JUSTICE 1 COMMITTEE

AGENDA

11th Meeting, 2004 (Session 2)

Wednesday 17 March 2004

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

1. **Criminal Procedure (Amendment) (Scotland) Bill**: The Committee will consider the Bill at Stage 2 (Day 2).

Alison Walker
Clerk to the Committee
Tel: 0131 348 5195
Papers for the meeting—

Agenda item 1

Members should bring with them copies of the Criminal Procedure (Amendment) (Scotland) Bill, available from the Document Supply Centre or on the Scottish Parliament website: http://www.scottish.parliament.uk/bills/index.htm

Members should also bring with them copies of the marshalled list, available from the Document Supply Centre on the morning of Tuesday 16 March 2004, and the groupings of amendments, available from the Document Supply Centre on the morning of Wednesday 17 March 2004. Copies of these documents will also be emailed to members as soon as they are available.

Papers for information circulated for the 11th meeting, 2004 (session 2)—

Criminal Procedure (Amendment) (Scotland) Bill—

Correspondence from the Minister for Education and Young People regarding amendments to the Criminal Procedure (Amendment) (Scotland) Bill in respect of the Protection of Children (Scotland) Act 2003 (hard copy only) J1/S2/04/11/1

Correspondence from the Crown Office and Procurator Fiscal Service regarding a draft practice note on disclosure J1/S2/04/11/2

Forthcoming business—

Wednesday 24 March 2004 – Justice 1 Committee, Committee Room 3*;
Wednesday 31 March 2004 – Justice 1 Committee, Chamber.

* denotes a change from forthcoming business previously indicated.
We have lodged an amendment to the Protection of Children (Scotland) Act 2003 in the Criminal Procedure (Amendment) Bill and I thought it might be helpful to explain the background to it.

The Act received Royal Assent last year and planning for implementation has been underway since. It aims to strengthen the safeguards for children by establishing the Disqualified from Working with Children List. In addition to referrals from organisations, the courts are to make referrals to the List when a person is convicted of an offence against a child. This is to provide an additional deterrent as those on the List will commit an offence if they apply to or work with children and organisations will commit an offence if they knowingly employ a banned person in a child care position. A court referral was to be deferred until the appeal process had expired, in recognition of possible human rights issues.

In preparing for implementation the Scottish Court Service discovered that section 10 of the Act was unworkable. The difficulty arose in determining the point at which the appeal period could be considered to have expired given that the Criminal Procedure (Scotland) Act 1995 allows the time limits for bringing appeals to be extended. If an amendment is not made then the purpose of that part of the Act will be frustrated and the courts will be unable to make referrals to the List.

My officials along with officials from Justice Department and the Scottish Courts Service have been working together on the proposed amendment. The intention is to provide for referrals to the List to be made on expiry of the period afforded by the Criminal Procedure (Scotland) Act 1995 for timeous appeals. Extensions to the time limits for bringing appeals will not apply where appeals against references to the List are concerned. This is to avoid the possibility of lengthy or indefinite extensions leading to an inordinate delay in including a convicted offender on the List, and reflects the balance to be struck between protecting children and safeguarding the rights of the individual. Extensions to the time limits for bringing appeals against the conviction are not affected by the
amendment and the individual who subsequently has their conviction over turned, will be able to apply to Scottish Ministers for removal from the List.

The Criminal Procedure (Amendment) (Scotland) Bill is the most suitable legislative vehicle available for the amendment. The amendment will not be considered before day 2 of Stage 2 of the Bill which I understand is currently scheduled for 17 March at the earliest. It will therefore be in the public domain for some time before the Committee are asked to consider it.

The scope of the Bill was set at introduction and is not affected by this amendment. If the amendment is not included in the Bill then the additional safeguards for children will be lost until another legislative vehicle for what is a technical, although critical, amendment can be found.

PETER J PEACOCK
Dear Ms McNeill

CRIMINAL PROCEDURE (AMENDMENT) (SCOTLAND) BILL

1. We have previously indicated to the committee that we fully recognise the vital role that disclosure will play in the operation of the new High Court system. We gave an undertaking to publish a protocol or practice note that set out clearly our commitment, and formalised the practical arrangements. In our evidence to you, we explained that we were working hard to lay the foundations for a scheme of disclosure that would play a key role in the realisation of Lord Bonomy’s vision of an efficient and effective High Court. We recognised that any system of disclosure would be severely limited in value unless the evidence disclosed was fit for purpose. Accordingly, our efforts have been focused on working with ACPOS to ensure that statements disclosed will provide the defence with the information essential for their requirements. We have made good progress and I am pleased to enclose a draft practice note.

2. The practice note represents a comprehensive response that goes beyond Lord Bonomy’s recommendations on disclosure and, in its emphasis on early disclosure, denotes a significant departure from existing arrangements. Under existing law and practice, the Crown typically discloses only a limited amount of material directly to the defence and the majority of disclosure occurs relatively late in proceedings. The key point of the practice note is that the Crown is committing to disclosing significantly more material, including all witness statements taken by the police, at stages as close as possible to commencement of proceedings. This will greatly enhance the ability of the defence to prepare for trial in a focused and effective manner and will allow meaningful preparation to begin at a much earlier stage in proceedings.

3. We believe that the practice note, by delivering to the defence the means of effective and early preparation for trial, will facilitate the successful operation of the system of preliminary hearings. Although the practice note will not be in statutory form, it will be published and, accordingly, at the preliminary hearing the Court will be entitled to have regard to its terms when considering issues around the state of preparation of parties and to take account, in making decisions about fixing trials,
of the Crown’s adherence to the commitments outlined in the practice note. This approach ensures that, while the Crown is committed to providing the defence with copies of statements and productions, the arrangements for doing so are sufficiently flexible to take account of the interests of vulnerable witnesses and the practicalities of disclosing material in large and complex cases.

4. We believe, in particular, that this approach will enable the defence to be better prepared for trial and at an earlier stage; that it will enable them to focus their enquiries and to concentrate better their efforts in precognition of witnesses. We hope that this will lead to greater agreement of the evidence of witnesses and identification of issues to be considered at the managed meeting.

5. We recognise that it is not enough simply to publish the practice note in a vacuum. In order for the anticipated culture change to be delivered, it is vital that we obtain the confidence and cooperation of our colleagues elsewhere in the criminal justice system. We think it is therefore important that other relevant organisations are provided with an opportunity to see, and comment on, our proposed approach to disclosure; and to ensure, where appropriate, that they are prepared to operate under the new procedures.

6. In recent weeks we have had two meetings with representatives of the Law Society to outline what work we have been doing and explain how the proposed disclosure regime will work. We have found these meetings to be extremely useful. We are now opening up consultation on our practice note, and it will shortly be sent out to the following agencies and bodies:

- Faculty of Advocates
- Society of Solicitor Advocates
- Scottish Legal Aid Board
- Scottish law Agents Society
- Edinburgh Bar Association
- Glasgow Bar Association
- Sheriffs’ Association
- Sheriffs Principal
- Judicial Studies Committee

7. We will be pleased to receive comments on the draft or to meet with representatives of these agencies and bodies as part of the wider consultation. I hope that providing these organisations with an opportunity to become involved in our work in this area at an early stage will make it easier to work with the new procedures in practice.

8. We are currently developing our IT systems to support the management of disclosure of witness details, statements and productions and we anticipate operating a robust disclosure regime in advance of the commencement of the Bill, so that the court and parties engaged in trials (in the High Court and Sheriff and Jury courts) have the full advantage of the new disclosure regime.

9. I hope that the Committee finds this information helpful.

Yours sincerely

Norman McFadyen
DRAFT PRACTICE NOTE

PROVISION OF INFORMATION BY THE CROWN TO THE DEFENCE IN SOLEMN CASES

List of Witnesses

1. The Crown will provide to the Solicitor for the accused (the defence) a copy of a provisional list of witnesses within 14 days of full committal or committal for further examination and liberation on bail.

2. The Crown may require, exceptionally, to withhold details of individual witnesses where further steps are necessary before disclosure is made. In any such case, the Crown will provide details of any relevant witness as soon as practicable.

3. Where the Crown has, in the course of its preparation or investigation of the case, identified any further witnesses who are relevant to the case against the accused and who have not been previously intimated to the defence, it will provide to the defence details of these as soon as practicable, subject to the same qualifications as apply to the provisional list of witnesses.

Statements

4. The Crown will, in custody cases, within 21 days of full committal and, in bail cases, within 30 days of full committal (or further examination, where the accused was liberated on bail upon committal for further examination) provide to the defence such copies of witness statements (excluding precognitions) as are then in the possession of the Crown.

5. The Crown may require, exceptionally, to withhold provision of individual statements where further steps are necessary before disclosure is made. In any such case, the Crown will provide copy statements as soon as practicable.

6. Where the Crown has, in the course of its preparation or investigation of the case, received additional statements from witnesses or statements of any further witnesses who are relevant to the case against the accused and who have not been previously provided to the defence it will provide to the defence copies of these as soon as practicable, subject to the same qualifications that apply to the original provision of copy statements.

7. Where any additional list of witnesses is served under s.67 of the Criminal Procedure (Scotland) Act 1995 the Crown will provide the defence with copies of any statements of the additional witnesses that are available to it at the time of service.
8. In any case where witness statements are provided to the defence it shall be open to the Crown to redact the statement to obscure information of a confidential nature contained within the statement, the disclosure of which is not necessary for the preparation of the defence (e.g. the home address of a witness who fears intimidation), but any redaction shall be obvious on the face of the statement.

Productions

9. The Crown will provide to the defence copies of documentary evidence in the case which would appear to be of material significance to the proper investigation of the defence as soon as practicable.

10. The Crown will provide to the defence, upon service of the Indictment,

   (i) a courtesy copy indictment
   (ii) a note giving details of where and when any previously undisclosed copy productions (so far as they may readily be copied) may be collected by the defence and where and when the productions in the case may be examined, in each case no later than 7 days after service of the indictment.

Material Developments

11. The Crown will provide to the defence information disclosed during the course of the investigation which is likely to be of material assistance to the proper preparation or presentation of the accused’s defence, in accordance with the principles set out in *HMA v McLeod 1998 SCCR 77*.

12. The Crown will review regularly during its investigation and preparation of the case, both pre- and post-indictment, any matters which should be brought to the attention of the defence and will advise the defence of material developments in the case as soon as it is practicable to do so without impairing proper investigation by the Crown.