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

1. **Emergency Workers (Scotland) Bill**: The Committee will take evidence from—

   David Wynne, Firemaster, Dumfries and Galloway Fire Brigade and Community Safety Portfolio Officer, and Mike Dunne, Senior Divisional Officer, Lothian and Borders Fire Brigade, the Chief and Assistant Chief Fire Officers’ Association; Ken Ross, Regional Secretary, Fire Brigades Union Scotland;

   Paul Hopson, Vice Chair, UK Health and Safety Committee, Royal College of Nursing; Dr Peter Terry, Deputy Chairman, Scottish Council, British Medical Association; Dr William G Morrison, Faculty of Accident and Emergency Medicine, Council of the Royal College of Physicians of Edinburgh;

   Peter Hunter, Legal Officer, UNISON Scotland; Martin Gaughan, Regional Organiser, T & G Scotland; Alex McLuckie, Senior Organiser, GMB Scotland; Ian Tasker, Health and Safety Officer, Scottish Trades Union Congress.

2. **Justice and home affairs in Europe**: The Committee will consider its ongoing scrutiny in relation to justice and home affairs in Europe.

3. **Freedom of Information (Scotland) Act 2002**: The Committee will consider a draft response to the Scottish Executive consultation on charging fees under the Act.

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

Agenda item 1

Note by the Clerk (PRIVATE PAPER) J1/S2/04/22/1
The Finance Committee, 1st Report 2004(Session 2): the Financial Memorandum of the Emergency Workers (Scotland) Bill J1/S2/04/22/2
CACFOA, Strathclyde Fire Brigade – Attacks on Fire Crews J1/S2/04/22/3
Briefing Note
BMA, Violence at work: the experience of UK doctors (hard copy, members only – available online at http://www.bma.org.uk/ap.nsf/Content/violence) J1/S2/04/22/4
Supplementary written evidence from the Law Society of Scotland J1/S2/04/22/5

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

Member should also bring their copies of compiled written evidence relating to the Bill, circulated as paper J1/S2/04/21/2 for the 21st meeting 2004 and available online at http://www.scottish.parliament.uk/justice1/evidence/ewb/j104-ewb-00.htm

Agenda item 2

Note by the clerk J1/S2/04/22/6

Agenda item 3

Note by the reporter and the clerk J1/S2/04/22/7

Papers for information—

Correspondence from the Minister for Justice – Reliance Prisoner Escort and Court Custody Service: Publication of Contract J1/S2/04/22/8

Documents not circulated—

Copies of the following have been provided to the Clerk:

- Scottish Executive, Subordinate legislation relevant to regulation by the Care Commission of offender accommodation services under the Regulation of Care (Scotland) Act 2001 – Report on Consultation Paper;
- HM Inspectorate of Prisons, HMP & YOI Compton Vale – Inspection: 4-6 February 2004;

Copies of these documents are available for consultation in room 3.11 CC. Additional copies may also be obtainable on request from the Document Supply Centre.

Forthcoming business—

Wednesday 9 June – Justice 1 Committee meeting, Committee Room 4;
Wednesday 16 June – Justice 1 Committee meeting, the Chamber;
Wednesday 23 June – Justice 1 Committee meeting, Committee Room 1;
Wednesday 30 June – Justice 1 Committee meeting, Committee Room 2.
Finance Committee

Remit and membership

Remit:

1. The remit of the Finance Committee is to consider and report on-

   (a) any report or other document laid before the Parliament by members of the Scottish Executive containing proposals for, or budgets of, public expenditure or proposals for the making of a tax-varying resolution, taking into account any report or recommendations concerning such documents made to them by any other committee with power to consider such documents or any part of them;

   (b) any report made by a committee setting out proposals concerning public expenditure;

   (c) Budget Bills; and

   (d) any other matter relating to or affecting the expenditure of the Scottish Administration or other expenditure payable out of the Scottish Consolidated Fund.

2. The Committee may also consider and, where it sees fit, report to the Parliament on the timetable for the Stages of Budget Bills and on the handling of financial business.

3. In these Rules, "public expenditure" means expenditure of the Scottish Administration, other expenditure payable out of the Scottish Consolidated Fund and any other expenditure met out of taxes, charges and other public revenue.

   *(Standing Orders of the Scottish Parliament, Rule 6.6)*

Membership:

Des McNulty (Convener)
Wendy Alexander
Ted Brocklebank
Fergus Ewing (Deputy Convener)
Kate Maclean
Jim Mather
Dr Elaine Murray
Jeremy Purvis
John Swinburne

Committee Clerking Team:

Clerk to the Committee
Susan Duffy

Senior Assistant Clerk
Terry Shevlin

Assistant Clerk
Emma Berry
the Financial Memorandum of the Emergency Workers (Scotland) Bill

The Committee reports to the Parliament as follows—

Background

1. Under Standing Orders, Rule 9.6, the lead committee in relation to a Bill must consider and report on the Bill’s Financial Memorandum at Stage 1. In doing so, it is obliged to take account of any views submitted to it by the Finance Committee.

2. This report sets out the views of the Finance Committee in relation to the Financial Memorandum published to accompany the Emergency Workers (Scotland) Bill, for which the Justice 1 Committee has been designated by the Parliamentary Bureau as the lead committee at Stage 1.

Introduction

3. At its meeting on 11 May 2004, the Finance Committee took oral evidence on the Financial Memorandum from—

   Richard Scott, Head, Criminal Justice Division and Gery McLaughlin, Bill Team Leader, Criminal Justice Division, Scottish Executive.

4. The Committee subsequently received additional information from Scottish Executive officials in response to various points raised at this meeting. This correspondence is attached at appendix A.

5. The Committee also considered written correspondence submitted by the Scottish Court Service, and the Crown Office and Procurator Fiscal Service. This correspondence is reproduced at appendix B.

Financial Memorandum

6. The Explanatory Notes published to accompany the Bill state that it introduces an offence of assaulting, obstructing or hindering an emergency worker, or a person assisting an emergency worker, in emergency circumstances. The Bill also introduces a similar offence of assaulting, obstructing or hindering
certain emergency workers in hospital accident and emergency premises. These measures are part of the Executive’s wider antisocial behaviour strategy.

7. The Financial Memorandum says that the number of additional prosecutions which will result from these provisions is uncertain, but that these are likely to be relatively few. Neither does the Financial Memorandum anticipate any significant, additional, on-going costs incurred through the introduction of the new offences. Indeed, it states that there may be a relatively minor cost saving from reducing the number of attacks on emergency workers, which could actually outweigh the costs of any additional prosecutions for the new offences. Finally, the Financial Memorandum does not anticipate any additional costs for local authorities, for other bodies or businesses.

8. The correspondence from the Crown Office and Procurator Fiscal Service said it was satisfied that it was capable of meeting any consequential costs from existing resources.

Summary of Evidence

Savings resulting from the Bill

9. The Committee sought information on the bill's likely costs, as these were not specified in the Financial Memorandum. Specifically, one of the Committee’s main lines of questioning was to focus on the likelihood of the savings resulting from the bill outweighing the costs of any additional prosecutions.

10. Executive officials acknowledged that they could not provide detailed costs, but reconfirmed that there is unlikely to be any significant increase in the number of prosecutions as a result of the bill. They also acknowledged that the deterrent effects of the bill are hard to quantify, but could materialise in the following ways:

   “we hope that the bill will deter people from attacking emergency workers, which will mean fewer court cases, fewer people sent to prison, savings on manpower and loss of days' work, savings on damaged equipment and, generally, a more effective response to emergency situations.”

11. Members were concerned that these financial benefits, while laudable, are based solely on speculation on the part of the Executive, and asked whether justification could be provided by other sources. The Committee asked whether there were data from any other jurisdictions showing that similar legislation had had a deterrent effect; whether the Police (Scotland) Act 1967, could provide comparable information on the likely deterrent effect of the bill; or whether any new offences have been introduced in Scotland, since the establishment of the Parliament, on which data have been captured showing a deterrent effect.

12. Executive officials said that they did not have comparable data from any other jurisdictions. Subsequent correspondence, however, did provide information on the other points raised by the Committee. There is an average of 2,730

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1 Scott, Official Report, 11 May 2004, Col 1411.
persons per year, from 1993 – 2002, with a charge proved under section 41 of the Police (Scotland) Act\textsuperscript{5}. Second, in terms of a comparable offence, the correspondence said that the closest analogy is perhaps the statutory aggravation for offences related to religious hatred introduced by section 74 of the Criminal Justice (Scotland) Act 2003, but there has not yet been sufficient time for associated offences to be reflected in official statistics.

13. It was suggested that the Financial Memorandum could be strengthened by calculating the current costs of impeding or assaulting emergency workers and then using this information to calculate a target for savings. This would also help to provide the basic justification that the bill is actually needed.\textsuperscript{6}

14. The Executive officials confirmed that “if the bill is enacted, monitoring will be put in place to see what kind of savings are being achieved in relation to the number of prosecutions (for example)”.\textsuperscript{7}

\textbf{Wider Scottish Executive policy}

15. The Policy Memorandum states that the bill is part of a broader strategy to deal with antisocial behaviour. Correspondingly, Ministers are considering whether to develop a wider package of measures to address attacks on all public service workers. These measures - which could comprise advertising, publicity and an awareness-raising campaign – are complementary to the bill but, as they have not been finally agreed, associated costs have not been included in the Financial Memorandum.

16. Nevertheless, officials were asked whether the cost of this package of measures should have been reflected in the Financial Memorandum, given that it could be expensive to implement. The efficacy of such campaigns in general was also questioned, given that there was no evidence provided to show its deterrent effect, and given that the introduction of the new offence will not result in tougher penalties being imposed. It was suggested that it was not necessary to introduce a bill to try and change public attitudes:

“…there is a basic question to be answered if we are going to spend money and are being asked to hand over a chequebook, if not sign a blank cheque. There is now considerable doubt whether public awareness campaigns—whether directed towards health or towards stopping criminal behaviour—actually work. Can you point us to any data that show that a public awareness campaign would work?”\textsuperscript{8}

17. Executive officials replied that they did not have such data to hand, but repeated the fact that they did not envisage the bill creating any particular cost.

18. The purpose of the awareness-raising campaign was also questioned, given that there was no evidence provided to show its deterrent effect, and given that the introduction of the new offence will not result in tougher penalties being imposed. It was suggested that it was not necessary to introduce a bill to try and change public attitudes:

\textsuperscript{5} The section covers any person who assaults, resists, obstructs, molests or hinders a constable or police custody and security officer in the execution of his duty or a person assisting a constable or any such officer in the execution of his duty.

\textsuperscript{6} Mather, Official Report, 11 May 2004, Cols 1416 and 1417.

\textsuperscript{7} Scott, Official Report, 11 May 2004, Col 1417.

\textsuperscript{8} Ewing, Official Report, 11 May 2004, Col 1413.
“The bill will have a cost in legislative and civil service time and a public awareness campaign will have a cost. The bill will generate a lot of additional costs, when the heart of the matter might be dealt with through a public awareness campaign to make it clear that it is absolutely unacceptable to assault or impede an emergency worker.”

Other Concerns

19. Officials were also asked if there was a possibility that additional paperwork and bureaucracy could result from the bill, if procurators fiscal were to pursue both the common-law offence and the statutory offence in respect of one accused. The Executive officials confirmed that this matter had been considered in conjunction with Crown Office and that they are content that it has been resolved.

Conclusions

20. The Committee is clearly supportive of the principle that emergency service workers should be afforded the protection they need in order to carry out their essential work, but has serious reservations about the information provided in – or omitted from – the Financial Memorandum.

21. The Committee feels that more effort could have been made to substantiate the claim made in the Financial Memorandum that there will be relatively few additional prosecutions resulting from the bill’s provisions.

22. On a related point, the Committee is unconvinced by another claim made in the Financial Memorandum, that the deterrent effect of the bill may even negate the costs of any additional prosecutions for the new offences created. The Committee feels that a lack of hard evidence means that such a claim is no more than speculation.

23. A third major concern relates to the Executive’s efforts to tackle the wider problem of attacks on all public sector workers, under which Ministers may introduce a package of measures, including a public awareness campaign. Members questioned both the cost and likely effectiveness of these measures.

24. The more general point was also made that the Committee’s consideration of Financial Memoranda would be aided if the cost of wider measures such as these, which are relevant to the Bill, were made clearer to the Committee at this stage.

25. In summary, the Committee regrets the fact that the more detailed information that could have aided the Committee’s scrutiny is not provided in this Financial Memorandum. It hopes that the specific concerns it has raised in relation to the Emergency Workers (Scotland) Bill can now be pursued by the Justice 1 Committee.

APPENDIX 1

Thank you for your email of 12 May to Richard Scott, following our provision of evidence to the Finance Committee on the Emergency Workers Bill. You ask about the collection of data on comparable offences introduced by the Scottish Parliament and about offences under section 41 of the Police (Scotland) Act 1967.

Comparable Offences

The most closely analogous offence introduced by the Scottish Parliament is perhaps the statutory aggravation for offences related to religious hatred introduced by section 74 ("Offences aggravated by religious prejudice") of the Criminal Justice (Scotland) Act 2003. While this is not an exact parallel with the offences created by the Emergency Workers Bill (and the consultation paper Protection of Emergency Workers set out the reasons why the Executive do not view that as the best approach in this instance) it is similar in that the statutory provision facilitates the recording, collection and reporting of associated offences and will enable any trends to be accurately tracked. However, the provisions of the 2003 Act only came into force last year and there has not yet been sufficient time for their introduction to be reflected in officially reported statistics.

Police (Scotland) Act 1967

Section 41 of the Police (Scotland) Act 1967, in contrast, has been in operation for a significant period of time. While the existence of the statutory provisions means that we have information on the occurrence of offences of this kind since the Act came into force we do not have that information on the era before then.

The number of persons with a charge proved under section 41 in each year 1992-2002 is as follows:

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</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2,865</td>
<td>2,853</td>
<td>2,873</td>
<td>2,933</td>
<td>2,967</td>
<td>3,002</td>
<td>2,819</td>
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<td></td>
<td>2,403</td>
<td>2,691</td>
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As was explained to the Committee, there is some degree of overlap between the provisions of the Bill and the 1967 Act but the offences in the Bill make specific provision for the inclusion of non physical means of obstruction. This is because case law on the 1967 Act indicates that there is not absolute certainty that such offences are covered in all instances. However, as indicated in the Financial Memorandum, the Executive believe that there is unlikely to be any significant increase in the overall numbers of prosecutions. The separate written evidence requested by the Finance Committee from the Scottish Court Service and the Crown Office & Procurator Fiscal Service agreed with that conclusion.

Gery McLaughlin
Scottish Executive Justice Department
Emergency Workers Bill Team
APPENDIX 2

SUBMISSION FROM SCOTTISH COURT SERVICE

Thank you for your letter inviting John Ewing to submit written evidence to the Finance Committee in respect to the above. AS Mr Ewing has now moved I am replying on behalf of the Scottish Court Service.

As the Bill introduces a new category of offence it is in my view that it will have no financial implications for Scottish Court Service.

Alan Swift, Acting Chief Executive

SUBMISSION FROM CROWN OFFICE AND PROCURATOR FISCAL SERVICE

Thank you for your letter of 22 April 2004 in which you invite written evidence from the Crown Office and Procurator Fiscal Service on the Financial Memorandum of this Bill.

The provisions in the Emergency Workers (Scotland) Bill introduce two new offences of assaulting, obstructing or hindering emergency workers or those assisting them in certain situations. Assault is an offence at common law and behaviour that would be caught by this aspect of the Bill’s provisions would at present be capable of prosecution under existing law. While obstruction or hindrance of emergency workers are not specific offences at common law, this type of behaviour would normally constitute a different common law offence, such as breach of the peace, or in the case of police officers and fire-fighters, might amount to an existing statutory crime.

We accordingly anticipate that there are likely to be few, if any, additional prosecutions as a result of the Bill’s provisions. We are satisfied that the Crown Office and Procurator Fiscal Service is capable of meeting any consequential costs from existing resources.

Robert Gordon
ATTACKS ON FIRE CREWS
BRIEFING NOTE

1. Example Events.
Examples of some recent events that were publicised by the media are given below.

1.1 Blackhill Glasgow.
Incident address: off Hogganfield Street, Blackhill, Glasgow.
Date: 17th August 2002.
Incident: Car fire.
Attack: Youths attacked crew using knives and throwing bricks, bottles and other objects.
Injuries: One Fire-fighter received a back injury as a result of being struck by a missile. The entire crew was in a state of alarm and fear following this attack.
Property damage: The fire appliance in use at the incident was badly damaged.

1.2 Parkhead Glasgow.
Incident address: Celtic Club, London Road, Glasgow.
Date: 19th August 2002.
Incident: Car fire.
Attack: Youths throwing stones.
Injuries: One Fire-fighter received injuries to right foot and left knee.
Property damage: None

1.3 Hamilton.
Incident address: Junction of Highstonehall Road and Neilisland Road, Hamilton.
Date: 24th August 2002.
Incident: Special Service incident, to rescue a nine-year old boy who had fallen down a twenty-foot gully.
Attack: An unseen assailant shot at the crew.
Injuries: One Fire-fighter receiving a head injury in which an air gun pellet lodged in his scalp.
Property damage: None.

1.4 Coatbridge.
Incident address: Coatbridge.
Date: 7th December 2003
Incident: Fire in open ground.
Attack: Large number of youths involved in throwing stones at firefighters. The youths became more aggressive and eventually personnel were attacked by some the youths using sticks and bottles as weapons.
Injuries: One firefighter treated and discharged from hospital with leg injuries. Three firefighters sustained facial injuries.
Property damage: The fire appliance in use at the incident was badly damaged.
2. **Statistics 2001 – November 2003**

<table>
<thead>
<tr>
<th>Year</th>
<th>No. of reported attacks</th>
<th>North Command</th>
</tr>
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<tbody>
<tr>
<td>2001</td>
<td>68</td>
<td>1</td>
</tr>
<tr>
<td>2002</td>
<td>162</td>
<td>12</td>
</tr>
<tr>
<td>2003 (to 10/11/03)</td>
<td>154</td>
<td>11</td>
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The figures shown above are from the Brigades database on violent attacks. The figure for 2003 is expected to exceed that of 2002 by the end of the calendar year showing the problem is still growing although the rate of growth is slowing down.

3. **Measures in place.**

   Strathclyde Fire Brigade has several policies and procedures in place for dealing with violent incidents. These are listed below.
   
   - Corporate Policy for Health and Safety, which includes a specific policy on workplace violence
   - Risk assessment for Civil Disturbance and Minor Disorders.
   - Operational Technical Note for Civil Disturbance and Minor Disorders.
   - Accident/near miss reporting and recording procedures. Including a telephone reporting line to provide an expeditious recording method.
   - Operational briefing log which provides crews with information on operational risks including potential for violent attacks.
   - Community Safety initiatives to tackle the problem at source through education and development programmes an example of which is Juvenile Fire Setters Scheme.

4. **Future initiatives.**

   A number of initiatives are being explored as means prevention and dealing with incidents.
   
   - CCTV trials on appliances at six of the worst affected stations.
   - New personal protective equipment affording better protection of the face and with integrated eye protection.
   - Training.
Dear Alison,

Further to our evidence session today, I am writing to clarify the current penalty available under the Police (Scotland) Act 1967 in relation to a contravention of section 41 of that Act. In evidence to the Committee, I stated that it was my understanding that the penalty for a first offence under the Police (Sc) Act 1967 was 3 months imprisonment and that for a second or subsequent offence committed within a two year period the penalty was nine months. I believe I said that I would be corrected if I was wrong. Well, having checked the position in further detail, I can confirm that this was the original sentence available under the Act but the Act has been amended so that the maximum penalty is in fact nine months imprisonment for a first offence. This would therefore put the police in the same position as emergency workers in relation to sentence under the bill.

I am sorry for this error on my part and would be grateful if you could pass on this information and my apologies to the Committee.

With best wishes,

Anne Keenan

Law Society of Scotland
Justice 1 Committee

European Justice and Home Affairs scrutiny

Note by the Clerk

Background

1. The Committee considered at its meetings on 17 September and 8 October 2003 its forward work programme including scrutiny of European Justice and Home Affairs (EU JHA) legislative developments.

2. The Committee decided to concentrate attention, initially, on proposals relating to alternative dispute resolution, parental responsibility and divorce.

3. This note provides an update on progress with these three areas of interest and highlights a Scottish Executive consultation on an EU proposal on small claims procedure.

EU White Paper on divorce

4. The Commission now expects to table a White Paper on divorce towards the end of 2004. This is almost 12 months later than originally envisaged. The White Paper is expected to propose regulation of the way in which international divorces are handled.

5. Scottish Executive officials indicated in oral evidence to the Committee on 17 September 2003 that the Executive would like to reserve its position on the proposal until the text of the White Paper is available.¹

Action

6. It is suggested that on publication of the White Paper the Committee may wish to consider further action regarding the proposals.

Council Regulation concerning matters of parental responsibility

7. In June 2003 the Council of the EU reached political agreement on the adoption of the proposal for a Council Regulation concerning matters of parental responsibility. The Regulation² was subsequently adopted on 23 November 2003 and will replace the existing Regulation as of 1 March 2005.

¹ Official Report, Justice 1 Committee, 17 September 2003; c 50
8. The Committee received a note from the Executive on the draft Regulation in November 2003\(^3\) which set out the provisions of the Regulation and the possible implications. The Regulation contains rules concerning mutual recognition of judgements on divorce and parental responsibility and how a judgement can be recognised and enforced across international borders in situations where more than one Member State is involved. It covers both matrimonial matters (divorce, nullity, legal separation) and issues of parental responsibility.

**Action**

9. As the new Regulation will come into force on 1 March 2005, the Committee may wish to seek an update from the Scottish Executive regarding plans for implementing the obligations contained therein. It may also wish to ask whether there are any implications for Executive plans for reform of family law following the current consultation, “Family Matters: Improving Family Law in Scotland.”

**Alternative dispute resolution**

10. The European Commission launched its green paper on alternative dispute resolution in civil and commercial law in April 2002\(^4\). Alternative dispute resolution (ADR) methods are extra-judicial procedures used for resolving civil or commercial disputes. These usually involve the collaboration of disputing parties in finding a solution to their dispute with the help of a neutral third party.\(^5\)

11. On the basis of the outcome of the consultation, the Commission decided to launch two initiatives: to develop a European plan for best practice in mediation; and a proposal for a directive\(^6\) to promote mediation.

**Committee’s response to the green paper on ADR**

12. The Committee responded to the green paper in December 2003. It highlighted the potential benefits of mediation and other forms of dispute resolution but stressed mandatory regulation at EU level is not the appropriate course of action for ADR services because it is essentially a consensual and voluntary process.

13. The Committee’s response clearly suggested that it would prefer a legislative instrument that provides flexibility for member states to

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\(^3\) Note from Scottish Executive, Committee paper J1/S2/03/12/6, 12 November 2003  
\(^4\) The green paper on alternative dispute resolution in civil and commercial law, COM(2002) 196 final, is available online at: http://europa.eu.int/scadplus/leg/en/lvb/l33189.htm  
\(^5\) Background on the green paper is available on the EU website at: http://europa.eu.int/comm/justice_home/fsj/civil/dispute/wai/fsj_civil_dispute_en.htm  
\(^6\) Directives are binding in the result to be achieved but leave national authorities to choose the form and method of achieving the result.
translate European legislation into domestic law, particularly given that ADR is at very different stages of development within the European Union and within the United Kingdom.

14. The Committee also encouraged the establishment of an umbrella body which could have a role to play in ensuring practitioners are properly supported and in maintaining standards. The response stressed that the Committee hoped that a European code of conduct will place a spotlight on the benefits of ADR and help to establish trust between Member States.

**Scottish Executive correspondence**

15. Following the short inquiry into ADR in Scotland, the Committee wrote to the Scottish Executive to ask whether it had any plans to use, or currently uses, mediation as a method of resolving disputes involving public bodies; whether it will bring together the profession in Scotland under an umbrella organisation which could establish benchmarks for the profession; and what action might be taken to improve use of ADR in other aspects of the Scottish justice system. The response from the Minister for Justice is attached at annex A.

16. The response from the Minister states that the Executive supports and encourages the use of mediation for individuals, public bodies and other organisations where feasible and appropriate. Increased use of mediation services is currently being examined in the fields of education and health and the Executive intends to produce more general guidance for the public on dealing with disputes without going to court.

17. The Executive has no plans at present to create an umbrella organisation for the profession but is discussing the issues with key players in the mediation field including the Scottish Mediation Network.

18. Finally, the response refers to the use of alternative dispute resolution in the sheriff court commercial rules, in use in Glasgow, and the establishment by the Sheriff Court Rules Council of a Mediation Committee which will consider what the functions of the court should be in relation to the use by the parties to an action of alternative dispute resolution procedures.

**Preliminary draft proposal for a directive**

19. As part of its preparations of a proposal for a directive on mediation, the Directorate-General for Justice and Home Affairs (DG JHA) published a preliminary draft text in early April 2004. DG JHA stress that the text has been prepared as a basis for collecting comments only and will not prejudge the final form of the proposal which is expected to be published in September 2004. This stage provides an additional opportunity to make comments to the Commission prior to the publication of a final proposal. The text of the proposal is attached at annex B.
20. The Commission has chosen to frame its proposal in the form of a directive. Directives are binding in the result to be achieved but leave national authorities to choose the form and method of achieving the result. Member States are required under the terms of a directive to make the necessary changes in their laws and administrative arrangements to comply with the requirements of the directive by the date specified in it. It is important, therefore, that Member States and other interested individuals and organisations consider carefully the wording of the draft proposal and submit comments to the Commission.

21. The Committee may wish to consider whether a directive is an appropriate instrument to encourage the development of mediation in Scotland and across Europe.

22. Although the consultation period was very short and coincided with the Scottish Parliament Easter recess, Commission officials have confirmed that they would welcome comments from the Committee given its continuing interest in the subject.

Objective and scope
23. The preliminary draft proposal states that the objective of the directive is to “facilitate access to justice by promoting the use of mediation in civil and commercial matters and to ensure a sound articulation between mediation and judicial proceedings.”

24. Article 1.2, which defines the scope of the proposed directive, does so very widely. It states that “The directive shall apply in civil and commercial matters” excluding “disputes which are not suitable for out-of-court settlements in accordance with the law applicable to the dispute in question” and also excluding collective bargaining disputes. This would leave Member States to define the range of legal matters where mediation would be acceptable and to exclude other areas as appropriate.

Definitions
25. Article 2 sets out definitions for mediation and third parties.

Referral to mediation
26. Article 3.1 is drafted in such a way as to appear to require a court to “invite the parties to use mediation in order to settle the dispute.” A directive cannot order national courts to act in a particular way, but rather define the result to be achieved and leave national authorities to decide how to achieve it.

27. Article 3.2 states that this “directive is without prejudice to national legislation making the use of mediation compulsory.” From the terms

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7 European Commission, DG Justice and Home Affairs, Preliminary draft proposal for a directive on certain aspects of mediation in civil and commercial matters, April 2004, Article 1
of the Scottish Executive’s response to previous correspondence, it does not appear such compulsion is likely to be introduced in Scotland at present.

**Ensuring the quality of mediation**

28. Article 4 sets out a number of actions which Member States shall take to ensure the quality of mediation. These are: the promotion of effective quality control mechanisms; promotion and support for the training of third parties (mediators); and promotion and development of voluntary codes of conduct at Community and national level. The Committee expressed support for all of these elements in its response to the Commission’s Green Paper although the Committee did not anticipate their compulsory introduction.

**Enforcement of agreements**

29. Article 5 requires Member States to ensure that, upon request of the parties, a settlement agreement reached as a result of mediation can be confirmed in a judgement or other form that renders the agreement enforceable under national law.

**Confidentiality of mediation**

30. Article 6 provides that third parties will not in judicial proceedings give testimony or evidence relating to a mediation unless agreed by the parties.

**Suspension of limitation periods**

31. Article 7 provides for the suspension of the limitation period regarding the claim that is the subject of the mediation at the point where mediation commences. If mediation ends without a settlement agreement, the limitation period would resume running from the time the mediation is terminated.

**European code of conduct for mediators**

32. Separately from the draft directive, a group of stakeholders, with assistance from Commission officials has prepared a draft European code of conduct for mediators. A copy of the draft (dated 6 April 2004) is attached at annex C.

33. The draft code sets out a number of principles to which individual mediators can decide to commit. These include competence, independence, impartiality and confidentiality. Essential requirements relating to the mediation agreement, process, settlement and fees are also incorporated into the code.

34. The Commission anticipates that the code of conduct will be launched at a conference in Brussels in early July. Arrangements for this have yet to be confirmed and may be subject to change.

35. It should be noted that the Commission expects to attach a disclaimer to the code of conduct when it is published on its website. The
Commission will not give official endorsement to the code of conduct nor will it carry out verification of whether the code is adhered to and will not accept responsibility for the services offered by mediators or organisations which decide to commit voluntarily to its terms.

36. In its response to the Green Paper, the Committee supported the creation of a European code of conduct and expressed the hope that such a code would place a spotlight on the benefits of ADR and help to establish trust between Member States. The Committee may wish to welcome the draft code as a first step in this process.

Action

37. The Committee is invited to consider the European Commission’s preliminary draft text of a directive on alternative dispute resolution in civil and commercial law and the draft European code of conduct for mediators.

38. The Committee may wish to write to the Scottish Executive to seek its views on the text and draft code of conduct. The Committee may also wish to submit a response to the Commission setting out the current situation in Scotland based on information previously received from the Executive and highlighting concerns with the proposal. A draft response is attached at annex D.

39. The response can be followed up by a meeting with officials during the Committee’s visit to Brussels in September when the formal draft proposal is expected to be published.

Regulation for a European Small Claims Procedure


41. A draft Regulation has now been published by the Commission. The objective of the Regulation is to simplify and speed up litigation concerning small claims by creating a European Small Claims Procedure available to litigants as an alternative to the procedures existing under the laws of the Member States, which will remain unaffected, and to abolish the intermediate measures to enable the recognition and enforcement of a judgement given in a European Small Claims Procedure in the another State.

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Executive officials and their Department for Constitutional Affairs colleagues are involved in discussions on the proposal. The Scottish Executive states that it and the UK government support a European system that would promote the simple, quick and cost-effective resolution of small claims across European borders, but is less certain of the proposal to extend the European Small Claim to internal cases. A consultation exercise has been launched by the Scottish Executive to gather comments from interested organisations. The consultation papers are attached at annex E.

Action

43. The Committee is invited to note the proposed Regulation.

Conclusions

44. The Committee is invited to:

   a) await the publication of the EU White Paper on divorce and, thereafter, consider further action regarding the proposals;

   b) seek an update from the Scottish Executive regarding plans for implementing the obligations contained in the Council Regulation concerning mutual recognition of judgements on divorce and parental responsibility, including whether there are any implications for Executive plans for reform of family law;

   c) write to the Scottish Executive to seek its views on the text of the preliminary draft proposal for a directive on mediation. The Committee may also wish to submit a response to the European Commission setting out the current situation in Scotland based on information previously received from the Executive and highlighting concerns with the proposal; and

   d) note the proposed Regulation for a European small claims procedure.
Dear Pauline

Thank you for your letter of 11 December in which you asked a number of questions stemming from Justice 1 Committee's consideration of the European Commission's Green Paper on Alternative Dispute Resolution.

First, you asked whether the Scottish Executive has any plans to use, or currently uses, mediation as a method of resolving disputes involving public bodies. The Executive supports and encourages the use of mediation for individuals, public bodies and other organisations where feasible and appropriate. The essence of mediation is that the parties enter it voluntarily and there will always be instances where there is reluctance to do so, or where there are important issues of fact, or points of law, in dispute that require an authoritative decision by the court. But mediation can be very useful and the Executive is keen to encourage its use.

There is a wide range of active interest in mediation across the Scottish Executive, straddling a number of diverse areas. An example would be the draft Education (Additional Support for Learning) (Scotland) Bill, which proposes a new duty for independent mediation services to be set up in all education authorities, helping resolve disputes between parents and schools. Another would be the Department of Health working group which is looking at the potential for greater use of mediation in patient/health service disputes. The Executive also provides funding for mediation and advice services to a range of bodies including SACRO, which provides a nationwide service from which all local authorities and housing associations can benefit. In relation to contractual disputes with the Executive itself, our Procurement Directorate has recently produced information and guidance for contractors and suppliers on methods of alternative dispute resolution which has received wide circulation and is available on the Scottish Executive website. We also intend to produce more general guidance for the public on dealing with disputes without going to court. This guidance should be available this Spring.
You also asked whether the Executive will bring together the profession in Scotland under an umbrella organisation. We have no plans to do so at present, though we have not ruled out future consideration of such a measure. Our attention at present is focussed on discussion of the issues with key players in the mediation field, for example the Scottish Mediation Network. We shall consider carefully the outcomes from this before reaching any conclusions.

Finally, you asked what action had been taken to improve the use of ADR in Glasgow Sheriff Court specifically and more generally to consider what action might be taken to improve use of ADR in other aspects of the Scottish justice system. As mentioned by Professor Sturrock in his address to the Committee on 12 November, reference is made to alternative dispute resolution in the sheriff court commercial rules, which are in use in Glasgow. Those rules allow the sheriff to make "any order which the sheriff thinks will result in the speedy resolution of the action (including the use of alternative dispute resolution)".

The Sheriff Court Rules Council is also taking an active interest in mediation and set up a Mediation Committee last June. Part of the Committee's remit is to consider what the functions of the court should be in relation to the use by the parties to an action of alternative dispute resolution procedures. The Committee will report back to the Council with recommendations at the end of this year.

I hope this is helpful.

Best wishes,

CATHY JAMIESON
Preliminary draft proposal for a directive on
certain aspects of mediation in civil and commercial matters

Article 1 – Objective and scope
1. The objective of this directive is to facilitate access to justice by promoting the use of mediation in civil and commercial matters and to ensure a sound articulation between mediation and judicial proceedings.
2. This directive shall apply in civil and commercial matters with the exception of
   (a) disputes which are not suitable for out-of-court settlements in accordance with the law applicable to the dispute in question, and
   (b) collective bargaining disputes related to employment contracts.

Article 2 – Definitions
1. “Mediation” shall mean any procedure, however named or referred to, where two or more parties to a dispute are assisted by a third party to reach an agreement on the settlement of the dispute, and regardless of whether the procedure is initiated by the parties, ordered by a court or prescribed by the national law of a Member State.
   It shall not include attempts made by the judge or the sitting court to settle a dispute within the course of judicial proceedings concerning that dispute.
2. “Third-party” shall mean any person conducting a mediation, regardless of the denomination or profession of that third party in the Member State concerned and of the way the third party has been appointed or requested to conduct the mediation.

Article 3 – Referral to mediation
1. A court before which an action is brought shall, when appropriate and having regard to all circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court shall in any event have the right to require the parties to attend an information session on the use of mediation.
2. This directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not impede on the right of access to the judicial system, in particular in situations where one of the parties is resident in a Member State other than that of the court.
Article 4 – Ensuring the quality of mediation

1. Member States shall promote effective quality control mechanisms concerning the provision of mediation services.

2. Member States shall promote and support the training of third parties in order to allow parties in dispute to choose a third party who will be able to effectively conduct a mediation in the manner expected by the parties.

3. In order to contribute to the implementation of paragraph 1 of this Article the Commission and the Member States shall promote and facilitate the development of and adherence to voluntary codes of conduct by third parties and providers of mediation services, at Community as well as at national level.

Article 5 – Enforcement of agreements

1. Member States shall ensure that, upon request of the parties, a settlement agreement reached as a result of a mediation can be confirmed in a judgment, decision, authentic instrument or any other form that renders the agreement enforceable under national law, provided that the agreement is considered as a binding contract in accordance with the applicable law to the agreement.

2. Member States shall designate one or more courts or public authorities competent for receiving a request in accordance with paragraph 1 and communicate that information to the Commission.

Article 6 – Confidentiality of mediation

1. Third parties, as well as any other third person involved in the administration of mediation services, shall not in judicial proceedings give testimony or evidence regarding any of the following, unless otherwise agreed by the parties:
   (a) An invitation by a party to engage in mediation or the fact that a party was willing to participate in mediation;
   (b) Views expressed or suggestions made by a party in a mediation in respect of a possible settlement of the dispute;
   (c) Statements or admissions made by a party in the course of the mediation;
   (d) Proposals made by the third party;
   (e) The fact that a party had indicated its willingness to accept a proposal for a settlement made by the third party;
   (f) A document prepared solely for purposes of the mediation.

2. Paragraph 1 of this Article applies irrespective of the form of the information or evidence referred to therein.

3. The disclosure of the information referred to in paragraph 1 of this Article shall not be ordered by a court or other judicial authority and, if such information is offered as evidence in contravention of paragraph 1 of this Article, that evidence shall be treated as inadmissible. Nevertheless, such information may be disclosed or admitted in evidence to
the extent required for the purposes of implementation or enforcement of an agreement reached as a direct result of the mediation.

4. The provisions of paragraphs 1, 2 and 3 of this Article apply whether or not the judicial proceedings relate to the dispute that is or was the subject matter of the mediation.

5. Subject to the limitations of paragraph 1 of this Article, evidence that is otherwise admissible in judicial proceedings does not become inadmissible as a consequence of having been used in a mediation.

Article 7 – Suspension of limitation periods

1. The running of the limitation period regarding the claim that is the subject matter of the mediation shall be suspended or interrupted as of when, after the dispute has arisen, the parties agree to use mediation, the use of mediation is ordered by a court, or an obligation to use mediation arises under the national law of a Member State.

2. Where the mediation has ended without a settlement agreement, the limitation period resumes running from the time the mediation ended without a settlement agreement, counting from the date of a declaration of one or both of the parties or of the third party that the mediation is terminated.

Article 8 – Implementing provisions

The Commission shall make public the information related to the competent courts and authorities designated by the Member States pursuant to Article 5(2).
EUROPEAN CODE OF CONDUCT FOR MEDIATORS

[This page will be used as an introductory statement for the Commission’s website, where the code will be available as a separate document for download.]

A European code of conduct for mediators [link to draft version] has been developed by a group of stakeholders with the assistance of the European Commission.

The code sets out a number of principles to which individual mediators can voluntarily decide to commit, under their own responsibility. It is intended to be applicable to all kinds of mediation in civil and commercial matters.

Organisations providing mediation services can also make such a commitment, by asking mediators acting under the auspices of their organisation to respect the code. Organisations have the opportunity to make available information on the measures they are taking to support the respect of the code by individual mediators through, for example, training, evaluation and monitoring.

For the purposes of the code mediation is defined as any process where two or more parties agree to the appointment of a third-party – hereinafter “the mediator” - to help the parties to solve a dispute by reaching an agreement without adjudication and regardless of how that process may be called or commonly referred to in each Member State.

Adherence to the code is without prejudice to national legislation or rules regulating individual professions.

Organisations providing mediation services may wish to develop more detailed codes adapted to their specific context or the types of mediation services they offer, as well as with regard to specific areas such as family mediation or consumer mediation.

The European Code of Conduct will be launched at a conference to be organised in Brussels in the beginning of July. Further details about the conference will be announced on this webpage.

List of mediators and mediation organisations

The following individual mediators have informed the Commission that they intend to commit to the code [link to list]. The following organisations providing mediation services have informed the Commission that they intend to commit to asking mediators acting under their auspices to respect the code [link to list].

Consumer mediation

As concerns consumer mediation, including financial disputes, the websites of the EEJ-Net and FIN-Net provide further information:

http://europa.eu.int/comm/internal_market/finservices-retail/finnet/index_en.htm
DISCLAIMER: The code of conduct does not represent the Commission’s official position. The terminology used and the content of the code may not be attributed to the Commission. The list of mediators and organisations adhering to the code does not represent an endorsement of the Commission of these mediators or organisations in any way. The Commission is not carrying out any verification of whether the code is actually adhered to and does not accept any responsibility in this regard, nor for the services offered by these mediators or organisations.
1. **COMPETENCE AND APPOINTMENT OF MEDIATORS**

1.1 Competence

Mediators shall be competent and knowledgeable in the process of mediation. Relevant factors shall include proper training and continuous updating of their education and practice in mediation skills, having regard to any relevant standards or accreditation schemes.

1.2 Appointment

The mediator will confer with the parties regarding suitable dates on which the mediation may take place. The mediator shall satisfy him/herself as to his/her background and competence to conduct the mediation before accepting the appointment and, upon request, disclose information concerning his/her background and experience to the parties.

1.3 Advertising/promotion of the mediator’s services

Mediators may promote their practice, in a professional, truthful and dignified way.

2. **INDEPENDENCE AND IMPARTIALITY**

2.1 Independence and neutrality

The mediator must not act, or, having started to do so, continue to act, before having disclosed any circumstances that may, or may be seen to, affect his or her independence or conflict of interests. The duty to disclose is a continuing obligation throughout the process.

Such circumstances shall include
- any personal or business relationship with one of the parties,
- any financial or other interest, direct or indirect, in the outcome of the mediation,
- the mediator, or a member of his or her firm, having acted in any capacity other than mediator for one of the parties.

In such cases the mediator may only accept or continue the mediation provided that he/she is certain of being able to carry out the mediation with full independence and neutrality in order to guarantee full impartiality and that the parties explicitly consent.

2.2 Impartiality

The mediator shall at all times act, and endeavour to be seen to act, with impartiality towards the parties and be committed to serve all parties equally with respect to the process of mediation.
3. **THE MEDIATION AGREEMENT, PROCESS, SETTLEMENT AND FEES**

3.1 **Procedure**

The mediator shall satisfy himself/herself that the parties to the mediation understand the characteristics of the mediation process and the role of the mediator and the parties in it.

The mediator shall in particular ensure that prior to commencement of the mediation the parties have understood and expressly agreed the terms and conditions of the mediation agreement including in particular any applicable provisions relating to obligations of confidentiality on the mediator and on the parties.

The mediation agreement shall, upon request of the parties, be drawn up in writing.

The mediator shall conduct the proceedings in an appropriate manner, taking into account the circumstances of the case, including possible power imbalances and the rule of law, any wishes the parties may express and the need for a prompt settlement of the dispute. The parties shall be free to agree with the mediator, by reference to a set of rules or otherwise, on the manner in which the mediation is to be conducted.

The mediator, if he/she deems it useful, may hear the parties separately.

3.2 **Fairness of the process**

The mediator shall ensure that all parties have adequate opportunities to be involved in the process.

The mediator if appropriate shall inform the parties, and may terminate the mediation, if:
- a settlement is being reached that for the mediator appears unenforceable or illegal, having regard to the circumstances of the case and the competence of the mediator for making such an assessment, or
- the mediator considers that continuing the mediation is unlikely to result in a settlement.

3.3 **The end of the process**

The mediator shall take all appropriate measures to ensure that any understanding is reached by all parties through knowing and informed consent, and that all parties understand the terms of the agreement.

The parties may withdraw from the mediation at any time without giving any justification.

The mediator may, upon request of the parties and within the limits of his or her competence, inform the parties as to how they may formalise the agreement and as to the possibilities for making the agreement enforceable.
3.4 Fees

Where not already provided, the mediator must always supply the parties with complete information on the mode of remuneration which he intends to apply. He/she shall not accept a mediation before the principles of his/her remuneration have been accepted by all parties concerned.

4. CONFIDENTIALITY

The mediator shall keep confidential all information, arising out of or in connection with the mediation, including the fact that the mediation is to take place or has taken place, unless compelled by law or public policy grounds. Any information disclosed in confidence to mediators by one of the parties shall not be disclosed to the other parties without permission or unless compelled by law.
Draft Response to the Commission

Introduction
1. The Justice 1 Committee of the Scottish Parliament welcomes the opportunity to comment on the European Commission’s preliminary draft proposal for a directive on certain aspects of mediation in civil and commercial matters.

2. The Committee responded to the Green Paper on Alternative Dispute Resolution (ADR) in December 2003 following a short inquiry into ADR in Scotland. The Committee gathered a sizeable amount of evidence from a range of relevant individuals and organisations at that time.

Further scrutiny
3. During the inquiry it became evident that ADR could offer substantial benefits and savings for the people of Scotland, commerce and public bodies if utilised consistently throughout the country. The Committee wrote to the Scottish Executive requesting further information on the level of implementation and support for ADR in Scotland. The response from the Minister for Justice is attached for information.

4. The response from the Minister states that the Executive supports and encourages the use of mediation for individuals, public bodies and other organisations where feasible and appropriate. Increased use of mediation services is currently being examined in the fields of education and health and the Executive intends to produce more general guidance for the public on dealing with disputes without going to court.

5. The Executive has no plans at present to create an umbrella organisation for the profession in Scotland but is discussing the issues with key players in the mediation field including the Scottish Mediation Network.

6. Finally, the response refers to the use of alternative dispute resolution in the sheriff court commercial rules, in use in Glasgow, and the establishment by the Sheriff Court Rules Council of a Mediation Committee which will consider what the functions of the court should be in relation to the use by the parties to an action of alternative dispute resolution procedures.

Conclusion
7. The Committee holds to its view that regulation would stifle the growth of mediation in Scotland which is still in its infancy in comparison with other parts of the United Kingdom and Europe. The Committee questions whether a directive is the most appropriate instrument in
order to achieve the objective of encouraging the use of mediation in civil and commercial matters.

8. The Committee does, however, welcome the preparation by stakeholders of a draft European code of conduct for mediation. The Committee hopes that the code will be widely publicised in order to highlight the benefits of ADR within and between Member States.

9. The Committee will continue to monitor progress of both the draft legislation and the code of conduct while pursuing its national justice and home affairs work programme.

10. The Committee will undertake a short familiarisation visit to Brussels on 20 and 21 September 2004 in order to develop a working dialogue with MEPs, Commissioners and Commission officials. Members would welcome the opportunity to discuss developments on alternative dispute resolution and other justice and home affairs matters at that time.

Yours sincerely,

Pauline McNeill MSP
Convener, Justice 1 Committee
Draft Fees Regulations Under Sections 9, 12, and 13 Freedom of Information (Scotland) Act 2002

Note by the Reporter and the Clerk

Background

1. The Freedom of Information Act 2002 received Royal Assent on 28 May 2002. The purpose of the Act is to establish a legal right of access to information held by a broad range of Scottish public authorities; to balance this right with provisions protecting sensitive information; to establish a fully independent Scottish Information Commissioner to promote and enforce the freedom of information regime; to encourage the proactive disclosure of information by Scottish public authorities through a requirement to maintain a publication scheme and to make provision for the application of the freedom of information regime to historical records. The Act empowers Scottish Ministers to make fees regulations which will set out the legal framework that Scottish public authorities should comply with when charging for providing information under the Act.

2. This paper relates to the Scottish Executive’s consultation on the draft fees regulations under sections 9, 12, and 13 of the Freedom of Information (Scotland) Act 2002, together with guidance to Scottish public authorities on charging fees.

3. At its meeting on 8 October 2003, the Justice 1 Committee agreed to appoint Michael Matheson as reporter, in relation to the Scottish Executive’s consultation on its draft code of practice under the Freedom of Information (Scotland) Act 2002. The Committee considered the report at its meeting on 3 December 2004 and agreed a response to the consultation.

4. The response made a number of recommendations to the Scottish Executive including several relating to fees:

- costs for producing information in alternative formats should be clarified and set out in the guidance;
- consistency of charging should be addressed in the guidance;
- details of the mechanism used to determine the upper cost limit.
- guidance for public authorities when the cost limit is exceeded, but where the disclosure of the information is in the public interest;

5. In response to the Committee’s submission, Tavish Scott MSP, Deputy Minister for Finance and Parliamentary Business, gave a written
assurance that the Committee would be given the opportunity to comment on the fees regulations in draft. The letter is attached as annex C.

Consultation on charging fees

6. On 4 March 2004, the draft Freedom of Information (Fees and Appropriate Limit) (Scotland) Regulations 2004, draft Freedom of Information (Fees and Appropriate Limit) (No.2) (Scotland) Regulations 2004 and associated guidance were submitted by the Scottish Executive for consideration by the Justice 1 Committee. The public consultation period commenced soon after and will end on 31 May 2004.

Evidence

7. During the Committee’s consideration of the draft code of practice, The Scottish Consumer Council and the Campaign for Freedom of Information kindly provided copies of their responses to the Executive. Both organisations have once again provided information to the Committee on the draft fees regulations. The submissions are attached at annexes A and B respectively.

Consideration of draft regulations and guidance

Alternative formats

8. In his letter of 6 January, Tavish Scott confirmed that the Freedom of Information (Scotland) Act makes clear that the costs of complying with the Disability Discrimination Act (in relation to the means in which information is provided) cannot be passed on to applicants, and the draft Code of practice reflected that. However, he also gave a commitment that the Scottish Executive would look to see what further clarification could usefully be provided.

9. Regulation 3(1) of both sets of Regulations specifically excludes “any costs likely to be incurred by a Scottish public authority in fulfilling any such duty under or by virtue of the Disability Discrimination Act 1995”. Paragraph 15 of the draft guidance notes highlights this provision.

Consistency of charging

10. Regulation 3 defines the prescribed costs which may be taken into account by a Scottish public authority in calculating the amount of fee in relation to any request for information. Regulation 3(2) specifies a maximum level of £15 per hour for staff costs related to locating and retrieving the information requested.

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1 Regulations made under sections 9 and 12 of the Freedom of Information Act require affirmative procedure to be followed in the Scottish Parliament, but those under section 13 of the Act require to follow negative procedure.

11. Paragraphs 8 to 15 of the draft guidance notes set out how Scottish public authorities should go about charging fees under the Regulations.

12. The Scottish Consumer Council are generally happy with the proposals in this regard, believing the prescribed costs “present a clear and consistent basis for charging”.³

13. The Campaign for Freedom of Information, although very happy with the proposals, highlight that while staff time will be subject to a statutory maximum, other cost elements, such as photocopying charges, will not. They suggest that surveys of charges for photocopying planning documents sometimes reveal extremely high charges of several pounds per page. They, therefore, recommend that it would be advisable to specify a maximum photocopying charge in the fees regulations and a limit to cost price on any storage media e.g. CDs used to supply the information.⁴

Determining the upper cost limit

14. Regulation 5 of the Freedom of Information (Fees and Appropriate Limit) (Scotland) Regulations 2004 sets the method for calculating the fee which an authority may request for providing information. This shall not exceed 10% of the prescribed costs, excluding the first £100 of costs which will not attract a fee. The upper cost limit is set at £600.

Costs which exceed the upper limit

15. Regulation 5 of the Freedom of Information (Fees and Appropriate Limit) (No.2) (Scotland) Regulations 2004 provides for circumstances where estimated costs are likely to exceed the upper limit of £600.

16. An authority is under no obligation to provide information which exceeds the upper limit but the guidance notes encourage the authority to consider what information could be provided free of charge, or below the upper cost limit. The authority is also encouraged to set out the costs for providing the information reflecting full cost recovery for the element over the upper cost limit.⁵

17. The draft regulations do not introduce the provisions in the Act to aggregate costs where two or more requests are made by one person or by two or more different parties.

18. The Scottish Consumer Council are concerned that the regulations prescribe a blanket upper limit of £600 above which level an authority

³ Annex A, Scottish Consumer Council, Response to Scottish Executive consultation on charging fees, page 4
⁴ Annex B, The Campaign for Freedom of Information, Submission to Justice 1 Committee, Page 1
⁵ Scottish Executive, Draft guidance to Scottish public authorities on charging fees, paragraph 20
is not obliged to provide the information.\textsuperscript{6} Their response goes on to provide an alternative suggestion. “It should be noted that an independent review of government communications, commissioned by the UK government, recommended that in complex cases involving significant issues of public interest, the £600 limit on the cost of providing information should be removed.”\textsuperscript{7} It was suggested that the Information Commissioner could act as the judge as to whether an application involves a significant issue of public interest. We would support the introduction of such a provision in Scotland, with the appropriate authority being given to the Scottish Information Commissioner.”

19. In their submission, The Campaign for Freedom of Information stress that they have been concerned that there should be some mechanism to require authorities to respond to important requests involving matters of substantial public interest even if the cost exceeded £600. They believe that the present proposals provide such a mechanism. “Although any one request might be capped at £600, the applicant could make a separate request for the additional information. The final paragraph of the draft guidance makes clear that the Executive is not proposing to take the powers mentioned in section 12(2)(a) of the Act to aggregate the costs of two or more related requests made by the same person and refuse them insofar as the total costs exceed £600. So long as this remains the case, our previously mentioned concern would not arise.”\textsuperscript{8}

20. The draft guidance makes reference to the situation where multiple requests are made by one person and recommends that “the Authority should, as far as it is reasonable, provide advice and assistance to the applicant to enable access where possible.”\textsuperscript{9} The Executive’s consultation paper also suggests that if significant difficulties emerged over operating this element of the Act, relevant provisions could be included in future revised regulations.\textsuperscript{10} The Information Commissioner will have the role of promoting the observance of the codes of practice, including this guidance, by public authorities and of promoting good practice. On balance, it would be appropriate to ask the Executive to monitor closely the implementation of this part of the Act.

\textsuperscript{6} Annex A, Scottish Consumer Council, Response to Scottish Executive consultation on charging fees, page 4  
\textsuperscript{7} \textit{An Independent Review of Government Communications} Chairman, Bob Phillis; Presented to the Minister for the Cabinet Office, January 2004  
\textsuperscript{8} Annex B, The Campaign for Freedom of Information, Submission to Justice 1 Committee, Page 1  
\textsuperscript{9} Final paragraph, Draft guidance to Scottish public authorities on charging fees, Scottish Executive.  
\textsuperscript{10} Consultation question 7, Draft guidance to Scottish public authorities on charging fees, Scottish Executive.
Conclusion

21. The draft regulations and guidance to public authorities on charging fees are welcomed as the basis for establishing a clear and consistent scheme for applications made under the Freedom of Information (Scotland) Act 2002.

22. The draft regulations prescribe the fees which Scottish public authorities may charge applicants for complying with requests for information. The draft guidance provides helpful information on the provisions set out in the draft regulations and, in particular, clarification that costs involved in fulfilling the obligations of the Disability Discrimination Act 1995 do not fall within the definition of Prescribed Costs.11

23. The Committee is invited to write to the Executive in the following terms:

Alternative formats
- welcome the clarification that costs for producing information in alternative formats do not fall within the definition of Prescribed Costs;

Consistency of charging
- welcome the inclusion of a framework for charging in the guidance which will help to ensure that there is a consistency of charging between public authorities;

Determining the upper cost limit
- confirm that the Committee is content with the mechanism to be used to determine the upper cost limit;

Costs which exceed the upper limit
- welcome the guidance on circumstances when the cost limit is exceeded, but recommend that the Executive monitor closely the implementation of this part of the Act to ensure that, if necessary, Regulations are amended to ensure that the £600 cost limit does not act as a barrier where the disclosure of the information is in the public interest;

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11 Paragraph 14, Draft guidance to Scottish public authorities on charging fees, Scottish Executive.
Justice 1 Committee

Draft code of practice under section 60 of the Freedom of Information (Scotland) Act 2002

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

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

Fees and Charges

The Committee asked a number of questions about the “way in which the fees and charges regimes will work for FOI requests generally and for information produced in alternative formats in particular. I am very conscious of the need to get this area right, and you will be aware that the key provisions, including the upper cost limit, will be set out in separate Fees Regulations and in associated guidance. Work on this is being taken forward by a small group under the auspices of the Scottish Freedom of Information Implementation Group — the group helpfully includes both representatives of public authorities and of consumer interests — and my intention is that a set of draft regulations should be available for consultation around the end of this month. I will certainly ensure that Justice 1 Committee is given opportunity to comment on the regulations in draft.

On the particular issue of alternative formats, officials have been working closely with the Disability Rights Commission and other equality bodies to try to ensure that the Code is properly equality-proofed, and responses to the consultation from such bodies are generally positive. However, I accept that the Code needs to draw out more clearly the distinction between the duties in section 11 of the POT (Sc) Act, where authorities are required to meet, “so far as is reasonably practicable”, the preferences of any requester as to the means in which information is provided, and the additional provisions of the Disability Discrimination Act (DDA). The POT (Sc) Act makes clear (in section 12) that the cost of complying with the DDA cannot be passed onto applicants, and the draft Code reflects that, but we will look to see what further clarification can usefully be provided.

Formulation of Scottish Administration Policy

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

**Cultural and Organisational Issues**

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

**Conclusion**

I am grateful for the Committee’s consideration of the draft Code of Practice and hope that this letter and its enclosure will provide you with a helpful update pending our finalisation of the Code over the next few weeks.

Tavish Scott  
Deputy Minister for Finance and Parliamentary Business  
6 January 2004
Freedom of Information (Scotland) Act 2002: A Consultation on Charging Fees

May 2004
About the Scottish Consumer Council

The Scottish Consumer Council (SCC) was set up by Government in 1978. Our purpose is to promote the interests of consumers in Scotland, with particular regard to those people who experience disadvantage in society. While producers of goods and services are usually well-organised and articulate when protecting their own interests, individual consumers very often are not. The people whose interests we represent are consumers of all kinds: they may be patients, tenants, parents, soliders’ clients, public transport users, or simply shoppers in a supermarket.

Consumers benefit from efficient and effective services in the public and private sector. Services providers benefit from discriminating consumers. A balanced partnership between the two is essential and the SCC seeks to develop this partnership by:

- carrying out research into consumer issues and concerns;
- informing key policy and decision-makers about consumer concerns and issues;
- influencing key policy and decision-making processes;
- informing and raising awareness among consumers.

The SCC is part of the National Consumer Council (NCC) and is sponsored by the Department of Trade and Industry. The SCC’s Chairman and Council members are appointed by the Secretary of State for Trade and Industry in consultation with the Secretary of State for Scotland. Future appointments will be in consultation with the First Minister, Margo MacDonald, the SCC’s Director, leads the staff team.

Please check our website at www.scotconsumer.org.uk for news about our publications.

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The SCC assesses the consumer perspective in any situation by analysing the position of consumers against a set of consumer principles.

These are:

ACCESS
Can consumers actually get the goods or services they need or want?

CHOICE
Can consumers affect the way the goods and services are provided through their own choice?

INFORMATION
Do consumers have the information they need, presented in the way they want, to make informed choices?

REDRESS
If something goes wrong, can it be put right?

SAFETY
Are standards as high as they can reasonably be?

FAIRNESS
Are consumers subject to arbitrary discrimination for reasons unconnected with their characteristics as consumers?

REPRESENTATION
If consumers cannot affect what is provided through their own choices, are there other effective means for their views to be represented?

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We can often make our publications available in braille or large print, on audio tape or computer disk. Please contact us for details.
Introduction

The Scottish Consumer Council (SCC) welcomes the opportunity to respond to the consultation on charging fees under the Freedom of Information (Scotland) Act 2002.

We have a particular interest in the implications of the proposed fee-charging regime for consumers who wish to exercise their rights under this Act. We have previously responded to a number of Scottish Executive consultations on freedom of information, and have argued in particular that there is a need for guidance to be issued on the charging of fees under the Act.¹

The SCC was represented on the fees sub-group of the Freedom of Information Implementation Group which oversaw the draft regulations and guidance, and we are very pleased that many of our suggestions have been taken on board.

General Comments

Our main concern is to ensure that the fee-charging regime is clear, consistent and fair to applicants. If Freedom of Information legislation is to achieve the desired results, it is essential that consumers are not put off applying for information by the costs of making an application.

Applicants should be entitled to expect that any fee they are charged should be roughly the same regardless of which authority holds the information they require. The costs of compliance could potentially vary significantly depending on the degree of efficiency and good record keeping exercised by individual authorities. Accordingly, we very much welcome the draft regulations and accompanying guidance which prescribe the costs to be estimated and how they should be estimated, and should help to ensure uniformity among authorities.

We welcome the proposal to incorporate the guidance on fees as an annex to the section 60 code of practice, which will underline its importance.

Specific Comments

1. Do the Prescribed Costs as set out in Regulation 3 present a clear and consistent basis for charging?

2. Should the Regulations include a maximum level for staff costs?

3. If so, is the level proposed of £15 per hour appropriate?

We believe that the Prescribed Costs as set out in Regulation 3 do present a clear and consistent basis for charging. We welcome the intention to ensure uniform charging across all public authorities.

We hope that the prescribed costs which are set out will prove to be set at a level which will ensure that most requests will cost less than £100 to deal with, and therefore, most applicants will not be charged for their request.

We would also hope that the levels set will have the effect of encouraging public authorities to improve their records management strategies, to make these more efficient, reducing the time taken to search for requested information.

4. Do you consider the approach towards aggregation of costs to be reasonable, both on Scottish Public Authorities and on those seeking information?

We are concerned that the regulations prescribe a blanket upper limit of £600 above which level an authority is not obliged to provide the information. It should be noted that an independent review of government communications, commissioned by the UK government, recommended that in complex cases involving significant issues of public interest, the £600 limit on the cost of providing information should be removed. It was suggested that the Information Commissioner could act as the judge as to whether an application involves a significant issue of public interest. We would support the introduction of such a provision in Scotland, with the appropriate authority being given to the Scottish Information Commissioner.

5. Do you consider the framework reflected in these Fees Regulations to be straightforward and simple?

   a. for applicants
   b. for public authorities to operate

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2 Regulation 5(2) of the first set of draft regulations.
3 An Independent Review of Government Communications Chairman, Bob Phillis; Presented to the Minister for the Cabinet Office, January 2004
6. Do you consider that the framework set out in the regulations will not deter applicants seeking information from Scottish public authorities?

We believe that there should be clear provision for exemption from charging fees for those on low incomes. Such a provision should ensure that everyone has true access to information, regardless of their circumstances. We note that there is some recognition of this issue in the draft guidance in paragraph 5, but we would question whether it should be more explicit.

7. The draft regulations do not introduce the provisions in the Act to aggregate costs where two or more requests are made by one person or by two or more different parties acting in concert. Should experience of operating Freedom of Information indicate that multiple requests of this nature were presenting significant difficulties, relevant provisions could be included in future revised regulations?

Do you consider this to be a reasonable approach to developing the fees regulations or do you feel that all the provision to aggregate costs should be included now in the regulations?

We agree that the approach taken is reasonable at this stage.
Dear Mr Matheson

Freedom of Information (Scotland) Act 2002. Consultation on Charging Fees

Thank you for your letter of April 20 asking for any comments we may have on the Scottish Executive’s proposals for charging under the Freedom of Information (Scotland) Act.

In general we are very happy with these proposals. They represent a positive attitude towards disclosure, which envisages that most requests will be dealt with free of charge and that where fees are charged they are likely to be modest.

We note that while charges for staff time will be subject to a statutory maximum (of £15 per hour, for which the applicant will be charged £1.50) other cost elements are not. It may not be safe to assume that authorities’ photocopying charges will necessarily be limited to 5p or 10p per sheet. Surveys of photocopying charges for planning documents sometimes reveal extremely high charges of several pounds per page. It would advisable to specify a maximum photocopying charge in the fees regulations. It may also be helpful to specify that the cost charged for storage media on which information may be provided (eg CDs) should not exceed the purchase price of the materials themselves.

We have previously mentioned our concern that there should be some mechanism to require authorities to respond to important requests involving matters of substantial public interest even if the cost exceeded £600. The present proposals provide such a mechanism. Although any one request might be capped at £600, the applicant could make a separate request for the additional information. The final paragraph of the draft guidance makes clear that the Executive is not proposing to take the powers mentioned in section 12(2)(a) of the Act to aggregate the costs of two or more related requests made by the same person and refuse them insofar as the total costs exceed £600. So long as this remains the case, our previously mentioned concern would not arise.
The only power to aggregate costs which appears in the regulations, applies only where related requests are made by different persons, and even then the authority is only permitted to aggregate the costs (and refuse the information which costs more than £600 to locate) if it publishes the information to the public at large. This would allow an authority faced with, say, 100 identical requests, to publish the information instead of dealing individually with each separate request. So long as there is no excessive charge for such a publication, that seems a perfectly sensible approach.

Yours sincerely,

Maurice Frankel
Director