higher Education Funding Council
The Scottish Industrial Development Advisory Board
The Scottish Information Commissioner
The Scottish Law Commission
The Scottish Legal Aid Board
Scottish Natural Heritage
The Scottish Prison Complaints Commission
The Scottish Public Services Ombudsman
The Scottish Qualifications Authority
The Scottish Records Advisory Council
The Scottish Sports Council
The Scottish Tourist Board
Scottish Water
The Standards Commission for Scotland
The Trustees of the National Library of Scotland
The Water Industry Commissioner for Scotland

COMMUNITY COUNCILS

EQUALITY GROUPS

Commission for Racial Equality
Disabled Person's Housing Service
Equal Opportunities Commission Office for Scotland
British Deaf Association Scotland
Age Concern, Scotland
Capability Scotland
Deaf Blind Scotland
Disability Rights Commission Office for Scotland
ENABLE
Royal National Institute for Blind
Scottish Association of Mental Health
Royal National Institute for Deaf People
SENSE Scotland
The Scottish Council on Deafness
Scottish Disability Equality Forum
Inclusion Scotland
Scottish Accessible Information Forum
UPDATE
Scottish Council for Single Homeless

POLITICAL
Scottish Labour Party
Scottish National Party
Scottish Conservative Party
Scottish Liberal Democrats
Scottish Socialist Party
Scottish Green Party
Independent
MSP for Falkirk West
Senior Citizen's Unity Party

Elspeth Attwood MEP, Lib Dem
Ian Hudghton MEP, SNP
Neil MacCormick MEP, SNP
David Martin MEP, Lab
Bill Miller MEP, Lab
John Parry MEP, Con
Struan Stevenson MEP, Con
Catherine Stihler MEP, Lab

CLERICAL

Action of Churches Together in Scotland
Catholic Parliamentary Office
Scottish Inter-Faith Council
Evangelical Alliance (Scotland)
The General Assembly of the Church of Scotland
Scottish Churches Parliamentary Office

LEGAL DEPOSIT LIBRARIES

The British Library
The Bodleian Library
The Cambridge University Library
The National Library of Scotland
The Library of Trinity College
The National Library of Wales

OTHERS

The Educational Institute for Scotland
National Association of Women Pharmacists
British Medical Association
The Open University
Friends of the Earth Scotland
Scottish Consumer Council
Consumers Association
The Saltire Society
The Association for the Protection of Rural Scotland
COSLA
Scottish Environment LINK
Campaign for Freedom of Information
Scottish Civic Forum
Scottish Youth Parliament
Young Scot
Youthlink Scotland
Confederation of British Industry
Scottish Federation of Housing Associations
Civil Engineering Contractors Association (Scotland)
Scottish Media Lawyers Society
The Royal Institute of Chartered Surveyors
Mining and Environment Group Ayrshire
Ciba Speciality Chemicals plc
Scottish Landowners Association
Turcan Connell Solicitors
The Royal Town Planning Institute in Scotland
The Law Society of Scotland
Individuals who responded to previous consultations.

TRADE UNIONS

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<td>Association of Scottish Colleges</td>
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**Individual**

- Amott Wilson
- Dr C Cohen
- C Menlove
- D Astbury
- D Thomson
- GDR Watkinson
- Graham Morison
- H S Murphy
- J Scott
- J M Surkamp MBE Hon Sec.
Justice 1 Committee  
Criminal Procedure (Amendment) (Scotland) Bill  
Further submission by the Scottish Law Agents Society

POINTS RAISED IN ORAL EVIDENCE

The right of an accused to be present at his trial

This is part of the notion of the right to a fair trial guaranteed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The accused has a right to be present, to be heard and to be represented at an oral hearing which is adversarial. The accused must have proper notification of the hearing and the opportunity to collect all necessary evidence to be adduced. Any waiver of the right to be present must be unequivocal (see Colenzo below) and if it is waived, the accused must have legal representation (Lala). The presence of the accused's lawyer will not be enough if he is faced with a serious criminal charge and he has not waived his right to be present (Zana).

Some of the leading cases on this are:

Delcourt v Belgium 1 EHRR 335  
Pakelli v Switzerland (19840 6 EHRR 1  
Monnell and Morris v UK 10 EHRR 205  
Colozza v Italy 7 EHRR 516  
Zana v Turkey 4 BHRC 241  
Poirimal v France (1993) 13 EHRR 130  
Le Compte v Belgium (1983) 5 EHRR 533  
Lala v Netherlands (1994) 18 EHRR 586

Article 6 contains various express rights but others have been implied through practice and interpretation. The latter category is subject to limitation— the fairness of the whole trial must be considered even if certain aspects of it might not have been carried out perfectly. As in most aspects of human rights, there is a balancing exercise to be carried out. The interests of the public weigh heavily in the scales. In each case of alleged violation of article 6 one must consider whether the actions taken were proportionate and necessary in a democratic society where the rule of law prevails.

In the case of Monnell the two accused sought leave to appeal because they were not present or represented at a hearing. By five votes to two it was held that there had been no breach of Article 6 (1) or 6-(3) (c). The latter covers the right of a person "to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require". Mr. Monnell had not liked the advice tendered to him and was dissatisfied with how his defence had been conducted at his trial. He dismissed his solicitors and instructed others. A single judge rejected his appeal and also extended the period of
imprisonment. The Court confirmed the basic rule in Delcourt v Belgium 1 EHRR 272 at paragraph 30 that paragraph 1 of Article 6 requires that a person charged with a criminal charge is entitled to take part in the hearing. In the present case, however, the court was dealing with a question at second instance. It was argued that there had been equality of arms in so far as the prosecution also had not been represented at the second hearing. Both accused had had the benefit of advice at the original trial and had been advised not to appeal. It was felt that over all the proceedings had been fair.

Colozza deals with the issue of waiver of a Convention right. A person cannot be taken to have waived rights if he is unaware of proceedings or where attempts to trace him are inadequate. The court did not consider whether a person who absconds forfeits rights. The court also held that "the need to allow for trials by default does not justify a complete and irreparable loss of entitlement to take part in the proceedings. An accused who becomes aware of the proceedings should be able to obtain a fresh determination of the merits of the charge. He should not be left with the burden of proving that he was not seeking to evade justice, or that his absence was due to force majeure."

In Italian law an accused who fails to appear has the same rights as an accused who does appear and is, for example entitled to be defended by a lawyer who will be officially assigned to him. He will not have chosen the lawyer and if the rules on participation, assistance and representation of an accused are not followed, then under Article 185 of the Code of Criminal Procedure, the proceedings are null and void.

A trawl through the cases shows that the right to be present is not absolute but that there must be very compelling reasons for denying the right. Waiver may apply but because it must be established in an unequivocal way may not always be accepted as an answer to trials in absentia. An ill informed accused, not fully aware of the consequences of his actions or the procedures or evidence required may not be in a position to waive his rights. Going a little further, as we said in evidence, what one might call "informed waiver" may also be unacceptable because of the lack of knowledge or understanding of the accused. Each case must be considered on its merits and the public interest must be weighed against the interests of the accused.

As far as the equality of arms aspect is concerned, public perception as well as the actual position must be considered. A state defender with no detailed knowledge of the accused's background may be perceived to be likely to provide an inferior service (see Bulut v Austria (1996) 24 EHRR 84 at paragraph 47
Justice 1 Committee
Criminal Procedure (Amendment) (Scotland) Bill
Submission by the Procurators Fiscal Society

The Procurators Fiscal Society welcomes the opportunity to make a submission in writing to the Committee on the subject of the Bill which has been drafted following the report prepared by Lord Bonomy into the workings of the High Court. The Society recognises the various difficulties, which the current working of the High Court can make for witnesses and victims, and is aware that the continual adjournment of cases can often add to their distress and anxiety. The current set up causes its own frustrations for our own members who work hard to prepare serious cases only to find that these cases are then adjourned to later dates. Any measures that will reduce the continual so called “churning” of cases are welcomed by the Society.

There is no doubt that some of the measures, which are contained in the Bill, will mean additional work for our members. Early disclosure of information may well be of benefit to the defence, but this extra work will take additional time for COPFS staff. The same can be said for the preparation for the proposed preliminary diet and the managed meeting. The proposed relaxation of the 110 day rule will have little practical effect on our members since the indictment will have to be served at the same early stage, the case preparation having been done. In addition the proposed restrictions on the time when S67 notices can be served may have the effect of placing additional pressure on our members in their preparation of cases. Beyond the impact this proposed change is likely to have on our members, we are not of course in a position to comment on the policy merits of a particular proposal. However, reinforcing remarks which we made in oral evidence, a great deal of evidence which is added by way of a section 67 notice is evidence that the Crown has requested from third parties, e.g. forensic science laboratories, but is nonetheless crucial to the prosecution. We would respectfully suggest that the Committee may wish to satisfy itself that these agencies are in a position to comply with what would be for them, significantly shortened reporting periods.

The proposed move to place certain cases in the Sheriff and Jury courts instead of the High Court will mean that there is an increase in the number of sheriff and jury cases which our members require to prosecute. The additional work, which the package of measures in the Bill represents, is likely to mean that more resources are required within COPFS. As a Society we are aware of the evidence given by the Crown Agent to the Finance Committee and the costings he produced. It is well nigh impossible for us to say whether these costings accurately reflect the requirements as we have no knowledge as to how these figures were arrived at and we were not consulted as to the content.

The other factor, which may affect the picture in terms of resources within COPFS, is the publication of the report by Sheriff Principal McInnes into
summary proceedings in the Sheriff and District courts. At this time it is not possible to know what effect that might have on the summary caseload in the sheriff courts but it is a factor, which cannot be overlooked in discussing this Bill.

While the Procurators Fiscal Society welcomes measures, which will improve the running of the High Court in Scotland, it is likely that if inadequate resources are made available to cope with the additional work required, that our members will be left with the burden of heavier workloads and increased pressure. That would be a most unwelcome scenario.

Gordon Williams
Val Bremner

On behalf of the Procurators Fiscal Society.
Ms C Menzies-Smith  
Senior Assistant Clerk  
Justice 1 Committee  
Room 3.12  
Committee Chambers  
EDINBURGH  
EH99 1SP  

Dear Ms Menzies-Smith  

HMP GREENOCK  

Thank you for your letter dated 17 December 2003 to Mr Cameron, Chief Executive. I am replying, as I am the SPS Board member with operational responsibility for HM Prison Greenock.  

Rule 120 of the Prisons and Young Offenders Institution (Scotland) Rule 1994, and the Directions to these Rules cover the temporary release of prisoners for the purpose of Short Leave. This Rule and the Directions specify which establishment and parts of establishments prisoners can be temporarily released for the purpose of home visits. It also stipulates what the supervision level of the prisoner requires to be at the time of application.  

HMP Greenock is not designated as an area where prisoners can be released for this purpose as it is a closed establishment. In part this is because of the risk of pressure being put on prisoners to import drugs or other contraband into a closed establishment on their return from home leave.  

The Independent Living Units (ILUs) at HMP Cornton Vale are open accommodation and as such are included within Directions to the Rules as accommodation from which temporary release for short leave is allowable. Prisoners have to complete a period of time in the Open Conditions of the ILUs before they can be granted any period of temporary release for the purpose of short leave. This period of time allows for further assessment and for the home background reports etc to be completed.  

In order for the female prisoners to be granted periods of short leave then they have to be classified as Low Supervision and return to the ILU at HMP Cornton Vale. They must meet the criteria in terms of time spent in the Open Conditions before they can be considered for temporary release. These procedures are no different from those in place for any other prisoner in the SPS.  

I trust that the above answers the points raised.  

Yours sincerely  

M DUFFY  
Operations Director (South & West)  

ASH00801
12 January 2004

Ms Pauline McNeill MSP
Convener
Justice 1 Committee
The Scottish Parliament
Edinburgh
EH99 1SP

Dear Ms McNeill

Citation of Witnesses
Criminal Procedure (Amendment) (Scotland) Bill

I note with interest that the potential use of Sheriff Officers to serve witness citations in Criminal Proceedings has been raised in your Committee in the Stage 1 consideration of the above Bill. This was an issue we raised with the Crown Office some 5 years ago and correspondence passed between our two organisations until January 2001. Matters went into abeyance at that time until the pilot postal citation scheme, then only recently implemented, had been evaluated.

This matter was brought to the Society’s attention again by an article in the Herald newspaper on 12 November 2003, which indicated that the postal citation scheme had been evaluated as successful and would be rolled out nationwide. As a consequence, the Society wrote to the Crown Agent on the basis of the agreement in January 2001 that the subject would be revisited once the postal scheme had been evaluated.

I have attached for your information a copy of the Society’s letter to the Crown Agent dated 2 December 2003, together with the copy extract of the Society’s responses to the Inquiry into the Crown Office and Procurator Fiscal Service. The Society’s case for the use of Sheriff Officer’s in the service of witness citations in Criminal Proceedings is set out in these documents.

We were however disappointed to receive a response dated 6 January 2004 from the Crown Agent indicating that it did not appear worthwhile exploring alternative approaches at this time. A copy of that response is enclosed for your information. In view of the level of criticism levelled at the current citation system, whether justified or not, and the fact the issue of witness citations has been raised in your own Committee, we would have thought it appropriate to consider all possible alternatives.
Part of the reason the use of Sheriff Officer’s is not explored is potentially a misunderstanding of the role of the Sheriff Officer. This is highlighted to some degree in the minutes from your own proceedings. In the Official Report of the Committee Meeting on 10 December 2003, Stewart Maxwell MSP posed the question at Column 311: “Do either of you have a view about the idea of using Sheriff Officers for the work?” Chief Superintendent Shanks of the Association of Scottish Police Superintendents responded, “I do not have a specific view about using sheriff officers. They have some very specialist roles…….” (my italics).

That is correct. Citation is one of our specialised roles. I suspect that there is a misconception that our duties are in enforcement areas only which is simply not the case. Our members are daily involved in citation duties in the civil courts as well as citing witnesses for the Defence in Criminal Proceedings. As was noted in the documents enclosed, Citation in Criminal Proceedings was historically the duty of Sheriff Officers. There is accordingly no need for another agency as Scotland has a body of professionals with the relevant qualifications and experience to take on the duties of service of Criminal Witness Citations.

At the risk of repeating myself, I would draw your attention to the penultimate paragraph in our Responses to the Inquiry into the Crown Office and Procurator Fiscal Service as follows.

"The society would respectfully suggest that the Committee considers a role for our members in the service of documents in criminal proceedings. It was a historical role of Officers of Court. Officers of Court retain a role on behalf of defence witnesses in criminal cases. These duties are equivalent to Officer of Court duties in civil court matters. Our members have invested in the latest technology, which allows the tracking of progress of citation as well as systems for tracking witnesses who have moved or absconded. Officers of Court are highly qualified and are in a position to offer an efficient service to the PFS/CO. We would be happy to co-operate in any pilot scheme or any process for establishing an appropriate level of fees for these services."

We have sought in the past details of the costs to the various agencies involved of the costs of prosecution witness citation to investigate a proposed level of fee to be charged by our members. That information has not been forthcoming. That apart, our previous efforts to explore the principles of this issue have net with no success. We would similarly ask your own Committee to further consider the use of Sheriff Officers in the service of Criminal Witness Citations. We would be happy to provide any further information that the Committee may require and would of course, be prepared to enter into discussions with any other relevant agencies to resolve any practical or financial issues that might arise.

I have copied this letter to the other members of the Committee for their information and look forward to hearing from you in due course.

Yours sincerely

[Signature]

Stuart Hunter
President
02 December 2003

Mr N McFadyen
Crown Agent
Crown Office
25 Chambers Street
Edinburgh
EH1 1LA

Dear Mr McFadyen

Citation of Witnesses

The Society was in correspondence with your predecessor, Mr Andrew Normand, concerning the possibility of Sheriff Officers becoming involved in the service of citations upon prosecution witnesses in criminal trials. That previous correspondence terminated in a letter from Mr Normand to the Society dated 11 January 2001 indicating that the use of Sheriff Officers would not be considered at that time due to the ongoing evaluation of the pilot schemes of postal citation. He did go on to indicate that this subject would be revisited once the postal citation scheme had been monitored and evaluated.

I was accordingly interested to note an article in the Herald newspaper of 12 November indicating that the postal citation pilot schemes had been evaluated as successful and would accordingly be rolled out nationwide. In view of the completion of the pilot schemes, it would appear to be an appropriate time to again raise the issue of the use of Sheriff Officers to serve citations in criminal proceedings.

I should make it clear that the Society does not take issue with the principles of postal citation, which appears to be the slant of the article referred to. On the contrary, we can see the logic in introducing a system of postal citation. Conversely there will always be a requirement for citations to be hand served where postal service has been unsuccessful. It is in the hand service of citations that we would see a role for officers of court. We consider that our Profession could provide a high quality of service to the authorities in this area as our members are experienced and well qualified to undertake work of this nature.

We are confident that a competitive service package could be put together that would prove to be cost effective and beneficial to all parties concerned. I have enclosed for your information an extract from the Society’s responses to the “Inquiry into the Crown Office And Procurator Fiscal Service”, where the case for the use of officers of court in the field of citation is more fully set out. We would again respectfully draw attention to the fact that comment has been made that police officers were spending too much time
on issues such as service of citations and reference was made in our paper to those comments in the annual report of the Chief Inspector for Constabulary published in 2000. While postal citation will remove some of the burden upon the police in this regard, use of Sheriff Officers in the area of citation would release further time for what I suspect the police themselves would consider front line duties.

I would accordingly ask if a meeting could be scheduled to discuss the potential for the use of officers of court in the areas mentioned. I appreciate that the evaluation of postal citation has only recently been completed, and that you may be coming anew to these issues. Accordingly, the objective any initial meeting would be to establish whether there was any common ground on which matters could progress.

Finally, I have copied this letter to the Summary Justice Review Secretariat in view of the fact that the responses referred to were originally submitted to them. I look forward to hearing from you.

Yours sincerely

Stuart Hunter
President
Extract from the Society Responses to the Inquiry into the Crown Office And Procurator Fiscal Service

5. Any Other Comments – Citation and Countermanding of Witnesses.

Our Society has contacted the Crown Office to suggest that the services of Sheriff Officers may be used in such areas as Criminal Witness citations. That contact is continuing. For the purposes of this paper, the background is as follows.

Historically, the range of officers’ duties included the apprehension of criminals and service of court writs in criminal cases. This was still an important role in the mid 19th century. Campbell’s Law of Diligence published in 1862 devoted a chapter to the Officer’s role in criminal matters and a further chapter on the requisite forms. In the same publication, the Table of fees had specific references to Apprehensions, citation of the accused, citation of witnesses, and citation of jurors. Effecting service in criminal matters appears to have been an important part of the officers’ duties at that time.

With the rise of professional police forces in the 19th century, the role of the Sheriff Officer in criminal matters on behalf of the Crown diminished and is now, in practice non-existent. Sheriff Officers do continue to serve witness citations on behalf of the Defence in criminal cases.

The restriction on the role of Sheriff Officers was not as a result of legislation. Sheriff Officers retained their authority to serve warrants, citations, indictments, complaints, lists of witnesses etc., in criminal cases. For instance, The Criminal Procedure (Scotland) Act 1987, s24 makes clear reference to messengers-at-arms and sheriff officers having the authority to serve all citations etc. That position is continued in the current legislation. The Criminal Procedure (Scotland) Act, 1995, s307 states, inter alia that; “officer of law” includes (in relation to the service and execution of any warrant, citation, petition, indictment, complaint, list of witnesses, order, notice or other proceedings or document,) any mace, messenger-at-arms, sheriff officer or other person having authority to execute a warrant of the court.

Legislation accordingly has a provision for the use of our members in criminal proceedings. In practice, this is not the case.

Reference to difficulties with current citation practices were made in the annual report of the Chief Inspector for Constabulary published in 2000. It was commented that police officers were spending too much time on routine tasks such as serving citations, escorting prisoners and tracking down people who fail to pay fines.

The Society is aware that the Scottish Executive have introduced a pilot scheme of postal citation in parts of the country as a step to addressing the problem. An evaluation was published on 8 December 2000, the Crime and Criminal Justice Research Findings No. 49. The results of the evaluation at that time were inconclusive. It was, however, noted that low response rates to postal citation inevitably increased the burden on process servers and police to deliver reissued citations promptly. Notwithstanding the success of a postal scheme, there will still be a need for hand delivery of documents in certain cases.

From the comments above, the emphasis has been on saving the police service time in matters such as witness citations etc. The efficiency of the system of citation of witnesses does impact on the work of the PFS/CO. Proper citation of witnesses will allow the smooth process of trials and timeous countermanding of witnesses would lead to less public dissatisfaction with unnecessary time taken in court. Releasing this
time from the police, would allow greater time for liaison on enforcement and court proceeding issues for both the Police and the PFS/CO.

The society would respectfully suggest that the Committee considers a role for our members in the service of documents in criminal proceedings. It was a historical role of Officers of Court. Officers of Court retain a role on behalf of defence witnesses in criminal cases. These duties are equivalent to Officer of Court duties in civil court matters. Our members have invested in the latest technology, which allows the tracking of progress of citation as well as systems for tracing witnesses who have moved or absconded. Officers of court are highly qualified and are in a position to offer an efficient service to the PFS/CO. We would be happy to co-operate in any pilot scheme or any process for establishing an appropriate level of fees for these services.
Dear Mr Hunter

CITATION OF WITNESSES

Thank you for your letter of 8 December 2003 which I read with interest.

Although a large number of witnesses are now successfully cited by post, the system national was only introduced in September 2003 and is still being fully rolled out. It will clearly take some time before the system can be evaluated on a national scale.

There is also ongoing work with the police to improve the timing and service of witness citations that require to be served personally.

Given the amount of work that is presently in hand on improvement current arrangements for citation of witnesses, I am not convinced that there would be value in exploring alternative approaches at this time.

Yours sincerely

Norman McFadyen
Crown Agent