The Committee will meet at 9.45 am in Committee Room 2.

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

   Val Bremner, Secretary, and Rachael Weir, Member, Council of Procurators Fiscal Society

   and then from

   Gerard A Brown, Convener, Gerard Sinclair, Member, and William McVicar, Member, Criminal Law Committee, The Law Society of Scotland.

2. **Criminal Proceedings etc. (Reform) (Scotland) Bill (in private)**: 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 SPICe and Committee Adviser *(PRIVATE PAPER)* J1/S2/06/18/1

Submission from Procurators Fiscal Society J1/S2/06/18/2

Submission from The Law Society of Scotland J1/S2/06/18/3

Documents for information—

The following documents are circulated for information:

- Post Council report on the Justice and Home Affairs Council of EU Ministers, 27-28 April 2006; and

- Correspondence from Scottish Executive, Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

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—

Tuesday 30 May, Committee Room 2;
Wednesday 31 May, Committee Room 5;
Wednesday 7 June, Committee Room 2;
Wednesday 14 June, Committee Room 6.
Justice 1 Committee

Criminal Proceedings etc. (Reform) (Scotland) Bill

Written submission from Procurators Fiscal Society

The Procurators Fiscal Society welcomes the opportunity to comment on the Criminal Proceedings etc (Reform) (Scotland) Bill. We regard some of the reforms as innovative and share the same goal as others working within the Criminal Justice system to deliver justice efficiently and effectively. That said we take the view that any measures must be adequately planned, resourced and implemented.

We have commented below on the areas of the Bill which may impact on our members.

Reform to the system of bail and remand - part 1

We have concerns at the apparent codification of what is considered to be the existing common law, particularly with regards to what is described in the explanatory notes to the Bill as a non-exhaustive list of the considerations that will be relevant to bail. As a matter of principle alone great care must be given in enacting any provision to ensure that it in no way interferes with the independence and discretion of the Procurators Fiscal and Judiciary in that regard. Moreover, although the list is described as non-exhaustive, it might mislead victims and witnesses and unfairly raise their expectations in respect of the opposition to bail by the Crown.

More troubling are the provisions of proposed new section 23B(5), which appear to imply that parties will have the opportunity to comment on the risks inherent in the decision to grant bail. Risk assessment is a difficult exercise. If it is expected that the Crown is to carry out such an assessment and proffer a view on the risks inherent in particular cases our members must be better equipped to carry this out. Appropriate guidance to assist members in deciding whether to offer a view to the court on risk and ensure a nationwide consistency of approach will be required. This will involve training with resource implications.

With a more stringent approach to breaches of bail it is perhaps inevitable that there will be increases in reports for breaches of bail. Any such increase in reporting will require be carefully reviewing and planning for to ensure that there is a proportionate increase in resources available.

We welcome the flexibility created in relation to the time allowed for dealing with bail applications.

Changes to the law relating to criminal proceedings, in relation to procedure in summary and solemn cases – part 2

Liberation on undertaking
Although the desire for more efficient, effective summary justice is one which the Society shares, the extension of the provisions for release on undertaking will result in an inevitable increase in the number of cases to be processed as undertakings. There is already considerable pressure on our members to comply with tight timescales for taking and implementing decisions. Our members have succeeded against the odds in ensuring the Departmental performance but in many cases at significant personal cost. It is imperative that additional resources are available to meet this new challenge without adversely impacting further on our members and having an adverse effect on the quality of their decision-making.

Increasing the sentencing power of summary criminal courts - part 3

Although sentencing is entirely a matter for the independent judiciary the provisions will indirectly impact on the work of the Crown Office and Procurator Fiscal Service. Just as the increase in sentencing powers of the Shrieval bench in solemn proceedings from 3 to 5 years imprisonment increased the proportion of cases tried on indictment in the Sheriff Court, any increase in the sentencing powers of the Sheriff on summary complaint will give rise to an increase in the proportion of cases proceeded with at level. Although there are expectations that the extension in the range of alternatives to prosecution and changes in the mechanisms for their enforcement will reduce the business of the summary courts, in fact that might only make way for more serious cases to be prosecuted in their place. The review by Sheriff Principal McInnes highlighted the pressure of business on the existing summary courts. The Society is therefore anxious that the Scottish Executive ensure that the resources are in place to cope with any additional workload, particularly where more serious cases might proceed on summary complaint than do so at present in order to avoid any adverse impact on our members.

Extending the range of alternatives to prosecution – part 4

The Society welcomes the decision to extend the range of alternatives to prosecution. This reflects favourably on the trust which is placed on our members in respect of their decision-making, integrity and use of discretion.

The change to an opt-out system is seen as a positive step. Care will require to be taken with the implementation of these changes to ensure that our members are given adequate training, guidance and resources. We believe that Conditional Offers of Fixed Penalties should have little or no resource implications given the existing systems, which are in place. We are concerned that the right of recall may prove difficult to manage and there may be resource implications there.

It will be essential for the efficient working of this system that police reports contain the additional necessary information to allow our members to be in a position to make informed choices. Any failure in that respect will have the potential to cause difficulties.
Compensation Offers are seen as a positive step but will result in training issues for our members and will require guidance on implementation. While we welcome the general approach, we have concerns over the issuing of such offers in cases of assault/personal injury. We see difficulties in being able to decide whether fault lies entirely on one side in some such cases and will require to rely on the impression of the police officer reporting the case. We are concerned that police reporting may not be comprehensive enough to allow for a positive decision to be made. Comparison should be made with the present system where Courts make very few awards of compensation in such cases for the same reasons.

Work Offers in principle are to be welcomed but there are clear resource issues and training/guidance implications for our members. Such offers are likely to be labour intensive and potentially long running. We fear they will add considerably to the pressures already placed on our members. They will require to be properly resourced.

We welcome the ability to disclose the acceptance/issue of such alternatives to the Court. We have some concerns regarding the limit of two years placed on such disclosure which may prove difficult to manage and could lead to resource implications in its management.

Time limit extensions are to be welcome and are essential if the changes are to be workable.

Establishing justice of the peace courts and reform of the procedure by which justices of the peace are appointed and trained – part 4

The Society acknowledges the careful consideration given to the future of the District Courts and the commitment to community justice, a commitment that our members share. We welcome the plans for Justice of the Peace courts to fall within the overall Scottish Court Service umbrella and hope that this step will bring about the necessary consistency of approach and efficiencies in practice.

The Society also welcomes the new provisions for the appointment and training of Justices of the peace. It is also vital that those acting as Clerks in the Justice of the Peace courts will have the necessary, relevant criminal law experience to best advise the Justices who are advised by them. We consider it essential that a robust approach is taken in all these areas to ensure that we will have a well equipped, professional and accountable lay bench.

To that end we are concerned to ensure that Parliament addresses itself to the standards to be applied in such appraisal, both in terms of competency and more general professional conduct. Although the Bill does not appear to set out the criteria for appraisal, and nor should it, it must be made clear that care requires to be given not only to ensuring that there are well established and understood consequences for failures to comply with the conditions of appointment, including satisfactory appraisal, but also that those responsible
for conducting those appraisals have both the guidance and powers necessary to effectively carry out their responsibilities.

Council of the Procurators Fiscal Society
6 April 2006
Justice 1 Committee

Criminal Proceedings etc. (Reform) (Scotland) Bill

Written submission from The Law Society of Scotland

The Law Society of Scotland ("the Society") as the governing body of Scotland's solicitors has a unique role in the administration of justice in Scotland. The Society has, as its statutory objects under the Solicitors (Scotland) Act 1980, the promotion of the interests of the solicitor's profession in Scotland and the promotion of the interests of the public in relation to that profession. Not only is the Society therefore concerned with the administration of justice from the perspective of the solicitor but also from the viewpoint of the public, the principal consumers of the services of the justice system whether as victims, witnesses or accused persons.

General Comments

The Society's Criminal Law Committee ("the Committee") has been actively engaged in consultation on the reform of the summary criminal justice system in recent years and now welcomes the publication of the Criminal Proceedings etc (Reform) (Scotland) Bill.

In debating any proposals for reform, it is important to consider what the aims of the summary criminal justice system should be. The Committee believes that there are central values, which should be at the core of any criminal justice system and which are essential in reflecting the fair administration of justice. The system should be (a) just and fair; (b) certain and predictable; and (c) effective and efficient.

(a) Just and Fair

By this the Committee means a system of criminal justice, which conforms to acceptable standards of justice and fairness. The incorporation of the European Convention on Human Rights ("ECHR") has reinforced principles which are central in delivering justice and fairness in Scots criminal law. These principles include the proper investigation of crime, the presumption of innocence, equality of arms and the determination of guilt and innocence within a reasonable time by an independent and impartial court. The criminal justice system should continue to uphold these principles and ensure that sufficient safeguards are in place to protect against miscarriages of justice.

(b) Certain and predictable

The system should be organised to enable those affected by its operation to be confident that the law will be interpreted clearly without giving rise to doubt about its aims and objectives and reasonably certain about the outcome of cases decided by criminal courts. Inconsistency and apparent
arbitrary sentencing give rise to concerns and can impinge adversely on public confidence in the system.

(c) Efficient and effective

The Committee recognises and supports the need for value for money from the criminal justice system. It is clear that the criminal justice system, in common with other areas of public expenditure, must operate within a controlled budget. However, as the criminal justice system is a central feature of any civilised society and is responsible for ensuring that people can live and go about their daily business without fear of personal violation or destruction of property, it is therefore essential that the system is properly resourced and that the resources are directed where they are needed. In delivering summary justice, resources must be allocated to ensuring that the procedures and processes involved operate fairly whilst facilitating the expeditious disposal of business.

Part 1 – Bail

The consultation paper¹ on bail and remand issued by the Sentencing Commission for Scotland in 2004 presented compelling evidence to suggest that the current bail system in Scotland is not operating effectively in terms of crime reduction for those granted bail or consistently in terms of sentencing policy. The challenge for the Scottish Parliament, in addressing these issues, is therefore to seek to restore credibility in the system whilst balancing the rights of the accused with the interests of public safety and the smooth operation of the judicial process.

The Committee welcomes the introduction of a statutory framework of criteria for the consideration of bail. At present, the lack of statutory or judicial guidelines can mean that there is the potential for a lack of consistency both in relation to the opposition to bail by the Crown and in the decision making process by individual judges. The requirement in section 2 for judges to provide reasons for their decisions will allow case law on bail to develop, thereby ensuring greater transparency and certainty in the decision-making process. If certainty and predictability are to be achieved throughout the system, then a court at first instance should be informed when a decision made by it in regard to bail is overturned by the High Court. Provision should therefore be made for the decisions of the High Court in bail appeals to be disseminated to the courts at first instance.

If the bail system is to operate effectively, the person who is subject to the bail order must have a clear understanding of what is expected of him or her and what will happen in the event of a breach of an order. The Committee therefore supports the express provision in section 2(2) of the court's responsibility to explain the implications of being granted bail, the bail conditions and the consequences of breach of bail. The provision of this information in a formal written bail order is helpful and the Committee would

suggest that the order should be extended to include the dates on which the accused is next required to attend court.

The bill sets out the general propositions that are at present reflected in Scots common law and Strasbourg case law\(^2\). However, the new section 23D which is inserted by section 1 of the bill would appear to depart from the current law, reverse the presumption in favour of bail and provide that in certain cases, bail will only be justified in *exceptional circumstances*. Whilst it will still be possible for a judge to grant bail having regard to the circumstances of a particular case, before doing so the judge must be satisfied that there are “exceptional circumstances”. What will amount to “exceptional circumstances” has yet to be determined. The Committee is concerned that the certainty which other provisions in this part of the bill introduce will be diluted by this section. It is also difficult to ascertain why this section is needed. If the court is applying the standard criteria set out in section 23C, it will have regard to the serious nature of the offence and the fact that the accused has an analogous previous conviction. Clarification would therefore be welcomed as to why it is thought necessary to include this provision in this measure and confirmation that its terms are compliant with Article 5 of the European Convention on Human Rights (ECHR)(the right to liberty and security of the person).

The bill presents the Parliament with an opportunity to look at the law on bail afresh and consider innovative ways to address the causes of potential offending behaviour at an early stage in the process. Rather than focusing on the alleged commission of certain categories of crime, the bail system could adopt a more holistic approach, tailored to the interests of justice, the needs of the community at large and the circumstances of individual accused persons. To make a proper assessment of the accused’s suitability for bail, particularly in regard to the likelihood of re-offending, the court should have all relevant information before it. Greater emphasis should be placed on front-loading the system so that informed decisions can be taken, with the focus on a package of bail conditions, which will be specific to the circumstances of the individual accused.

Projects could be identified to assist in addressing the underlying cause of potential offending behaviour and thereby reducing the risk of offending whilst on bail. In this way, it is hoped that the accused person will engage more readily with the process and thereby assume greater responsibility for his or her behaviour whilst on bail. This additional responsibility should be set in the context of an appropriate environment so that every opportunity is afforded to the accused to adhere to the conditions of bail, thereby offering increased protection for the public and victims of crime, in particular.

Referral to treatment programmes at this stage in the process should not be regarded as an admission of guilt on the part of the accused and it would be inappropriate to consider the merits of the case against the accused. However, there may be situations in which it is apparent that the accused

\(^2\) Policy Memorandum Paragraph 30.
could benefit from some intervention, such as treatment for an alcohol problem, which could assist in reducing any likelihood of future offending behaviour. With this kind of focused intervention and support, the Committee would hope that the number of offences committed by those on bail would reduce.

If the system is front loaded with a significant effort made at the early stages of the case to ensure that the accused has a specified address, can be supported at that address and receive any assistance in the form of treatment programmes, then it is hoped that this may reduce the rate of offending whilst on bail and improve public confidence in the system. It is appreciated that this would be resource intensive and that additional funding would have to be allocated to the system. However, there may be corresponding savings from the reduction in the numbers ultimately remanded in custody pre-trial and savings arising from the reduction in the number of prosecutions for breach of bail.

Linked to this is the need to have a swift turn-around time between the pleading diet and the conclusion of the trial. Delays in the criminal justice system undoubtedly place pressures on the bail system. It is therefore important that the provisions in the remainder of the bill facilitate the speedy administration of justice and in so doing complement the reform of the bail system.

Part 2 – Proceedings

Section 6 (Liberation on undertaking) - The Committee welcomes this provision as it should ensure that in appropriate cases accused persons are brought before the courts shortly after the alleged commission of the criminal offence. This reinforces the link between alleged criminal behaviour and the court process whilst ensuring that justice is delivered swiftly. Consideration could be given to extending the procedure so that if the accused person advises the police which solicitor is to be instructed, then that solicitor could be given notification of the undertaking and the date when the accused is scheduled to appear. The solicitor could in this way assist in seeking to ensure that the accused attends court on the specified date. The Committee believes that the reference in the new section (1F) to the procurator fiscal’s discretion is particularly important as it preserves the role of the prosecutor in determining the appropriate disposal of a case in the public interest and ensures flexibility in the process.

Section 7 (Electronic Proceedings) - The Committee supports the introduction of electronic proceedings and believes that efforts should be made to modernise court procedure through greater use of electronic communication in a secure setting. Consideration could be given to developing this further to provide for the initial tendering of pleas of guilty and not guilty in cited cases by electronic means as well as by paper format. Such improvements could deliver greater efficiency within the system.
Section 12 (Disclosure of Previous Convictions) - The Committee supports the insertion of a new section 166A into the Criminal Procedure (Scotland) Act 1995 to allow the court to take account of previous convictions acquired by the accused between the date of the offence and the date of conviction. The Committee can see the merit in allowing the court to have all relevant information before it when sentencing. However, the Committee does have concerns about the proposed new section 166B. This represents a fundamental change in procedure and allows a charge which discloses that the accused person has a previous conviction to be placed on a complaint with other charges. The rationale for the current prohibition of allowing reference to previous convictions on the same complaint as other charges is to preserve the transparency and impartiality of the system. The judge must not only be impartial, but must be seen to be impartial and the Committee is not satisfied that there are sufficient grounds to justify a departure from this principle in these circumstances.

Section 13 (Complaints triable together) - The Committee supports this provision but would suggest that the section should be extended to allow the defence the right to address the court in relation to a Crown application and to make such an application in their own right. The defence may be in possession of information which is relevant to this decision.

Section 14 (Proceedings in absence of the accused) - At present in summary proceedings, “no part of a trial shall take place outwith the presence of the accused” except in very limited circumstances such as non-imprisonable statutory offences in terms of sections 155 to 157 of the Criminal Procedure (Scotland) Act 1995.

The Committee is aware that in the English case of R.-v- Jones 2002 All ER (HL) 113 provision was made for a trial to proceed in the absence of the accused. That case was, however, decided on its own facts and circumstances. Lord Rodger of Earlsferry pointed out that different countries have different systems of procedure. He then drew substantial distinctions between Scottish and English criminal procedure and highlighted the importance in Scots law of the long established principle that a trial should proceed in the presence of the accused.

The Committee agrees with Lord Rodger in relation to the distinctions which are drawn and is not satisfied that the existing provisions, enabling trials to be conducted in the absence of the accused, require extension.

The principle of trial in absence in solemn proceedings was debated recently in the Scottish Parliament during the passage of the Criminal Procedure (Amendment)(Scotland) Act 2004. There were comprehensive debates on this issue during Stage 2 and 3 of the bill. The bill was amended “to strike the correct balance between the rights of the accused … and the rights of victims

3 Section 153(1) of the Criminal Procedure (Scotland) Act 1995
4 Section 54 of the 1995 Act (Insanity in bar of trial); section 70(5) of the 1995 Act (Prosecution of a body corporate); and section 92(2) of the 1995 Act (Misconduct of the accused).
and witnesses". The amended section provided that a trial in absence could only proceed if the accused failed to appear after evidence had been led which substantially implicated him or her in respect of the offence charged and then only if the trial judge was satisfied that it was in the interests of justice so to proceed.

Bill Butler summarised the concerns of the Justice 1 Committee in relation to the bill as introduced, saying,

“One proposal that caused the committee deep concern throughout stage 1 was the proposal to have trials in the absence of the accused from the outset. It is clear from the majority of the evidence that we heard that there were grave concerns about that. In paragraph 140 of its stage 1 report, the committee was unanimous in rejecting the proposal that accused persons should be able to be tried in their absence from the outset. We believed and continue to believe that there was little evidence to support the proposal, that there was little justice in it and that it was far too inflexible.”

Although this debate took place in the context of solemn procedure, the same objections to the principle apply in relation to summary justice. The Committee continues to have concerns about the fairness of such proceedings and about the potential impact implementation could have on victims and witnesses, particularly in situations where a procedural defect during a trial in absence could result in a retrial.

There are already mechanisms in place to deal with non attendance. If there are reasonable grounds to believe that an accused will abscond during the course of a trial, then the prosecutor can oppose bail or at a later stage in proceedings could bring that information to the attention of the trial judge. It would then be within the trial judge’s discretion to consider withdrawing bail. The new section 23C contained in section 1 of the bill will strengthen these provisions by placing this ground of opposition to bail on a statutory footing.

Bail can also be refused when an accused is arrested for failure to appear for trial. In the case of Jones, Lord Rodger pointed out that failure to appear for trial is an offence in itself. The bill again strengthens the existing law by increasing the maximum sentence to twelve months imprisonment for failure to appear, both when the accused person is on bail7 and even in circumstances when he or she is ordained to appear8. Such sentences will run consecutively to the substantive charges on the complaint. If these provisions are utilised, then the Committee would anticipate that it will soon

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5 Hugh Henry, Stage 3 Debate Criminal Procedure (Amendment)(Scotland) Bill 28 April 2004 at Col 7789
6 Column 7791
7 Section 3 of the Criminal Proceedings etc (Reform)(Scotland) Bill.
8 Section 15 of the Criminal Proceedings etc. (Reform)(Scotland) Bill.
become clear to all court users that failing to appear for court will not be tolerated and will be dealt with severely. Implementation of these provisions could address the problem of failure to appear without having to resort to the procedure of trial in absence.

In addition to the objections in principle to this procedure, there are also a number of practical difficulties with implementation. In cases which proceed to trial in the absence of the accused, the court can consider allowing the accused’s solicitor to continue to act (if satisfied that he or she has sufficient authority) or can appoint another solicitor to act if it is in the interests of justice to do so. The Committee has concerns about these provisions and of appointing representation through the court. These concerns are centred on the nature of the solicitor/client relationship and the lack of information, which will be available to the court appointed lawyer.

(a) The solicitor/client relationship

Article 5(a) of the Code of Conduct for Scottish Solicitors states that “solicitors must act on the basis of their client’s proper instructions”. This statement reflects the fact that the solicitor/client relationship has its foundation in the law of contract and solicitors must have their client’s authority to act. If the solicitor has no instructions, then he or she has no authority to act.

Legislation could provide statutory authority for the solicitor to act. However, despite the fact that the solicitor may never have met the accused, the solicitor would have, and be subject to, the same obligations as if he or she were engaged by the accused.

Unlike in England and Wales\(^9\), a court appointed solicitor in Scotland would be placed under a duty to act in the best interests of the accused. The solicitor is therefore, obliged to have regard to the other provisions of the Code of Conduct.

Article 5 of the Code states that “solicitors must provide adequate professional services”. The Code explains that an adequate professional service requires the legal knowledge, skill, thoroughness and preparation necessary to process the matter in hand. Solicitors should not accept instructions unless they can adequately discharge them. Consideration should therefore be given to how the court appointed solicitor could fulfil these responsibilities whilst acting in that capacity.

(b) Lack of information

In terms of the rules of evidence, it is generally accepted that it is inappropriate for an advocate or solicitor to put a question to a witness during a trial, which to his or her knowledge, has no basis in fact or forms part of the

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\(^9\) In terms of Section 38 of the Youth Justice and Criminal Evidence Act 1999, a court appointed solicitor in proceedings for sexual offences is not responsible in any way to the accused.
accused’s version of events. Without the co-operation of the accused, or information as to the defence, it is difficult to envisage how the court appointed lawyer will be in a position to test the evidence led by the prosecution.

Efforts could be made to ensure that the solicitor is fully aware of the strengths and weaknesses of the prosecution case and to that extent, the prosecution case can be tested. However, without information from the accused as to the defence, the court appointee cannot effectively represent the accused or discharge the professional duties already identified. If the trial proceeds without the appointment of a solicitor by the court, it is difficult to envisage how the prosecution case will be tested at all.

Section 22 (Transfer of Proceedings) - The Committee can see the benefit of transferring proceedings to another sheriffdom where there are other summary proceedings for an accused person. This will allow the court to adopt a holistic approach and will be particularly helpful in situations in which the court is concentrating on ways to address an individual’s offending behaviour, rather than on one particular offence. The Committee understands that such transfers will be at the discretion of the court and would hope that the interests of victims and witnesses would also be taken into account.

Section 39 (Fixed penalty and compensation orders) - The policy objective of this part of the bill is to remove from the courts a further tranche of low-level offending to ensure that court time is focused on those matters which can only be dealt with by way of prosecution and those which are in dispute. The Committee would question whether the bill as currently drafted will achieve this policy intention.

Fixed Penalty Notices

Section 39 of the bill substantially amends section 302 of the 1995 Act, altering the scope of the fixed penalty scheme, the procedure to be followed and the disclosure provisions.

The bill proposes to extend the range of offences for which a conditional offer can be made. Section 39(1)(i) provides that a fixed penalty can be offered for offences which can be tried summarily, rather than simply those offences which can be tried in the district court whilst section 39(1)(e) increases the maximum level of a conditional offer from £200 to £500. If the level and range of fiscal fine is increased in this way, there are a number of practical and public policy issues which must be considered.

It could be argued that under such a system, the procurator fiscal is adopting a quasi-judicial role in determining the appropriate level of sentence. This determination will be made in circumstances where the procurator fiscal will have no detailed information about the accused’s means. The police report may indicate whether the person is working or on benefit but may give no

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10 Paragraph 220 of the Policy Memorandum.
accurate indication of income and outgoings. Furthermore, in determining the appropriate level of penalty, no regard could be given to any mitigatory circumstances which may be relevant to the case.

When considering the extension of the fixed penalty scheme, regard must be had to wider criminal justice policy and initiatives and care taken to ensure that they are not undermined. There are for example certain offences which by their nature should not be dealt with by way of non-court disposal. The proposed extension of the fiscal fine to £500 could result in comparatively serious cases being diverted from prosecution when previously they would have been prosecuted in court. There is also the anomalous situation in which the courts may have imposed a lower fine than the assessed level of fiscal fine, particularly if the fiscal fine is extended to £500 and the average fine in the sheriff court is £304.72\(^{11}\).

One perceived attraction of the use of alternatives to prosecution, such as fixed penalty notices, is that there is currently no formal record of a conviction against the accused person. No inference of guilt can be drawn from the acceptance of a fixed penalty notice. Although the acceptance of a fixed penalty will not be a conviction or recorded as such, section 39(1)(v) of the bill will allow the prosecutor to disclose to the court in proceedings for a different offence the fact that the alleged offender has accepted or been deemed to have accepted a fixed penalty within a two year period. The Committee believes that this provision could have an adverse impact on the operation of the fixed penalty scheme and the criminal justice system as a whole. If the court is to have regard to this information at a later date, then individuals may be dissuaded from accepting the fixed penalty notice as it could, in practice, be regarded as an admission of guilt. The adoption of such a policy could therefore result conversely in more cases proceeding to court than under the present system.

The Committee has significant concerns about the introduction of a system whereby a fixed penalty notice will be deemed to have been accepted unless the accused gives notice to the clerk of court within 28 days that he or she is refusing the offer. A fixed penalty could be deemed to have been accepted by an individual who is unaware of the existence of the notice. Although there is provision for recall of fixed penalties which have been deemed to have been accepted, it remains to be seen how this will operate in practice in terms of time and resources.

The Committee would suggest that an alternative would be a system whereby a scheduled court date is given on the fixed penalty notice, at which the accused should attend if he or she does not wish to accept the conditional offer or fixed penalty. The fixed penalty notice should be written in language,\(^{11}\)

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which is plain and can be easily understood. Information should be contained in the notice to the effect that the recipient is entitled to receive legal advice and may receive legal aid to do so. The consequences of acceptance of a fixed penalty notice will vary from individual to individual and it is important that the recipient is fully advised of the consequences of acceptance before making payment.

Compensation Offers

The Committee can see the merit in the introduction of fiscal compensation offers in considering the disposal of certain specified offences. However, it is not thought that such orders would be appropriate in cases where an individual has suffered personal injury or emotional trauma as a result of crime. There are wider public policy considerations which must be taken into account in such cases as well as difficulties in quantifying the level of such offers. The Committee believes that compensation offers should be restricted to compensate for loss or damage arising, for example, from the crimes of malicious damage or in some cases of theft. Such losses or damage can be evidenced and quantified in an objective way.

The introduction of such offers would have to be accompanied by guidance for the police, clearly specifying that any loss claimed would have to be properly evidenced and the value of any loss accurately reflected in the police report which is submitted to the procurator fiscal. Guidance to the Crown Office and Procurator Fiscal Service (“COPFS”) would also have to address issues such as culpability in cases involving multiple accused.

The Committee has the same concerns about reference being made in subsequent proceedings to the existence of compensation offers and the procedure to be adopted as those identified above in relation to fixed penalty notices.

Part 4 – JP Courts and JPs

The recommendation of the Summary Justice Review Committee (“the Review Committee”) to unify the administration of the summary courts brings into sharp focus the central values referred to at the beginning of this paper and highlights that the goal of any summary justice system should be to deliver a service which best satisfies these different criteria.

The Review Committee made a strong argument in favour of unification and considered the following areas where service delivery could be improved by the unification of the summary courts:-

(i) Support for the bench – At present there are contrasting levels of training and support within the court system. Unification of administration could ensure uniform standards of training for the bench, whether lay or professional.

(ii) Investment in the estate – The Review Committee compared the quality and variety of properties and premises used to house the
various types of court. The Review Committee suggested that unification would ensure that all reasonable steps could be taken to provide courthouses of appropriate size and quality which would conform with statutory requirements.

(iii) Investment in technology – The Review Committee suggested that there are benefits in terms of economy of scale, effectiveness and consistency by having all the summary courts operating a unified and centrally controlled electronic management system and fines enforcement system.

(iv) Support for court users by existing agencies – Organisations such as Victim Support Scotland and the Witness Service which presently operate within the sheriff court system could extend their services.

(v) Greater flexibility – A unified system would make it easier to deal with persistent offenders, with cases calling in a number of differing courts, allowing for transfer of business more easily between the various courts.

(vi) Greater transparency, accountability and responsiveness to change – A unified system would allow for greater coordination of areas of change ensuring a consistency of approach and efficiency in dealing with the fast moving level of change within which the criminal justice system in Scotland operates.

The Committee believes that these are persuasive arguments in favour of the creation of a unified court system and therefore supports this proposal, provided that the court system is properly resourced and will continue to allow individuals, particularly those in small towns and rural areas, access to local courts. Unification should not be to the detriment of local service provision and access to justice.

The Committee also welcomes the express provision in section 56 of the bill for training and appraisal of Justices of the Peace (“JPs”). Proper and focused induction, support and training programmes as well as appraisals are crucial in ensuring that all those performing a judicial role in the summary courts can carry out their function well in practice. As Lord Thomson said in his booklet “What Scots magistrates should know”:

“A few lucky people may be born judges but most of them have to learn to be judges the hard way. Being a judge is just a job like any other job. You have to work at it and learn how to do it.”

It will be important that sufficient funding is set aside to ensure that JPs can participate in a proper induction process prior to sitting and thereafter receive appropriate training, support and performance appraisal.

Part 5 – Inspection of the Crown Office and Procurator Fiscal Service
The Committee welcomes the introduction on a statutory basis of a Chief Inspector of Prosecution in Scotland.

Monitoring

The proposals brought forward in this measure are designed to improve the delivery of summary criminal justice in Scotland. It will be important that implementation of these provisions is monitored in practice to ascertain whether the reforms brought forward achieve the intended results and restore the credibility of summary justice for all court users, victims, witnesses and accused persons.

Law Society of Scotland
13 April 2006
POST COUNCIL REPORT ON THE JUSTICE AND HOME AFFAIRS COUNCIL OF EU MINISTERS, 27-28 APRIL 2006

Comments by the Executive

The UK was represented by Baroness Ashton of Upholland. The council reached a political agreement on a Regulation applicable to non-contractual obligations (Rome II). Discussion on the European Evidence Warrant resulted in deadlock. Also discussion on the Fight against Organised Crime, Certain Procedural Rights in Criminal Proceedings and Mutual recognition of Custodial Sentences.

AGENDA ITEMS

Civil Judicial Co-operation


Political Agreement was reached on the articles of the draft regulation on the law of applicable to non-contractual obligations. The Presidency tabled a final compromise package which was agreed by qualified majority as Latvia and Estonia continued to oppose on the grounds of Article 8A.

Criminal Judicial Co-operation

European Evidence Warrant

This draft framework decision is the Commission’s first step towards updating arrangements in the EU for mutual legal assistance in criminal matters. It will apply the principle of mutual recognition to obtaining certain types of evidence and as such will ultimately replace the relevant provisions in the 1959 Council of Europe Convention on Mutual Legal Assistance – although it is proposed that there will be a period of structured co-existence until the new measures are fully in place across the board. As it is a first step, there are limitations on the types of evidence covered e.g. obtaining evidence in real time and biometric material directly from the body are excluded.

A Scottish Executive official has attended Working Group meetings as part of the UK negotiating team. For Scotland, the Framework Decision when adopted will require primary legislation. Current provisions are to be found in the Crime (International) Co-operation Act 2003, which extends UK wide, but which was subject to the Sewel procedure for those elements which were in devolved competence.

Discussion at the Council continued on the definition of offences for which dual criminality is to be abolished.
Framework Decision on Fight Against Organised Crime

The Framework Decision proposes to repeal the 1998 EU Joint Action on Participation in a Criminal Organisation and seeks principally to provide for specific offences of directing a criminal organisation and membership of a criminal organisation. Having entered the working group in March 2005, negotiations to date have been very technical. The main issue for the UK is how the proposals in the draft would interface with domestic provisions on conspiracy to commit criminal acts. Early indications are that it will not be necessary to amend domestic legislation.

The Council reached a general approach on the text subject to parliamentary scrutiny.

Framework Decision on Certain Procedural rights in Criminal Proceedings

This proposal, which was submitted by the Commission in May 2004, has been in the working group for some time. The Presidency informed the Council about the state of play with regard to the negotiations. The Council agreed that an expert ad hoc working group, which had been set up to examine further the outstanding issues from the working group, should continue its work, and that it should have a broad remit.

Framework Decision on the Mutual Recognition of Custodial Sentences

Delegations were divided between those who believed that transfer of sentenced persons should not require the application of dual criminality and those who insisted on the possibility to apply dual criminality. It was agreed that this could be met by developing an option proposing the abolition of dual criminality for the listed offences but provided an opt-out for those that wished to maintain dual criminality. It was acknowledge that the scope of the opt-out would be the key to the solution. The Working Group would continue negotiations on that basis.

Framework Decision on Data Protection

The Presidency gave a short update on the progress of discussions to date. Main issues included several matters in relation to scope, such as whether it ought to be restricted to cross border transmission of information and whether it should cover both police and judicial co-operation. Other matters raised included the issue of transmission of information to third countries. The FD generally deals with the protection of personal data processed in the context of police and judicial co-operation in criminal matters.

Combating and Prevention Trafficking in Human Beings

Max-Peter Ratzel, Director of Europol, gave a presentation on Europol’s mandate, activities, sources and challenging regarding trafficking in human beings. He made the following recommendations to the Member States:

- Follow the EU Action Plan on Trafficking Human Beings (THB)
- Member States investigation teams should be aware of how to make use of Europol and “existing best practices”
- Member States should inform and request support from Europol, and
• Member States should exploit benefits of closer co-operation with international and non-governmental organisations.

**Implementation of the action plan – state of play**

The Presidency and Commission Vice President Franco Frattini informed the Council about ongoing implementation of the THB Action Plan. A joint Presidency/Commission conference is envisaged for June 2006 in order to comply with the THB Action Plan.

The Commission then informed the Council about its intention to present recommendations on child trafficking.

The meeting also agreed the draft Council Conclusion.

**Police and Judicial Co-operation**

**Council Decision on Improvement of police co-operation**

The Presidency noted that there was general agreement that police co-operation needed to be improved, but that it would be better in the context of the current negotiations to pause to consider next steps. It was agreed therefore that a new text should be developed with the objective of devising an effective instrument for improving both strategic and operational co-operation between Member States’ law enforcement authorities.

**SIS II (Schengen Information System)**

The Council was given a regular overview of the state of play of the SIS II and discussed its legal basis. The Council confirmed the use of biometrics for identification purposes in the SIS II as soon as it is technically possible.

On 31 May 2005, the Commission submitted legislative proposals setting out the legal basis for SIS II: two regulations to be adopted in co-decision procedure and one Council Decision. The discussions on these proposals have reached a crucial stage. In order to allow the SIS II to be operational in 2007 and consequently to lift the checks at the internal borders for the new Member States, the legislative instruments have to be adopted quickly.

SIS is a data system containing data issued a Member State on persons or property for the purposes of applying the immigration and law enforcement provisions of the Schengen acquis. The UK will participate in SIS II to the extent permitted by our partial application of the Schengen acquis.

**Asylum and Immigration**

**Un High Level Dialogue on International Migration and Development**

Mr Sutherland, Special Representative on the United Nations secretary General for Migration, informed the Council on the preparation by the UN of the High Level Dialogue on International Migration and Development to be held in New York on 14-15 September 2006.
List of Safe Countries

Commission Vice-President Frattini informed the Council about a forthcoming Commission proposal containing a list of safe countries of origin in the sense of the Directive on minimum standards for granting and withdrawing refugee status.

Article 29(1) of the Directive establishes that the Council shall, acting by a qualified majority on a proposal from the Commission and after consultation of the European Parliament, adopt a minimum common list of third countries which shall be regarded my Member States as safe countries of origin.

Under Article 30 of the Directive, Member States may retain or introduce legislation that allows for the national designation of third countries, other than those appearing on the minimum common list, as safe countries of origin for the purpose of examining applications for asylum.

General

Common Application centres for Visas

The Commission’s proposals on common application centres for Visas were outlined by Commissioner Frattini. The proposal is expected to be adopted by the college no later than the end of May. The text would be submitted to the June Council.

Increase in Schengen Visa Fees

The Mixed Committee debate was summarised by the Presidency. Most Member States were in favour of the proposal, which was agreed.

Opening of N-Lex and Presentation of Eur-Lex

A presentation was given by the Office of Publication to the Council on N-Lex, a new electronic database containing the national legislation of Member States and Eur-Lex, the database that gives access to EU legal instruments.

EU Agreement with Norway and Iceland on a surrender procedure

The Council reached a general approach on the substance of the Agreement subject to Parliamentary scrutiny.

EU JHA Strategy Unit
16 May 2006
Dear Dougie

Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations

I refer to the Convenor’s letter of 9 March 2006 to the Minister for Justice inviting Ms Jamieson to participate in an evidence session on the outcomes of Scottish Executive activity during the UK Presidency and the priorities for the Executive during the Austrian and Finnish presidencies. In her letter Ms Pauline McNeill MSP also indicated that the Committee would like to be kept regularly updated about developments regarding the proposed Regulation on maintenance obligations.

Background to the draft Regulation

As the Committee will be aware the proposed Regulation was published by the EU Commission on 15 December 2005. The Commission’s draft proposal seeks to establish common jurisdictional rules, an applicable law regime and rules governing the recognition and enforcement of decisions made about matters relating to cross-border maintenance obligations. This proposal issued as part of the Hague Multi-Annual Programme to bring forward an instrument on mutual recognition and enforcement of maintenance obligation decisions. A number of Member States, including the UK, are of the view that this proposal goes further than the mandate as it extends to rules on which country’s law should apply in each case and is not purely aimed at strengthening mutual recognition and enforcement of maintenance obligations.

The draft Regulation

The draft Regulation is now being considered by the EU Civil Law Committee Working Group which has met twice this year; in February and in March. All Member States are represented on this Working Group and at the first meeting each delegation shared its initial views on the proposal. The second meeting focussed almost exclusively on the applicable law chapter contained in the proposal, and a third meeting on this draft instrument has been scheduled for later this month. As the Committee will be aware, Working Group discussions constitute closed governmental meetings. However, the UK has continued to press its line that the application of foreign law in this area would not be desirable (as already stated in the UK response to the Green Paper of 2004), where the law of the forum is preferred as UK jurisdictions have no experience of applying foreign law in maintenance obligations. Foreign law needs to be proven and averred in Scottish and UK courts,
which would contribute considerable additional and disproportionate cost and delay to the process for parties and court systems. A number of other Member States have also voiced their concern about including applicable law rules in any instrument in this area. The Hague Conference on Private International Law has been developing an international Convention on maintenance obligations for a few years which would have global reach and arguably better facilitate UK jurisdictions’ handling of international maintenance obligations. The draft Hague Convention contains an optional protocol on applicable law which a number of Member States, including the UK, consider to be a pragmatic solution and would prefer to the mandatory applicable law regime proposed in the draft EU Regulation.

**UK Title IV protocol arrangements on civil judicial co-operation proposals**

As the Committee will be aware, under the UK’s Title IV protocol opt-in arrangements to the Treaty, we have three months from the issue of a proposal to take the decision on whether the UK is formally opting into negotiations. This three month period expired on 24 April 2006 for this draft instrument. The Committee will wish to note that the UK made the decision not to opt into the negotiations under its Title IV protocol arrangements on this occasion.

SE and UK Government Ministers found that the Commission’s current proposal presented significant risks for UK jurisdictions primarily around the inclusion of rules on applicable law. There were similar concerns about other issues such as the lack of a public policy exemption which, if included, would give a Member State a domestic public policy ground to refuse to recognise and enforce a decision from another country on a maintenance obligation which it did not recognise in its own jurisdiction. On balance the UK concluded that in the interests of the vulnerable stakeholders whom this proposal is designed to assist, it was not in our interest to opt-in formally to negotiations. The UK concluded that since it was very possible that the form of the final instrument could still contain applicable law provisions, coupled with the current appetite of a number of Member States to ensure an applicable law regime remains a central feature of this Regulation, that this pointed to a necessary decision to formally opt out of the negotiations at this time.

Were we to have opted in, it would have had to be on the basis that we would strongly resist features of the Commission’s proposal which currently seem central to it, such as the applicable law rules. Since the proposal is subject to unanimity, that may have required the UK to block it, on the understanding that under the terms of the Title IV protocol the other Member States may, after a reasonable time, proceed without us. It is likely that such action would have been viewed as unhelpful by partner Member States.

**UK and SE continued engagement on this dossier**

However, it is important to emphasise that whilst this legal formality has been exercised at this stage, the UK delegation will continue to attend and participate fully in working group meetings and will continue to work co-operatively with its EU partners in influencing the shape of any future Regulation on maintenance obligations. The Executive and the UK Government are committed to developing and delivering improvements in the way international maintenance cases are handled, and the continued participation of the UK delegation at working group meetings reflects this commitment.

I should point out that the UK is not precluded from opting in to the final instrument at the end of negotiations, and indeed we would hope to be in a position to do so at that time.
An Executive official has participated in the UK delegation at all of these meetings and continues to work very closely with Department of Constitutional Affairs officials to develop and co-ordinate the UK position.

I hope this letter is of assistance to the Committee.

Yours sincerely,

CLAIRE M NEWTON
Private International Law Branch