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

1. **Subordinate legislation:** Hugh Henry MSP (Deputy Minister for Justice) to move motion S2M-2061—

   that the Justice 2 Committee recommends that the draft Tenements (Scotland) Act 2004 (Consequential Provisions) Order 2004 be approved.

2. **Subordinate legislation:** The Committee will consider the following negative instruments—
   
   The Tenements (Scotland) Act 2004 (Notice of Potential Liability for Costs) Amendment Order 2004 (SSI 2004/490);
   The Civil Legal Aid (Scotland) Amendment (No.2) Regulations 2004 (SSI 2004/491);
   The Advice and Assistance (Scotland) Amendment (No.3) Regulations 2004 (SSI 2004/492); and
   The Legal Aid (Scotland) Act 1986 Amendment Regulations 2004 (SSI 2004/493).

3. **Youth Justice Inquiry:** The Committee will take evidence from—
   
   **Panel 1**
   
   Dr Andrew McLellan, HM Chief Inspector of Prisons, and Rod MacCowan, HM Deputy Chief Inspector of Prisons, HM Prisons Inspectorate for Scotland; and
   
   David Wiseman, Director of Operations and Lorne Findlay, Regional Manager, Central East Region, the Care Commission.
   
   **Panel 2**
   
   Bill Duffy, St Mary’s Secure Unit, Bishopbriggs; and
   
   Frank Phelan, Howdenhall Centre, Edinburgh;
   
   **Panel 3**
   
   Jennifer Davidson, Director and Professor Andrew Kendrick, Scottish Institute for Residential Child Care.

4. **Prisoner Escort and Court Custody Services Contract:** The Committee will consider a paper by the Clerk.
5. **Constitutional Reform Bill:** The Committee will consider a paper by the Clerk.
Agenda item 1 and 2 – Subordinate legislation

Note by Clerk (draft SSI) J2/S2/04/34/1
Note by Clerk (SSI 2004/490) J2/S2/04/34/2
Note by Clerk (SSI 2004/491, 2004/492 and 2004/493) J2/S2/04/34/3

Agenda item 3 – Youth Justice Inquiry

Proposed areas for questioning J2/S2/04/34/4
(PRIVATE PAPER – MEMBERS ONLY) (To follow)
Written submission from the Care Commission J2/S2/04/34/5

Agenda item 4 – Prisoner Escort And Court Custody Services Contract

Note by the Clerk J2/S2/04/34/6
Report by the short-term working group on outstanding warrants J2/S2/04/34/7
(hard copy only)
Correspondence from the Audit Committee, 4 November 2004 J2/S2/04/34/8
Correspondence from the Minister for Justice, 8 November 2004 J2/S2/04/34/9
Correspondence from the Minister for Justice, 15 November 2004 J2/S2/04/34/10
Summary of the Audit Scotland report on the Scottish Prison Service, Contract for the provision of prisoner escort and court custody services (hard copy only) J2/S2/04/34/11

Agenda item 5 – Constitutional Reform Bill

Note by the Clerk J2/S2/04/34/12
Correspondence from the Lord Advocate including Sewel Motion and accompanying memorandum, 22 November 2004 J2/S2/04/34/13

The following documents are circulated for information only:

- Post Council Report on the Justice and Home Affairs Council of EU Ministers, 19 November 2004

Forthcoming meetings:

- Tuesday 14 December 2pm

Gillian Baxendine / Tracey Hawe
Clerks to the Committee
Tel 0131 348 5054
The draft Tenements (Scotland) Act 2004 (Consequential Provisions) Order 2004

Note by the Clerk

The Instrument

1. The Tenements (Scotland) Act 2004 adds a new Schedule 1A to the Title Conditions (Scotland) Act 2003. Schedule 1A consists of a Form of notice of potential liability for costs. The notice gives details of certain maintenance or work carried out in relation to the flat specified. The effect of the notice is that a person may, on becoming the owner of the flat, be liable by virtue of section 10(2A) of the Title Conditions (Scotland) Act 2003 for any outstanding costs relating to the maintenance or work.

2. The purpose of this instrument is to add schedule 1A of the Title Conditions (Scotland) Act 2003 to the list of schedules in section 128(3)(a) of that act. Sections 128(3)(a) lists the schedules which Scottish Ministers may, by order, amend. Adding schedule 1A to the list will mean that it will be possible for Scottish Ministers to amend the form by order.

Procedure

3. The Justice 2 Committee has been designated lead Committee and is required to report to Parliament by 13 December 2004.

4. The Subordinate Legislation Committee considered the instrument at its meeting on 16 November and had no comment to make.

5. The instrument was laid on 10 November. Under Rule 10.6, the draft Order is subject to affirmative resolution and it is for the Justice 2 committee to recommend to the Parliament whether the instrument should come into force. The Minister for Justice has, by motion S2M-2061 (set out in the Agenda), proposed that the Committee recommends approval of the Order. The Minister will attend to speak to and move the motion. The debate may last for up to 90 minutes.

6. At the end of the debate, the Committee must decide whether or not to agree to the motion, and then report to the Parliament accordingly. Such a report need only be a short statement of the Committee’s recommendation.

25 November 2004
Clerk to the Committee
The Instrument

1. Section 11 of the Tenements (Scotland) Act concerns the apportionment of liability for repair and other costs when a flat is sold. It makes it clear that an owner does not necessarily cease to be liable when he or she ceases to own a flat. The Bill also provides that the buyer may be severally liable with the seller for any unpaid debts.

2. Sections 11 and 12 of the Tenements (Scotland) Act concern the apportionment of liability for repair and costs. Section 12 sets out that any owner who is liable for relevant costs shall not, when ceasing to be such an owner, cease to be liable for such costs. It further provides that a new owner shall only be severally liable with any former owner for maintenance or work costs carried out before the acquisition date if “notice of potential liability costs” is properly recorded.

3. Schedule 2 sets out the Form for “notice of potential liability of costs” and provides notes for completion.

4. A “notice of potential liability of costs” may be registered in respect of maintenance or work irrespective of whether that maintenance or work is carried out before or after the registration of the notice. This Order amends Schedule 2 to reflect this.

Procedure

5. The Justice 2 Committee has been designated lead Committee and is required to report to Parliament by 13 December 2004. The instrument was laid on 11 November and comes into force on 6 December 2004.

6. The Subordinate Legislation Committee considered this instrument on 16 November 2004 and asked the Executive for an explanation of the following matters.

   “The Executive is asked to explain why it has not chosen to bring this instrument into force contemporaneously, on 28 November 2004, with the schedule it amends given the potential disadvantage to a purchaser”.

7. The Subordinate Legislation Committee considered Executive’s response (attached at Annexe A) at its meeting on 23 November and agreed to report the instrument to the Parliament on the grounds of defective drafting. A copy of the
letter to the Executive, following the Subordinate Legislation Committee’s meeting on 23 November is attached at Annexe B.

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.

9. The Committee might want to consider whether it shares the concerns of the Subordinate Legislation Committee and whether it wishes to bring any concern to the attention of the Parliament.

25 November 2004                  Clerk to the Committee
On 16th November the Committee asked the Executive for an explanation of the following matters.

“The Executive is asked to explain why it has not chosen to bring this instrument into force contemporaneously, on 28 November 2004, with the schedule it amends given the potential disadvantage to a purchaser”.

**The Scottish Executive responds as follows:**

The Executive did consider whether or not to make the amendment to schedule 2 with effect from 28th November 2004, however, at the time which the matter came to the attention of the Executive it would not have been possible to do so without breaching the 21 day rule. The Executive did not consider that there was sufficient urgency to support a breach of the 21 day rule.

In terms of section 12(2) a new owner is liable for all relevant costs for which the seller is liable. Section 12(3) makes a limited exception. This exception is in respect of maintenance or work carried out before the acquisition date. It only applies where a notice is not registered at least 14 days before the date on which the new owner acquires the flat.

This means that new owners are liable for work still to be carried out at the acquisition date. The fact that the current schedule 2 notice only refers to work carried out is not thus an immediate problem. If the work has already been carried out then a notice could be registered immediately. If the work has yet to be carried out then there is no immediate effect on liability, as the new owner is in any event liable for work yet to be carried out.

The Executive do not consider that delaying the amendment of schedule 2 results in any disadvantage to purchasers. Any potential disadvantage is to the current owners of flats within a tenement who are planning to carry out work but have yet to do so. The Executive consider, however, that the potential for disadvantage to be caused by the delay in making the amendment to schedule is minimal. Any disadvantage only arises where work is carried out after the 28th November but before 5th December and a new owner acquires the property in the two weeks following registration of the notice. The owners could register a notice but only once the work described in the notice has been carried out. The new owner would not be liable if he acquired the property in the next two weeks.

The Executive consider that the real issue arises for the future when owners want to plan to do works and want to be sure that new owners will be liable for the cost of the works once done. They should be able to register the notice before the work is done, and the Tenements (Scotland) Act 2004 will enable them to do so.
THE TENEMENTS (SCOTLAND) ACT 2004 (NOTICE OF POTENTIAL LIABILITY FOR COSTS) AMENDMENT ORDER 2004 (SSI 2004/490)

1. The Subordinate Legislation Committee today considered the response from the Executive of 18 November with regard to the above instrument.

2. The Committee does not accept the contention that the potential for disadvantage to be caused by the delay in making the amendment to schedule is minimal.

3. The Committee considers that a new owner would have difficulty in rejecting liability for the costs of the work carried out in the short period before the amendment to schedule 2 comes into force. The only requirement on the present owner is to register a notice in the prescribed form which at present does not require details of prospective work to be shown. The present owner will therefore have complied with the statutory provisions and there seems no reason why the purchaser should not have to meet the costs of work even although that work is not shown on the notice.

4. The Committee considers that the scope for disagreement as to liability for the costs in question emphasises the need for the two provisions to be commenced simultaneously.

5. The Committee intends to report to the Lead Committee on the basis that the instrument is defectively drafted. In view of the timeframe involved the Lead Committee may not have time to consider the Report prior to 28 November. The Committee therefore asks the Executive to take account of its views and consider correcting the defect prior to 28 November.

Ruth Cooper
Clerk to the Committee
JUSTICE 2 COMMITTEE  
34th Meeting 2004 (Session 2) 
Tuesday 30 November 2004 

Note by the Clerk 

The Civil Legal Aid (Scotland) Amendment (No.2) Regulations 2004 (SSI 2004/491) 
The Advice and Assistance (Scotland) Amendment (No.3) Regulations 2004 (SSI 2004/492) 
The Legal Aid (Scotland) Act 1986 Amendment Regulations 2004 (SSI 2004/493) 

Background 

1. These three sets of Regulations are, according to the Executive Note, part of a package of modernisation of legal aid based on the principles of fair reward for work done; the introduction of quality assurance where it does not already exist and value for money for the taxpayer. 

2. The first, (The Civil Legal Aid (Scotland) Amendment (No.2) Regulations 2004 (SSI 2004/491) makes provision for the SLAB to request any information, financial or otherwise, relating to a change in circumstances. If such a request if not complied with, the Board can withdraw legal aid and may recover any funds paid. 

3. The second set of Regulations (The Advice and Assistance (Scotland) Amendment (No.3) Regulations 2004 (SSI 2004/492) requires solicitors to determine whether the application relates to a single to multiple matter (to discourage multiple or unnecessary applications). 

4. The Regulations also state that for an application of any form of advice and assistance, a solicitor should not approve an application where an applicant has other forms of rights and facilities, or has a reasonable expectation of obtaining financial or other help from a body of which he/she is a member. Again, any person in receipt of advice and assistance is required to submit any information requested by the Board and failure to do so entitles the Board to recover sums paid. 

5. The third set of Regulations modify the Legal Aid (Scotland) Act 1986 to allow SLAB to pay sums recovered from a person who has received financial assistance from elsewhere, into the Scottish Legal Aid Fund. 

Procedure

7. The instruments were laid on 12 November and come into force on 4 December. The lead Committee is required to report to Parliament by 21 December 2004.

8. The Subordinate Legislation Committee considered the instruments at its meeting on 23 November and no points arose.

9. 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.

10. The instruments were laid on 12 November.

Clerk to the Committee
18 November 2004
JUSTICE 2 COMMITTEE

34th Meeting 2004 (Session 2)

Tuesday 30 November 2004

Youth Justice Inquiry
Submission from the Care Commission
4 August 2004

Mr Richard Hough
Assistant Clerk
Justice 2 Committee
Room 3.10 Committee Chambers
George IV Bridge
EDINBURGH
EH99 1SP

Dear Mr Hough

Youth Justice Inquiry

Thank you for your letter of 21 May 2004 inviting the Care Commission to submit evidence to the above Inquiry.

We note the Inquiry’s central interest in the effectiveness of multi-agency working and in the identification and assessment of gaps in service provision in the Youth Justice field. The Care Commission, by its function as the regulator of care services has an indirect locus in such matters. However, the Committee will wish to be aware that the Scottish Executive has developed a series of National Care Standards. At any one time young people engaged with the Youth Justice system may be supported through services in children’s homes, supported accommodation for offenders, secure accommodation, fostering and adoption or other support services in which we are the regulator.

National Care Standards devised for all these settings have been developed on the over-riding principles of

- Dignity
- Privacy
- Choice
- Safety
- Realising Potential
- Equality and Diversity

The Committee may be interested in reviewing the National Standards to consider which have transferable applications with the Youth Justice agenda and specifically in regard to the planning and delivery of such services.
2

4 August 2004

Mr Richard Hough

In regard to the specific questions raised within the second remit of the Inquiry, we would offer the following comments:-

- Diversionary schemes and other alternative strategies can have a significant impact if properly resourced and developed on a multi-agency basis. The co-ordination requirements of schemes jointly involving education, police, social work and volunteers however are considerable.

- The Committee will wish to be aware that the Care Commission regulates all secure accommodation services approved by the Scottish Minister. Each service requires to be inspected at least twice a year. Inspection Reports to the Committee could be made available if required. Staff involved in such inspections could also provide oral evidence as necessary.

- The recently published Health and Community Care Research Findings 39/04 – “On the Borderline” – provides an extensive critique of many of the issues raised in connection with services to young people with a mental illness. The study was conducted by Fiona Myers from the Scottish Development Centre for Mental Health. Copies of the study are in the Scottish Executive library – www.scotland.gov.uk/library5/education/otb-02.asp

Yours sincerely

Jacquie C Roberts
Chief Executive
Issue
1. This note updates the Committee on two reports relevant to the Prisoner Escort and Court Custody Contract and invites the Committee to decide how to take this issue forward.

Background

2. At its meeting on 8 June 2004, the Committee took evidence on the Prisoner Escort and Court Custody Contract from Reliance Custodial Services, the Scottish Prison Service and the Minister for Justice.

3. At that meeting the Committee noted that ACPOS was leading a multi-agency review into problems with the current system of dealing with outstanding warrants; and that the Auditor General had been asked to bring forward his report on the audit of the award of the contract.

4. The Committee also requested further information on the membership of the project board and implementation board which oversaw the development of the contract. Tony Cameron’s letter of 18 June providing this information was circulated to the Committee at the meeting on 28 June.

5. At its meeting on 9 September, the Committee considered an update paper from the Clerk and agreed to defer further consideration until either the report of the APCOS led group or the report by the Auditor General was available. These reports have now been published and their main conclusions are outlined below.

6. Since the Committee last considered this matter Reliance has taken on responsibility for prisoner escort and court custody duties in Lothian and Borders, Tayside, Fife, Grampian and Highlands. Formal statements of assurance/readiness from the Chief Executives of the Scottish Prison Service, the Crown Office and Procurator Fiscal Service and the Scottish Court Service, and from the relevant Chief Constable, were received by the Minister in respect of each of these roll-outs.

7. The Scottish Information Commissioner has also recently (24 November) issued a decision in relation to the Scottish Prison Service’s refusal to release full details of the contract with Reliance. The decision relates to the operation of the Scottish Executive Code of Practice (a voluntary code which governs the release of Scottish Executive information until the Freedom of Information Act comes into effect on 1 January 2005.) The Commissioner concluded that the SPS had not provided
sufficient justification under the terms of the Code of Practice for withholding the information but that it was legally bound by the confidentiality clause within the contract which requires information in the contract to be withheld solely if requested by Reliance. The Commissioner comments on best practice in relation to such confidentiality clauses once the Freedom of Information Act comes into operation. The full text of the Commissioner’s decision is available on his website at www.itspublicknowledge.info.

The Audit Scotland Report

8. In September 2004, the Auditor General published his report on the contract for the provision of prisoner escort and court custody services. The report focussed on four key issues:

- Whether the SPS set clear objectives for the contract, consistent with achieving value for money and whether it achieved these objectives
- Whether the SPS properly specified and awarded the contract
- Whether the SPS established robust and clear arrangements for managing the contract as soon as the contract period began, and for monitoring the contractor’s performance
- How well the SPS is implementing and monitoring the contract.

9. The report found that in relation to the contract objectives:

- The SPS set clear objectives for the project, based on perceived difficulties with the existing system, and consistent with achieving value for money. The report concluded that it was too early to say whether these objectives had been achieved, and noted that it was therefore important that SPS’s post-implementation review should consider the extent to which the original aims of the project had been achieved, and in particular, the success of the new arrangements in releasing police and prison officers to undertake their core duties.

- Key to the success of the project is that performance standards should be demanding and achievable and that Reliance should meet them. The lack of reliable and relevant historical data means that the performance standards and Reliance’s actual performance cannot be assessed against previous arrangements when the services were undertaken by police and prison officers.

10. In relation to the preparation and award of the contract the report found that:

- The SPS’s specification and award of the contract to Reliance was handled well. The procurement process was well controlled and there were good risk management processes in place. The tendering process was undertaken in accordance with EC and with the SPS’s own procurement regulations and it established clear criteria for evaluating tenders. While there was scope to improve the level of indicative activity data included in the invitation to tender, the SPS and partner agencies subsequently provided Reliance with activity data and discussed proposed staffing numbers for each phase of the contract implementation. The report notes that in order to ensure the seamless transfer of duties, similar exchanges must take place in the remaining areas in which the contract will be rolled out.
11. In relation to managing the contract, the report found that:

- The SPS discussed with Reliance the resources required to deliver the contract before it commenced operations. SPS also took steps to ensure Reliance could deliver the services required before the contract was further rolled out. The report recommends that SPS should finalise as soon as possible its high level contingency plans for continuity of service in the event of a default in the contract. The report also noted a need to finalise those service level agreements documenting the relationship between SPS and other agency partners which are still outstanding.

- A key strength of the new arrangements is that Reliance must report regularly to the SPS on a range of clearly defined performance measures. These measures are used to levy financial penalties on Reliance where it is established that it is at fault. (In relation to prisoner release in error, 12 out of 23 prisoners released in error in the Glasgow area since April 2004 have been attributed to Reliance). The report notes that it is important that SPS and partner agencies clearly identify the reasons for other incidences of releases in error to prevent recurrences.

- Despite the releases in error for which it was responsible, the report notes that there are signs that the performance of Reliance is improving. The report further notes that the appointed auditors will continue to review how SPS monitor and report on the performance of Reliance.

12. The Auditor-General for Scotland gave evidence to the Audit Committee on 26 October 2004 in relation to this report. Following this evidence the Audit Committee agreed not to hold an inquiry on the report but wrote to the SPS seeking clarification on the following points:

- Progress on finalising high level contingency plans to ensure continuity of service in the event that Reliance withdraws or is withdrawn from the contract;
- Information on roll-out of the contract across Scotland;
- When the SPS considers that the contract will have "bedded in" and it will be possible to gauge whether the contract objectives have been achieved; and
- Plans to perform a post implementation review of the contract and when the results will be available.

13. The reply to the Audit Committee from Tony Cameron comments that:

- an expanded contingency planning group is due to meet shortly
- all core aspects of the contract (covering escorts to and from court and management of court custody units) have been implemented across Scotland and two final Phases are being commissioned to cover non-core escorts
- it is difficult to say when the contract will have bedded in but it is already delivering very considerable improvements to what went before
- a post implementation review will be held once the contract has run for a full year.
14. This Working Group was established by the Justice Department and ACPOS to review systems for the communication of information about outstanding warrants and other custodial orders relating to persons appearing in court, and to make recommendations for improvement throughout the criminal justice system.

15. The Group examined the current warrants system, and concluded that while it was complex, with a mix of legal requirements and custom and practice that has developed over the years, it was not flawed. Given the complexity of the system and the informal relationships and local understandings which underpinned it, the report noted that it was perhaps not surprising that Reliance staff were overwhelmed by the sheer scale of the task which they faced. It was also noted that the media spotlight accompanying the releases in error had brought to light practices which needed to be looked at afresh. The report commended Reliance and its partners for pulling together and plugging gaps where they had occurred. It was further noted that lessons had been learnt quickly, with improvements and refinements being made to Reliance’s organisational processes in conjunction with the relevant criminal justice agencies.

16. The Group noted that Summary Justice reform will continue to move forward as a result of the McInnes report and the Executive’s wider reform agenda. These developments will also play a part in improving the effectiveness of the criminal justice system. Having scrutinised the system, the group made 20 recommendations for reform. The recommendations stress the development of local solutions but with a degree of central liaison and oversight.

17. Amongst other things, the report recommends that:

- a working group be formed to further develop the Protocol for Prioritisation of Warrants and service level agreements to ensure fast, accurate and workable practices in relation to the execution of warrants
- formal information sharing protocols should be developed between public sector agencies to allow the exchange of information to better secure the execution of warrants. Further, the Scottish Executive and Whitehall should consider the need for any legislative changes needed to support the development of such protocols
- ACPOS should examine and promulgate best practice by forces in relation to the execution of warrants
- The SPS and service provider should consider ways in which systems for monitoring prisoners should be improved
- The SPS should, together with the service provider:
  - review the Personal Escort Record (PER) form
  - ensure that the procedures for the production and update of PER forms are agreed, documented and clearly understood
  - ensure that police and PF reference numbers appear routinely on the PER
  - pursue the development and maintenance of procedures to ensure that the PER accompanies the prisoner at all times
  - identify and train a group of staff to perform a ‘gatekeeper’ role, akin to that of the Duty Officer/Police Sergeant that existed before the contract roll-out. This role should be clearly defined and it should be made
explicit that they are not diverted from regular prisoner escort duties or ancillary tasks.

18. Most of the recommendations are to be taken forward by organisations represented on the group. The recommendations have been accepted by the organisations represented on the group and an action plan for implementing the recommendations is set out in the report.

For Decision

19. The Committee is invited to decide whether to take any further action in relation to this matter. The Committee may wish to:

   A. Take no further action in view of the conclusions of the reports outlined above and the actions agreed as a result of the ACPOS report;

   B. Take no further action at this point in time but agree to seek further written and/or oral evidence on the implementation of the contract from the SPS and/or the Minister for Justice in 6-12 month’s time; or

   C. Take evidence from the SPS and/or the Minster for Justice early in the New Year in order to explore the Scottish Executive’s response to the reports outlined above.

Clerk to the Committee

November 2004
THE SCOTTISH PRISON SERVICE: CONTRACT FOR THE PROVISION OF PRISONER ESCORT AND COURT SERVICES

At its meeting on 26 October the Audit Committee considered the report by the Auditor General for Scotland entitled “Scottish Prison Service: Contract for the provision of prisoner escort and court custody services” (AGS/2004/10). The Committee agreed not to hold an inquiry on the report and agreed to write to the Scottish Prison Service seeking clarification on points raised by members during the discussion.

I attach a copy of the letter to the Scottish Prison Service for your information and will forward their reply in due course. [Reply now attached to these papers]

Shelagh McKinlay
Clerk to the Committee
Dear Mr Cameron

AUDIT COMMITTEE: AGS REPORT

At its meeting on 26 October 2004, the Audit Committee considered a report by the Auditor General for Scotland (AGS) entitled “Scottish Prison Service: Contract for the provision of prisoner escort and court custody services”. I attach the Official Report of that meeting for your information. I am writing on the Committee’s behalf to inform you as to the outcome of that meeting.

The Committee agreed not to hold an inquiry on the report at this stage but may return to the issue on publication of any future AGS report on the issue. The Committee also agreed to seek further information on the issue.

I would therefore be grateful for information on the following issues:

- Progress on finalising high level contingency plans to ensure continuity of service in the event that Reliance withdraws or is withdrawn from the contract;
- Information on roll-out of the contract across Scotland;
- When you consider that the contract will have “bedded in” and it will be possible to gauge whether the contract objectives have been achieved; and
- Plans to perform a post implementation review of the contract and when the results will be available.

I would be grateful for a response by 22 November 2004.

Should you require any further information please do not hesitate to contact me.

Yours sincerely

Shelagh McKinlay
Clerk to the Committee
"Scottish Prison Service: Contract for the provision of prisoner escort and court custody services"

10:08

The Convener: We now move on to item 2, on the Scottish Prison Service. I invite the Auditor General to brief the committee on the report that was recently published by Audit Scotland.

Mr Robert Black (Auditor General for Scotland): In November 2003, the Scottish Prison Service signed a contract, on behalf of Scottish ministers, with Reliance Secure Task Management Ltd—commonly referred to as Reliance—for the provision of prisoner escort and court custody services throughout Scotland. The contract is worth about £126 million over seven years and covers the transport of prisoners between prisons and police stations, for example, and court, and the safe custody of prisoners while at court. In 2003-04, there were some 140,000 prisoner escorts throughout Scotland.

The contract is based on a phased programme of implementation, which started in Glasgow and the surrounding area from April 2004. A further four stages were planned. It was originally intended that Reliance would be responsible for all prisoner escort and court custody services in Scotland by October 2004.

From the very start of the contract in April, there has been a lot of media attention because of a number of incidents involving alleged escapes or releases in error. The Minister for Justice asked me to bring forward audit work relating to the procurement of the contract and, under the circumstances, I agreed to do that. This is not a normal audit report but the result of a special exercise that I have undertaken, through the audit resource, in order to report early on a matter that is of public concern and of concern to the minister.

I asked Audit Scotland to review four key issues: first, whether the Scottish Prison Service had set clear objectives for the contract, consistent with achieving value for money; secondly, whether the SPS properly specified and awarded the contract; thirdly, whether the SPS established robust and clear arrangements for managing the contract as soon as the contract period began and for monitoring the contractor's performance; and, finally, to consider how well the SPS is implementing and monitoring the contract in the early days.

The report that I have made to the Parliament is based on the auditors' examination. It might be

Col 767

Helpful if I summarise my findings in relation to the key issues that I mentioned, the first of which was contract objectives. Prior to the introduction of the Reliance contract, the police undertook the main work of managing prisoners at court and the Scottish Prison Service escorted prisoners to and from court. However, there was concern that the arrangements involved the duplication of resources, with little co-
ordination between police, prisons and courts. Vehicles with spare capacity could pass each other en route to the same court. A review team was established and on the basis of the team's findings the SPS, with ministerial approval, decided in January 2002 to contract out prisoner escort and court custody services. The SPS set clear objectives for the project to procure the restructured service and contracted out prisoner escort and court custody services because that would provide an opportunity for the better use of resources. The existing arrangement involved the use of police officers and prison officials for duties that did not require the full range of legislative powers or skills that such people have. It was intended that the contract would remove duplication of effort and free up police officers and prison staff for other duties. It would also allow more efficient practices to be introduced.

It is too early to say whether those objectives have been achieved. However, the SPS has estimated that the service that Reliance provides will produce savings of about £20 million over the seven years of the life of the contract. The Prison Service will carry out a review of the contract after Reliance has taken over full responsibility for prisoner escorting and court custody. Clearly, the review should consider the extent to which the original aims of the project have been achieved.

Secondly, the specification and award of the contract were generally handled well. The SPS used consultants to help to determine how long the contract should run and took on board lessons from England and Wales, where prisoner escort duties have been contracted out for a number of years. The contract is based on the outputs that are expected to be delivered and not on staff and other resource inputs. The invitation to tender specifies the range of activities and tasks to be performed and there are quality requirements that relate to prisoner care, security, the maintenance of good order and the general contribution to the justice system. In general, the auditors found that the information provided at tender was sufficient to enable high-quality bids to be made. Some of the background information could have been better, but the SPS and partner agencies subsequently provided Reliance with activity data and discussed proposed staffing numbers for each phase of contract implementation.

The SPS followed good practice in managing the procurement process. There was a comprehensive project plan and the SPS took steps to identify and manage risks to the achievement of the project. The tendering process was in accordance with the relevant European Community regulations. Five companies expressed an interest in the contract and three bids were considered. The number of bids was comparatively small, but the SPS considers that the three bids that it received represented a good competition in the circumstances, given the specialist nature of the services being tendered. The SPS subjected the three bids to a technical, financial, legal and commercial assessment. Reliance's bid was the cheapest and resulted in a contract value of £126 million, some £20 million below what the SPS considered that it would cost to retain the service in-house. Reliance was ranked third in the technical evaluation, but the SPS considered that the level of service offered fully met its requirements. The SPS therefore concluded that the bid from Reliance promised the best value for money.

Finally, I mentioned contract management and monitoring. Because of early problems, the timetable for the contract's implementation has been extended to early
2005. The SPS and its partner agencies must indicate their agreement before the contract is rolled out throughout Scotland. However, contingency plans are still to be finalised to ensure continuity of service should Reliance withdraw or be withdrawn from the contract.

A key strength of the new arrangements is that Reliance is required to report regularly on performance against a set of 33 performance measures, which cover delivery of the service, prisoner care, security of custody and the maintenance of good order. Failure to deliver against the performance measures results in reduced payments to Reliance. There are early signs that Reliance's performance is improving and I have asked the auditors to continue to review how the SPS monitors and reports on Reliance's performance.

As always, my colleagues and I will be happy to answer any questions that the committee might have.

10:15

Margaret Jamieson (Kilmarnock and Loudoun) (Lab): Throughout the report, it appears that the information that was available from the police and the SPS about what happened in the past was not reliable. I am therefore concerned that some of the anticipated savings might well not be achieved, but there seems to be no tracking of that. Do you have further information on that point?

Col 769

I am also concerned about what would happen if the contract were to go belly up. How long has the SPS been in discussions to finalise the high-level contingency plan and is there a timescale for the plan's completion?

Finally, Mr Riall of Reliance dismissed your report in a newspaper article on 3 October. Will you comment on that?

Mr Black: You asked first about the information that was available. The SPS has advised us that one of the subsidiary reasons for considering the form of contract that was used was the fact that in the past very poor information about performance was available. It is not unfair to say that, generally, the agencies that carried out the service in the past did not retain and manage good information about how the service was delivered. As a consequence, the SPS reached the general conclusion that it would not be practical to attempt to gather such information so long after the event, which meant that limited information could be provided to potential tenderers about what they would be taking on. I referred to that in my opening comments.

I will consider each of your questions in turn, as my colleagues might expand on my answers and give you more assistance.

Arwel Roberts (Audit Scotland): As the Auditor General said, the main difference between the service that was provided in-house and the service that Reliance performs is that the former was based on input whereas the latter is based on outputs. There is a shortage of information about input and even if such information were available it would be difficult to compare it with the output performance against which the new contract is measured—that is not to diminish the disadvantage of not having the information but to recognise that it would be difficult to compare one type of information with the other.
Margaret Jamieson: That is why I am concerned. How can we say that savings are being made when we do not know how many hours used to be input by the SPS, the police and Kilmarnock prison, for example? Where does the figure come from?

Arwel Roberts: The figure of £20 million represents savings against the calculation of what might be called the public sector comparator. It is a calculation of what the public sector cost of continuing to pay for the service in-house would have been, as against what the contract is costing. It is a calculation, but with the disadvantage that it does not have all the information behind it about what was being spent.

Margaret Jamieson: So the figure may not be as robust as we would like.

Col 770

Mr Black: I am sure that the Scottish Prison Service would say that it was not an absolutely accurate, guaranteed figure but the best estimate, using the public sector comparator, of what could be saved.

Your second question was about what would happen in the event of a contract default. I emphasise that the Prison Service does not think that that is likely. However, our role as auditors is to be cautious in such matters, which is why we asked the Prison Service about its contingency plans in case either party feels obliged to withdraw from the contract because of performance failure or other reasons. Because the operation of the contract is at an early stage, full arrangements are still not in place, but when we closed down our study, discussions were taking place with partner agencies with the aim of putting in place contingency plans for continuity of service in case of failure for whatever reason. For example, if vehicles were no longer available, something would have to be put in place quickly to keep the service running. The Prison Service is considering that issue seriously.

As I say, the Prison Service believes that it is highly unlikely that the contract will fail, but if it did fail for any reason, significant penalty clauses and liquidated damages would be payable by the contractor. It would therefore be inappropriate for the committee to have a concern on that matter at this time.

Arwel Roberts: The concept of a contingency may for some people imply a catastrophic failure. However, if the contract is not a success, it will not necessarily close suddenly—it could wind down and leave time for contingency measures to be put in place. That is not to say that a catastrophic failure is impossible, but it is the least likely outcome.

Margaret Jamieson: The Auditor General said that it would be "inappropriate" for the committee to be concerned about such a failure. Why did you use that term?

Mr Black: The contract has been properly formed and at present is being rolled out with a longer timescale. I assure the committee that I see no immediate prospect that the contract will not continue to plan.

Mr Andrew Welsh (Angus) (SNP): What is the plan? You say that the contract is properly formed, but it strikes me that it was based on poor or limited information. The contract is supposed to save £20 million. The use of penalty clauses comes after the event—we should not need them because we should get the saving that is predicted. However, the estimate for the saving seems to be poorly based. Is it not the case that the SPS estimate of a saving of £20 million was
largely speculative, especially given that the costing was not based on specific activity data?

**The Convener:** Before the Auditor General answers that question, I ask him to answer Margaret Jamieson's third question, which was about a newspaper report.

**Mr Black:** I am sorry, but you have the advantage on me on that issue—I may not have been around when the press report came out. Will Margaret Jamieson help me with that?

**Margaret Jamieson:** The report was by the home affairs correspondent for *Scotland on Sunday*, Kate Foster, and appeared in that newspaper on 3 October 2004. It states:

"Riall dismissed the criticisms in the report despite admitting he had not read it on the day it was officially published, but only seen press reports."

I will provide the Auditor General with a copy of the article, which contains a number of concerns that I would like to discuss in private.

**Mr Black:** Thank you for helping me with that. I am sure that the committee appreciates that my role as the Auditor General is to report to Parliament on matters relating to accounts for which accountable officers are responsible. I do not have powers or duties to report on contractors or what they might say.

**The Convener:** Very good. We will now deal with Andrew Welsh's question.

**Mr Black:** As Arwel Roberts and I said, the Prison Service calculated its best estimate of the potential saving using the public sector comparator, which is an appropriate action for all departments or agencies in considering such matters. I would not wish to hold bodies to a requirement that there be an exact calculation of savings that will eventually be achieved. I imagine that the Prison Service takes useful knowledge from the fact that the Reliance tender was the lowest of the three tenders and that there was good competition for what is a fairly specialist job. The Prison Service accepted the lowest tender and is satisfied with the technical specification. It is not my role to second guess the decisions that the Prison Service took, but I am satisfied that it undertook a proper and robust process and that, under the circumstances, it probably let the contract well.

**Mr Welsh:** The contract could be technically correct, but it may not have been sensible. Is it the case that Reliance was supplied with specific activity data and advice on staffing numbers only after the contract was awarded?

**Arwel Roberts:** Reliance was provided with that information when the tenders were considered. Before the contract was let, Reliance and other

potential contractors were given information. Subsequently, after the contract was let, Reliance was given more information.

**Mr Welsh:** It is the word "subsequently" that bothers me. How significant was the subsequent information? When the contract was signed, how much did Reliance know about what it had to do?
Arwel Roberts: I refer you to paragraph 2.11 of our report, which states:

"The invitation to tender ... did outline indicative levels of activity ... Both documents also outlined 'quality' requirements".

The point is that information was available when potential contractors were invited to tender, but that it was subsequently supplemented with more information when Reliance asked for that.

Mr Welsh: How significant was the subsequent information? What was the contract based on when it was signed? Was the basis of the awarding of the contract adequate, or was there important subsequent information that would have affected negotiations?

Arwel Roberts: The Prison Service reacted to Reliance's request for additional information. Reliance clearly did not feel that the information in the invitation to tender was sufficient, so that information was subsequently supplemented.

Mr Black: In tendering processes for public contracts, it is not uncommon for potential tenderers to ask for additional information. Paragraphs 2.12 and 2.13 of our report, which attempt to explain what happened as precisely as possible, state:

"Although the invitation to tender was a comprehensive document, all bidders had the opportunity to ask questions throughout the process. Bidders used this opportunity to clarify ambiguous points and to request further information. On a periodic basis, the SPS issued to all bidders its responses to questions asked ... One bidder asked about the availability of a more extensive breakdown of police escorts activity to identify peaks and troughs. The SPS's response indicated that 'Mondays and days following public holidays would be particularly busy days'. It also supplied bidders with activity data on a daily basis for Glasgow courts for the month of September 2002. This period covered a public holiday and clearly indicated that activity increased on Mondays and after public holidays".

My judgment is that the Prison Service was as helpful as possible in supplying information and that potential tenderers for the service would have had sufficient knowledge of the business to be able to use the information in order to structure their tenders appropriately.

10:30

Mr Welsh: How realistic was the £20 million projected saving?

Mr Black: I have attempted to answer that question; any more specific questions would have to be put to the accountable officer in person. However, I assure the committee that the Scottish Prison Service used its best endeavours to compare bids with the public sector comparator, based on the best information that it had. That is a significant assurance.

Mr Welsh: On management and monitoring, you say that the SPS

"should also finalise those service agreements documenting the relationship between the SPS and other agency partners which are still outstanding."
Will you give us an indication of how many such agreements are outstanding and of the content of such agreements? How difficult a task will it be to complete them?

**Mr Black:** We will find it difficult to provide a comprehensive and reliable response to that question because, as I described, the audit is unusual in that it was undertaken partly in response to a request from the minister to provide independent assurance and the contract is still bedding in. Moreover, much of the information for which you ask is not fully available to us and the situation changes weekly as work proceeds to bed the contract in. However, I ask the team whether it can help you with some information on that.

**Graeme Greenhill (Audit Scotland):** I refer the committee to paragraph 3.8, which is on page 15 of the report. It indicates that the SPS has finalised service-level agreements with individual prison establishments, the Scottish Court Service, the Crown Office and Procurator Fiscal Service and four local authorities. Service-level agreements have still to be finalised with the remaining local authorities and the eight Scottish police forces, but there is a working group that is seeking to finalise those agreements as soon as possible.

**Mr Welsh:** It strikes me that the situation is still in the melting pot rather than being set and in operation. Have any of the penalty clauses been implemented yet?

**Arwel Roberts:** We understand that they have.

**Robin Harper (Lothians) (Green):** In paragraph 6 of the report's summary, you say:

"The overall aim of contracting out was to free up time for police and prison officers and to secure better value for money."

You have explained to us that securing better value for money means making a £20 million saving. You have also indicated that we do not have sound figures from the SPS—its figures are indicative—but I would have thought that, where the police are concerned, it would be relatively easy to find out, using police time records and log sheets, how much time and money the police were putting into prisoner escorts before the contract was let and whether the contract represents significant savings for the police. Will such information from the police become available?

**Mr Black:** On the point about value for money being equivalent to the £20 million saving, neither the SPS nor Audit Scotland would expect best value to be equivalent to cost reduction. The SPS is hopeful that it will get a better quality of service, as well as a more efficient one, measured against the public sector comparator.

On the main part of the question, the reality is that the police forces do not have accurate, detailed records of how police time was deployed in prisoner escort services. That has been a problem for the Prison Service and it will make a before-and-after comparison more challenging. However, it will be possible in future to undertake an evaluation of whether the service that is being delivered conforms to the specification. Perhaps the team can add to that.

**Arwel Roberts:** I can only repeat the point that because the contract with Reliance is based on a definition of outputs, to make a comparison with historical inputs might...
not give an accurate picture of the value for money to which Robin Harper refers. I stress that the £20 million figure is based on an estimate, due to the difficulty of obtaining information. The concept of the public sector comparator is similar to the one that is used when a contract is put together under the private finance initiative. Under that system, estimates are made of the likely public cost against the private cost. Similarly, with the prisoner escort contract, an estimate of the cost of delivering a particular output was made and compared with the cost that Reliance offered. That is what influences the cost element of value for money, separately from quality.

Robin Harper: I take the Auditor General's point about best value involving quality. Is he saying that, in our monitoring of the audit over the years to come, we should concentrate entirely on outputs?

Mr Black: Yes.

The Convener: Some aspects of the contract are commercially confidential. To what extent might that change in the future as a result of the operation of the freedom of information legislation and to what extent would more availability of commercial information be in the public interest? Would it help to drive down costs as competitors become better able to compare costs?

Mr Black: It is fair to predict that the freedom of information legislation will make it more difficult for any party to use commercial confidentiality as a reason for withholding information that would otherwise be put into the public domain. That would have to be considered case by case. In the instance about which we are talking, the contract provides for Reliance to have significant control over the release of what it considers to be commercial information.

It is a matter of speculation whether the release of more commercially confidential information would lead to better competition. It could be argued that more information about the lowest cost would cause potential bidders to sharpen their pencils more but, in an imperfect market, it might in theory—not in the case of the prisoner escort contract, I am sure—lead to collusion between potential bidders. Therefore, it is difficult to predict in general terms how the greater release of such information would play out. I suspect that it would depend on the specific markets for individual goods and services.

Mr Welsh: One thing that still bothers me is that Reliance’s bid was the cheapest and that the present tendering system tends to lead to the cheapest bid being accepted. Reliance’s bid was accepted even though it was not technically the best, but it had enough in it to satisfy the technical requirements and was the cheapest. However, there was no activity data, and it bothers me that those involved seem to have talked about the detailed activity in an activity-based process after the contract had been signed. Is that normal practice and would you recommend it?

Mr Black: I apologise, because I am not giving a good explanation of what happened in the contracting-out process. The SPS specified the contract appropriately and included sufficient information for the tenderers to prepare their bids. In the course of preparing their bids, the tenderers came back and asked for various pieces of additional information, which were provided. That in turn led to a good competition under the circumstances. The lowest bid was accepted, but only
after an extensive technical evaluation, which included a range of factors that I have
detailed in the report. Therefore, there was a careful assessment of whether the
contractor with the lowest bid was capable of delivering the required standard of
service, and the Prison Service satisfied itself that that was the case.

As I have said in the past and again this morning, it is not for me to second-guess a
decision of management. However, I am satisfied that the processes that the
tenderers went through were appropriate and robust.

Mr Welsh: Thank you for that clarification.

The Convener: With that, we close agenda item 2. Members will be able to
consider, under a later agenda item, what action, if any, the committee wishes to
take in regard to the discussion that we have just had.
AUDIT COMMITTEE: AGS REPORT

Thank you for your letter of 4 November 2004. We have studied the transcript and we agree with what the Auditor General says both there and in his report on the Prisoner Escort and Court Custody Service contract.

In particular, the setting of clear objectives for the project in the light of the considerable deficiencies of the previous escorting systems provided a solid foundation for the multi-agency review team which developed the specification for the future of escorting. We at the SPS believed that the specification and subsequent award of the contract was handled well and are pleased that the Auditor General agrees. Post implementation, the regular reporting of performance information for the first time gives confidence that the services is operating properly and that where faults are identified, appropriate action is taken.

After 3 previous meetings, the first meeting of an expanded contingency planning group is due to sit meet shortly under the chairmanship of Peter Withers, Director of Prison Services. Membership of this group is taken from across all partners and involves relevant personnel from Crown Office, Scottish Courts Service, SPS and the police.

All the core aspects of the contract (that is, escorting of prisoners to and from court from Police and Prison custody) and the management of court custody units have now been implemented across Scotland. We are in the process of commissioning the final two Phases of the rollout of the contract which cover non–core escorts, that is mainly the "traditional" prison escorts such as prison to prison, hospital appointments and confinement, funeral and marriage escorts and approved escorted leaves.
It is difficult to say exactly when the contract will have fully bedded in. We have already imposed some changes to the implementation programme where SPS felt smooth rollout would be assisted. But we are already clear that many of the key objectives of the contract have already been achieved. Though accurate data of the position before the contract commenced is not available, we believe that prisoner security has been improved, there is better adherence to safe systems of work and health & safety considerations, Agencies involved have improved their procedures, there is greater transparency in document and other administrative handling, the efficiency of escorts is likely to have improved compared to when the police and SPS overlapped (though this will not be fully realised until the contract has rolled out completely) and there are other wider benefits stemming from the redeployment of Police officers and reduced disruption to prison regimes to meet unpredictable escort demands. In all we consider that the contract is already delivering very considerable improvements to what went before.

As part of a review of the contract, Peter Withers, Director of Prison Services, has established a performance review system with the Directors of Reliance Secure Task Management Ltd, but a post implementation review needs to await a full year's running of the contract.

I am copying this letter to the Minister for Justice.

TONY CAMERON
Chief Executive
Dear Ms Goldie

FURTHER ROLL-OUT OF RELIANCE ESCORTING CONTRACT

You will recall that when I appeared before your Committee on 8 June, I gave a commitment to tell you of any further roll-out of the Escorting Contract with Reliance Custodial Services. On 18 October you were advised that Reliance were shadowing the escorts function in the Tayside and Fife area. HMPs Perth, Castle Huntly and Noranside, 6 Sheriff and 7 District Courts and all of the custody units of Tayside and Fife Police are involved in this phase.

The SPS have conducted a rigorous assessment of Reliance’s readiness to proceed based on the criteria set out to the Committee on 8 June and have provided formal assurance that Reliance are now ready to roll-out this phase of the contract. In addition, I have received formal statements of assurance from the Chief Executives of the Crown Office and Procurator Fiscal Service, the Scottish Court Service and the Chief Constables of Tayside and Fife Police, all of whom have indicated that their organisations are ready for roll-out.

The Chief Executive of the SPS has therefore authorised Reliance to roll out Phase 3B of the Contract in the Tayside and Fife areas on Tuesday 9 November 2004.

A comprehensive, evidence-based Assessment of Readiness is being made before each phase of the roll-out. I receive assurances from SPS and others based on the outcome of that Assessment of Readiness before each phase of the roll-out.

A copy of this letter has also been sent to the Convener and Clerk of Justice 1 Committee and 5 copies lodged in SPICE.

CATHY JAMIESON
Minister for Justice
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15 November 2004

Annabel Goldie MSP
Chair, Justice 2 Committee
The Scottish Parliament
EDINBURGH
EH99 1SP

Dear Ms Goldie

FURTHER ROLL-OUT OF RELIANCE ESCORTING CONTRACT

You will recall that when I appeared before your Committee on 8 June, I gave a commitment to tell you of any further roll-out of the Escorting Contract with Reliance Custodial Services. On 19 October you were advised that Reliance were shadowing the escorts function in the Grampian & Highlands area. HMPs Aberdeen, Inverness and Peterhead, 21 Sheriff and 21 District Courts and all of the custody units of Northern Constabulary and Grampian Police are involved in this phase.

The SPS have conducted a comprehensive assessment of Reliance’s readiness to proceed based on the criteria set out to the Committee on 8 June and have provided formal assurance that Reliance are now ready to roll-out this phase of the contract. In addition, I have received formal statements of assurance from the Chief Executives of the Crown Office and Procurator Fiscal Service, the Scottish Court Service and the Chief Constables of Northern Constabulary and Grampian Police, all of whom have indicated that their organisations are ready for roll-out.

The Chief Executive of the SPS has therefore authorised Reliance to roll out Phase 4 of the Contract in the Grampians & Highlands areas on Tuesday 16 November 2004.

A copy of this letter has also been sent to the Convener and Clerk of Justice 1 Committee and 5 copies lodged in SPICE.

CATHY JAMIESON
1. In May of this year, the Justice 2 Committee took evidence, and reported, on the Constitutional Reform Bill currently before the UK Parliament. Because the Bill followed the unusual procedure of being referred to a Special Select Committee of the House of Lords, it is only now completing its passage through the House of Lords. The Executive has therefore at this point brought forward a Sewel Motion and Memorandum which has been circulated to Members along with a covering letter from the Lord Advocate.

2. The Memorandum summarises the provisions of the Bill and sets out the areas where the consent of the Scottish Parliament is sought to legislation in the UK Parliament. The covering letter highlights changes to the Bill since it was last considered by the Committee and also responds to the recommendations in the Justice 2 Committee’s report. A summary of the Justice 2 Committee’s report recommendations is attached.

3. In preparing its report, the Committee heard evidence from the Law Society of Scotland, the Faculty of Advocates, the Lord President and Professor Hector MacQueen. All these witnesses have been sent a copy of the Memorandum and asked to submit any comments to the Committee by 9 December. The Lord Advocate has been invited to give evidence to the Committee on 14 December.

4. In considering a Sewel motion, there is no prescribed procedure and it is up to the Committee to decide whether it wants to report to Parliament. If the Committee does want to publish a report, a draft could be considered at its meeting on 11 January, allowing the motion to be considered at the plenary meeting on 13 January before the Bill completes its House of Lords passage.

5. **The Committee is invited to note the proposed approach.**

Clerk to the Committee

November 2004
Justice 2 Committee 4th Report 2004: Constitutional Reform Bill

Summary of Recommendations

1. The Committee agrees with the Government’s case for establishing a supreme court.\(^1\)

2. The Committee agreed that appeals to the supreme court should be on the same range of cases as can currently be appealed to the House of Lords.\(^2\) The Committee also agreed that no requirement for leave to appeal should be introduced for Scottish cases.

3. The proposed amendment to protect the separate identity of Scots law is an important and necessary safeguard. The Committee welcomes it and will wish to scrutinise the detail of it at a later stage.

4. The Committee concludes that it would be desirable for there to be a majority of Scottish judges in all Scottish cases but that this should be an absolute requirement in cases involving devolution issues. The Committee further concludes that such an arrangement should not depend merely on convention and we look forward to hearing further from the Lord Advocate how it might be enshrined in the new supreme court.

5. The Committee does not consider at this stage that it has sufficient evidence to reach a view on the issues raised in relation to administration and funding. We ask the Lord Advocate to bring forward more advanced thinking about the funding implications for Scotland when the Scottish Executive tables its Sewel motion.

6. In relation to the appointments procedure, while the majority of best qualified candidates may be drawn from the Court of Session, given the current lack of gender and racial equality in the higher judiciary we consider it essential that the appointments commission should look at the widest pool of candidates. We are therefore content with the proposals in the bill.\(^3\)

7. Clause 1 of the Bill places a duty on UK Ministers to uphold the independence of the judiciary. The Committee concludes that, if such a duty is required for Scotland, the vehicle should be a Scottish Parliament bill and in those circumstances the Scottish Executive should seek an early opportunity to legislate.

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\(^1\) Annabel Goldie dissented on the basis that the case for change had not been made. Nicola Sturgeon dissented on the basis that Scottish appeals should be heard by a Scottish court.

\(^2\) Nicola Sturgeon dissented on the basis that Scottish civil cases should not be appealable to a UK supreme court.

\(^3\) Annabel Goldie dissented on the basis that supreme court judges should be promoted from the Court of Session.
CONSTITUTIONAL REFORM: SUPREME COURT

The Constitutional Reform Bill including proposals for the establishment of a UK Supreme Court was introduced by the UK Government into the House of Lords in February of this year. At Second Reading of the Bill, it was referred to a Special Select Committee for the purpose of giving detailed consideration to and hearing evidence about the Government’s proposals. The proposal to create a new Supreme Court was debated in the Parliament on an Executive Motion on 29 January.

In parallel with the evidence taken by the Special Select Committee in the UK Parliament, the Justice 2 Committee took evidence from a number of witnesses (including myself) before issuing a report to the Parliament on its findings (SP Paper 163).

Due to the unusual nature of the Parliamentary process at Westminster in relation to this Bill, I felt that it was premature to lodge the Sewel Motion and Memorandum as would normally be the case.

As consideration of the UK Bill by the Special Select Committee has now been completed and the provisions in relation to the Supreme Court have been debated, the content of the Bill is now much clearer, at least as it stands towards the end of its consideration by the House of Lords.

Therefore, it is at this stage appropriate for the Executive to proceed with the lodging
of the Sewel Motion and I confirm that this has been done today. A copy of the Sewel Motion and Memorandum is enclosed with this letter.

The Minister for Parliamentary Business will discuss the finding of an appropriate date for the Sewel debate with the Parliamentary authorities. In doing so, I have asked that they ensure that every opportunity is given to both of the Justice Committees (in particular Justice 2 Committee) to resume their consideration of the Bill. I am mindful though of the desirability of giving an opportunity for a Sewel Motion to be considered by the full Parliament before the Constitutional Reform Bill leaves the House of Lords.

In order to assist the resumed consideration of the Bill by Justice 2 Committee, I would set out briefly some comments on the changes to the Bill since last considered by the Justice Committees and make some comments on the report to the Parliament made by the Justice 2 Committee.

In relation to the Bill itself:

a. The system of judicial appointments originally introduced in the Bill has been amended and can now be seen from clauses 20 to 25 and Schedule 9. The Memorandum to the Sewel Motion summarises the procedure at paragraphs 6 to 9.

b. In response to concerns of the Executive and of others on the question of the appropriate number of Scottish appointees, I would draw the Committees’ attention to clause 21(5) which obliges the ad hoc Supreme Court Selection Commission to “ensure that between them the Judges will have knowledge of, and experience of practice in, the law of each part of the United Kingdom”. I remain of the view that this strikes the right balance in ensuring adequate Scottish representation on the Bench without imposing inflexible quotas.

c. Following discussions between the DCA, my officials and the Lord President the drafting is well advanced for the tabling of an amendment putting beyond doubt that the decisions of the Court should respect the separate and distinctive legal systems within the UK. This was a matter of concern to the Lord President and I welcome the willingness of the DCA to agree the benefit of clarification of this point.
In relation to the report of the Justice 2 Committee, this was a good opportunity for the Committee to hear from a range of witnesses holding diverse views on the main line issues of the case in principle for the creation of a Supreme Court; the merits and demerits of changing the present system whereby civil but not criminal non-devolution cases can progress to a final UK Court of Appeal; and whether there was a risk of longer term dilution of the separate identity of Scots law. The evidence taken and the report that followed also went on to consider more detailed issues as to the practical operation of the new Court, including the question of how many Scottish Judges there should be.

I welcome the Committee’s agreement that the case is made for the establishment of a Supreme Court and that appeals to the Supreme Court should be on the same range of cases as can currently be taken to the House of Lords. I also agree that no requirement for leave for appeals should be introduced for Scottish cases.

The Committee called for an amendment to clarify that a decision in an appeal emanating from England shall not be determinative of Scots law. As I indicate above, I too support such an amendment. The text of that amendment is not available as of today’s date but I hope that this can be made available to you very shortly.

In relation to the number of Scottish Judges, I set out above what I consider to be the right way forward on this issue. Clause 21(5) as it now stands, does not rely simply on convention alone but builds in a flexible appointments system of ensuring that permanent members of the Supreme Court with Scottish qualifications are available for allocation to cases.

I must say though that I do not agree with the conclusion reached by the Committee that a majority of Scottish Judges in all Scottish cases should be an absolute requirement in proceedings involving devolution issues. The Constitutional nature of devolution issues (often including human rights issues) have UK wide significance and I do not believe that an institutionalised and separate court within a court is consistent with the concept of a UK wide Supreme Court.

Furthermore, as far as allocation of judges to individual cases is concerned, where it is considered that (in the circumstances of the case) there ought to be a Scottish majority,
having regard to the subject matter of the case, there is and will remain the option of bringing in additional members to sit in such cases. For Scottish purposes, these additional members would be Inner House Court of Session Judges.

The Committee in its report raises questions in relation to the Scottish position on funding. I would draw the attention of the Committees to paragraphs 25 to 27 of the Sewel Memorandum which sets out those arrangements.

Lastly, an amendment was made during House of Lords consideration in relation to Part I of the Bill, which had the effect of leaving questions of independence of Judges to a Scottish Parliamentary Bill. This was done in the context of amendment to Clause 1. I agree with the Report of the Committee that this is appropriate and can confirm that the intention of the Executive is to bring forward legislation in that respect, at the earliest appropriate opportunity.

I hope that these comments are of assistance for the Committee in its resumed consideration of this Bill.

Due to the interest of both Justice Committees in this Bill, I am writing in similar terms to the Chair of the Justice 1 Committee.

COLIN BOYD
Memorandum

Constitutional Reform Bill– Supreme Court

Motion : That the Parliament endorses the principle of having a clear and transparent separation between the judiciary and the legislature and agrees that provisions in the Constitutional Reform Bill establishing a Supreme Court (and provisions consequential thereto), so far as they relate to matters within the legislative competence of the Parliament, should be considered by the UK Parliament.

Introduction

1. The provisions of the Constitutional Reform Bill relating to the proposed establishment of a UK Supreme Court flow from the consultation document Constitutional Reform – A Supreme Court for the United Kingdom, issued by the Department for Constitutional Affairs (DCA) in July 2003. The consultation period ended on 7 November 2003. The provisions as they affect Scotland were debated before the Scottish Parliament on a Motion of the Executive on 29 January 2004. The Bill had its First Reading in the House of Lords on 24 February 2004 and at Second Reading was referred to a Special Select Committee of the House of Lords for detailed consideration. That Committee completed its consideration of the Bill in June. The Bill was then subject to consideration by the House of Lords sitting as a Committee of the whole House, which is not as yet complete. This note sets out the background to and content of the Bill, as it stands at present.

Background

2. Part 2 of the Bill makes provision for the setting up of a Supreme Court for the United Kingdom exercising the same appellate jurisdictions as currently exercised by the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council. It also makes provision for the appointment of judges to the Court including the number of judges and their terms and conditions of employment and in relation to the funding and administration of the court. It disqualifies judges holding office in the proposed new Supreme Court and other judges in full time employment from sitting and voting in the House of Lords.

3. At present the exercise of the highest level of jurisdiction in the United
Kingdom is shared between the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council. The Appellate Committee of the House of Lords receives appeals in civil and criminal cases from the courts in England and Wales and Northern Ireland, and in civil cases, from Scotland. The Judicial Committee of the Privy Council, in addition to its overseas and ecclesiastical jurisdiction, considers questions as to whether the Scottish Parliament, the National Assembly for Wales and the Northern Ireland Assembly are acting within their legal powers. That jurisdiction, in relation to Scotland, was established by virtue of the Scotland Act 1998.

Detailed content of the Bill

4. Parts 1 and 3 of the Bill, which are not the subject of this Memorandum, make provision to abolish the office of the Lord Chancellor and redistribute the responsibilities of that office (including in relation to the organisation of the Courts in England and Wales) (clauses 1 to 16); to create a Judicial Appointments Commission (clauses 52 to 89); and to create a complaints procedure and a procedure for disciplining judges in England and Wales (clauses 90 to 98).

5. Part 2 of the Bill at clause 17 establishes a Supreme Court for the United Kingdom which will consist of a maximum of 12 judges, including a President and Deputy President. The judges are to be known as “Justices of the Supreme Court”. The number of judges may be increased by Her Majesty by Order in Council, laid before each House of the UK Parliament. The Bill provides that those judges holding office as Lords of Appeal in Ordinary at the commencement date of the Act will become the first judges of the Supreme Court (clause 18). Qualification for appointment in future as a judge will remain unchanged (clause 19).

6. This Part of the Bill goes on to set out a system of Judicial appointments for the Court (clauses 20-25 and Schedule 9). The system involves the Secretary of State for Constitutional Affairs establishing an ad hoc selection commission, when a vacancy is imminent or has occurred, comprising the President and Deputy President of the Court and one member of the Judicial Appointments Commission/Boards for each of Scotland; England and Wales; and Northern Ireland. The member of the selection commission from each of the Judicial Appointments Commission/Boards is to be appointed on the recommendation of that particular Commission/Board.

7. The selection commission will be chaired by the President of the Court. It must ensure that selection is made on merit and, in doing so, must ensure that the Judges appointed appropriately reflect knowledge and experience of the different legal jurisdictions within the UK (clause 21(5)). The selection commission must consult the senior judiciary in each jurisdiction including the Lord President of the Court of Session and the First Minister as part of the selection process (whether or not the vacancy arises in respect of a Judge who met the criterion at clause 21(5) in relation to Scotland).

8. The selection commission will make a recommendation to the Secretary of State for consideration. He or she may accept or reject the recommendation or may
require the commission to reconsider the selection. Again, an obligation is imposed
to consult with the Lord President and First Minister, on receipt of the
recommendation.

9. The Bill further specifies the tenure of judicial office and re-enacts the current
requirement to take the oath of allegiance and the judicial oath. It specifies the
entitlement of judges to salaries and makes provision for their removal, resignation,
pension and retirement at the age of 75, as is currently the case (clauses 26-31).

10. The Bill makes provision for the Court to be able to call upon additional judges
as necessary and appropriate, either from among senior serving judges or from a
supplementary panel of judges (clauses 32 and 33). A person who holds office as a
senior territorial judge may act as a judge at the request of the President of the
Supreme Court. “Senior territorial judge” includes a judge of the Inner House of the
Court of Session. A person becomes a member of the supplementary panel on
ceasing to hold office as a judge of the Supreme Court, or as a senior territorial judge,
provided that his or her membership of the panel is approved in writing by the
President of the Supreme Court and provided that the President of the Court gives the
Secretary of State notice in writing of such approval. There is also provision for the
membership of the supplementary panel on commencement: in effect, those (other
than the Lords of Appeal in Ordinary) who are at present eligible to sit in judicial
proceedings in the House of Lords and do not at present also hold office as senior
territorial judges.

11. Clause 34 deals with the jurisdiction of the Court. It states at subsection (3)
that “An appeal lies to the Court from any order or judgment of a court in Scotland if
an appeal lay from that court to the House of Lords at or immediately before the
commencement of this section.” Subsection (4) (as read with Schedule 10) makes
provision for transferring other jurisdiction (including in appeals from Northern
Ireland, and in devolution issues) from the House of Lords to the Supreme Court.
Taken together, these provisions have the effect of transferring to the Supreme Court
jurisdiction to hear those Scottish Appeals formerly heard by the Appellate
Committee of the House of Lords and the Judicial Committee of the Privy Council.
Only the former falls within devolved competence.

12. In order to reflect and respond to concerns as to the jurisdiction in relation to
Scotland, the Executive is exploring the possibility of making an express provision
ensuring that a decision in a case emanating from one part of the UK is binding only
in the jurisdiction from which it came, reflecting present House of Lords
jurisprudence. The Executive is in consultation with the Lord President of the Court
of Session in relation to the detail of such a provision.

13. The Bill provides that the Court will be duly constituted where there are a
minimum of three judges, consists of uneven numbers and has at least one permanent
judge. The Bill also makes provision for the appointment of specialist advisers to
assist the Court, for the making of procedural rules of court by the President of the
Court, and to permit photography subject to the control of the Court, mirroring the
position of the higher courts in Scotland (clauses 35-40).
14. There is placed on the Secretary of State for Constitutional Affairs a duty to ensure that there is an efficient and effective system to support the carrying on of the business of the Supreme Court and that appropriate services are provided. This includes power to appoint such officers and staff as is considered appropriate, the provision of accommodation and the preparation of an annual report (clauses 41-48).

**Devolved matters**

15. Regulation of the civil court system in Scotland is a devolved matter. This Part of the Bill, insofar as it amends the rights of parties to appeal from the Inner House of the Court of Session by providing for an appeal to the Supreme Court instead of to the Appellate Committee of the House of Lords seeks to legislate in a devolved area. The Bill modifies those rights in that way by the provisions of clause 34(3) (jurisdiction). At present, section 40 of the Court of Session Act 1988 governs appeal rights to the House of Lords. That Act would require to be amended, in consequence of clause 34(3). Provision to make such amendment is contained in paragraph 47 of Schedule 10 of the Bill.

16. For these reasons, the consent of the Parliament under the Sewel Convention is necessary.

17. In addition to that need to make amendment to the Court of Session Act 1988 consequential to clause 34, there will be a need to make changes to other legislation which also are consequential to the Bill in the establishment of the Supreme Court. Most are simply changes to nomenclature to change references to the House of Lords to references to the Supreme Court. Particular attention is drawn to the need for amendments in the devolved matter of legal aid. Amendments are needed to the Legal Aid (Scotland) Act 1986 and the Solicitors (Scotland) Act 1980. These amendments relate to the provision of legal aid for parties appearing before the new court and the rights of Scottish Solicitors to appear before it.

18. The Legal Aid (Scotland) 1986 contains provisions which allow legal aid to be made available in relation to civil proceedings in the Judicial Committee of the Privy Council, in references, appeals and applications for special leave to appeal under paragraphs 10, 12 and 13(b) of Schedule 6 to the Scotland Act 1998 and in relation to civil proceedings in the House of Lords, in appeals from the Court of Session. It also allows criminal legal aid to be made available in connection with any reference, appeal or application for special leave to appeal to the Judicial Committee of the Privy Council under paragraph 11 or 13(a) of Schedule 6 to the Scotland Act 1998.

19. Section 25A of the Solicitors (Scotland) Act 1980 enables Scottish solicitors to acquire rights of audience in the Court of Session, the High Court of Justiciary, the House of Lords and the Judicial Committee of the Privy Council. Any solicitor who wishes to acquire such extended rights of audience must satisfy the Council of the Law Society of Scotland as to their professional conduct and reputation, their competency in the practice and procedure of these Courts and pass an examination. As those solicitors who satisfy the existing criteria to become solicitor advocates are
to have extended rights of audience in relation to the Supreme Court, references in section 25A of the 1980 Act to the House of Lords and the Judicial Committee of the Privy Council are to be replaced by references to the Supreme Court.

20. For the reasons set out at paragraphs 25 to 28 below, it will be necessary to make provision in the Bill empowering the Executive to make a contribution towards the ongoing operating costs of the court. Such an amendment has been agreed in principle between the Executive and DCA and will be tabled at a later Parliamentary stage. So far as relating to a contribution in connection with non-devolution issues, the consent of the Parliament under the Sewel convention is necessary. See paragraph 15 above.

Discussion

21. As set out by the Executive during the debate on 29 January, it supports the underlying reasoning for the creation of a new Supreme Court for the UK that there should be a transparent separation between the House of Lords sitting as a court and the House of Lords sitting as a legislature. The Executive recognise the importance of maintaining the integrity of Scots Law. The amendments on jurisdictional balance and in relation to the binding nature of decisions were respectively made and agreed by the UK Government to meet the concerns of the Executive in these respects. There are no provisions in the Bill which prejudice the independence of Scots Law in either of those ways. The Bill therefore does not contravene the Act of Union.

22. It is not possible to create a new Supreme Court having jurisdiction throughout the UK by the means of an Act of the Scottish Parliament. The Scottish Parliament does not enjoy legislative competence in relation to appeals from England, Wales or Northern Ireland.

23. It would be possible, within Parliamentary competence, to create a new court in Scotland which would hear appeals from the Inner House of the Court of Session, but that is not what is proposed. The DCA have a legislative opportunity to carry out their proposals to legislate in relation to Constitutional Reform and, although it would be possible to introduce a Scottish Bill which did no more than amend the relevant parts of the Court of Session Act 1988, doing so would not present a coherent package of reform. There is no immediate space in the legislative programme of the Executive for such a Bill which would complement the DCA proposals.

24. It should also be noted that, under the Scotland Act, it is necessary that Scottish cases regarding devolution issues require to be determined by appeal to the Judicial Committee of the Privy Council (JCPC). As such matters raise matters of UK wide constitutional importance, it is necessary that a right of appeal to a UK wide court exists. Devolution issues (as defined in the Scotland Act) are issues where a question arises as to whether the Scottish Parliament has legislative competence or the Scottish Executive has devolved competence to legislate or act. These concern, for example, legislation or acts which contravene ECHR, fail to comply with Community law or deal with matters which are reserved to the UK Parliament. The proposal is that the new Supreme Court takes on the JCPC’s jurisdiction (which was established at and in
consequence of Devolution) in those respects. That jurisdiction is transferred by clause 34(4)(b) and Schedule 10. The Bill contains consequential amendments to the Scotland Act at paragraphs 91 to 105 of Schedule 10.

Financial Consequences

25. It is the policy of the Executive and UK Government that the costs of operating the civil courts should be recovered in full through a system of charging fees to those who use the courts. There is no reason in principle why the costs of the United Kingdom Supreme Court attributable to civil business should not be treated in the same way.

26. The number of individual users of the House of Lords however is at present too low to justify the proposition that users of the new Supreme Court should alone bear the full costs of the new system, through court fees. The Executive do not consider that it is appropriate that the operating costs of the new court (over and above those costs which can fairly and reasonably be recovered from litigants in the Supreme Court), should fall on other users of the lower courts. Rather, the Executive are of the view that such costs should be borne from the Justice Department budget in general. This will require the empowering provision referred to in paragraph 20 above.

27. The proposition is that the Scottish budget should bear a share of the running costs of the new court in proportion to the current usage of the House of Lords for hearing Scottish cases. The best estimate is that the overall annual impact for Scotland should be in the range £500,000-£700,000. Scotland will not be expected to meet any share of the costs of acquiring a building and making it fit for purposes of hosting the Supreme Court. All of these costs will be met by the Department for Constitutional Affairs.

28. There are no other estimated financial implications for Scotland of the proposals.