JUSTICE 1 COMMITTEE

AGENDA

37th Meeting, 2004 (Session 2)

Wednesday 1 December 2004

The Committee will meet at 10.00 am in Committee Room 4.

1. **Dangerous driving and the law**: The Committee will consider correspondence relating to closed petitions PE29, PE55, PE299 and PE331 and consider whether there are any issues arising from those petitions that remain outstanding.

2. **Emergency vehicles and the law**: The Committee will consider correspondence relating to closed petition PE111.

3. **Protection from Abuse (Scotland) Act 2001**: The Committee will undertake further post-legislative scrutiny of the Act.

4. **Former Justice 1 Committee inquiry into the regulation of the legal profession and public petition PE763**: The Committee will examine what progress has been made in relation to implementing the recommendations made by the former Justice 1 Committee in its *11th Report 2002: Report on Regulation of the Legal Profession Inquiry* and how the recommendations relate to petition PE763 by the Consumers' Association.

5. **Transparency of legal fees**: The Committee will consider further correspondence relating to the transparency of legal fees and the role of the auditor of court.

6. **European Union justice and home affairs**: The Committee will consider recent progress with proposals relating to alternative dispute resolution, parental responsibility and applicable law in divorce and its approach to other recent developments in the area of European Union justice and home affairs.

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

Agenda item 1
Note by the clerk  J1/S2/04/37/1

Agenda item 2
Note by the clerk  J1/S2/04/37/2

Agenda item 3
Note by the clerk  J1/S2/04/37/3

Agenda Item 4
Note by the clerk  J1/S2/04/37/4

Agenda item 5
Note by the clerk  J1/S2/04/37/5

Agenda Item 6
Note by the clerk  J1/S2/04/37/6
Scottish Executive, Ministerial Priorities for the Dutch Presidency  J1/S2/04/37/7
Council of the European Union, 4-5 November 2004, Presidency  J1/S2/04/37/8

Conclusions
Correspondence from the Scottish Executive enclosing—  J1/S2/04/37/19
European Commission proposal for a directive on certain aspects of mediation in civil and commercial matters;
European Commission annex to the proposal;
Department for Constitutional Affairs explanatory memorandum on the proposal

Papers for information—

Scottish Executive, Post Council Report on the Justice and Home Affairs Council of EU Ministers, 19 November 2004  J1/S2/04/37/10
European Commission, Green Paper on mutual recognition of non-custodial pre-trial supervision measures  J1/S2/04/37/12
European Commission, Green Paper on Maintenance Obligations  J1/S2/04/37/14
Scottish Executive, Guidance For Integrated Children’s Services Plans 2005-2008  J1/S2/04/37/16
Correspondence from the Lord Advocate about the Constitutional Reform Bill (UK legislation)  J1/S2/04/37/17
Correspondence from the Deputy Minister for Justice about the draft Maximum Number of Judges (Scotland) Order 2004  J1/S2/04/37/18
Forthcoming meetings—
Wednesday, 8 December 2004, CR4*;
Wednesday, 15 December 2004, CR2;
Wednesday, 22 December 2004, CR1*.

*denotes a change from the venue or date indicated previously.
Justice 1 Committee

Dangerous driving and the law

Note by the Clerk

Background

Petitions

1. Four petitions on the subject of dangerous driving and the law were referred to the former Justice and Home Affair Committee (session 1) and the former Justice 1 Committee (session 1); the petitions were subsequently allocated to the current Justice 1 Committee. Those petitions were—

<table>
<thead>
<tr>
<th>Petition</th>
<th>Date of first referral</th>
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<tr>
<td>PE29</td>
<td>16 November 1999</td>
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<tr>
<td>PE55</td>
<td>18 January 2000</td>
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<tr>
<td>PE299</td>
<td>6 February 2001</td>
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<td>PE331</td>
<td>6 February 2001</td>
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Petition PE29 by Alex and Margaret Dekker, calling for action to be taken in relation to the Crown Office’s decisions and consideration in prosecuting road traffic deaths.

Petition PE55 by Ms Tricia Donegan, calling for the Parliament to conduct an investigation to establish why the full powers of the law are not enforced in all cases which involve death by dangerous driving.

Petition PE299 by Ms Tricia Donegan, calling for the Parliament to investigate whether the additional driving offences of failure to possess the correct licence, MOT or insurance documentation should be taken into consideration at court hearings concerning a fatality caused by dangerous driving.

Petition PE331 by Ms Tricia Donegan, calling for the Parliament to investigate why drivers who have made deliberate decisions when driving which cause risk to the lives of others are classed as careless drivers when prosecuted, even in the event of a fatality.

2. The approach of the former committees and of the Justice 1 Committee has been to consider the petitions together under the general heading of dangerous driving and the law and the matter was last considered at its meeting on 16 June 2004. At that meeting, the Committee noted that issues highlighted in ongoing correspondence from Scotland’s Campaign against Irresponsible Drivers (SCID) were wider than the terms of the original petitions and, therefore, to close the petitions. The Committee also agreed, however, to continue to monitor developments in respect of the devolved aspects of dangerous driving and the law.

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1 Justice 1 Committee, 24th Meeting 2004 (Session 2)
and to consider at a future meeting a paper outlining the work undertaken by the Committee and by the former Justice 1 Committee in relation to the subject matter of these petitions in order to ascertain whether any issues remain outstanding.

3. This paper summarises action taken in relation to each issue raised in relation to the petitions and includes a summary of correspondence received since the Committee’s meeting on 16 June 2004.

4. Members are reminded that the subject matter of the petitions spans areas reserved to Parliament and devolved to the Scottish Parliament. Road traffic legislation is itself reserved; how offences under such legislation are prosecuted in Scottish courts, however, is not.

Research by HM Government

Report on dangerous driving and the law

5. Through much of 2000 and 2001, consideration of the petitions was suspended pending publication of research commissioned by the former Department of Environment, Transport and the Regions; the report was published on 7 February 2002 by the former Department of Transport, Local Government and the Regions (DTLR). The recommendations contained in that report are reproduced in annex A for information.

6. A steering group, comprising representatives of relevant Government and Executive departments, including the Scottish Executive Justice Department, was subsequently established to consider the policy and legal implications of the report’s recommendations. The views of the former Justice 1 Committee were passed on to the steering group by the then Deputy First Minister and Minister for Justice.

7. In January and May 2004, correspondence from the Scottish Executive indicated that an announcement of the group’s progress and publication of a Home Office consultation on issues raised by the report were expected in the near future but that no date had been set. The correspondence also indicated that the Department of Transport was planning to publish a report on surveys of convicted dangerous and careless drivers and victims.

8. Correspondence from the Justice Department was received on 29 November 2004 and is reproduced at annex B. It provides an update on various issues relating to this matter and, in relation to the work of the Department of Transport, gives the following information—

- in relation to the announcement on progress and the consultation paper, both originally anticipated in early 2004, the response explains that concluding the review of road traffic offences involving bad driving has taken considerably longer than hoped and has “embraced a number of very difficult legal and public policy issues, all of which demand full consideration before a consultation paper can be published”. The letter goes on to state that the Home Office

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2 The report is now available on the Department for Transport’s website at http://www.dft.gov.uk/stellent/groups/dft_rdsafety/documents/page/dft_rdsafety_504603.hcsp
has assured that a consultation paper will be published at the earliest opportunity; there is, however, no indication of when that might now be;

- in relation to the report on survey results, the letter advises that the Department for Transport published *Drivers convicted of dangerous or careless driving and victims: what they think of driving offences and penalties* in May 2004 and encloses a copy for information. The report may also be viewed online at—


9. Concerns were expressed by SCID about the level of Scottish participation in the research leading to the publication of the report, *Dangerous Driving and the Law*. These concerns have been acknowledged by the Executive, which, however, maintains that experience in Scotland, whilst not given specific prominence, was an important part of the study and reassures the Committee that it is working closely with various Whitehall departments to ensure that any particular Scottish issues are addressed before decisions are taken about whether to change the law or its administration.

*Prosecution in the High Court*

10. In January 2003, the Lord Advocate responded to representations by the former Justice 1 Committee in support of the position argued by Scotland’s Campaign against Irresponsible Drivers (SCID) that all cases of death by dangerous driving should be heard in the High Court of Justiciary. He explained that, having regard to the range of sentences being imposed by courts in Scotland in relation to such offences, to the Home Office’s proposals to increase the maximum penalty from 10 to 14 years’ imprisonment and to public concern about such cases, he had decided that there should be “a presumption that offences under sections 1 and 3A of the Road Traffic Act 1988 will be

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3 **Cause death by dangerous driving**—
A person who causes the death of another person by driving a mechanically propelled vehicle dangerously on a road or other public place is guilty of an offence.

4 **Cause death by careless driving when under influence of drink or drugs**—

(1) If a person causes the death of another person by driving a mechanically propelled vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or place, and—

(a) he is, at the time when he is driving, unfit to drive through drink or drugs, or

(b) he has consumed so much alcohol that the proportion of it in his breath, blood or urine at that time exceeds the prescribed limit, or

(c) he is, within 18 hours after that time, required to provide a specimen in pursuance of section 7 of this Act, but without reasonable excuse fails to provide it,

he is guilty of an offence.

(2) For the purposes of this section a person shall be taken to be unfit to drive at any time when his ability to drive properly is impaired.

(3) Subsection (1)(b) and (c) above shall not apply in relation to a person driving a mechanically propelled vehicle other than a motor vehicle.
prosecuted in the High Court”, although prosecutions in sheriff courts will continue to take place where there are particular circumstances that appear to mitigate the offence.

11. In April 2004, correspondence from the office of the Lord Advocate indicated that, since 13 January 2003, five indictments had been served containing a charge under section 3A of the Road Traffic Act 1988 (“the 1988 Act”) and that, of those cases, four were prosecuted in the High Court leading to sentences ranging from 18 months’ to six years’ imprisonment. In the other case, the decision was taken to proceed in a sheriff court under solemn proceedings, leading to a sentence of 9 months’ imprisonment, which, according to the response, demonstrates that High Court proceedings would not have been justified in that particular case. Moreover, there were four further cases initially investigated as contraventions of section 3A but were subsequently prosecuted in the High Court either under section 1 of the 1988 Act or as culpable homicide, leading to sentences of 2 to 10 years’ imprisonment.

Review of the investigation of road deaths in Scotland

12. In June 2004, the Lord Advocate wrote to the Committee to give an update of progress in relation to the recommendations in the Review of the Investigation of Road Deaths in Scotland by the Crown Office and Procurator Fiscal Service (COPFS). He attached a detailed breakdown of progress in relation to each of the 80 recommendations and the letter and its attachments are included in annex C of this note.

13. The progress listed includes work by the COPFS itself and work by the police. The Lord Advocate advises that the recommendations relating to the police were addressed in new guidelines issued to Chief Constables in February 2002 and implemented on 1 April 2002, to assist the police in the investigation and reporting of road traffic deaths, and that regular liaison meetings continue to be held between COPFS officials and ACPOS representatives, to provide the forum for reviewing the consistent and effective operation of current procedures and practice.

14. The Lord Advocate also explains changes to the COPFS that have been introduced since the review recommendations were published in April 2001, namely—

- the restructuring of the service into a unitary structure of 11 areas matching the corresponding police force areas;
- increased staff numbers;
- the extension of the victim information and advice (VIA) service to the whole of Scotland;
- strengthening of corporate services;
- internal guidance and desk instructions taking on board the recommendations;
• revised guidance to procurators fiscal on the investigation of road traffic deaths, which is reviewed on an ongoing basis.

15. The response includes further information about the following revised guidance in preparation—

• guidance on business rules for the investigation of deaths and preparation for and conduct of public inquiries, including rules on liaison with families and procurators fiscal and the role of the VIA service;

• a comprehensive practice manual to supplement the guidance;

• documentation provided to the public.

16. The Lord Advocate further advises that existing training on handling road traffic deaths is now to form part of the new mandatory core training programme for legal and precognition staff. He also emphasises that the roll-out of the VIA service will have a major impact on the way in which the COPFS communicates with those who have lost a relative as a result of a road traffic accident.

17. The Lord Advocate acknowledges that, owing to the restructuring of the service, some of the recommendations have not been taken forward in the manner originally envisaged; he maintains, however, that the COPFS and the police “are committed to delivering the type and quality of service envisaged by the review team” and that good progress has been made in taking the recommendations forward.

18. Attached at annex B of the Lord Advocate’s response is a paper responding to specific points raised by SCID.

Statistics

19. One of the issues raised by SCID during the period since the lodging of petition PE 29 related to difficulties with the availability of statistical information on road deaths and serious injury cases. This became the subject of correspondence between the former Committee and the then Deputy First Minister and Minister for Justice and was followed up in correspondence between the new Justice 1 Committee and the new Minister for Justice.

20. The issue was referred to the SCOTSCAT Crime and Justice Committee for consideration and a consultation group, the Liaison Group on Road Accident Statistics, was set up.

21. Correspondence from the Scottish Executive in January and May 2004 gave an update in relation to this work. The SCOTSCAT committee had discussed introducing suitable offence aggravator codes and amending the Justice Department’s classification of crimes and offences in order to enable separate identification of cases involving road accident serious injuries within the statistics on offences of dangerous and careless driving. However, police force representatives felt that there would be a number of practical difficulties with that approach and suggested instead that a better option would be for the crime reference number to be included as a data item in the road
accident statistical returns, which could then be used to enable data matching with court disposal records. The feasibility of this approach was then to be discussed by the consultation group with the outcome expected towards the end of May 2004.

22. The latest position in relation to this work is given in the letter from the Justice Department reproduced at annex B. The proposal to link statistical records on road traffic accidents with court proceedings by matching common reference numbers was discussed by the consultation group in May 2004. Police force representatives advised that the feasibility of the approach depended on IT systems and reference numbering systems used by each police force and that the link could be achieved quite readily for some forces but not for others. Sample data has now been extracted for a single police force area and an analysis to match the two sets of data is currently under way; it is hoped that evaluation results will be available by the end of January 2005, subsequent to which, subject to a positive evaluation, data will be extracted and analysed for other force areas where such records can be linked electronically.

Scotland's Campaign against Irresponsible Drivers
23. A letter dated 7 September 2004 was received from Margaret Dekker, researcher and secretary for SCID and petitioner to closed petition PE29; the letter is attached at annex D. In it, Mrs Dekker states that SCID had hoped that the wider issues raised in relation to the petition, which the Committee is continuing to follow up, would have been either investigated by a reporter appointed by the Committee or the subject of a Committee inquiry. Mrs Dekker explains that SCID has undertaken research of its own into the application and administration of road traffic legislation in Scotland and that SCID’s assessment of the findings is that the system in Scotland prosecutes a very small number of irresponsible driver behaviours as “dangerous”, the remainder being prosecuted as “careless”

Review of charges brought
24. Mrs Dekker reminds the Committee of the circumstances of her son’s death and the charge of careless driving subsequently brought against the driver concerned. She explains that the family appealed to the Crown to review this charge and that the Crown subsequently upheld the charge. She goes on to remind the Committee that SCID, seeking transparency in the review process, had then requested that the former Justice 1 Committee seek information from the Crown on the procedures to review such a charge and, in particular—

- whether a visit to the locus is considered mandatory;
- whether further evidence was requested from the police or other witnesses and whether existing evidence was clarified with them;
- what the benchmarks of very bad driving were meriting contravention of section 1 of the 1988 Act (i.e. causing death by dangerous driving);
whether the same advocates or procurators fiscal depute that levelled the original charge carry out the review.

25. Mrs Dekker states that there have been no answers to these questions and that the process and procedures of a review remain unknown.

Victim statements

26. SCID had also previously raised concerns relating to the administration and application of the victims statements scheme, namely—

• what road traffic offences would be included in the Victim Statements (Prescribed Offences) (Scotland) Order 2003;

• what provision has been made for victims seriously injured as the result of a road traffic crash to participate in the victim statement scheme as stated by the Deputy Minister for Justice in evidence to the Committee.

27. On 20 May 2004, the Deputy Minister for Justice responded to the Committee in detail on the points raised by SCID. His response is attached at annex E.

28. Annex B of the Lord Advocate’s response (attached in annex C), referred to in paragraph 18 above, also addresses points raised by SCID in relation to the victim statements scheme.

Fatal accident inquiries

29. SCID had also made recommendations in respect of fatal accident inquiries (FAIs), namely that—

(a) procurators fiscal should have procedures in place whereby next-of-kin’s views on whether there should be an FAI would be recorded formally and forwarded to the Crown Office for consideration;

(b) the COPFS should acknowledge to a bereaved family that those views have been forwarded for consideration;

(c) the reasons for the final decision are explained by the COPFS to the next-of-kin.

30. Annex B of the Lord Advocate’s response (see paragraph 28) addresses these recommendations and states that the Crown Office is not aware of cases in which the next-of-kin has not been asked for their views on an FAI and “would be happy to have these investigated if SCID can provide more detail”.

Future Committee action

SCID – request for a response

31. Mrs Dekker letter also refers to the Committee’s commitment on closing the petitions to continue to monitor developments in respect of the devolved aspects of dangerous driving and the law and asks for a response on the following specific points—

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5 Official Report, Justice 1 Committee, 8 October 2003; c 70-71
• what procedures the Committee has put in place to monitor developments in relation to the devolved aspects of the 1988 Act;
• whether any further assistance will be given by the Committee in relation to further issues that SCID might raise;
• whether any further responses from the Scottish Executive, the Crown Office and the Department for Transport could be copied to SCID for information.

32. Finally, Mrs Dekker thanks the Committee for its continuing assistance and welcomes the opportunity to continue to correspond with the Committee.

Other correspondence
33. On 29 November 2004, a letter was received from a party in support of the Dekkers’ position and outlining a personal case history, involving a death caused by an accident later found in a sheriff court to have been caused by driving without due care and attention, to illustrate problems encountered in the system.

34. The letter describes problems with access to information from the COPFS. The accident occurred in July 2003 and the procurator fiscal depute initially concluded not to proceed. The family wrote to the COPFS with their concerns but received no acknowledgement; the driver was charged under section 2 of the Road Traffic Act 1988 in January 2004 and was found guilty of causing the accident, receiving a £300 fine and six penalty points.

35. The correspondent concludes—

“Victims and their families should have the right to have the deaths of their loved ones investigate thoroughly and only charges that acknowledge their deaths and allow for appropriate punishments should be brought. It is also unacceptable that the Crown Office and Procurator Fiscal Service remain unaccountable to the victims’ families and in so doing add to the distress of families at a time of intense grief.”

36. The Committee is invited to consider whether it wishes to take any further action in relation to the following matters—

Report on dangerous driving and the law
(a) The Committee could decide to examine the consultation paper from the Home Office once it is published in order to establish whether it addresses the concerns of the correspondents on this matter, particularly in relation to “downgrading of offences”;

Statistics
(b) The Committee could decide to write to the COPFS asking to be informed of the outcome of the pilot for gathering more comprehensive statistics on road deaths and serious injury cases;

SCID – transparency in the review process
(c) The Committee could write to the COPFS, seeking information on the process for reviewing charges brought. The Committee may wish to address SCID’s suggested questions directly to the COPFS;

**Next steps**

(d) The Committee should consider how it intends to monitor developments in this policy area in the future. It could—

(i) consider progress on a six monthly basis (including any correspondence from interested parties);

(ii) consider allowing a period of time to elapse to allow current activities by the Scottish Executive and the Department for Transport to come to fruition before reassessing whether any further action necessary; if so, the Committee may wish to return to consideration of the matter in 12-18 months’ time.
This review has examined in depth the current legislation and how it is being implemented. The legal principles concerned were also examined. In making recommendations that are based on sound logic, whilst recognising the need for pragmatism, it is important that any proposals can be justified as sitting correctly within a fair criminal justice system. It is worth noting, for that reason, that whilst the views of those invited to contribute were taken into account and described in this report, the final recommendations are based on all aspects of the research. The recommendations are:

- In any offence where consequences form part of the charge, then serious injury should be taken into account as well as death. The current offence of Causing Death by Dangerous Driving should therefore be extended to include severe injuries. This would recognise the suffering and impact that severe and permanent injuries have both on the victim and their family.
- A consultation exercise should be carried out to assess how the introduction of an intermediate offence, to sit between the current offences of Dangerous Driving and Careless Driving, would be received by the agencies responsible for implementing road traffic legislation and other concerned groups. This offence might be called 'Negligent Driving' and would be defined such that it includes gross carelessness or a serious failure to take sufficient care whilst driving. Behaviour which involves violation or aggression would still be classed as Dangerous Driving. This new offence would define a duty of care which, if breached, would render the driver liable to more severe penalties than the relatively minor offence of Careless Driving. If such an offence was introduced, there should also be an offence of 'Causing Death/Serious Injury by Negligent Driving.' The penalty for such offences, which would probably be an 'either way' offence (i.e. can be tried in either magistrates' court or Crown Court), would fall between the penalties for Dangerous Driving and Careless Driving and would include imprisonment, disqualification and community service.
- The research did not find sufficient argument to recommend the introduction of an offence of Causing Death by Careless Driving. It was sufficiently popular, however, amongst respondents that it should also be included in the consultation exercise. If it is decided to introduce such an offence, the range of penalties, and whether they would differ from those available for Careless Driving, should be carefully considered. It may be necessary to make clear that the purpose of the new offence would be to recognise the fact that a death has been caused but there should be a clear statement that penalties must be in proportion to culpability.
There should be a requirement that statistics are kept on the outcome of cases involving fatalities and serious injuries where these do not form part of the charge.

There is a significant amount of re-offending, suggesting that current penalties are not acting as a sufficient deterrent. As the worst offenders often disregard a disqualification, alternative penalties should be considered. Increased use of vehicle forfeiture and community service could be part of the solution.

There should be a requirement that convictions for the bad driving offences are kept by DVLA, if not on the 'live' driver record at least in an archive, in order that future monitoring of re-offending can be carried out.

The extension of the use of Fixed Penalty Notices for certain offences, with substantial fines, should be considered. These include close following (or tailgating), poor lane discipline (including undertaking) and the use of mobile phones whilst driving.

There should be a clear message about the relationship between speeding and Dangerous Driving. The research highlighted serious inconsistencies in the way in which speed is seen as a criterion in determining the charge. The proportion of offences, and accidents, in which excess speed is a factor is high. Clear guidelines would ensure that drivers who exceed the speed limit by a significant amount would face prosecution for Dangerous Driving. These guidelines would take into account the relative risk associated with speeding in different conditions.

The feasibility of specialised prosecutors should be investigated.

There should be an investigation into the funding of victim support for the victims of road traffic accidents. The pilot scheme in South Lanarkshire should be looked at as a possible model.
Thank you for your e-mail of 9 November, regarding the response that the Minister for Justice gave to the Justice 1 Committee in her correspondence dated 5 January 2004. This related to the Transport Research Laboratory’s (TRL) report, ‘Dangerous Driving and the Law’. You have now requested an update on the original information provided by the Minister and I have been asked to reply to you.

Firstly, with regards to the Steering Group formed to consider the TRL report, and the announcement on progress and consultation paper that had been expected early in 2004, I have to inform you that it has taken considerably longer than we had hoped to conclude the review of road traffic offences involving bad driving, but this has embraced a number of very difficult legal and public policy issues, all of which demand full consideration before a consultation paper can be published. These matters cannot be rushed and do take time. However, we have been assured by the Home Office that a consultation paper will be published at the earliest opportunity.

You have also requested an update on the position with regards to the feasibility of a new approach to linking statistical information on road traffic accidents with criminal charges arising from them, which was being pursued with the group responsible for collecting road accident statistics.

Possible approaches to linking statistical information on road accident injuries with that of any criminal charges arising have been considered by the SCOTSTAT Crime & Justice Committee. The option of introducing suitable Integration of Scottish Criminal Justice Information Systems (ISCJIS) offence aggravator or modifier codes to separately identify cases involving road accident injuries in the data collected on court proceedings was not judged by the Committee to be practical. Instead it was agreed to explore the possibility of linking statistical records on road traffic accidents and court proceedings by matching any reference numbers that were common to both sets of data. This proposal was discussed at the meeting of the Liaison Group on Road Accident Statistics (LGRAS) held on 25 May. Police force representatives on LGRAS advised that the feasibility of linking data in the way originally proposed depended upon the IT systems, and systems of reference numbering used by each force; that the linkage could be achieved fairly readily for some forces but not others. To progress matters, sample data on both road accidents and court proceedings have now been extracted for a single police force area, and an analysis to match up these two sets of information is currently under development. It is hoped to have evaluation results from this exercise available by the end of January 2005. Subject to a positive evaluation, data will be extracted and analysed for other force areas where such records can be linked electronically.

Finally, the Minister had referred to a subsequent report that was hoped to be issued early in 2004 and you had asked if such a report has been published.
We have now been advised that the TRL report ‘Drivers convicted of dangerous or careless driving and victims: what they think of driving offences and penalties’ was published by the Department for Transport in May 2004. With apologies for the delay in forwarding this to you, a copy of the Report is hereby enclosed.

I hope that you find this response helpful.

Yours sincerely

ADAM SINCLAIR
Justice 1 Committee

Dangerous driving and emergency service vehicles

Note by the Clerk

Background

Previous consideration
1. Petition PE111 by Mr Frank Harvey, calling for the Scottish Parliament to inquire into road traffic accidents involving police responding to emergency calls was last considered by the Justice 1 Committee at its meeting on 25 February 2004. At that meeting, the Committee agreed to write to the Minister for Justice recommending that there should be minimum standards and uniformity of training for drivers within the Scottish Fire Brigades and asking whether the maximum penalty under section 163 of the Road Traffic Act 1988 (requiring drivers to stop when requested to do so by a uniformed police constable) is considered to be a sufficient deterrent. The Committee also agreed to write to the Chief and Assistant Chief Fire Officers Association (CACFOA) requesting an update on the progress of the draft national standard for response driver training. The Committee further agreed that this action concluded its consideration of the petition.

2. The Committee returned to the matter at its meeting on 23 June 2004. At that meeting, the Committee considered correspondence arising from the closed petition and agreed to respond to the CACFOA seeking (a) its views on the guidance contained in the *Highway Code* on how the driving public should respond when an emergency vehicle is approaching en route to an incident and (b) further clarification on what training is delivered to officers temporarily promoted into posts that require response driving skills.

Correspondence

Chief and Assistant Chief Fire Officers’ Association
3. A response was received on 30 August 2004 from the Assistant Firemaster of the Fife Fire and Rescue Service and is annexed for information.

4. The response comments that the advice in the *Highway Code* is of a general nature and could be expanded to be more specific to certain types of emergency vehicle, such as advising to accelerate out of the path of slower response vehicles in order to allow them later to pass at a more convenient location. The response also notes that the code gives no guidance in relation to congested streets or motorways and suggests that video guidance, which has been produced for the emergency services, could form part of the national driving tests for all new category drivers.
5. In relation to response training for officers, the letter clarifies that there is no difference in training for officers promoted temporarily compared with those promoted permanently.

6. The response adds that further work is being undertaken by a CACFOA working group to review *A National Standard for Response Driving* in order to ensure that it reflects fully the needs of a competency-based approach to driving within the Integrated Personal Development System. The Committee was also informed of the work of this group in correspondence from the Scottish Executive, considered at the meeting on 23 June 2004.

**Action**

7. The Committee is invited to consider whether it would like to take any further action in respect of this matter.
Dear Ms McNeill

Road Traffic Accidents Involving the Emergency Services

Thank you for your letter seeking clarification on the above subject.

The advice in the Highway Code is of a general nature, and may be expanded to be more specific to certain vehicles as the advice makes no reference to the option of accelerating out of the path of the “slower” vehicles such as fire appliances and specialist vehicles, and ultimately allowing to pass at a more convenient location.

It gives no guidance on congested streets or motorways. There is video guidance available, produced for the emergency services which could form part of the national driving tests for all new category drivers. The reference to the previous campaign for Highway Code inclusion was a reference to the situation before the current guidance was included in the booklets.

With reference to the second point on response training for officers, there is no difference in the response driving input offered to officers promoted temporarily or to those promoted on a permanent basis.

Further work is being undertaken by a working group of the Chief Fire Officers Association to review the document ‘A National Standard for Response Driving’ to ensure it fully reflects the needs of a competency based approach to driving within the Integrated Personal Development System.

I trust this gives further clarification, but if you wish to discuss the matter further, please do not hesitate to contact me.

Yours sincerely

Forbes Catto
Assistant Firemaster
Background

Previous consideration
1. The Committee considered its approach to post-legislative scrutiny of the Protection from Abuse (Scotland) Act 2001 ("the Act") at its meeting on 31 March 2004. The Committee had previously received an informal briefing on a research report commissioned by the Scottish Executive, *An Evaluation of The Protection From Abuse (Scotland) Act 2001*, in advance of the report’s publication in November 2003. A SPICe briefing, circulated as paper J1/S2/04/13/8 to the Committee for its meeting on 31 March, is attached to this note for information; it 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.

2. At the meeting on 31 March, the Committee agreed to write to the Scottish Police College and the Law Society of Scotland about raising awareness of the provisions of the Act; to release a further press release about the Act, and write to the Scottish Executive to seek its views on issues noted in responses to the Committee.

Responses

The Scottish Police College
3. A response dated 25 June 2004 has been received from the Director of the Scottish Police College and is attached at annex A. In it, he advises that formal training on its family liaison officer and domestic abuse courses and operational management programme cover the Act. He goes on to add that the Police Information Network for Scotland, a computerised legal database available to all Scottish police forces, holds details of the provisions of the Act.

Law Society of Scotland
4. The Committee agreed to write to the Law Society of Scotland to ask (a) what its views are on whether steps should be taken to widen the knowledge about the provisions of the Act and (b) what steps the society is taking to promote awareness of the provisions of the Act, either through training of solicitors or by other means. In its response (attached at annex B), the society comments on the timing of the research commissioned by the Scottish Executive, being soon after the inauguration of the Act; on the length of the period of research, being only three months after the Act came into force, and on the size of the

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1 Justice 1 Committee, 13th Meeting 2004 (Session 2)
sample group, which included interviews with 18 court professionals “of whom only 6 were solicitors”.

5. The society states that it may, therefore, be “inappropriate” to make further decisions about the Act based on this research and encourages the Executive to “re-iterate the research now that the legislation has had time to settle in and practitioners and the public are likely to be more familiar with it”. The society also draws attention to one of the findings in chapter 6 of the report, on the experience of those using and operationalising the Act, that “all of the professionals knew of the Act but some were less clear about its detail which is important to note given the discretion it provides and the wider group of people who can access it”\(^2\).

6. The society goes on to inform the Committee that it is acting in conjunction with Scottish Women’s Aid to find out more about the operation of the Act and plans to publish an article in the *Journal of the Law Society of Scotland*. The article as published is attached for information at *annex C*.

7. The society also plans to include a section on the Act in its family law update course in 2005. The response concludes by commenting in favour of the Committee’s decision to undertake post-legislative scrutiny of the Act and expressing willingness to participate in this activity.

*Sheriffs’ Association*

8. The Sheriff’s Association’s response, from its Honorary Secretary, Sheriff Pamela Bowman, (attached at *annex D*) does not comment on the operation of the Act but does address certain other matters raised by the Committee—

- In relation to the Association of Scottish Police Superintendents’ perception that some sheriffs use the Act only in cases involving a physical assault, Sheriff Bowman points out that it is not for sheriffs to elect to use the Act but that an application is made under the Act by a solicitor, on behalf of a client, for the attachment of a power of arrest to an interdict. She goes on to explain that, in each case, it is for the applicant to place material before the court to persuade the sheriff that attaching the power is necessary to protect the applicant from a risk of abuse in breach of the interdict and that whether the sheriff is prepared to conclude in a particular case that there is a risk of abuse in breach of the interdict is a matter of judicial discretion. She also explains that “abuse” is defined under section 7 of the Act and includes violence, harassment, threatening conduct and any other conduct giving rise, or likely to give rise, to physical or mental injury, fear, alarm or distress.

\(^2\) Cavanagh, K et al, *An Evaluation of The Protection From Abuse (Scotland) Act 2001*; page 71, para 6.95
The association also comments on the distinction between a power of arrest under the Matrimonial Homes (Family Protection) (Scotland) Act 1981 and the Protection from Abuse (Scotland) Act 2001, insofar as a power of arrest under the former is specific to actions between spouses whereas the latter is specific to actions parties that are not married.

In relation to concerns regarding access to legal aid, the association informs the Committee that an abused person would include a claim addressed to the court but states that any problems with obtaining legal aid should be followed up with the Scottish Legal Aid Board. It is added, however, that breach of an interdict to which a power of arrest has been attached is a criminal matter and therefore legal aid is not necessary for the abused person, who has the assistance of the police and the procurator fiscal. If there is only an interdict in place, any action for breach of interdict would require to be raised in a civil court and legal aid could be applied for by both parties.

Scottish Legal Aid Board

9. The response from the Scottish Legal Aid Board’s Chief Executive (attached at annex E) starts by stating that the board has “no evidence of the existence of particular difficulties in relation to applications for legal aid” under the Act and that its powers and responsibility to administer the legal aid system are set out under legislation. He explains that all applications for civil legal aid are made through a solicitor and that each such application has to meet three tests—

- financial eligibility;
- whether there is a plausible case to put to the court;
- whether it is reasonable to use public funds to support the case.

10. He goes on to give examples of the types of issue that may be taken into account when determining whether it is reasonable to use public funds—

- the prospects for the case;
- whether the appropriate remedy is being sought;
- whether the applicant has fully considered ways of sorting out the particular problem other than by litigation.

11. The response also comments that the board has introduced a new civil application form, which gives the solicitor acting on behalf of the client an opportunity to make comments on the merits of the case in terms both of its plausibility and of the reasonableness of using public funds and states that such comments are always taken into consideration.

12. The response also draws the Committee’s attention to revised civil legal aid guidelines that it published in October 2003, which include a specific section dealing with applications for civil legal aid for interdict, power of arrest and non-harassment orders.
13. The response refers to some of the comments made to Scottish Women’s Aid to the effect that the board sometimes suggests that the issues involved should be dealt with by the police rather than by civil interdict. The board responds that this is not a strictly accurate view of the position and explains how the involvement or otherwise of the police may impact on the reasonableness test. The response emphasises that it is not the case that the involvement or non-involvement of the police is a critical factor; rather, solicitors must explain either why the police were not involved in a case or why, if they were involved, it is still considered necessary to obtain a civil interdict or other such remedy. An explanation of how financial eligibility is determined is also given.

14. The response goes on to explain that the board has been monitoring the number of applications received for advice and assistance and civil legal aid in relation to proceedings under the Act as the primary matter. In 2003-04, the board received 65 intimations of grants by solicitors of advice and assistance and 14 applications for civil legal aid, of which 10 were granted and four refused, of which three were on the merits of the applications and one was on the basis of financial eligibility. The response adds that it is likely that there were many other applications where an order sought under the Act formed part of the proceedings but was not the primary matter.

15. In relation to solicitors’ comments to Scottish Women’s Aid that it is sometimes difficult to obtain legal aid to pursue breach of interdict proceedings, the board states that it is not aware that such applications cause any particular difficulty and comments that breach of interdict proceedings can cover many more matters than physical or verbal abuse and that the total number of applications for such breaches is very modest. It is also stated that the vast majority of applications in relation to abuse cases are dealt with pursuant to the obtaining of an interim order and, therefore, legal aid may be obtained by way of an extension to the principle legal aid; as such, the proceedings in relation to the breach of interdict is not the primary matter giving rise to the application and, consequently, are not recorded on the system.

16. The board goes on to explain that applicants and their solicitors may appeal a decision of the board by way of judicial review but that it has not seen any such reviews in respect of decisions taken in applications involving interdicts or breach of interdict.

17. Finally, the board explains that it set up an independent checking and quality unit in 2000-01, whose role includes checking that decisions on civil legal aid applications are made in accordance with the guidelines and are accurate and consistent. It is stated that the unit’s work has not shown any difficulty in relation to the handling of interdict or related applications.
Scottish Executive

18. The Minister for Justice’s response is attached at annex F and addresses each point raised by the Committee in turn—

- **Public awareness**: The Executive wrote to key bodies in February 2003 in order to remind them of all legal provisions available in respect of protection from abuse and followed up with a further reminder to over 180 organisations in August 2004. The minister’s letter also refers to the Executive’s involvement in a major publicity campaign aimed at tackling domestic abuse and commits to considering how certain strands of the campaign might be used to raise awareness of the legislation. The response also refers to the Executive’s leaflet, *Domestic Abuse – There is no excuse*, which highlights the legislation available and is widely distributed to hospitals, health centres, libraries, citizens’ advice bureaux and the police. There is also an Executive-supported website containing information about the law.

- **Training for professionals**: The minister refers to modules on abuse included in Scottish Police College probationer training, reinforced by supplementary guidance available locally within police forces. The minister also draws attention to a special interest seminar held earlier this year at the college in order to raise wider managerial awareness of the issues involved in tackling stalking and harassment.

- **Access to legal aid**: The minister states that she is not aware of any legal aid problems related directly to the Act and that the rules on eligibility apply equally to everyone. She adds that the Executive has no plans to create special rules for proceedings under the Act nor for domestic abuse more generally. She then refers to changes that have been made to the way in which legal aid operates, which, she explains, will assist victims of domestic abuse.

- **Prosecuting breached protection orders**: the minister acknowledges the difficulties that the problems identified by the Committee, including breach of interdict not being a crime, can cause and accepts that it may be necessary to examine the operation of the Act in the future to determine what further steps the Executive might take to protect and support victims of abuse. She reminds the Committee that the evaluation of the Act took place at a very early stage following commencement and is, therefore, more akin to a scoping exercise; she adds that, whilst it currently has no plans to do so, the Executive would be willing to consider a further evaluation “at a suitable point in the future”.

Action

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

- noting the various responses and agreeing to take no further action until a longer period of time since commencement of the Act has elapsed, at which point it could consider whether to seek further written or oral evidence about the operation of the Act;

- writing to the Law Society of Scotland and Scottish Women’s Aid asking to be kept informed of responses to the recent article in the *Journal of the Law Society of Scotland*;

- writing to the Scottish Executive in support of further research into the effectiveness of the Act being conducted, once it has been in operation for a longer period of time;

- pursuing the option of issuing a press release in relation to its post-legislative scrutiny of the Act or suggesting that the Scottish Executive should issue a press release highlighting the legislation, which could be done to correspond with the anniversary of the day on which the Act came into force (6 February 2002).
Pauline McNeill  
Convener  
Justice 1 Committee  
3.11 CC  
The Scottish Parliament  
EDINBURGH  
EH99 1SP

Dear Convener,

Protection from Abuse (Scotland) Act 2001

Thank you for your letter regarding the above subject in which you enquire about the steps taken to educate police officers about the provisions of the Act.

Inputs on the Act are given to officers attending both the Family Liaison Officer Training Course and the Domestic Abuse Course run by our Crime Management Division.

Officers, normally first line supervisors, attending the Operational Management Programme provided by our Leadership and Management Division, are given an overview of the Act as part of an input on Domestic Abuse presented in conjunction with the Family Law Association.

In addition to this formal training, the Police Information Network for Scotland (PINS), the computerised legal database available on line to all Scottish Police Forces, holds detail on the provisions of the Act.

I trust this information is of assistance to the Committee.

Yours sincerely,

[Signature]

Director
Dear Mr. Reilly,

PROTECTION FROM ABUSE (SCOTLAND) ACT 2001

Further to your letter of 29th June and Pauline McNell’s letter of 20th May, I can confirm that the Society’s Family Law Sub-Committee had also considered the Evaluation of the Protection from Abuse (Scotland) Act 2001 which was issued by the Scottish Executive as Research Findings No. 41/2003.

I think it is worth setting this research study in context. As the researchers from the Universities of Glasgow and Strathclyde acknowledge, in paragraph 2.1 of the research, the study “coming so soon after the inauguration of the Act would find minimal use of the legislation itself” and that the study should be seen as a “scoping exercise” with a more comprehensive evaluation to occur once the Act has had more time to be in use.

The research was conducted on the basis of data gathered from four Scottish court areas – Glasgow, Stonehaven, Dumbarton and Stirling; and covered two time periods – one before the Act came into force and the other only relates to four months subsequent to the Act coming into force on 6th February 2002. The effective period of the research was further reduced by the fact that the Act of Sederunt (Ordinary Cause Rules) Amendment Rule 2002, which provided the procedure for the operation of the Act, only came into effect on 8th March 2002. The study concluded in May 2002. Therefore, the effective period of the research was less than three months.

The research involved a very small sample group including interviews with 18 court professionals, of whom only 6 were solicitors.

It may be inappropriate, therefore, to make further decisions about the Act based on this research. Consequently, the Society would encourage the Executive to reiterate the research now that the legislation has had time to settle in and practitioners and the public are likely to be more familiar with it, so as to get a better picture of the uptake of the use of the Act. In any event, the research findings came to the conclusion, at paragraph 6.95, that “the new Act was seen to be important in terms of increasing access to powers of arrest. All of the professionals knew of the Act but some were less clear about its detail which is important to note given the discretion it provides and the wider group of people who can access it.”
The Society has been in contact with Scottish Women’s Aid and is co-operating with that organisation in finding out more about the operation of the Act. The Society will also be publishing an article in a forthcoming of the Journal of the Law Society of Scotland prepared by the Convener of the Society’s Family Law Sub-Committee about the Act. I enclose a copy of the draft article for your information.

Next year it is intended that the Society’s Family Law Update course will contain a section on the Act. There were earlier discussions about whether or not a section should be included in a forthcoming Specialist Family Law Practitioners’ Conference which will be taking place this November but, in all the circumstances, it was considered more appropriate for it to be placed in the more general Update course in the Spring.

The Society believes that the Justice 1 Committee’s decision to undertake post-legislative evaluation of the Act is a good idea and would be willing to participate in that evaluation so as to enhance its effectiveness and provide an accurate picture of the operation of this very valuable legislation.

Yours sincerely,

Michael P. Clancy
Director

Enc.
For the client who comes into the office with a tale of being on the receiving end of frightening or aggressive behaviour, whether from a spouse, partner or someone outside the immediate family, the obvious option is the protection of an interdict. An anti-molestation interdict offers limited protection, but the addition of a power of arrest can be a helpful additional layer of protection. Until recently, the added protection of a power of arrest was only available for those who were being abused by a spouse or cohabitee. In November 2001 the Protection from Abuse (Scotland) Act (which had started life as the first “Committee Bill” of the Scottish Parliament’s Justice 1 Committee) quietly became part of Scots law. There was little fanfare, and while specialist family law practitioners are well aware of the change, those who do less work in this area may not be so familiar with the options provided by this valuable legislation.

Under section 14(1) of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 a spouse was able to apply to the court for a matrimonial interdict, and if circumstances warranted, for the attachment of a power of arrest under section 15. The major flaw of the Act was that the power of arrest fell when the parties divorced. All too often the solicitor would have to advise a client that while the sheriff had granted the power of arrest, it would only last a few weeks until the divorce was granted. Many clients may have wondered what on earth the point of it was. The limitation of the granting of powers of arrest to anti-molestation interdicts between spouses or cohabitees was another major disadvantage.

Section 1(2) of the new statute improves matters greatly. A power of arrest is available, where circumstances warrant, for anyone who is applying for an anti-molestation interdict. The parties do not have to be spouses or cohabitees. The procedure is very much the same as the older law. A solicitor should still apply for the attachment of the power of arrest in the same way, although it is necessary to narrate in the crave that it is a power of arrest in terms of the relevant section of the Act. A standard crave is likely to be along these lines: “and to grant interim interdict and to attach a power of arrest to the said interdict and interim interdict in terms of section 1(2) of the Protection from Abuse (Scotland) Act 2001 and that for a period of three years from the date of the attachment of the said power of arrest”.

The Act has been embraced in the Borders with what the sheriff clerk there describes as “considerable enthusiasm”, and it would be helpful to know more about the situation across Scotland. It should be noted that not all
practitioners make it clear in the writ which Act they are relying on. The writ should specify to the court that the 2001 Act is being applied.

Section 1(1) reads: “A person who is applying for, or who has obtained, an interdict for the purpose of protection against abuse may apply to the court for a power of arrest to be attached to the interdict under this Act.” The Act describes the test at section 1(2)(c) very simply as “necessary to protect the applicant from a risk of abuse in breach of the interdict”. An essential difference from the old law is that the new legislation has reversed the burden from the defender to the pursuer. Under the 1981 Act it was required that the defender should give sufficient cause why the power of arrest should not be attached. The 2001 Act requires the pursuer to show that a power of arrest is necessary.

The power of arrest can only be attached if the interdicted person has been given an opportunity to be heard by, or represented before the court. As with the 1981 Act, a power of arrest under the 2001 Act is not effective until it has been served on the chief constable. It is important to note that it is not possible to apply for a power of arrest under the 1981 Act and the 2001 Act in the same writ. Section 2(3) of the Act allows for the power of arrest to be extended if it is necessary to protect the applicant from the risk of abuse, but again only after the defender has had the opportunity of addressing or being represented in court. The extension is not effective until served, and the court must “specify a new date of expiry for the power, being a date not later than three years after the date when the extension is granted” (section 2(4)).

If the application for interdict and power of arrest is part of a divorce action, it is essential at decree stage to ask the court to continue the power of arrest for a period of three years in terms of the Act. This is in effect a new interdict and power of arrest, which then must be served again on the defender and the chief constable.

The 2001 Act makes provision for the lifting of the power of arrest. The language of the statute is rather strongly worded. Section 2(7) says that “the power of arrest must [my italics] be recalled if (a) the person who obtained it applies for recall, or (b)… the power is no longer necessary to protect that person from a risk of abuse in breach of the interdict”. There is at least one recent case of recall of a power of arrest where the pursuer was abusing the power of arrest. The procedure is to minute under the original action, to vary the interlocutor. It would be wise, in the case of an applicant who was legally aided in the original action, to check with SLAB as to whether a new legal aid application is necessary, or whether it can be done under the original certificate.

There is no doubt that the 2001 power of arrest is more useful than that under the 1981 Act, and has a much wider application. The Act does specify in some detail in section 4 the powers and duties of the police, and in section 5 the court appearance of any person detained under the Act. If someone is arrested under the power of arrest, and the procurator fiscal decides that no criminal proceedings are to be brought, the matter does not end there. The detained person must appear at court not later than the first court day after
the arrest. The procurator fiscal must narrate the particulars, facts and circumstances, and any other relevant information that he or she may have, and request the court to consider whether “on the information presented, a further period of detention is justified” (section 5(3)(a)-(e)). The sheriff can order a further period of detention of up to two days.

If you have had recent experience of the operation of the Protection from Abuse (Scotland) Act 2001, please contact Michael P Clancy, Director, Law Reform at the Society either in writing to 26 Drumsheugh Gardens, Edinburgh EH3 7YR (Legal Post: LP – 1, Edinburgh 1) or by email to moiragoll@lawscot.org.uk.

Morag Driscoll

Council Member, Convener of Law Reform Committee and Convener of Family Law Subcommittee
Dear Ms McNeill

PROTECTION FROM ABUSE (SCOTLAND) ACT 2001

I thank you for your letter of 20 May 2004 addressed to Sheriff Matthews. Please note that I have now taken over as Secretary of the Sheriffs' Association.

The provisions of the Protection from Abuse (Scotland) Act 2001 are now being regularly used in the Sheriff Court. The Sheriffs' Association have no comments of their own to make on the operation of the Act, but we hope we can assist in connection with certain matters raised in the documents which you sent to us.

We note that you wish to raise the perceived perception of the Association of the Scottish Police Superintendents that some sheriffs use the 2001 Act only in cases in which there has been a physical assault.

We would point out that it is not for sheriffs to elect to use the 2001 Act. An application is made by a solicitor on behalf of a client for the attachment of a power of arrest to an interdict. That application is based on Section 1 of the Protection of Abuse (Scotland) Act 2001. That section provides:

"1 A person who is applying for, or who has obtained, an interdict for the purpose of protection against abuse may apply to the court for a power of arrest to be attached to the interdict under this Act.

2 The court must, on such application, attach a power of arrest to the interdict if satisfied that –

(a) the interdicted person has been given an opportunity to be heard by, or represented before, the court;

(b) attaching the power of arrest would not result in the interdicted person being subject, in relation to the interdict, to a power of arrest under both this Act and the Matrimonial Homes (Family Protection) (Scotland) Act 1981; and
(c) the power of arrest is necessary to protect the applicant from a risk of abuse in breach of the interdict.

3. The court, on attaching a power of arrest, must specify a date of expiry for the power, being a date not later than three years after the date when the power is attached”.

In each case it is for the party making the application to place material before the court to persuade the sheriff to conclude that attaching the power of arrest is necessary to protect the applicant from a risk of abuse in breach of the interdict. “Abuse” in terms of Section 7 of the 2001 Act, includes violence, harassment, threatening conduct, and any other conduct giving rise, or likely to give rise, to physical or mental injury, fear, alarm or distress”. That section further provides that “conduct” includes (a) speech and (b) presence in a specified place or area.

Whether the sheriff, on the basis of the material available, is prepared to conclude in a particular case that there is a risk of abuse in breach of the interdict is a matter for the sheriff in the exercise of his or her judicial discretion.

We would further comment on the distinction between a power of arrest under the Matrimonial Homes (Family Protection) (Scotland) Act 1981 and the Protection from Abuse (Scotland) Act 2001. The former relates only to actions between spouses. A power of arrest can be attached in terms of the Protection from Abuse (Scotland) Act 2001 when in a situation where the parties to the action are not married. Section 1(2)(b) of the 2001 Act recognises this distinction in that a power of arrest cannot be granted under the 2001 Act if one is already in existence under the Matrimonial Homes (Family Protection) (Scotland) Act 1981.

We note that concern has been raised by Scottish Women’s Aid regarding legal aid when an interdict has been breached. Normally, when applying for an interdict, an abused person would include a crave for the attaching of a power of arrest, either under the 2001 Act or under the Matrimonial Homes (Family Protection) (Scotland) Act 1981. If there is perceived to be a problem with obtaining legal aid at this stage, this should be taken up with the Scottish Legal Aid Board.

It is important to note that breach of an interdict to which a power of arrest has been attached is a criminal process and legal aid is not necessary for the abused person. In terms of Section 4(1) of the 2001 Act:

“Where a power of arrest attached to an interdict has effect a constable may arrest the interdicted person without warrant if the constable—
(a) has reasonable cause for suspecting that person of being in breach of the interdict, and
(b) considers that there would, if that person were not arrested, be a risk of abuse or further abuse by that person in breach of the interdict”.

In terms of Section 4(6) “when a person has been arrested under this section, the facts and circumstances giving rise to their arrest must be reported to the Procurator Fiscal as soon as practicable.

The Procurator Fiscal may then prosecute forthwith. Alternatively, in terms of Section 5(1) “if the Procurator Fiscal decides that no criminal proceedings are to be taken in respect of the facts and circumstances giving rise to the arrest, the detained person must wherever practicable be brought before the sheriff...not later than in the course of the first day after the arrest, each day not being a Saturday, a Sunday or court holiday for that court”. The Procurator Fiscal must then explain the facts to the court which may order detention for a further two days.

Legal aid is not necessary for the abused person in either of these processes as that person has the assistance first of the police and then of the Procurator Fiscal. They are both criminal procedures following the exercising of the power of arrest. The alleged abuser would be entitled to legal representation under the duty solicitor scheme when that person appeared in court.

These proceedings are only competent where a power of arrest has been attached to an interdict. If there is only an interdict in place, any action for breach of interdict would require to be raised in a civil court. In the normal case legal aid could be applied for by both parties. This has always been the case. If there are concerns about delay in the granting of legal aid for such cases, these should be taken up with the Scottish Legal Aid Board.

We note the steps taken by the Committee in respect of the perceived lack of knowledge about the provisions of the Act identified in evidence and in research.

We hope these comments are of assistance.

Yours sincerely

[Signature]

SHERIFF PAMELA BOWMAN
Hon Secretary
Sheriffs’ Association
Dear Mr Reilly,

PROTECTION FROM ABUSE (SCOTLAND) ACT 2001

I refer to your letter of 29 June 2004 asking for comments on matters raised in the Justice 1 Committee's post-legislative scrutiny of the Protection from Abuse (Scotland) Act 2001.

The Board has no evidence of the existence of particular difficulties in relation to applications for legal aid seeking to utilise the provisions of the Protection from Abuse (Scotland) Act 2001.

I note that most of those responding to the Scottish Women's Aid letter reflected this experience.

In considering legal aid applications it should be noted that our powers and responsibility to administer the legal aid system are set out under legislation. While we are reliant upon the Scottish Executive and ultimately the Scottish Parliament to take forward any changes to the system under which we operate, we take a proactive approach where possible to ensure that information is made available to applicants and their solicitors to allow them to operate the civil legal aid system effectively.

All applications for civil legal aid are made through a solicitor and each application for civil legal aid has to meet three tests. These tests are:

- Financial eligibility.
- An assessment of the merits of the case - that is whether there is a plausible case to put to the court.
- Whether it is reasonable to use public funds to support the case.

In assessing the reasonableness of providing public funding for a case issues that may be taken into account will include:

- The prospects for the case.
- Whether the appropriate remedy is being sought.
- Whether the applicant has fully considered other ways of sorting out the particular problem other than by way of litigation.
This list is not definitive but merely illustrative of the types of issues that the Board has to take into account in determining whether it is reasonable to make legal aid available.

The Board introduced a new civil application form to be completed by the solicitor acting on behalf of the client. This form provides solicitors with the opportunity to comment on the merits of the case in relation to both the question of the plausible case and whether it is reasonable to make legal aid available. When solicitors apply for civil legal aid it is in their clients' interests if they take full advantage of this opportunity to set out the arguments in support of the civil legal aid application. We always take such comments into consideration.

To assist members of staff at the Board and the profession as a whole, we published revised civil legal aid merits guidelines in October 2003. These guidelines set out the information we expect to see in support of various types of legal aid applications and detail our particular approach to the tests of plausible case and reasonableness in each of these case types. The guidelines include a specific section dealing with applications for civil legal aid for interdict, power of arrest and non-harassment orders. I have enclosed a copy for your information. The relevant section covering interdict and other related orders is section C. Guidelines are given in relation to:

- applications for legal aid both to pursue and to defend non matrimonial interdicts (excluding non molestation orders),
- applications to pursue and defend matrimonial interdicts,
- applications to pursue and defend breach of interim interdicts,
- applications to pursue and defend power of arrest orders,
- applications to pursue and defend non harassment orders and
- applications to revoke or vary existing non harassment orders.

This guidance is followed by staff members in assessing applications for civil legal aid. It sets out the Board’s expectations in relation to such applications.

Some of those responding to Scottish Women’s Aid made reference to the difficulty in obtaining applications for interdict and, in particular, noted that the Board sometimes takes an approach suggesting that the issues involved should be dealt with by the police rather than by way of civil interdict. This is not a strictly accurate representation of the Board’s position. Our guidance on such matters indicates that when assessing whether it is reasonable to make legal aid available in a particular case, the involvement of the police in a dispute will be considered. In particular, if an applicant for civil legal aid did not involve the police but wishes to obtain a civil interdict then reasons should be provided as to why the police were not involved. If the applicant considers that the matter was too minor with which to bother the police then there may need to be a strong argument put forward to show that it would be reasonable for public funds to be made available to finance an action of interdict. If, on the other hand, the police were involved and took no action then an applicant for civil legal aid should address why legal aid is needed for a civil action if the police took the view that the matter was minor in nature. In situations where criminal proceedings have been taken then the need for a civil remedy in addition to the criminal proceedings needs to be explained.

There is no suggestion in the guidelines however that the involvement or non involvement of the police is critical to whether or not civil legal aid will be made available in all cases. What we ask is that solicitors tell us either why the police were not involved or why if they were involved, it is still considered necessary to obtain a civil interdict or other such remedy. This information helps inform our decision on one of the statutory tests namely, that it is reasonable that public funds be made available for the action.
We are dependant on information provided by solicitors to assess any application and so it is in all parties interests that full details be given.

Applicants for civil legal aid also need to satisfy the Board that they are financially eligible. Financial eligibility limits are set each year by the Scottish Parliament and our legislation contains guidance on the matters that need to be taken into or left out of account in assessing such eligibility. We have to assess whether an individual is eligible financially both in relation to their disposable income and disposable capital.

In assessing disposable income the Board is obliged to take into account all income that an individual is likely to receive over the twelve month period following submission of the legal aid application. From this income we deduct all reasonable expenditure. Reasonable expenditure will vary from case to case depending on individual circumstances but will generally include matters such as income tax, national insurance contributions, housing costs, child care costs, council tax payments, trade union subscriptions and any other expenditure that we regard as appropriate in each individual case. We deduct the total allowable expenditure from the total income to arrive at the disposable income figure. If this figure is less than the lower disposable income figure (currently set at £2,902), civil legal aid will be made available if the merits tests is also met without any payment of a contribution from income. If an individual’s disposable income exceeds the current upper limit of £9,475 then they are excluded from eligibility for civil legal aid. If the disposable income figure falls within these two limits then the individual will be eligible for civil legal aid subject to payment of a contribution which may be up to one third of the disposable income they have in excess of £2,902.

In determining disposable capital, we take into account all the capital that an individual has available to them. Certain items are disregarded including the capital value of an individual’s only or main residence. If the disposable capital that an individual has is less than £6,271 then they are entitled to civil legal aid without any payment of a contribution from capital. If it is in excess of £10,455 then they may not be eligible for civil legal aid but this will depend on other factors such as whether the case is one that can be met from the capital an individual has. Unlike the upper limit for disposable income, the upper limit for disposable capital does not automatically mean that an individual is not eligible for civil legal aid but careful consideration still needs to be given to whether it is reasonable to make legal aid available to someone who has capital in excess of the current upper limit. A contribution from capital will usually consist of all capital above the £6,271 limit.

Where applicants or their solicitors consider that the case will cost less than the assessed contribution they can ask us to consider restricting the contribution to the case estimate. In cases where the total cost of the case is likely to be modest it is hoped that this will encourage people to use legal aid where previously the size of the contribution may have been viewed as off-putting.

We have been monitoring the number of applications received for both advice and assistance and civil legal aid where the primary matter for which the advice or representation is sought concerns proceedings under the Protection from Abuse (Scotland) Act 2001. In the year 2003/2004 we received 65 intimations of grants by solicitors of advice and assistance. In the same year we received 14 applications for civil legal aid of which 10 were granted and 4 refused. Of these refusals 3 related to the merits of the applications while one was refused as the applicant was not financially eligible. It is of course likely that there have been many other applications where an order sought under the 2001 Act formed part of the proceedings but was not the primary matter giving rise to either advice and assistance or a legal aid application. We record only the primary
matter for which the advice or representation is given. In the same period we received 2199
interdict applications of which 1419 were granted and 780 were refused. Not all of these
interdicts will concern abuse cases however as they may relate to matters such as encroachment
on another individual’s property or an interdict against removal of children from a particular
jurisdiction. Of those applications that were refused only 26 were because applicants were not
financially eligible.

You refer to solicitors’ comments that it is sometimes difficult to obtain legal aid to pursue
breach of interdict proceedings. The Board is not aware that these applications cause any
particular difficulty. We have included guidance on our approach to such applications in our
merits guidelines. In the year 2003/2004 we received 31 applications for civil legal aid for
breach of interdict proceedings of which 14 were granted, 11 were refused and five were
outstanding at the year end. Again, breach of interdict proceedings can cover many more matters
than physical or verbal abuse including encroachment on another individual’s property or an
interdict against removal of children from a particular jurisdiction. The total number of
applications specifically for breach of interdict proceedings is very modest. The vast majority of
applications for legal aid to raise breach of interdict proceedings in relation to abuse cases are
dealt with after an interim order has been obtained but before the court has reached a final
decision on the interdict or on a harassment order. In cases where there is no final court
interlocutor we allow solicitors to raise the breach of interdict proceedings by way of an
extension to the principal legal aid application rather than asking them to submit an entirely fresh
application. Given this, breach of interdict proceedings may form part of the proceedings an
individual has legal aid for but they are not the primary matter giving rise to the legal aid
application and as such, are not recorded on our system.

Where applicant’s and their solicitors consider that we have erred in our decision it is open to
them to seek a judicial review of the decision. We have not, however, seen any judicial reviews
concerning decisions taken in applications involving interdicts or breach of interdict.

The Board also has an independent checking and quality unit set up during 2000/2001. Amongst
other things this unit checks the decisions taken in relation to civil legal aid applications are
made in accordance with our guidelines and are accurate and consistent. The work of this unit
has not shown any difficulty in relation to our handling of interdict or related applications.

I hope that this information is of assistance to the Committee in its post legislative scrutiny of the
2001 Act.

Yours sincerely

Lindsay Montgomery
Chief Executive
Dear Pauline

Protection from Abuse (Scotland) Act 2001

Thank you for your letter of 29 June 2004 about the Committee’s post-legislative scrutiny of the Protection from Abuse (Scotland) Act 2001.

While a relatively short time has passed since the Act came into operation, I am pleased to note that the evaluation recognises that this new legislation is being utilised, that it has been successful in increasing access to powers of arrest and that it is offering greater protection to the victims of domestic abuse. Perhaps once more time has passed a more thorough assessment of the Act’s effectiveness can be carried out using the existing evaluation as its basis. In the meantime, however, you refer in your letter to several specific points that you wish to highlight to the Executive, and I respond to these below.

The first issue that you raise concerns public awareness of the Act. My officials wrote to key bodies on 10 February 2003 to remind them of all of the legal provisions available to protect against abuse. On 27 August 2004, they wrote to over 180 organisations across Scotland with a further reminder. I note that the Committee has sought comments on the Act from the Sheriffs Association, The Law Society of Scotland, the Scottish Legal Aid Board (SLAB) and the Scottish Police College. The responses from these bodies should collectively help to provide a clearer perspective on how awareness of the Act has changed in the period since commencement.

You will also be aware that the Executive is already involved in a major publicity campaign aimed at tackling domestic abuse. The most recognised strand of the campaign is the television advert that runs from Boxing Day until 31 January each year. While it would not be appropriate to publicise the available legislation in this way, we will consider how we can use other strands of the campaign to raise awareness of the legislative environment.
The Executive also produces a leaflet called ‘Domestic Abuse – There is no excuse’. The leaflet highlights the legislative protection available, including the Protection from Abuse (Scotland) Act 2001, and suggests other points of contact for further information. We distribute the leaflet widely across Scotland, to hospitals, health centres, libraries, Citizens Advice Bureaux and to the police. The Executive supported website http://www.domesticabuse.co.uk - which forms part of the publicity campaign - contains information about the law and directs users to other sources of advice and support.

The Committee also raised the issue of the training available to professionals involved with victims and perpetrators of domestic abuse. The Scottish Police College, the Law Society of Scotland, and the Sheriffs’ Association will be able to report to you any steps they have taken to raise awareness of the Act within their own organisations. However, I understand that the probationer training programme at the Scottish Police College includes modules on abuse. This training is reinforced by supplementary guidance available currently at a local level within forces. You will also be interested to hear that a special interest seminar took place earlier this year at the Scottish Police College to raise wider managerial awareness of the issues involved in tackling stalking and harassment.

You also mentioned the issue of access to legal aid. At this time, I am not aware of any legal aid problems related directly to the 2001 Act. The rules on eligibility for advice and assistance and for civil legal aid apply equally to everyone seeking those services. The Executive has no plans to create special rules for proceedings under the 2001 Act or for domestic abuse more generally. However, we have already made significant changes to the way in which legal aid operates which will assist victims of domestic abuse.

We now disregard state benefits, except Statutory Sick Pay, in assessing financial eligibility for advice and assistance. We have committed to do the same for civil legal aid when funds permit. In addition, we have increased the period over which contributions for civil legal aid can be paid and eased the operation of emergency legal aid so that clients do not have to pay their contribution in advance to their solicitor. Instead, they undertake to pay this directly to SLAB over the agreed period.

Finally, you also asked about the problems that can arise in prosecuting breached protection orders, including the fact that breach of interdict is not a crime. I am aware of the difficulties that this can cause. It may be necessary to examine the operation of the 2001 Act in the future to determine what further steps we might take to protect and support the victims of abuse. You will appreciate that the evaluation of the Act took place at a very early stage following commencement and only covered a small number of cases. The research notes that it is more accurate to describe the evaluation as a ‘scoping’ exercise and that further longitudinal evaluation of the 2001 Act “would more fully inform the Scottish Parliament with regard to its use and effectiveness.” Although the Executive have no plans at present for such an evaluation, we would be willing to consider a further evaluation at a suitable point in the future.

I hope that you find this helpful.

Best wishes,

CATHY JAMIESON
Justice 1 Committee

Regulation of the legal profession and PE763 by the Consumers’ Association

Note by the Clerk

Background

Meeting on 23 February
1. At its meeting on 23 February 2004, the Committee considered the recommendations made by the former Justice 1 Committee in its 11th Report 2002: Report on Regulation of the Legal Profession Inquiry and updates received from the Scottish Legal Services Ombudsman and the Law Society of Scotland.

2. The Committee agreed not to re-open the former inquiry but to monitor whether the recommendations have been implemented; to write to the Minister for Justice seeking an update on the Scottish Executive’s response to the recommendations and to write to the Faculty of Advocates for an update on progress.

3. In its response, the Executive stated that it has decided to develop an agenda of reform to improve complaints handling by the legal profession in Scotland, drawing on the recommendations made by the former Justice 1 Committee. It stated that it intends to hold a public consultation on policy proposals which will represent the Executive’s position on the recommendations of the former Justice 1 Committee. The Executive also confirmed that it intends to carry out research on regulation and competition in the legal services market in Scotland.

4. The Executive told the Committee that it is considering developments at Whitehall and Brussels. The Clementi Review was set up by the Lord Chancellor last year. Its remit is to consider what regulatory framework would best promote competition, innovation and the public and consumer interest in an efficient, effective and independent legal sector. A consultation paper on matters arising from that review was published on 8 March 2004. Sir Clementi is due to publish his recommendations by the end of the year. The European Commission has been studying the impact of professional regulation and has published a report which requires member states to review professional rules and regulations and identify any that could be seen as hindering effective competition within the profession.

Meeting on 23 June
5. At its meeting on 23 June, the Committee considered what progress has been made in relation to implementing the recommendations made by the former Justice 1 Committee and agreed to write to the Scottish...
Executive asking for a timescale for its public consultation on the former committee’s recommendations and, once it is published, to consider whether the consultation paper adequately reflects those recommendations; to write also to the Law Society of Scotland in relation to the former committee’s recommendation in favour of a joint complaints procedure and to the Faculty of Advocates seeking clarification in respect of its response, and to invite the Scottish Legal Services Ombudsman to give oral evidence to the Committee.

Recent responses received

Executive
6. The Minister for Justice wrote to the Committee (letter attached at annex B) indicating that the Executive intends to issue a public consultation paper towards the end of this year inviting comments on the Executive’s proposals in relation to the former Justice 1 Committee’s recommendations and probably including some related matters on which legislative action might also be beneficial.

7. The Executive intends to take early action to review levels of compensation awarded for upheld complaints relating to inadequate professional service as recommended by the previous Committee as these changes can be effected by secondary legislation. The Executive plans to introduce orders to this effect later this year.

8. The Executive has also written to the Committee outlining details of the research it is currently undertaking in relation to the regulation of the legal profession. That letter is attached at annex C.

Law Society of Scotland
9. The Law Society has confirmed that it has agreed a memorandum of understanding with the Faculty of Advocates with respect of complaints which relate to members of both branches of the profession. The memorandum is attached for members’ information (annex D).

Faculty of Advocates
10. The Faculty has written to the Committee stating that the Faculty Council has agreed to introduce a provision which would permit the awarding of compensation to a complainer for inadequate professional service up to £5,000 and also to increase lay membership on each complaints committee and disciplinary tribunal to 50% (letter attached at annex E for information). It hopes that these amendments will be in force by the beginning of next year. The Faculty has also confirmed that the Dean has written to the Minister for Justice seeking the appointment of additional lay persons to the panel of those available to sit on Complaints Committees and Disciplinary Tribunals and that correspondence on this issue is continuing.
Petition PE763 by the Consumer’s Association

11. At its meeting on 5 October, the Committee considered a petition by the Consumers’ Association calling for the Scottish Parliament to urge the Scottish Executive to urgently implement the findings of the Parliament’s Justice 1 Committee inquiry into the regulation of the legal profession (petition attached at annex F for information). The Committee noted for the record work that it has already undertaken to monitor Executive action in respect of implementation of the recommendations of the former Justice 1 Committee’s inquiry; further noted that a response from the Executive in respect of that work has been received and will be considered by the Committee when time allows; recognised that the petition also raises issues not covered by the former committee’s recommendations, and agreed to continue consideration of the petition at a later meeting in order to consider these issues alongside the Committee’s ongoing work in this area.

Next steps

12. The attached paper (at annex A) outlines the recommendations made by the former Justice 1 Committee and updates the Committee on the status of each recommendation. The paper also outlines issues referred to in the petition. On closer examination, it appears that the recommendations outlined in the petition are in fact covered by recommendations of the former Justice 1 Committee. The Committee is invited to consider the attached paper and the following options:

(a) A large number of the former Committee’s outstanding recommendations would require action from the Executive. The Committee could confirm that it will examine Executive’s consultation paper once published to establish whether the issues covered adequately reflect the recommendations of the former Justice 1 Committee’s report;

(b) A number of the former Committee’s outstanding recommendations are the responsibility of the Law Society of Scotland. The Committee could decide to write to the Law Society of Scotland to ask for an update on changes it has implemented in relation to the former Justice 1 Committee’s report and in particular to establish the following:

*Consistency in awarding compensation*

- whether it intends to issue guidance, placed in the public domain, on how levels of compensation paid by a solicitor to a client in relation to inadequate professional services are calculated, in order that the consumer knows how the award has been determined (see paras 23 & 24 of
annex A). The Committee could also ask the Faculty of Advocates whether it will produce similar guidance and place it in the public domain;

**Conciliation**
- whether it intends to respond to the former Committee’s recommendation to introduce a practice rule requiring firms to have a complaints procedure, with a delegated person within a firm to deal with complaints and that the conciliation process should have strict time limits to ensure that it is not used as a method to stall genuine complaints and to ask for a progress report on the pilot scheme on the creation of a conciliation service specifically tailored to sole practitioners (see paras 25 – 26 of annex A);

**Negligence**
- The former Committee recommended that the Law Society should examine its procedure for dealing with complaints involving negligence and consider setting up an arbitration scheme for dealing with such complaints. The Committee may wish to ask the Law Society for an update on this area of work (see paras 15 & 16 of annex A).

(c) The Faculty of Advocates has indicated that it has agreed to introduce a provision which would permit the awarding of compensation to a complainer for inadequate professional service up to £5,000. However, the Faculty has not responded to the former Committee’s recommendation that compensation should be awarded in relation to conduct complaints:

**Faculty of Advocates**
- The Committee may wish to write to the Faculty of Advocates asking whether it would consider introducing a provision which would permit the awarding of compensation to a complainer where it is established that loss has been suffered as a result of the advocate’s conduct (paras 39-40).

**PE763 by the Consumers’ Association**
(d) The Committee may wish to note that the issues raised by PE763 are being taken forward in the context of its work on the former Justice 1 Committee’s report on the regulation of the legal profession and agree to close the petition.
Annex A: Former Justice 1 Committee’s inquiry on the regulation of the legal profession inquiry: update on the recommendations and responses

Background

1. The former Justice 1 Committee published a report on its inquiry into the regulation of the legal profession on 27 November 2002. The report can be found on the former Committee’s website at the following address: www.scottish.parliament.uk/S1/official_report/cttee/archive/just1-02.htm

2. In the last session of the Parliament, the former Committee received a response to the report from the Executive and from the Law Society of Scotland. These responses are available on the Committee’s website at the following address (under papers for 7th meeting, 2003): www.scottish.parliament.uk/S1/official_report/cttee/archive/just1-03.htm

3. This paper summarises the former Committee’s recommendations and recent developments in relation to each recommendation. It also highlights issues raised by the Consumers’ Association in PE763.

Remit of the inquiry

4. The remit of the inquiry was to investigate the existing systems and procedures for dealing with complaints (including the definition of complaints, whether there are complaints/grievances that are excluded and the reasons for this); the nature of complaints currently dealt with; the effectiveness of the complaints systems and perceptions of their effectiveness; comparative models and their effectiveness, and; how complaints systems can be improved.

Regulatory framework

5. The legal profession in Scotland is regulated by the professional bodies acting within a statutory framework. Complaints against solicitors and advocates are dealt with by these professional bodies. The Scottish Legal Services Ombudsman is an additional regulatory mechanism and is a statutory body established to oversee the complaint handling mechanisms of the legal profession. This system is sometimes referred to as “joint regulation” which provides independent supervision of the self-regulatory complaints processes operated by professional bodies.1

6. A number of options for reform of the current regulatory framework emerged in the course of the inquiry, which fall broadly into two camps: a completely independent system and joint regulation with increased independence from the professional bodies. The former Committee was not persuaded by the option of a completely independent system for the

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regulation of the legal profession and believed that it would be more effective to maintain the present system of joint regulation, namely self-regulation with the additional independent regulatory mechanism of the Ombudsman, but with increased independence. The former Committee believed that the present system should be reformed, in order to make it more acceptable to consumers, and more representative of the public interest. Its recommendations for reform are outlined below.

**Former Justice 1 Committee’s specific recommendations**

**Recommendations awaiting action**

**Single gateway**
7. The former Committee believed that it is vital that the public perception of the complaints systems is that it is both fair and transparent. The former Committee was in favour of the creation of a single gateway\(^2\) for all complaints against the legal profession which it believed would improve the public perception of the complaints system and play a valuable oversight role. In PE763, the Consumers’ Association requested that the Committee urges the Executive to urgently implement this recommendation.

**Response**
8. The Executive indicated in its response that it was not persuaded that the case had been made for a single gateway, but Ministers would be willing to revisit the proposal if there was persistent evidence that complaints which should be investigated by the professional bodies were not being addressed. Similarly, the Law Society has indicated that it does not agree with the concept of a single gateway as a portal for all complaints against the legal profession. The Ombudsman reported that the Law Society has established a sift panel to review a draft decision to refuse to investigate a complaint. This was set up in September 2003.

**Powers of the Ombudsman**
9. The former Committee believed that the role of the Ombudsman is crucial in ensuring that the complaints process is open and transparent. The former Committee recommended that the powers of the Ombudsman should be augmented. The former Committee recommended specifically that the Ombudsman be given the following statutory powers:

- Power to investigate the substance of the original decision made by the professional body (the Ombudsman currently only has the power to investigate the way in which a complaint has been handled);
- Power to enforce recommendations;
- Power to conduct general audits;

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\(^2\) i.e. an independent body which would receive all complaints about the legal profession.
• Power to prescribe general timescales (for dealing with complaints);
• Power to direct professional bodies to investigate a complaint;
• Power to make recommendations on the operation of the complaints procedures of professional bodies.

In PE763, the Consumers’ Association requested that the Committee urges the Executive to urgently implement this recommendation.

Response
10. The Executive agreed in principle with the recommendation that the powers of the Ombudsman should be augmented but stated that substantive changes to these powers would require legislation. The Law Society indicated that it is of the view that the powers of the Ombudsman should only be enhanced if it were demonstrated that such enhancement would be in the interests of the public.

Funding
11. The former Committee acknowledged that increasing the powers of the Ombudsman will require additional funding. The former Committee believed that it is important that the independent element of the system is not funded by the legal profession and recommended that the Government should fund the increased costs incurred by the Ombudsman’s office as a result of the Committee’s proposals.

Response
12. Both the Executive and the Law Society were in broad agreement with this recommendation.

Law Society of Scotland

Definition of a complaint
13. There are two definitions of a complaint against a solicitor: inadequate professional services (IPS) and professional misconduct. The former Committee found that this could cause confusion to consumers. The former Committee recommended that the distinction between conduct and IPS complaints should be removed and that a "complaint against a solicitor" should be redefined in statute, and the new definition should be simple and widely drawn. They believed that this should be supported by an education campaign aimed at both the profession and the wider public. In PE763, the Consumers’ Association requested that the Committee urges the Executive to urgently implement this recommendation.

Response
14. The Executive supported in principle the case for producing a simple and widely-drawn definition of a complaint. The Law Society indicated that such a change could result in a lack of flexibility, but that the advantages are clear.
**Negligence**

15. “Poor quality of advice” matters cannot be treated as complaints by the professional bodies as these have to be pursued in the courts as negligence. The former Committee found that professional bodies were often too ready to reject a complaint on the basis that it involves negligence, where it may be that inadequate professional service is also involved.

16. The former Committee recommended that the Law Society should examine its procedure for dealing with complaints involving negligence and consider setting up an arbitration scheme for dealing with such complaints. The former Committee also recommended that the Law Society should examine the merits of the Troubleshooter scheme\(^3\) and report back to the former Committee on other ways of addressing problems experienced by complainants in pursuing negligence cases in court. Finally, the former Committee recommended that the Scottish Executive should examine the merits of allowing professional bodies to investigate small negligence cases up to a certain financial limit, and report back to the Committee on its findings.

17. The Executive agreed to give further consideration to the case for allowing the legal professional bodies to investigate small negligence claims. In its original response, the Law Society indicated that it does not agree that the professional bodies should be empowered to investigate small negligence claims. The Society has informed the Committee that it has established a Pursuers’ Panel for Professional Negligence Claims against solicitors in October 2002. It reported that the panel seeks to assist members of the public and solicitors in potential negligence claims against other solicitors. The Ombudsman confirmed that the Society no longer automatically puts an investigation on hold if there is a related negligence action but treats each case on its merits.

**Redress**

18. There is no facility to award compensation if a complaint is about an individual solicitor’s conduct whereas a complaint classified as inadequate professional services would, if upheld, enable the Law Society to order a number of sanctions. The former Committee believed that redress should be available to the complainant regardless of the classification of the complaint. The former Committee therefore recommended that compensation should be offered for a complaint about an individual solicitor’s conduct where it is established that

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\(^3\) There was evidence that it is difficult to find a solicitor willing to act against another solicitor in a negligence case. The Law Society told the Committee that it operates the Troubleshooter scheme which involves referring a complainant to a senior solicitor with relevant experience who will assess whether or not the complainant has a good claim (Report, p20, para 91).
loss has been suffered as a direct result of the solicitor’s conduct. In PE763, the Consumers’ Association requested that the Committee urges the Executive to urgently implement this recommendation.

Response
19. The Executive agreed that such circumstances would present a reasonable case for compensation. The Law Society indicated that compensation for conduct matters could only be awarded if it could be established that loss were suffered by a dissatisfied client as a direct result of the solicitor’s conduct.

Compensation levels
20. The Solicitors (Scotland) Act 1980 (the 1980 Act) sets at £1,000 the maximum level of compensation which the Law Society or the Scottish Solicitors Discipline Tribunal may order a solicitor to pay a client in relation to inadequate professional services. The maximum award of £1,000 has not been increased since 1990. The former Committee recommended that the maximum compensation level should be increased to £5,000 with a mechanism for annual uprating in line with inflation. In PE763, the Consumers’ Association requested that the Committee urges the Executive to urgently implement this recommendation.

Response
21. The Executive agreed to review the current maximum level of compensation. The Executive also agreed to consider whether there is a case for increasing the level of compensation for inconvenience which the Scottish Legal Services Ombudsman can recommend the professional bodies pay to a complainer which currently stands at £1,200. In its letter of 5 July, the Executive indicated that it plans to introduce orders raising compensation levels later this year.

22. The Law Society accepted that the maximum level of compensation which a solicitor can be ordered to pay a client in relation to inadequate professional services should be increased.

23. The former Committee believed that there should be consistency in the awarding of compensation and supported the suggestion that the professional bodies should issue guidance, placed in the public domain, on this matter in order that the consumer knows how the award has been determined.

Response
24. The Executive supported this recommendation in principle and hoped that the professional bodies would explore this recommendation. The Ombudsman told the Committee that the Society has issued “useful
guidance” to its reporters on compensation levels but does not think that the guidance is in the public domain.

Conciliation

25. When it receives a complaint, the Law Society will seek to have the matter resolved in the first instance between the firm and the dissatisfied client. This process is referred to as conciliation. The former Committee recommended that the conciliation process should be strengthened and that a practice rule should be introduced to require firms to have a complaints procedure, with a delegated person within a firm to deal with complaints. The former Committee also recommended that conciliation services should be provided to small firms and sole practitioners and that the conciliation process should have strict time limits to ensure that it is not used as a method to stall genuine complaints.

Response

26. The Executive would support a practice rule which would require all firms to have a complaints procedure, with a delegated person within each firm to deal with complaints. In its original response the Law Society agreed to consider strengthening the conciliation process. The Society has told the Committee that a working party was established to examine conciliation issues last year. The working party produced a recommendation to create a pilot scheme conciliation service specifically tailored to sole practitioners which will involve the Society’s case managers meeting with a solicitor and dissatisfied client to conciliate complaints. The Ombudsman is not aware of the Law Society having taken any steps to make it a requirement that firms of solicitors have a complaint handling policy or a Client Relations Partner.

Scottish Solicitors Discipline Tribunal

27. The former Committee believed that the independence of the Scottish Solicitors Discipline Tribunal would be enhanced if its solicitor members were appointed by an open selection process rather than recommended by the Law Society and appointed by the Lord President and if lay membership were increased. The former Committee recommended that members of the Scottish Solicitors Discipline Tribunal should be appointed by an open selection process. The former Committee also recommended that the membership of the Scottish Solicitors Discipline Tribunal should be made up of 50% lay people and that it should be possible for the Scottish Solicitors Discipline Tribunal to be chaired by a lay person, with the assistance of a legally qualified clerk.

Response

28. The Executive supports an open selection process for appointments to the Scottish Solicitors Discipline Tribunal and an increase in lay

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4 Reporters conduct investigations into complaints and prepare reports to be considered by Client Relations Committees of the Law Society.
membership and pointed out that it is already possible to appoint a lay member as Chairman.

Finance

Professional Indemnity Insurance

29. The Law Society has the power to provide and to require solicitors to have professional indemnity insurance and does so through the Solicitors (Scotland) Professional Indemnity Insurance Rules 1995 and a master policy scheme. The former Committee was made aware that lengthy delays in receiving settlements from the master policy have caused distress to a number of individuals. The former Committee recommended that the Scottish Executive should examine ways in which the operation of the guarantee fund and the master policy could be made subject to external regulation and report back to the former Committee on its findings. In PE763, the Consumers' Association requested that the Committee urges the Executive to ensure that where redress is provided through the guarantee fund and the Master Policy, complainants do not face long delays in settlement.

Response

30. The Executive was concerned by the delays experienced by complainers in receiving settlements from the master policy or guarantee fund and proposed to give the matter further consideration. The Law Society indicated that consideration would be required as to the form which the examination of the master policy and guarantee fund would take and the effect of "external regulation" in the light of the current regulation of the financial services sector. The Law Society has indicated that the Office of Fair Trading has recently begun an independent assessment of the master policy under the Competition Act 1998. The Ombudsman reported that the Scottish Consumer Council wanted to investigate the operation of the master policy but that the Law Society was not able to respond when first approached.

Recommendations on which action has been taken

Setting standards

31. The former Committee recommended that there should be lay involvement in the setting of standards for professional bodies to ensure that the consumer's voice is represented from the very outset.

Response

32. The Executive agreed that lay involvement in standard setting would be beneficial. The Law Society has indicated that it has appointed additional lay persons to its Client Relations Committees and to the Professional Conduct Committee so that each Committee has 50% lay and 50% qualified membership. In addition, the Client Care Committee
has a revised remit which specifically identifies setting standards as an issue.

**Dual role of the Law Society**

33. The Law Society is responsible for the promotion of the interests of the solicitors’ profession and of the interests of the public in relation to that profession. **The former Committee recommended that the Law Society should consider the creation of firewalls, namely establishing procedures where there is a clear separation of interests and demarcation between the interests of the complainer and the solicitor subject to the complaint. In PE763, the Consumers’ Association requested that the Committee urges the Executive to urgently implement this recommendation.**

**Response**

34. The Society has explained to the Committee that it has implemented the Council of the Law Society of Scotland Act 2003 and created a scheme of delegation which creates a “clearer separation of roles” between the Council, Client Relations Committees and Professional Conduct Committee.

**Delegated powers**

35. Previously under the 1980 Act, the Council of the Law Society had to look at each complaint made to the Law Society and to determine the outcome. There is no lay involvement in the Council. **The former Committee recommended that the power to determine the outcome of all complaints should be delegated to committees of the Law Society.**

**Response**

36. The Executive agreed with this recommendation. The Society has reported that all complaints are now delegated to Committees of the Society.

**Lay involvement**

37. **The former Committee believed that lay involvement in the complaints process is crucial for promoting consumer confidence. The former Committee recommended that lay representation on committees of the Law Society dealing with all complaints should be at least 50%.**

**Response**

38. The Executive agreed with this recommendation. The Law Society confirmed that its Client Relations Committees now comprise 50% lay people.
Faculty of Advocates

Redress

39. The Ombudsman told the former Committee that the Faculty's handling of complaints allows no consumer redress and is based entirely on an internal disciplinary code. The former Committee believed that there should be redress where complaints have been upheld. The former Committee recommended that the Faculty of Advocates should offer compensation of up to £5,000 for upheld complaints which relate to IPS, and for complaints about an individual advocate's conduct where it is established that loss has been suffered as a direct result of the advocate's conduct.

Response

40. The Executive agreed in principle with this recommendation. The Ombudsman told the Committee that the Faculty is considering whether it should amend its powers to include being able to order redress if a complaint is upheld. In its letter of 6 September, the Faculty confirmed that the Faculty Council resolved on 3 May to introduce a provision which would permit the awarding of compensation to a complainant for inadequate professional service up to £5,000.

Committees dealing with complaints

41. The former Committee recommended that lay representation on committees dealing with complaints against advocates should be at least 50% and that there should be 50% lay membership on the disciplinary tribunal.

Response

42. The Executive agreed with these proposals in principle. The Ombudsman told the Committee that the Faculty's complaint handling rules have been changed and a Complaints Committee with non-advocate membership now makes decisions on all complaints, including those the Faculty will refuse to investigate further. In its letter of 6 September, the Faculty confirmed that the Faculty Council resolved on 3 May to increase lay membership on each Complaints Committee and the Disciplinary Tribunal to 50%.

Information sheet

43. The former Committee recommended that the Faculty should prepare an information sheet to be sent to all complainers providing a brief outline of the way the Faculty deals with complaints.

Response

44. The Executive pointed out that the Faculty published an information sheet for complainers in July 2002, as recommended by the Ombudsman in her Annual Report for 2000-01.
Complaints involving solicitors and advocates

45. The former Committee recommended that the Law Society and the Faculty of Advocates should produce a procedure for dealing with complaints which involve both solicitors and advocates, in consultation with the Ombudsman. In PE763, the Consumers’ Association requested that the Committee urges the Executive to urgently implement this recommendation.

Response

46. The Executive considered that such a procedure would be in the interests of complainers and supported the Committee’s recommendation. In its letter of 18 August 2004, the Law Society confirmed that it has agreed a memorandum of understanding with the Faculty of Advocates in respect of handling complaints which involve members of both professional bodies.
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.

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.

Committee consideration
3. The Convener believed that this correspondence raised 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.

4. The society’s response explained that fees are calculated as per chapters 1 and 2 of its Table of Fees for General Business. However, the Convener felt that the parameters set out in the table of fees were 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 solicitor’s fees, should they believe them to be unduly high.
5. Views were then sought from the Scottish Legal Services Ombudsman, the Minister for Justice and the Scottish Consumer Council. Their views are outlined below.

Scottish Legal Services Ombudsman
6. The Ombudsman made the following points:
   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 it was reasonable to undertake the work itself.

The Scottish Executive
7. A response dated 3 June 2004 was received from the Minister for Justice. In it, the minister observed that there is no general practice rule requiring solicitors to send out letters of engagement setting out aspects of charging and acknowledged the repeated recommendations of the Scottish Legal Services Ombudsman that such a rule should be introduced. The minister’s view was that it would be in the interests of the users of legal services in Scotland that there should be a practice rule to this effect.

8. The minister also advised that the working group for research into the legal services markets has identified the role of auditors of court as an issue for consideration in terms of its impact on competition. She has also been advised by the Chief Executive of the Scottish Court Service that it is considering a consultation, initially with sheriffs principal, about arrangements for the taxation of solicitors’ accounts, other than court-ordered judicial taxations. The minister undertook to keep the Committee informed of how these areas of work will be taken forward.

Scottish Consumer Council
9. In its response, the Scottish Consumer Council (SCC) stated that those who purchase services of any kind are entitled to be informed by the service provider as to how much those services are likely to cost. According to the SCC, evidence suggests that a substantial proportion of solicitors have failed to give clients an estimate of likely costs.
10. The SCC explained that many clients are not informed by their solicitor about the possibility of outlays to be paid and supported the view that a letter of engagement should be sent to every client as a matter of course. The SCC believed that the client should be kept informed about costs, particularly if it becomes apparent that these are likely to exceed the initial estimate.

11. The SCC also supported the view that a solicitor’s account should be clearly set out and itemised. It explained that the option of challenging the level of fees charged by going to the Auditor of Court to have the account ‘taxed’ can result in additional costs for the client. Evidence shows that many clients are unaware of their right to have the account taxed. The SCC believed that it is important that solicitors advise clients that they have this right.

**Law Society of Scotland**

12. The Law Society stated that its Professional Practice Committee had recommended to the Council of the Law Society that a Practice Rule should be created rendering letters of engagement obligatory in respect of all forms of business. This was due to be considered at a forthcoming Council meeting and the Law Society would report to the Committee thereafter.

13. In relation to transparency of fees, the Law Society stated that it has considered the Committee’s representations. The Law Society is of the view that, because of the complexity of the issues involved, it would be appropriate for members of the Committee to meet with members of the Society’s Remuneration Committee to discuss these issues further.

**Committee meeting on 23 June**

14. At its meeting on 23 June, the Committee considered the responses summarised above and agreed to consider at a future meeting (a) the outcome of the Council of the Law Society of Scotland’s forthcoming consideration of the recommendation that a practice rule should be created rendering letters of engagement obligatory in respect of all forms of business and (b) whether to accept the offer of a meeting with members of the society’s Remuneration Committee to discuss transparency of legal fees. The Committee also agreed to include this matter in the evidence session with the Scottish Legal Services Ombudsman.

**Recent correspondence from the Law Society**

15. The Law Society wrote to the Committee on 29 June (letter attached annex A) confirming that the Society’s Council had agreed to make a Practice Rule requiring solicitors to provide the following information to their clients in writing at the earliest practical opportunity:

- The work carried out by the solicitor;
- The fees and outgoings to be charged;
• The identity of the person or persons by whom the work will be carried out;
• The identity of the person to whom the client should refer in the event of there being any dissatisfaction in relation to the work.

Options

16. The Committee may wish to consider the following options:

(a) The Committee could write to the Law Society in the following terms:

• welcoming the introduction of a practice rule requiring solicitors to issue clients with a letter of engagement;
• asking whether it has considered making a practice rule requiring solicitors to provide clients with itemised bills (without charging for such a bill to be produced);
• asking whether solicitors advise clients that they have the right to challenge the level of fees charged by a solicitor by going to the Auditor of Court;

(b) The Committee could consider whether to accept the offer of a meeting with the Law Society’s Remuneration Committee to discuss transparency of legal fees;

(c) The Committee could write to the Minister for Justice and the Scottish Court Service requesting an update on work being undertaken by the Scottish Court Service regarding the arrangements for the taxation of solicitors’ accounts;

(d) The Committee has received the offer of an informal briefing on matters relating to transparency of legal fees and taxation of solicitors’ accounts from Professor Alan Patterson of the University of Strathclyde. The Committee could consider whether to accept this offer;

(e) The Committee is reminded that it intends to include these issues in questions to the Scottish Legal Services Ombudsman when she appears before the Committee in February.
JUSTICE 1 COMMITTEE

European Justice and Home Affairs update

Note by the Clerk

Background

1. The Committee has been actively engaged in recent months in fulfilling its scrutiny role in respect of European Union Justice and Home Affairs (EU JHA) legislative developments. Committee members participated in a familiarisation visit to the EU institutions in Brussels in September 2004 and the Committee hosted a European JHA symposium on Friday 29 October 2004.

2. In terms of scrutiny of specific EU dossiers, the Committee decided in October 2003 to concentrate attention, initially, on proposals relating to alternative dispute resolution, parental responsibility and applicable law in divorce.

3. This note provides an update on progress with these three areas of interest and highlights other recent EU JHA developments.

Applicable law in divorce

4. The Committee has been anticipating, since October 2003, the publication by the European Commission of a consultation, in the form of a White Paper, discussing the possibility of introducing common European rules regulating which country’s law would apply to a divorce involving nationals from different states who may be resident anywhere across the European Union.

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. At present courts in the UK jurisdictions do not apply foreign law in family cases, so the Executive has identified that this dossier will require to be closely monitored.

6. When members of the Committee were in Brussels in September, they met with the lead Commission official to seek an update on progress. From the discussion, it was clear that because of the complexity of the issues involved in trying to reconcile the wide variety of legal systems across the 25 Member States, publication is not now expected until 2005 and could become a Green Paper rather than White.

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1 Official Report, Justice 1 Committee, 17 September 2003; c 50
2 J1/S2/04/36/X, Scottish Executive, Ministerial Priorities for the Dutch Presidency
3 Commission Green Papers are documents intended to stimulate debate and launch a process of consultation at a European level. These consultations may then lead to the
Action

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

Council Regulation concerning matters of parental responsibility

8. 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 Regulation\(^4\) was subsequently adopted on 23 November 2003 and will replace the existing Regulation as of 1 March 2005.

9. The Committee received a note from the Executive on the draft Regulation in November 2003\(^5\) 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.

10. The Regulation will take affect from 1 March 2005 and the Justice 1 Committee agreed that it would monitor implementation in Scotland which it is expected will be via a Statutory Instrument.

Action

11. The new Regulation will come into force on 1 March 2005. The Committee may wish to seek confirmation from the Scottish Executive regarding plans for implementing the obligations in Scotland.

Alternative dispute resolution

12. The European Commission launched its green paper on alternative dispute resolution in civil and commercial law in April 2002\(^6\). Alternative dispute resolution (ADR) methods are extra-judicial procedures used for resolving civil or commercial disputes. These


\(^5\) Note from Scottish Executive, Committee paper J1/S2/03/12/6, 12 November 2003

usually involve the collaboration of disputing parties in finding a solution to their dispute with the help of a neutral third party.7

13. 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 to promote mediation.

14. The Commission published a preliminary draft text of a proposal for a Directive on Mediation in April 2004. The Committee considered the dossier at its meeting on 9 June 2004 and agreed to submit a response.

15. In the response, the Committee expressed 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 and questioned 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. The Committee did, however, welcome the preparation by stakeholders of a draft European code of conduct for mediation. The Committee suggested that the code be widely publicised in order to highlight the benefits of ADR within and between Member States.

16. Once again, when members of the Committee were in Brussels in September, they met with the lead Commission official on this dossier. He explained that the formal proposal would be adopted by the Commission at the earliest in October.

Proposal for a Directive on certain aspects of mediation

17. A proposal for a Directive on certain aspects of mediation in civil and commercial matters was published by the Commission on 29 October 2004. The dossier and associated papers were sent to the clerks by the Scottish Executive on 25 November. Copies have been provided to members as paper J1/S2/04/37/19.

18. The Directive would apply to mediation in civil and commercial matters, including family mediation. The Commission states that the objective of the proposal is to contribute to ensuring better access to justice by facilitating access to dispute resolution. It will do so through two types of provision. The first is the establishment of minimum common procedure rules; the second the promotion of non-compulsory mediation. In terms of procedure rules the proposed Directive requires a mediated agreement to be capable of confirmation as a court judgment or order if requested by the parties; it imposes a duty of confidentiality on mediators so that matters regarding or raised during

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7 Background on the green paper is available on the EU website at: [http://europa.eu.int/comm/justice_home/fsj/civil/dispute/wai/fsj_civil_dispute_en.htm](http://europa.eu.int/comm/justice_home/fsj/civil/dispute/wai/fsj_civil_dispute_en.htm)
the mediation cannot be used as evidence in civil judicial proceedings subject to overriding considerations of public policy such as child protection matters; and it requires the suspension of limitation periods regarding a claim which is the subject of mediation.

19. The scope of the proposed Directive is not limited to cross-border mediations. The Commission considers that the procedure should apply in all situations regardless of the presence of cross-border elements as to limit it to mediations with cross-border implications would lead to the creation of two parallel legal regimes as different standards could be created for national and cross-border mediation services.

20. In the Explanatory Memorandum prepared by the Department for Constitutional Affairs, it states that, “The Government believes that legislation on ADR should not be unnecessarily prescriptive given that flexibility is an important feature of ADR and that mediation should be based on consensus. In general terms the Government is satisfied with the content of this proposal which it believes applies a sufficiently light touch to regulation in this field. It is pleased that the proposed Directive takes account of the particular sensitivities of family mediation in terms of child protection issues.”

21. However, the Memorandum goes on to identify issues which will require further exploration during negotiations. These include how the provisions for confirming a mediation agreement through a court judgment (Article 5) or the suspension of limitation periods (Article 7) might work in practice. The UK Government also intends to pursue the issue of the Commission’s legal authority to propose a measure which is not limited to cross-border mediations.

22. The United Kingdom has three months to indicate whether it intends to opt-in to the proposed Directive.

23. The Scottish Executive, in its covering letter, states that it is not undertaking a formal consultation exercise on the Directive but it is drawing it to the attention of relevant interests such as certain legal and mediation organisations.

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8 An Explanatory Memorandum setting out the UK Government’s position on a dossier is prepared for all European Community legislative proposals by the lead UK Government Department and submitted to the UK Parliament, Scottish Parliament and National Assembly for Wales to assist the scrutiny of EU legislative proposals.
9 Explanatory Memorandum paragraph 16.
10 Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and the treaty establishing the European Community.
Action

24. It is suggested that the Committee may wish to ask the Scottish Executive to provide details of responses it has received from interested organisations regarding the proposal and the terms of the response it intends to make to the UK Government.

25. The Committee may also wish to ask for further updates from the Executive following meetings of the EU Council Working Group considering the proposal.

Justice 1 Committee European Justice and Home Affairs Symposium

26. On Friday 29 October, the Committee hosted a European Symposium at Holyrood to consider progress in developing an area of freedom security and justice within the European Union and the implications for Scotland.

27. Speakers included the Minister for Justice, officials from the European Commission Directorate-General for Justice and Home Affairs and Scottish academics with a specialist interest in this area. Members discussed with delegates from a wide range of interested organisations to examine ways in which Scotland engages with the EU in relation to justice and home affairs issues and how Scottish interests may be best represented in the future.

28. Among the conclusions drawn from the discussions was that in order to effectively represent Scottish interests and influence the shape of emerging legislative proposals, the Scottish Parliament needs to engage with the EU institutions both before and after legislative proposals are published. This can be achieved in a variety of ways including by:

- asking the Scottish Executive to provide regular briefing on emerging legislative proposals;
- asking Scottish Ministers for their views on proposals and to what extent they have been engaged in the development of the UK line;
- developing further the relations formed with the European Parliament, European Commission and Council Secretariat;
- making use of the soon to be appointed Brussels-based Scottish Parliament European Officer to gather intelligence on particular initiatives; and
- cooperating closely with colleagues on the European Scrutiny Committee at Westminster.
Update on other areas of interest

Ministerial Priorities for Dutch Presidency

29. The Scottish Executive produces for each six month Presidency of the Council of the EU, a statement by the Minister for Justice outlining Scottish Ministerial priorities in Justice and Home Affairs for that Presidency. The Executive has recently provided a helpful update of the Ministerial priorities for the remainder of the Dutch Presidency (due to conclude at the end of the year), enclosed as paper J1/S2/04/37/7.

Action

30. It is suggested that in the New Year, the Committee may wish to invite the Minister for Justice to give oral evidence on the priorities for the Scottish Executive during the Luxembourg presidency and details of plans for Scottish Executive involvement during the UK presidency in the second half of the year. The Committee could consider undertaking this jointly with the Justice 2 Committee.

The Hague Programme – Strengthening freedom, security and justice in the European Union

31. The European Council, at its meeting in Brussels on 4/5 November 2004, adopted a new multi-annual programme for the next five years, to be known as the Hague Programme. This is intended to build upon the Tampere programme, agreed five years earlier, which laid the foundation for the development of an area of freedom, security and justice within the European Union. A copy of the Council conclusions, including the text of the Hague Programme, has been provided to members for information as paper J1/S2/04/37/8.

32. The programme reflects the changes to EU competences in Justice and Home Affairs as expressed in the Treaty establishing a Constitution for Europe but allows preliminary work to commence under the legal basis of the existing Treaties until such time as the Constitutional Treaty takes effect. It takes account of the evaluation by the Commission of the implementation of the Tampere programme as welcomed by the European Council in June 2004 as well as of the recommendation on the use of qualified majority voting and the co-

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decision procedure adopted by the European Parliament on 14 October 2004.\textsuperscript{12}

33. The Hague Programme deals with all aspects of policies relating to the area of freedom, security and justice, including their external dimension, notably fundamental rights and citizenship, asylum and migration, border management, integration, the fight against terrorism and organised crime, justice and police cooperation, and civil law, while a drugs strategy will be added in December 2004. In conjunction, the European Council considers that creating appropriate European legal instruments and strengthening practical and operational cooperation between relevant national agencies, as well as timely implementation of agreed measures, are of vital importance.

34. Following adoption of the Programme, the European Council invited the Commission to present an Action Plan in 2005 with proposals for concrete actions and a timetable for their adoption and implementation. The Commission will also be required to present to the Council an annual report on implementation of Union measures (in the form of a "scoreboard").

### Green Paper on maintenance obligations

35. In April 2004, the European Commission published a Green Paper on maintenance obligations. This was intended to launch a wide-ranging consultation on whether there is a need for Community rules or new conventions in cases with an international element in matters of maintenance obligations. A copy of the Green Paper has been provided to members for information.

36. The Scottish Executive has submitted a response to the Commission Green Paper. The Executive considers that the proposals must be viewed in the context of the continuing negotiations in The Hague\textsuperscript{13} for a new worldwide Convention on Maintenance Obligations and that it is important that any new EU instrument in the same field adds value to the Hague project, and does not duplicate it. The Executive submits that there is no point in having separate EU and worldwide regimes purely for the sake of it as this would only be liable to cause confusion and put obstacles in the way of recovery of resources for families in need. For this reason, the Executive considers it is important that EU thinking in this area proceeds in the light of what emerges from The Hague, and the timetable for the Community project needs to reflect this.

\textsuperscript{12} European Parliament adopted text P6_TA-PROV(2004)0022

\textsuperscript{13} The Hague Conference on Private International Law is a global inter-governmental organisation. With more than 60 Member States representing all continents, with different legal traditions, it develops and services multilateral legal instruments, which respond to global needs. Website [http://hcch.e-vision.nl](http://hcch.e-vision.nl)
37. A copy of the full Scottish Executive response has been provided to members for information.

**Green Paper on Bail**

38. The Green Paper on Bail (formal title - Green Paper on the Mutual Recognition of Non-Custodial Pre-Trial Supervision Measures) was published on 17 August 2004 together with a detailed Commission Staff Working Paper which provides some analysis of current legal frameworks. The Green Paper seeks answers to 6 main questions listed at the end of the paper. The paper has been circulated to members for information.

39. The various alternatives to pre-trial detention that currently exist within the different Member States (e.g. reporting to police authorities or travel prohibition) cannot presently be transferred across borders. The aim of the Commission is to make it possible for a criminal suspect arrested in an EU Member State in which he/she is not resident to be subject to non-custodial supervision measures there. The Green Paper states at present “owing to risk of flight, non-resident suspects are often remanded in custody, while residents benefit from alternative measures.” (Para 1.1)

40. The Executive is presently formulating its response to this Paper working to a deadline of the end of November.

41. The Justice 2 Committee is following the development of this dossier as part of its scrutiny of EU JHA matters.

**Conclusions**

42. The Committee is invited to:

   a) await the publication of the EU Green Paper on applicable law in divorce and, thereafter, consider further action regarding the proposals;

   b) seek confirmation 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 in Scotland, including whether there are any implications for Executive plans for reform of family law;

   c) ask the Scottish Executive to provide details of responses it has received from interested organisations regarding the proposed Directive on mediation and the terms of the input it intends to make to the UK Government line;
d) ask for further updates from the Executive following meetings of the EU Council Working Group considering the proposed Directive on mediation; and

e) in the New Year, invite the Minister for Justice to give oral evidence on the priorities for the Scottish Executive during the Luxembourg presidency and details of plans for Scottish Executive involvement during the UK presidency in the second half of the year [this could be done jointly with the Justice 2 Committee].
MINISTERIAL PRIORITIES FOR THE DUTCH PRESIDENCY

UPDATED VERSION OF MINISTERIAL PRIORITIES DOCUMENT FOR J2 COMMITTEE IN ADVANCE OF EVIDENCE SESSION ON 9 NOVEMBER

Statement by the Minister for Justice

1. Prospects for the Dutch Presidency for Justice and Home Affairs (JHA)

1.1 The top priorities as stated by the Presidency

The Dutch Presidency has presented a programme of work in which it makes clear its top priority in JHA will be to agree the next five year JHA programme (“Tampere II”). – Update: now known as Hague Programme The Tampere II programme will cover counter terrorism; police and judicial co-operation; asylum, immigration and integration; civil judicial co-operation and homeland security (focussing on how to respond to emergencies). We expect the Programme to be formally agreed at the November European Council, when the Presidency will address the new Commission for the first time. The Presidency plans to make the distinction between different fields of Justice and Home Affairs and accord levels of priority to them. Terrorism will take priority followed by the establishment of a Common Asylum System and Police Co-operation. In Police Co-operation the Dutch will focus on practical on the ground co-operation rather than legislation.

The Dutch programme confirms that the Presidency will seek to:

- Focus on effective operational co-operation that delivers results on the ground; to connect better between the Member States by learning from one another.
- Improve security for Europe's citizens by implementing action plans and work programmes including those directed to combating organised crime, drugs and terrorism as well as other forms of crime which pose a threat to the security to the citizens of the EU. Also making full use of Europol, the European Police College (CEPOL) and the Police Chief's Task Force. The emphasis will be on strengthening the police and judicial co-operation at the practical level, including use of the European Arrest Warrant and Joint Investigation Teams.
- The anti-terrorist agenda will be a priority for the Dutch Presidency particularly as the recently appointed Counter-Terrorism Co-ordinator is a former Dutch Minister. The Presidency will aim to ensure that targets set in the Action Plan and various Council Conclusions are met and will press for the completion of measures, such as those relating to orders freezing property or evidence by December 2004.

1.2 Important issues for the Executive to be dealt with by the Presidency

Justice Department Priorities in JHA

The Minister for Justice, where appropriate in conjunction with the Lord Advocate, will work to ensure that EU JHA legislation is compatible with the principles of Scots criminal and civil law, that Scotland can play its full part in promoting cross border access to justice and in cooperation to combat organised crime and that Scotland does not become a safe haven for
MINISTERIAL PRIORITIES FOR THE DUTCH PRESIDENCY

criminals. Work will also be undertaken to develop the exchange of best practice with EU partners on areas such as tackling crime and cross border access to justice.

Scottish Justice Ministers will attend Council meetings during the Dutch Presidency, where this is appropriate as was the case during the Irish Presidency when the Minister for Justice attended the JHA Council on 30 March 2004. **Update – Minister for Justice attended 25/26 October JHA Council as part of the UK Delegation along with the Home Secretary and Caroline Flint MP. At this Council Ministers discussed the Hague Programme in advance of it being submitted to European Council on 5 November.**

Civil Judicial Co-operation

- There will be further discussions on The Regulation on the law applicable to non-contractual obligations (Rome II). The regulation will decide which country’s law would apply to resolve an international dispute concerning a non-contractual obligation – anything from a negligence action arising from a road traffic accident to defamation to a claim based on environmental pollution. The most difficult area is likely to be defamation because of the need to balance freedom of expression against protection of reputation in a way which is acceptable across Europe. However, the outgoing Irish and incoming Dutch Presidencies have produced a revised provision which would apply the law of the forum in defamation cases, and this is likely to be much less objectionable to media interests than previous suggestions. **Update – A final set of discussions during the Dutch Presidency will take place later this month (November). On the issue of defamation the revised provision tabled by the Dutch Presidency is still being considered by the Working Group.**

- **Update: Executive has submitted to UKRep its response to Green Paper on Maintenance Obligations**

- There will be further discussions on the European Order for Payment Procedures. This is a proposal for a simplified procedure for obtaining and enforcing a judgment in uncontested claims. The draft regulation currently being considered applies to both cross border and internal cases. The treaty base for such a regulation has been questioned by a number of member states. Whilst the Scottish Executive fully supports the proposal in so far as it relates to cross border cases it has, along with the other jurisdictions in the United Kingdom, sought to restrict this proposal to cross border cases only, questioning the treaty base for the proposal as it presently stands. Further, the need for such a procedure for internal cases is doubted. There are other similar procedures in each of the UK jurisdictions which are simple and bring about speedy judgements in uncontested claims. **– Update: Proposal being discussed in Working Group meetings. Executive officials working closely with colleagues from Department for Constitutional Affairs (DCA) on UK negotiating line.**

- **A proposal for a European Small Claim is scheduled to be presented in September and will be discussed at meetings scheduled for October and November. The aim of this proposal is to simplify and speed up litigation concerning small claims and to abolish intermediate measures with a view to enabling recognition and enforcement of judgments in these cases in other member states. – Update: Working Group on 29 October discusses Commission proposal. Executive officials in close contact with DCA officials and contributing to negotiations.**
MINISTERIAL PRIORITIES FOR THE DUTCH PRESIDENCY

- We expect the Commission to present a White Paper on Rome II on the law applicable to divorce during the Presidency. This is likely to discuss the possibility of common European rules regulating which country’s law would apply to a “multinational” divorce. At present courts in the UK jurisdictions do not apply foreign law in family cases, so this dossier will require to be closely monitored. **Update – We now expect the Commission to present its White Paper in 2005**

- A Green Paper on Wills and Succession is expected to be published and the Executive will be submitting a response. The Green Paper is expected to look at issues such as mutual recognition of the title of executors to administer estates, and common rules on which country’s law should apply to succession in an international case. This is a very complex area which has already been the subject of unsuccessful attempts at worldwide regulation. An EU solution would be difficult to arrive at, but would add value. **Update – This Green Paper is not expected to be published until 2005**

- We expect a proposal on Alternative Dispute Resolution (ADR) to be presented by the Commission and a draft Directive has been issued on certain aspects of mediation in civil and commercial matters. The Executive generally welcomes the proposals but considers a number of points require to be clarified before the Directive is finalised. A draft code of conduct for mediators has also recently been prepared by Stakeholders and was launched at a conference in Brussels on 2nd July. The Executive is also generally supportive of this code but again considers that its status and effect requires further clarification. **Update: Proposal has been presented by the Commission and Executive officials, where appropriate, will attend Working Group meetings in Brussels with DCA officials.**

**Criminal Law**

- The Commission has published a Green Paper on Sentencing to which the Executive will be responding. As part of this process, an Executive official and Professor Christopher Gane of Aberdeen University attended an experts meeting in Brussels in June as part of the UK delegation. **Update: The Executive has responded to the Sentencing Green Paper and will be responding to the GP on Bail that was published during the summer by 30 November.**

- The Executive, including Crown Office, will also be involved in discussions with the Home Office on establishing the UK negotiating line on the Framework Decisions on the European Evidence Warrant and on Minimum Standards in Criminal Proceedings. The European Evidence Warrant is an order which would be issued by a judicial authority in one Member State to obtain evidence in another Member State, based on the principle of mutual recognition, and would have repercussions for the way in which mutual legal assistance is provided within the EU. However, the creation of a separate Central Authority in Scotland (see below) will make such future changes much simpler to implement. The Framework Decision on Minimum Standards in Criminal Proceedings will also be important as there are likely to be implications for Scots Law in a range of areas arising from these particular proposals. Where it is appropriate the Executive will field officials as part of the UK delegation at the Working Groups in Brussels which will be discussing these draft Framework Decisions. **Update: Executive officials have been involved in the formulation of the UK negotiating line.**
MINISTERIAL PRIORITIES FOR THE DUTCH PRESIDENCY

- We also expect the Commission to publish proposals for Framework Decisions on Combating participation in a criminal organisation and penalties for combating counterfeiting. – **Update:** These items have gone down the Commission’s priority list and are unlikely to appear during the Dutch Presidency and are more likely to appear during the early stages of the Luxembourg Presidency.

- It is anticipated that the Commission will now bring forward a White Paper in the field of mutual recognition, proposing legislative instruments on the subject of disqualifications and on previous convictions. – **Update:** In advance of the White Paper the Commission have tabled a short term measure with the aim of improving the exchange of information on convictions in the EU within the scope of the 1959 Convention on mutual legal assistance in criminal matters. JD officials have been fully engaged with the Home Office in developing the UK line on this initiative.

Police Co-operation

Key issues for the Executive during the Dutch Presidency will focus on their desire to improve practical, operational police co-operation, including strengthening police co-operation by removing obstacles to cross-border actions of police forces. For example:

- further work on promoting the use of Joint Investigation Teams, which can be established involving two or more EU Member States for any criminal investigation involving the Member States concerned.

- **Update** - The Presidency has developed a Draft Council Decision on reinforcing law enforcement co-operation at the internal borders of the EU, which it intends submitting during November. Limited applicability for the UK for obvious geographical reasons

- combating motor vehicle crime with cross border implications and the further handling of the relevant draft Council Decision. – **Update:** The UK has negotiated a number of changes that make the draft a clearer document including, in particular, an amendment to Article 4 (co-operation between competent authorities) which was accepted by the Presidency in October.

- combating violence and disorder at sports events, in the context of the EC Football and the Olympic Games, as well as to the Conclusions of the Council on police co-operation for combating football hooliganism. - **Update:** Remains work in progress, but there have been useful information exchanges within the Police Co-operation Working Group following Euro 2004 in Portugal and also the Olympic Games in Athens.

The Dutch Presidency also attaches much value to the integrity of European police forces. To that end, the Council of Europe adopted in 2002 a ‘Code of Ethics’. The Presidency would like to discuss how such a code could be further shaped within the EU

The Dutch Presidency is also believed to be keen to press ahead with work on profiling the European Police Chiefs’ Task Force and on building the new institution CEPOL (the European Police College, consisting of a network of existing national training institutes
MINISTERIAL PRIORITIES FOR THE DUTCH PRESIDENCY

within the EU), and these will also be important areas of work for the Executive. - Update: The Secretariat of CEPOL is based at Bramshill and an officer from the Scottish Police College has been seconded to the Secretariat. During the UK Presidency of the EU the Director of the Scottish Police College will take the Chair of the CEPOL Board and the Board meeting will take place in Scotland in December.

These policing issues will be considered primarily in the Police Co-operation Working Group in Brussels. Where appropriate the Executive will field an official at this Working Group in Brussels and contribute to the UK negotiating position; and the frequency of our attendance will increase in the lead up to next years’ UK Presidency. –Update: Our increased participation has continued where the Agenda has merited meaningful involvement.

Asylum and Immigration

This is a key area in the JHA field with the Dutch Presidency giving impetus to negotiations on readmission agreements. The Presidency will build on work establishing a Common Asylum System and will prioritise work on integration. Although asylum and immigration is reserved there may be implications for Scotland from some of the proposals, e.g. for legal aid, and Executive officials are keeping in close touch with the Home Office on relevant dossiers.

2. Implementation

Recent measures that have been agreed and are or are in the process of being implemented in Scotland include:

- The Regulation on Parental Responsibility which will apply from March 2005, and we are currently working on its implementation. This is likely to require an SSI, new Rules of Court and, more importantly, awareness raising with relevant interest groups, especially the legal professions. The Regulation itself is concerned with setting common rules of jurisdiction and ensuring rapid recognition and enforcement of court orders relating to matrimonial issues or residence of/contact with children.
- The European Order for Payment will apply from October 2005 and the Executive is considering its implementation.
- The Framework Decision on the European Arrest Warrant, which was agreed on 13 June 2002, has been implemented into Scots law by means of the Extradition Act 2003. The new Act came into force in 1 January 2004 and aims to simplify procedures for seeking extradition across the EU. The Crown Office is now a designated Central Authority for the operation of the European Arrest Warrant and is already seeing the advantages of closer and more direct contact with our European neighbours.
- The principal provisions of the Crime (International Co-operation) Act 2003 were brought into force on 26 April 2004, and the Lord Advocate (through the International Cooperation Unit in Crown Office), is now the Central Authority for mutual legal assistance in criminal matters in Scotland. The Crown Office is now working with Scottish enforcement bodies to ensure the benefits of the new simplified process can be properly realised.
- The directive to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid in such disputes has to be implemented
MINISTERIAL PRIORITIES FOR THE DUTCH PRESIDENCY

by 30 November 2004. Changes to the legal aid regulations to give effect to this directive in Scotland are currently under consideration. – Update: Regulations in the process of being laid before Scottish Parliament.

3. Best Practice

We are undertaking a number of measures in the order to exchange best practice with other Member States:

- Through the Scottish Police College, in partnership with Northern Ireland, in a twinning project to improve the training and development of the Latvian State Police
- Closer links with the Commission through visits, presentations to DG JHA on Scots Law and facilitating a visit to Scotland. A Scots lawyer from the Procurator Fiscal Service will be seconded to DG JHA for 6 months from September 04, to be followed by a lawyer from OSSE on a further 6 month secondment. – Update: Rob McAndrew from COPFS has now begun work in the Criminal Judicial Co-operation Unit of the Commission.
- Hosting Justice related events as part of the Scotland in the Netherlands programme in The Hague and University of Leiden in October 2004.- Update: Event successfully took place on 7th and 8th October
- Working on seminars to take place during the UK Presidency of the EU in Scotland, which will include the conference on policing with young people which was originally to take place this year. – Update: Executive officials are working with Whitehall colleagues on UK Presidency

CATHY JAMIESON
Delegations will find attached the Presidency Conclusions of the Brussels European Council (4/5 November 2004).
1. The European Council discussed in particular
   • preparation of the Mid-Term Review of the Lisbon Strategy
   • an area of Freedom, Security and Justice: the Hague Programme
   • communicating Europe
   It also held discussions with the Prime Minister of Iraq, Mr Allawi.

2. The meeting of the European Council was preceded by an exposé by the President of the European Parliament, Mr Josep Borrell, followed by an exchange of views.

3. The European Council took note of the outcome of the European Parliament debate on the investiture of the designated Commission. It welcomed the new list of Members-designate of the Commission presented by the nominee for President, Mr José Manuel Barroso. The Council, by common accord with the President-designate, adopted this list. The European Council expressed its hope that this Commission can be approved and enter into office as soon as possible.

4. The European Council noted with deep satisfaction that the "Treaty establishing a Constitution for Europe" was solemnly signed in Rome on 29 October 2004 on behalf of all Member States.

I. THE LISBON STRATEGY: PREPARING FOR THE MID-TERM REVIEW

5. The European Council confirmed the validity and relevance of the process it set in motion in Lisbon in March 2000 aimed at enhancing substantially the competitiveness of European economies through a balanced strategy with an economic, social and environmental dimension. It encouraged the Council to build on the progress made since the Spring meeting and to maintain the momentum of its work. It reiterated the importance of the implementation of agreed measures by the Member States.
6. The European Council stressed the importance of the Mid-Term Review at the 2005 Spring European Council for providing renewed impetus to the Lisbon Strategy. In this connection it welcomed a presentation by Mr Wim Kok, Chairman of the High-Level Group advising the Commission on its preparations for the Mid-Term Review. The presentation was followed by an exchange of views.

7. The European Council welcomed the European Commission's intention to continue to make implementation of the Lisbon Strategy a key component of its policy. In this connection it invited the Commission to bring forward the necessary proposals for the Mid-Term Review in the light of new challenges by the end of January 2005. Those comprehensive proposals should pay regard to the report by the High-Level Group chaired by Mr Kok and take into account the views of Member States. They will also take into account the forthcoming review of the Sustainable Development Strategy. The European Council invited the Council to examine these proposals in good time and looks forward to further concrete contributions with a view to the successful implementation of the Lisbon Strategy in all its dimensions.

8. The European Council took note of the exchange of views at the Tripartite Social Summit and, recognising the key role social partners play at all levels, in particular in relation to modernisation of the labour market and anticipation of change, invited them to commit to the Mid-Term Review on a more effective implementation of the Lisbon Strategy.

9. The European Council noted with satisfaction that a programme of actions was undertaken to drive forward the joint initiative on better regulation. EU institutions have made good progress towards developing a common methodology for impact assessments and adapting working methods for the simplification programme, as provided for in the Inter-institutional Agreement on Better Lawmaking.
10. The European Council welcomed the conclusions of the Council (ECOFIN) on 21 October. In this connection it noted, in particular,

- the support given to the development of a common methodology for measuring administrative burdens;
- the Commission's intention to present shortly a communication on this issue;
- the cooperation between the Commission and Member States in pilot projects aiming at the further determination of such a methodology, to be completed as soon as possible in 2005.

The European Council called on the Commission to implement the methodology in its guidelines for impact assessments and working methods for simplification after finalisation of the pilots.

11. The European Council, acknowledging the important role played by the European Parliament in this area, welcomed the progress made by the Commission and the Council towards establishing Council priorities for simplification of existing Community legislation while respecting the acquis communautaire. It invited the Commission to include these priorities in its rolling simplification programme. It noted that the priorities are likely to be identified in the environment, transport and statistics sectors. It invited the Council to pursue work primarily within these selected sectors and to identify, at its November meeting, agreed priorities in the form of a shortlist of 10-15 legal acts.

12. The 2005 Spring European Council will discuss better regulation in the context of the Lisbon Mid-Term Review.

13. Finally, in the context of the preparation of the Mid-Term Review the European Council took note of the letter of the Heads of State or Government of France, Germany, Spain and Sweden pointing out the importance of demographic factors in shaping the future economic and social development of Europe and calling for the elaboration of a "European Pact for Youth".
II. **AREA OF FREEDOM, SECURITY AND JUSTICE: THE HAGUE PROGRAMME**


The citizens of Europe rightly expect the European Union, while guaranteeing respect for fundamental freedoms and rights, to take a more effective, joint approach to cross-border problems such as illegal migration and trafficking in and smuggling of human beings, as well as to terrorism and organised crime.

15. Five years after the European Council's meeting in Tampere, when it agreed on a programme which laid the foundation for important achievements in the area of freedom, security and justice, it is time for a new programme to enable the Union to build on these achievements and effectively meet the new challenges it will face. To this end, it adopted a new multi-annual programme for the next five years, to be known as the Hague Programme, which is attached to these conclusions. This programme reflects the ambitions as expressed in the Treaty establishing a Constitution for Europe. It takes account of the evaluation by the Commission as welcomed by the European Council in June 2004 as well as of the Recommendation on the use of qualified majority voting and the co-decision procedure adopted by the European Parliament on 14 October 2004.

16. The Hague Programme deals with all aspects of policies relating to the area of freedom, security and justice, including their external dimension, notably fundamental rights and citizenship, asylum and migration, border management, integration, the fight against terrorism and organised crime, justice and police cooperation, and civil law, while a drugs strategy will be added in December 2004. In conjunction, the European Council considers that creating appropriate European legal instruments and strengthening practical and operational cooperation between relevant national agencies, as well as timely implementation of agreed measures, are of vital importance.
17. In the light of this Programme, the European Council invites the Commission to present an Action Plan in 2005 with proposals for concrete actions and a timetable for their adoption and implementation. Furthermore, it invites the Commission to present to the Council an annual report on implementation of Union measures ("scoreboard"). Member States shall provide the relevant information to this end. In this context, the European Council emphasised the importance of transparency and the involvement of the European Parliament.

18. The European Council called on the Council to ensure that the timetable for each of the various measures is observed.

19. Without prejudice to the Financial Framework 2007-2013, the European Council noted that due account should be taken of the financial implications of the multi-annual agenda for the area of freedom, security and justice.

20. The European Council will review progress on the Hague Programme in the second half of 2006.

III. **COMMUNICATING EUROPE**

21. The European Council reiterated the need to strengthen awareness among citizens of the importance of the work of the Union and welcomes the outcome of the meeting of the Ministers for European Affairs dedicated to this subject. It also encourages future presidencies to continue discussion of this matter, including examination of possibilities for televised public debates on European issues prior to European Council meetings. The citizens of Europe hold essential values in common and politicians both at the national and the European level have a responsibility to communicate the relevance of the European project and to involve Europeans, through public debate and active citizenship, in decision-making.
22. The European Council welcomed the special emphasis that the Commission continues to place on communication as well as the Commission's intention to present its communication strategy in good time before the June 2005 European Council.

23. The European Council reiterated that the process of ratification of the Constitutional Treaty provides an important opportunity to inform the public about European issues. Member States may share information and experiences relating to this process, notwithstanding the fact that campaigns relating to ratification remain the national responsibility of each Member State.

IV. **ENLARGEMENT**

24. The European Council heard a presentation by the President of the European Commission on the Progress Reports, the Strategy Paper on Enlargement and Recommendations regarding the four candidate States as well as the study on issues arising from Turkey's membership perspective published by the Commission on 6 October 2004.

25. The European Council confirmed that, in line with previous conclusions, it will address outstanding enlargement issues at its meeting in December 2004.

V. **EXTERNAL AFFAIRS**

**US Presidential election**

26. The European Council warmly congratulated President George W. Bush on his re-election as President of the United States of America. Our close transatlantic partnership, based on shared values, is fundamental for Europe's approach to building international peace, security and prosperity. Our deep political, economic and cultural ties make us each other's natural and indispensable partners.
27. The European Union and the United States of America share a responsibility in addressing key threats and challenges, such as regional conflicts, in particular the Middle East; terrorism; proliferation of weapons of mass destruction; AIDS; the fight against poverty. The European Union and the United States should also continue to cooperate closely to contribute to a successful outcome of the Doha Round of trade negotiations.

28. The EU and its Member States look forward to working very closely with President Bush and his new Administration to combine efforts, including in multilateral institutions, to promote the rule of law and create a just, democratic and secure world.

**Sudan**

29. The European Council expressed its grave concern about the situation in Sudan/Darfur and emphasised the importance of respect for human rights and improvement of security conditions. It called upon the Government of Sudan and on the other parties to meet the demands set out by the international community. The European Council reaffirmed its continued support to the African Union and its readiness to provide assistance and expertise to the expansion of the African Union's mission in Darfur. In this context, the European Council endorsed the Council conclusions of 2 November and encouraged the Council and the Commission to take the necessary action for their implementation, not excluding the use of sanctions, as a matter of urgency.

**Iraq**

30. The European Council met Iraqi Prime Minister Allawi to discuss the situation in Iraq and reiterated its strong support for the political process in Iraq and the Iraqi Interim Government. It welcomed the Iraqi determination to continue the political process and assured the Prime Minister that the European Union will continue to support the brave and difficult course the people of Iraq are steering towards the restoration of security, democracy and the rule of law. In this context, the European Council adopted the attached declaration and encouraged the Council and the Commission to take the necessary action for its implementation as a matter of urgency.
Middle East

31. The European Council expresses its solidarity with the Palestinian people in this difficult moment. It encourages the Palestinian leadership to demonstrate a strong sense of responsibility in ensuring the regular functioning of Palestinian institutions. The European Council considers that it is essential that a legitimate leadership continues to resolutely pursue the path towards peace in the Middle East.

32. The European Council, recalling the established EU positions, remains committed to the two-State solution as laid out in the Roadmap and agreed between the parties, which would result in a viable, contiguous, sovereign and independent Palestinian State existing side by side in peace with an Israel living within recognised and secure borders.

33. The European Council welcomes the Knesset vote on 26 October to support an Israeli withdrawal from the Gaza strip and part of the northern West Bank. The European Council expresses its willingness to support such a withdrawal as a first step in the overall process, in accordance with the conditions laid out by the European Council in March 2004, amongst which, that it takes place in the context of the Roadmap. The European Council also recalls the Quartet statement of 22 September.

34. The European Council endorses the short-term programme of action in the fields of security, reforms, elections and economy proposed by the High Representative. It underlines in particular its readiness to support the electoral process in the Palestinian Territories. The European Council calls on the Palestinian Authority to organise elections in accordance with international standards under the authority of an independent electoral commission and calls upon Israel to facilitate these elections.
35. The European Council stresses that these initiatives will need full cooperation from and between the parties, as well as coordination with other partners involved, especially in the region - in particular with Egypt - and within the Quartet. The European Council reiterates its readiness to support the Palestinian Authority in taking responsibility for law and order. The European Council invites the High Representative and the Commission to present regular progress reports on the implementation of these initiatives.

36. At the same time, with a view to relaunching a meaningful political process of negotiations, the European Council considers that support for these short-term proposals would be enhanced if they could be placed within a broader political perspective. It invites the High Representative to conduct consultations to that effect, with the parties, the international community, and, especially, the other members of the Quartet.

37. The European Council reiterates its condemnation of violence and terrorism, and urges the resumption of a ceasefire embracing all parties and groups.

**Iran: nuclear issues**

38. The European Council discussed the current exchanges with Iran on its nuclear programme. It reaffirmed that it will work to open the way for a durable and cooperative long-term relationship with Iran, including political, commercial and technological dimensions.

39. It underlined the importance it attached to building confidence in the peaceful nature of Iran's nuclear programme and the need for transparency and compliance with IAEA Board of Governors' resolutions. A full and sustained suspension of all enrichment and reprocessing activities, on a voluntary basis, would open the door for talks on long-term cooperation offering mutual benefits.
40. It confirmed that the European Union and its Member States would remain actively engaged - notably through the efforts of France, Germany, the United Kingdom and the High Representative - with the objective of achieving progress on the Iranian nuclear issue before the IAEA Board of Governors meeting starting on 25 November 2004.

41. If the present exchanges resulted in a successful conclusion, the European Council agreed that the negotiations on a Trade and Cooperation Agreement should be resumed as soon as suspension was verified.

**Ukraine**

42. The European Council values Ukraine as a key neighbour and partner. Against this background, it regrets that the first round of the presidential elections in Ukraine on 31 October did not meet international standards for democratic elections.

43. The EU welcomed the high turnout of voters as a positive element.

44. The European Council calls on the Ukrainian authorities to address the noted deficiencies in time before the second round of the elections and to create conditions allowing for free and fair elections, in particular by ensuring equal access to state media for both contenders.

**Common Strategy on the Mediterranean**

45. The European Council took note of the report on the implementation of the Common Strategy on the Mediterranean region and agreed to extend the period of its application by 18 months until 23 January 2006.
THE HAGUE PROGRAMME

STRENGTHENING FREEDOM, SECURITY AND JUSTICE
IN THE EUROPEAN UNION

I. INTRODUCTION

The European Council reaffirms the priority it attaches to the development of an area of freedom, security and justice, responding to a central concern of the peoples of the States brought together in the Union.

Over the past years the European Union has increased its role in securing police, customs and judicial cooperation and in developing a coordinated policy with regard to asylum, immigration and external border controls. This development will continue with the firmer establishment of a common area of freedom, security and justice by the Treaty establishing a Constitution for Europe, signed in Rome on 29 October 2004. This Treaty and the preceding Treaties of Maastricht, Amsterdam and Nice have progressively brought about a common legal framework in the field of justice and home affairs, and the integration of this policy area with other policy areas of the Union.

Since the Tampere European Council in 1999, the Union's policy in the area of justice and home affairs has been developed in the framework of a general programme. Even if not all the original aims were achieved, comprehensive and coordinated progress has been made. The European Council welcomes the results that have been achieved in the first five-year period: the foundations for a common asylum and immigration policy have been laid, the harmonisation of border controls has been prepared, police cooperation has been improved, and the groundwork for judicial cooperation on the basis of the principle of mutual recognition of judicial decisions and judgments has been well advanced.
The security of the European Union and its Member States has acquired a new urgency, especially in the light of the terrorist attacks in the United States on 11 September 2001 and in Madrid on 11 March 2004. The citizens of Europe rightly expect the European Union, while guaranteeing respect for fundamental freedoms and rights, to take a more effective, joint approach to cross-border problems such as illegal migration, trafficking in and smuggling of human beings, terrorism and organised crime, as well as the prevention thereof. Notably in the field of security, the coordination and coherence between the internal and the external dimension has been growing in importance and needs to continue to be vigorously pursued.

Five years after the European Council's meeting in Tampere, it is time for a new agenda to enable the Union to build on the achievements and to meet effectively the new challenges it will face. To this end, the European Council has adopted this new multi-annual programme to be known as the Hague Programme. It reflects the ambitions as expressed in the Treaty establishing a Constitution for Europe and contributes to preparing the Union for its entry into force. It takes account of the evaluation by the Commission\(^1\) as welcomed by the European Council in June 2004 as well as the Recommendation adopted by the European Parliament on 14 October 2004\(^2\), in particular in respect of the passage to qualified majority voting and co-decision as foreseen by Article 67(2) TEC.

The objective of the Hague programme is to improve the common capability of the Union and its Member States to guarantee fundamental rights, minimum procedural safeguards and access to justice, to provide protection in accordance with the Geneva Convention on Refugees and other international treaties to persons in need, to regulate migration flows and to control the external borders of the Union, to fight organised cross-border crime and repress the threat of terrorism, to realise the potential of Europol and Eurojust, to carry further the mutual recognition of judicial decisions and certificates both in civil and in criminal matters, and to eliminate legal and judicial obstacles in litigation in civil and family matters with cross-border implications. This is an objective that has to be achieved in the interests of our citizens by the development of a Common Asylum System and by improving access to the courts, practical police and judicial cooperation, the approximation of laws and the development of common policies.

\(^1\) COM (2004) 401 final

A key element in the near future will be the prevention and suppression of terrorism. A common approach in this area should be based on the principle that when preserving national security, the Member States should take full account of the security of the Union as a whole. In addition, the European Council will be asked to endorse in December 2004 the new European Strategy on Drugs 2005-2012 that will be added to this programme.

The European Council considers that the common project of strengthening the area of freedom, security and justice is vital to securing safe communities, mutual trust and the rule of law throughout the Union. Freedom, justice, control at the external borders, internal security and the prevention of terrorism should henceforth be considered indivisible within the Union as a whole. An optimal level of protection of the area of freedom, security and justice requires multi-disciplinary and concerted action both at EU level and at national level between the competent law enforcement authorities, especially police, customs and border guards.

In the light of this Programme, the European Council invites the Commission to present to the Council an Action Plan in 2005 in which the aims and priorities of this programme will be translated into concrete actions. The plan shall contain a timetable for the adoption and implementation of all the actions. The European Council calls on the Council to ensure that the timetable for each of the various measures is observed. The Commission is invited to present to the Council a yearly report on the implementation of the Hague programme ("scoreboard").

II. GENERAL ORIENTATIONS

1. General principles
The programme set out below seeks to respond to the challenge and the expectations of our citizens. It is based on a pragmatic approach and builds on ongoing work arising from the Tampere programme, current action plans and an evaluation of first generation measures. It is also grounded in the general principles of subsidiarity, proportionality, solidarity and respect for the different legal systems and traditions of the Member States.
The Treaty establishing a Constitution of Europe (hereinafter "the Constitutional Treaty") served as a guideline for the level of ambition, but the existing Treaties provide the legal basis for Council action until such time as the Constitutional Treaty takes effect. Accordingly, the various policy areas have been examined to determine whether preparatory work or studies could already commence, so that measures provided for in the Constitutional Treaty can be taken as soon as it enters into force.

Fundamental rights, as guaranteed by the European Convention on Human Rights and the Charter of Fundamental Rights in Part II of the Constitutional Treaty, including the explanatory notes, as well as the Geneva Convention on Refugees, must be fully respected. At the same time, the programme aims at real and substantial progress towards enhancing mutual confidence and promoting common policies to the benefit of all our citizens.

2. **Protection of fundamental rights**
Incorporating the Charter into the Constitutional Treaty and accession to the European Convention for the protection of human rights and fundamental freedoms will place the Union, including its institutions, under a legal obligation to ensure that in all its areas of activity, fundamental rights are not only respected but also actively promoted.

In this context, the European Council, recalling its firm commitment to oppose any form of racism, antisemitism and xenophobia as expressed in December 2003, welcomes the Commission's communication on the extension of the mandate of the European Monitoring Centre on Racism and Xenophobia towards a Human Rights Agency.

3. **Implementation and evaluation**
The evaluation by the Commission of the Tampere programme\(^1\) showed a clear need for adequate and timely implementation and evaluation of all types of measures in the area of freedom, security and justice.

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\(^1\) COM(2004) 401 final
It is vital for the Council to develop in 2005 practical methods to facilitate timely implementation in all policy areas: measures requiring national authorities' resources should be accompanied by proper plans to ensure more effective implementation, and the length of the implementation period should be more closely related to the complexity of the measure concerned. Regular progress reports by the Commission to the Council during the implementation period should provide an incentive for action in Member States.

Evaluation of the implementation as well as of the effects of all measures is, in the European Council's opinion, essential to the effectiveness of Union action. The evaluations undertaken as from 1 July 2005 must be systematic, objective, impartial and efficient, while avoiding too heavy an administrative burden on national authorities and the Commission. Their goal should be to address the functioning of the measure and to suggest solutions for problems encountered in its implementation and/or application. The Commission should prepare a yearly evaluation report of measures to be submitted to the Council and to inform the European Parliament and the national parliaments.

The European Commission is invited to prepare proposals, to be tabled as soon as the Constitutional Treaty has entered into force, relating to the role of the European Parliament and national parliaments in the evaluation of Eurojust's activities and the scrutiny of Europol's activities.

4. Review
Since the programme will run for a period during which the Constitutional Treaty will enter into force, a review of its implementation is considered to be useful. To that end, the Commission is invited to report by the entry into force of the Constitutional Treaty (1 November 2006) to the European Council on the progress made and to propose the necessary additions to the programme, taking into account the changing legal basis as a consequence of its entry into force.
III. SPECIFIC ORIENTATIONS

1. STRENGTHENING FREEDOM

1.1 Citizenship of the Union

The right of all EU citizens to move and reside freely in the territory of the Member States is the central right of citizenship of the Union. Practical significance of citizenship of the Union will be enhanced by full implementation of Directive 2004/38\(^1\), which codifies Community law in this field and brings clarity and simplicity. The Commission is asked to submit in 2008 a report to the Council and the European Parliament, accompanied by proposals, if appropriate, for allowing EU citizens to move within the European Union on similar terms to nationals of a Member State moving around or changing their place of residence in their own country, in conformity with established principles of Community law.

The European Council encourages the Union's institutions, within the framework of their competences, to maintain an open, transparent and regular dialogue with representative associations and civil society and to promote and facilitate citizens' participation in public life. In particular, the European Council invites the Council and the Commission to give special attention to the fight against anti-semitism, racism and xenophobia.

1.2 Asylum, migration and border policy

International migration will continue. A comprehensive approach, involving all stages of migration, with respect to the root causes of migration, entry and admission policies and integration and return policies is needed.

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JO L 158 of 30.04.2004, p. 77
To ensure such an approach, the European Council urges the Council, the Member States and the Commission to pursue coordinated, strong and effective working relations between those responsible for migration and asylum policies and those responsible for other policy fields relevant to these areas.

The ongoing development of European asylum and migration policy should be based on a common analysis of migratory phenomena in all their aspects. Reinforcing the collection, provision, exchange and efficient use of up-to-date information and data on all relevant migratory developments is of key importance.

The second phase of development of a common policy in the field of asylum, migration and borders started on 1 May 2004. It should be based on solidarity and fair sharing of responsibility including its financial implications and closer practical cooperation between Member States: technical assistance, training, and exchange of information, monitoring of the adequate and timely implementation and application of instruments as well as further harmonisation of legislation.

The European Council, taking into account the assessment by the Commission and the strong views expressed by the European Parliament in its Recommendation¹, asks the Council to adopt a decision based on Article 67(2) TEC immediately after formal consultation of the European Parliament and no later than 1 April 2005 to apply the procedure provided for in Article 251 TEC to all Title IV measures to strengthen freedom, subject to the Nice Treaty, except for legal migration.

1.3 A Common European Asylum System
The aims of the Common European Asylum System in its second phase will be the establishment of a common asylum procedure and a uniform status for those who are granted asylum or subsidiary protection. It will be based on the full and inclusive application of the Geneva Convention on Refugees and other relevant Treaties, and be built on a thorough and complete evaluation of the legal instruments that have been adopted in the first phase.

The European Council urges the Member States to implement fully the first phase without delay. In this regard the Council should adopt unanimously, in conformity with article 67(5) TEC, the Asylum Procedures Directive as soon as possible. The Commission is invited to conclude the evaluation of first-phase legal instruments in 2007 and to submit the second-phase instruments and measures to the Council and the European Parliament with a view to their adoption before the end of 2010. In this framework, the European Council invites the Commission to present a study on the appropriateness, the possibilities and the difficulties, as well as the legal and practical implications of joint processing of asylum applications within the Union. Furthermore a separate study, to be conducted in close consultation with the UNHCR, should look into the merits, appropriateness and feasibility of joint processing of asylum applications outside EU territory, in complementarity with the Common European Asylum System and in compliance with the relevant international standards.

The European Council invites the Council and the Commission to establish in 2005 appropriate structures involving the national asylum services of the Member States with a view to facilitating practical and collaborative cooperation. Thus Member States will be assisted, inter alia, in achieving a single procedure for the assessment of applications for international protection, and in jointly compiling, assessing and applying information on countries of origin, as well as in addressing particular pressures on the asylum systems and reception capacities resulting, inter alia, from their geographical location. After a common asylum procedure has been established, these structures should be transformed, on the basis of an evaluation, into a European support office for all forms of cooperation between Member States relating to the Common European Asylum System.

The European Council welcomes the establishment of the new European Refugee Fund for the period 2005-2010 and stresses the urgent need for Member States to maintain adequate asylum systems and reception facilities in the run-up to the establishment of a common asylum procedure. It invites the Commission to earmark existing Community funds to assist Member States in the processing of asylum applications and in the reception of categories of third-country nationals. It invites the Council to designate these categories on the basis of a proposal to be submitted by the Commission in 2005.
1.4 Legal migration and the fight against illegal employment

Legal migration will play an important role in enhancing the knowledge-based economy in Europe, in advancing economic development, and thus contributing to the implementation of the Lisbon strategy. It could also play a role in partnerships with third countries.

The European Council emphasizes that the determination of volumes of admission of labour migrants is a competence of the Member States. The European Council, taking into account the outcome of discussions on the Green Paper on labour migration, best practices in Member States and its relevance for implementation of the Lisbon strategy, invites the Commission to present a policy plan on legal migration including admission procedures capable of responding promptly to fluctuating demands for migrant labour in the labour market before the end of 2005.

As the informal economy and illegal employment can act as a pull factor for illegal immigration and can lead to exploitation, the European Council calls on Member States to reach the targets for reducing the informal economy set out in the European employment strategy.

1.5 Integration of third-country nationals

Stability and cohesion within our societies benefit from the successful integration of legally resident third-country nationals and their descendants. To achieve this objective, it is essential to develop effective policies, and to prevent the isolation of certain groups. A comprehensive approach involving stakeholders at the local, regional, national, and EU level is therefore essential.

While recognising the progress that has already been made in respect of the fair treatment of legally resident third-country nationals in the EU, the European Council calls for the creation of equal opportunities to participate fully in society. Obstacles to integration need to be actively eliminated.
The European Council underlines the need for greater coordination of national integration policies and EU initiatives in this field. In this respect, the common basic principles underlying a coherent European framework on integration should be established.

These principles, connecting all policy areas related to integration, should include at least the following aspects. Integration:

- is a continuous, two-way process involving both legally resident third-country nationals and the host society;
- includes, but goes beyond, anti-discrimination policy;
- implies respect for the basic values of the European Union and fundamental human rights;
- requires basic skills for participation in society;
- relies on frequent interaction and intercultural dialogue between all members of society within common forums and activities in order to improve mutual understanding;
- extends to a variety of policy areas, including employment and education.

A framework, based on these common basic principles, will form the foundation for future initiatives in the EU, relying on clear goals and means of evaluation. The European Council invites Member States, the Council and the Commission to promote the structural exchange of experience and information on integration, supported by the development of a widely accessible website on the Internet.

1.6 The external dimension of asylum and migration

1.6.1 Partnership with third countries

Asylum and migration are by their very nature international issues. EU policy should aim at assisting third countries, in full partnership, using existing Community funds where appropriate, in their efforts to improve their capacity for migration management and refugee protection, prevent and combat illegal immigration, inform on legal channels for migration, resolve refugee situations by providing better access to durable solutions, build border-control capacity, enhance document security and tackle the problem of return.
The European Council recognises that insufficiently managed migration flows can result in humanitarian disasters. It wishes to express its utmost concern about the human tragedies that take place in the Mediterranean as a result of attempts to enter the EU illegally. It calls upon all States to intensify their cooperation in preventing further loss of life.

The European Council calls upon the Council and the Commission to continue the process of fully integrating migration into the EU's existing and future relations with third countries. It invites the Commission to complete the integration of migration into the Country and Regional Strategy Papers for all relevant third countries by the spring of 2005.

The European Council acknowledges the need for the EU to contribute in a spirit of shared responsibility to a more accessible, equitable and effective international protection system in partnership with third countries, and to provide access to protection and durable solutions at the earliest possible stage. Countries in regions of origin and transit will be encouraged in their efforts to strengthen the capacity for the protection of refugees. In this regard the European Council calls upon all third countries to accede and adhere to the Geneva Convention on Refugees.

1.6.2 Partnership with countries and regions of origin

The European Council welcomes the Commission Communication on improving access to durable solutions ¹ and invites the Commission to develop EU-Regional Protection Programmes in partnership with the third countries concerned and in close consultation and cooperation with UNHCR. These programmes will build on experience gained in pilot protection programmes to be launched before the end of 2005. These programmes will incorporate a variety of relevant instruments, primarily focused on capacity building, and include a joint resettlement programme for Member States willing to participate in such a programme.

Policies which link migration, development cooperation and humanitarian assistance should be coherent and be developed in partnership and dialogue with countries and regions of origin. The European Council welcomes the progress already made, invites the Council to develop these policies, with particular emphasis on root causes, push factors and poverty alleviation, and urges the Commission to present concrete and carefully worked out proposals by the spring of 2005.

1.6.3. Partnership with countries and regions of transit
As regards countries of transit, the European Council emphasises the need for intensified cooperation and capacity building, both on the southern and the eastern borders of the EU, to enable these countries better to manage migration and to provide adequate protection for refugees. Support for capacity-building in national asylum systems, border control and wider cooperation on migration issues will be provided to those countries that demonstrate a genuine commitment to fulfil their obligations under the Geneva Convention on Refugees.

The proposal for a Regulation establishing a European Neighbourhood and Partnership Instrument\(^1\) provides the strategic framework for intensifying cooperation and dialogue on asylum and migration with neighbouring countries amongst others around the Mediterranean basin, and for initiating new measures. In this connection, the European Council requests a report on progress and achievements before the end of 2005.

1.6.4 Return and re-admission policy
Migrants who do not or no longer have the right to stay legally in the EU must return on a voluntary or, if necessary, compulsory basis. The European Council calls for the establishment of an effective removal and repatriation policy based on common standards for persons to be returned in a humane manner and with full respect for their human rights and dignity.

\(^1\) COM (2004) 628 final
The European Council considers it essential that the Council begins discussions in early 2005 on minimum standards for return procedures including minimum standards to support effective national removal efforts. The proposal should also take into account special concerns with regard to safeguarding public order and security. A coherent approach between return policy and all other aspects of the external relations of the Community with third countries is necessary as is special emphasis on the problem of nationals of such third countries who are not in the possession of passports or other identity documents.

The European Council calls for:

- closer cooperation and mutual technical assistance;
- launching of the preparatory phase of a European return fund;
- common integrated country and region specific return programmes;
- the establishment of a European Return Fund by 2007 taking into account the evaluation of the preparatory phase;
- the timely conclusion of Community readmission agreements;
- the prompt appointment by the Commission of a Special Representative for a common readmission policy.

1.7 Management of migration flows

1.7.1 Border checks and the fight against illegal immigration
The European Council stresses the importance of swift abolition of internal border controls, the further gradual establishment of the integrated management system for external borders and the strengthening of controls at and surveillance of the external borders of the Union. In this respect the need for solidarity and fair sharing of responsibility including its financial implications between the Member States is underlined.
The European Council urges the Council, the Commission and Member States to take all necessary measures to allow the abolition of controls at internal borders as soon as possible, provided all requirements to apply the Schengen acquis have been fulfilled and after the Schengen Information System (SIS II) has become operational in 2007. In order to reach this goal, the evaluation of the implementation of the non SIS II related acquis should start in the first half of 2006.

The European Council welcomes the establishment of the European Agency for the Management of Operational Cooperation at the External Borders, on 1 May 2005. It requests the Commission to submit an evaluation of the Agency to the Council before the end of 2007. The evaluation should contain a review of the tasks of the Agency and an assessment of whether the Agency should concern itself with other aspects of border management, including enhanced cooperation with customs services and other competent authorities for goods-related security matters.

The control and surveillance of external borders fall within the sphere of national border authorities. However, in order to support Member States with specific requirements for control and surveillance of long or difficult stretches of external borders, and where Member States are confronted with special and unforeseen circumstances due to exceptional migratory pressures on these borders, the European Council:

- invites the Council to establish teams of national experts that can provide rapid technical and operational assistance to Member States requesting it, following proper risk analysis by the Border Management Agency and acting within its framework, on the basis of a proposal by the Commission on the appropriate powers and funding for such teams, to be submitted in 2005;
- invites the Council and the Commission to establish a Community border management fund by the end of 2006 at the latest;
- invites the Commission to submit, as soon as the abolition of controls at internal borders has been completed, a proposal to supplement the existing Schengen evaluation mechanism with a supervisory mechanism, ensuring full involvement of Member States experts, and including unannounced inspections.
The review of the tasks of the Agency envisaged above and in particular the evaluation of the functioning of the teams of national experts should include the feasibility of the creation of a European system of border guards.

The European Council invites Member States to improve their joint analyses of migratory routes and smuggling and trafficking practices and of criminal networks active in this area, inter alia within the framework of the Border Management Agency and in close cooperation with Europol and Eurojust. It also calls on the Council and the Commission to ensure the firm establishment of immigration liaison networks in relevant third countries. In this connection, the European Council welcomes initiatives by Member States for cooperation at sea, on a voluntary basis, notably for rescue operations, in accordance with national and international law, possibly including future cooperation with third countries.

With a view to the development of common standards, best practices and mechanisms to prevent and combat trafficking in human beings, the European Council invites the Council and the Commission to develop a plan in 2005.

1.7.2 Biometrics and information systems

The management of migration flows, including the fight against illegal immigration should be strengthened by establishing a continuum of security measures that effectively links visa application procedures and entry and exit procedures at external border crossings. Such measures are also of importance for the prevention and control of crime, in particular terrorism. In order to achieve this, a coherent approach and harmonised solutions in the EU on biometric identifiers and data are necessary.

The European Council requests the Council to examine how to maximise the effectiveness and interoperability of EU information systems in tackling illegal immigration and improving border controls as well as the management of these systems on the basis of a communication by the Commission on the interoperability between the Schengen Information System (SIS II), the Visa Information System (VIS) and EURODAC to be released in 2005, taking into account the need to strike the right balance between law enforcement purposes and safeguarding the fundamental rights of individuals.
The European Council invites the Council, the Commission and Member States to continue their efforts to integrate biometric identifiers in travel documents, visa, residence permits, EU citizens’ passports and information systems without delay and to prepare for the development of minimum standards for national identity cards, taking into account ICAO standards.

1.7.3 Visa policy

The European Council underlines the need for further development of the common visa policy as part of a multi-layered system aimed at facilitating legitimate travel and tackling illegal immigration through further harmonisation of national legislation and handling practices at local consular missions. Common visa offices should be established in the long term, taking into account discussions on the establishment of an European External Action Service. The European Council welcomes initiatives by individual Member States which, on a voluntary basis, cooperate at pooling of staff and means for visa issuance.

The European Council:

• invites the Commission, as a first step, to propose the necessary amendments to further enhance visa policies and to submit in 2005 a proposal on the establishment of common application centres focusing inter alia on possible synergies linked with the development of the VIS, to review the Common Consular Instructions and table the appropriate proposal by early 2006 at the latest;

• stresses the importance of swift implementation of the VIS starting with the incorporation of among others alphanumeric data and photographs by the end of 2006 and biometrics by the end of 2007 at the latest;

• invites the Commission to submit without delay the necessary proposal in order to comply with the agreed time frame for implementation of the VIS;

• calls on the Commission to continue its efforts to ensure that the citizens of all Member States can travel without a short-stay visa to all third countries whose nationals can travel to the EU without a visa as soon as possible;
• invites the Council and the Commission to examine, with a view to developing a common approach, whether in the context of the EC readmission policy it would be opportune to facilitate, on a case by case basis, the issuance of short-stay visas to third-country nationals, where possible and on a basis of reciprocity, as part of a real partnership in external relations, including migration-related issues.

2. STRENGTHENING SECURITY

2.1 Improving the exchange of information

The European Council is convinced that strengthening freedom, security and justice requires an innovative approach to the cross-border exchange of law-enforcement information. The mere fact that information crosses borders should no longer be relevant.

With effect from 1 January 2008 the exchange of such information should be governed by conditions set out below with regard to the principle of availability, which means that, throughout the Union, a law enforcement officer in one Member State who needs information in order to perform his duties can obtain this from another Member State and that the law enforcement agency in the other Member State which holds this information will make it available for the stated purpose, taking into account the requirement of ongoing investigations in that State.

Without prejudice to work in progress\(^1\) the Commission is invited to submit proposals by the end of 2005 at the latest for implementation of the principle of availability, in which the following key conditions should be strictly observed:

- the exchange may only take place in order that legal tasks may be performed;
- the integrity of the data to be exchanged must be guaranteed;
- the need to protect sources of information and to secure the confidentiality of the data at all stages of the exchange, and subsequently;

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\(^1\) The Draft framework decision on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, in particular as regards serious offences including terrorist acts, doc. COM(2004) 221 final.
• common standards for access to the data and common technical standards must be applied;
• supervision of respect for data protection, and appropriate control prior to and after the exchange must be ensured;
• individuals must be protected from abuse of data and have the right to seek correction of incorrect data.

The methods of exchange of information should make full use of new technology and must be adapted to each type of information, where appropriate, through reciprocal access to or interoperability of national databases, or direct (on-line) access, including for Europol, to existing central EU databases such as the SIS. New centralised European databases should only be created on the basis of studies that have shown their added value.

2.2 Terrorism
The European Council underlines that effective prevention and combating of terrorism in full compliance with fundamental rights requires Member States not to confine their activities to maintaining their own security, but to focus also on the security of the Union as a whole.

As a goal this means that Member States:
• use the powers of their intelligence and security services not only to counter threats to their own security, but also, as the case may be, to protect the internal security of the other Member States;
• bring immediately to the attention of the competent authorities of other Member States any information available to their services which concerns threats to the internal security of these other Member States;
• in cases where persons or goods are under surveillance by security services in connection with terrorist threats, ensure that no gaps occur in their surveillance as a result of their crossing a border.
In the short term all the elements of the European Council's declaration of 25 March 2004 and the EU action plan on combating terrorism must continue to be implemented in full, notably that enhanced use of Europol and Eurojust should be made and the EU Counter Terrorism Coordinator is encouraged to promote progress.

In this context the European Council recalls its invitation to the Commission to bring forward a proposal for a common EU approach to the use of passengers data for border and aviation security and other law enforcement purposes.\(^1\)

The high level of exchange of information between security services shall be maintained. Nevertheless it should be improved, taking into account the overall principle of availability as described above in paragraph 2.1 and giving particular consideration to the special circumstances that apply to the working methods of security services, e.g. the need to secure the methods of collecting information, the sources of information and the continued confidentiality of the data after the exchange.

With effect from 1 January 2005, SitCen will provide the Council with strategic analysis of the terrorist threat based on intelligence from Member States' intelligence and security services and, where appropriate, on information provided by Europol.

The European Council stresses the importance of measures to combat financing of terrorism. It looks forward to examining the coherent overall approach that will be submitted to it by the Secretary General/High Representative and the Commission at its meeting in December 2004. This strategy should suggest ways to improve the efficiency of existing instruments such as the monitoring of suspicious financial flows and the freezing of assets and propose new tools in respect of cash transactions and the institutions involved in them.

The Commission is invited to make proposals aimed at improving the security of the storage and transport of explosives as well as at ensuring traceability of industrial and chemical precursors.

\(^{1}\) Declaration on Combating terrorism adopted on 25 March 2004, doc. 7906/04, point 6.
The European Council also stresses the need to ensure adequate protection and assistance to victims of terrorism.

The Council should, by the end of 2005, develop a long-term strategy to address the factors which contribute to radicalisation and recruitment for terrorist activities.

All the instruments available to the European Union should be used in a consistent manner so that the key concern – the fight against terrorism – is fully addressed. To that end the JHA Ministers within the Council should have the leading role, taking into account the task of the General Affairs and External Relations Council. The Commission should review Community legislation in sufficient time to be able to adapt it in parallel with measures to be adopted in order to combat terrorism.

The European Union will further strengthen its efforts being directed, in the external dimension of the area of freedom, security and justice, towards the fight against terrorism. In this context, the Council is invited to set up in conjunction with Europol and the European Border Agency a network of national experts on preventing and combating terrorism and on border control, who will be available to respond to requests from third countries for technical assistance in the training and instruction of their authorities.

The European Council urges the Commission to increase the funding for counter-terrorism related capacity-building projects in third countries and to ensure it has the necessary expertise to implement such projects effectively. The Council also calls on the Commission to ensure that, in the proposed revision of the existing instruments governing external assistance, appropriate provisions are made to enable rapid, flexible and targeted counter-terrorist assistance.

2.3 Police cooperation

The effective combating of cross-border organised and other serious crime and terrorism requires intensified practical cooperation between police and customs authorities of Member States and with Europol and better use of existing instruments in this field.
The European Council urges the Member States to enable Europol in cooperation with Eurojust to play a key role in the fight against serious cross-border (organised) crime and terrorism by:

- ratifying and effectively implementing the necessary legal instruments by the end of 2004;\(^1\)
- providing all necessary high quality information to Europol in good time;
- encouraging good cooperation between their competent national authorities and Europol.

With effect from 1 January 2006, Europol must have replaced its "crime situation reports" by yearly "threat assessments" on serious forms of organised crime, based on information provided by the Member States and input from Eurojust and the Police Chiefs Task Force. The Council should use these analyses to establish yearly strategic priorities, which will serve as guidelines for further action. This should be the next step towards the goal of setting up and implementing a methodology for intelligence-led law enforcement at EU level.

Europol should be designated by Member States as central office of the Union for euro counterfeits within the meaning of the Geneva Convention of 1929.

The Council should adopt the European law on Europol, provided for in Article III-276 of the Constitutional Treaty, as soon as possible after the entry into force of the Constitutional Treaty and no later than 1 January 2008, taking account of all tasks conferred upon Europol.

Until that time, Europol must improve its functioning by making full use of the cooperation agreement with Eurojust. Europol and Eurojust should report annually to the Council on their common experiences and about specific results. Furthermore Europol and Eurojust should encourage the use of and their participation in Member States' joint investigation teams.

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Experience in the Member States with the use of joint investigation teams is limited. With a view to encouraging the use of such teams and exchanging experiences on best practice, each Member State should designate a national expert.

The Council should develop cross-border police and customs cooperation on the basis of common principles. It invites the Commission to bring forward proposals to further develop the Schengen-acquis in respect of cross border operational police cooperation.

Member States should engage in improving the quality of their law enforcement data with the assistance of Europol. Furthermore, Europol should advise the Council on ways to improve the data. The Europol information system should be up and running without delay.

The Council is invited to encourage the exchange of best practice on investigative techniques as a first step to the development of common investigative techniques, envisaged in Article III-257 of the Constitutional Treaty, in particular in the areas of forensic investigations and information technology security.

Police cooperation between Member States is made more efficient and effective in a number of cases by facilitating cooperation on specified themes between the Member States concerned, where appropriate by establishing joint investigation teams and, where necessary, supported by Europol and Eurojust. In specific border areas, closer cooperation and better coordination is the only way to deal with crime and threats to public security and national safety.

Strengthening police cooperation requires focused attention on mutual trust and confidence-building. In an enlarged European Union, an explicit effort should be made to improve the understanding of the working of Member States' legal systems and organisations. The Council and the Member States should develop by the end of 2005 in cooperation with CEPOL standards and modules for training courses for national police officers with regard to practical aspects of EU law enforcement cooperation.
The Commission is invited to develop, in close cooperation with CEPOL and by the end of 2005, systematic exchange programmes for police authorities aimed at achieving better understanding of the working of Member States' legal systems and organisations.

Finally experience with external police operations should also be taken into account with a view to improving internal security of the European Union.

2.4 Management of crises within the European Union with cross-border effects

On 12 December 2003 the European Council adopted the European security strategy, which outlines global challenges, key threats, strategic objectives and policy implications for a secure Europe in a better world. An essential complement thereof is providing internal security within the European Union, with particular reference to possible major internal crises with cross-border effects affecting our citizens, vital infrastructure and public order and security. Only then can optimum protection be provided to European citizens and vital infrastructure for instance in the event of a CBRN accident.

Effective management of cross-border crises within the EU requires not only strengthening of current actions on civil protection and vital infrastructure but also addressing effectively the public order and security aspects of such crises and coordination between these areas.

Therefore the European Council calls for the Council and the Commission to set up within their existing structures, while fully respecting national competences, integrated and coordinated EU crisis-management arrangements for crises with cross-border effects within the EU, to be implemented at the latest by 1 July 2006. These arrangements should at least address the following issues: further assessment of Member States' capabilities, stockpiling, training, joint exercises and operational plans for civilian crisis management.
2.5 Operational cooperation
Coordination of operational activities by law enforcement agencies and other agencies in all parts of the area of freedom, security and justice, and monitoring of the strategic priorities set by the Council, must be ensured.

To that end, the Council is invited to prepare for the setting up of the Committee on Internal Security, envisaged in Article III-261 of the Constitutional Treaty, in particular by determining its field of activity, tasks, competences and composition, with a view to its establishment as soon as possible after the Constitutional Treaty has entered into force.

To gain practical experience with coordination in the meantime, the Council is invited to organise a joint meeting every six months between the chairpersons of the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) and the Article 36 Committee (CATS) and representatives of the Commission, Europol, Eurojust, the EBA, the Police Chiefs' Task Force, and the SitCEN.

2.6 Crime Prevention
Crime prevention is an indispensable part of the work to create an area of freedom, security and justice. The Union therefore needs an effective tool to support the efforts of Member States in preventing crime. To that end, the European Crime Prevention Network should be professionalised and strengthened. Since the scope of prevention is very wide, it is essential to focus on measures and priorities that are most beneficial to Member States. The European Crime Prevention Network should provide expertise and knowledge to the Council and the Commission in developing effective crime prevention policies.

In this respect the European Council welcomes the initiative of the Commission to establish European instruments for collecting, analysing and comparing information on crime and victimisation and their respective trends in Member States, using national statistics and other sources of information as agreed indicators. Eurostat should be tasked with the definition of such data and its collection from the Member States.
It is important to protect public organisations and private companies from organised crime through administrative and other measures. Particular attention should be given to systematic investigations of property holdings as a tool in the fight against organised crime. Private/public partnership is an essential tool. The Commission is invited to present proposals to this effect in 2006.

2.7. **Organised crime and corruption**

The European Council welcomes the development of a strategic concept with regard to tackling cross-border organised crime at EU-level and asks the Council and the Commission to develop this concept further and make it operational, in conjunction with other partners such as Europol, Eurojust, the Police Chiefs Task Force, EUCPN and CEPOL. In this connection, issues relating to corruption and its links with organised crime should be examined.

2.8 **European strategy on drugs**

The European Council underlines the importance of addressing the drugs problem in a comprehensive, balanced and multidisciplinary approach between the policy of prevention, assistance and rehabilitation of drug dependence, the policy of combating illegal drug trafficking and precursors and money laundering, and the strengthening of international cooperation.

The European Strategy on Drugs 2005-2012 will be added to the programme after its adoption by the European Council in December 2004.

3. **STRENGTHENING JUSTICE**

The European Council underlines the need further to enhance work on the creation of a Europe for citizens and the essential role that the setting up of a European Area for Justice will play in this respect. A number of measures have already been carried out. Further efforts should be made to facilitate access to justice and judicial cooperation as well as the full employment of mutual recognition. It is of particular importance that borders between countries in Europe no longer constitute an obstacle to the settlement of civil law matters or to the bringing of court proceedings and the enforcement of decisions in civil matters.
3.1 **European Court of Justice**

The European Council underlines the importance of the European Court of Justice in the relatively new area of freedom, security and justice and is satisfied that the Constitutional Treaty greatly increases the powers of the European Court of Justice in that area.

To ensure, both for European citizens and for the functioning of the area of freedom, security and justice, that questions on points of law brought before the Court are answered quickly, it is necessary to enable the Court to respond quickly as required by Article III-369 of the Constitutional Treaty.

In this context and with the Constitutional Treaty in prospect, thought should be given to creating a solution for the speedy and appropriate handling of requests for preliminary rulings concerning the area of freedom, security and justice, where appropriate, by amending the Statutes of the Court. The Commission is invited to bring forward - after consultation of the Court of Justice - a proposal to that effect.

3.2 **Confidence-building and mutual trust**

Judicial cooperation both in criminal and civil matters could be further enhanced by strengthening mutual trust and by progressive development of a European judicial culture based on diversity of the legal systems of the Member States and unity through European law. In an enlarged European Union, mutual confidence shall be based on the certainty that all European citizens have access to a judicial system meeting high standards of quality. In order to facilitate full implementation of the principle of mutual recognition, a system providing for objective and impartial evaluation of the implementation of EU policies in the field of justice, while fully respecting the independence of the judiciary and consistent with all the existing European mechanisms, must be established.

Strengthening mutual confidence requires an explicit effort to improve mutual understanding among judicial authorities and different legal systems. In this regard, networks of judicial organisations and institutions, such as the network of the Councils for the Judiciary, the European Network of Supreme Courts and the European Judicial Training Network, should be supported by the Union.
Exchange programmes for judicial authorities will facilitate cooperation and help develop mutual trust. An EU component should be systematically included in the training of judicial authorities. The Commission is invited to prepare as soon as possible a proposal aimed at creating, from the existing structures, an effective European training network for judicial authorities for both civil and criminal matters, as envisaged by Articles III-269 and III-270 of the Constitutional Treaty.

3.3 Judicial cooperation in criminal matters
Improvement should be sought through reducing existing legal obstacles and strengthening the coordination of investigations. With a view to increasing the efficiency of prosecutions, while guaranteeing the proper administration of justice, particular attention should be given to possibilities of concentrating the prosecution in cross-border multilateral cases in one Member State. Further development of judicial cooperation in criminal matters is essential to provide for an adequate follow up to investigations of law enforcement authorities of the Member States and Europol.

The European Council recalls in this context the need to ratify and implement effectively - without delay - the legal instruments to improve judicial cooperation in criminal matters, as referred to already in the paragraph on police cooperation.

3.3.1 Mutual recognition
The comprehensive programme of measures to implement the principle of mutual recognition of judicial decisions in criminal matters, which encompasses judicial decisions in all phases of criminal procedures or otherwise relevant to such procedures, such as the gathering and admissibility of evidence, conflicts of jurisdiction and the ne bis in idem principle and the execution of final sentences of imprisonment or other (alternative) sanctions\(^1\), should be completed and further attention should be given to additional proposals in that context.

\(^1\) OJ C 12, 15.1.2001, pages 10-22.
The further realisation of mutual recognition as the cornerstone of judicial cooperation implies the development of equivalent standards for procedural rights in criminal proceedings, based on studies of the existing level of safeguards in Member States and with due respect for their legal traditions. In this context, the draft Framework Decision on certain procedural rights in criminal proceedings throughout the European Union should be adopted by the end of 2005. The Council should adopt by the end of 2005 the Framework Decision on the European Evidence Warrant. The Commission is invited to present its proposals on enhancing the exchange of information from national records of convictions and disqualifications, in particular of sex offenders, by December 2004 with a view to its adoption by the Council by the end of 2005. This should be followed in March 2005 by a further proposal on a computerised system of exchange of information.

3.3.2 Approximation of law
The European Council recalls that the establishment of minimum rules concerning aspects of procedural law is envisaged by the treaties in order to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension. The approximation of substantive criminal law serves the same purposes and concerns areas of particular serious crime with cross border dimensions. Priority should be given to areas of crime that are specifically mentioned in the treaties. To ensure more effective implementation within national systems, JHA Ministers should be responsible within the Council for defining criminal offences and determining penalties in general.

3.3.3 Eurojust
Effective combating of cross-border organised and other serious crime and terrorism requires the cooperation and coordination of investigations and, where possible, concentrated prosecutions by Eurojust, in cooperation with Europol.

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The European Council urges the Member States to enable Eurojust to perform its tasks by:

- effectively implementing the Council Decision on Eurojust by the end of 2004 with special attention to the judicial powers to be conferred upon their national members; and
- ensuring full cooperation between their competent national authorities and Eurojust.

The Council should adopt on the basis of a proposal of the Commission the European law on Eurojust, provided for in Article III-273 of the Constitutional Treaty, after the entry into force of the Constitutional Treaty but no later than 1 January 2008, taking account of all tasks referred to Eurojust.

Until that time, Eurojust will improve its functioning by focusing on coordination of multilateral, serious and complex cases. Eurojust should include in its annual report to the Council the results and the quality of its cooperation with the Member States. Eurojust should make maximum use of the cooperation agreement with Europol and should continue cooperation with the European Judicial Network and other relevant partners.

The European Council invites the Council to consider the further development of Eurojust, on the basis of a proposal from the Commission.

3.4 Judicial cooperation in civil matters

3.4.1 Facilitating civil law procedure across borders

Civil law, including family law, concerns citizens in their everyday lives. The European Council therefore attaches great importance to the continued development of judicial cooperation in civil matters and full completion of the programme of mutual recognition adopted in 2000. The main policy objective in this area is that borders between countries in Europe should no longer constitute an obstacle to the settlement of civil law matters or to the bringing of court proceedings and the enforcement of decisions in civil matters.

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3.4.2 Mutual recognition of decisions

Mutual recognition of decisions is an effective means of protecting citizens' rights and securing the enforcement of such rights across European borders. Continued implementation of the programme of measures on mutual recognition \(^1\) must therefore be a main priority in the coming years to ensure its completion by 2011. Work concerning the following projects should be actively pursued: the conflict of laws regarding non-contractual obligations ("Rome II") and contractual obligations ("Rome I"), a European Payment Order and instruments concerning alternative dispute resolution and concerning small claims. In timing the completion of these projects, due regard should be given to current work in related areas.

The effectiveness of existing instruments on mutual recognition should be increased by standardising procedures and documents and developing minimum standards for aspects of procedural law, such as the service of judicial and extra-judicial documents, the commencement of proceedings, enforcement of judgments and transparency of costs.

Regarding family and succession law, the Commission is invited to submit the following proposals:

- a draft instrument on the recognition and enforcement of decisions on maintenance, including precautionary measures and provisional enforcement in 2005;
- a green paper on the conflict of laws in matters of succession, including the question of jurisdiction, mutual recognition and enforcement of decisions in this area, a European certificate of inheritance and a mechanism allowing precise knowledge of the existence of last wills and testaments of residents of European Union in 2005; and
- a green paper on the conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition in 2006;

a green paper on the conflict of laws in matters relating to divorce (Rome III) in 2005.

Instruments in these areas should be completed by 2011. Such instruments should cover matters of private international law and should not be based on harmonised concepts of "family", "marriage", or other. Rules of uniform substantive law should only be introduced as an accompanying measure, whenever necessary to effect mutual recognition of decisions or to improve judicial cooperation in civil matters.

Implementation of the programme of mutual recognition should be accompanied by a careful review of the operation of instruments that have recently been adopted. The outcome of such reviews should provide the necessary input for the preparation of new measures.

3.4.3 Enhancing cooperation
With a view to achieving smooth operation of instruments involving cooperation of judicial or other bodies, Member States should be required to designate liaison judges or other competent authorities based in their own country. Where appropriate they could use their national contact point within the European Judicial Network in civil matters. The Commission is invited to organise EU workshops on the application of EU law and promote cooperation between members of the legal professions (such as bailiffs and notaries public) with a view to establishing best practice.

3.4.4 Ensuring coherence and upgrading the quality of EU legislation
In matters of contract law, the quality of existing and future Community law should be improved by measures of consolidation, codification and rationalisation of legal instruments in force and by developing a common frame of reference. A framework should be set up to explore the possibilities to develop EU-wide standard terms and conditions of contract law which could be used by companies and trade associations in the Union.

Measures should be taken to enable the Council to effect a more systematic scrutiny of the quality and coherence of all Community law instruments relating to cooperation on civil law matters.

3.4.5 International legal order
The Commission and the Council are urged to ensure coherence between the EU and the international legal order and continue to engage in closer relations and cooperation with international organisations such as The Hague Conference on Private International Law and the Council of Europe, particularly in order to coordinate initiatives and to maximise synergies between these organisations' activities and instruments and the EU instruments. Accession of the Community to the Hague Conference should be concluded as soon as possible.
4. EXTERNAL RELATIONS

The European Council considers the development of a coherent external dimension of the Union policy of freedom, security and justice as a growing priority. In addition to the aspects already addressed in the previous chapters, the European Council calls on the Commission and the Secretary-General / High Representative to present, by the end of 2005, a strategy covering all external aspects of the Union policy on freedom, security and justice, based on the measures developed in this programme to the Council. The strategy should reflect the Union's special relations with third countries, groups of countries and regions, and focus on the specific needs for JHA cooperation with them.

All powers available to the Union, including external relations, should be used in an integrated and consistent way to establish the area of freedom, security and justice. The following guidelines should be taken into account: the existence of internal policies as the major parameter justifying external action; need for value added in relation to projects carried out by the Member States; contribution to the general political objectives of the foreign policies of the Union; possibility of achieving the goals during a period of reasonable time; the possibility of long-term action.

1 established at the European Council meeting in Feira in 2000.
EUROPEAN COUNCIL DECLARATION
ON THE RELATION BETWEEN THE EU AND IRAQ

1. The European Council discussed the developments in Iraq since the restoration of sovereignty of Iraq on 28 June 2004.

2. The European Council reaffirmed its objective of a secure, stable, unified, prosperous and democratic Iraq that will make a positive contribution to the stability of the region; an Iraq that will work constructively with its neighbours and with the international community to meet shared challenges. It agreed that the EU as a whole should work in partnership with the Iraqi Interim Government, the Iraqi people and participants at the Sharm el Sheikh Conference on 23 November 2004, with the aim of realising these objectives.

3. The European Council warmly welcomed the restoration of sovereignty to the Iraqi Interim Government that took place on 28 June 2004. It reaffirmed its commitment to support the implementation of UN Security Council Resolution 1546 and to support the UN in its activities in Iraq. The European Council expressed the EU's full support for the political transition leading to a constitutionally elected Iraqi Government. It welcomes any steps taken by the Interim Iraqi Government to achieve broader participation of the political spectrum in Iraq, thus contributing to the success of the political process and providing solutions to the problems of Iraq. The elections planned for January 2005 are an important step in this process, and the European Council noted the importance of the EU's continued support for these, as well as for the elections scheduled to take place in December 2005.
4. The EU will use its dialogue with Iraq and its neighbours to encourage continuous regional engagement and support for improved security and for the political and reconstruction process in Iraq based on inclusiveness, democratic principles, respect for human rights and the rule of law, as well as support for security and cooperation in the region. In this respect, the European Council welcomed the International Conference that will be held in Sharm el Sheikh in which the EU will participate, as a further step in efforts to support the political and reconstruction process in accordance with UNSCR 1546. The EU will support this process and underlines the necessity of holding elections in January 2005.

5. The European Council reiterates its condemnation of terrorist attacks, the taking of hostages and the murders which have been committed in Iraq. The EU regrets that the campaign of terrorist violence in Iraq is prolonging the suffering of the Iraqi people and posing difficulties for political progress and economic reconstruction in Iraq and welcomes the commitment under UNSCR 1546 for all parties to act in accordance with international law, including the effective protection and promotion of human rights.

6. The European Council recalled the Commission Communication "The EU and Iraq - A framework for Engagement", endorsed by the European Council in June, that sets out medium-term objectives for the development of EU-Iraq relations and the letter by High Representative Solana and Commissioner Patten. The European Council noted that significant progress on engagement with Iraq has been made.

7. The European Council recalled the contribution of more than € 300 million that the Community has committed to humanitarian and reconstruction support in 2003-2004. Such a contribution has focused on rehabilitation of essential services - water, sanitation, education and health -, boosting employment and reducing poverty and support to governance, the political process, civil society and human rights. Several Member States also contributed to the International Reconstruction Fund Facility for Iraq (IRFFI).
8. The European Council welcomed the joint Fact Finding Mission for a possible integrated Police and Rule of Law operation for Iraq and considered its report. The European Council recognised the importance of strengthening the criminal justice system, consistent with the respect for the rule of law, human rights and fundamental freedoms. It noted the wish of the Iraqi authorities for the EU to become more actively involved in Iraq and that strengthening the criminal justice sector would respond to Iraqi needs and priorities.

9. The European Council agreed that the EU could usefully contribute to the reconstruction and the emergence of a stable, secure and democratic Iraq through an integrated police, rule of law and civilian administration mission, which could inter alia promote closer collaboration between the different actors across the criminal justice system and strengthen the management capacity of senior and high-potential officials from the police, judiciary and penitentiary and improve skills and procedures in criminal investigation in full respect for the rule of law and human rights. Such a mission should be secure, independent and distinct but would be complementary and bring added value to ongoing international efforts as well as develop synergies with ongoing Community and Member States' efforts. While judging that activities outside Iraq with a presence of liaison elements in Iraq would be feasible at this point in time, the European Council agreed that with regard to a mission inside Iraq all security concerns need to be appropriately addressed before any decision could be taken.

10. Prime Minister Allawi's meeting with the European Council has presented the Union with an opportunity to further its political dialogue with Iraq and to discuss Iraq's future and the strengthening of EU's engagement with Iraq.

11. The European Council presented Mr Allawi with a comprehensive package of EU assistance to Iraq. This package, comprised of elements provided by both the Community and Member States, includes the following elements:
• Iraq will be given the perspective of an agreement between the EU and Iraq to reflect the mutual interest in developing a partnership and to promote political and trade cooperation between the EU and Iraq. The European Council asked the Commission to start preparations and work with the Iraqi Government on focused assistance programmes aimed at developing the conditions for such an agreement. In that respect the European Council invited the Commission to enhance as appropriate and with due regard to security its presence in Baghdad.

• In conformity with the July and September GAERC conclusions on EU financial and personnel support for the preparation of elections in close coordination with the UN, the Community will provide a further € 30 million to the elections cluster of the International Reconstruction Fund Facility for Iraq (IRFFI) and intends to provide further support to the electoral process through specific measures, such as the provision of election experts to the Independent Electoral Commission of Iraq as well as the training of domestic observers. Member States are also providing assistance to the preparations for elections through bilateral contributions. Given the January deadline for elections, it is crucial that this support will be disbursed immediately in order to play a part in the pre-election process.

• As the EU attaches great importance to an active UN presence in Iraq and supports the UN's leading role in promoting the political process and reconstruction of Iraq, EU Member States are ready to contribute substantially to the financing of the middle ring of the UN Protection Force in Iraq, following the request made by the UN Secretary General. The Commission continues to discuss with the UN a possible financial contribution of the Community to the inner ring.

• An expert team should be sent by the end of November 2004 to continue the dialogue with the Iraqi authorities, to start initial planning for a possible integrated police, rule of law and civilian administration mission which is expected to start after the January 2005 elections and in particular assess the urgent security needs for such a mission. A dialogue with other countries in the region on these and other matters should also be encouraged.
- On-going implementation of humanitarian and reconstruction assistance; the majority of funds of the Community and Member States will continue to be directed to the IRFFI.

- Iraq is a beneficiary of the EU Generalized System of Preferences and should be encouraged to do the necessary to benefit from those preferences. The European Council recalled the Commission's offer to the Interim Iraqi Government to implement GSP preferences with Iraq. As soon as conditions allow, the European Commission should work together with the Iraqi administration to set up the administrative cooperation system which is a requirement for the system to operate.

- Continued efforts of the Member States to exchange views on debt and related economic policy conditionality. Several EU Member States are involved in the current Paris Club negotiations on Iraq's debt. The European Council welcomed the upcoming visit of a mission of the Iraqi Ministry of Finance to the Paris Club in November.