JUSTICE 2 COMMITTEE

AGENDA

12th Meeting, 2004 (Session 2)

Tuesday 30 March 2004

The Committee will meet at 2.00 pm in Committee Room 1.

1. Tenements (Scotland) Bill: The Committee will take evidence on the general principles of the Bill at Stage 1 from—

   John McNeil, member, and Linsey Lewin, secretary, the Conveyancing Committee, the Law Society of Scotland; and

   Ken Swinton, the Scottish Law Agents Society.

2. Constitutional Reform Bill: The Committee will consider its approach to the Constitutional Reform Bill currently before the UK Parliament.

3. Adults with Incapacity Act 2000: The Committee will consider written responses received in relation to its post-legislative scrutiny of this Act.

4. Subordinate legislation: The Committee will consider the following negative instruments—

   The Police Grant (Scotland) Order 2004 (SSI 2004/120);
   The Police (Scotland) Amendment Regulations 2004 (SSI 2004/121);
   The Criminal Legal Aid (Fixed Payments) (Scotland) Amendment (No.2) Regulations 2004 (SSI 2004/126).

5. Procedures Committee inquiry on timescales and stages of Bills: The Committee will consider correspondence from the Convener of the Procedures Committee.

Gillian Baxendine / Lynn Tullis
Clerks to the Committee
Tel 0131 348 5054
The following papers are enclosed for this meeting:

Agenda item 1 – Tenements (Scotland) Bill

Written submission from the Law Society J2/S2/04/12/1
Written submission from the Scottish Law Agents Society J2/S2/04/12/2
Proposed areas for questioning J2/S2/04/11/3
(PRIVATE PAPER – MEMBERS ONLY) (To follow)

Agenda item 2 – Constitutional Reform Bill

Note by the Clerk J2/S2/04/11/4
Correspondence from Hector MacQueen J2/S2/04/11/5

Agenda item 3 – Adults with Incapacity Act 2000

Note by the Clerk (written evidence attached) J2/S2/04/11/6

Agenda item 4 – Subordinate legislation

Note by the Clerk (SSI 2004/120 attached) J2/S2/04/11/7
Note by the Clerk (SSI 2004/121 attached) J2/S2/04/11/8
Note by the Clerk (SSI 2004/126 attached) J2/S2/04/11/9

Agenda item 5 – Procedures Committee inquiry on timescales and stages of Bills

Correspondence from the Convener of the Procedures Committee J2/S2/04/11/10

Forthcoming Meetings:

- Tuesday 20 April – Justice 2 Committee meeting (PM)
- Wednesday 21 April – Joint Justice 1 & 2 Committee Meeting (AM)
- Tuesday 27 April - Justice 2 Committee meeting (PM)
- Wednesday 28 April - Joint Justice 1 & 2 Committee Meeting (AM)
- Tuesday 4 May - Justice 2 Committee meeting (PM)
The Scottish Law Agents Society was established by Royal Charter in 1884. It is the largest voluntary association of Scottish Solicitors from all branches of the profession and from all parts of Scotland. We have some members practising abroad. The Society does not have any responsibility for regulation but its objects include the promotion of legal services in Scotland.

SLAS is active in responding to consultative documents issued by the Scottish Executive, the Scottish Parliament, the Scottish Law Commission and others and is generally interested in the good government of Scotland. The Society has a number of specialist committees including a Conveyancing Committee.

The Society publishes a legal journal called the Scottish Law Gazette published six times a year with articles on professional practice and developments in the law and the Memorandum Book published annually containing valuable information for practitioners.

The Society welcomes the opportunity to give evidence the Justice 2 Committee of the Scottish Parliament on the Tenements (Scotland) Bill. We were pleased to make submissions to the Executive as part of its consultation exercise in 2003 and earlier to the Scottish Law Commission in what follows we draw on that material where appropriate. We are in a position to give oral evidence if required.

**General principles of the Bill**

**The common law**

The common law of the tenement has operated since at least the 17th century. The main principles are comparatively well known as are some of the shortcomings. The two most obvious defects in the common are the principle of unanimity required for the instruction of repairs to common property which the Scottish Law Commission in its *Report on the Law of the Tenement* (No 181) refer to as the lack of a system of management [para 2.19] and the burden of shelter falling on the top floor proprietor with regard to maintenance of the roof which the Commission refers to as unfairness [para 2.16].

It operates as a default code and given these awkward features that default code is routinely contracted out of in practice. We do not agree with the Commission that the system is unduly rigid [para 2.15]. The Commission also commented on the uncertainty within the present system. There are comparatively few decisions dealing with tenement property issues and many of those are 19th century. It is arguable that the infrequency of case law in recent times is attributable to two factors firstly that the law is sufficiently well known and secondly that the default position is contracted out
of in the vast majority of tenement title deeds. It has to be admitted that there are issues on which there is no decision or conflicting authorities. For owners of tenement properties and those engaged in the management of such property a statutory restatement would form a useful point of departure.

**The Work of the Housing Improvement Task Force**

We also note the work done by the Housing Improvement Task Force in its Final Report: *Stewardship and Responsibility, A Policy Framework for Private Housing in Scotland* (March 2003). Substantial amounts of public money were invested in the repair and modernisation of existing tenements in private ownership in Scotland throughout the 1970s through to the early 1990s. We therefore fully support the principle of providing a statutory code dealing with tenement properties, particularly of this will assist in the future maintenance of that stock.

**A Default Code only**

There are dangers with any Code that it deals with the general and when applied to the particular circumstances of a given situation it may not be sufficiently flexible to provide a just solution. 'Tenement' covers a multitude of different types of building from the traditional residential block to office and commercial and mixed blocks and makes up one quarter of the total housing stock [see para 5 Explanatory Notes to the Bill]. For this reason we welcome the introduction of the Code in a similar position to the common law, i.e. a default Code which can be freely adapted to meet the circumstances of any particular tenement. This is the position adopted by the Executive [para 13 Policy Memorandum].

**All tenements or future tenements only?**

When the Commission originally considered the matter [DP 91 December 1990] their views were that the new law which they were then proposing and which was in many ways more radical than their final report should apply only to new tenements. That would leave the problems and unfairness within the existing law unresolved. In the future it may become difficult to tell whether a building was erected or converted into separate flats before the operative date of the legislation. For these reasons the Commission rejected its earlier approach [ para 3.2 of its Report] as does the Executive [para 14 Policy Memorandum].We agree with those views. Accordingly the default code should apply to tenements irrespective of their date of erection. This has the consequence that it must be as harmonious as possible with the existing law to avoid potential human rights challenges.

**The Tenement Management Scheme**

We are in general agreement with the provisions of the Tenement Management Scheme as set out in the Bill. We are in agreement with the concept of 'scheme property' which is to be maintained by all the owners of the tenement irrespective of the ownership of particular items of Scheme Property. As is stated in the Policy Memorandum [para19] there will be some winners and losers for example where the common law currently requires the top floor owner to maintain the roof in the future this will be borne by all owners in the tenement. We agree that the policy gains which are likely to encourage maintenance outweigh other considerations.
The Provisions of the Bill

Section 1: Determination of boundaries and pertinents
We agree with the provisions of this section. We note that the original draft bill annexed to the Commission Report used the term ‘unit’ which has been replaced by the word ‘sector’ although the definition of each term is identical. In our view ‘unit’ would be better understood than ‘sector’ and the reason for this change is not clear. The explanation given in para 11 of the Explanatory Memorandum that this is a convenient method is not convincing.

Section 2: Tenement Boundaries
We are in general agreement with the propositions set out in s2. However, we disagree with the statement in the Explanatory Memorandum [para 13] that this represents a restatement of the common law. While this is generally the case, we disagree with regard to the ownership of the space above the pitched roof of a tenement building. There is no doubt that the owner of a top floor can throw out dormer windows *Watt v Burgess* (1891) 18 R 766 and *Sanderson v Yule* (1897) 25 R 211 but there general position appears to be that the ownership of the airspace above the roof is owned by the owner of the *solum* on the basis that each flat comprises only a limited stratum. The provisions of s2(7) which state that the owner of the top flat owns the roof above as under the current law but also the space above to the line of highest point of the roof. That appears to be an extension of the current limited concession regarding dormers. The Commission seem to have made this change for policy reasons [Report para 4.22]. It would seem to permit the construction of effectively another whole storey provided it did not increase the burden of support [para 4.37]. In our view the Bill is not as neutral as the Commission suggest and this may make it easier for a top floor owner to form another whole storey compared with the common law.

S3 Pertinents
We are pleased to note that Executive have taken account of the comments made by us and others in relation to the service test. This is now based on equal shares for maintenance for all using the pertinent rather than the test originally proposed by the Commission which would have allocated shares of maintenance on the basis of the use made of the pertinent. We refer to our submissions to the Executive on the consultation exercise [page 4] and also the example given in para 30 of the Policy Memorandum. This illustrates that the higher services go in the block then the greater the proportion of the cost that will be borne by the highest proprietor. This will create the same sort of unfairness that the common law imposes on the top floor proprietor in relation to the roof. A block comprises four floors and a pipe serves all four flats. This is repaired at a cost of £100. Under the Commission proposals this would be borne

<table>
<thead>
<tr>
<th>Floor</th>
<th>Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Top Floor</td>
<td>£25.00 + £12.50 + £8.33 + £6.25 = £52.08</td>
</tr>
<tr>
<td>Second floor</td>
<td>£12.50 + £8.33 + £6.25 = £27.08</td>
</tr>
<tr>
<td>First floor</td>
<td>£8.34 + £6.25 = £14.59</td>
</tr>
<tr>
<td>Ground floor</td>
<td>£6.26 = £6.25</td>
</tr>
</tbody>
</table>

We agree that the pertinents should be owned equally by the proprietors using them and the expenses shared accordingly.
In our submissions to the Executive we noted one concern about the service test. Where for example a water tank serves all four flats in a block and each flat is connected to it then it will be a pertinent and each flat will have a right of common property to that flat. It is not clear whether the test is applied once and that is then definitive of the rights and obligations of the parties. If one of the owners severs his connection to the tank and installs his own tank does he remain liable to maintain the original common tank (single application of the test, presumably on the date of the Act coming into force or that date of the creation of the tenement if later) or does his severing the connection end his responsibility to repair (multiple application of the test, presumably on every occasion when a change is effected. The latter does not seem fair to the remaining unit owners and the former does not seem fair to the owner opting out in the long term. In our view the Bill should clarify this issue.

We note that while close is used in s3 it is defined in s25 to cover both the common passage and stairs. We note that in s3(2) if a close does not afford a means of access to a flat then no right of common property will vest in that flat. For a ground floor flat which gains access from the common passage this equal share of the stairs and its maintenance as well does not seem equitable. Our preference would be to drop the definition of close and use common passage and stairs and define them separately in s25 which would produce a more precise provision.

S4 Application of the Tenement Management Scheme
We agree with the provisions of s4 in relation to the establishment of the Tenement Management Scheme. In relation to the Scheme itself we have some concerns regarding the definitions. We are pleased to note that our suggestions regarding structural columns and beams [Submissions to the Executive Consultation] are now included within the definitions of scheme property [Policy Memorandum para 43 and Rule 1.2(vi) of the Bill].

Our preference would still be to state the general purposes of structural function and shelter which were set out by the Commission in para 143 of its Report as general principles and the existing terms of Rule 1.2 could then become a non-exhaustive list of examples of the application of those principles. This would permit changes in future construction techniques to be accommodated without any need to amend the legislation. In our submissions to the Executive we commented on the exclusion of ‘window’ from scheme property. In s25 this is defined to include its frame. In a modern building the exterior walls may not be load bearing at all and serve merely to provide shelter. If the wall is made exclusively of glass is it a window or a wall? The Bill gives no guidance beyond its terms and a statement of general principles would assist courts in interpretation of difficult cases.

S5 Application to sheriff for annulment of certain decisions
We have no observations.

S6 Application to sheriff for order resolving certain disputes
We have no observations.

S7 Abolition as respects tenements of common law rules of common interest
We have no observations.
S8 Duty to maintain so as to provide support and shelter etc.
We are now content with the statutory restatement of the duty to provide support and shelter. Exactly where the bounds of reasonableness lie in relation to the derogation in respect of age, condition, cost and all other circumstances are not clear. For example the owners of the two ground floor flats are a wealthy shop owner and an impecunious pensioner. Is it reasonable that once should be obliged to support while the other is not?

S9 Prohibition on interference with support or shelter etc.
We have no observations on this statutory restatement of the common law.

S10 Recovery of costs incurred by virtue of section 8
We have no observations.

S11 Liability of owner and successors for certain costs
This section is likely to cause significant problems. In discussions with our members this is the provision in the Bill which has proved most controversial. S11(2) provides that a new owner becomes liable for any costs for which a former owner is liable. It is true that the new owner has a right of relief against the former owner. That of course is dependent on being able to trace the former owner and his having funds to make payment. There are two important public policies in conflict here. One of the objectives of the Bill is to ensure that tenements are maintained in the future. Factors and contractors will be less willing to instruct tenement repairs if there is a prospect that they will be unable to recover costs.

On the other hand the common law rule, established in David Watson Property Management Ltd v Woolwich Equitable Building Society 1992 SLT 430, a case which deals with heritable creditors, but, by analogy, extends to sales, provides that purchaser will be liable to maintain the property in the future but in respect of costs which have already been incurred these were held not to transmit to the purchaser. This is on the basis that if the costs did transmit then they would be a real burden and real burdens for a monetary sum must be for a precise amount which appears in the Property Registers. There is a long established public policy of transacting on the faith of the Registers.

S11 as it is drafted secures the first objective at the expense of the second. The Policy Memorandum states, 'It is envisaged that, in line with current practice, solicitors acting on behalf of a purchaser would ensure that the debts were paid out of the proceeds of the sale'. [para 61]. That current practice is based on the current law - that the burden does not transmit. If s11 is enacted it will be possible to ask the factor for the block, if there is one, as to any outstanding costs. If there is no factor or the unscrupulous seller says there is no factor then there is no-one to ask. Solicitors are willing to undertake work when they are given the right tools but in this event the solicitor acting for the purchaser cannot ensure anything. Contrary to well established and fundamental rules of Scots Property Law what is a personal obligation of the seller will become a real burden and will transmit with the unit to the purchaser. No claim will lie against the solicitor because they have not been negligent and the cost will be borne by the purchaser in the first instance. No doubt that purchaser will have paid a market price for the property which will not have reflected outstanding repairs costs. The title of the property will be registered in the
Land Register. Here the Keeper guarantees title and in the event that the purchaser has to pay out the repairs costs then the purchaser will, it appears, have a right to claim indemnity from the Keeper because of the failure by the Keeper to note it on the Title Sheet as any enforceable real right under s6(1)(e). This means that the cost in such cases may actually be borne by the Executive. When repairs are carried out by a local authority under statutory powers the fact that the work has been done will show up in a local authority property inquiry certificate and in some circumstances a charging order will be recorded in the Land Register against the property. This is consistent with Scottish principles of transacting on the faith of the public registers.

The solution is to require a notice to be recorded in the Land Register before the cost transmits. As is pointed out in the Policy Memorandum the Registers Direct service costs only £2 or £4 to ascertain the owner and a notice can be prepared and registered for a cost of £22. The onus ought to be on the creditor whether that is a factor, contractor or other instructing owner to do so to preserve their right to recover rather than merely making the costs transmit to the purchaser who is unable to take any steps to protect himself. If the creditor takes no steps then the purchaser should not suffer in cases where he is unable to trace the seller or recover from him. If we are correct as outlined above [ and see submissions of Prof. A.J.McDonald to the Executive consultation at http://www.scotland.gov.uk/about/JD/CL/00017975/profmacdonald.pdf] then the costs may in fact fall on the Keeper. The Policy Memorandum refers to difficulties that would have occurred in the system of registration of title [Policy Memorandum para 64]. These are not specified and in any event s11 may cause even greater problems with claims against the Keeper.

**S12 Prescriptive period for costs to which section 11 relates**

We agree that a prescriptive period of five years is consistent with the Scheme of prescription in the 1973 Prescription and Limitation (Scotland) Act. Nonetheless this is a substantial period of time over which a purchaser must seek assurance regarding repairs. There may be no evidence of these repairs and this is an onerous burden for purchasers. In our view this reinforces the arguments given in relation to s11 regarding the need to register a notice.

**S13 Common property: disapplication of common law right of recovery**

We have no observations.

**S14 Access for maintenance purposes**

We understand the policy reasons for this provision.

**S15 Obligation of owner to insure**

We understand the policy reasons for this provision which we commend. We are not in favour of compulsory block insurance. We wonder about the effectiveness of the provision.

In *Hooper v Royal London General Insurance Co Ltd* 1993 SLT 679 the owner insured his property through his lender’s block policy. Following a fire a claim was avoided on the basis of the failure to disclose a conviction for vandalism. The Commission considered the issue of the arsonist seeking insurance in its Discussion Paper but not in its Report. Under s15(4) such a person would presumably not
require to obtain insurance as he was unable to do so or to do so at an uneconomic cost.

In s15 (5) the duty on an owner is to produce the policy or a copy of it when requested to do so. If the subjects are insured through a lender’s block policy the owner will not have the policy and may not have a copy. He may have a schedule detailing the cover. The payments of the premium may be monthly as part of the mortgage payment in which an adjoining owner has no interest.

S16 Demolition of tenement building not to affect ownership
We have no observations.

S17 Cost of demolishing tenement building
We have no observations.

S18 Use and disposal of site where tenement building demolished
We note that the site of the tenement is defined to include the footprint of the tenement and airspace above. This definition may exclude garden ground or common areas to the rear and there may be garden ground to the front of the ground floor flats. At common law such ground to the front would be owned by the ground floor owners and this is preserved by s3(3). The former owners of the ground floor will continue to own the former garden ground notwithstanding the sale of the tenement site. This will operate as a ransom strip and the former owners will be able to stymie development. In our view the whole of the original building stance should be included in the sale provisions of s18 but with a safeguard of permitting owners of the areas outwith the solum of the original tenement to object to the sheriff against inclusion of the garden or other ground.

S19 Effect of demolition and sale on certain undischarged securities
We have no observations

S20 Sale of abandoned tenement building
We agree with the proposition that an owner should be able to force the sale of a derelict tenement. We consider however that the period of 6 months during which the building is unoccupied is unduly short. We do however note that this is coupled to the test that any other owner or person will be unlikely to return to occupy the building or any part. If the building is repaired then it may be occupied in the future. It is not then unlikely that the building will be reoccupied. In that event can the test ever be satisfied?

The use of the word ‘return’ is perhaps unfortunate. Let us say B buys seven flats in the block with a view to redevelopment but has never occupied any of them. He can never ‘return’ to occupy the flats and neither can new tenants ‘return’. A owns the remaining flat. If A removes for more than 6 months he can then force B to sell his seven flats along with A’s flat when B was already intent on repairing. That seems inequitable. A power which would let B acquire the remaining flat might be preferable but the Bill contains no such provision.

S21 Liability to non-owner for certain damage costs
We have no observations.
We have no observations.

We have no observations.

We commented to the Executive that the Bill had been changed from the original draft attached to the Commission’s Report in respect of the concept of owner. In our view the formulation used in s29(3) of that draft makes clear when a person becomes owner. This is omitted from the current s24. For reasons of clarity we prefer the original drafting.

We have noted above our concerns regarding the use of ‘close’ to mean the common entrance passage and stair and our preference would be to use those terms. Again we have commented above on introduction of ‘sector’ when earlier drafts of the Bill used ‘unit’ which we find preferable as it is more readily understood.

We have no observations.

We note that the Executive support the concept of sinking fund burdens [Policy Memorandum para 99] as did the Housing Improvement Task Force Final Report: Stewardship and Responsibility. We also consider that sinking fund burdens ought to be encouraged.

Sinking fund burdens must not be confused with ordinary repairs and maintenance burdens. Ordinary burdens operate on the basis of recovering costs in respect of repairs previously instructed. In some situations deposits are taken against costs anticipated in the current year. S29 of the Title Conditions (Scotland) Act 2003 makes provision for monies deposited against repairs costs in this way as does the TMS rule 3.3 and rule 3.4 In both cases these refer to costs in respect of maintenance and refer to estimates for the cost of that maintenance. These provisions will not assist where there are sinking fund provisions. The maintenance burdens can be seen as revenue expenditure and the intention is to balance the revenue from owners with the expenditure currently being incurred in respect of maintenance. See rule 3.4(h) sums held in the maintenance account after all sums payable in respect of maintenance shall be shared among the owners by repaying depositors. In the Title Conditions Act depositors are entitled to demand repayment of unexpended sums.

Sinking fund burdens attempt to do something quite different. Estimates are made of the lifespan of particular components of a building which are known to require replacement in the future. For example a lift might have a lifespan of 30 years. The intention is to provide for the cost of replacement of the component over its likely lifespan. Other components may be assumed to have an indefinite lifespan because they will be kept in good condition by regular maintenance. This might be compared...
to provision for capital expenditure. In a conventional burden situation such expenditure will be met when it is incurred, often by resort to borrowing where the capital expenditure is significant. Funds are then contributed to the sinking fund annually to build up sufficient resources to meet the likely capital expenditure when it is incurred. The provisions in the TMS and the Title Conditions Act will not apply because the funds are not being accumulated in respect of repairs currently anticipated.

Sinking Funds Burdens have been used for a comparatively short time in title deeds and are not that common [they were found in 10% of modern title deeds; para 264 Housing Improvement Task Force Final Report: Stewardship and Responsibility]. There have been no decided cases on such burdens. As a result a number of issues arise relating to ownership of the funds in a sinking fund. These are principally:

1. If they are held for each depositor in the proportions which they have contributed then can each owner demand repayment?
2. When the unit is sold will the proportion of funds held in respect of a unit transmit with the transfer of the property? If not then the object of the sinking fund is defeated.
3. If the proportion of funds is held for the owners of units can the funds be attached by creditors? If so then the purpose of the sinking fund can be defeated.

We agree with the Executive that sinking fund burdens should not be made compulsory. The law set out in the Tenement Bill is likely to be in place for many years to come. In our view, if sinking fund burdens are to be encouraged, then making provision for them in the Bill is highly desirable. The absence of any provision for sinking fund burdens means that answers to the questions posed above will only arise by future decided cases. This lack of certainty discourages their more widespread use. It might be argued that if sinking fund burdens can be provided for in the deeds then that is sufficient. That argument might equally be applied to the any normal repairs burden but the Bill is thought necessary. If these points are addressed then it is probable that greater use will be made of sinking fund burdens in the future. We consider this is highly desirable and will encourage higher standards of maintenance in the broad sense in the future.
Introduction
1. The Constitutional Reform Bill was introduced in the House of Lords on 24 February 2004. Part 2 of the Bill creates a Supreme Court of the United Kingdom. (The Bill also abolishes the office of Lord Chancellor and makes provision in relation to judicial appointments for England and Wales.)

2. A note providing fuller background on the Bill and preceding consultation was considered at the Committee’s meeting on 2 March and can be found at www.scottish.parliament.uk/justice2/papers/j2p04-08.pdf.

3. This note provides an update on the Bill’s progress and invites the Committee to consider what steps to take next with this inquiry.

Progress of the Bill
4. At the Second Reading debate in the House of Lords on 8 March, the Bill was agreed to but was committed to a Select Committee. That Committee has now been established and met for the first time on Wednesday 24 March. It is required to report to the House of Lords by Tuesday 24 June.

5. The Committee intends to meet twice a week (on Tuesdays and Thursdays). It will begin by taking evidence but can also make amendments to the Bill. It is likely to seek evidence from Lord Cullen and possibly from other Scottish witnesses. The membership of the committee is set out on its web page at www.parliament.uk/parliamentary_committees/reformbill.cfm.

Evidence to the Committee
6. The Justice 2 Committee took oral evidence from the Lord President on 9 March and on 16 March from the Law Society, Professor Hector MacQueen and the Faculty of Advocates. On the basis that a Sewel motion would be tabled shortly, it had been agreed that oral evidence would be sought from Lord Falconer, the Secretary of State for Constitutional Affairs, and possibly from the Lord Advocate. At this stage, we have not been told whether Lord Falconer would be willing to give evidence.

7. The evidence to the Committee can be roughly categorised as:

- Issues of principle (such as whether change is required at all, whether civil appeals should go outwith Scotland, etc). The Department of Constitutional Affairs consultation did not invite responses on this type of
issue although a number of respondents nevertheless commented on them.

- Specifics of the Bill (eg protections required for Scots law, number of Scottish judges, appointments procedures, etc)

**Options for the Committee**

8. The Committee is invited to consider:

(a) whether it now wishes to proceed with evidence from Ministers. The Committee’s time is fairly fully occupied with the Tenements Bill and the Budget. However, there would be the option of an additional meeting on Wednesday or Thursday in the week of 10 May when there will be no plenary meetings preparatory to the move to the Hub.

(b) whether it wishes to report to the Parliament in time to feed into consideration by the House of Lords Committee. A report by mid/late May should serve this purpose.

(c) whether such a report should address the broader issues or simply focus on specific amendments to the bill.

Clerk to the Committee 25 March 2004
Further to his recent appearance before the Committee, Professor Hector MacQueen has provided the following information on how the separation of powers, and specifically of executive from judiciary with regard to appointment, budget, management etc of the federal courts, works in the USA.

Prof. MacQueen has also provided a short excerpt from the most recent (2002) Annual Report from the Director of the Administrative Office of the U.S. Courts, outlining the specifics of the budget for the judicial branch of the federal government and an illustration of the German separation of powers.

Separation of Powers in the USA

"The Federal Courts and Congress

Congress has three basic responsibilities under the Constitution that determine how the federal courts will operate.

First, it authorizes the creation of all federal courts below the Supreme Court, defines the jurisdiction of the courts, and decides how many judges there should be for each court.

Second, through the confirmation process, the Senate determines which of the President's judicial nominees ultimately become federal judges.

Third, Congress approves the federal courts budget and appropriates money for the judiciary to operate. The judiciaries budget is a very small part about two-tenths of one percent of the entire federal budget."

"Three of the essential characteristics of federal judicial administration are that:

- The federal judiciary is a separate, independent branch of the government that has been given statutory authority to manage its own affairs, hire and pay its own staff, and maintain its own separate budget.

1 The Federal Court System in the U.S., Page 10 ((available online at: http://www.uscourts.gov/library/internationalbook-fedcts2.pdf)
The management of the federal judiciary is largely decentralized. The Judicial Conference of the United States establishes national policies and approves the budget for the judiciary, but each court has substantial local autonomy.

Judges are in charge of the judiciary at all levels and establish the policies for management of the courts. Court administrators are hired by the judges and report to the judges.\textsuperscript{2}

"The Judicial Conference of the United States

The Judicial Conference of the United States, established by statute in 1922, is the federal courts national policy-making body, and it speaks for the judicial branch as a whole. The Chief Justice of the United States presides over the Conference, which consists of 26 other judges, including the chief judge of each court of appeals, one district court judge from each regional circuit, and the chief judge of the Court of International Trade.

The Judicial Conference works through committees established along subject matter lines to recommend national policies and legislation on all aspects of federal judicial administration. The committees, all of which are appointed by the Chief Justice, consist mostly of judges. Committees address such matters as budget, rules of practice and procedure, court administration and case management, criminal law, bankruptcy, judicial resources (judgeships and personnel matters), automation and technology, and codes of conduct. The main responsibilities of the Judicial Conference are:

- approving the judiciary's annual budget request (which is prepared by the Administrative Office and the Judicial Conference's Budget Committee)
- proposing, reviewing, and commenting on legislation that may affect the work load and procedures of the courts
- implementing legislation by promulgating national regulations, guidelines, and policies
- supervising and directing the Administrative Office in such matters as human resources, accounting and finance, automation and technology, statistics, and administrative support services

\textsuperscript{2} The Federal Court System in the U.S., Page 36
• drafting and amending the general rules of practice and procedure for litigation in the federal courts, subject to the formal approval of the Supreme Court and Congress.\(^3\)

"The Judiciary’s Budget"

In recognition of the constitutional separation of powers among the three branches of the federal government, Congress has given the judiciary authority to prepare and execute its own budget. The Administrative Office [of the Judicial Conference of the U.S.], in consultation with the courts and with various Judicial Conference committees, prepares a proposed budget for the judiciary for each fiscal year. The proposed budget is based in large part on workload staffing and resources formulas developed by the Administrative Office in consultation with the courts. Using these formulas, a budget proposal is developed that incorporates specific allocations for support staff and administrative services for each court. The proposed budget also includes the requests of various Judicial Conference committees for funding new or expanded programs.

The proposal is first reviewed by the Judicial Conference’s Budget Committee, then approved by the Judicial Conference and submitted directly to the Congress with detailed justifications. By law, the President must include in his budget to Congress the judiciary’s budget proposal without change.

The appropriation committees of the Congress conduct hearings on the judiciary’s proposed budget at which judges and the Director of the Administrative Office present and justify the judiciary’s projected expenditures. After Congress enacts a budget for the judiciary, the Judicial Conference Executive Committee approves plans to spend the money, and the Administrative Office distributes funds directly to each court, operating unit, and program in the judiciary.

The Administrative Office’s Director has delegated to the individual courts many statutory administrative authorities. For this reason, individual courts have considerable authority and flexibility to conduct their work, establish budget priorities, make sound business decisions, hire staff, and make purchases, consistent with policies and spending limits. The judiciary’s budget includes salaries for judges and court personnel, which typically account for over 60% of the total budget.\(^4\)

Separation of powers Germany

Another illustration of what other countries understand separation of powers to mean with regard to the relationship between the executive and the judiciary - I

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\(^3\) The Federal Court System in the U.S., Page 38  
\(^4\) The Federal Court System in the U.S., Page 41
checked my guide to the German Federal Constitutional Court and it says that
the judges of that court (16 all told) are elected by the Federal legislative bodies
(half each by the Bundestag and the Bundesrat, and each requiring a two-thirds
majority). The court is not subject to supervision by any Ministry. The President
of the court heads its administration, and fundamental organisational decisions
are taken by the judges as a plenary group. These include preliminary estimates
for their annual budget (in 2002, 16 million Euros). There is of course a
supporting staff appointed by the court.

I hope the Justice 2 Committee may find this a helpful further illustration of how
basic principles of governance are understood elsewhere.

Professor Hector MacQueen
Justice 2 Committee

Adults With Incapacity (Scotland) Act 2000 – Post Enactment Scrutiny

Summary of Written Evidence Received

Note by the Clerk

Introduction
1. The Adults with Incapacity (Scotland) Act 2000 was passed by the Parliament on 29 March 2000 and received Royal Assent on 9 May 2000. Annexe A to this paper gives a brief overview of what the Act does. The Act has been implemented in stages between April 2001 and October 2003 as follows:

   By April 2002
   Part 1: general matters
   Part 2: continuing and welfare powers of attorney
   Part 3: access to funds
   Part 6: intervention orders and guardianship orders
   Part 7: Misc.

   July 2002
   Part 5: medical treatment and research

   October 2003
   Part 4: management of residents’ finances

2. At its awayday in September 2003, the Committee agreed to write to interested organisations seeking views on the effectiveness of the Act.

Responses Received
3. In total 12 responses were received by the deadline of mid-December 2003 from Alzheimer Scotland, Association of Directors of Social Work (ADSW), British Medical Association, Enable, Law Society of Scotland, Mental Welfare Commission for Scotland, the Office of the Public Guardian, Royal College of General Practitioners (Scotland), RCN Scotland, the Royal College of Psychiatrists, Scottish Law Agents Society, Scottish Law Commission and the Sheriff’s Association. Thereafter a further 3 responses were received from Enable, W Hunter Watson and the Minister for Justice. The written submissions have been circulated along with this paper.

Generic
4. There is general support for the underlying principles of the Act, but particular, and in some cases recurrent, areas of concern have been raised. These include the need for better training, awareness and expertise and the problems surrounding the availability of legal aid. In the view of the Association of Directors of Social Work (ADSW) the financial implications of
the Act were not sufficiently well-defined with the consequence that the monies allocated were wholly inadequate.

**Part 1 – General**

5. Concerns expressed about cost and bureaucracy surrounding applications for intervention or guardianship Orders and the need to obtain a bond of caution and in certain cases the prohibitive cost of doing so (Alzheimer Scotland, Office of the Public Guardian, Scottish Law Agents Society). The cost and slow speed and lower take-up suggest people have found other ways of meeting their needs (Scottish Law Agents Society).

6. A tribunal system similar to that used for the purposes of the Mental Health (Care and Treatment) Scotland Act would be preferable to the Sheriff Court application (Alzheimer Scotland, ADSW, and Mental Welfare Commission). Lack of harmonisation between the Adults with Incapacity and the Mental Health Acts (Royal College of Psychiatrists) and lack of clarity on whether Sheriff Court Hearings can be held in private (Alzheimer Scotland, ADSW, Mental Welfare Commission for Scotland).

**Part 2 – Continuing Powers of Attorney and Welfare Powers of Attorney**

7. Means assessment should be on the adult in whose name advice and assistance is sought. In Scotland non-means tested assistance by way of representation in relation to welfare power applications is not available (Law Society).

8. Registration of Powers of Attorney which may not be needed for many years should not be necessary (Scottish Law Agents Society)

9. Welfare Power of Attorney appointments should require a medical assessment (Mental Welfare Commission)

**Part 3 – Accounts and Funds**

10. Low uptake of these provisions (Office of the Public Guardian). The Act requires a pre-existing bank account but many adults do not have one. Only one designated account can be opened at a time which can cause problems (Alzheimer Scotland, Enable). Further consideration should also be given to who can intromit with an account and who can be a signatory for an application for authority to intromit (Alzheimer Scotland, Scottish Law Agents Society). Another problem is the exclusion of Local Authority employees from acting as Financial Guardians (Mental Welfare Commission)

11. The intromitter should be able to support any dependant of the incapable adult and be entitled to reasonable expenses. In section 87, the interpretation of “primary carer” should be the same as in section 329 of the Mental Health Act (W Hunter Watson)

**Part 4 – Management of Resident’s Finances**

12. Home support service providers should be permitted to manage finances of a resident (Enable)
Part 5 – Medical Treatment and Research

13. This part of the Act has not been fully implemented or complied with and effectiveness not fully assessed due to low public awareness (Alzheimer Scotland, Royal College of Psychiatrists). Urgent treatment is excluded from Section 47 but dentists do not seem to be aware of this, more training needed (Mental Welfare Commission). Generally opposed to any major changes to this Part of the Act (Alzheimer Scotland).

14. Clear guidance on who is authorised to administer medication is required (Enable). Difficulties encountered with consent for influenza vaccinations (RCN Scotland)

15. Definition of “medical practitioner” is too narrow; it excludes nurses and other healthcare professionals (RCN Scotland). Definition of “medical treatment” is too wide and results in too many formal assessments for minor interventions (BMA). Requirements of the Act can mean that people with learning disabilities are excluded (Law Society).

16. Section 47 certificates (giving the medical practitioner primarily responsible for an adult, who is incapable, the authority to do what is appropriate in relation to medical treatment) should be extended for up to 3 years and not require annual renewal in every case (BMA, Royal College of General Practitioners, Scotland, and Alzheimer Scotland). One year should remain the standard period of duration (RCN Scotland). There should be different statutory requirements depending on intensity of treatment, for example amputation as opposed to dental treatment (BMA). Sympathy with variable assessment but not sure how it will work in practice (Mental Welfare Commission)

17. Widen category of person who can assess capacity (Alzheimer Scotland, BMA, Law Society, Royal College of Nursing, and Royal College of General Practitioners, Scotland). Widen category of who can authorise treatment (Law Society). Introduce a qualification in assessing capacity (Alzheimer Scotland, Law Society) and further guidance by way of Code of Practice as to how capacity and residual capacity should be assessed (ADSW) and procedures to be followed for revocation of certificates (Mental Welfare Commission)

18. More flexibility when signing certificates suggested, replace “today examined” with “based on my considered opinion” (BMA) Disagree with that proposal, would prefer “in the last month” (Mental Welfare Commission)

19. Section 47 certificate should not be required where a proxy has been appointed (Law Society). Opposing view taken by Mental Welfare Commission.

Part 6 – Intervention and Guardianship Orders

20. Confusion about when to invoke this Part (Alzheimer Scotland, ADSW, Mental Welfare Commission, Office of the Public Guardian). Intervention Orders not appropriate for taking decisions, need to review this (Enable)
21. The length of time taken to process applications, the complexity and cost are causing applicants (against the spirit of the Act) to seek more than the minimum intervention required to avoid coming back to court. Few intervention or partial guardianship orders are being sought (Scottish Law Agents Society).

22. Where there is no dispute about the benefits of a significant intervention, the Act should provide a less complex and costly measure. Compare less complex requirements of Part 5 which could involve invasive and risky procedures with requirements under Part 6 (Mental Welfare Commission)

23. A simplified fast-track procedure for accredited specialists should be introduced; this would obviate the need for a report on suitability (Scottish Law Agents Society) Difficulties in identifying appropriate financial managers given restrictions of the Act e.g. Local Authorities are not allowed to appoint themselves (Alzheimer Scotland, ADSW, Office of the Public Guardian)

24. Obtaining 3 certificates to support applications within a 30 day period can be problematic, for long-term incapacity, 2 month period would be more appropriate (Law Society, Scottish Law Agents Society)

25. No automatic entitlement to free Legal Aid, including Advice and Assistance, this is unjust and leaves many worse off than they would have been under the Mental Health (Scotland) Act, the issue of payment of fees for reports also requires clarification (Alzheimer Scotland, ASDW, Law Society. Sheriffs Association, Enable, Mental Welfare Commission).

26. The number of visits required under Welfare Guardianship is intrusive and should be reduced (Alzheimer Scotland, ASDW) Welfare Guardians should be entitled to claim reasonable expenses (Alzheimer Scotland)

27. At present there is no emergency power for intervention when access has been gained to an adult’s finances or when he or she has been “abducted,” removed from their home and taken elsewhere – this should be addressed, as interim powers are insufficient and use is being made of the emergency provisions of Mental Health legislation which may not be most appropriate (Alzheimer Scotland, ADSW, Royal College of Psychiatrists, Mental Welfare Commission)

28. 3-year guardianship appointments seem long, there should be a statutory requirement for regular reviews and reports to the Commission (Mental Welfare Commission). Mechanism for recalling a guardianship appointment is cumbersome and at odds with the principles of the Act, in terms of least restriction (ADSW, Mental Welfare Commission).

Part 7 – Misc.
29. Lack of clarity on timescales for reviewing tutor-dative appointments, i.e. pre-existing appointments for the purposes of decision-taking usually on the grounds of welfare. (Mental Welfare Commission)
Scottish Executive Response
30. The Minister advises in her submission that a project is being carried out by Alzheimer Scotland who are due to report in September on implementation of the Act. The project focuses on Parts 1, 2, 3 and 6. A separate consultation on Part 5 of the Act and the accompanying Code has been undertaken. The report on the Part 5 Code is available by following this link http://www.scotland.gov.uk/cru/resfinds/hcc34-00.asp

A number of issues are acknowledged to have emerged from the research so far; when to invoke the Act, issues surrounding legal aid, costs associated with application for court orders, lack of financial managers and procedural issues such as complexity and bureaucracy. The Executive are developing an Action Plan and intend to consult on proposals in the autumn.

For Committee Consideration
31. The Committee is asked to consider what it wishes to do now. There are a number of options.

(a) The Committee could note the evidence received, await publication of the Executive’s proposals and meantime draw the Minister’s attention to the evidence received.

(b) The Committee could invite Executive officials to update the Committee on action taken and to talk to the recently published report on Part 5 of the Act.

(c) The Committee could hold 1 or 2 oral evidence sessions concluding with the Minister being invited to give evidence and make a report to the Parliament.

32. The Committee is asked to decide what course of action it wishes to pursue.

Clerk to the Committee
Part 1: General

The Act provides various methods of intervening (that is, taking decisions or action) on behalf of an adult. Interventions can cover property and financial affairs, or personal welfare matters, including healthcare. When deciding whether to intervene the following principles should be applied:

- intervention must be necessary and must benefit the adult;
- intervention must be the minimum necessary to achieve the purpose;
- must take account of the adult's present and past wishes and feelings (and every possible means of communicating with the adult to find out what these are should be tried);
- must take into account the views of the adult's nearest relative and primary carer, and of any other person with powers to intervene in the adult's affairs or personal welfare, or with an interest in the adult, so far as it is reasonable and practicable to do so;


Individuals can arrange for their welfare to be safeguarded and their affairs to be properly managed in the future, should their capacity deteriorate. They can do this by giving another person (who could be a relative, carer, professional person or trusted friend) power of attorney to look after some or all of their property and financial affairs and/or to make specified decisions about their personal welfare, including medical treatment.

All continuing and welfare powers of attorney granted from 2 April 2001 will need to be registered with the Public Guardian to be effective.

Part 3: Accounts and Funds

Individuals (normally relatives or carers) can apply to the Public Guardian to gain access to the funds of an adult incapable of managing those funds. This applies to funds held in, for example, a bank or building society account in the sole name of the adult. The Act also includes provisions to allow access to a joint account to continue where one account holder has become incapable of managing the funds.

Part 4: Management of Residents’ Finances

Authorised care establishments are able to manage a limited amount of the funds and property of residents who are unable to do this themselves.

Part 5: Medical Treatment and Research

The Act allows treatment to be given to safeguard or promote the physical or mental health of an adult who is unable to consent. Special provisions apply where others such as attorneys have been appointed under the Act with powers relating to medical treatment. Where there is disagreement a second medical opinion can be sought. Cases can also be referred to the Court of Session in certain circumstances. The Act also permits research involving an adult incapable of giving consent, but only under strict guidelines.
Part 6: Intervention Orders and Guardianship Orders Individuals can apply to their local Sheriff Court for:

- an intervention order where a one-off decision or short term help is required (for example, selling property or signing a document)
- a guardianship order, which may be more appropriate where the continuous management of affairs or the safeguarding of welfare is required

Local authorities or any person claiming an interest in the adult’s affairs may make applications for intervention and guardianship orders.
The Instrument

1. The Order is being made in accordance with the powers conferred on the Scottish Ministers by section 32(3) and (5) of the Police (Scotland) Act 1967, as amended by section 45(1) of the Crime and Punishment (Scotland) Act 1997, and amended by section 53 of the Scotland Act 1998 and is laid annually before the Parliament.

2. The Order makes provision for payment of funds from the Scottish Consolidated Fund, by police grant for police purposes, to police authorities and joint police boards in Scotland in 2004-05.

3. Section 2 of the Order determines that the aggregate amount required for the payment of police grants is £485,820,000. This is an increase of just under £25.9 million, or 4.97% on last years figure of £459,944,000. The Police Grant (Scotland) Order 2003 was considered and noted by the Justice 1 Committee of the previous Parliament at its meeting on 25 March 2003. The table below sets out the police grant figures for recent years.

<table>
<thead>
<tr>
<th>Year</th>
<th>Police Grant</th>
<th>Approx % increase on previous year</th>
</tr>
</thead>
<tbody>
<tr>
<td>2004</td>
<td>£485,820,000</td>
<td>5.0</td>
</tr>
<tr>
<td>2003</td>
<td>£459,944,000</td>
<td>6.2</td>
</tr>
<tr>
<td>2002</td>
<td>£432,984,000</td>
<td>5.7</td>
</tr>
<tr>
<td>2001</td>
<td>£409,485,000</td>
<td>7.9</td>
</tr>
<tr>
<td>2000</td>
<td>£377,160,000</td>
<td></td>
</tr>
</tbody>
</table>

4. Section 3 gives the details of the allocation of police grants to each individual police authority for the financial year commencing 1 April 2004.

5. Article 4 sets out how and when the grant is payable.

Procedure

6. The Justice 2 Committee has been designated lead Committee and is required to report to Parliament by 26 April 2004.

7. The Subordinate Legislation Committee considered this instrument on 23 March 2004 and had no comment to make. The instrument was laid on 11 March and comes into force on 1 April 2004.
8. Under Rule 10.4, the instrument is subject to negative resolution procedure - which means that the Order remains in force unless the Parliament passes a resolution, not later than 40 days after the instrument is laid, calling for its annulment. Any MSP may lodge a motion seeking to annul such an instrument and, if such a motion is lodged, there must be a debate on the instrument at a meeting of the Committee.

25 March 2004

Clerk to the Committee
The Police (Scotland) Amendment Regulations 2004 (SSI 2004/121)

Note by the Clerk

The Instrument

1. The Order is being made in accordance with the powers conferred on the Scottish Ministers by section 26 of the Police (Scotland) Act 1967.

2. These regulations revoke regulation 50 of, and paragraph 17 of Schedule 1B to, the Police (Scotland) Regulations 1976, removing a police constable’s entitlement to a plain clothes allowance, as agreed as part of the pay and conditions of service package in May 2002.

Procedure

6. The Justice 2 Committee has been designated lead Committee and is required to report to Parliament by 26 April 2004.

7. The Subordinate Legislation Committee considered this instrument on 23 March 2004 and had no comment to make. The instrument was laid on 11 March and comes into force on 1 April 2004.

8. Under Rule 10.4, the instrument is subject to negative resolution procedure - which means that the Order remains in force unless the Parliament passes a resolution, not later than 40 days after the instrument is laid, calling for its annulment. Any MSP may lodge a motion seeking to annul such an instrument and, if such a motion is lodged, there must be a debate on the instrument at a meeting of the Committee.

25 March 2004

Clerk to the Committee
The Instrument

1. This instrument amends the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999. It restores legal aid payment for work on community supervision orders in youth courts and for appeals against the refusal of bail, or against bail conditions imposed (under section 201(4) of the Criminal Procedure (Scotland) Act 1999).

2. These two items were inadvertently omitted from the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999 by the Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations which were considered by the Committee on 2 March and which introduced payment for work done in the consideration of victim statements.

Procedure

3. The Justice 2 Committee has been designated lead Committee and is required to report to Parliament by 3 May 2004.

4. The Subordinate Legislation Committee considered this instrument on 23 March 2004 and had no comment to make. The instrument was laid on 11 March and comes into force on 2 April 2004.

5. Under Rule 10.4, the instrument is subject to negative resolution procedure - which means that the Order remains in force unless the Parliament passes a resolution, not later than 40 days after the instrument is laid, calling for its annulment. Any MSP may lodge a motion seeking to annul such an instrument and, if such a motion is lodged, there must be a debate on the instrument at a meeting of the Committee.

25 March 2004

Clerk to the Committee
PROCEDURES COMMITTEE LAUNCHES INQUIRY INTO LEGISLATION PROCEDURES

The Procedures Committee is undertaking a major inquiry into the procedures and practices that determine the speed at which Bills progress through the 3-Stage process from introduction to passing.

Convener of the Committee, Iain Smith MSP said:

“This will be a major piece of work for the Committee. We plan to review the whole way that Bills are timetabled to ensure that there is sufficient time throughout the process for proper scrutiny of Bills to be carried out. The Committee is keen to get written evidence from as wide a range of people as possible who have experience of engaging with the Parliament in relation to a Bill.”

In particular, the Committee will be considering:

- whether sufficient time is available for evidence-taking at Stage 1, particularly when more than one committee is involved;
- whether sufficient time is available during Stages 2 and 3 for members (and outside interests) to prepare amendments for lodging, to consider amendments lodged by others and to debate amendments at meetings of committees and the Parliament;
- whether the current minimum intervals between Stages are appropriate;
- whether committees involved in considering a Bill after it is first introduced have sufficient opportunity at later Stages to consider the impact of amendments; and
- to what extent the timetable should be determined by the Executive (or the member-in-charge of the Bill), the Bureau, committees or the Parliament as a whole.

The main focus will be on Executive Bills, which have generally been subject to more timetabling pressure. However, the scope
of the inquiry extends to other types of Public Bill – Committee Bills and Members' Bills – and will also take into account the effects of any procedural changes that may be proposed on specialised types of Bill such as Consolidation Bills and on Private Bills.

Written evidence is invited from any MSP, person or organisation with an interest in or previous involvement in, the passage of a Scottish Parliament Bill. Evidence should be submitted, preferably in electronic form (MS Word preferred), to the Clerk to the Procedures Committee, procedures.committee@scottish.parliament.uk or at The Scottish Parliament, George IV Bridge, Edinburgh EH99 1SP. Please keep submissions to a maximum of 6 sides of A4 if at all possible. A brief summary of the main points at the beginning or end would be helpful.

Evidence submitted may be published by the Parliament, in electronic or paper form. If you do not wish your submission to be made public, please request this clearly at the start of the submission giving your reasons. Any such request will be considered by the Committee.

The initial deadline for written evidence is **Wednesday 31 March 2004.** Please indicate whether you would be prepared also to give oral evidence to the Committee if invited to do so. It is expected that oral evidence will be taken in late March and during April, with a view to completing the inquiry, if possible, before the summer recess.

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