The Committee will meet at 9.45 am in Committee Room 4.

1. **Item in private:** The Committee will consider whether to consider the main themes arising from the oral evidence sessions on the Criminal Proceedings etc. (Reform) (Scotland) Bill in private, at this and future meetings, in order to inform the drafting of its Stage 1 report.

2. **Criminal Proceedings etc. (Reform) (Scotland) Bill:** The Committee will take evidence at Stage 1 of the Bill from—

   - Sheriff Principal John McInnes, Formerly Chairman, Summary Justice Review Committee

   and then from

   - Chief Constable David Strang, Association of Chief Police Officers in Scotland, Assistant Chief Constable Kevin Smith, Chief Superintendent Ewen MacLellan and Inspector Steven Graham, Strathclyde Police Criminal Justice Office

   and then from

   - John Campbell, President, Society of Messengers-at-Arms and Sheriff Officers.

3. **Criminal Proceedings etc. (Reform) (Scotland) Bill:** The Committee will consider the main themes arising from the evidence sessions to date on the Criminal Proceedings etc. (Reform) (Scotland) Bill, in order to inform the drafting of its Stage 1 report.

   Callum Thomson
   Clerk to the Committee
Papers for the meeting—

**Agenda item 1**

Note by Committee Adviser and SPICe (PRIVATE PAPER) J1/S2/06/13/1

Submission from Sheriff Principal John McInnes J1/S2/06/13/2

Submission from Association of Chief Police Officers in Scotland J1/S2/06/13/3

Submission from Society of Messengers-at-Arms and Sheriff Officers J1/S2/06/13/4

**Documents for information—**

The following document has circulated for information:

- Scottish Executive, *Regulatory Impact Assessment on Adult Support and Protection (Scotland) Bill.*

**Documents not circulated—**

A copy of the following document has been supplied to the clerk:

- Scottish Legal Aid Board, *Updated leaflets on financial eligibility 2006 and Complaints and comments about the Scottish Legal Aid Board.*

This document is available for consultation in Room T3.60. Additional copies may also be obtainable on request from the Parliament’s Document Supply Centre.

**Forthcoming meetings—**

Thursday 4 May, Committee Room 4;
Wednesday 10 May, Committee Room 6;
Wednesday 17 May, Committee Room 6;
Wednesday 24 May, Committee Room 4;
Wednesday 31 May, Committee Room 5.
**Justice 1 Committee**

**Criminal Proceedings etc. (Reform) (Scotland) Bill**

**Written submission from Sheriff Principal John Colin McInnes QC DL**
(Formerly Chairman, Summary Justice Review Committee)

**Speeding up the system and reducing wasted effort**

In addition to chairing the Summary Justice Review Committee (and while that Committee was in the middle of its deliberations) I chaired a Project Group to make recommendations for the setting up of a Youth Court which would concentrate on 16 and 17 year old persistent offenders, about the most difficult group of all to turn into law abiding citizens, given how prolific their offending can be and the multiple problems which such individual offenders can present. The pilot courts in Hamilton and Airdrie, anecdotally, are seen locally as a real success, particularly by the police and by the offenders’ families. These courts are also, in part, an experiment, trying out many of what were then the forthcoming recommendations of the Summary Justice Review Committee. These include the fast tracking of cases from arrest into court and through court to bring home to offenders that there is a more or less immediate link between their offending and repercussions in court. Other features include very close collaboration between agencies, providing much fuller and better quality information to the defence at an early stage and addressing the particular problems of those individual offenders who are convicted. Post-conviction the progress of an offender is likely to be reviewed regularly by the same sheriff over what could be a year or 18 months.

This process is being taken a stage further in a pilot in West Lothian and applies to all types of offender coming before a summary criminal court. I would recommend that the Committee seek evidence from those responsible for the West Lothian Project based in Livingston (contact Eileen Flockhart). That Project seeks to build on and try out in practice those of the Committee’s proposals which do not require legislation. The Project has been developed by a group which includes the police, the fiscals, defence solicitors, the courts and social work. They have worked out in great detail the best way to progress summary cases for the time of a call to the police through to the conclusion of a case. A presentation from them would, I believe, be as quick a way as any for the Committee to get a feel for what summary criminal justice involves and what needs to be done to make sure that the system works as well as it can. The National Criminal Justice Board has had such a presentation.

If cases get too far through the system and are not persisted in (as with fiscals marking cases “no proceedings” or a plea of guilty on the day of the trial) there is wasted effort as well as delay. Wasted effort is very expensive, especially if legal aid is involved. There is far too much waste and delay at the moment. Legal aid is all too often not spent to good effect. Hardly any cases for which legal aid is granted on the hypothesis that the case will go to trial ever actually
get as far as evidence at a trial. Far too many cases result in pleas at a very late stage when all the costs have been incurred.

What should prosecution be aiming to achieve?

Some cases clearly must and will be prosecuted. More serious cases, cases involving persistent or at least repeat offenders, cases involving offenders for whom court disposals could be beneficial (e.g. where probation is likely to be appropriate) are examples. Concentrating resources where there is the potential for a considerable pay-back, in the form of reduced offending, often of a very anti-social kind, lies behind many of the proposed changes to the summary criminal justice system.

From memory there are now about 125,000 prosecutions a year in Scotland, the bulk of them in the Sheriff Court. That number is roughly static, but may be falling slightly. There are about 300,000 fixed penalty notices issued each year in Scotland, excluding decriminalised parking offences. That number has been rising rapidly in recent years. It simply is not practicable to increase the numbers of cases prosecuted without causing the system to become even slower and more clogged than it is at present. Yet there is a need, as well as a demand (zero tolerance), for infringements of the criminal law to be dealt with and consistently dealt with. That is why there is emphasis on police warnings, fixed penalties and fiscal fines and compensation orders to deal with more minor offending. The objective is to get less serious infringements dealt with as early and as quickly as possible, involving as few agencies as possible.

The Bill

I have read the Bill and almost all of the accompanying documents. In almost every respect I welcome what is in the Bill. The Bill gives effect to most of the recommendations of the Summary Justice Review Committee. I have little doubt that the process of consultation between the publication of the Committee’s report and the drafting of the Bill will have led to more detailed thought being given to how the proposed changes would work in practice. The Bill, if implemented broadly in its present form, should lead to a more effective and efficient summary criminal justice system. However it will depend on those involved in that system embracing the spirit of the changes and showing collective and co-operative determination to make them work.

I have not had the time to go through most of the provisions of the Bill in sufficient detail to have a view on how a particular clause or sub-clause would fit in with existing legislation, on the assumption that there will be no amendments to the Bill prior to its being passed. But there are two specific matters on which I would like to comment. The first is more a matter of detail.

Courts being given power to alter their own decisions (Clause 32)

If, for example, a court passes an incompetent sentence e.g. too many or too few hours community service or passes sentence without a social enquiry
report when one is mandatory, there is very limited scope to correct the error. The same is true if a court has adjourned a case for longer than the statute allows. At present a court which makes a technical or procedural error by and large cannot put it right – only the appeal court can. Involving the appeal court causes delay and considerable expense. So I welcome parts of the provisions in clause 32. But I do not think that that clause tackles some of the problems which should be tackled. In the Appendix I have quoted in full, in its current form, section 142 of the Magistrates’ Courts Act 1980, which applies to England and Wales. The passages underlined (by me) give the gist of what that section says. It enables the court at its own hand to correct its own errors prior to an appeal against its decision being determined. The court can order a re-hearing before a differently constituted bench, if it is in the interests of justice to do so. In England and Wales, if a person is convicted of using a motor vehicle without insurance and is later able to show that he had insurance and so should not have been convicted, the Magistrates’ Court can recall its own order and proceed in a just manner. That would not be regarded in Scotland as a “procedural irregularity”. Clause 32 would not cover that.

Clause 32 is more prescriptive than section 142 (see e.g. clause 32(3)(a)-(d)). There is to be a requirement that in Scotland there is an application by the prosecutor or the accused before the court can exercise the power. The court seems to be given no power to initiate the correction of errors which it notices. Many errors will only come to light when one or both of the prosecutor and the accused have left the court. In any event I very much doubt if any of clauses 32(3)(a)-(d) add anything to clause 32(3)(e) (deleting the word “other” from (e)). Being prescriptive can, and I think does in this case, mean that the Scottish provision is narrower than the equivalent provision south of the border and narrower than it should be. I would like to see the clause amended to express principles by reference to which the court may exercise the power either on the application of the prosecutor or the accused, or at its own hand. It is not necessary in primary legislation to require the court to give notice of its intention to exercise the power. That is self-evident and, if need be, could be dealt with by subordinate legislation.

The enforcement of fines and other sanctions for infringements of the criminal law Clause 43

I think that this clause misses several important points and fails to address some aspects of the problem as effectively as it could.

1. There should be a single system which covers the enforcement of all fines, fixed penalties and other financial sanctions for breaches of the criminal law in Scotland. It is clear that that is what is in mind. “Relevant penalty” is widely defined. (See new section 226I). It includes fixed penalties, fiscal fines and compensation. That is to be welcomed.
2. Any system of enforcement will be potentially expensive. The more complicated it is and the more people and agencies who are involved
in it, the higher the true overheads will be and the less effective it is likely to become. There should be a range of ways in which payment can be made and the offender should be made aware of these. Payment should be made easy. That is not the same as saying that it should be possible to pay almost anywhere. It would be more cost effective to get almost all payments made to a central point by a variety of means.

3. If enforcement is required, not only must the person concerned be regarded as having breached the law but he, she or a company must also have failed to comply with the order to pay within the time allowed. So the starting point should not be one of sympathy for them.

4. In the case of offenders who are not at all well off there are usually only two sanctions available, unless they have a car. These are deductions from benefits and a fine on their time, i.e. a supervised attendance order or equivalent. There should be a mechanism whereby such people can claim at a very early stage to fall into that category and so avoid any other sanctions being applied to them. Their claims should be capable of being checked by the enforcement agency.

5. It is not apparent that the cost of the enforcement process should be borne by Government and taxpayers. It is perfectly possible to require the agency responsible for enforcement to cover its costs year on year and to keep its true costs down. The State Debt Recovery Agency in New South Wales, an equivalent agency, runs at a small profit. The costs can be met by a system of charging those who fail to pay for the enforcement steps which their conduct makes necessary, perhaps £10 or £20 for each step.

6. I believe that there should be a single accountable government agency, responsibility for delivering the whole process in the most cost effective manner.

7. The agency should be largely free-standing, to avoid blurring of lines of responsibility (though it would no doubt be answerable to the Board of the Scottish Court Service and to Parliament).

8. The agency should have power to make a range of orders, which will make it not worthwhile not paying, and both power and the responsibility for making alternative orders where a fine is unlikely to be paid. Such alternative orders should include the equivalent of a supervised attendance order. The agency should be able to tailor the sanctions applied for non-payment to the circumstances of the particular offender.

9. The full range of orders could usefully be included in the same part of the same Act. There is an existing statutory power to disqualify from driving for non-payment of a fine. Suspension of a driving licence is a potentially useful sanction in a new regime, which might be included in this clause.

10. Section 226A(4) might usefully be widened to enable Scottish Ministers to make further provision as to the powers of Fines Enforcement Officers e.g. to make charges for enforcement procedures or to notify credit rating agencies of unpaid relevant penalties.
11. Courts should not be involved at all or, if they must be, then in relation to appeals against the actions of the agency but otherwise only in the most exceptional of circumstances. See new section 226B(4) – why should a court have to be involved in making an enforcement order at all let alone for a fixed penalty which it will not have imposed? Relevant penalties should be deemed to be enforceable. Specified people should have power to certify that they are unpaid in whole or in part.

12. If there is to be no imprisonment for non-payment of a fine (and there are very good reasons why that should be so), what could a court realistically be expected to achieve where others have failed? Section 226G(1) envisages a Fines Enforcement Officer referring to the court all or most of the cases in which recovery in whole or in part is unlikely, i.e. the failures. Presumably this is so that the court, rather than the agency, can make a supervised attendance order or something similar. In any event, the way this new section is drafted introduces a quite bureaucratic procedure, the cost of which will be significant in each case. Responsibility for failures should stay with the agency.

13. The section provides that the court can revoke an enforcement order and deal with the offender as if the enforcement order had not been made. (section 226G(9)(a)) Does that mean cancel the fine? If so, the agency should write it off. If not, what could the court do which was effective at that stage?

14. Courts should not be involved in making application for deductions in benefits. Applications should be made by the agency. The true cost of involving the courts in this would be grossly disproportionate to what is involved. Deductions from benefit procedure is currently complicated and has many drawbacks. It is neither an effective nor a cost effective way of recovering money in many cases but it is effective in some. A single agency would build up experience in this field which individual courts could never do. (See clause 226E(1))

John McInnes
April 2006

APPENDIX

The Magistrates Courts Act 1980 section 142 provides:

Power of magistrates’ court to re-open cases to rectify mistakes etc.

(1) A magistrates’ court may vary or rescind a sentence or other order imposed or made by it when dealing with an offender if it appears to the court to be in the interests of justice to do so, and it is hereby declared that this power extends to replacing a sentence or order which for any reason appears to be invalid by another which the court has power to impose or make.

(1A) The power conferred on a magistrates’ court by subsection (1) above shall not be exercisable in relation to any sentence or order imposed or made by it when dealing with an offender if—

(a) the Crown Court has determined an appeal against—
(i) that sentence or order;
(ii) the conviction in respect of which that sentence or order was imposed or made; or
(iii) any other sentence or order imposed or made by the magistrates' court when dealing with the offender in respect of that conviction (including a sentence or order replaced by that sentence or order); or

(b) the High Court has determined a case stated for the opinion of that court on any question arising in any proceeding leading to or resulting from the imposition or making of the sentence or order.

(2) Where a person is convicted by a magistrates' court and it subsequently appears to the court that it would be in the interests of justice that the case should be heard again by different justices, the court may so direct.

(2A) The power conferred on a magistrates' court by subsection (2) above shall not be exercisable in relation to a conviction if—
(a) the Crown Court has determined an appeal against—
   (i) the conviction; or
   (ii) any sentence or order imposed or made by the magistrates' court when dealing with the offender in respect of the conviction; or
(b) the High Court has determined a case stated for the opinion of that court on any question arising in any proceeding leading to or resulting from the conviction.

(3) Where a court gives a direction under subsection (2) above—
(a) the conviction and any sentence or other order imposed or made in consequence thereof shall be of no effect; and
(b) section 10(4) above shall apply as if the trial of the person in question had been adjourned.

(5) Where a sentence or order is varied under subsection (1) above, the sentence or other order, as so varied, shall take effect from the beginning of the day on which it was originally imposed or made, unless the court otherwise directs.
Justice 1 Committee

Criminal Proceedings etc. (Reform) (Scotland) Bill

Written submission from Association of Chief Police Officers in Scotland

I refer to your correspondence dated 1 March 2006 in connection with the above subject, which has been considered by members of the ACPOS Criminal Justice Business Area, and can now offer the following by way of comment.

The relevant parts of the Bill have been listed and comments documented under the appropriate sub heading. Where there is no comment on a part or section of the Bill, the assumption to be made is that members are content with the proposals.

At the outset, it is important to say that members welcome the Bill, which clarifies how the summary justice reform process will develop in the future. It is also evident that the provisions set out in the Bill should advance the cause of speedier justice, which is a worthwhile and much needed goal, and members would wish to ensure that the Scottish Police Service plays its part. The significant changes to the criminal justice system would have to be implemented in a measured fashion, taking care not to overwhelm the current capacity of criminal justice organisations. It is essential that consultation takes place between each organisation throughout this process.

PART 1 - BAIL

In principle, setting out in statute the legislative framework for bail decisions is welcomed by members, given that it will bring clarity and transparency to the decision making process. Members appreciate that, whilst the presumption is always towards the grant of bail, in recent times the attitude of some accused persons towards bail has not always been fitting. The more robust procedures and increased penalties contained in the Bill, as they would apply to bail defaulters, should encourage greater compliance with the terms and conditions of being released on bail.

Members welcome the fact that the decision on bail is clearly for the court to determine. The setting out, and thereby the transparency, of the court’s decision is equally welcomed. The Scottish Police Service recognises the part it has to play in ensuring that information is provided to the prosecutor to enable the court to take account of all relevant factors to inform any bail decision.

Section 1 – Determination of Questions of Bail

23C – Grounds relevant as to question of bail
This section sets out the grounds for the refusal of bail and members recognise what are, more or less, the current standard conditions. Public safety is not, however, separately identified as a ground for refusal. The accompanying Explanatory Notes to the Bill suggest that concerns in relation to public safety should be met by the ‘commit further offences’ provision. Members agree that public safety should either be included as a standard ground for refusal, based upon a reasonable and well founded risk assessment of the accused, or alternatively, a ‘stand alone' matter to be explicitly and routinely commented upon by the Sheriff in all cases. To incorporate what is a fundamental issue, that of public safety, into the ‘commit further offences’ provision is wholly inadequate and indeed, implies that further victims have to be present before considerations of public safety come to the fore.

The provisions of the new subsection 2B of Section 25 of the 1995 Act, which places an onus on the accused person to inform the court of a change in ‘domicile of citation’, is welcomed, as is the penalty for failure to comply (2C). This may assist by providing a starting point from which an accused can be traced, not only for matters in connection with the case, but also where he or she fails to attend court. It should also overcome the difficulty of serving court papers at addresses which are owned by third parties, the accused having long since moved on.

**Section 3 – Breach of Bail Conditions**

*Subsection (1)* relates to *Section 27* of the 1995 Act (breach of bail conditions: offences). This section of the Bill and accompanying papers mentions the bail condition which may be imposed on an accused person to refrain from entering a particular locus or retail premises. Members considered examples where this section could be enhanced to allow for proactive policing in this regard. For example, where a shoplifting accused is banned by a bail condition from entering a shopping area, providing a description or photograph to staff in order that the police could be alerted to a breach of bail would allow for more robust enforcement. Although, perhaps, not something that the Bill is intended to address, members agree that it would be helpful to give consideration to such a provision.

**PART 2 - PROCEEDINGS**

*Explanatory Notes - Section 6: Liberation on Undertaking*

The ability of officers to release an offender from the locus on an undertaking without removing him or her to a police office is a new way in which to cite an accused to attend court. Work is underway to generally increase the number of accused persons liberated from custody on an undertaking to attend court. This will all need to be the subject of careful management by the police, the Procurator Fiscal’s Office and the Scottish Court Service. Without doubt there will have to be some form of technical court programming available to all
partners in the criminal justice system to avoid any potential confusion, or current systems becoming overwhelmed.

It is unclear in the Bill or accompanying notes, how, in practice, any ‘additional conditions’ imposed by the arresting officers, or the officer in charge of a police office, will be recorded in order to inform other officers of the condition imposed. In the normal course of events, bail conditions are recorded on SCRO and thereby available to all personnel. Given the shorter period of time taken for an accused to appear in court on an undertaking this may not be practicable or even possible.

Members noted that Subsection (a) within 1E of the Bill (the imposition of conditions of bail Page 7) states “…the Scottish Ministers may by regulations describe officers (by rank or other description) whose authority is required…” [to impose bail conditions]. Members suggest that the word ‘may’ ought to be replaced by ‘shall’. There is also a need to be more prescriptive by identifying a particular rank, perhaps Inspector, as to do otherwise suggests that any officer, of any rank, could impose such conditions. Notwithstanding, given that in some locations an Inspector is not readily available, such authority provision should be made to impose such conditions remotely and thereafter documented as it is with legislative provisions elsewhere. The overall point here is that this would provide greater control and a more authoritative consideration of the circumstances.

Section 7 - Electronic Proceedings

Members welcome the additional flexibility provided to cite witnesses and accused in the manner documented under the relevant sections of the Bill. Time will tell whether issues emerge with regard to confirmation of receipt.

Section 8 - Manner of Citation

This section provides that personal service of a complaint, or witness citation, may be effected on an accused or witness by an officer of the law, or other person. Although postal citation and the intended electronic citation is carried out by staff of the Procurators Fiscal, the majority of such documents are served by police officers, or staff employed by the police authority for this explicit purpose. For some considerable time members have felt it to be an inappropriate use of police resources and question whether this is now a fitting time to look at this once again, perhaps with a view towards a third party taking on this responsibility.

Section 32 - Power of Court to Excuse Procedural Irregularities

The power of the court to excuse procedural irregularities arising from a mistake or oversight, or other excusable reason, is particularly welcomed. It is hoped thereby that public confidence in the criminal justice system will be enhanced as it is often affected when some seemingly minor technical flaw has a disproportionate impact on proceedings.

PART 3 - PENALTIES
Penalties as Alternatives to Prosecution

Explanatory Notes – Section 39 - Conditional Offers – Changes to Procedures etc

Paragraph 195: Subsection (1)(c) - members welcome the assumption that a conditional offer is deemed to be accepted either by making a payment or by taking no action in respect of the fine.

Paragraph 196: Subsection (1)(e) amends the maximum level of a conditional offer, from level 1 on the standard scale (presently £200) to level 2 (presently £500). Members have reservations regarding this proposed increase of the maximum level of a conditional offer. This is a significant increase and it is important that the Procurator Fiscal has a clear indication of the means of an offender before imposing such a hefty penalty. However, the means of an accused may not be readily or willingly disclosed to the police and how this information is subsequently sourced may be problematic. Members understand and appreciate that fines at the upper end of the scale are unlikely to be common.

Paragraph 197: Subsection (1)(f) – Members have concerns regarding the proposed discounting of fines, as introduced by this new subsection and also the procedure for the Procurator Fiscal issuing a Compensation Offer. It is noted that there is no scope within these proposals for consultation with the victim. Members express some reservations should such consultation become a further obligation to be imposed on the police service.

Section 42 - Time Bar Where Offer Made

This section of the Bill introduces a new section 136B into the 1995 Act, and makes it clear that the period of time from offering a conditional offer will not affect the overall time the prosecution has to act before a time bar comes into effect, should the offender prevaricate on the offer. Members welcome this amendment. Clarification is however sought as to whether this will apply to all conditional offers, thereby embracing those currently available where the existing arrangements of time bar have proven to present difficulties. If it does not extend that far, members suggest that consideration should be given to taking this provision further to standardise arrangements in respect of all conditional offer time-bars.

Section 43 - Fines Enforcement Officers and their Functions

The provisions of this section will clearly be of immense benefit to the Scottish Police Service given the often overwhelming number of Means Enquiry Warrants that forces have to deal with. Members appreciate that Means Enquiry Warrants will still exist, but will only come into being once all other avenues open to the Fines Enforcement Officers have been exhausted. Accordingly members hope that this will lead to a vast reduction in such
warrants allowing the police to focus on warrants for those accused yet to appear in court.

The timetable for the introduction of Fines Enforcement Officers is determined by the progress of court unification and all courts coming under the auspices of the Scottish Court Service. Members recognise the need for such a stepped approach but express concern regarding the timetable for the City Of Glasgow Court unification which, it has been suggested, will not occur until circa 2014. The volume of work carried by these courts is appreciated and members recognise the challenge of unification in Glasgow. Nevertheless the benefits of an accelerated timetable would be equally significant and members support any initiative that would bring this forward.

On a separate issue, members note that no mention is made of ‘rolling up’ Means Enquiry Warrants from separate jurisdictions to allow an offender to have all such matters attended to in one sitting. It would make sense to explore and include this, thereby replicating the provisions in the Bill which allow the ‘rolling up’ of crimes or offences across sheriffdoms.

PART 4 - JP COURTS AND JPS

Section 49 - Area and Territorial Jurisdiction of JP courts

Members note that this particular section makes reference to the terms ‘sheriffdom’ and ‘sheriff court district’. Members are of the view that the term ‘sheriff court district’ may cause confusion and should be avoided if possible.

Section 51 - Abolition of District Courts

The proposal to unify the court system under the control of the Scottish Court Service is welcomed although members reiterate their concerns in relation to the proposed timetable as expressed earlier.

Section 54 - Appointment of JPs

The purpose of this section of the Bill, to provide a more professional platform for the appointment, training and appraisal of JPs, is also welcomed.

PART 5 - CROWN OFFICE INSPECTORATE

Members acknowledge that this section places on a statutory footing, the current arrangements of the Inspectorate of Prosecution Scotland (IPS). However, whilst most of the proposed arrangements replicate the current position with Her Majesty’s Inspectorate of Constabulary, the appointment of the Inspector to secure the inspection of the Crown Office and Procurator Fiscal’s Office is at the instance of the Lord Advocate. This may not be perceived in the eyes of the public to be a wholly transparent process, given that ultimate responsibility for COPFS’ matters also rests with the Lord Advocate. A greater sense of impartiality may be achieved by the
appointment being at the instance of elected Scottish Ministers or through a Public Appointment Process.

PART 6 - MODIFICATION OF ENACTMENTS

This section provides that “…any income received from fixed penalty notices issued under the Act will accrue to the issuing authority.” In relation to fixed penalty tickets, when the police are the issuing authority, as with the present ongoing pilot within Tayside, clarification is sought on who would be entitled to the revenue streams.

In summary, notwithstanding the comments documented above, and concerns in relation to capacity issues which have to be measured, members welcome the Bill and the opportunity to comment on its content and look forward to further dialogue in the near future as it progresses.

Sir William Rae
Chief Constable
(Hon. Secretary)
7 April 2006
Justice 1 Committee

Criminal Proceedings etc. (Reform) (Scotland) Bill

Written submission from the Society of Messengers-at-Arms and Sheriff Officers

The Society of Messengers-at-Arms and Sheriff Officers welcomes this opportunity to comment on the Criminal Proceedings etc. (Reform) (Scotland) Bill.

In view of the central role that our members could undertake in the citation of witnesses and the enforcement of fines the Society requests the opportunity to also provide oral evidence to the committee. Most disappointingly our proposals appear to have been disregarded during the pre-Bill consultation process. We consider it essential, the Committee is aware of all alternative solutions to the issues surrounding the citation of witnesses and fine enforcement.

Our comments are restricted to section 8, Manner of Citation and section 43, fines enforcement officers and their functions.

Section 8 – Citation of Witnesses

Section 8 of the Bill repeats the earlier position that citation can be made by an officer of law. In terms of the Criminal Procedure (Scotland) Act 1995, officer of law includes a messenger-at-arms or sheriff officer. It is accordingly competent for sheriff officers to effect citation of witnesses under the current law and under the proposed bill. Our submissions on this point were not mentioned in the McInnes Report, or in the Scottish Executive’s responses to that report, nor are they mentioned in the Policy Memorandum. We have therefore repeated our submissions to ensure the Committee is aware of the role we can adopt in respect of:

- The efficient delivery of citations to ensure witness attendance at court, and
- Removing the burden of work on the police, enabling them to concentrate on core policing duties.

Citation of witnesses was addressed in Chapter 19 of the Summary Justice Review as was the case with our comments on the enforcement of fines referred to below. The Society was and remains extremely disappointed our submissions on the potential use of officers of court in the field of citation of witnesses was neither commented upon nor acknowledged. The Society has been in correspondence with the Crown Office over a number of years regarding the possible use of officers of court in the provision of this service. To date our extensive correspondence has not prompted an invitation to engage in discussion of the possibilities. The principal focus of the Crown Office at this stage appears to be on the postal citation system, possibly to the detriment of consideration of any alternatives.
There has been a range of articles in the press regarding difficulties in the citation of witnesses and more recently in the service of warrants in fine default cases. Given, there is a degree of public concern on these issues; we would have considered the practical and financial implications of all alternatives would/should have been explored. There are compelling reasons for use of officers of court for citation functions in criminal procedure, we comment on these hereafter.

The Society can only surmise a form of institutionalised thinking leads to the view that all criminal citation functions should be a duty of police officers. Vested interests may also have a part to play as there is presumably a figure within police budgets to cover the costs of citation. The Society has asked for details of those budget figures in the past, to facilitate a cost study and establish a potential appropriate fee level. The information has not been forthcoming to allow such a study.

The Society was particularly disappointed to note from the Crime and Criminal Justice Research Findings (referred to in the original Inquiry into the Crown Office and Procurator Fiscal Service) that reference was made to the use of “civilian process servers”. We can only assume that these process servers come under the definition of officer of law in the Criminal Procedure (Scotland) Act 1995 which states “any person who is employed under section 9 of the Police (Scotland) Act 1967 for the assistance of constables of a police force and who is authorised by the chief constable of that police force in relation to service and execution.”

Service of court documents has traditionally been affected in Scotland by either serving police officers or commissioned officers of court. The use of civilian process servers is a move away from tradition and professionalism to a system apparently imported from other parts of the UK, to that of an unregulated and untrained process server. The Society considers the service of court documents to be an important issue which should not be delegated to unqualified process servers. Members of our Society are fully trained in the rules of Citation and are answerable to the courts in respect of any failure in citation. Sheriff Officers are the natural qualified and trained professionals to carry out the vital function of serving court documents.

The 1995 Act foresaw the Police required assistance in the field of witness citations and the Society is appalled, the use of officers of court does not appear to have been considered. Is this another example of institutionalised thinking or vested interests preventing consideration of all options, or simply due to a lack of understanding of the role of the officer of court?

This possible institutionalism or lack of understanding is perhaps highlighted to some degree in the minutes of the Official Report of the Justice 1 Committee Meeting of 10 December 2003. During consideration of the Criminal Procedure Amendment (Scotland) Bill, Stewart Maxwell MSP posed the question at Column 311: “Do either of you have a view about the idea of using Sheriff Officers for the work?” Chief Superintendent Shanks of the Association of Scottish Police Superintendents responded, “I do not have a
specific view about using sheriff officers. They have some very specialist roles….” (Our italics).

Sheriff Officers do indeed have very specialised roles. Citation is one of those specialised roles. It is suspected, there may be a misconception in some quarters that our duties are in enforcement only which is simply not the case. Our members are daily involved in citation duties in the civil courts as well as citing witnesses for the defence in criminal proceedings. Citation of defence witnesses in Criminal Proceedings has historically been a duty of Sheriff Officers. There is accordingly no need for another agency, as Scotland has a body of professionals with the relevant qualifications and experience to undertake the vital duty of service of Criminal Witness Citations for the prosecution.

Our position was set out in our responses to the Inquiry into the Crown Office and Procurator Fiscal Service as follows.

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

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

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

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

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

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

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

Our position was noted by the Justice 1 Committee in their report on the
Criminal Procedure Amendment (Scotland) Bill as follows: The Society of
Messengers-At-Arms and Sheriff Officers told the Committee that citation is
one of its specialised roles and that there is no requirement for the creation of
a single agency as "Scotland has a body of professionals with the relevant
qualifications and experience to take on the duties of service of criminal
witness citations". The Society reported that the Crown Office is not
considering the use of Sheriff Officers for the citation of witnesses given that
the postal system was only recently rolled out and there is ongoing work with
the police to improve the timing and service of witness citations that require to
be served personally.249

An opportunity to consider all options was missed in Chapter 19 of the report
and is now being missed in the Bill. There are practical and financial issues
which require to be addressed before officers of court can be fully utilised in
the area of citation. It does not however, require a change of legislation as
officers can competently execute citations etc in terms of the Criminal
Procedure (Scotland) Act 1995. As with our submissions on fine enforcement,
officers of court have the advantages of experience in citation, employ
experienced staff, have training schemes and Continuing Professional
Development schemes established and utilised up to date technology. The
Society accordingly submits the use of our members would be an efficient and
cost effective method of dealing with citation in criminal procedure. In addition,
the committee may wish to consider whether the Police Scotland Act 1967
should be amended to the effect that only serving police officers may
competently serve any citation, if they are to remain involved in this operation.
The use of retired policemen in the function of citation of witnesses smacks of
“jobs for the boys” and serves to dilute the importance of the task. When Witnesses are cited in a haphazard and unprofessional manner, their subsequent failure to attend at court to give evidence should come as no surprise. Equally any warrant issued for the apprehension of such witnesses due to failure to attend as cited is plainly wrong. In view of the importance of citation to the criminal court system, citation should only be the responsibility of competent and qualified professionals.

The Society respectfully requests the Committee to consider the role our members can adopt in the service of documents in criminal proceedings. It is a historical role of officers of court. Officers of court retain a role on behalf of defence witnesses in criminal cases. These duties are equivalent to officer of court duties in civil court matters. Our members have invested in the latest technology, which allow the tracking of progress of citation as well as systems for tracing witnesses who have moved or absconded. Officers of court are highly qualified and are in a position to offer a professional and efficient service to the PFS/CO. The professional of Officers of Court would be happy to co-operate in any pilot scheme or any process for establishing an appropriate level of fees for these services.

Enforcement of Fines etc.

S43 Fines Enforcement Officers and their Functions

The Society fully supports the concept that recovery of fines should no longer be the responsibility of the courts and the police with other methods of fine enforcement considered. However, again must, express it’s disappointment with regard to the potential roles of officers of court not being considered in the Summary Justice Review Process. As with witness citations our potential involvement was not commented upon in the review process and disappointingly not touched upon in the Policy Memorandum.

Support for the use of Sheriff Officers is in evidence in the public domain. For example, Malcolm Dickson, Assistant Chief Constable of Lothian & Borders was quoted in the Sunday Mail on 2 November 2003 as saying he would like to see the job of collection of fines handed to Sheriff Officers. There are a number of factors in support of this position which reflect some of the issues raised in the report. A number of key features are identified in paragraph 32.43 of the Summary Justice Review and we comment on those individually. Officers of court meet the criteria of the 10 factors identified by the McInnes Committee.

32.43.1 – The Society notes the suggestion for centralisation of management etc. For the reasons mentioned below, the collection functions themselves could be effectively provided by firms of Sheriff Officers without the need for an additional layer of public administration. The staff, expertise and IT infrastructure are already in place as detailed further hereafter. The Society would concede that there may be a role for a centralised monitoring body. We would submit that for issues of public expenditure this need be no more than a
centralised monitoring body. We would also point out that in terms of the Consultation on the Enforcement of Civil Obligations in Scotland, there is a recommendation that a further body is set up, namely the Scottish Civil Enforcement Commission. In the event that greater powers of Civil Recovery are to be used, it would appear appropriate that the centralised monitoring powers of fine recovery also come under the jurisdiction of the Scottish Civil Enforcement Commission.

32.43.ii – One of the official duties of an Officer of Court is collection of debts subject to a decree including warrants for civil diligence. As an official function, collection and enforcement of financial penalties is an integral part of an officer’s duties and will accordingly merit a degree of priority.

32.43.iii – Officers of court currently have extensive expertise in the field including the effective use of earnings arrestment. The Society can see no good reason why that expertise should not be utilised in the field of fines enforcement. The Society already has a training and Continuing Professional Development Scheme in place to ensure members have and maintain the requisite skills and on that basis there appears no need for a further body with the same range of skills. On the other hand, the Society could provide the relevant expertise if it is considered a centralised monitoring body is required.

32.4.iv – Officers of court can offer a full range of payment methods from cash payments at an office to direct debit. On the same basis that expertise is already available for fine enforcement, the facilities for various payment methods are already available. The Society’s members have also built up a considerable expertise in the assessment of debtor’s circumstances with a view to recommending the most effective method of recovery. That would include both the assessment of whether the debtor has the ability to pay and how that payment should be enforced as well as an assessment of inability to pay and accordingly a recommendation for some other method of disposal.

32.4.v – Officers of Court have long experience of performance monitoring, particularly in the collection of local authority taxation and have in addition developed their own systems for internal performance monitoring.

32.4. Vi – The society sees no reason why all forms of financial penalty should not be collected by a single method subject to the submission that a single form of warrant should be established.

32.4.vii – The Society sees no reason why the system should not largely be self-financing both through the recovery of diligence expenses, and any other charges imposed as a result of any default.
32.4.viii – Transfer of the fines enforcement function to Officers of Court either supported by or contributing to a fines enforcement agency would free up resources from the court service and police.

32.4.ix – The point is noted that a consistent dedicated IT system would be a benefit of a single organisation. This does not take into account the IT systems already in place in Sheriff Officer firms, developed through experience of many years collection experience, and making use of available up-to-date technology. There seems little merit in the expense and other requirements such as training in the introduction of an IT system in the situation where IT systems are already in place that are readily adaptable to the functions envisaged.

32.4.x – Officers of court have shown an ability to innovate, as a result of performance monitoring mentioned above, as a result of new technologies becoming available and in their capacity to react to changes required by legislation.

In view of the above, the creation of a new type of administrator with the power to arrest earnings and bank accounts etc, appear absolutely superfluous.

These proposed new officers will require

- Training – in subjects already within the competence of officers of court and for which the professions, professional body supplies training
- Office accommodation, furnishings and equipment
- Clerical staff for preparation of work and monitoring of cases – an infrastructure which is already available within officer of court firms.
- Vehicles for site visits – also already available within officer firms

Fundamentally, the Scottish Executive is proposing the duplication of a number of functions where the infrastructure, qualifications, training, and experience are already available within a body of professionals in Scotland. The Executive is also proposing a further layer of what will no doubt be considerable further cost for a function which could be self-funded by recoveries utilising the expertise of officers of court.

In recent correspondence, the Scottish Executive confirmed it would be competent under current legislation to recover fines by use of warrants for civil diligence. There is therefore no need to create another "office" to facilitate an earnings arrestment and arrestment in execution.

The approach taken appears to blindly follow the example of England and Wales. This is confirmed in the Report on Collection and Enforcement of Fines and Financial Penalties produced by the Fines Working Group of the Scottish Court Service, which is available at http://www.scotcourts.gov.uk/sjr/docs/fines_enforcement_report.pdf. The
working group has however, failed to take into account the significant differences in the enforcement systems of England in comparison to Scotland. In terms of the English Scheme, the Society supports the principle of a fines officer being appointed to administer recovery of fines and to provide advice and assistance to those with difficulty in paying. We strongly oppose enforcement powers being invested in such officers in Scotland. There is not a directly equivalent body of professionals in England to Sheriff Officers in Scotland. Sheriff Officers are the appointed Officers in Scotland to carry out enforcement of court orders in Scotland. There is no compelling argument or reason to change this situation.

The separation of administration from enforcement makes sense. The Society submits that the officers envisaged by the Bill should be renamed ‘Fines Recovery Administrators’ with responsibility for administration, negotiation and collection etc as appropriate. Enforcement does not fit well with these responsibilities. Enforcement should be left to the trained and qualified enforcement professionals – Sheriff Officers.

In addition there is the requirement for independence and impartiality in the enforcement of diligence. The Scottish Law Commission has always been clear that diligence is a judicial function and accordingly earnings arrestment and bank arrestment cannot be considered administrative functions as envisaged by the report referred to. These issues have been referred to by the Scottish Law Commission Memorandum No 51 1980 and also in their Report on Diligence and Debtor Protection (Scot. Law Com. No. 95) 1985. To quote from the 1985 report “the enforcement of court orders would be liable to be affected, or appear to be affected, by political considerations and would infringe the constitutional principle of independence of the courts.” The Society accepts that the courts are administering this system but their position has changed to that of a creditor enforcing recovery of sums due to the Exchequer. We would submit this places them in the same position as a Central Government creditor and accordingly the enforcement of recovery of funds due to the Exchequer should remain with impartial and independent officers of court.

The Bankruptcy and Diligence (Scotland) Bill's sections on enforcement set out a system for the modernisation and advancement of the officer of court profession. It seems contradictory on the part of the Scottish Executive to look to the development of the profession in one Bill, yet in another Bill, seek to remove work from that profession which traditionally and logically falls within its remit.

The report goes on to recommend that civil diligence should be an option under collection orders. This again appears to miss the point that arrestment of earnings and bank accounts etc are civil diligences in the law of Scotland. Both the report and the Bill appear set to blindly follow the example of England while ignoring the principles of Scottish practice, procedures and law, which are ironically often admired in England.
Reference is also made to the cost of collection of fines. Use of Sheriff Officers would be cost neutral if recovery of the fine was affected by the relevant diligence. That is to say the costs of diligence would be added to the debt and recovered from the funds collected. We would submit that the cost to the state should be minimised and this would contribute substantially to minimising the burden on the state. We understand it may be argued that costs should not be added to the burden of anyone struggling to pay a fine. This should not be an issue. Inability to pay should be identified by the ‘Fines Recovery Administrator’. If that system works properly enforcement should only be instructed against the “can pay – won’t pay’s”. We see no reason that the “can pay - won’t pay’s” should not contribute to the costs of collection. It should not be forgotten the offender occasioned the fine.

Out with the enforcement/recovery issue, the Committee may wish to consider other areas where officers could contribute, such as:

- Pre-sentencing status reports
- Post Sentencing intimations and status reports
- Tracing
- Providing collection functions including on-line and telephone payment and electronic transfer of funds to the court system.

In conclusion, the Society considers its members could make a valuable contribution in the field of fine enforcement. Prior to the introduction of professional police forces in the 19th century, officers of court carried out many functions of criminal court procedure. Officers are still recognised as competent to exercise a number of functions in criminal procedure in terms of the Criminal Procedure (Scotland) Act, 1995. The skills required in recovering a civil debt are the same as those for recovering a criminal debt. As has been demonstrated above, there already exists in Scotland a professional who can effectively and efficiently carry out the functions of fine recovery. Officers of court already have the advantages of experience in the recovery of debts, employ experienced staff, training schemes, Continuing Professional Development Schemes established and utilise up to date technology. Accordingly the Society submits our members presently present an efficient and cost effective method of dealing with fine enforcement.

John Campbell
President
The Society of Messenger-at-Arms and Sheriff Officers
March 2006