The Committee will meet at 9.30 am in Committee Room 2.

1. **Criminal Proceedings etc. (Reform) (Scotland) Bill**: The Committee will consider the Bill at Stage 2 (Day 4).

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 21 November 2006. Copies of these documents will also be emailed to members as soon as they are available.

Documents for information—
The following documents are circulated for information:

- Scottish Executive note on Undertakings; and


Documents not circulated—

Copies of the following documents have been supplied to the Clerk:

- Joint Scottish Executive, Home Office and Northern Ireland Office consultation paper, Making Sure That Crime Doesn't Pay: Proposals for a new measure to prevent convicted criminals profiting from published accounts of their crime; and

- Scottish Legal Aid Board, Consultation on Revisions to the Code of Practice for Criminal Legal Assistance.

These documents are 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 28 November, Committee Room 5;
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.
UNDERTAKINGS – CURRENT USE, WHAT THE CPR BILL CHANGES AND HOW THEY WILL BE USED MORE WIDELY IN FUTURE

Current law and use

1. Undertakings are provided for by section 22 of the Criminal Procedure (Scotland) Act 1995. The section is headed “liberation by police” as it only the police who have the power to liberate alleged offenders on an undertaking.

2. The section provides that where a person who has been arrested and charged with an offence which may be tried summarily – that is a case which may be tried in the sheriff court where the sheriff is sitting without a jury, or in the district court – the officer in charge of a police station may liberate the person on an undertaking. The undertaking specifies a date and time at which the person is to appear at court and the person has to sign the undertaking to the effect that he will abide by those terms. (in effect they are “undertaking” to turn up at court on that date). If the person does not sign, or is not prepared to agree to the terms of the undertaking, he will be detained in custody.

3. In terms of getting an accused from the point at which the accused is charged by the police until their first appearance in court there are 2 other options:
   - The police could decide to refuse to liberate the person (which will mean that the accused is kept in custody pending his court appearance). This is known as a custody case
   - The police could simply release the person and prepare a report to the procurator fiscal. Once prepared the fiscal would decide whether to take action and, if so, cite the person to attend court on a certain date. These are known as cited cases.

4. When considering whether or not it is appropriate to give an accused an undertaking the police will have regard to the guidelines issued by the Lord Advocate governing the use of undertakings.

5. At present undertakings are most commonly used in cases where the person is charged with the offence of drink driving. The purpose is to get the case into court as quickly as possible without detaining someone in custody where that is not deemed appropriate. It is competent however (under existing law) for them to be used for offences triable summarily, such as assault, breach of the peace or shoplifting.

6. The gap between liberating the accused on an undertaking and appearance in court is dependant upon local practice but is generally between 10 days and two weeks. This is substantially shorter than the gap in cited cases and allows the case to be resolved more quickly.

7. Should the person fail to attend on the date and time specified a warrant may be issued for his/her apprehension and s/he may be prosecuted for being in breach of the undertaking. The penalty for that breach may be in addition to any other penalty imposed for the original offence.
8. The fact that an undertaking is in place does not commit the procurator fiscal to prosecute the person on a summary complaint in the court specified in the undertaking. The procurator fiscal retains the ability to decide independently on the appropriate disposal of the case i.e. no proceedings; fiscal fine; liberate for citation; summary complaint district court; summary complaint sheriff court; petition proceedings.

What the CPR Bill Changes

9. Section 6 of the Bill makes provision which extends and clarifies the provisions in relation to undertakings.

10. Subsection (2) provides that there is no need to arrest the alleged offender or to take that person to the police station. The officer charging the alleged offender with the offence can release the person on an undertaking at that stage. The undertaking will be in the same standard form. The effect of this change will be to allow undertakings to take place without the need to take the accused to the police station in every case (which can cause problems in rural areas or at busy periods). This will also assist a greater use of undertakings to be made in future as opposed to cited cases. This will allow cases to get into and be processed through the court more quickly.

11. Presently there is no statutory provision for conditions to be attached to an undertaking issued to an accused, apart from the condition to attend at court on a particular date. This is clarified by providing that the conditions on an undertaking are to be the same as the conditions applying to a person liberated by a court on standard bail conditions.

12. In addition, provision is made to allow the Scottish Ministers to make regulations, describing by rank or otherwise, officers whose authority is required to impose any additional conditions that may be necessary. This will give the police the ability to impose the standard conditions and additional conditions if that is considered necessary. This will ensure that, where a person is released on an undertaking they will be subject to certain conditions. As the use of undertakings increases these will replace a number of the cases where an accused is currently dealt with as a cited case. That will have 2 benefits:

- The accused will appear in court more quickly.
- For the period between the offence being committed and their appearance at court they will be subject to conditions – that would not have applied if this were treated as a cited case.

Although it will remain the case that if the accused is unwilling to accept the terms of the undertaking s/he will be dealt with as a custody case.

13. Section 6 of the Bill also makes provision in relation to the variation of undertaking conditions by the fiscal and the use of undertakings following arrest on a warrant. More detail on these provisions can be found in the Bill’s policy memorandum.
How will undertakings be used more widely in future and what are the benefits?

14. In addition to the changes made by the Bill an important part of the summary justice reform programme is getting more cases into court by way of undertakings as opposed to cited cases. This will bring the case to court more quickly and ensure that the whole matter is resolved more quickly. That is a core goal of the summary justice reform programme. Police could make increased use of undertakings in this way **without the additional changes in the Bill**, but these changes do help. The ability of the charging officer to liberate the alleged offender “on the street” subject to the standard bail conditions will allow undertakings to be issued quickly and will put the accused in a greater position of trust until the court date than if s/he was simply released and told to wait for a citation from the fiscal about when to turn up at court (a cited case – see para 3 above).

15. It must be stressed that these provisions are **not about allowing people who would currently be dealt with as custody cases to be released on undertakings in future**. Those people will continue to be detained because there will be good reasons why the police do not want to release them. There may be some very limited exceptions (e.g. – where a husband and wife are arrested, one may be released on an undertaking to allow them to continue looking after their children). The change that will take place in practice is to make a **shift from cited cases to undertakings.** This will enable these cases to be dealt with faster. The initial court appearance and the disposal of the case will be nearer the time of the commission of the offence, a change which will help tackle reoffending and the accumulation of further offences.

16. The section also makes provision for breaches of undertakings and increases the maximum penalty for breach from 3 to 12 months imprisonment

17. The proposal is part of the overall objective of the summary justice reform programme to make the process from caution and charge to appearance in court more effective and fast.
Provisional Agenda
Justice and Home Affairs Council (JHA)
Brussels – 4/5 December 2006

Please note that this Pre-council Report is based on a provisional agenda which was published in July and may be subject to change. At this stage we do not know which Ministers will be representing the UK.

CIVIL JUDICIAL CO-OPERATION


The European Parliament was not initially convinced a legislative proposal was the way forward and the rapporteur, Arlene McCarthy MEP, invited a number of experts to attend the Legal Affairs Committee Meeting in late April 2006. Following this meeting, a draft report was prepared and published on 6 September 2006 and the Legal Affairs Committee is now considering it. The Rapporteur commends the initiative in her report, in so far as it will serve to publicise and promote mediation as an alternative means of access to justice and afford a framework of common rules which are sufficiently robust to protect the parties’ interests, yet light enough to allow market-driven solutions. It is hoped that we will have the Parliament’s full opinion by the end of the year.

This Directive should not have significant financial implications for Scotland. It is difficult to know, however, exactly what will be involved until the proposals are finalised.

(poss.) Proposal for a Regulation of the European Parliament and of the Council on the law applicable to contractual obligations, Rome I (debate on certain issues).

Council working group negotiations began on 18 May on the draft Regulation on the law applicable to contractual obligations ("Rome I"). The Commission's draft proposal aims to establish uniform rules as to which country's law should apply in cross-border cases concerning contractual issues and was published in December 2005. After much consultation with key stakeholders and further consideration, Ministers decided to use the Title IV protocol arrangements to the Treaty and not opt into the negotiations on 8 May. There was concern that certain elements of the Commission's proposal, particularly Article 8(3) which deals with the application of the mandatory rules of a third country, could have an adverse impact on the prosperity of the UK and the EU as a whole by introducing an unacceptable degree of legal certainty. Therefore, it was decided that the UK would be better placed to make a fully informed decision on its opt into the instrument when negotiations had concluded. The UK has made it very clear to Member States and other EU partners that it will continue its commitment to full participation in the working group meetings, and play its role in the development of the shape of the Regulation. Council Working Group negotiations are progressing well and the UK has made some progress in several of the areas which are of most concern to us. In particular, Article 8(3), which was the single most significant area of concern for UK stakeholders, has been deleted from both the latest Finnish Presidency text and from the report of the JURI Committee Rapporteur, Maria Berger MEP, to the European
Parliament. We are therefore cautiously optimistic that this provision will not feature in the final Regulation.

Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (debate on certain issues).

The Commission’s draft proposal on a Regulation on applicable law and jurisdiction relating to maintenance obligations issued in December 2005. The maintenance negotiations working group met on 27 and 28 September for the second time during the Finnish Presidency to discuss the enforcement provisions proposed by the EU Commission. Delegations in working group are still completing their first reading of the proposals however, the aim is to finally complete the first read-through at the meeting of 15 and 16 November. The Executive official with lead responsibility will provide the Justice 1 Committee with an update on negotiations thereafter. An initial update was provided in May and this correspondence detailed the UK’s decision not to formally opt into the negotiations using the UK’s Title IV protocol arrangements. The UK will be able to take a final decision on whether it opts into the finalised instrument at the completion of negotiations, which are likely to take several more years in working group. The UK is firmly committed to fully participating in working group negotiations and helping shape the development of the final Regulation.

POLICE AND CRIMINAL JUDICIAL CO-OPERATION

Draft Framework Decision on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings. (political agreement).

This proposal has relatively limited scope. Where there may be new criminal proceedings on the basis on new facts against an individual, it seeks to set out some minimum conditions for taking into account previous criminal convictions from other EU Member States. The key principle it proposes is that such previous convictions should in general be treated in the same fashion as equivalent domestic convictions.

The Scottish Executive supports this initiative as it will help provide a level playing field across the EU. It will facilitate better informed decision making by the courts and other practitioners, in for example deciding on the most appropriate sentence or rehabilitation measure. The taking account of previous convictions from other Member States is already possible in Scottish procedure. It is thought the Presidency will seek to get final agreement on this initiative at the Council.

Council Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (political agreement).

The aim of this proposal is to provide a simple and speedy process for transfer of EU nationals/residents to their countries of origin/association to serve their sentence following extradition and/or conviction. Most prisoner transfers currently take place under the Council of Europe Convention on the Transfer of Sentenced Persons of 21 March 1983, which provides for the transfer of sentenced persons to their country of nationality and only
with their consent and the consent of the States involved. The Additional Protocol to the Convention of 18 December 1997 provides for transfer without consent where the prisoner is to be deported or where the prisoner has fled. The draft FD differs from this and other international agreements in that it proposes an obligation on the existing State to accept back its own nationals and those normally resident there, and in most cases transfer will not require the consent of the prisoner. These issues continue as the focus of discussion. Impact on Scotland is not expected to be great as there are few foreign prisoners here. It is thought the Presidency hopes to get an agreement on this dossier at the December Council.

Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union (political agreement).

Aimed at setting common minimum standards with regard to certain procedural right throughout the EU, current drafts focus on the provision of certain basic information, access to legal advice free of charge, where appropriate, and access to free interpretation and translation. This Framework Decision would apply not only to individuals who found themselves in another Member State, but as an all encompassing measure applying throughout the EU to all citizens. Published by the Commission in early 2004, this initiative first appeared at working group level in September 2004. Progress in the working group has been slow, mainly due to the difficulty in arriving at a common approach where procedure may vary in its detail across different jurisdictions in the EU. Some delegations still question whether in fact there is a legal base for this initiative within current Treaties. A possible alternative of a Resolution focusing on practical measures is also now being considered by the working group.

There may still be implications for Scotland from this dossier, depending on how negotiations go, mainly in relation to the potential interface with the initial 6 hour detention period. It is thought the Presidency will seek guidance from the Council as to whether to continue negotiations on the basis of a binding Framework Decision.

(poss.) Manual on tracing crime-related firearms (adoption of a Council instrument).

Future of Europol (political agreement on certain questions).

A High Level Conference on “The Future of Europol” was held in Vienna in February. The Friends of the Presidency Group was also established to prepare an Options paper on the future development of Europol. The UK was actively involved in influencing the draft Council Conclusions. An emerging prevailing view in the Friends of the Presidency Group is that the policy focus in the short term should be on ensuring that Europol achieves its full potential within the framework of the existing Europol Convention and associated legal structures. Although most member states are happy to convert the Europol Convention into a more flexible Council Decision in the longer term, there is a widely supported view that this should not divert attention from the more immediate imperative of credible delivery of expected outcomes within the new Organised Crime Threat Assessment (OCTA) framework. There are no apparent separate implications for Scotland on this matter.
Counter-terrorism:
  - Update of progress on the implementation of the EU Strategy on Radicalisation and Recruitment (adoption)
  - Report on the implementation of the EU-Counter-terrorism Action Plan/Strategy (adoption)

The EU Anti-Terrorism Co-ordinator will give his regular briefing to the Council.

Schengen Information System II

The Schengen Information System is a data system containing alerts issued by Member States on persons and property for the purposes of applying the immigration and law enforcement provisions of the Schengen acquis. The UK has opted not to participate in the immigration and borders control measures of Schengen and will therefore have no access to entry refusal data – but will be participating in the law enforcement aspects in line with the UK Schengen opt in protocol. In June 2005 the Commission published three draft legal texts detailing the objective and scope of the second generation Schengen Information System (SIS II). These texts have been under negotiation since then and are now reaching a near final stage, with the European Parliament having adopted them in October this year. It is anticipated that the JHA Council will confirm their approach at the JHA on 4-5 December, after which the Presidency will seek to adopt them as soon as possible.

It is thought that implementation of the applicable provisions in the UK will not take place, however, for several years even after adoption, it is believed at this stage that any separate issues arise for Scottish interests

ASYLUM AND IMMIGRATION

Council Decision on the establishment of a network of national contact points involving the national asylum services of the Member States for promoting cooperation (adoption / political agreement)

(poss.) Report of the Commission on application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national and possible proposals for amendments (presentation by the Commission)

Communication on common policy on illegal immigration (conclusions)

(poss.) Directive of the European Parliament and of the Council on common standards and procedures in member States for returning illegally staying third-country nationals (political agreement / progress report)

(poss.) Council Decision on the establishment of European Migration Network (political agreement)

(poss.) Commission Report on the implementation of the follow-up of Hampton Court / Global Approach to Migration (information by the Commission)
The Executive has a co-ordination role with regard to the provision of services for asylum seekers and refugees. Any change to operations in Scotland will be for the Home Office to implement.

GENERAL

(poss.) European Programme for the protection of critical infrastructure (adoption)

EU anti-trafficking policy and the need for further action (political debate)

(poss.) Development of the EU-China approved destination status (ADS) agreement (political agreement)

EU, International and Human Rights Branch
13 November 2006