JUSTICE 1 COMMITTEE
AGENDA

43rd Meeting, 2006 (Session 2)

Wednesday 15 November 2006

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

1. **Criminal Proceedings etc. (Reform) (Scotland) Bill:** The Committee will consider the Bill at Stage 2 (Day 3).

2. **Subordinate Legislation:** The Committee will take evidence on the Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2006 (SSI 2006/515) from—

   Gillian Mawdsley, Justice Department, Scottish Executive, and Ian Vickerstaff, Office of the Solicitor to the Scottish Executive.

   Callum Thomson
   Clerk to the Committee
Papers for the meeting—

Agenda item 1

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

Members should also bring with them copies of the marshalled list and the groupings of amendments, both available from the Document Supply Centre on the morning of Tuesday 14 November 2006. Copies of these documents will also be emailed to members as soon as they are available.

Agenda item 2

Note by the Clerk on SSI 2006/515

Documents for information—

The following documents are circulated for information:

- SPICe Briefing Paper, Criminal Proceedings etc. (Reform) (Scotland) Bill – Proposals for an “Opt-Out” Approach” to Fiscal Fines;
- Letter from Minister for Justice, on Disclosure: Review of Law and Practice; and

Document not circulated—

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

- Faculty of Advocates, Advocates Today.

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—

Wednesday 22 November, Committee Room 2;
Wednesday 29 November, Committee Room 6;
Wednesday 6 December, Committee Room 1;
Wednesday 13 December, Committee Room 4; and
Tuesday 19 December, Committee Room 1.
SSI Cover Note For Committee Meeting

SSI title and number: The Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2006 (SSI 2006/515)

Type of Instrument: Negative

Meeting: 43rd Meeting, Wednesday 15 November 2006

Date circulated to members: Friday 10 November 2006

Justice 1 Committee deadline to consider SSI: 27 November 2006

Motion for annulment lodged: No

SSI drawn to Parliament’s attention by Sub Leg Committee: Yes

If members have any queries or points of clarification on the instrument which they wish to have raised with the Scottish Executive in advance of the meeting, please could these be passed to the Clerk to the Committee as soon as possible, to allow sufficient time for a response to be received in advance of the Committee meeting.

Extract from the Subordinate Legislation Committee’s 39th Report, 2006 (Session 2)

The Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2006, (SSI 2006/515)

4. The Committee noted that the increases in solicitors’ fees provided for by these Regulations were backdated to 1st December 2005. However, the Committee was unable to find any power in the parent statute (the Legal Aid (Scotland) Act 1986) which confers an express authority to provide for backdated fees. The Committee therefore asked the Executive to confirm what power in the parent Act authorises the retrospective effect of the Regulations provided for in regulation 2.

5. In its response printed in Appendix 2, the Executive agree that the Regulations have retrospective effect in so far as they apply in respect of work done on or after 1st December 2005. The Executive also confirm that the Legal Aid (Scotland) Act 1986 does not contain an express enabling power allowing for the making of retrospective provision.
6. The Committee notes the Executive’s approach and supporting information given in its response but considers that there is nothing in the parent Act in this case to indicate that the intention was to permit regulations to provide for backdating of payments.

7. The Committee draws the attention of the lead committee and the Parliament to this instrument on the grounds that it purports to have retrospective effect where the parent statute confers no express authority so to provide, as acknowledged by the Executive. The Committee considers that, to that extent, there is doubt as to whether it is intra vires.

APPENDIX 2

The Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2006, (SSI 2006/515)

1. In its letter of 31 October 2006 the Subordinate Legislation Committee sought an explanation from the Executive of the following matter.

2. “One of the grounds on which the Committee reports on an instrument is where it purports to have retrospective effect where the parent statute confers no express authority so to provide. The Committee has been unable to find any such power in the Legal Aid (Scotland) Act 1986. The Committee asks the Executive to confirm what power in the parent Act authorises the retrospective effect of the Regulations provided for in regulation 2.”

The Executive responds as follows.

3. The Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2006 (“the Regulations”) provide for an increase in the rate of payment of fees to solicitors in solemn proceedings and in respect of duty solicitors for their work in solemn and summary proceedings. The Regulations have retrospective effect in so far as they apply in respect of work done on or after 1st December 2005.

4. The Legal Aid (Scotland) Act 1986 does not contain an express enabling power allowing for the making of retrospective provision. Relevant to the question of retrospection, there is a general principle that Parliament is presumed not to have intended to alter the law applicable to past events or transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. The Regulations provide for an increase in solicitors’ fees. As they do not deprive persons of any rights which may have vested in them prior to their coming into effect no Convention issues, namely Article 1 of Protocol 1, fall to be considered. It is accordingly considered that approaching retrospection from the “unfairness” angle, the 1986 Act powers do not prevent the Scottish Ministers from making these Regulations.

5. This is consistent with the approach taken in McCall v The Scottish Ministers (29 November 2005). In that case Lord Carloway held that the Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2005 (SSI 2005/113) were ultra vires as regards the applicability of new fees to work done prior to the commencement of those Regulations solely on the grounds that this was an unfair interference with the
Petitioner’s right to peaceful enjoyment of the (higher) fees which she had earned before commencement.

Justice Department
POST COUNCIL REPORT ON THE JUSTICE AND HOME AFFAIRS COUNCIL OF EU MINISTERS, 5-6 OCTOBER 2006

Main Outcomes of the Council

The UK was represented by the Home Secretary, Dr John Reid, Baroness Scotland from the Home Office and Baroness Ashton from the Department for Constitutional Affairs. The Council adopted conclusions on the Schengen Information System (SIS), and also on reinforcing the southern external maritime borders, a Decision on the establishment of a mutual information mechanism concerning Member States measures in the areas of asylum and immigration, and a regulation establishing a local border traffic regime at the external land borders of the EU.

AGENDA ITEMS

HAGUE PROGRAMME

Hague Programme Review

The Council took stock of the progress made and assessed the level of implementation at EU and national level of the Hague Programme.

The Presidency noted that they were still working to a European Council mandate to improve decision making in JHA. Opinions were divided as to whether to implement the “passerelle” provision (using article 42 TEU to move decision making to QMV and co-decision with the EP in police and criminal co-operation) or not. The Presidency concluded that discussion would continue with a view to a paper on this for the December European Council.

As the Hague Programme contains the overall programme for JHA co-operation within the EU, it is of general interest to Scotland.

CIVIL JUDICIAL CO-OPERATION

Civil Protection Financial Instrument

The Council examined a proposal establishing a civil protection (major emergencies) financial instrument, in particular its main outstanding question, whether a part of the Community budget foreseen for the EU civil protection activities could, under certain conditions, be used for hiring of transport and equipment.

The Council confirmed its willingness to conclude an agreement by December 2006 and instructed COREPER to prepare a compromise on all outstanding questions. In particular, it was tasked to conclude the discussion on transport and equipment financing on the basis of the ideas expressed in the Council.
European Union Agency for Fundamental Rights

The Council had an exchange of views on the state of play regarding the establishment and function of the Agency and in particular its role in third pillar matters. The majority thought the Agency should have a third pillar role. However, it was suggested that the Presidency should focus more on getting the Agency up and running as soon as possible on first pillar business and the Council could reconsider the third pillar application in a couple of years. The Presidency concluded that this dossier would be remitted to COREPER.

POLICE & CRIMINAL JUDICIAL CO-OPERATION

Principle of Mutual Recognition to Judgements in Criminals Matters imposing custodial sentences

The Presidency sought agreement to the package of provisions reflecting the social rehabilitation aim of the instrument. Some Member States still wanted a ground for refusal if the aim of social rehabilitation would not be met, linked to the limitations on the need for consent. Other Member States argued against further watering down of the text in particular through such a broad ground for refusal.

A large majority of delegations favoured the approach by the Presidency, which consisted of providing for an obligation for the issuing State to only forward a judgement if this will facilitate the social rehabilitation of the sentenced person, rather than to provide for a ground for refusal for the executing State.

The Presidency concluded that the inclusion of an additional ground for refusal based on social rehabilitation could not form the basis for a compromise and asked those with reservations to re-consider their position. The Presidency thought that a definition of residence might assist in finding a solution to the treatment of third country nationals. Work would continue at expert level with a view to concluding negotiations in December.

Impact on Scotland is not expected to be great as there are few foreign prisoners here, and vice versa.

Directive on Criminal Measures aimed at ensuring enforcement of intellectual property rights

Some Member States thought more work was needed to establish if there was a need for such a Directive, while other Member States thought it was clearly necessary now. The Presidency concluded that work would continue both on the need for a Directive, and on the substance, on the basis of the limited scope.

The UK has questioned the need for any new measures arguing that sufficient approximation has already been achieved through the Directive on the Enforcement of Intellectual Property Rights 2004/48/EC. The domestic legislation in this area is thought to be entirely reserved.
Draft Framework Decision on taking account of convictions in the Member States of the EU in the course of new criminal proceedings

The Council discussed the Framework Decision on taking account of convictions in the Member States of the EU in the course of new criminal proceedings. The Presidency concluded that the approach in the Framework Decision was generally accepted, but that the detail needed further work at expert level, and instructed its preparatory bodies to further examine this proposal. The Presidency hoped to finalise the text at the December JHA Council.

It is already possible in Scottish procedure to take into account previous convictions from elsewhere in the EU.

SIS II

The Presidency confirmed that the LIBE Committee had agreed on all essential points the compromise package on the SIS II legal texts. However, the new Member States were disappointed by the delay to the SIS II timetable. SIS is an information system designed to support the dropping of the internal borders within the EU, by, for example, allowing alerts to be posted on missing persons. The UK does not participate in the border arrangements, but will take part in those elements which support general police and criminal co-operation.

Draft Council Conclusions on Reinforcing the Southern External Maritime Borders

The Commission recalled the principles agreed at Hampton Court. A first practical step should be the pooling of resources – FRONTEX missions had to respond to the growing demand. The EU needed the wider involvement of all states to address the problem. The text of conclusions was agreed without discussion.

Visa Waiver Reciprocity

The Commission presented their second report on visa waiver reciprocity with certain third countries. The Council held a first exchange of views on it and the Presidency concluded that the Community should continue working towards full visa waiver reciprocity with those third countries in which it has yet to be achieved and to strengthen its effort in relation to the US.

EU, International and Human Rights Branch
26 October 2006
JUSTICE 1 COMMITTEE

BRIEFING PAPER

Criminal Proceedings etc (Reform) (Scotland) Bill
Proposals for an ‘Opt-Out Approach’ to Fiscal Fines

Current provisions

The ‘fiscal fine’ (conditional offer by procurator fiscal) was introduced by section 56 of the Criminal Justice (Scotland) Act 1987. Since then, fiscal fines have been available as alternatives to prosecution for any offence which could be tried in the district court (excluding certain road traffic offences). In practice, fiscal fines are used to deal with a wide variety of offences, including shoplifting, breach of the peace, minor assaults and simple possession of class B and C drugs.

Section 302 of the Criminal Procedure (Scotland) Act 1995 (‘the 1995 Act’) currently provides that the offer of a fiscal fine is deemed to be accepted where payment (of the full amount or of the first instalment) is made within a period stated in the offer. Acceptance in this way prevents prosecution for the alleged offence. Otherwise, prosecution can proceed as normal.

McInnes Committee

Current provisions dealing with the acceptance of a fiscal fine may be described as an ‘opt-in approach’ – the person who receives the offer must take positive action for there to be acceptance. Inactivity on the part of the alleged offender is treated as a refusal of the offer.

A majority of the McInnes Committee were of the view that the current ‘opt-in approach’ should be changed to an ‘opt-out approach’. The Committee’s report stated that “those who are alleged to have breached the criminal law and who wish to have the matter heard in court can reasonably be expected to express a wish to exercise their right to have their case heard by a court” (para 11.22). On this basis, the report went on to state that any alleged offender offered a fiscal fine should be required to take action to opt out of the scheme in order to contest the charge in court. In other words, inactivity on the part of the alleged offender should be treated as an acceptance of the offer.

The McInnes Committee noted that practical difficulties might arise with an ‘opt-out approach’ (eg where an alleged offender is illiterate, is of no fixed abode, is absent from home for a prolonged period, or where there are other difficulties in achieving service of the offer). In light of this, the Committee stated that there should be
provision allowing an alleged offender to seek recall of a fiscal fine, and also allowing such a person to appeal against the refusal of an application for recall.

**Provisions of the Bill as introduced**

The Bill (as introduced) sought, amongst other things, to amend section 302 of the 1995 Act so as to provide for an ‘opt-out approach’ to fiscal fines. Section 39(1)(a)(iii) of the Bill provides that the offer of a fiscal fine shall indicate:

“(i) that the alleged offender may refuse the conditional offer by giving notice to the clerk of court in the manner specified in the conditional offer before the expiry of 28 days, or such longer period as may be specified in the conditional offer, beginning on the day on which the conditional offer is made;

(ii) that unless the alleged offender gives such notice, the alleged offender will be deemed to have accepted the conditional offer (even where no payment is made in respect of the offer);

(iii) that where the alleged offender is deemed as described in subparagraph (ii) above to have accepted the conditional offer any liability for conviction of the offence shall be discharged except where the offer is recalled under section 302C of this Act”.

Section 39 of the Bill goes on to provide that following the expiry of the 28 day period (or longer period specified in the offer) the clerk of court is to notify the procurator fiscal as to whether or not any payment, or notice refusing the conditional offer, has been received.

The Bill also provides for a recall procedure. Section 39 of the Bill (inserting a new section 302C into the 1995 Act) provides that an alleged offender, who is deemed to have accepted a fiscal fine because the clerk of court has not received notice of refusal within the specified period of time, may request that the fiscal fine be recalled. The following conditions apply to the recall procedure:

- application for recall must be on the basis that the alleged offender did not receive the offer
- the application is to be made to the clerk of court no later than seven days after: (a) the expiry of the period specified in the offer for payment of the fiscal fine; or (b) the sending of a notice to the alleged offender stating that enforcement action is to be taken (and outlining the recall procedure) in relation to an unpaid fiscal fine

An alleged offender may, where the clerk of court does not recall a fiscal fine, apply to the court for a review of the clerk’s decision. The alleged offender has seven days to apply for such a review. The Bill provides that the decision of the court is final.

It should be noted that the ‘opt-out approach’ is also applied to the provisions in the Bill creating the new option of a fiscal compensation offer. It is not, however, applied to any offer of a work order made by a fiscal (in relation to which the alleged offender would have to take positive action to accept the offer).
The Justice 1 Committee’s **Stage 1 Report on the Bill** (July 2006) considered the proposals for an ‘opt-out approach’ at paragraphs 173 to 178. It noted that:

“There is a difference of opinion in the Committee as to whether the case has been made for the change to an opt-out policy in relation to fiscal fines and compensation offers. However, all Members recognise that this proposal represents a major shift from the current system and that, in order for the new system to work, there needs to be certainty that an accused person has received proper and easily understood notification of the fiscal’s offer.

The Committee would welcome further information from the Executive/COPFS ahead of Stage 2 as to the practical measures it will introduce to safeguard the fairness and effectiveness of an opt-out system.” (paras 177-178)

The Scottish Executive’s **response to the Stage 1 Report** (August 2006) included the following statement:

“The Executive is also aware that there should be a mechanism to permit recall of such an offer [ie fiscal fine or compensation offer] where acceptance has been deemed. While there are proposals in the Bill to cover most eventualities, we recognise that the timescales provided for may leave open the possibility of injustice in exceptional cases, such as the person who is hospitalised for a lengthy period. That being so we intend to make Stage 2 amendment to reinforce the recall procedure, with a view to eliminating the possibility of injustice arising as a result of the ‘opt-out’ system. The intention is that the accused should be able, on cause shown, to make an application for recall outwith the time limits currently specified in the Bill.” (para 89)

**Stage 2 Scottish Executive amendments**

Amendments lodged by the Scottish Executive during Stage 2 of the Bill include a number of amendments designed to respond to concerns, raised in the Justice 1 Committee’s Stage 1 Report, about the operation of the ‘opt-out approach’. See, in particular, amendments 130 and 131 (both lodged on 8 November 2006).

As noted above, the Bill as introduced requires that any application for recall must be on the basis that the alleged offender did not receive the offer. Amendment 130 seeks to relax this requirement by also allowing recall where the alleged offender can demonstrate that it was not practicable to take action to reject the offer because of ‘exceptional circumstances’, despite having received it. Whether or not this ‘exceptional circumstances’ test is met would be a matter for the clerk of court in the first instance, and for the court if the accused decided to challenge the clerk’s decision by way of a review. The types of situation which could give rise to a claim of ‘exceptional circumstances’ might include cases where an alleged offender was unable to respond to the offer as a result of being hospitalised, or otherwise away from home, for a lengthy period of time.

Also as noted above, the Bill as introduced requires that any application for recall is made no later than seven days after certain events. Amendment 131 seeks to relax this requirement, removing any absolute time bar, by also allowing the clerk of court to consider a request for recall on ‘cause shown’, even though the normal time limit
has expired. Whether or not cause has been shown in any individual case will be a matter for the clerk of court (or for the court where the clerk’s decision is under review). The amendment is aimed at ensuring that, where an alleged offender has missed a time limit because it was impracticable for him/her to take timeous action to seek recall, the clerk (or court) can consider whether it would be appropriate to allow recall.

Frazer McCallum
SPICe Research
9 November 2006

Note: Committee briefing papers are provided by SPICe for the use of Scottish Parliament Committees and clerking staff. They provide focused information or respond to specific questions and areas of interest to committees and are not intended to offer comprehensive coverage of a subject area.
Dear Pauline

Disclosure: Review of Law and Practice

I am writing to inform the Justice Committees of the Parliament that I have asked Lord Coulsfield to conduct a review of the law and practice on disclosure, and to report in Summer 2007.

You may recall that on 31 May, in her evidence to the Justice 1 Committee at Stage 1 of the Criminal Proceedings etc (Reform) (Scotland) Bill, the then Solicitor General said that “disclosure is a very live and dynamic issue that we want to consider comprehensively and to legislate on fully, rather than just in the context of the bill.” Lord Coulsfield’s review will now take forward this comprehensive consideration of the issue. Given the timescale, clearly I do not intend to bring forward legislation on this matter during the current Parliament.

The remit which I have asked Lord Coulsfield to address is “to review the law and practice of disclosure of evidence and other relevant material in criminal proceedings in Scotland with a view to making recommendations that will secure a system that is both practical and effective, recognising the rights of the accused, the interests of victims and witnesses and the wider interests of justice”.

Lord Coulsfield is inviting a number of key interests to join a Reference Group for the review, including representatives from the police and defence practitioners.

I am writing in similar terms to David Davidson.

CATHY JAMIESON