JUSTICE 1 COMMITTEE

AGENDA

13th Meeting, 2004 (Session 2)

Wednesday 31 March 2004

The Committee will meet at 10.00 am in the Chamber, Assembly Hall, The Mound, Edinburgh.

1. **Protection from Abuse (Scotland) Act 2001**: The Committee will consider its approach to post-legislative scrutiny of the Act.

2. **Transparency of legal fees**: The Committee will consider recent correspondence to the Convener.

3. **Security of tenure and rights of access**: The Committee will consider recent correspondence relating to security of tenure and rights of access for those who own property built on leased land.

4. **Children (Scotland) Act 1995**: The Committee will consider access to rights under the Act.

5. **Civil partnership registration**: The Committee will consider its approach to scrutiny of forthcoming legislation in respect of registering civil partnerships for same-sex couples.

6. **Emergency Workers (Scotland) Bill**: The Committee will consider its approach to consideration of the Bill at stage 1.

7. **Annual report**: The Committee will consider its draft annual report.

8. **Procedures Committee inquiry on timescales and stages of Bills**: The Committee will consider correspondence from the Convener of the Procedures Committee.

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

Agenda item 1

Note by the Clerk

Responses from
Scottish Women’s Aid
the Scottish Police Federation
the Association of Scottish Police Superintendents
the Association of Chief Police Officers in Scotland
Scottish Legal Aid Board
The Sheriffs’ Association
Lady Smith
The Law Society of Scotland

Agenda item 2

Note by the Clerk

Agenda item 3

Note by the Clerk

Agenda item 4

Note by the Clerk

Agenda item 5

Note by the Clerk

Agenda item 6

Note by the Clerk

Agenda item 7

Note by the Clerk

Agenda item 8

Note by the Clerk

Papers for information—

Criminal Procedure (Amendment) (Scotland) Bill—
Correspondence from the Deputy Minister for Justice arising from stage 2

Rehabilitation programmes in prisons inquiry
Correspondence from the Minister for Justice regarding the inquiry and the Scottish Executive consultation on reducing reoffending
Documents not circulated—
Copies of the following have been provided to the Clerk:


A copy of this document is available for consultation in room 3.11 CC. It may also be obtainable on request from the Document Supply Centre.

Forthcoming business—
Wednesday 21 April – Justice 1 Committee, Committee Room 1;
Wednesday 21 April – joint meeting with the Justice 2 Committee, Committee Room 1;
Wednesday 28 April – joint meeting with the Justice 2 Committee, Committee Room 2;
Tuesday 4 May – joint meeting with the Justice 2 Committee, Committee Room 2.

* denotes a change from forthcoming business previously indicated.
Justice 1 Committee

Post-legislative Scrutiny of the Protection from Abuse (Scotland) Act 2001

Note by the Clerk

Background

1. The Justice 1 Committee agreed at its meeting on Tuesday 24 June 2003 to carry out post-legislative scrutiny of the Protection from Abuse (Scotland) Act 2001 and to request written evidence on the operation of the Act from the organisations which gave evidence to the former Justice and Home Affairs Committee in Autumn of 1999, and from Victim Support Scotland, on the proposal for a protection from abuse bill.

2. Research was also commissioned by the Scottish Executive to evaluate the influence and the effectiveness of the Protection from Abuse (Scotland) Act 2001 (‘the Act’). On Wednesday 3 October 2003, the Committee received an informal briefing on the research report prior to its publication. The final report “An Evaluation of the Protection From Abuse Act 2001” (‘the evaluation report’) was published in November 2003.

3. The purpose of this paper is to set out possible follow-up action for the Committee to progress its post-legislative scrutiny of the Act.

Approach to post-legislative scrutiny of the Act

4. The attached SPICe briefing sets out the background to and the provisions of the Act and gives consideration to the evaluation report and the written submissions received in response to the Committee’s request for evidence.

5. The Committee should consider whether it wishes to write to the Scottish Executive and the Scottish Legal Aid Board in relation to the evidence gathered on the operation and effectiveness of the Act.

6. It is suggested that the Committee may wish to write to the Scottish Executive seeking its views on the following points:

   a) The difficulties encountered in prosecuting breached protection orders, including the fact that breach of interdict is not of itself a crime, although actions which result in breach of an interdict might amount to a criminal offence, e.g. breach of the peace or assault. It is, where there are no criminal proceedings, open to the person who had obtained the interdict to raise a civil action for breach of that interdict. However, this may be time-consuming and, unless

---

legal aid is available, costly. Breach of a non-harassment order is a criminal offence. However, where the authorities decide not to prosecute, the person who had obtained the non-harassment order cannot raise a civil action in respect of the breach;

b) Knowledge of the Act is variable. Some respondents thought this situation could be improved by the use of targeted publicity;

c) Mixed views were received from solicitors about whether an interdict with the power of arrest under the Act was more difficult to obtain than equivalent provisions under the Matrimonial Homes (Family Protection) Act 1981;

d) The Association of Scottish Police Superintendents (ASPS) suggests that sheriff court decisions and police recording of abuse cases should be monitored; and

e) The need for training for professionals (e.g. solicitors, police, procurator fiscais, sheriffs) on the detail of the Act was raised in the report. Some respondents considered increased general training for police officers dealing with domestic abuse as necessary.

7. The Committee may also wish to write to the Scottish Legal Aid Board seeking its views on solicitors’ concerns that there is increasing difficulty securing legal aid and about the high levels of contributions required from clients. It was thought to be extremely difficult to access financial aid for anyone not on the full spectrum of benefits. Some solicitors indicated that obtaining legal aid for individuals applying for interdicts in urgent domestic abuse cases was particularly difficult as the individual’s life circumstances was in a state of flux (e.g. calculation of contributions difficult as applicant may be in the process of leaving home, etc).

---

3 The Scottish Executive Report, An Evaluation of the Protection From Abuse Act 2001, para 6.72
4 The Scottish Executive Report, An Evaluation of the Protection From Abuse Act 2001, para 6.73
Ms Claire Menzies Smith  
Senior Assistant Clerk  
Justice 1 Committee  
The Scottish Parliament  
Room 3.11  
Committee Chambers  
Edinburgh  
EH99 1SP  

31 July 2003

Dear Claire

Post-Legislative Scrutiny of the Protection from Abuse (Scotland) Act 2001

With reference to our telephone conversation, please find enclosed responses received from 18 solicitors who act for women using the Women’s Aid service, in relation to the above review. The responses will be of particular interest to the Committee as these solicitors are in a prime position to comment on the use of the Act, the legal processes surrounding its use and any associated problems encountered, either by themselves or the women they represent.

I have also enclosed a copy of the letter sent by me which prompted their response, listing the questions asked in relation to the Act.

I hope the Committee will find the enclosed of use in their review and I should be grateful if you would keep me appraised of matters as they progress, including any evidence sessions. If Women’s Aid can be of any further assistance, please do not hesitate to contact me.

Yours sincerely

H. Louise Johnson  
National Worker - Legal Issues

---

Norton Park, 57 Albion Road, Edinburgh EH7 5QY  
Tel: 0131 475 2372  
Textphone: 0131 475 2389  
Fax: 0131 475 2384  
E-mail swa@swa-1.demon.co.uk  
www.scottishwomensaid.co.uk

Scottish Women’s Aid Company No. 128431. Registered in Edinburgh at Norton Park, 57 Albion Road, Edinburgh EH7 5QY  
Recognised by the Inland Revenue in Scotland as an organisation with charitable status, which offers information, support and refuge to abused women and their children

Scottish Women’s Aid is the national office for Women’s Aid in Scotland. We are a feminist organisation and we aim to end violence against women. With all affiliated local Women’s Aid groups in Scotland, we exist to promote the interests of abused women and their children and provide an accessible and effective network and service. If you are not already a supporter, please help us by making a donation, or contact us for information about other ways of supporting our work.
Dear Practitioner

10 July 2003

PROTECTION FROM ABUSE (SCOTLAND) ACT 2001 REVIEW

You may recall I previously contacted you on 5th December 2002, in your capacity as a legal practitioner dealing with women, children and young people experiencing domestic abuse, seeking your comments on the impact of the Protection from Abuse (Scotland) Act 2001. The Scottish Parliament’s Justice I Committee has recently indicated that they are now carrying out a review of the “influence and effectiveness” of the above legislation and wish to take evidence from various organisations, including Scottish Women’s Aid, in this matter.

The purpose of this letter is to seek information from you again on this issue, in particular, whether your initial experience of using the legislation and the number of applications has changed. In order to meet the deadline for the submission of the written evidence to the Committee, I should be very grateful if you would respond to the questions below by Friday 25th July:-

- Did your clients know of the existence of the new Act before they consulted you? Has it been well publicised?
- Since the Act came into force on 6 February 2002, have you seen an increase in the number of women seeking interdicts with a power of arrest?
- Is it easier or more difficult to obtain an interdict and power of arrest under this Act, rather than under the Mat. Homes Act, and have you encountered any technical or procedural problems?
- Are you now using this Act in preference to the Mat. Homes Act in relation to interdicts?
- Given that the new legislation does not cover Exclusion Orders, have you experienced any problems where the client needs both an Exclusion Order and interdict with a power of arrest?
- What has the courts’ attitude been towards granting interdicts with a power of arrest to women experiencing domestic abuse?
- Have the police been pro-active in enforcing the powers of arrest?
- Are they clear about the procedure under the Act?
- Have there been any problems obtaining Legal Aid for interdicts under this Act?

Please feel free to add any other comments not covered by the above. I thank you in advance for giving your time to respond to the above. Your assistance is invaluable in reflecting practitioners’ first-hand experience of the impact of legislation on our service users and I look forward to hearing from you.

Yours sincerely,

Louise Johnson - National Worker (Legal Issues)

Norton Park, 57 Albion Road, Edinburgh EH7 5QY Tel: 0131 475 2372 Textphone: 0131 475 2389 Fax: 0131 475 2384
E-mail swa@swa-1.demon.co.uk www.scottishwomensaid.co.uk

Scottish Women’s Aid Company No. 128413. Registered in Edinburgh at Norton Park, 57 Albion Road, Edinburgh EH7 5QY
Recognised by the charities in Scotland as an organisation with charitable status, which offers information, support and refuge to abused women and their children.

Scottish Women’s Aid is the national office for Women’s Aid in Scotland. We are a feminist organisation and we aim to end violence against women. With all affiliated local Women’s Aid groups in Scotland, we exist to promote the interests of abused women and their children and provide an accessible and effective network and service. If you are not already a supporter, please help us by making a donation, or contact us for information about other ways of supporting our work.
Dear Ms. Johnson,

PROTECTION FROM ABUSE (SCOTLAND) ACT 2001 REVIEW

Many thanks for your letter of 10th July.

I shall respond as best I can to your various points in order

1. To be frank, most of the clients did not know of the existence of the new Act before they consulted us. As far as I am concerned, it has been fairly well publicised but the publicity is perhaps missing the "target group".

2. I do not believe that there really has been an increase in the number of women seeking interdicts with power of arrest. When a client arrives for consultation however, it is much easier to advise and to proceed with an interdict together with power of arrest, rather than interdict as it is a much more effective remedy.

3. At Greenock Sheriff Court, the same standard of proof is required to obtain an interdict with power of arrest under the Act, as it is an exclusion order.

4. In relation to interdicts, I am certainly using the Act in preference to the Matrimonial Homes Act.

5. If a client requires an exclusion order, I have simply been using the Matrimonial Homes Family Protection (Scotland) Act to cover the exclusion order, together with interdicts and power of arrest rather than the new act.

6. As far as I am concerned, Greenock Sheriff Court has been sympathetic towards granting women interdicts with power of arrest where these women have been experiencing domestic abuse. They do however require a fairly high standard of evidence.

7. The police have been fairly proactive in enforcing the powers of arrest. We had difficulty with one case, fairly early on, when the officers appeared not to grasp the importance of the interdict and the power of arrest. We referred that matter to the Chief Constable of Strathclyde Police and matters were eventually resolved.

8. Initially, certain police officers appeared to be rather confused regarding the procedure under the Act but more recently, matters do appear to have improved.

9. Unfortunately, we do experience considerable difficulty with the Legal Aid Board in obtaining legal aid for the women who have been the victims of domestic abuse. Interdicts with powers of arrest have not proved particularly difficult. What has proved a huge problem however, is obtaining legal aid in connection with breach of interdict actions, which we have required to raise in terms of the 2001 Act. The procedure in Greenock is that if someone is arrested in terms of the Act, we require to appear at Court that morning and persuade the Sheriff to detain them in custody until the breach of interdict writ has been served upon them within 48 hours. On various occasions, the Legal Aid Board have refused to grant us cover for so doing. We have tried what we can to explain to them the procedures but they are not prepared to grant us cover for so doing. We are therefore effectively requiring to carry out the initial stages of this work free of charge. Any assistance in persuading the Legal Aid Board that this is far from fair would be gratefully received!

I hope this is of some assistance and please let me know if you require further information.

Yours sincerely,
Dear Ms Johnson

Protection From Abuse (Scotland) Act 2001 Review

Thank you for your letter of 10th July, which was addressed to [Name] of this office. Unfortunately, [Name] will be on holiday until 25th July, and unable to respond in time.

As another Partner of the firm who also deals with Family Law cases, I would be happy to answer your questions, although I cannot say for certain that my answers will represent [Name]'s views, or that they will be consistent with her earlier response.

For what it is worth, however:

1. I have not found that clients know of the existence of the Act, other than the odd one who has been informed by the police that she should seek an interdict with a power of arrest.

2. I am not aware of any increase in the number of women seeking interdicts with powers of arrest.

3. I have encountered no technical or procedural problems, and think it is generally a little easier to obtain the interdict and power of arrest under the 2001 Act.

4. I would now use the Act in preference to the Matrimonial Homes Act.

5. I have experienced no problems of conflict between the need for an exclusion order and an interdict with power of arrest. In this case, I would simply use the Matrimonial Homes Act.

6. The attitude of Sheriffs is sympathetic, and they are anxious to do what they can to try to prevent a continuation or recurrence of domestic abuse.

7. I have insufficient experience of the police enforcing powers of arrest to answer this question.

8. I believe the police are clear as to procedures, as they themselves receive good advice from a specialist department within their headquarters.

9. I am unaware of any Legal Aid problems. Similar to the courts, I believe the Scottish Legal Aid Board is generally sympathetic and anxious to try to help.

If it is not too late for [Name] to write to you after 25th July, perhaps you would let her know and she may then be able to add her own comments. In the meantime I will bring your letter and this response to her attention.

Yours sincerely,
Dear Practitioner

10 July 2003

PROTECTION FROM ABUSE (SCOTLAND) ACT 2001 REVIEW

You may recall I previously contacted you on 5th December 2002, in your capacity as a legal practitioner dealing with women, children and young people experiencing domestic abuse, seeking your comments on the impact of the Protection from Abuse (Scotland) Act 2001. The Scottish Parliament’s Justice I Committee has recently indicated that they are now carrying out a review of the “influence and effectiveness” of the above legislation and wish to take evidence from various organisations, including Scottish Women’s Aid, in this matter.

The purpose of this letter is to seek information from you again on this issue, in particular, whether your initial experience of using the legislation and the number of applications has changed. In order to meet the deadline for the submission of the written evidence to the Committee, I should be very grateful if you would respond to the questions below by Friday 25th July:

- Did your clients know of the existence of the new Act before they consulted you? Has it been well publicised? Not well.
- Since the Act came into force on 6 February 2002, have you seen an increase in the number of women seeking interdicts with a power of arrest? Yes.
- Is it easier or more difficult to obtain an interdict and power of arrest under this Act, rather than under the Mat. Homes Act, and have you encountered any technical or procedural problems? More difficult.
- Are you now using this Act in preference to the Mat. Homes Act in relation to interdicts? No.
- Given that the new legislation does not cover Exclusion Orders, have you experienced any problems where the client needs both an Exclusion Order and an interdict with a power of arrest? No.
- What has the courts’ attitude been towards granting interdicts with a power of arrest to women experiencing domestic abuse? Fair.
- Have the police been pro-active in enforcing the powers of arrest? Yes.
- Are they clear about the procedure under the Act? Yes.
- Have there been any problems obtaining Legal Aid for interdicts under this Act? Yes. SAW Group caught up in LD police procedure.

Please feel free to add any other comments not covered by the above. I thank you in advance for giving your time to respond to the above. Your assistance is invaluable in reflecting practitioners’ first-hand experience of the impact of legislation on our service users and I look forward to hearing from you.

Yours sincerely,

Louise Johnson - National Worker (Legal Issues)

Norton Park, 57 Albion Road, Edinburgh EH7 5QY  
Tel: 0131 475 2372  Texphone: 0131 475 2389  Fax: 0131 475 2384  
E-mail swa@swa1.demon.co.uk  www.scottishwomensaid.co.uk

Scottish Women’s Aid Company No. 128453. Registered in Edinburgh as Norton Park, 57 Albion Road, Edinburgh EH7 5QY
Recognised by the Inland Revenue in Scotland as an organisation with charitable status, which offers information, support and refuge to abused women and their children.

Scottish Women’s Aid is the national office for Women’s Aid in Scotland. We are a feminist organisation and we aim to end violence against women. With all affiliated local Women’s Aid groups in Scotland, we exist to promote the interests of abused women and their children and provide an accessible and effective network and service. If you are not already a supporter, please help us by making a donation, or contact us for information about other ways of supporting our work.
Dear Sirs

PROTECTION FROM ABUSE (SCOTLAND) ACT 2001 REVIEW

We write in response to your letter of 10th July 2003 and we note that you intend to provide evidence to the Scottish Parliament’s Justice 1 Committee as part of their review of the influence and effectiveness of the above legislation. We shall deal with each of your questions in turn.

- Did your clients know of the existence of the new Act before they consulted you? Has it been well publicised?

The majority of our clients did not know of the existence of the 2001 Act before they consulted us. The majority of clients, however, were aware of the remedy of interdict and had generally assumed (wrongly) that a breach of that interdict would result in the Defender being arrested. Some clients have been referred to us from Police Officers and around half of those clients knew of the existence of the new Act. It appears to us, however, that knowledge of the existence of the new Act tends to have been gained through word of mouth between clients themselves rather than through other publicity.

- Since the Act came into force on 6th February 2002 have you seen an increase in the number of women seeking interdicts with a Power of Arrest?

We have seen a slight increase in the number of women seeking interdicts with a Power of Arrest, although we have also seen a number of women who were seeking to have Powers of Arrest attached to existing interdicts now that the new Act provides for that. As we previously indicated, most of the women that previously consulted us with regards to raising interdict proceedings assumed that a Power of Arrest would be able to be attached to that, whether they were married or not. Women that were therefore
disappointed in the past to learn that a Power of Arrest could not be attached are now obtaining interdicts with the added protection of a Power of Arrest.

• Is it easier or more difficult to obtain an interdict and Power of Arrest under this Act rather than under the Matrimonial Homes Act, and have you encountered any technical or procedural problems?

It is certainly easier to obtain an interdict and Power of Arrest under this Act. The only procedural problem, which we experienced when the Act first came into force, was how to go about asking the court to attach a Power of Arrest to an existing interdict. This issue has now been clarified by the Act of Sederunt (Ordinary Cause Rules) Amendment (Applications under the Protection from Abuse (Scotland) Act 2001) 2002 which came into force on 8th March 2002. It is now clear that such an application shall be made by a Motion in the process of the action in which the interdict was obtained.

• Are you now using this Act in preference to the Matrimonial Homes Act in relation to interdicts?

We do use this Act in preference to the Matrimonial Homes Act in relation to interdicts. However, some Sheriffs take the view that if parties are married then a party seeking interdict should do so under the Matrimonial Homes Act. The 2001 Act is silent on this point and is certainly being used by married parties. It therefore seems to come down to the preference of the individual Sheriff and this is perhaps a point, which could be clarified so that the most appropriate Act is used in every case.

• Given that the new legislation does not cover Exclusion Orders, have you experienced any problems where the client needs both an Exclusion Order and interdict with a Power of Arrest?

We have not experienced problems in this regard in practice, however, we have not come across any clients yet who required both orders. Sheriffs do tend to be very reluctant to grant a Power of Arrest when the parties are living together though.

• What has the courts’ attitude been towards granting interdicts with a Power of Arrest to women experiencing domestic abuse?

Provided that the tests in the Act are met, the court will grant interdicts with Power of Arrest to women experiencing domestic abuse. Provided that there are sufficient averments in the Initial Writ to show a continuing pattern of abuse, the court tends to grant the interdict sought. As far as the Power of Arrest is concerned, provided that the defender has had the opportunity to make representations, and provided that he or she has been unable to show that a Power of Arrest is unnecessary, or that attaching a Power of Arrest would result in him or her being subject to Power of Arrest under both the 2001 Act and the Matrimonial Homes Act in relation to Interdict, the court will then attach a Power of Arrest to the interdict. The Power of Arrest will often be attached for a period of one year but sometimes for the full three years that the Act allows for.
• Have the police been pro-active in enforcing the powers of arrest?

We have not had many cases in which we have had to have the Power of Arrest enforced, however, in the few relevant cases the police have not been particularly pro-active in enforcing the Powers of Arrest and, in answer to your next question, it does seem that they are rather unclear about the procedure under the Act. Although a few clients have come to us on the advice of the police to have Powers of Arrest attached to interdicts previously granted, it seems that many other police officers do not have any knowledge of the existence of the new Act.

• Have there been any problems obtaining Legal Aid for interdicts under this Act?

We have not had any particular difficulties in obtaining Legal Aid for interdicts under this Act.

We hope that our response has been of some assistance.

Yours faithfully

[Signature]
Dear Ms Johnston,

Thank you for your letter regarding the Review of Protection From Abuse (Scotland) Act 2001. You ask a number of questions and I respond in the numerical order articulated:-

Not many women have utilised the opportunity to obtain an interdict or a power of arrest under either the old or new legislation. Principally the concern of the victim is to obtain a residence order in respect of her children. The facilities offered to the woman by Henriet Gryffe Woman’s Aid appear to placate their potential concerns.

When I have had the opportunity to make use of the provisions contained within the new legislation I have not found there to be any difficulty. I believe the same standards and proof is required in respect of the new order as it was for the old order.

The victims tend not to be aware of the existence of the protections afforded by the new act.

The police have been done what they have been told to do when a power of arrest is in force. There is a need however for the police to be fully educated not to view situations of domestic abuse as not being as serious as a common assault in the street.

It is extremely difficult at present to obtain legal aid for practically any form of judicial procedure. The Legal Aid Board, despite the glossy brochures which they will produce, are accountant driven. They are not interested in the protection of women from violence. They are interested only in controlling a budget. The writer has found, after nearly 18 years of experience, that it is becoming more difficult to obtain legal aid in respect of any course of judicial procedure. The Board are clearly operating a policy to frustrate and to thwart at every turn. There are numerous forms which require to be completed. If emergency work is carried out and a form is not completed to the nth degree the application will be rejected and the solicitor will have spent hours in court trying to secure a protective order for the victim for which he will not be paid.

There are changes coming to Legal Aid in the Autumn. The system is becoming more form orientated. The fees are ridiculously low. I am aware of numerous firms leaving the legal aid environment. We ourselves are seriously contemplating giving up civil legal aid. The man who fixes a television aerial earns twice the hourly rate as a solicitor does for legal aid. It is simply no longer worth while when the outlays and staff salaries which we have to pay continue to rise.

However that argument is for another day. I wish you every success in your endeavours.

Yours sincerely
Dear Sirs,

Protection from Abuse (Scotland) Act 2001 Review

With regard to your letter dated 10th July 2003, we would say as follows:-

1. No
2. No
3. The same
4. Occasionally
5. No
6. The same
7. The same
8. No
9. No
10. Not so far.

Yours faithfully,

[Signature]
Dear Ms Johnson,

**PROTECTION FROM ABUSE (SCOTLAND) ACT 2001 REVIEW**

Thank you very much for your letter dated 10th July. As regards the various information you require I would comment as follows:

1. In the main I would say that clients did not know about the existence of the new Act before they consult me. Any clients who did know about the new Act were usually clients who had been to Women's Aid first of all and had been informed that they did have the right to apply for interdict with power of arrest. Although solicitors are aware of the new Act I would not say that it has been well publicised for members of the public.

2. I would say that since the Act came into force on 6th February 2002 my experience has been that there has been an increase in the number of women seeking interdicts with power of arrest. Obviously prior to the new Act women who were unmarried had very limited legal recourse available to them in cases of domestic violence. I feel that the new Act has greatly assisted such women.

3. My experience at Paisley Sheriff Court has been that it has not been more difficult or indeed easier to obtain an interdict and power of arrest under the new Act rather than the Matrimonial Homes Act. I have not encountered any technical or procedural problems and the Sheriffs at Paisley Sheriff Court have in the main dealt appropriately and fairly with applications under the new Act. The only difference is obviously in terms of the new Act the interdict with power of arrest can only last for a maximum period of 3 years and you must specify the period you seek and the Sheriff can either grant this period or a lesser period. In the cases I have dealt with the Sheriff has tended to grant interdict with power of arrest for a period of one year but I have had a few cases when it has been granted for a period of 3 years. These cases have obviously been very serious cases.

[Signature]
4. In my practice I use the new Act in cases where the women are unmarried. If the woman is married I tend to use the Protection of the Matrimonial Homes Act as we are normally also seeking Exclusion Orders etc.

5. Although the new Act does not cover Exclusion Orders I have had no difficulties or experienced any problems in cases where the client needs an Exclusion Order. Obviously if the client is a joint tenant she can seek an Exclusion Order and if she is not we can apply for occupancy rights and once she has these occupancy rights then seek an Exclusion Order. My practice in connection with the Exclusion Orders has not changed since the new Act came into force.

6. The Court I deal with mainly is Paisley Sheriff Court and my experience has been that the Sheriffs have granted interdicts with power of arrest in cases of domestic abuse.

7. In my experience the police have been pro-active in enforcing the powers of arrest. All powers of arrest and obviously registered with the Chief Constable and I have not thus far had any clients who have had any problems enforcing the power of arrest when this proves necessary.

8. I cannot comment on whether or not the police are clear about the procedure under the Act. As you are aware the procedure does differ from the Matrimonial Homes Act. I have not had any feedback from clients to suggest that the police are not acting appropriately.

9. I have not had any problems obtaining legal aid for interdicts under the new Act. Obviously the problem still remains that many women are not eligible for legal aid because of their income position and this remains a problem in domestic abuse cases. As you are aware I commented upon this in my last letter to you and I remain concerned that many women can simply not afford to raise court proceedings and are therefore not afforded the protection that the new Act is supposed to give them.

I hope the foregoing information is useful. If you want to discuss any matters with me please do not hesitate to give me a call.

Best wishes,
Yours sincerely,
Dear Ms. Johnson,

PROTECTION FROM ABUSE (SCOTLAND) ACT 2001 REVIEW

Thank you for your letter of 10th July 2003. My responses to the questions are as follows:-

1. Some clients were aware of the change in the Act which affords more protection to unmarried couples. I think there was reasonable publicity.

2. I do not think there has been an increase in the number of women seeking interdicts with power of arrest. I just think I have been able to obtain more interdicts with powers of arrest. I have not encountered any technical or procedural problems. I have not found it any easier or any more difficult.

3. I think my tendency is to use the Act in preference to the Matrimonial Homes Act unless the proceedings include a crave for an exclusion order.

4. I have not experienced any problems where the client needs both an exclusion order and an interdict with a power of arrest.

5. I have not had any difficulty with the local Courts’ attitudes with regard to granting interdicts with a power of arrest.

6. The Police have been reasonably proactive, the onus is of course on us to ensure that the Police have the necessary information and in my experience they are acting if they have information and if the circumstances warrant it.

7. I think the Police are as clear about the procedure as anyone else.

8. I have not had any particular difficulties in obtaining Legal Aid for interdicts under this Act.

I hope this helps.

Yours sincerely,
Dear Ms Johnson,

Protection from Abuse (Scotland) Act 2001 Review

Many thanks for your letter of 10th July, 2003 which was received in my office during my holiday. I apologise for the delay in replying.

Unfortunately the position does not seem to have altered much since I last wrote to you regarding the Protection from Abuse (Scotland) Act 2001.

My experience regrettably is that clients are not aware of the new Act or the new powers conferred by that Act. It has not been well published and confers a relatively unknown right.

As a result I have not seen an increase in the number of women seeking powers of arrest attached to general non-matrimonial interdicts.

When I have invoked the powers of the 2001 Act initially I think the Court was reluctant to grant powers of arrest, the Act being a rather unknown quantity. That being said as time has moved on the Sheriffs are more comfortable with the Act but it would have to be said that the majority of powers of arrest are still granted in terms of the Matrimonial Homes Act given that most matrimonial splits in which I am consulted relate to married parties.

As a result my preference where I can is still to use the Matrimonial Homes Act and use the Protection from Abuse (Scotland) Act only where appropriate.

In general I find the Courts less approving of exclusion orders which I find frustrating and difficult to comprehend. This goes for powers of arrest attached to interdicts whether under the Matrimonial Homes (Scotland) Act or the Protection from Abuse (Scotland) Act. As I become more involved in these proceedings I find that it very much depends on the presiding Sheriff at the time.

Insofar as the Police are concerned I find that they are well versed in the procedures and that if there is any lack of understanding in procedures or lack of coherence about those procedures it arises when the arrest has been effected and the party is due to appear in Court in respect of his/her arrest. It is at that stage that technical and procedural difficulties seem to present problems.

Finally, the Legal Aid issue is one which is badly affecting us all. It is becoming increasingly difficult to obtain legal aid in civil matters. This extends from divorce through to a whole manner of protective orders and powers of arrest. I find that obtaining legal aid is becoming an increasingly difficult exercise and in particular unless there is regular physical violence and that applies whether under the Protection from Abuse (Scotland) Act or the Matrimonial Homes (Scotland) Act.

I trust the above is of some assistance to you but should you require any further information or feedback please do not hesitate to contact me.

Yours sincerely,
Dear Ms Johnson

Protection From Abuse (Scotland) Act 2001 Review

Thank you for your letter of 10 July 2003. I would answer your queries as follows:

1. No clients have ever been aware of the existence of the new Act before they consulted me. I am not aware of any publicity myself.
2. I have not seen an increase in the number of women seeking interdicts with a Power of Arrest.
3. It is no more difficult to obtain an interdict and Power of Arrest under the new Act than it was under the Matrimonial Homes Act. I have not encountered any technical or procedural problems using the legislation.
4. The use of the Act depends on the client's circumstances. This always dictates which piece of legislation you use.
5. In relation to exclusion orders, I would rely on the Matrimonial Homes Act.
6. The court's attitude towards granting interdicts with a Power of Arrest is unchanged.
7. I am not aware of the police attitude in relation to enforcing the Powers of Arrest and do not know whether they are clear about the procedures under the Act. I would assume by now that they are.
8. It has been relatively straightforward obtaining the legal aid for interdicts under this Act.

I trust the above is of assistance to you. Please feel free to contact me in the future.

Yours sincerely
Dear Ms. Johnson,

Protection From Abuse (Scotland) Act, 2001 Review.

I thank you for your letter of 10th July, 2003. I would reply to the questions as follows:

1. I would say that it is only now that my clients are beginning to realise the existence of the new Act. I do not think it has been well publicised but I am certainly publicising it through my contacts with Womens Aid in Lanarkshire and also through the Police Domestic Abuse Unit in Motherwell. It is also my experience that some Solicitors have not heard of the new Act either.

2. Since the Act came into force I cannot say that I have seen an increase in the number of women seeking Interdicts with Power of Arrest. This may be because I am constantly applying for these in any event.

3. I would not say it is easier or more difficult to obtain an interdict with Power of Arrest under this Act rather than under the Matrimonial Homes Act.

4. I am using this Act in preference to the Matrimonial Homes Act.

5. Where I am seeking Exclusion Orders I am still tending to seek an Interdict and Power of Arrest in terms of the Matrimonial Homes Act.

6. The Courts appear in my view to be pro-active in granting Interdicts with Power of Arrests. Most of my experiences however are limited to Hamilton Sheriff Court and the attitude there is excellent.

7. In my area in Motherwell and North and South Lanarkshire the police have been very pro-active in enforcing the powers of the Act.

8. I think the police I deal with are clear about the procedure under the Act because most of my referrals from the police come through the Domestic Abuse Unit.

9. I have not experienced any problems obtaining Legal Aid for Interdicts under this Act.

I would like to add that I have found the new Act to be an excellent piece of legislation and in my view it has pre-empted any need to raise Actions for Non Harassment Orders on behalf of non-married clients.

I hope the above information is of some use to you.

Yours sincerely,
Dear Ms. Johnson,

Protection from Abuse (Scotland) Act 2001.

I thank you for your letter of 10th July, 2003. Our firm indeed deals with many cases of domestic abuse and we have widely used the legislation under the Protection from Abuse (Scotland) Act 2001 since it came into force. Indeed, I understand that our firm had the first power of arrest granted under this legislation as soon as the act came into effect. I shall answer your questions in the same order they appear in your letter.

1. My clients did not appear to know of the existence of the new act and I am not sure that it was particularly well publicised.

2. Since the act came into force in February, 2002 I have not necessarily seen an increase in the number of women seeking interdicts but now that they can obtain a power of arrest obviously there has been an increase in applications to the Court for interdict with power of arrest.

3. Different Courts may have different practices. When the act first came in we were required to lodge Affidavits if we were seeking a power of arrest under the Protection from Abuse Act. The residing Sheriff, Sheriff Stewart, however, has made it known that he does not now expect Affidavits to be lodged. In other words it is just as easy to obtain a power of arrest under this act as it is under the Matrimonial Homes Act although the test is somewhat
different in that evidence has to be slightly stronger for power of arrest under the protection from abuse act.

4. Obviously we are using this act where parties are not married or have joint occupancy rights ie: they have no remedies under the Matrimonial Homes Act. In relation to people who are married I tend to have craves in for power of arrest under the Matrimonial Homes Act and under the Protection from Abuse Act. As you will be aware, once the parties are divorced a power of arrest under the Matrimonial Homes act falls. Under the Protection from Abuse Act the power of arrest can continue for three years from the date of the power of arrest first being attached and applications can be made to the Court at the end of the three year period to extend the three years.

5. This is quite a lengthy matter to explain. If parties are living together and they have joint occupancy rights (whether they are married or not) which would include jointly owning a house or having a joint tenancy of a house, they have rights under the Matrimonial Homes Act and therefore they can apply for an exclusion order. If, as is commonly the case, my client (for argument's sake say it is the woman) has sole tenancy of a house I can apply for an interdict with power of arrest and I can raise a separate action for summary ejection of the abusive partner from the house although, if this is defended by the abusive partner, this can take some time to go through the Courts. In other words there are remedies but it would probably be more expedient to have legislation covering exclusion orders for parties who do not have joint occupancy rights.

6. In my experience Dundee Sheriff Court has taken a very good attitude towards granting interdicts with a power of arrest and I have had no difficulties whatsoever with this.

7. Unfortunately, we continue to have problems with Police in enforcing powers of arrest. The main difficulty is, and has always been, that the domestic abuse section of the Police (including Barnardos forum on domestic abuse who liaise with the Police) are excellent in helping people who are abused. Unfortunately, it would appear that a lot of the work they do does not filter through to the “bobby on the beat” who normally has to deal with the domestic situation first hand and I still feel that the Police could do more in training officers in enforcing powers of arrest.

8. Relating to the above it would appear that there are many officers who are not clear about the procedure under the Act.

9. The difficulty about obtaining legal aid is where a client is working and is perhaps receiving Child Tax Credit or some benefits such as this. We often
see clients being asked to make contributions of £1,000 if they wish to obtain civil legal aid for interdict. This causes a great difficulty as interdict work requires to be carried out very quickly before the client knows whether or not the client will receive legal aid, if so, at what level of contribution. In other words they do not know right away if they are able to afford to raise such an action. The actual outlays i.e. Sheriff Officers fees, court dues etc, can be hundreds of pounds. I have seen my firm on several occasions actually having to meet outlays as work has been carried out on an emergency basis where the client has not taken up an offer of legal aid. I would point out that Barnardos forum on domestic abuse have contacted me as a practitioner who has an interest in these matters. I have written to Kate McLean MSP with regard to the difficulties with legal aid. It has long been my suggestion that if the legal aid board can be satisfied that someone urgently requires protective orders then a contribution should be waived in certain cases. I would point out that anyone receiving income support or income based jobseekers allowance will automatically be entitled to legal aid (depending on the merits) with a nil contribution.

If I can be of any further help, please do not hesitate to telephone me or write to me again. I have not yet heard back from the MSP with regard to matters but it is our intention to lobby parliament in relation to matters relating to legal aid and other difficulties.

Yours sincerely,
Dear Madam

PROTECTION FROM ABUSE (SCOTLAND) ACT 2001 REVIEW

I thank you for your letter dated 10th July 2003. I would respond to the questions in your letter dated 10th July 2003 as follows:-

Q. Did your clients know of the existence of the new Act before they consulted you? Has it been well published?
A. My experience has been that none of my clients were aware of the existence of the new Act before they consulted myself. I do not consider that the Act has been well publicised. I think that there is still much confusion among women as to whether powers of arrest can be attached to interdicts if they are not married to their partners.

Q. Since the Act came into force on 6th February 2002, have you seen in increase in the number of women seeking interdicts with a power of arrest?
A. The answer to this is yes since we are now advising women who previously could not obtain an interdict under the Matrimonial Homes Act to use the 2001 Act to secure interdicts with powers of arrest.
Q. Is it easier or more difficult to obtain an interdict and power of arrest under this Act, rather than under the Matrimonial Homes Act, and have you encountered any technical or procedural problems?
A. It is no more easy nor difficult to obtain an interdict and power of arrest under the Act than under the Matrimonial Homes Act. I have encountered no particular technical or procedural problems.

Q. Are you now using this Act in preference to the Matrimonial Homes Act in relation to interdicts?
A. I am still using the Matrimonial Homes Act in relation to women who are married with the advice to clients that they can seek an interdict under the Protection from Abuse Act or a power of arrest to be attached to an existing matrimonial interdict if they are discontinued after divorce. For cohabiting partners I am using the Act in preference to the Matrimonial Homes Act. The 2001 Act really comes into its own for women who were previously denied access to an interdict with a power of arrest.

Q. Given that the new legislation does not cover Exclusion Orders, have you experienced any problems where the client needs both an Exclusion Order and an interdict with powers of arrest?
A. I have not experienced any problems where the client needs both an Exclusion Order and an interdict with power of arrest. In situations of co-habitees and married clients the Matrimonial Homes Act still gives sufficient protection in my view. Where the client is in a situation where she wants a partner put out of the house who is not a co-owner or co-tenant remedies still exist under common law to have that person ejected.

Q. What has the Courts' attitude been towards granting interdicts with a power of arrest to women experiencing domestic abuse?
A. The Courts' attitude in my experience remains very much the same as the Courts' attitude towards matrimonial interdicts. If there is sufficient evidence a power of arrest will be granted.

Q. Have the police been pro-active in enforcing the powers of arrest?
A. My experience is that the police have not been pro-active in enforcing powers of arrest. Rather any police action of necessity be re-active to a call from the client seeking to enforce the powers of arrest. I have had some recent difficulties in relation to enforcement of matrimonial powers of arrest which I think are equally valid to powers...
of arrest under the 2001 Act. The police seem to take the view that if they cannot catch the perpetrator immediately then they do not bother to seek that person and many women are left in a situation where their ex-partner or ex-husband simply flees the scene and is never arrested because the police take the view that after a certain period of time there is no likelihood of continuing breach of the interdict.

Q. Are they clear about the procedure under the Act?
A. It is not always apparent to me that junior police officers are clear about the procedure under the Act and when they can arrest and what lengths they should go to arrest a perpetrator. As stated above it is certainly not my experience that they will put themselves out to actually go and search for the person who has breached the interdict.

Q. Have there been any problems obtaining Legal Aid for interdicts under this Act?
A. I am not aware of any problems obtaining Legal Aid for interdicts under the 2001 Act. I think that a lot of women are now obtaining access to Legal Aid under the new Legal Aid emergency regulations where women are not being asked for notional contributions by solicitors upfront. This allows women to be able to instruct us immediately to procedure with emergency action without having to worry about how they are going to raise the national contributions and this has in my view allowed greater access to such protective orders.

I trust that the foregoing is helpful.

Yours sincerely
Dear Madam

We thank you for your letter of 10 July 2003.

We can respond to the questions posed as follows:

1. Generally clients do not know of the existence of the new Protection from Abuse Act and its powers prior to obtaining legal advice.

2. We have not seen an increase in the interdicts sought but have seen an increase in the instruction to seek a power of arrest in addition when it has been explained to the clients that this is available, subject to the grant of the same by the court.

3. It is no more difficult to obtain a power of arrest under the new Act than the Matrimonial Homes Act.

4. We are normally using the Protection from Abuse Act in preference to the Matrimonial Homes Act unless an exclusion order is being sought.

5. No.

6. There would appear to be no differential in the courts' attitude following upon the new Act coming into force.

7. We have not received any feedback in relation to enforcement of the powers of arrest for the cases that we have dealt with without police involvement.

8. It would appear that the police are dealing with the powers of arrest in terms of the Protection from Abuse Act in the same manner as the Matrimonial Homes Act powers of arrest and they are asking for the same documentation when recording the existence of the power of arrest.

9. There has been an ongoing problem in obtaining legal aid for interdicts for a number of years as the legal aid Board's view is generally that the police should be dealing with the matter. This inevitably causes difficulty for persons seeking interdicts when they feel criminal procedure does not fit their particular needs.

Yours sincerely
Dear Ms Johnson

Legal Issues

I refer to the above and thank you for your letter of 10th July 2003.

In relation to the various questions raised, I would respond as follows:-

1. Did your client’s know of the existence of the new act before they consulted you? Has it been well publicised? The vast majority of my clients had no knowledge of the new act prior to consulting me. This however is not particularly unusual, particularly if the client’s have not consulted legal advise before. Clients who have not had legal advice before tend to have abstract knowledge of the powers the Court has. From my experience clients generally have a vague knowledge of the law from either speaking to friends or colleagues. Obviously however this does not always give client’s an accurate assessment of their own situation as of course many factors in a case can affect application of legislation to any particular circumstance. Certainly it is my view that the new legislation was not well publicised.

2. Since the act came into force on 6th February 2002, have you seen an increase in the number of woman seeking interdicts with a Power of Arrest? I have not noticed any significant increase in the number of woman seeking interdicts with a Power of Arrest. In practice I have mainly be using the legislation to apply for interdicts following Decree of divorce. Existing clients have all been advised of this additional order which they can now seek. I have experienced a few previous clients getting in touch and asking information about the legislation which has subsequently led to applications being made in terms of the legislation. Given however the lack of publicity, I feel that the legislation is being used by woman who are experiencing
continued harassment and have sought legal advise concerning the same or alternatively woman who are already instructing a Solicitor.

3. Is it easier or more difficult to obtain an Interdict than a Power of Arrest under this act rather than under the matrimonial act, and have you encountered any technical or procedural problems? On balance I would say it was easier to obtain an Interdict and Power of Arrest in terms of the Matrimonial Homes Act. This may be due to the fact however that I have only been instructed to use the legislation to apply for continuations of interdicts post divorce. I feel that slightly more is required to justify a continuation of an Interdict for a period of three years or less than obtaining an Interim Interdict with a Power of Arrest in the first instance, usually in the terms of a divorce action. In relation to technical or procedural problems, I did experience procedural difficulties in the first instance. This was due to a difficulty with the rules. When the legislation was introduced, a set of rules were also drafted. Unfortunately the rules failed to set out procedure which practitioners should use in order to apply for the new order. Following an appeal to the Sheriff Principal at Edinburgh, practitioners thereafter received guidance from the Sheriff Principal as to the procedure which should be used. Since then I have not experienced any difficulties.

4. Are you now using this act in preference to the Matrimonial Homes Act in relation to interdicts? Not as a general rule. I have continued to use the Matrimonial Homes Act if applicable. If however the client’s circumstances are not applicable to the Matrimonial Homes Act I will thereafter have recourse to the Protection from Abuse (Scotland) Act 2001.

5. Given that the new legislation does not cover exclusion orders, have you experienced any problems when client needs both an Exclusion Order and an Interdict with a Power of Arrest? No I haven’t. The test for an exclusion order is much higher than that required for an Interdict with a Power of Arrest. Generally if the client meets the requirements for an Exclusion Order, the test for Interdict will more than certainly have been met.

6. What have the Courts attitude been towards granting Interdicts with a Power of Arrest to woman experiencing domestic abuse? The Courts attitude varies from Sheriff to Sheriff however on the whole particularly at first instance, the Sheriff’s will grant Interdict with a Power of Arrest. Some clients however do run into difficulties with corroboration. As with many domestic violence incidents the two parties are often the only witnesses to the altercation. Sheriffs are much more likely to grant the Power of Arrest if some form of corroboration is available.

7. Have the Police been pro-active in enforcing the powers of arrest? My experience of Police involvement has been varied. In some cases, I have found the Police very co-operative. In other cases however I have found the opposite. In particular I am concerned about the general attitude of the Police towards domestic violence disputes. I do not feel they are taken seriously. I have also experienced numerous incidents where my clients are made to feel unimportant and in some instances made to feel as if they are just being a nuisance to the Police. I am deeply
concerned about this ongoing attitude. In a very recent incident, a client of mine who has an interdict and a Power of Arrest telephoned the Police for help. Given that there had been a brief reconciliation between herself and her husband the client was given a dressing down in front of her husband, the abuser. Of particular concern was the Policeman’s scornful remarks that he would have the interdict removed by the following day. It was of particular concern to me that a young Police Officer thought he had the power to recall Court Orders made by a Sheriff. The Policeman’s demeanour frightened my client. I felt his attitude was appalling regardless of him seeing fit to hand out grossly incorrect legal advice.

8. *Are they clear about the procedure under the act?* As a general rule no. I tend to find Police Officers attending domestic violent situations are not up to date with the law and seem very unsure about Powers of Arrest.

9. *Have there been any problems obtaining Legal Aid for Interdicts under this act?* Initially I did experience problems. The situation has eased somewhat. I did find that the Legal Aid Board were unsure of the legislation when it first came in. At present, I would say that I am experiencing no more difficulty in obtaining Legal Aid for the Interdicts under this act and for any other actions being rasied.

I hope these comments are of some use to you. If you have any questions or queries, please do not hesitate to contact me.
Dear Madam

Protection from abuse (Scotland) Act 2001
Justice F’s consultation on its “influence and effectiveness”

Further to your letter of 10th July 2003 my response to your questions is as follows:

1. My office has a shop front which I use to display information about my services and on particular issues of law, including important new developments. I did display a notice about the introduction of the act and the new order which was available particularly for co-habitees, but I'm not sure that anyone came in forearmed with any knowledge about the act, from this or any other source. I found that I had to explain to local sheriffs about the nature (if not the existence) of the new power of arrest. Lots of solicitors did not know about it. As recently as this year I have had a solicitor express surprise at the existence of the Act. So I would have to say that I do not think it was at all well publicised, within and without the profession.

2. I doubt that I have seen an increase in the number of women seeking interdicts. As I explained above, clients do not tend to know much about the remedies available to them. They present the problem and rely on me to provide a solution. The difference now is that I am able to offer a much more effective solution to unmarried women than I could in the past.

3. It is more difficult since the legal test which requires to be satisfied is more onerous under the 2001 Act. A risk of further abuse has to be demonstrated under the new Act. Under the 1981 Act the onus was on the defender to show that the attachment of a power of arrest was unnecessary. The onus under the new Act falls on the Pursuer. Having said that I have not found it difficult to satisfy the test. I have sought, and been granted four or five powers of arrest under the 2001 Act. In most cases where an interdict is justified it will have been necessary to narrate more than one instance of actual abuse as this is necessary to show the “intention to persist”. I have found that the existence of repeated conduct, whether actual abuse or threats, is enough to satisfy the “risk of further abuse” test.
I have only encountered one technical problem. The new power of arrest has to be granted for a specific period. It is usually granted at an interim hearing, before the period of notice has expired. It is not possible at that stage to move for a permanent interdict, only an interim order. By the time a legal aid application had been processed and a certificate issued perhaps two months will have gone by since the power of arrest has been granted. When I have then submitted minute for decree it is not clear whether the power of arrest requires to be renewed in the final decree or not. I had assumed it did not as the power, once granted, remains in force for its duration unless earlier recalled. However, two Sheriffs, in different courts, have expressed some concern about this. Neither Sheriff was being obstructive and indeed one expressed concern that if the power of arrest was not referred to in the final decree the police might have a difficulty in enforcing the order. He got round the problem by re-granting the power for the term which was still left unexpired from the date it was originally granted.

4. It depends on the circumstances. If the incidents about which we have evidence are few and there is likely to be a difficulty satisfying the court on the 2001 test, if the parties are married I would consider using the 1981 act. Also, if the action is one of divorce and it is likely to be granted fairly speedily I would use the 2001 Act where possible as the power would be in force for longer. The reverse could be the case if there was a possibility that the court would grant the power for a short period it might be better to use the 1981 Act to extend the protection. These considerations are balanced by the right to apply for the power of arrest to be extended if there is a continuing risk of abuse.

5. No. Where an exclusion order is granted the court is obliged also to grant a power of arrest. In circumstances where the power of arrest under the 1981 Act was going to come to an end and there was a continuing risk of abuse I do not see any difficulty in applying for a further power under the 2001 Act at the appropriate time.

6. Although I found some Sheriffs not well informed about the new Act I also found an openness to its provisions and no reluctance to grant the orders sought, upon being properly satisfied to the appropriate standard of evidence. My experience has been limited to the two local courts in which I appear most often, before a total of four different Sheriffs.

7. I have not yet had any clients who have had to enforce their power of arrest under the new Act. Does that mean they are having the desired effect?!

8. Strathclyde Police seem to have their systems ready to deal with registering the new powers. I cannot really comment on the enforcement procedure.

9. Surprisingly not in my experience! All bar one of the powers of arrest I have sought under the new Act have been legally aided and certificates have been granted without difficulty for both the interdict and the power of arrest.

I hope this is of some assistance but if I can be of further help please let me know.

Yours faithfully
Dear Louise

PROTECTION FROM ABUSE (SCOTLAND) ACT 2001 REVIEW

I apologise for being late in responding to your enquiry. I had been off on holiday.

In brief, I would answer as follows:

1. Clients were not aware of the new Act and, indeed, many solicitors were not aware of the new Act until it became law itself.

2. I wouldn't say there has been an increase in numbers of women seeking interdicts with powers of arrest but certainly I have been in a position to advise women who make general enquiries that this facility is now available to them so there has probably been an increased uptake of such applications.

3. It is much more difficult to obtain the power of arrest under the Act than it is under the Matrimonial Homes Act. The test, for some bizarre reason, is reversed, so that it is for the pursuer to show that it is necessary for the power of arrest to be attached, rather than under the Matrimonial Homes Act where it is for the defender to show that it is unnecessary. It may be a fine balance but it is one which seems to be interpreted fairly strictly against the pursuer.

4. I would not say we are using the Act in preference to the Matrimonial Homes Act. Indeed, for the reasons involved regarding the respective tests here, I would tend to prefer the Matrimonial Homes Act if possible and only use the new Act if there is no marriage in place or if divorce was contemplated and the powers were required to be continued after the divorce.

5. I cannot say that there have been any problems regarding exclusion orders and cross over with interdicts and powers of arrest.

6/......
Scottish Women's Aid  
EDINBURGH  
29 July 2003

....../Contd.

6. I can only talk locally, but my experience is that it is quite difficult to secure powers of arrest locally in matters involving domestic abuse, if they are defended.

7. I would say that recently the police in West Dunbartonshire have set up an Domestic Violence Unit with an appointed police officer and since then the police have been relatively proactive in these matters.

8. I wouldn't say that the police are clear about the procedure under the Act unfortunately, but there seems to be a willingness to learn by the police locally.

9. There are always problems with the Scottish Legal Aid Board when obtaining interdicts, whether it be under the new Act, the old Act or at common law. The Scottish Legal Aid Board seems to take the view that if a report is made to the police then the police should deal with it and women should not be entitled to a civil remedy. Bizarre, to say the least, given that a civil remedy would at least give her the chance of immediate protection rather than waiting for the Procurator Fiscal to prosecute. This has been a long term bug bear between firms, such as my own, and the Scottish Legal Aid Board.

Once again, I apologise for not getting back to you sooner. I would also raise one issue with you further and that is that with the removal of the Working Tax Credit, which is a passport benefit for at least Advice & Assistance as you know, there are unfortunately more women who will now be asked for contributions towards their legal aid than there was in the past. I think this would bear to be investigated. I know we are only at an early stage here but it is something which I have raised with the Board and they have neither admitted or refuted that people will be caught out by this. They simply say that some will qualify who would not have done so in the past and that others will not qualify. That is not my experience, however. My experience is that people who have previously qualified with a nil contribution under Advice & Assistance are now being asked for contributions which they would not have been asked for before.

I hope this letter is helpful, although late!

Yours sincerely

[Signature]
Dear Louise,

**Protection from Abuse (Scotland) Act 2001 Review**

We refer to your telephone conversation with our [redacted] on the 30th July 2003 and now respond as follows:-

1. Did your clients know of the existence of the new Act before they consulted you? Has it been well publicised? - We have yet to meet a client who was aware of the existence of the new Act. Indeed, there are a fair number of solicitors who are unaware of its existence. We have taken over a number of cases where proceedings were originally initiated under the Non Harassment Act, when it would have been appropriate to proceed under the Protection from Abuse (Scotland) Act 2001, given it is possible to obtain a power of arrest on an interim basis.

2. Since the Act came into force on 6th February 2002 have you seen an increase in the number of women seeking interdicts with a power of arrest? - In short the answer is “No”. From recollection no single client was aware of the existence of the legislation (unless referred from organisations such as Women’s Aid or Central Scotland Police Domestic Violence Unit).

3. Is it easier or more difficult to obtain an interdict and power of arrest under this Act, rather than under the Matrimonial Homes Act, and have you encountered any technical or procedural problems? - There is an interesting discrepancy between the new Scotland Act and the Matrimonial Homes Act. In particular if we are proceeding under the Matrimonial Homes Act and seeking a power of arrest, the opponent must demonstrate to the Court why a power of arrest is not necessary. However if we are proceeding under the Protection from Abuse (Scotland) Act 2001, the onus is on ourselves to establish why a power of arrest is necessary. We would require to produce affidavits under the Abuse (Scotland) Act 2001 to get a power of arrest, which is not needed under the Matrimonial Homes Act. Accordingly there are more hurdles to jump through to obtain the power of arrest. It is difficult to understand why there should be
any discrepancy.

4. Are you using this Act in preference to the Matrimonial Homes Act in relation to interdicts? - If the client is married and/or has occupancy rights we would always proceed under the Matrimonial Homes Act because of the aforementioned points raised in 3 above. If however the parties are unmarried, and there are no occupancy rights, we would proceed under the Abuse (Scotland) Act. We would say that the Abuse (Scotland) Act 2001 has consigned the Non Harassment Act to the bin. It is not possible to obtain an interim Non Harassment Act and, as such, no solicitor worth his or her salt should proceed in terms of the Non Harassment Act when it would be more appropriate to proceed under the Abuse (Scotland) Act or the Matrimonial Homes Act.

5. Given that the new legislation does not cover exclusion orders, have you experienced any problems with the client who needs both an exclusion order and an interdict with a power of arrest? - When a client is seeking an exclusion order then by definition the partner/spouse must have occupancy rights. As a consequence of occupancy rights we would proceed under the Matrimonial Homes Act.

6. What has the Court’s attitude been towards granting interdicts with a power of arrest to women who experience domestic abuse? - The Court’s attitude has not varied over the course of the last ten years. Providing the client has a stateable case, with relevant evidence, then the Court will grant an interdict with a power of arrest.

7. Have the police been pro-active in enforcing the powers of arrest? - If the appropriate power of arrest has been lodged with the Chief Constable then Central Scotland Police will always enforce the power of arrest. Occasionally we come across situations where an abused client will allow the abuser to return to the former home. In that situation some police officers can be less than sympathetic if there are then further incidents of violence. We have come across cases where clients have been informed that they no longer have a power of arrest as they have allowed a violent partner back into the home. This of course is completely incorrect.

8. Are the police clear about the procedure under the Act? - We are satisfied that the police are aware of their obligations in terms of the Abuse (Scotland) Act 2001. It is treated in exactly the same way as a power of arrest under the Matrimonial Homes Act. As the Matrimonial Homes Act has been in operation for approximately twenty years, the police are quite familiar with the concept. We would point out however that the Non Harassment Act does cause problems for the police in terms of enforcement. However that is perhaps a story for a different day.

9. Have there been any problems in obtaining legal aid for interdicts under this Act? Once again, providing there is a stateable case with appropriate evidence, we have not encountered any difficulties in obtaining legal aid.

We hope the foregoing information is of some use to you. Should you wish to discuss any of the above further please do not hesitate to contact our [redacted] at the office.

Yours faithfully,

Dear Louise

Protection form Abuse (Scotland) Act 2001

Thank you for your letter of 10 July. I am sorry that I have not been able to comply with your deadline, I'm afraid two weeks was just too tight for me to manage. However, I think it might be helpful for SWA to have my comments anyway, in case these are useful to you in advising abused women. Here goes, in the order of your original questions:

1. Few clients know of the existence of the Act itself. Indeed few clients have ever heard of the Matrimonial Homes Act either. Quite often if they have been in contact with the police, they will come with a mantra that they've been told to see a solicitor and tell the solicitor to get them an interdict with power of arrest. Of course, they used to come along with this form of words before the existence of the Protection from Abuse (Scotland) Act 2001, whether they were entitled to a power of arrest or not, because the police themselves generally did not know that not all women were entitled to a power of arrest. So little has changed, except that now I don't have to disappoint cohabiting women who were not eligible for a power of arrest, as I can offer them one under the 2001 Act.

However, I do think that women are more aware generally that there is legislation to protect them from abuse, and that something can and should be done, even though they don't know the name of the legislation or what exactly it does. Whereas some years ago there was an assumption that nothing could be done, this has definitely changed.

2. As I have said above, there has not really been an increase in the number of women who arrive with an already defined aim of getting an interdict with a power of arrest. What has changed is that I can offer it to them now, where previously they were not eligible.
3. There is really no difference between obtaining a Matrimonial Homes Act or Protection From Abuse Act power of arrest attached to an interdict (but for exclusion order see below). Once the grounds have been shown for granting an interdict then the attachment of the power of arrest is usually quite smooth. The two procedures are much the same. There are some technical differences between the basis on which the two types of power of arrest might be attached:

For attachment to a matrimonial interdict (Mat Homes Act) the test is that the Sheriff “shall” attach a power of arrest unless it appears to the court that in all the circumstances it is unnecessary.

For attachment to a common law interdict it is that the Sheriff “must” attach a power of arrest if satisfied that it is necessary to protect the applicant from a risk of abuse in breach of interdict.

I struggle to find any practical difference between these two formulas. In both cases the man must be given the opportunity of being heard, and in both cases the court will require affidavits to be lodged in court to support the necessity for a power of arrest.

As I say above, the important hurdle is getting the interdict granted, not getting the power of arrest.

4. No, I don’t use the Protection from Abuse Act in preference to the Mat Homes Act. I don’t think it appropriate to use this Act where the Mat Homes Act can be used.

5. I am not sure what you mean by the legislation does not cover exclusion orders. The court must attach a power of arrest to an exclusion order if requested, it is always requested and always granted in my experience. So there is no need for any other provision. The exclusion order power of arrest is preferable simply because you don’t have to show that it is necessary (or not unnecessary) – it is automatic and this is an advantage. A client will almost always need both an exclusion order and an interdict with power of arrest. If she is entitled to an exclusion order then it is greatly preferable to use the Mat Homes Act. If there is sufficient evidence for an exclusion order then the power of arrest will be automatic, and almost certainly there will by definition be enough to show that the power of arrest should also be attached to the interdict. So no need to complicate things by using two different Acts.

6. I have not experienced any differences between the courts’ attitude to interdicts with powers of arrest before and after the Protection from Abuse Act. The courts have become steadily more sympathetic to victims of domestic abuse over the years. Provided the evidence for the interdict is there, then it is usually granted and a power of arrest attached unless the man can convince the court it is not required. This is not easy for a man to do where there have been incidents of violence and abuse.
I do not detect any difference between the police reaction to a Protection from Abuse Act power of arrest, and a Mat Homes Act one. There are slight differences between police powers under the two Acts:

The Mat Homes Act says a constable may arrest if he has reasonable cause for suspecting the [man] of being in breach of interdict.

The Protection from Abuse Act says a constable may arrest if he has reasonable cause for suspecting the [man] of being in breach of interdict and he considers that there would, if the [man] were not arrested, be a risk of abuse or further abuse by that person in breach of the interdict.

This I think makes the Protection from Abuse power technically slightly less useful, as the police officer has to make a judgement about future behaviour rather than just whether there has been a breach of interdict. A woman may well want the man lifted even if he might not cause her further problems in the immediate future, in order to show him that she has taken the step of calling the police.

In practical terms I don’t think this is a real difference for two reasons (1) as far as I can tell no-one in the police has noticed the difference yet and (2) I think they have always made a similar type of judgement in deciding whether to use their power of arrest under the Mat Homes Act, unless the man was caught on the spot. That is, the police never have been, and never will be, keen to chase after a man to arrest him if he has left the scene unless a criminal offence has been committed.

The police do use these powers of arrest more than they used to, but they will always prefer to charge a man with a criminal offence rather than use a Mat Homes of Protection from Abuse Act power of arrest, because they prefer to familiar situation and procedure.

It has always been my experience that the police are more ready to charge a man with a breach of the police because of his reaction when the police come on the scene, than with any offence which occurred before they arrive. Only last week I saw a woman who was seriously assaulted in front of her children and one of them called the police. When they arrived the man had one of the children in his arms and he punched one police officer and pushed another. Although they had statements from the woman and the children, they in their wisdom charged him only with the two police assaults because this meant that the children would not have to give evidence. This means that he is now going round saying that she called the police for no reason and then he got charged because he was angry that they arrested him for nothing. I look back twenty years and think - plus ça change ...
8. I am sure the police have proper procedures for what happens after an arrest under either of the Acts. But see above about their preference to arrest for a criminal offence if they can.

9. I have had no problems getting legal aid. Your question says "for interdicts under this Act" – but the Act does not make any provision at all for obtaining interdicts. It is exclusively about attaching powers of arrest to interdicts obtained otherwise. This means in effect common law interdicts, since matrimonial ones have their own procedure for powers of arrest. So there is no change to any application for legal aid – you still have to show reasonable grounds for fear of unlawful behaviour in order to get the interdict. The power of arrest application is just an add-on. All you need to do is say that the power of arrest is necessary to protect the application from abuse or further abuse. The details provided for getting the interdict will usually be enough to support this statement.

Hopefully this is of some interest. As ever, if you need any further information, please don’t hesitate to contact me.

Kind regards
Ms. Claire Menzies-Smith,
Senior Assistant Clerk,
The Scottish Parliament,
Justice 1 Committee,
Room 3.11,
Committee Chambers,
Edinburgh,
EH99 1SP.


Dear Ms. Menzies-Smith,

Post-Legislative Scrutiny of the Protection From Abuse (Scotland) Act 2001.

Thank you for the opportunity to comment on the above legislation on behalf of the Scottish Police Federation, which is the staff association that represents 98% of all police officers in Scotland.

From an operational point of view, our members are supportive of this legislation and are confident that the provisions of the legislation make it simpler for them to deal effectively with domestic abuse situations.

However, the evidence we have from our members is that they are very rarely called upon to use their powers under this legislation. They have no explanation for this other than the legislation does not appear to be extensively used by the public or breaches very seldom occur.

We have no further comment to make but trust this of assistance to you.

Yours sincerely,

Douglas J. Keil, QPM,
General Secretary.

Please address all communications to: General Secretary, 5 Woodside Place, Glasgow G3 7QF
Tel: 0141 332 5234 Fax: 0141 331 2436
Website: www.spf.org.uk
Dear Ms Menzies Smith,

POST LEGISLATIVE SCRUTINY OF THE PROTECTION FOR ABUSE (SCOTLAND) ACT 2001

I refer to the above and would make the following comments.

This Act came into Force on 6 February 2002, with the power of arrest attached to interdicts to protect the individuals from abuse. It also allowed people no longer in relationships to apply. The power of arrest lasts for 3 years, however, it does appear that some Sheriffs are turning down a high percentage of such applications, reducing the arrest period and making it difficult to obtain powers of arrest unless the case involves physical assault.

Whilst we only have anecdotal evidence of this, it is clear that monitoring of Sheriff Court decisions and police recording of specific abuse cases such as domestic violence, child abuse, etc would assist in ensuring that legislative changes are being implemented through the criminal justice process.

As example of how the system currently works, I provide some information about the situation in one of our membership Force areas as follows:

"There have been 5 interdicts with power of arrest since the introduction of the legislation, with one reported breach.

There is a difficulty in obtaining accurate figures about the number of applications granted or refused and the reasons for this."

It may be that the Scottish Executive could be pro-active in commissioning a survey in an effort to ascertain actual numbers and the process outcomes thereafter. It may also be appropriate to ask police forces and Procurators Fiscal to intimate the number of cases brought for prosecution and that the disposals of these cases then be monitored.

Please address communications to:- General Secretary, 173 Pitt Street, GLASGOW, G2 4JS Tel: 0141-221-1131 Fax: 0141-221-8407 E-mail: general.secretary@scottishpolicesupers.co.uk Website: www.scottishpolicesupers.co.uk
Ms Claire Menzies Smith  
Senior Assistant Clerk  
Justice 1 Committee  
The Scottish Parliament  
Room 3.11  
Committee Chambers  
EDINBURGH EH99 1SP

Dear Ms Smith

POST-LEGISLATIVE SCRUTINY OF THE PROTECTION FROM ABUSE  
(SCOTLAND) ACT 2001

I refer to your correspondence dated 2 July 2003 in relation to the above subject, which has been  
considered by members of the Crime Standing Committee, and can now offer the following by  
way of comment.

Members agree that the Act has been effective and influential throughout Scotland and its  
provisions have been welcomed by victims and officers. The objectives of the research being  
undertaken are considered by members to be relevant and comprehensive.

Many of the forces in Scotland have not had the opportunity to invoke the powers afforded by  
the Act, however members anticipate a marked increase in the number of applications once the  
principles of the Act become more widely known. Therefore, since the promotion of the Act has,  
in the main, been undertaken by the police and domestic abuse agencies, members agree that  
there is scope for the Scottish Executive to reinforce its promotion on a national basis.

I trust that the foregoing is of assistance to you.

Yours sincerely

[Signature]  
Chief Constable  
(Hon. Secretary)

Hon Sec : William Rae QPM
Dear Ms Claire Menzies Smith

POST-LEGISLATIVE SCRUTINY OF THE PROTECTION FROM ABUSE (SCOTLAND) ACT 2001

Thank you for your letter dated 2 July 2003 addressed to Lindsay Montgomery which has been passed to me for my attention. I am sorry this will reach you outwith your requested timescale for responses.

Following the commencement of the Protection from Abuse (Scotland) Act 2001, we created category codes to identify applications for advice and assistance and civil legal aid where the primary matter for which advice or representation was sought concern proceedings under the Act. To date, we have received intimation of 75 grants for advice and assistance. Advice and assistance is granted by a solicitor to a client on a matter of Scots Law, which obviously includes advice on the Protection from Abuse (Scotland) Act 2001. We have also received a total of 24 applications for civil legal aid, of which 17 have been granted.

However, it must be understood that our coding system captures the primary matter upon which advice or representation is sought. It may well be that other applicants for both advice and assistance and civil legal aid are receiving advice on the Act within a more general heading (for example, interdict). We cannot separately identify those cases and would not wish to speculate as to whether a much larger number of clients are receiving advice on the implications of the Act for their own case.

I hope you find this helpful. If you require any further information, please do not hesitate to contact me.

Yours sincerely

Tom C Murray
Director of Legal Services and Applications
Dear Ms Menzies Smith

POST-LEGISLATIVE SCRUTINY OF THE PROTECTION FROM ABUSE (SCOTLAND) ACT 2001

Thank you for your letter of 2 July 2003.

As you are aware this is a fairly recent Act and I am afraid that the Association does not yet have sufficient experience of its workings to be able to provide any meaningful evidence.

Nonetheless we are grateful to you for having asked us to comment.

Yours sincerely

[Signature]

SHERIFF H MATTHEWS QC
Justice 1 Committee

Post-legislative Scrutiny of the Protection from Abuse (Scotland) Act 2001

Response from Lady Smith

From: Lady Smith
Sent: Tuesday, July 08, 2003
To: ‘claire.menzies-smith@scottish.parliament.uk’
Subject: Protection from Abuse [Scotland] Act 2001

Dear Ms Menzies-Smith

I refer to your letter of 2 July 2003. I note that you are looking into the effectiveness and operation of the above Act which was passed following upon some of the work of the Scottish Partnership on Domestic Abuse which I chaired. It is, however, now almost 2 years since I was in practice at the Bar and I have not come across any instances of the Act in operation since my elevation to the Supreme Court bench. I suspect that you may get more information from the Sheriff Court than from the Court of Session.

I cannot, accordingly, offer any evidence.

Yours sincerely

Lady Smith
Dear Ms Menzies-Smith

I refer to your letter of 2 July 2003. I note that you are looking into the effectiveness and operation of the above Act which was passed following upon some of the work of the Scottish Partnership on Domestic Abuse which I chaired. It is, however, now almost 2 years since I was in practice at the Bar and I have not come across any instances of the Act in operation since my elevation to the Supreme Court bench. I suspect that you may get more information from the Sheriff Court than from the Court of Session.

I cannot, accordingly, offer any evidence.

Yours sincerely

Lady Smith
Dear Claire,

POST-LEGISLATIVE SCRUTINY OF THE PROTECTION FROM ABUSE (SCOTLAND) ACT 2001

Further to your letter of 2nd July, I have taken some soundings from the Family Law Committee. The information which I have from the Committee is that the Act has been operated on a number of occasions. It is generally considered that the power of arrest has proved useful because all the experience points to the fact that the actions have been raised by women who would not have previously been able to have a power of arrest because they were not married to the abusive partner.

I have no numerical statistics to offer you about the usage of the Act, but I can state that in each instance the client has been in receipt of Legal Aid. No doubt the Scottish Executive research will produce much more comprehensive data.

I am sorry that this is a very general response, but hope that your investigation into the operation of the Act will prove useful.

Yours sincerely,

[Signature]

Michael P. Clancy
Director
This briefing has been prepared to assist the Justice 1 Committee in considering the operation of the Protection from Abuse (Scotland) Act 2001. It is divided into three main sections:

- Providing an outline of the background to and provisions of the Act
- Considering research commissioned by the Scottish Executive evaluating the use and impact of the Act
- Considering written submissions made to the Justice 1 Committee in response to a request for evidence on the operation of the Act

Scottish Parliament Information Centre (SPICe) Briefings are compiled for the benefit of the Members of the Parliament and their personal staff. Authors are available to discuss the contents of these papers with MSPs and their staff who should contact Frazer McCallum on extension 85189 or email frazer.mccallum@scottish.parliament.uk. Members of the public or external organisations may comment on this briefing by emailing us at spice.research@scottish.parliament.uk. However, researchers are unable to enter into personal discussion in relation to SPICe Briefing Papers.

Every effort is made to ensure that the information contained in SPICe briefings is correct at the time of publication. Readers should be aware however that briefings are not necessarily updated or otherwise amended to reflect subsequent changes.

www.scottish.parliament.uk
KEY POINTS OF THIS BRIEFING

- The Justice 1 Committee decided at its meeting on 24 June 2003 to carry out post-legislative scrutiny of the Protection from Abuse (Scotland) Act 2001 (‘the PFA Act’). It agreed to request written evidence from a number of sources and to use that evidence, together with research commissioned by the Scottish Executive, to evaluate the impact and effectiveness of the PFA Act.

- Following the Justice 1 Committee’s call for written evidence, responses were received from seven organisations and one individual. The research commissioned by the Scottish Executive was published in November 2003.

- The former Justice 1 Committee introduced the Protection from Abuse (Scotland) Bill during the first session of the Parliament with the purpose of improving the legal protection available to individuals who are at risk of abuse. The Bill was passed by the Parliament on 4 October 2001 and the resulting PFA Act came into force on 6 February 2002.

- Prior to the PFA Act, only matrimonial interdicts granted under the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (‘the MH Act’) could have a power of arrest attached to them. The definition of a matrimonial interdict excludes various people who might wish to have a power of arrest attached to an interdict against an abusive person. Categories of people who are not entitled to obtain a matrimonial interdict include divorced spouses, same-sex cohabitants and non-cohabitant partners.

- The PFA Act changed the law to allow anyone who has obtained, or who is applying for, an interdict against an abusive person to apply to the court to have a power of arrest attached to that interdict, regardless of whether the interdict is a matrimonial interdict or not.

- The research commissioned by the Scottish Executive reported that it should be viewed as a ‘scoping’ exercise, with a more comprehensive evaluation of the PFA Act taking place once people have had more time to make use of its provisions. The report included the following findings:
  - that women are the main users of the PFA Act and of previous legislation
  - that knowledge and awareness of the PFA Act is variable
  - that initial findings suggest that the PFA Act has been successful in increasing access to powers of arrest
  - that any success has to be considered in the light of continuing barriers to accessing protection from abuse
  - that by mirroring the MH Act, the PFA Act reproduces the limitations inherent in hybrid civil/criminal orders designed to respond to cases of domestic violence, where responsibility is split between the pursuer and the state.

- The written evidence submitted to the Justice 1 Committee included information and views on: knowledge of the PFA Act; numbers of people seeking interdicts with a power of arrest; experience of obtaining an interdict with a power of arrest; exclusion orders; the approach of the courts and of the police; and the availability of legal aid.
INTRODUCTION

The Justice 1 Committee decided at its meeting on 24 June 2003 to carry out post-legislative scrutiny of the Protection from Abuse (Scotland) Act 2001 (asp 14) (‘the PFA Act’). It agreed to request written evidence on the operation of the PFA Act from the organisations which gave evidence to the former Justice and Home Affairs Committee in Autumn 1999, and from Victim Support Scotland, on the proposal for a protection from abuse bill. The deadline for responses to this call for written evidence was 31 July 2003. The intention was to use this evidence together with research commissioned by the Scottish Executive to evaluate the impact and effectiveness of the PFA Act.

Following the Committee’s call for written evidence, responses were received (including two responses received after the July deadline) from seven organisations and one individual. A list of respondents is provided in Appendix 1. Two of the respondents stated that they were unable (or unable at that stage) to provide useful evidence in relation to the operation of the PFA Act. The other six substantive responses were, with the exception of a response from Scottish Women’s Aid, relatively brief. The response from Scottish Women’s Aid consisted of replies which it had received from 19 solicitors in response to a letter which it had sent to a number of legal practitioners with experience of dealing with women, children and young people affected by domestic abuse. The letter sought information on various issues relating to the PFA Act. Part of this letter, including the part setting out the specific issues in relation to which information was sought, is reproduced in Appendix 2.

The above mentioned research commissioned by the Scottish Executive was published in November 2003 ‘An Evaluation of the Protection from Abuse (Scotland) Act 2001’ (Cavanagh, K. et al 2003a).

The latest statistics published by the Scottish Executive on domestic abuse recorded by the police are available in ‘Domestic Abuse Recorded by the Police in Scotland, 1 January – 31 December 2002’ (2003).

The remainder of this briefing is split into three main sections:

- an outline of the background to and provisions of the Protection from Abuse (Scotland) Act 2001
- consideration of the research commissioned by the Scottish Executive
- consideration of the evidence submitted to the Justice 1 Committee

THE PROTECTION FROM ABUSE (SCOTLAND) ACT 2001

On 4 June 2001, the former Justice 1 Committee introduced the Protection from Abuse (Scotland) Bill (SP Bill 30) with the purpose of improving the legal protection available to individuals who are at risk of abuse. The Bill was passed by the Parliament on 4 October 2001 and the resulting PFA Act came into force on 6 February 2002.

1 Replies from Lady Smith and the Sheriffs’ Association.
Position prior to the PFA Act

The background to the PFA Act is outlined in the Explanatory Notes published with the Act. These note that, prior to the PFA Act becoming law, the courts already had the power to grant interdicts to protect individuals from abusers, regardless of relationship. An interdict is a civil court order which can be obtained by one person to forbid (or interdict) some course of action by another person, eg restricting the access of an abusive person to the home, and surrounding area, of the person who obtained the interdict. Breach of an order for interdict is not of itself a criminal offence but is punishable as contempt of court.

However, only matrimonial interdicts, granted under the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (c 59) (‘the MH Act’), could have a power of arrest, which can be used by a police officer, attached to them. Matrimonial interdicts can, in general, only be brought by one spouse against another, or by one person against another person where they have been cohabiting as if they were husband and wife. Thus, the definition of matrimonial interdict excludes various categories of people who might wish to have a power of arrest attached to an interdict against an abusive person, including divorced spouses, same-sex cohabitants, non-cohabitant partners and other family members.

In the case of non-matrimonial interdicts, the courts had no power to attach a power of arrest to the interdict. Thus, the police could only arrest an abusive person who was in breach of such an interdict if a criminal offence had also been committed, eg a breach of the peace or an assault.

In addition to interdicts, there is the possibility of obtaining an exclusion order under the MH Act. An exclusion order suspends a spouse’s occupancy rights in the matrimonial home where the court deems it necessary to protect the other spouse or any children of the family from actual or threatened behaviour and to enable the non-abusive partner to continue her/his occupancy rights of the matrimonial home unmolested. The provisions on exclusion orders can also be extended to cohabiting couples.

There is also the possibility of obtaining a non-harassment order under the Protection from Harassment Act 1997 (c 40) (‘the PH Act’). The PH Act provides that:

“Every individual has a right to be free from harassment and, accordingly, a person must not pursue a course of conduct which amounts to harassment of another (…)” (section 8(1))

Any person who believes him- or herself to have been subjected to harassment by another person may initiate civil proceedings known as an ‘action of harassment’. In such an action, the court may award damages, grant interdict, or make a non-harassment order requiring the other party to refrain from such harassment for a specified period (the period set may be indeterminate). Under the PH Act, breach of a non-harassment order is a criminal offence. One consequence of this is that the police have common law powers of arrest in relation to those suspected of breaching such an order. More recently, section 49 of the Criminal Justice (Scotland) Act 2003 (asp 7) amended the PH Act to provide for a specific statutory power of arrest for the breach of a non-harassment order.²

² The report of the research commissioned by the Scottish Executive notes that the addition of a specific statutory power of arrest came after the conclusion of the data collection for the research project (Cavanagh, K. et al 2003a, para 1.19).
Changes made by the PFA Act

The PFA Act changed the law to allow anyone who has obtained, or who is applying for, an interdict against an abusive person to apply to the court to have a power of arrest attached to the interdict, regardless of whether the interdict is a matrimonial interdict or not. Thus, the PFA Act extended the protection available to categories of people who had previously been unable to access interdicts with powers of arrest under the MH Act, for example, divorced spouses, same-sex cohabitants, non-cohabitant partners and other family members.

Under the PFA Act, the court has to be satisfied that granting a power of arrest is necessary to protect the applicant from a risk of abuse through repetition of the action for which the interdict was granted, but the applicant is not required to show any particular personal relationship to the alleged abuser. The power of arrest means that, where an interdicted person is suspected of breaching the interdict, a police officer is entitled to arrest that person and take him/her away from the scene, without there being any allegation that a crime has been committed. The power may be exercised where the officer is satisfied that not doing so would result in a risk of the interdicted person causing or continuing to cause abuse in breach of the interdict.

The PFA Act also makes provision for the procedure to be followed where a person has been arrested for breach of an interdict, including provision for the arrested person to be detained for up to two days if the court is satisfied that this would minimise the risk of abuse.

RESEARCH COMMISSIONED BY THE SCOTTISH EXECUTIVE

Research commissioned by the Scottish Executive to monitor and evaluate the use and impact of the PFA Act was published in November 2003 ‘An Evaluation of the Protection from Abuse (Scotland) Act 2001’ (Cavanagh, K. et al 2003a). The main findings of the research are set out in Research Findings (Cavanagh, K. et al 2003b).

The research looked at data from four sources:

- information contained in 123 official civil court records from four sheriff courts (Glasgow, Stonehaven, Dumbarton and Stirling) covering applications for interdict, with or without a power of arrest, or non-harassment orders as a result of domestic abuse in the three months before and the four months after the coming into force of the PFA Act
- scrutiny of 16 criminal cases involving breached protection orders (interdicts or non-harassment orders)\(^3\)
- interviews with 18 court/justice personnel (sheriffs, procurators fiscal, solicitors and the police)
- 32 questionnaires completed by women who had experience both of violence and abuse and of seeking protection orders

\(^3\) An additional two cases involving breaches of non-harassment orders related to neighbourhood disputes were considered not to be relevant in relation to the research.
The introduction to the research report notes that:

“It was anticipated that any evaluative study of this Act, coming so soon after its inauguration, would find minimal use of the legislation itself. Thus it is more accurate to think of this study as a ‘scoping’ exercise with a more comprehensive evaluation of the Act best placed to occur once the Act itself and those people who both operationalise and seek help via its powers, have had more time to make use of the Act and its provisions. Nevertheless, the introduction of any new piece of legislation requires early investigation of its use and potential effectiveness in order to ascertain the extent to which further work requires to be done with regard to, for example, enhancing the profile of the Act, its powers and its provisions.” (Cavanagh, K. et al 2003a, para 2.1)

The conclusions of the research are set out in Chapter 8 of the report and are summarised below:

- women are the main users of the PFA Act and of previous legislation. Legislation which aims to protect victims of abuse must be sensitive to the fact that domestic abuse predominantly involves violence by men against women

- a particularly dangerous time for women, in terms of potential for abuse, is when they are in the processes of separating from a partner, married or otherwise. The need for effective legal protection for women at this time is critical

- knowledge and awareness of the PFA Act was variable. The questionnaires completed by women victims of domestic violence indicated that 87% of the 32 women responding had never heard of the PFA Act, indicating a need for awareness raising. Of eight women who could have sought an interdict with a power of arrest under the PFA Act, only one was able to do so and two reported negative experiences. All of the professionals knew of the PFA Act but some were less clear about its detail, indicating that professional training on the provisions of the Act is also required

- during the period covered by the research, the provisions of the PFA Act were utilised in three of the four sheriff courts whose records were scrutinised. There were, during the four month period after the coming into force of the provisions, 35 requests for interdicts with a power of arrest under the PFA Act. There was a gradual increase in the use of the PFA Act during the period and initial findings suggest that the Act was successful in increasing access to powers of arrest. These findings will require further monitoring

- any success has to be considered in the light of continuing barriers to accessing protection from abuse. These include continued difficulties in securing powers of arrest. Judicial practice was sometimes seen to be inconsistent, with divergences in terms of evidential requirements and attitudes towards the need for powers of arrest. In addition, difficulties in obtaining legal aid for civil court actions were found to inhibit victims from seeking protection orders, and the enforcement of powers of arrest relies on police discretion. More could be done to increase access to protective measures by increasing public awareness, offering more training for professionals involved in the process and providing greater financial support to pursue cases via legal aid

- difficulties were encountered in prosecuting breached protection orders, including the fact that breach of interdict is not itself a crime, although actions which result in breach of an interdict might also amount to a criminal offence, eg breach of the peace or assault. It is, where there are no criminal proceedings, open to the person who had obtained the
interdict to raise a civil action for breach of that interdict. However, this may be time-
consuming and, unless legal aid is available, costly. Breach of a non-harassment order
is a criminal offence. However, where the authorities decide not to prosecute, the person
who had obtained the non-harassment order cannot raise a civil action in respect of the
breach

- scrutiny of the 16 criminal cases involving breached protection orders (13 non-
harassment orders, one matrimonial interdict and two interdicts with powers of arrest
under the PFA Act) revealed that, whilst all 16 cases were reported to the procurator
fiscal, in only five cases (all breached non-harassment orders) was the matter disposed
of following a trial or a guilty plea. Four cases were deserted at trial and seven cases
were marked ‘no proceedings’. None of the prosecutions involved the three cases where
an interdict, as opposed to a non-harassment order, had been breached. More research
involving a greater number of cases is required. Changing the law to criminalise the
breach of an interdict may result in more prosecutions and emphasise to perpetrators the
seriousness of breaching such orders

The report goes on to state that

“In summary, the Scottish Parliament’s intention in enacting the PFA Act was to offer
increased protection for those experiencing domestic violence. This evaluation shows that
the Act is being utilised but reveals a lack of fit between the intention of this legislation and
its actual operation. By mirroring the matrimonial homes legislation, the new Act
reproduces the limitations inherent in hybrid civil/criminal orders designed to respond to
cases of domestic violence, where responsibility is split between the pursuer and the state.
Civil law interdicts place an unfair burden on victims of abuse to pursue actions due to strict
criteria for legal aid and the cost of privately funding civil court actions. Powers of arrest go
some way to attaching criminal powers, but stop short due to the continued reliance on
police discretion and the requirement that the breach of interdict must amount to a crime
before prosecution can be considered. The effects of these limitations are being felt by
those already vulnerable, victims of abuse who, in consequence, continue to find it
extremely difficult to secure protection from the legal system.” (Cavanagh, K. et al 2003a,
para 8.11)

EVIDENCE SUBMITTED TO THE JUSTICE 1 COMMITTEE

The issues raised in the six substantive responses, including a response from Scottish
Women’s Aid consisting of information submitted by 19 solicitors, are outlined below.

Knowledge of the PFA Act

Most solicitors providing information via Scottish Women’s Aid reported that their clients, prior to
consulting them, had not generally been aware of the provisions of the PFA Act. Where clients
did have some existing knowledge of its provisions, it was noted that this could have been
information provided by the police, by relevant support organisations or through word of mouth
between people facing similar problems. Some commented that a fair number of solicitors also
had limited knowledge of the Act’s provisions. There was support for more publicity, targeted to
reach relevant groups/people. However, it was also noted that, amongst people seeking legal
advice, a limited knowledge of legal rights more generally was not unusual.
A response from the Association of Chief Police Officers in Scotland (‘ACPOS’) highlighted some similar points, stating that the promotion of the PFA Act had, in the main, been undertaken by the police and domestic abuse agencies, and suggesting that there was scope for greater promotion of the Act by the Scottish Executive.

**Numbers of people seeking interdicts with a power of arrest**

Solicitors providing information via Scottish Women’s Aid did not generally report an increase in the number of clients coming to them actively seeking interdicts with a power of arrest, although they did indicate that the provisions of the PFA Act meant that they (ie the solicitors) could now apply for more interdicts with a power of arrest on behalf of their clients.

**Obtaining an interdict with a power of arrest**

The majority of solicitors providing information via Scottish Women’s Aid reported that obtaining a power of arrest under the PFA Act is not significantly harder or easier than, in appropriate circumstances, obtaining an interdict with a power of arrest under the MH Act. However, some did argue that justifying a power of arrest under the PFA Act is more difficult, with the pursuer having to demonstrate why a power of arrest is necessary rather than, where the MH Act is used, the defender having to demonstrate why one is not necessary. Solicitors expressed mixed views on whether they had a preference for using the provisions of the PFA Act or the equivalent provisions in the MH Act. The choice was often said to depend on the circumstances of the client.

The above mentioned solicitors did not generally report any technical legal difficulties in relation to obtaining a power of arrest under the PFA Act, although some did highlight some initial problems which had been resolved by regulation or guidance from the courts. One solicitor reported that some, but not all, sheriffs take the view that if the parties are married then the provisions of the MH Act should be used in preference to those of the PFA Act. The solicitor suggested that this might be a point which could be clarified so that the most appropriate provisions can be used in every case.

A response from the Law Society of Scotland, based on views expressed by members of its Family Law Committee, stated that in general the power of arrest under the PFA Act was considered to be useful. This was on the basis that experience indicated that applications under the provisions of the PFA Act had been raised by women who would not, because they were not married to the abusive partner, have previously been able to obtain a power of arrest.

**Exclusion orders**

The letter circulated to solicitors by Scottish Women’s Aid sought views on whether the fact that the PFA Act does not itself provide for exclusion orders has created any problems where a client needs both an exclusion order and an interdict with a power of arrest. Most solicitors responding reported that this had not created any problems, although it might mean that the solicitor relied on the MH Act in relation to both matters.
Approach of the courts and the police

Most solicitors providing information via Scottish Women’s Aid did not highlight any particular problems in relation to the attitude of sheriffs towards granting interdicts with a power of arrest. It was noted by some that the PFA Act had not resulted in a change of attitude, whilst others reported that at least some sheriffs are quite sympathetic to the need to provide the protection of a power of arrest in appropriate cases.

A response from the Association of Scottish Police Superintendents stated that it had anecdotal evidence that some sheriffs are turning down a high percentage of applications for powers of arrest under the PFA Act, or agreeing to a lesser period during which the power of arrest will apply, and making it difficult to obtain powers of arrest unless the case involves physical assault. The approach of the courts was not specifically highlighted by the other two police respondents (ACPOS and the Scottish Police Federation). The response from the Association of Scottish Police Superintendents went on to state that the monitoring of sheriff court decisions, and of police recording of specific abuse cases, would assist in ensuring that legislative changes are being implemented through the criminal justice process.

The letter circulated to solicitors by Scottish Women’s Aid also sought views on whether the police: (a) have been pro-active in enforcing powers of arrest; and (b) are clear about procedures under the PFA Act. There were mixed reports on the attitude of the police to enforcing a power of arrest attached to an interdict, including praise for the approach of some police officers and concerns expressed about other incidents. Some of the concerns related to the attitudes of some police officers to domestic abuse more generally. There were also mixed reports in relation to police understanding of the procedures under the PFA Act. Some solicitors did not feel able to comment on the matter. The reports of those who did, pointed both to officers having a good or improving understanding of their role in relation to the legislation and to officers not being clear about such matters. The need for more general training for police officers on dealing with domestic abuse was also indicated by some respondents.

Responses from both ACPOS and the Scottish Police Federation stated that police officers are supportive of the provisions of the PFA Act. The response from ACPOS also stated that members of its Crime Standing Committee agreed that the PFA Act has been “effective and influential throughout Scotland”. However, it went on to state that many police forces had not had the opportunity to invoke the powers under the PFA Act. This observation was linked to the number of applications under the legislation by people seeking protection from abuse, with the prediction that the number would increase once the principles of the PFA Act became more widely known. The response from the Scottish Police Federation stated that the evidence which it had from its members is that those members:

“are very rarely called upon to use their powers under this legislation. They have no explanation for this other than the legislation does not appear to be extensively used by the public or breaches very seldom occur”.

Availability of legal aid

The letter circulated to solicitors by Scottish Women’s Aid sought views on whether there had been any problems obtaining legal aid in respect of applications under the PFA Act for powers of arrest to be attached to interdicts. Many of those responding reported that they had not experienced any particular problems in relation to the provisions of the PFA Act. However,
some highlighted difficulties with the availability or level of legal aid in relation to civil matters more generally.

Some solicitors responding to Scottish Women's Aid did state that obtaining legal aid in relation to applications for interdicts in domestic abuse cases more generally, not just under the PFA Act, could be problematic. These respondents argued that the Scottish Legal Aid Board ("SLAB") sometimes takes an approach suggesting that the issues involved should be dealt with by the police using their criminal law powers, rather than by a person seeking legal aid for a civil interdict application. However, some respondents also expressed views suggesting SLAB has been sympathetic in how it has dealt with applications in this area. It was also stated by a respondent that, although obtaining legal aid in relation to applications for interdicts with a power of arrest has not proved to be particularly difficult, it can be very difficult to obtain legal aid in connection with breach of interdict actions.

A response from SLAB stated that it had been monitoring the number of applications, for both advice and assistance and civil legal aid, where the primary matter for which advice or representation was sought concerned proceedings under the PFA Act. In relation to such cases, SLAB stated that as of 6 August 2003 it had received: (a) intimation of 75 grants for advice and assistance; and (b) 24 applications, 17 of which were granted, for civil legal aid. The response from SLAB went on to note that this system of monitoring would not have highlighted any other cases where the provisions of the PFA Act, although not the primary matter giving rise to advice or assistance or a legal aid application, were covered as part of the advice provided.
APPENDIX 1 – RESPONSES TO CALL FOR EVIDENCE

Responses were received from the following seven organisations and one individual in relation to the request by the Justice 1 Committee for written evidence on the operation of the PFA Act:

- Association of Chief Police Officers in Scotland
- The Association of Scottish Police Superintendents
- Lady Smith
- The Law Society of Scotland
- Scottish Legal Aid Board
- Scottish Police Federation
- Scottish Women’s Aid
- The Sheriffs’ Association

Two of the above respondents stated that they were unable (or unable at that stage) to provide useful evidence in relation to the operation of the PFA Act – the replies from Lady Smith and the Sheriffs’ Association.
APPENDIX 2 – INFORMATION SOUGHT BY SCOTTISH WOMENS’ AID

The response which Scottish Women’s Aid submitted in relation to the Justice 1 Committee’s request for written evidence on the operation of the PFA Act consisted of replies which it had received from 19 solicitors in response to a letter (dated 10 July 2003) which it had sent to a number of legal practitioners with experience of dealing with women, children and young people affected by domestic abuse. The letter sought information on various issues relating to the PFA Act. Part of this letter, including the part setting out a number of specific issues in relation to which information was sought, is reproduced below.

“You may recall I previously contacted you on 5 December 2002, in your capacity as a legal practitioner dealing with women, children and young people experiencing domestic abuse, seeking your comments on the impact of the Protection from Abuse (Scotland) Act 2001. The Scottish Parliament’s Justice 1 Committee has recently indicated that they are now carrying out a review of the ‘influence and effectiveness’ of the above legislation and wish to take evidence from various organisations, including Scottish Women’s Aid, in this matter.

The purpose of this letter is to seek information from you again on this issue, in particular, whether your initial experience of using the legislation and the number of applications has changed. In order to meet the deadline for the submission of the written evidence to the Committee, I should be very grateful if you would respond to the questions below by Friday 25 July:–

- Did your clients know of the existence of the new Act before they consulted you? Has it been well publicised?
- Since the Act came into force on 6 February 2002, have you seen an increase in the number of women seeking interdicts with a power of arrest?
- Is it easier or more difficult to obtain an interdict and power of arrest under this Act, rather than under the Mat. Home Act, and have you encountered any technical or procedural problems?
- Are you now using this Act in preference to the Mat. Homes Act in relation to interdicts?
- Given that the new legislation does not cover Exclusion Orders, have you experienced any problems where the client needs both an Exclusion Order and interdict with a power of arrest?
- What has the courts’ attitude been towards granting interdicts with a power of arrest to women experiencing domestic abuse?
- Have the police been pro-active in enforcing the powers of arrest?
- Are they clear about the procedure under the Act?
- Have there been any problems obtaining Legal Aid for interdicts under this Act?”
SOURCES


Matrimonial Homes (Family Protection) (Scotland) Act 1981 (c 59). London: HMSO


Protection from Harassment Act 1997 (c 40) (‘the PH Act’). London: HMSO

Justice 1 Committee

Transparency of Legal Fees

Note by the Clerk

Background

Disputed solicitors’ fees
1. In August 2003, Margo MacDonald MSP wrote to the Clerk, enclosing correspondence from a Mr J Wilson concerning a complaint in relation to disputed solicitors’ fees and requesting that the substance of his complaint be placed before the Convener for an investigation by the Committee. Ms MacDonald’s and Mr Wilson’s correspondence to her are attached at Annex A.

The role of auditors of court
2. Mr Wilson’s case involved a dispute of legal fees, which he had pursued by means of the procedure for having the solicitor's account independently scrutinised, called the “taxation” of the solicitor's account which is carried out by an auditor of court. Auditors of court are officials based in sheriff courts who, in cases referred to them, determine the proper fee that it is reasonable to pay. In Mr Wilson’s case, the auditor of court found that the fee charged of £1,200 should be reduced to £950. However, Mr Wilson was dissatisfied with this outcome as he felt that the final fee, although reduced, was nonetheless an amount well in excess of a fair charge for the nature of the work undertaken by the solicitor. Furthermore, he was not content with the taxation procedure, feeling that it lacked transparency as there was no minute taken of the meeting and no itemisation of specific costs and that the official undertaking the role of auditor of court was not appropriately qualified to do so.

Law Society of Scotland
3. Whilst the Convener and the Committee could take no action in relation to Mr Wilson’s individual case, the Convener felt that there was a wider issue relating to transparency of legal fees and wrote to the Law Society of Scotland seeking its views on the matter and any guidelines that it issues to solicitors on the process of calculating and setting legal fees and on how this process should be explained to the client. The society's response refers to chapters 1 and 2 of its Table of Fees for General Business; the response and extracts are attached at Annex B.

4. The Convener felt that the parameters set out in the table of fees are very wide and quite complicated; that, for the lay person, it would be very difficult to understand how fees are calculated in relation to the table, and that, as the parameters are wide, it also makes it difficult for lay persons to pin their solicitors down to a cost per item. The Convener also felt that this raised questions about how such a person would go about challenging their solicitors’ fees, should they believe
them to be unduly high, and wrote to the Scottish Legal Services Ombudsman (“the Ombudsman”) to seek her views on these points.

Scottish Legal Services Ombudsman

5. The Ombudsman replied to the Convener’s letter in February 2004 and a copy of the response is at Annex C. The Ombudsman identifies three main issues—

(a) Despite recommendations by the Ombudsman and unlike the Law Society in England and Wales, the Law Society of Scotland does not have a practice rule that, at the beginning of the solicitor-client relationship, solicitors send a letter of engagement, setting matters out clearly, such as charges or charging rates, how much may be paid to other parties on the client’s behalf and when they expect to be paid;

(b) It is the Law Society of Scotland’s position that clients should have to pay extra charges for a detailed or itemised account, whereas the Ombudsman believes that, owing to advances in technology, detailed accounts are likely to be quite simple to draw up and, therefore, such charges are not justifiable;

(c) The role of the auditor of court in taxing solicitors’ accounts is to assess whether the amount charged for work undertaken is reasonable but not to assess whether the it was reasonable to undertake the work itself.

6. During this period, further items of correspondence were also received from Mr Wilson (Annex D). The Convener felt that the Ombudsman made some interesting points which, together with points made by Mr Wilson, should be considered by the Committee.

Action

7. The Committee is invited to consider what course of action it would like to take. This could include—

(a) writing to the Minister for Justice, outlining the problems identified in this area and seeking action in relation to this matter;

(b) writing to the Law Society of Scotland, enclosing the Ombudsman’s comments, to press for a change in the rules in this area.
Ms Alison Taylor  
Clerk to the Justice 1 Committee  
PHQ  
George IV Bridge  
Edinburgh  
EH99 1SP

25th August 2003

Dear Ms Taylor,

Re: Mr J Wilson, 50A Argyle Crescent, Edinburgh EH15 2QD

Mr Wilson has been in correspondence with me concerning a complaint about where accountability really lies in respect of public offices whose function is to protect the public in disputes with solicitors. The previous Justice Minister’s reply (copy attached) to his complaints now give rise, in Mr Wilson’s view, to a series of questions which I think lie within the scope of the Justice Committee.

I also attach a copy of Mr Wilson’s letter, and request that you consider whether the substance of his complaint can be placed before the Convener for an investigation by the Committee.

Yours sincerely,

Mary Blackford

P.P.  
Margo MacDonald MSP  
Encls.
Thank you for your letter of 25 February 2003 about the Scottish Legal Services Ombudsman and the Auditor of Court on behalf of your constituent Mr J Wilson of 50a Argyle Crescent Edinburgh.

With regard to the Ombudsman, as I noted in my letter of 16 July 2001 the Ombudsman is required to report to Scottish Ministers by means of an annual report. The instance when backlog reached 14 months was due to specific circumstances which were addressed through increased staffing. The current Ombudsman has succeeded in further reducing the backlog despite an increasing caseload. You will be aware that the Justice 1 Committee recently conducted an inquiry into the regulation of the legal profession. As part of this inquiry the Committee considered the role of the Ombudsman, largely recommending that her powers should be increased. The Committee did not recommend that the Ombudsman need report directly and were content with the current mechanism of accountability by means of annual reports. Ministers replied to the Committee on 5 March 2003. Further information can be accessed at the Committee’s website at www.scottish.parliament.uk/official_report/cttee/just1.htm.

The role of the Auditor of Court is to give an independent view on solicitors accounts. As you say, the onus is on the solicitor to justify the amount of his account and it is open to the Auditor to adjust the amount if he considers that it is too high. In Mr Wilson’s case the Auditor did reduce the account in favour of Mr Wilson. I believe that this case demonstrates the value of the procedure and the protection that it affords to litigants who are unhappy with their solicitors bills.

The Auditor is appointed under statute by the First Minister on the nomination of the Lord Advocate. The current holder of the office was appointed after public advertisement of the post. The Auditor must be an experienced lawyer who will enjoy the confidence of the courts in the exercise of his functions but he is not allowed to practise law whilst holding the office. The Auditor receives an
annual fee of £10,000 from the Executive but otherwise his income derives wholly from fees for cases which he handles. His rate of charge for fees is fixed by statute.

The Auditor is independent of Ministers and employs his own staff who are not civil servants. As such there is no formal system for complaints about the conduct of his office but my Department do investigate any concerns such as those raised by Mr Wilson. Any challenge to a decision made by the Auditor would have to be by way of an appeal to the Court of Session.

Sincerely,

JIM WALLACE
24th June 2003

Dear George,

Thank you for passing on Jim Wallace’s letter. He says the Justice Committee will look into mechanisms of accountability by means of an annual report. Does this mean that the Scottish Executive no longer have the power to give directions to the Scottish Police about the scope and discharge of their functions? If a member of the public accuses the Police of abusing his powers, is it possible for the Scottish Executive to investigate? Surely the Executive must set up a service for the public but could not care less.
whether the public find it satisfactory or not?

What kind of organisation sets guidelines for its employees but would not care less whether they stick to them or not?

I still believe Jim Wallace had the power to investigate my complaint but chose not to for fear of offending the legal establishment. Mr Wallace likes to justify the taxation system by pointing out that I received a reduction. The solicitor was charging £1200. This was reduced to £900 — an attempt to pacify me. I approached 6 solicitors all of whom reckoned this work would cost £300 - £500. My own solicitor admitted no extra work was done.
One solicitor said, "All professions have their rotten apples. Is the taxation system not supposed to pick out these rotten apples?"

The Auditor must enjoy the confidence of the Court. Why is it not important that he enjoys the confidence of the public? How can he enjoy the confidence of the public if he argues against everything they make at the taxpayer meeting. I was left believing the whole thing is just a fix operated in favor of the legal profession. The public are more likely to be treated impartially if minutes of the meeting are kept. These could be used as evidence in court.

A scrutinised bill is produced again, usable in court.
31. The fee should not be assessed by a self-taught unqualified Principal Libel.

41. The arbitrator should not be a lawyer. Regarding the appeal, is it likely that the Court of Session will find against its own Auditor?

How many taxation judges justify his fee of £10,000? Mr. Wallace's refusal to divulge the rent paid by the Auditor for the use of his offices from which he operates his private business assessing legal fees is a clear indication that he pays no community charge. I think you will find that the Justice Committee...
did not investigate the taxation system and come one high up then turn off knowing the system would not stand scrutiny.

Finally after years of telling me he could take no action, Dr. Wallace, just prior to leaving office admits that although there is no formal system of complaint for Department of Treasury to investigate concerns regarding the conduct of this auditing office, why did he choose not to investigate my complaints?

An early reply would be appreciated.

Yours sincerely,

[Signature]

P.T.O.
Ms. Pauline McNeill MSP
Convener, Justice 1 Committee
C/o The Justice 1 Committee Clerks
3.11 CC
The Scottish Parliament
EDINBURGH EH99 1SP

0131 476 8124
0131 226 7184
LS.258/BAR/LAH

12 December 2003

Dear Ms. McNeill

Solicitors’ Fees

I acknowledge receipt of your letter dated 27 November 2003 which was addressed to Joseph Platt, President and has been passed to me for a reply. I attach a copy of Chapters 1 & 2 of the Table of Fees for General Business, which I hope will put the way fees are charged into a proper contact.

Yours sincerely

Bruce A. Ritchie
Director (Professional Practice Department)
TABLE OF FEES
for
General Business

THE LAW SOCIETY OF SCOTLAND
Approved by the Council on 31st October 2003
to come into effect on 1st January 2004
CHAPTER 1: page 3

General Regulations
1. Purpose of the Table
2. Methods of charging
3. Unit charges ("U")
4. Factors to be considered
5. Consideration of the factors
6. Written fee charging agreement
7. Drawing of deeds
8. Value of the transaction
9. Meetings and correspondence
10. Revising fee
11. Parties having distinct interests
12. Posts and incidents
13. Uncompleted matters
14. Description of fees
15. Travelling and waiting time

CHAPTER 2: page 6

Form of accounts and taxation
1. Accounts - preparation and presentation
2. Taxation
3. Written fee charging agreement
4. Expenses of taxation

CHAPTER 3: page 7

Detailed charges expressed in units
Value of the unit
Documents and papers
Time
Correspondence
Specific items

CHAPTER 4: page 9

Writs relating to heritable property
Feudal grants
Conveyances
Standard securities, etc.
Leases and subsidiary writs

CHAPTER 5: page 10

Execution estates and trusts
Administration of execution estates
Commissions on collection of revenue in execution estates
Commissions on capital transactions in execution estates
Executies becoming continuing trusts
Administration of trusts
Trusts and wills

CHAPTER 6: page 11

General business

CHAPTER 7: page 14

Sale, purchase or lease of property
By private treaty
Exposed or sold by auction

CHAPTER 8: page 14

Cash intromissions
Revenue
Capital
Recovery of debts

CHAPTER 9: page 15

Summary criminal complaints

CHAPTER 10: page 15

Negotiated settlements

APPENDIX page 16
Conveyancing Estimate Form
CHAPTER 1

GENERAL REGULATIONS

1 Purpose of the Table
The purpose of the Table is to recommend charges for professional services rendered by Solicitors in Scotland except in so far as prescribed by or under Statute. The term "Solicitor" includes a firm of Solicitors and an incorporated practice.

2 Methods of charging
(a) A Solicitor may charge his account according to the circumstances of the matter. The fixing of every fee is a balanced judgment rather than an arithmetical calculation. Fees which are unreasonably high would not be upheld in a taxation and may amount to professional misconduct. At the other extreme, every Solicitor has a responsibility to ensure that the fees he charges are sufficient to enable the work to be carried out to the proper professional standard. Failure to discharge that responsibility may also amount to professional misconduct. The Solicitor must be able to justify his fee, not only to the client but to an auditor in a taxation.
(b) A Solicitor and client may agree a fee in advance. If the agreement is in writing, then Section 61A of the Solicitors (Scotland) Act 1980 will apply and the account will not be subject to obligatory taxation.

3 Unit charges ('U')
Any item may be charged according to the number of Units. Where the time spent is charged in Units, proportions should be calculated on the basis that 1 U = 6 minutes.
A Solicitor may assess his own Unit value, or values for different fee earners, which would require to be justified at a taxation if challenged. If a Solicitor does set his own Unit value or values, this should be done by reference to his own particular hourly expense rate. Participation in the Society's Cost of Time Surveys will be of considerable assistance in so doing. If hourly charge rates are fixed without reference to the costs of running a practice, the rates may be divorced from such costs and may be unfair to either the Solicitor or the client.
Alternatively the Solicitor may adopt the recommended value of the Unit which is determined in the light of the results of the annual Cost of Time Survey and based on the average of the firms participating. This recommended value will be reviewed from time to time.
It is stressed that the recommended value of the Unit reflects the average cost of time which may require to be adjusted appropriately to represent a "charge" rate. The adjustment should be calculated by reference to the "Factors to be considered" in Regulation 4 which require to be applied either when fixing a Unit rate, or when assessing the final fee.

4 Factors to be considered
Where a Solicitor charges any item of business according to the circumstances or by reference to Units there shall be charged such sum as is fair and reasonable both to himself and to the client taking into consideration all the following factors where relevant:
(a) the importance of the matter to the client;
(b) the amount or value of any money or property involved;
(c) the complexity of the matter, or the difficulty or novelty of the question raised;
(d) the skill, labour, specialised knowledge and responsibility involved on the part of the Solicitor or assistant;
(e) the time expended;
(f) the length, number and importance of any documents or other papers prepared or perused; and
(g) the place where and the circumstances in which the services or any part thereof are rendered, including the degree of expediency required.
Reference is made to Regulation 5.

5 Consideration of the factors
As the sum to be charged is such sum as is fair and reasonable taking into consideration all the seven factors, it is not necessarily always correct to start by assessing the time spent on the matter to be charged. The first step in assessing the fee is to consider the overall effect of all seven factors on the matter.
(a) In a case where "time expended" can be regarded as the dominant factor, it is suggested that the next step should be to assess the seven factors in the following way:

(i) The time expended on the matter by each Solicitor and assistant should be totalled and the total should be reviewed to confirm that it is fair and reasonable. The total time, adjusted if necessary to a fair and reasonable amount, should then be multiplied by an hourly rate which should be assessed so as to take account of the cost of having the work carried out either by reference to the Unit Rate or by applying a rate calculated to reflect the justifiable cost rate which should be a reasonable margin or multiplier to compensate and reflect the remaining factors. If the work done includes preparation or perusal of documents, visits, titles etc. there should also be taken into account the length, number and importance of these.

(ii) A percentage of the amount or value of the money or property involved may be added in order to compensate for the risk or indemnity element. In carrying out the work, in many cases, an appropriate percentage may be 0.5% of the amount or value with lower percentages of higher amounts. The following are suggested percentages-

| First     | £100,000 | 0.5% |
| Next      | £200,000 | 0.4% |
| Next      | £100,000 | 0.3% |
| Next      | £100,000 | 0.25% |
| Next      | £500,000 | 0.2% |
| Next      | £500,000 | 0.15% |
| Next      | £500,000 | 0.1% |
| Over £2 million | 0.1% |

The percentage rate should, however, be fixed taking into account all seven factors and also the amount of any hourly rate applied to time expended. **Note:** If there is a loan without a conveyance, half of the above should be allowed.

(b) One of the factors other than "time expended" may be regarded as the dominant factor. This will usually be "value" in a conveyancing transaction or an executry where the value of the subject matter involved is high, or indeed low. The sum charged in these cases should be reasonably proportionate to the value of the property involved. Reference is made to Regulation 8.

(c) The resulting figure reached in either of these ways [(a) or (b)] should again be subjected to a general test of whether it is fair and reasonable, taking into account all seven factors and that the sum charged should be fixed as a matter of balanced judgment and not of arithmetical calculation. It is this figure which will need to be justified in a scrutiny or taxation of the account. There may be a negative weighting e.g. very small value or the work is of a routine or straightforward nature. If a downward adjustment is already made in calculating the time and labour factor of the remuneration, this may produce a fair and reasonable fee without further adjustment.

6 Written fee charging agreement
A Solicitor may enter into a written fee charging agreement with his client in terms of Section 61A of the Solicitors (Scotland) Act 1980. In such a case, the fee will be agreed in writing in advance, and it will not be subject to obligatory taxation. Such an agreement is required for a speculative case with After the Event insurance.

7 Drawing of deeds
(1) General rule
Generally, deeds shall be drawn by the Solicitor of the grantee or obligee or the Solicitor of the party to the deed in whose favour a right or obligation is constituted, or a discharge is given, or a security granted, or to whom any subject is conveyed, unless there is express provision to the contrary elsewhere in the Table, or by agreement of the parties.

(2) Special cases
Unless agreed otherwise:
(a) Deeds shall be drawn by the grantor’s Solicitor in the following cases: Wills, Feudal Writs, Leases and deeds connected therewith, Patent Licences and Minutes of Sale.
(b) Mutual contracts shall be drawn by the Solicitor of the party having the larger or largest interest.

8 Value of the transaction
In the majority of transactions, the value of the transaction will be the dominant factor in charging according to circumstances. In such a case the value shall either be as stated in the Writ or calculated as follows:

(a) (i) Where, before an executed Writ has been delivered, the parties to the Writ have made a contract for the development of the subjects, and the value of that contract is not reflected in the price or consideration shown in the Writ, the "value" shall be the total of the price or consideration shown in the Writ plus the value of the development contract.
(iii) Where, before an executed Writ has been delivered, the purchaser through his Solicitor has made a contract with a third party for the development of the subjects, the value for the purchaser's Solicitor shall be the total of the price or consideration shown in the Writ plus the value of the contract.

(b) If the consideration is a termly or periodic payment the "value" shall be the capitalised value of such payment, i.e. in leases or other similar contracts, the total sum exigible either under the whole contract or during the first ten years whichever is the lesser. Where the right of a landlord to recover possession of the subjects is restricted by Statute, the period of the lease shall be taken to be ten years.

(c) Where no price or consideration is stated, the value of the subject matter shall be calculated according to the best evidence available, examples of which might be:

(i) the value fixed for the purpose of Stamp Duty Land Tax at the time of the transaction, or,

(ii) the sum at which the subjects conveyed have last been valued for any relevant tax purpose within three years before the date of the transaction, or,

(iii) the last price at which a sale has taken place within the three years before the date of the transaction, or,

(iv) a surveyor's report.

(d) Where in a purchase from a Local or National Government Body or Agency the price is discounted, the gross value before discount shall be the value.

9 Meetings and correspondence

Fees shall be allowed for meetings, correspondence, etc. relative to the preparation and execution of deeds in all cases where the drawing fee for such deed is charged under item A1 of Chapter 3 or a multiple thereof, unless expressly excluded in the Table.

10 Revising fee

The revising fee shall be one half of the corresponding drawing fee unless otherwise provided in the Table. Where a deed is revised by more than one Solicitor in respect of different interests, each Solicitor shall be entitled to charge the revising fee.

11 Parties having distinct interests

Where a Solicitor properly acts for more than one party in any matter or business in which several parties have distinct interests, he may make a charge against each party in respect of his professional responsibility for each distinct interest.

12 Posts and incidents

This charge should cover posts, telephone and fax calls and minor outlays. The charge must be reasonably related to the incidental outlays incurred and in normal circumstances should not exceed 5%. The charge may either be shown separately in a business account or incorporated in the overall fee which should, in those circumstances, state that it is inclusive of posts and incidents. If a courier or other specialised delivery service is used, their fee may be charged as an outlay.

13 Uncompleted matters

A Solicitor who has acted in any matter which has not been completed by him may charge for the work which has been done. Where a Solicitor is selling property in circumstances where he would be entitled to commission on sale and a sale is not concluded, he is only entitled to charge for the work done unless there is an agreement to the contrary.

14 Description of fees

Where an account is charged in accordance with Chapter 9 or 10, and only in such cases, the account may state Per the Law Society Scale. Other accounts may state Per the Law Society's recommended Table of Fees.

It may be advisable that the note of fee should also state that the fee has been charged so as to reflect such of the factors outlined above as are relevant.

15 Travelling and waiting time

Where a Solicitor is engaged on business by a client which necessarily or by instruction involves travelling, waiting or any other factor which does not necessarily require professional skill etc., a fee based on the cost of the Solicitor's time assessed in accordance with Chapter 3B may be charged.
CHAPTER 2

FORM OF ACCOUNTS AND TAXATION

1 Accounts - preparation and presentation
(a) The form in which a Solicitor presents an account is a matter for the Solicitor’s personal preference but if the person liable to pay requires details, the Solicitor must give a narrative or summary sufficient to indicate the nature and the extent of the work done. If requested it is best practice for the Solicitor to give such helpful information as can readily be derived from the records, such as the total recorded time spent, the number and length of meetings, the number of letters and telephone calls. No charge may be made for preparing the note of fee or for the provision of such information. However if the party paying insists on a fully itemised account they should be advised that it will be prepared at their expense.

(b) If the paying party is still dissatisfied the Solicitor must inform them of the availability of taxation and the procedure. If the payer requests a taxation the Solicitor may have a fully itemised account prepared. That full account may be submitted for taxation even if it is for a greater amount than the note of fee.

(c) A Solicitor may submit the file to an Auditor of Court or a Law Accountant for charging, but it is stressed that a unilateral reference of this kind does not constitute a taxation. Such an assessment of a fee must never be represented as a taxation or as having any official status. The fee for such a reference is not chargeable to the party paying. If such a note of fee is disputed, the Solicitor must advise of the right to taxation as above. An Auditor of Court who has advised a Solicitor on his account in this way, may decline to act in any subsequent taxation of that file.

2 Taxation
(a) Remit
The essence of taxation is that it proceeds upon either a remit by the Court or a joint reference by both the Solicitor and the party paying, including non-contentious cases in (c) below. The Auditor provides the best guarantee of the fair and reasonable determination required by the profession and by the client.

(b) Disputed Accounts
When the party paying, whether client or third party, requires that the Solicitor’s account be taxed, the Solicitor cannot refuse to concur in the reference unless the Solicitor and client have entered into a written fee charging agreement. The Solicitor must forthwith submit the file and all relevant information including a note of fee or detailed account to the Auditor. It is for the Auditor to determine the procedure to be followed. In normal cases this will be a diet of taxation which should be intimated to the client by the Solicitor. Evidence of such intimation, which may be by ordinary first class post, may be required if the client does not appear at the diet. If either of the parties wishes to make written submissions, the Auditor will ensure that each party is fully aware of the other’s representations.

(c) Non Contentious Cases
Taxation is necessary by law and in practice in certain circumstances. The accounts of a Solicitor acting for:
- an administrator of a company under the Insolvency Acts;
- a liquidator appointed by the Court;
- a creditor’s voluntary liquidator;
- a trustee in bankruptcy;
- a judicial factor;
- curators of all kinds;
- guardians
must be taxed.

A Solicitor who acts:
- as an administrator of a client’s funds under a Power of Attorney;
- in a representative capacity e.g. a sole executor
may well consider that taxation of the account affords protection and reassurance to those now interested in the estate. A certificate by an Auditor is appropriate in these cases.

A Solicitor who is a co-executor with an unqualified person must not make a unilateral reference to the Auditor for taxation. Such a reference needs the concurrence of the other executor. The Auditor may require intimation of the taxation to any other party with an interest in the residue of the estate.
(c) Style of Remit

A formal remit may be in the following form:

[place] (date). I, AB as Executor of the late CD and we, Messrs E & F, Solicitors to the Executor, hereby request the Auditor of the (Sheriff Court of ...) (Court of Session) to tax the remuneration due and payable to the Solicitors for their whole work and responsibility in connection with (matter).

Signed: AB, E & F

This, however, is not essential; all the Auditor requires is to be satisfied that the client is concurring in the request for taxation and accepting that it will be binding. It is often in practice a matter of agreement reached at an early meeting between Solicitor and client. Any reasonable record of such an agreement having been reached will be sufficient for the Auditor.

3 Written fee charging agreements

Where in terms of Section 61A of the Solicitors (Scotland) Act 1980 Solicitor and client have reached an agreement in writing as to the Solicitor’s fees in respect of any work done or to be done for the client, the Solicitor is not obliged to concur in any request by the client for taxation.

4 Expenses of taxation

The Auditor will usually charge a fee for the taxation. It may be 3% or 4% of the amount of the account after taxation and may attract VAT. Any award of expenses of the taxation - not only the Auditor’s fee but also the time and expenses of parties attending - is wholly within the discretion of the Auditor. If the matter is settled within the seven days preceding the date of taxation the Auditor may still charge a proportion of his fee, not exceeding 50%, at his discretion.

**CHAPTER 3**

**DETAILED CHARGES EXPRESSED IN UNITS**

Value of the unit as from

<table>
<thead>
<tr>
<th>£ 1.475</th>
<th>£ 1.50</th>
<th>£ 1.57</th>
<th>£ 1.60</th>
</tr>
</thead>
<tbody>
<tr>
<td>£ 1.76</td>
<td>£ 1.80</td>
<td>£ 1.88</td>
<td>£ 1.95</td>
</tr>
<tr>
<td>£ 1.79</td>
<td>£ 2.00</td>
<td>£ 1.90</td>
<td>£ 1.95</td>
</tr>
<tr>
<td>£ 1.82</td>
<td>£ 3.25</td>
<td>£ 1.91</td>
<td>£ 1.95</td>
</tr>
<tr>
<td>£ 1.82</td>
<td>£ 3.50</td>
<td>£ 1.92</td>
<td>£ 1.95</td>
</tr>
<tr>
<td>£ 1.83</td>
<td>£ 3.80</td>
<td>£ 1.93</td>
<td>£ 1.95</td>
</tr>
<tr>
<td>£ 1.84</td>
<td>£ 4.00</td>
<td>£ 1.94</td>
<td>£ 1.95</td>
</tr>
<tr>
<td>£ 1.85</td>
<td>£ 4.25</td>
<td>£ 1.95</td>
<td>£ 1.95</td>
</tr>
<tr>
<td>£ 1.86</td>
<td>£ 4.50</td>
<td>£ 1.96</td>
<td>£ 1.95</td>
</tr>
</tbody>
</table>

**A DOCUMENTS AND PAPERS**

1 Drawing (to include engrossing):

(i) Deeds: documents intended to have contractual effect; Court Writs (other than simple debt recovery); Court pleadings; Affidavits; Motions of substance; financial statements and accounts except Solicitors’ business accounts; inventories (other than inventories of writs) and relative schedules; memorials for opinion

5 U per sheet

(ii) Other papers to include Transfers; Minutes of Meetings; Statements; routine or straightforward Motions; simple debt recovery Court Writs; Intimations and Certificates thereof

3 U per sheet

1.25 U each

Note: Where a pro forma document has been used and variables simply inserted or standard clauses inserted the rate for that part of the document will be

3 U per sheet

Note: Length of sheet - 250 words. Part of a sheet is charged as one sheet. A sum or quantity of one denomination stated in figures (e.g. "£25,564.75") is counted as one word; "£25,564.75" is counted as two words; "254 feet 11 inches" is counted as four words.
2 February 2004

Dear Convenor

Solicitors’ fees

Thank you for your letter of 29 January 2004 and for inviting me to comment.

The first, and probably most important, issue relating to fees is that despite recommendations from this Office over a number of years, the Law Society will not make it a Practice Rule that solicitors send what is called a Letter of Engagement at the beginning of the solicitor/client relationship. I think that such letters are vital as they set out, hopefully in plain English, how much the solicitors will charge or what the charging rate is, how much they will pay on the clients behalf as outlays to others, and how and when they expect to be paid. I remain convinced that one of the things that makes people reluctant and anxious about seeking legal advice when advice is badly needed, is the fear of the unknown so far as the costs are concerned. Upfront, transparent, easy to understand information about fees is vital and the public need to know before stepping into a solicitors’ office that they will be provided with that information without question.

The Law Society’s Code of Conduct for Scottish Solicitors is a set of guidelines, rather than Rules. The Code says that solicitors shall provide information in relation to the fees and outgoings to be charged. I have great difficulty in concluding that there is not an obligation on solicitors to inform their clients about fees, and to do so in writing, but I have seen complaints that have not been upheld on the grounds that the Code is for guidance and there is no a Rule.

Interestingly, where the Law Society is subject to co-regulation or specific external pressure the guidance has been strengthened into a Rule. The Financial Services /cont
Authority as co-regulator where solicitors provide investment advice, say that a Letter of Engagement is mandatory. The Housing Improvement Taskforce has been instrumental in the Law Society now having a Rule that a Letter of Engagement must be sent in relation to conveyancing work. You may wish to note that the Law Society in England and Wales have had a Rule for some time.

Turning to a second issue, in the Case Study about Mr N in my 2002-03 Annual Report, I highlight my concern over what I think is an outdated practice. Mr N did not see why he should have to pay extra for a detailed account from his solicitors and I agreed. The Law Society’s position is that clients should have to have to pay extra for a detailed account. My view is that it might have meant extra work in the days of quill pens, but accounts are likely to be computer based these days. If the summary of account is based on details recorded on an IT system, I cannot see where the extra cost lies in printing out the details. The Law Society agreed to review whether its policy is still sensible but has not yet responded despite me raising this issue in more recent Opinions. One such case was where an Executor paid for a detailed account of Executry work because he thought that the fees charged included non Executry work for a specific beneficiary: he could not have checked without the detailed accounting.

As you will know, the Law Society does not investigate complaints about fees - other than about significant overcharging once overcharging has been proved. The Law Society, at my suggestion, prepared an information sheet for complainants on what is called Taxation: the Auditor of Court, independently of the Law Society assesses the fee. You may wish to ask the Law Society for a copy of that information sheet. Taxation is not without its problems, however, as the Auditor assesses chargeable events, rather than quality of work and would not, for example, assess if 25 letters to the opposition were reasonable professional practice. The Auditor can charge a fee for the work, typically 3% of the fees charged, and that can be paid by the solicitors if the account is reduced or by the client if the fees are found to be reasonable.

To end on a more positive note, I have for over two years been asking the Law Society to have a clearer signpost on the Homepage of its website so that people can get quickly to information on how to complain, about fees or other matters. The signpost was set up last week! I attach for your information copies of what the Law Society says about fees on its website. You will note the advice that solicitor and client should agree on the method of pricing the work to be done.

Please do get back to me if you have further queries.

Yours sincerely

[Signature]

L M Costelloe Baker (Mrs)
Scottish Legal Services Ombudsman
Solicitors' Fees

Please choose a section from the drop down list below.

General

**General**

The Law Society of Scotland does not set solicitors' fees although it does recommend an hourly charge rate which is currently £113. This is reviewed annually. It is for the solicitor and the client to agree on an acceptable method of pricing the work done. This may be by changing an agreed hourly rate, or by charging a fixed fee for the whole work.

Factors Involved in setting of fees

The fees charged by solicitors shall be fair and reasonable in all the circumstances. Factors to be considered in relation to the reasonableness of the fee include:-

a) the importance of the matter to the client;

b) the amount or value of any money, property or transaction involved;

c) the complexity of the matter of the difficulty or novelty of the question raised;

d) the skill, labour, specialised knowledge and responsibility involved on the part of the solicitor;

e) the time expended;

f) the length, number and important of any documents or other papers prepared or persued; and

g) the place where and the circumstances in which the services or any part thereof are rendered and the degree of urgency involved.

**Estimates**

The Law Society of Scotland encourages solicitors to provide estimates of their fees to their clients. If your solicitor gives you a verbal estimate for their fees for carrying out the proposed work, you should get confirmation of the estimate in writing. The estimate should also include details of the "outlays" - or costs that the solicitor will have to pay out on your behalf in carrying out the work for you, such as stamp duty, recording dues or fees to the court for raising an action. The solicitor may ask for payment of some or all of the outlays before the end of the matter.

You should remember that an estimate is only an estimation of the final cost and may be exceeded.

**Payment of fees**

You may wish to receive interim fee-notes as the case progresses so that, for example, the cost of a long running case is spread over time. You should ask your solicitor about this at the outset. You should agree with your solicitor an acceptable level of fees and outlays to be incurred between interim billings. Many solicitors prefer to spread payment in this way.

http://www.lawscot.org.uk/legalcosts/sol.html

30/01/2004
If your solicitor receives funds for you at the end of the transaction or Court case, they are entitled to take payment of their fees and outlays for the matter plus any outstanding fee note from that money. The invoice must be issued at the same time if it has not been issued beforehand.

You are entitled to know the basic breakdown of an account into fees, VAT and outlays without incurring any further cost. However, if you request a fully itemised account, your solicitor is entitled to make a charge for this.

Querying the Fees

Unless you agreed in writing what the fees would be, if you are unhappy about the amount of the fee charged by your solicitor, even if payment has been taken as above, you can still insist on the fee being sent for reassessment by the Auditor of Court. This process is outlined in the Society’s Information sheet “Querying Solicitors’ Fees”.

Court Cases

If you raise a successful court action and the opponent is ordered to pay your expenses you may still have to pay some fees to your solicitor. This is because the expenses that the Court can order the other side to pay (Judicial Expenses) are calculated on a different basis than is used to calculate the fees charged by solicitors to their clients. Your solicitor may ask you to pay the difference, although you may agree with your solicitor at the outset that he/she will accept the fees that can be recovered (see speculative cases below).

Legal Aid

If you are getting Legal Aid and you are awarded compensation by the Court or recover monies in a settlement of the action, your solicitor must send the settlement cheque to the Legal Aid Board. The Board will then deduct the amount of your solicitor’s Legal Aid fee and permitted outlays before sending the balance back to your solicitor for you.

Further details can be found in the Society’s leaflet “Getting the Best from your Solicitor” (click here to download a pdf of the leaflet), the Legal Aid topic in Dialog-a-Law and in leaflets produced by the Scottish Legal Aid Board.

Speculative cases

Solicitors in Scotland may also act on a speculative basis - charging no fee unless the matter is successful. This is often referred to as acting on a “no win no fee” basis. This is mainly relevant to court actions rather than other types of work, although it is also done regularly in house sales (no sale no fee).

If you raise a speculative action in court and you are unsuccessful you will usually be liable for your opponent’s legal expenses, and your own solicitor’s outlays, but not their fees. To protect against this risk you may take out insurance before commencing a “no win no fee” case.

If you have any queries, take them up with your solicitor in the first place. If you are still unhappy, telephone the Society’s Client Relations Helpline: 0845 113 0018 for more information.

http://www.lawscot.org.uk/legalnet/scot.html
Querying Solicitors' Fees

Please choose a section from the drop down list below.

Challenging the amount of fees

The Law Society of Scotland does not have the power to consider the amount of fees charged by a solicitor but has responsibility in relation to considering the quality of service provided by the solicitor.

Challenging the amount of fees

If you wish to challenge the amount of fees charged, in the first instance you should speak to your solicitor or the Client Relations Partner in the firm. You may wish to ask on what basis the fee has been calculated. You can ask for a breakdown of the fee note but the solicitor is entitled to charge for preparing this.

Scale fees have been abolished except in a few restricted areas and is for the solicitor and client to agree on an acceptable method of pricing the work done. This may be by charging an agreed hourly rate, or by charging on a "time and a half" basis, or by agreeing a fixed fee for example.

If you remain unhappy with the level of the fee charged, the procedure for having the solicitor's account independently scrutinised is called the "taxation" of the solicitor's account and is carried out by the Auditor of Court.

Auditor of Court

The Auditor of Court is an official, based in every Sheriff Court in Scotland. The process has nothing to do with raising a court action or payment of any kind of tax, the Auditor is simply located within the court premises.

If you wish to proceed, all you have to do is to ask your solicitor to make suitable arrangements. They will then send you a simple form of letter for your signature, which will be addressed to the Auditor asking him to "tax" the account. The solicitor will also sign the form which is referred to as the "joint remit" and by signing the form both the client and the solicitor are agreeing to accept the Auditor's judgement on the correct level of fee.

The solicitor will submit the joint remit to the Auditor together with their account, their correspondence file, their cash ledger and any other papers which will help the auditor to determine the extent of the work done and the proper fee which it is reasonable to pay.

Attending the hearing

If you wish to attend the hearing before the Auditor in order to put forward your views you are entitled to do so. You must let the solicitor know at the outset that you wish to do so and he will let the Auditor know when he sends in the papers. You will then be advised of the date and time of the hearing.

Auditors' Fees

The Auditor has the discretion to charge a fee for his involvement - usually 3% or 4% of the final "taxed amount" plus VAT. Unless the Auditor finds that the solicitors account was excessive, he is likely to order his fee to be paid by the client in addition to what he determines is a fair and reasonable fee for the solicitors to receive.

Further Information

The Auditors' offices in the Sheriff Courts are most willing to give further information about this service, for instance their particular policy in respect of their own fees and how long it might take to complete the taxation process.

http://www.lawsoc.org.uk/legalcosts/query.html

30/01/2004
All Sheriff Court telephone numbers can be found in the appropriate telephone book, from Directory Enquiries, or from the Law Society Client Relations Helpline: 0845 113 0016.
Dear Pauline McNeil,

What kind of organization is the Scottish Parliament when it pays the Auditor of the Bank of Scotland £10,000 per annum but cannot insist that the taxation procedure is conducted with impartiality?

What kind of organization is the Scottish Parliament when it pays the Legal Ombudsman a salary but cannot insist that he works to his remit?

Without accountability there can be no justice. Parliament must listen to the public view on how these services are operated.

When you write to the...
Law Society they will tell you there are no standards.

He says, They threw my complaint as far away as possible.

I showed my case to a solicitor, He took his head saying, "All professions have their rotten apples."

So sought for the effectiveness of your system and the Law Society being a self-regulating body. Of the cases last year in how many instances did they find in favor of the Solicitor?

Hopefully you will manage an early reply.

Your sincerely,

Jim Wilson
Dear Mr. Neil,

I understand from your assistant that you are due to meet the Law Society.

I would be grateful if you could raise the following points:

1. Westminster Government report found it was wrong to describe a financial adviser as independent when they accept commission. It must also be wrong for solicitors to describe auditors as independent when they pay the auditing fees.

I look forward to hearing the results of your meeting.

Yours sincerely,

Jim Wilson
Dear Mr McNeil,

Further points you could raise with the Law Society regarding solicitors fees are:

1) Percentage charging. I was charged 1/4% for uplifting money from Bank and Building Society accounts. The amount if an account has £5000 it costs £120 to close, but if it has £15,000 then it costs £120 - yet the work done is the same. Introduce a standard charge.

2) If auditors are paid on a percentage basis it is in their interests to keep solicitors fees high.

3) Why don't solicitors give itemised bills like garage
Supermarkets and other tradesmen.

2) Why don't all solicitors give estimates like tradesmen do? Telling the public they will be treated fairly because the fee will be assessed by an independent auditor is just a con.

I look forward to hearing the results of your meeting. Good luck.

Yours sincerely,

Jim Wilson

*£20 for all uplifts regardless of value. There is very little book involved in closing an account.
Justice 1 Committee

Security of tenure and rights of access

Note by the Clerk

Background

Petition PE14 by the Carbeth Hutters Association

1. Closed petition PE14 by the Carbeth Hutters’ Association called for a statutory system of rent control and arbitration and increased security of tenure. The former Justice and Home Affairs Committee investigated the petition and published a report in May 2000 which recommended that the Scottish Executive consider ways of providing legislative protection for hutters. The Executive issued a consultation paper, to which overwhelming support was received for legislating in this area. As yet, there has been no movement towards legislation as the Executive considers that there are substantial drawbacks with legislation protecting hutters.

Consideration by the Justice 1 Committee

2. The Justice 1 Committee last considered correspondence arising from the petition at its meeting on 8 October 2004; the paper circulated for that meeting is attached for information at Annex A.

3. At that meeting, the Committee noted correspondence received from the former Minister for Justice outlining difficulties associated with legislating in this area. The Committee also noted developments on the Carbeth Estate, in respect of a solution negotiated between interested parties, and on the Drimsynie Estate, where the situation remains unresolved. The Committee agreed to write to the Scottish Executive in relation to exploring whether rent control schemes or compulsory arbitration could be useful in resolving such disputes.

The Scottish Executive

4. The Scottish Executive responded in February 2004. In its response (attached at Annex B), the Executive notes progress in respect of the situation at Carbeth and the ongoing difficulties experienced by chalet owners on the Drimsynie Estate. However, the Executive does not believe that rent control or compulsory arbitration proposals would facilitate resolution at this stage.

5. The Executive also makes a number of points against legislating in this area, namely—

- that legislation would need to be applied retrospectively in order to benefit existing hutters but to do so would carry a very strong risk of being incompatible with requirements under the European convention on human rights;
that legislation to reform the law of leases in order to ensure greater fairness along the lines of the Unfair Contract Terms Act 1977 would be an unworkable solution as leases providing for a 25-year tenure with no renewal clause are not inherently unfair;

that, where an original agreement or contract was freely negotiated and entered into, it is difficult to legislate in favour of one party at the expense of the other;

that legislation in this area could indirectly have unfavourable consequences for the interests of hutters, by, for example encouraging estate owners to terminate leases owing to concerns about the implications of hutters acquiring security of tenure or rent control.

Correspondence from hutters

6. Correspondence from hutters and their representatives has been received as follows—

- **From the Carbeth Hutters Association**: a letter dated 19 February 2004 restating the difficulties faced by hutters, with particular regard to security of tenure and rent control, and affirming that the situation in Carbeth cannot be resolved until legislation to protect hut owners is passed (Annex C);

- **From the Lochgoilhead Chalet Owners Association**: copy correspondence to the First Minister, highlighting ongoing problems facing hutters on the Drimsynie Estate arising from the landowner’s rent policy and further problems arising from assessments made for council tax purposes (Annex D);

- **From Christine and Norman Milligan**: emailed correspondence drawing the Committee’s attention to rent policy problems at a third location in Dumfries and Galloway, not previously considered by the Committee in the context of matters arising from petition PE14 by the Carbeth Hutters’ Association (Annex E).

Action

7. The Committee is invited to consider whether it wishes to take any further action in relation to this matter.
Justice 1 Committee

Petition PE14 by the Carbeth Hutters’ Association

Note by the Clerk

Background
1. The background to this petition was set out in the former Justice 1 Committee’s legacy paper:

“This is one of the very first petitions considered by the committees of the Parliament. The petition was raised by the Carbeth Hutters’ Association and called for a statutory system of rent control and arbitration and increased security of tenure. The Justice and Home Affairs Committee investigated the petition and published a report in May 2000 which recommended that the Executive consider ways of providing legislative protection for hutters. The Executive issued a consultation paper, to which overwhelming support was received for legislating in this area. As yet, there has been no movement towards legislation as the Executive considers that there are substantial drawbacks with legislation protecting hutters. The Committee has written to the Executive asking for details of these difficulties. The Committee awaits this information.”

Members have requested an update on the current position.

The Scottish Executive’s current position
2. A response has since been received from the Scottish Executive, from the then Minister for Justice, Mr Jim Wallace MSP. The response states that legislation to protect hutters would be against the fundamental principle of Scots law that leased land under a short lease reverts to the landlord at the expiry of the lease and that property built on leased land belongs to the landlord. Where huts accede to the ground, they belong to the landlord under the legal principle of accession, “an important feature of Scots law since it creates certainty about the ownership of property”.

3. The Executive further believes that applying legislation retrospectively to protect hutters that had already been served with an eviction notice would be inconsistent with the landlord’s property rights and probably incompatible with the European convention on human rights, unless a strong public-interest justification could be made. It is fundamental that a landlord must be able to terminate a lease if the tenant does not comply with its terms, of which an essential component is the payment of ground rent.

4. The Executive also highlights that introducing legislation to provide for tenants that had improved their chalets during the period of the let to be compensated by a landlord exercising the right to repossess leased
property at the expiry date of a lease that did not itself provide for such compensation would set a bad precedent, given that a lease is a contract.

5. The Executive is also concerned that legislation in this area could damage the interests of the hutters by leading to changes in the ownership and management of comparable estates, e.g. estate owners might terminate leases owing to concerns about hutters acquiring security of tenure or rent control and that any such repercussions would undermine any positive value of any legislation.

6. Finally, following its consultation exercise, the Executive has found that, although concerns in respect of similar issues were expressed by some tenants of chalets on the Drimsynie estate near Lochgoilhead, difficulties such as those between landlords and tenants on the Carbeth estate are not widespread between landlords and tenants generally.

**Developments in Carbeth**

7. Local discussions have been taking place between the interested parties in order to find a solution. A report giving the most recent position has been received from the consultancy involved in the discussions. It indicates that a charitable trust will be set up including representatives of the hutters, the estate, Stirling Council and MSPs; that an area of 60-70 acres has been identified, agreed with the Hutters' Association and designated by the estate for hutting; that the land in the designated area will be let for use for huts for a long period (100 years), for a nominal rent, and that the area will be managed by the trust on behalf of hutters and the estate, providing agreed services, determining individual rents and lease terms. All huts would be relocated there over a proposed period of five years, the cost of which would be met by the trust.

8. The hutters have agreed that the trust represent their interests in discussions. Approval is awaited from Stirling Council in respect of certain aspects of the proposal before it may proceed further.

**The Drimsynie Estate**

9. The former Justice 1 Committee received correspondence from the Lochgoilhead Chalet Owners’ Association regarding the situation that has arisen between owners of chalets in Lochgoilhead on the Drimsynie Estate and the estate owners. The association is aggrieved at action taken by the owners to evict chalet tenants and demolish their chalets without the owners’ permission. Recent correspondence from the association’s secretary indicates that the situation remains unresolved.

**Action**

10. The Committee is invited to consider whether it wishes to take any further action in relation to this matter.
BUTTERS IN SCOTLAND

Thank you for your letter of 08 December to Cathy Jamieson MSP, Minister for Justice, raising the issues discussed by the Justice 1 Committee at its meeting of 05 October in relation to hutting in Scotland. I have been asked to respond.

I share the satisfaction expressed by Committee members that the situation at Carbeth is being progressed through constructive discussions at local level. The Executive's underlying position is that it would not be appropriate to seek to intervene in private negotiations between landlord and tenants, and that we would encourage local resolution of such difficulties. We would be extremely reluctant to undertake anything to jeopardise the negotiations at Carbeth, and therefore do not think that rent control or compulsory arbitration proposals would facilitate resolution at this stage of the process.

In relation to the concerns which have been raised at Lochgoilhead, the Executive is unable to comment on specific issues which may become the subject of legal action. In general terms, although I sympathise with the problems which individual butters have experienced I remain unconvinced that a legislative solution is workable or desirable.

One major obstacle to legislation is that if it were to apply retrospectively it would carry the very strong risk of being incompatible with the ECHR. This is most pronounced in the area of giving tenants greater security of tenure, but it also applies to proposals to effectively insert new clauses into the lease agreements between landlord and tenant on rent review or mediation. It is a well accepted principle of legal policy that, except in special circumstances, legislation ought not to be retrospective on the grounds that it ought not to change the character of past transactions carried out in good faith and on the basis of existing laws. Unless any legislation is made retrospective, it would not benefit the existing butters.
I note from the Official Report that there was some discussion of possible reform to the law of leases to ensure greater fairness along the lines of the Unfair Contract Terms Act 1977. I regret that I also doubt whether this would be a workable solution as a lease providing for a 25-year tenure with no renewal clause is not of itself inherently unfair. Leases which roll-on on an annual basis with little or no provision for renewal or rent review are not uncommon. They operate perfectly satisfactorily in many circumstances. Quite understandably, a hutter who has personally maintained or customised their hut may feel that their investment should give them security of tenure. But, leaving aside the question of whether greater protection should be provided, this does not make the terms of the original contract unfair. It is the expectations of the parties and the circumstances of each case which produce dissatisfaction and disquiet.

Where the original agreement or contract was freely negotiated and entered into, it is difficult to intervene through legislation to the advantage of one of the parties at the expense of the other. In other forms of holiday lettings there is no statutory system of rent control or arbitration for determining rents as it is accepted that this is something which is properly decided by the market, and this system appears to work well. Even in relation to huts, we are only aware of pronounced dissatisfaction in two hutting estates out of the 37 sites (27 rented) identified in the "Huts and Hutters in Scotland" research paper published in 2000. Further consultation did not reveal widespread difficulties between landlords and hutters, although I note your comment that you have received correspondence from other hut sites.

I think it is worth remembering that there is a risk that legislation in this area might precipitate changes to the ownership and management of comparable estates in Scotland which could be damaging to the interest of hutters. In particular, estate owners might decide to terminate leases because of concern about the implications of hutters acquiring security of tenure or rent control, or even to sell their estate if they felt it would become economically unviable as a result. Such repercussions, if realised, would clearly undermine any positive value that legislative measures might have. One other factor on rent control is that because the leases are (or will be) generally of an annual duration, the landlord could end the lease by giving notice before the annual renewal date if he did not like the renewed rent.

I am sorry that this response is not as positive as you would have wished, but it might be helpful to the hutters too if a line were to be drawn under this matter. The Executive's position is that we see no prospect of a legislative solution. Furthermore, since it would not be appropriate for us to intervene between tenants and landlords, we do not believe that there is anything that can be done by the Executive to alter the position of the hutters.

Hugh Henry

HUGH HENRY
Carbeth Hutters Association

Copies to: Fergus Ewing  
            Chris Balance  
            Rosie Kane 
            Pauline McNeil

REF: PE14

Dear Member of Parliament,

Our association still awaits legislation to protect hut and chalet owners.

We would like to refresh your memories on the issues involved.

Due to the 1967 Sheriff Court Act, a landowner of leasehold property has the right to evict tenants without reason, whenever he chooses.

A landowner can build a hut or chalet on his land, sell it to a tenant and unless a long term lease has been agreed, he can legally evict the tenant in one year’s time.

A landowner can legally charge any rent he wishes to impose on a hut or chalet.

The Carbeth landowner on being asked in court stated that he could LEGALLY charge 30 million pounds if he wished.

A landowner can charge any fee he wishes to impose on a change of ownership of a hut or chalet. In 1997 a fee of £2215 was being asked for at Carbeth, on huts worth £500.

How pathetic of the executive, that due to Principles of Scottish Law, they can’t legislate to protect the hut owners, but they can condone this mass fraud when landowners sell huts and chalets to tenants but legally they remain the landowner’s property.

After all, we elected for a Scottish Parliament to change these outdated Scottish laws.

In the meantime we see no difficulty in bringing in legislation to protect hut and chalet owners.

Similar legislation that protects housing tenants and their landlords can easily be brought in to protect huts and chalets.

Rent control would have to be imposed as a landowner could charge a ridiculous rent, and on the rent not being paid, legally evict a tenant.

On the “Principle of Scottish Law,” this fraud could be stopped by legislating that when a hut or chalet is sold, the ground that the hut or chalet sits on must be sold along with them.

Alternatively, the hut or chalet is rented out.

We are receiving letters from hut and chalet owners from all over Scotland, of greedy and ruthless landowners. This raises fears of evictions coming to a head again.

The dispute at Carbeth cannot be solved until legislation to protect the hut owners is passed.

Yours Sincerely

Mr William McQueen  
Vice Chairman
Dear Mr McConnel,

I refer to the letter from M/s Duffy dated 12/02/04.

I can understand and confirm my acceptance of the decision of the Executive in relation to the possible introduction of new legislation for the matters under consideration.

Clearly this will come as a considerable disappointment to the members of our Association who had been hoping for some practical political support over the last four years without which owners will now be forced to abandon their huts due to excessive rents policy by the landowner.

This injustice is compounded by the fact that these huts some of which are made of aluminium are being assessed as dwelling houses for Council Tax purposes despite the fact that they cannot (because of inferior design and insulation) be lived in throughout the year. As they have been approved under the Scottish Building Regulations but classified only under Section A3

In my view these huts should be assessed on the same dwelling house exclusions basis as the Carbeth huts ie non-domestic.

This issue will be particularly relevant when the effect of the 50% second home discount is withdrawn and it is considered that our huts now have no capital value when compared to celebrity mansions and cannot be used as main residences by owners who are not entitled to vote and do not use many of the main Council Services.

This matter is currently under appeal with the Dunbartonshire and Argyll & Bute Valuation Joint Board (D. Wallace) and is likely to come before a Valuation Appeal Committee within the next two months.

It is particularly gallling that the well meaning land reform policy and Council Tax proposals by our first labour controlled Scottish Parliament should have benefited our wealthy landowner to such an extent and conversely had such an adverse effect on the savings (loss of 20000 capital) and ongoing expenses (increase of approx 400 pa in tax ) in relation to the 90% pensioner ownership of the huts at Drimsyne.

Yours faithfully,

J. T. L. Ramsay
Secretary to the Lochgoilhead Chalet Owners Association

Copies to Hugh Henry and Pauline McNeil
Justice 1 Committee

Security of tenure and rights of access

Correspondence from Christine and Norman Milligan

-----Original Message-----
From: Milligan, Christine
Sent: Monday, February 02, 2004
To: pauline.mcneill.msp@scottish.parliament.uk
Subject: Convenor Justice1 Committee

FOA: Pauline McNeill, Convenor Justice 1 Committee

Dear Ms McNeill

We are writing to you in connection with our holiday hut on the Rascarrel Shore in Dumfries and Galloway. These huts have been on the shore from at least the 2nd World War and most have remained in the ownership of the original families or have passed on to close friends.

In the recent past we have enjoyed good relations with the farmers who own the land for which we pay ground rent. However approximately five years ago the management of the farm passed into the hand of the son-in-law who has now passed over the management of the huts to a land agent. As a result we have received a letter indicating that the ground rent will increase this year from £150 per annum to £500.00 for 2004 and thereafter will rise to £1,000 per annum – an increase of over 700% in two years! As the law currently stands we appear to have no legal redress should he seek to impose even more rent increases of this kind in the following years. There are no services to these huts (i.e. no mains water, power or sewerage). We also have no written lease. Past policy by the farmer has simply been to invoice us in February of each year for payment of the ground rent. The rent increase affects eight families on the shore, few, if any, can afford to pay this kind of rent and have been told that if they fail to pay, matters will be placed in the hands of the Sheriff Officer, i.e. they are likely to be evicted. Though we have no solid evidence, we strongly believe that the landlord’s ultimate goal is to remove the original hut owners by seeking to make the ground rent unaffordable, leaving the path clear for his own development.

I have attached a copy of a letter sent to the land agents stating why we believe the independent valuation to be flawed.

I understand from the Carbeth Hutters Association that the Social Justice Committee is currently considering legislation that will give hutters legal protection from unreasonable action by landlords – something we currently do not enjoy. I also note from the House of Lords website, that owners of huts in Holtsfield, Wales won a similar case against the landowners in the House of Lords.

We would very much like to know how this proposed legislation is progressing in the Scottish Parliament and whether the House of Lords ruling sets a precedent that would help to protect hutters in Scotland. We are not alone in the difficulties we face with the landowner, hutters in at least two other areas across Scotland are currently facing the same problems. We are thus, appealing to the Social Justice Committee to move forward with this with the utmost urgency. At the very least would it be possible...
to consider implementing some interim ruling that would protect hutters until the new legislation is implemented (e.g. a freeze on rent increases above the rate of inflation or other reasonable figure)? We, and others like us, are in an extremely vulnerable position and face the possibility of losing our holiday homes with what appears to be no legal redress as things currently stand.

I cannot express how strongly we feel about the need for some legal protection under Scottish law.

Yours Sincerely

Christine and Norman Milligan
Justice 1 Committee

Access to Rights under the Children (Scotland) Act 1995

Note by the Clerk

Background

Petition PE124 by the Grandparents Apart Self Help Group
1. PE124 by Grandparents Apart Self Help Group called for the Parliament to consider amending the Children (Scotland) Act 1995 to name grandparents in the act as having an important part to play in the lives of their grandchildren.

2. The petition was last considered by the Committee at its meeting on 8 October 2004, when it agreed that the petition has been examined thoroughly and that all organisations and individuals involved with the issue of grandparents’ rights to children are content that current legislation in this area seems to be sufficient. However, the Committee also agreed to write to the Executive to request that it give serious consideration to this matter in the context of its forthcoming family law bill and to reviewing the Children (Scotland) Act 1995 with particular regard to strengthening access to existing rights under the Act.

The Scottish Executive
3. A response from the Minister for Justice was received on 10 February 2004 (attached at Annex A). The minister shares the Committee’s concerns in this area and has undertaken to ensure that they are considered in the context of the Executive’s forthcoming consultation into family law.

Other cases
4. Correspondence pertaining to two individual cases has been received, both relating to similar problems encountered by fathers in respect of access to their children following the breaking-up of the relationship between the parents. In one case, the problem was compounded by the relocation of the mother and children to England, where, after the children had been resident for a year and one day, Scottish court orders no longer had effect. This case was brought to the Convener’s attention by the father’s constituency MSP, Sarah Boyack, and the correspondence outlining the case is attached (Annex B).

Action
5. The Committee is invited to consider whether it wishes to take any further action in relation to this matter. This could include—
(a) noting the Minister for Justice’s commitment to consider the issue in the context of its forthcoming consultation and waiting for the consultation to be published before taking any further action; or

(b) writing to the Minister for Justice in the light of correspondence received relating particularly to access rights for fathers, seeking a specific commitment to consider the position of fathers following the deterioration of the relationship with the mother.
Justice 1 Committee

Civil Partnership Registration

Note by the Clerk

Background

Previous consideration by the Justice 1 Committee
1. The Committee last considered civil partnership registration at its meeting on 17 December 2003; the paper considered by the Committee at that meeting set out the background in detail and is attached for information (Annex A).

2. Following that meeting, the Committee responded to the Scottish Executive’s consultation on civil partnership registration. The response is also attached for information (Annex B).

UK legislation
3. It is expected that a bill to make provision for the registration of civil partnerships will be lodged in the UK Parliament shortly and that a Sewel motion will be lodged, seeking the agreement of the Scottish Parliament for the UK legislation to apply also to Scotland.

Scrutiny
4. In its response to the Executive consultation, the Committee expressed the view that 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.

Action
5. In considering what action to take in respect of the forthcoming Sewel motion, the Committee should bear in mind considerable restraints on the time available to the Committee at forthcoming meetings, owing to time required for consideration of the budget, stage 1 of the Emergency Workers (Scotland) Bill and the Committee’s inquiry into rehabilitation programmes in prisons. Possible courses of action could include—

(a) requesting an informal briefing from Scottish Executive officials working on the legislation in Scotland;

(b) taking oral evidence from the Minister for Justice (the normal course of action taken by the Committee in relation to Sewel motions);

(c) taking written evidence on the legislation before taking oral evidence from the Minister for Justice;

(d) appointing a reporter on the legislation;
(e) considering whether there is time available to take further oral evidence from parties in addition to the Minister for Justice.
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". 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.

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.

3 Written submission by Professor Kenneth Norrie, paper EO/S2/03/6/03
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 1 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.”

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.”

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.”

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.”

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.”

---

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

---

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.

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.16

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.”17

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.”18

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.”19

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.”20

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.

---

16 Written Submission, Equality Network, page 9
17 Equal Opportunities Committee Official Report, 4 November 2003, col 183
18 Scottish Executive, Civil Partnership Registration, A Legal Status for Committed Same-sex partnerships, paragraph 3.9
19 Equal Opportunities Committee Official Report, 28 October 2003, col 130
20 Written submission, Ellen Galford and Ellen Kelly.
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.”, but requests that sufficient time be made available for scrutiny of the draft legislation before the Sewel debate.

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:

“If we 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

---

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 Survey34 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-

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:

---

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.”39

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.”40

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

---

44 Equal Opportunities Committee Official Report, 11 November 2003, col 198
45 Equal Opportunities Committee Official Report, 28 October 2003, col 138
Dear Mr Mowat,

Consultation on Civil Partnerships Registration

I refer to the Scottish Executive’s recent consultation on registration of civil partnerships and would like to express my thanks for the extension to the deadline for responses granted to the Justice 1 Committee.

The Committee took into consideration oral evidence taken by the Parliament’s Equal Opportunities Committee in relation to the consultation and noted that some concerns were raised about the impact of the proposals on other legislation and about provisions affecting Scotland in the proposed legislation being based on English, rather than Scots, law.

The Committee therefore agreed to respond to the Executive's consultation, requesting—

that a detailed review of the impact of legislation in this area on other devolved areas be undertaken; and
that 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

Yours sincerely,

Pauline McNeill MSP
Convener, Justice 1 Committee
Introduction

1. The Emergency Workers (Scotland) Bill was introduced on 22 March 2004 by Andy Kerr, Minister for Finance and Public Services. The Parliamentary Bureau is expected to refer the Bill to the Justice 1 Committee for stage 1 consideration. No secondary committees are likely to be designated.

Background

2. The Bill’s policy objective is to create a specific offence of attacking an emergency worker, or someone assisting an emergency worker, who is responding to emergency circumstances. Emergency workers are currently protected from assault by the common law. The Bill provides specific protection for emergency workers similar to that provided for police officers in the Police (Scotland) Act 1967.

3. The Bill seeks to define “emergency circumstances” and groups defined as “emergency workers” are set out on the face of the Bill. These include police, fire, ambulance and coastguard services, lifeboat crews, medical practitioners, nurses, midwives and prison officers. There is also special provision within the Bill for health workers in hospital accident and emergency premises, indicating that a state of emergency is to be considered to exist at all times in such departments.

4. The Emergency Workers (Scotland) Bill was the subject of a public consultation launched in December 2003. The Executive’s consultation document is available by following the link below:

   http://www.scotland.gov.uk/consultations/justice/poewc-00.aspX

Timetable

5. The proposed timetable for the Committee’s consideration of the Bill is noted below.

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>25 March</td>
<td>Call for written evidence issued (6 weeks allowed – deadline 7 May)</td>
</tr>
<tr>
<td>5 May</td>
<td>Oral evidence session 1</td>
</tr>
<tr>
<td>12 May</td>
<td>Oral evidence session 2</td>
</tr>
<tr>
<td></td>
<td>Consideration of written evidence</td>
</tr>
<tr>
<td>26 May</td>
<td>Oral evidence session 3</td>
</tr>
<tr>
<td>2 June</td>
<td>Oral evidence session 4</td>
</tr>
<tr>
<td>9 June</td>
<td>Discuss issues paper for report</td>
</tr>
<tr>
<td>16 June</td>
<td>Discuss draft report</td>
</tr>
</tbody>
</table>
23 June  Agree final report
25 June  Publish Stage 1 report
1 July   Stage 1 debate

**Suggested witnesses**

6. It is proposed that the Committee will take oral evidence over four sessions. The Committee is invited to consider the list of suggested witnesses as outlined below.

**Session 1:**
Executive Bill team
Law Society of Scotland
Faculty of Advocates

**Session 2:**
Scottish Police Federation
Association of Chief Police Officers in Scotland (ACPOS) and Association of Scottish Police Superintendents (as a panel)
Fire Brigades Union Scotland and Chief and Assistant Chief Fire Officers’ Association (as a panel)

**Session 3:**
Royal College of Nursing
British Medical Association Scotland and Royal College of Physicians (as a panel)
UNISON Scotland and Scottish Trades Union Congress (as a panel)

**Session 4:**
Transport and General Workers’ Union Scotland and GMB Union (as a panel)
Minister
Introduction

1. This year the Justice 1 Committee has scrutinised a complex technical bill and launched a major inquiry. The Committee has also reported on three proposals for Sewel motions, undertaken post-legislative scrutiny of two Acts and responded to two consultations.

Inquiries and Reports

2. A major inquiry into the effectiveness of rehabilitation programmes in prisons was launched by the Committee during March 2004. The remit of the inquiry focuses on three main themes: penal policy as it relates to rehabilitation; opportunity as it relates to how the principle of rehabilitation is acted out during and post-custody and whether opportunities “mirror” those outside; and what impact the prison lifestyle (environment, culture, and surroundings) has on the effectiveness and the effects of rehabilitation during and post custody.

3. The Committee has also considered the European Commission’s green paper on the regulation of alternative dispute resolution and its potential impact on domestic law. A sizeable amount of evidence from a range of relevant individuals and organisations was gathered. To assist with its inquiry, the Committee held a video conference with the lead official in Brussels and thereafter responded to the Commission’s consultation.

4. In addition the Committee has found time to consider and report on three proposals for Sewel motions in relation to UK legislation: Gender Recognition Bill; Civil Contingencies Bill; and The Justice (Northern Ireland) Bill. The Committee also appointed a reporter to investigate the proposal for UK legislation on civil partnerships.
Bills

5. The Committee carried out thorough scrutiny of the Criminal Procedure (Amendment) (Scotland) Bill which is intended to introduce greater certainty into High Court of Justiciary (“the High Court”) proceedings. This was a complicated Bill to scrutinise due to the fact that it substantially amended the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) which is of itself very technical in nature. In addition there were a number of other associated issues such as early disclosure of evidence which also required investigation. Nonetheless, the Committee produced a comprehensive report at Stage 1 after considering a substantial volume of evidence, some of which was provided in informal circumstances. The Committee was particularly pleased with the output from the seminar for criminal legal practitioner which it hosted.

Post-legislative scrutiny

6. Two Acts of the Scottish Parliament have also been the subject of post-legislative scrutiny. The Committee appointed a reporter to assist with the Committee’s scrutiny of the implementation of the Freedom of Information (Scotland) Act 2001 and responded to the Executive’s consultation. This work is ongoing as the Committee considers the Executive’s proposed charging regime. In relation to the Protection from Abuse (Scotland) Act 2001 (the first parliamentary committee bill) the Committee has gathered evidence to enable it to reflect on its operation and efficacy.

Subordinate Legislation


Petitions

8. The Committee has considered a number of petitions this year which have been ongoing for some time but merited continued investigation such as dangerous driving and the law and issues arising from a petition on hutting in Scotland, which was considered by the Justice and Home Affairs Committee and the former Justice 1 Committee. Other petitions which the Committee has considered cover such wide ranging issues as amendment to the Children (Scotland) Act 1995 which concerned grandparents’ rights of access to children and a petition which seeks support for an aftercare programme for those who have suffered miscarriages of justice.

Visits

9. The Committee has also visited several prisons and courts across Scotland to meet and listen to the people who are affected by changes to the justice system. The prisons visited this year were HMP & YOI Cornton Vale, HMP Greenock, HMP Kilmarnock, HMP & YOI Polmont and HMP Shotts. Members also carried out fact-finding visits to Glasgow Sheriff Court, Glasgow High Court and the High Court in Edinburgh.
Meetings

10. The Committee met [35] times from 7 May 2003 to 6 May 2004. [11] of these meetings were held jointly with the Justice 2 Committee. Of the total number of meetings, [4] were entirely in private, and [6] were partly in private. Of the [4] meetings in private, [2] were to consider draft reports and [2] were consideration of potential advisers. Of the [6] meetings which were partly in private, [3] were to consider draft reports, [1] was to consider appointing an adviser, [1] to discuss lines of questions and [1] to consider possible witnesses.

11. All the meetings were held in Edinburgh.

[ ] Please note that the number of meetings, items in private, etc will be updated at the end of the Parliamentary year.
Justice 1 Committee

Procedures Committee inquiry on timescales and stages of Bills

Note by the clerk

Background

The Procedures Committee is carrying out an inquiry on timescales and stages of Bills. The Convener of the Procedures Committee has written to the Convener inviting her to submit written evidence (letter attached). The Committee is invited to discuss timescales and stages of Bill to inform the Convener’s response.
Dear Pauline,

Inquiry on Timescales and Stages of Bills

As you may already be aware, the Procedures Committee is conducting an inquiry into the procedures and practices that determine the speed at which Bills progress through Parliament. I attach a copy of a Press Release containing further information on the inquiry.

My purpose in writing is to draw your attention to this inquiry and to invite you, as Convenor of the Justice 1 Committee, to submit written evidence. It indicates on the Press Release that the initial deadline for written evidence is 31 March 2004, although we have set a separate deadline for Convenors of Wednesday 5 May. We look forward to receiving any evidence you wish to submit by that date. You may also wish to draw this letter to the attention of the members of the Justice 1 Committee.

If you have any questions or wish to discuss this please do not hesitate to contact me.

Yours sincerely,

[Signature]

Iain Smith MSP
Convener
PROCEDURES COMMITTEE LAUNCHES INQUIRY INTO LEGISLATION PROCEDURES

The Procedures Committee is undertaking a major inquiry into the procedures and practices that determine the speed at which Bills progress through the 3-Stage process from introduction to passing.

Convener of the Committee, Iain Smith MSP said:

"This will be a major piece of work for the Committee. We plan to review the whole way that Bills are timetabled to ensure that there is sufficient time throughout the process for proper scrutiny of Bills to be carried out. The Committee is keen to get written evidence from as wide a range of people as possible who have experience of engaging with the Parliament in relation to a Bill."

In particular, the Committee will be considering:

- whether sufficient time is available for evidence-taking at Stage 1, particularly when more than one committee is involved;
- whether sufficient time is available during Stages 2 and 3 for members (and outside interests) to prepare amendments for lodging, to consider amendments lodged by others and to debate amendments at meetings of committees and the Parliament;
- whether the current minimum intervals between Stages are appropriate;
- whether committees involved in considering a Bill after it is first introduced have sufficient opportunity at later Stages to consider the impact of amendments; and
- to what extent the timetable should be determined by the Executive (or the member-in-charge of the Bill), the Bureau, committees or the Parliament as a whole.

The main focus will be on Executive Bills, which have generally been subject to more timetabling pressure. However, the scope
of the inquiry extends to other types of Public Bill – Committee Bills and Members’ Bills – and will also take into account the effects of any procedural changes that may be proposed on specialised types of Bill such as Consolidation Bills and on Private Bills.

Written evidence is invited from any MSP, person or organisation with an interest in or previous involvement in, the passage of a Scottish Parliament Bill. Evidence should be submitted, preferably in electronic form (MS Word preferred), to the Clerk to the Procedures Committee, procedures.committee@scottish.parliament.uk or at The Scottish Parliament, George IV Bridge, Edinburgh EH99 1SP. Please keep submissions to a maximum of 6 sides of A4 if at all possible. A brief summary of the main points at the beginning or end would be helpful.

Evidence submitted may be published by the Parliament, in electronic or paper form. If you do not wish your submission to be made public, please request this clearly at the start of the submission giving your reasons. Any such request will be considered by the Committee.

The initial deadline for written evidence is Wednesday 31 March 2004. Please indicate whether you would be prepared also to give oral evidence to the Committee if invited to do so. It is expected that oral evidence will be taken in late March and during April, with a view to completing the inquiry, if possible, before the summer recess.

For further information the Media Contact is:
Sally Coyne: 0131 348 6269 (RNID Typetalk calls welcome)
E-mail: sally.coyne@scottish.parliament.uk

For specific committee information contact:
Lewis McNaughton, Assistant Clerk to the Committee: 0131 348 5178
E-mail: lewis.mcnoughton@scottish.parliament.uk

For public information enquiries, contact: 0131 348 5000

For general enquiries, contact 0845 278 1999 (local call rate)
Text phone: 0131 348 5415/ 0845 270 0152 (local rate) (RNID Typetalk calls welcome)
E-mail: sp.info@scottish.parliament.uk
Visit our website at: www.scottish.parliament.uk
Dear Pauline

CRIMINAL PROCEDURE (AMENDMENT) (SCOTLAND) BILL

I promised during the Stage 2 session on 10th March, during discussion of amendments 80, 80A-C, and 106, to write to you to explain the Executive's position on communication between prosecution and defence before the Preliminary Hearing.

We believe that the single biggest driver of cultural change in the High Court will be the statutory requirement to hold a preliminary hearing before the trial date is fixed. This will give judges the opportunity to manage cases proactively.

I fully agree with the points made in Committee and elsewhere that the effectiveness of a preliminary hearing will depend to a very great extent on the quality of the dialogue up to that point between the prosecution and defence agents. The written record will be an important measure of quality as well as a tangible output and that is why the parties will be required to produce one. This is firmly in line with the recommendations in Lord Bonomy's report, "Improving Practice". It is probably worth repeating section 8.11 of the report in full:

"In the week before the preliminary diet parties should be obliged to meet, or communicate in some other way, to discuss any issues which require resolution .... Some consider that such an obligation is unenforceable. It may be that imposing a requirement upon the parties to certify that they had met or communicated with each other, and to lodge that certificate in court on the day before the preliminary diet along with a formal record of the outcome of the meeting or communication, would ensure that the obligation was complied with".
It remains our position that a face to face meeting between the prosecutor and the defence agent prior to the written record being lodged should not be mandatory because:

- It is not always necessary: other forms of modern communications are perfectly adequate at this stage - if not more effective - in many if not most cases;

- If it were mandatory it might be difficult to get the right people together at the same time (especially because of court commitments of defence agents) - thus many face to face meetings would be fairly pointless;

- Conversely, trying to make sure the right people were brought together in every case could disrupt court proceedings and/or lead to delay. People might have to travel long distances and stay overnight for relatively short meetings;

- There is a real risk that a statutory face to face meeting would become the focus of effort rather than the preliminary hearing. The meetings could become protracted – or might themselves be adjourned – thus leading to delay;

- It would add to legal aid costs without adding much value. It would also add to the resource pressures on COPFS.

I firmly believe that a statutory requirement to produce a written record will ensure that defence and prosecution lawyers alike will do their very best to work together to produce something that meets the requirements of the court. In our view lawyers should be able to exercise their professional judgement in determining how they should communicate in each case taking into account the detailed requirements about procedure in the Act of Adjournal.

It will of course be for the presiding judge to determine at the preliminary hearing whether they have done well enough and whether the written record is fit for purpose. As has been said previously during consideration of the Bill, this should be an effective sanction as no lawyer would relish the public disapproval of a judge.

I note that you reserved your right to come back to this issue at stage 3. If you would find it helpful I would be happy to meet you and other Committee members before Stage 3 to discuss this matter further.

Yours sincerely,

Hugh Henry

HUGH HENRY
Pauline McNeill MSP
Convener
c/o Justice 1 Committee Clerks
3.11CC
The Scottish Parliament
EDINBURGH
EH99 1SP

Dear Pauline,

Thank you for your letter of 4 March regarding our respective consultations on issues relating to reoffending. There does seem to have been some gap in communications at official level. I understand that Justice Department officials have met with Committee clerks and action is being taken to avoid any similar shortcomings in the future.

While I see that there is a degree of overlap in our consultation subject area, much of your own work focuses on the design and impact of individual programmes in changing offenders’ behaviour. I believe your findings will complement the larger strategic view that the Executive’s consultation is considering.

I understand your concerns about running two concurrent consultations targeting the same groups. However, our consultation has been widely trailed both publicly and in correspondence with stakeholders, so they have been aware of our intent for some time.

I look forward to seeing the results of your work in due course.

Ben

CATHY JAMIESON
Dear Pauline

THE CHILDREN (SCOTLAND) ACT 1995

Thank you for your letter of 27 November 2003 about Petition PE124, which your committee considered recently. I note your views on the position of grandparents in relation to their grandchildren under the Children (Scotland) Act 1995. I share your concerns and we will consider in the context of our forthcoming consultation what actions may be helpful in improving the position. It may be that other solutions, such as mediation, may be more appropriate than legislation in this complex area.

I am also aware of the wider issues surrounding access to existing rights. We are in touch with the work of the Department of Constitutional Affairs on contact with children and will consider these issues in the context of our consultation exercise and any ensuing legislation.

I hope that this is helpful to you.

Best wishes

CATHY JAMIESON
Sarah Boyack MSP
15A Stafford Street
Edinburgh
EH3 7BU

Your Ref: 020010

Dear Ms Boyack,

Thank you for your letter dated 7th November enclosing a letter from the Justice Minister. Unfortunately, it appears that an extremely practical point has not been mentioned in Ms Jamieson’s letter – and that is the costs involved of such an action brought before the High Court.

In respect of my own case, I was informed that my ex-wife had raised an application in England. At this time, there already was a Court Order in place in Scotland. When I attended court in England to hear this new application, it was made clear to me by the Court that should I not agree to that Court taking on her application, the case would have to be referred to the High Court in London to adjudicate. I was then made aware that in doing this, I would face considerable legal costs which would run into thousands of pounds (of which I do not have) – just to sustain contact with my children. I simply took the cheapest option and conceded that Norwich County Court dealt with the case. This was a decision made solely due to the practical costs.

The point of addressing this case to you is to show that various aspects of the Family Law is flawed and requires amended to prevent a similar case occurring. I was simply beaten down by the legal costs involved. There is also a clear inconsistency with Public Funding in the UK. I qualified for and was receiving Legal Aid in Scotland but did not qualify for any Public Funding in England. This is ridiculous especially when in this case, the English Court had the ability to in effect, take over the Scottish proceedings.

On the wider issue, surely, it is not in the best interests of any children for one parent to relocate to the other side of the country or to another country (within the UK), preventing contact taking place. The Law is silent in this respect and only makes it an offence if a child is removed outside the UK – despite the effect on the children at each being the same.

I am deeply concerned that none of these issues will be reviewed and things will stay the same for other fathers who like me, simply wish to sustain contact with their children. I am more frequently reading newspaper reports and magazine articles detailing similar circumstances to my own. Surely it is time for change.
I ended up “biting the bullet” and took a further loan out to employ a barrister in England for my one day Court hearing. For this, her costs were over £1500. I was told that this was reasonable. The judge found my ex-wife’s application to be completely unreasonable and all of the false allegations made against me were unsubstantiated. I was awarded with a considerable increase in contact than ever before and my ex-wife was ordered to share the travelling from England to Scotland with our children. Clearly, her attempt to thwart contact has now failed.

The Scottish proceedings have since been disposed of and my ex-wife has been ordered to pay two thirds of my own legal costs. Some people may take the view that to this end, justice has prevailed, however I believe that it should have never been allowed to go on for so long in the first place.

My ex-wife has spent over £60 000 in her own legal fees. I incurred about £18 000.

I am interested for Ms Jamieson’s comments now that my case is closed.

Yours sincerely,

Ewen Gallagher