JUSTICE 2 COMMITTEE

AGENDA

4th Meeting, 2006 (Session 2)

Tuesday 21 February 2006

The Committee will meet at 2.00 pm in Committee Room 6.

1. **Police, Public Order and Criminal Justice (Scotland) Bill**: The Committee will receive a briefing from Scottish Executive officials on likely Scottish Executive amendments to the Bill at Stage 2.

2. **Legislative consent memorandum on the Police and Justice Bill**: The Committee will consider memorandum LCM (S2) 4.1 on the Police and Justice Bill, currently under consideration in the UK Parliament.

3. **Forthcoming Legal Profession and Legal Aid (Scotland) Bill**: The Committee will consider the role and person specification for the post of adviser.

Tracey Hawe/Gillian Baxendine
Clerks to the Committee
Papers for the meeting—

Agenda Item 1

Paper from the Scottish Executive
SPICE briefing on sex offender notification regime
SPICE briefing on regulating orders

Agenda Item 2

Note by Clerk (including copy of Memorandum, Bill and Explanatory Notes on the Bill)

Agenda Item 3

Note by Clerk

Documents circulated for information only—

Agency Review of the Scottish Court Service, Report by Douglas Osler
Memo from the Audit Committee on the 2004/05 Audit of the Scottish Prison Service
Faculty News, the newsletter of the Faculty of Advocates, Spring 2006
Letter from Deputy Minister for Justice on the Police Act 1997 Amendment (Scotland) Order 2006
Pre-Council Report for 20-21 February 2006

Forthcoming meetings—

- Tuesday 28 February 2006, 2pm, Committee Room 1
- Tuesday 7 March 2006, 2pm, Committee Room 4
REPORT TO THE JUSTICE 2 COMMITTEE

PROPOSED LEGISLATION GIVING POWERS TO ENFORCE REGULATING ORDERS: KEY FINDINGS OF RESPONSES TO A PUBLIC CONSULTATION

1. Background on Regulating Orders (ROs)

Regulating Orders (ROs) are a legislative tool to enable the establishment, improvement, maintenance and regulation of local shellfisheries through the introduction of a licensing scheme and other management measures.

Partnership agreement commitment number 346 states “we will legislate to permit enforcement of Regulating Orders within the range of activities of the Scottish Fisheries Protection Agency (SFPA)

ROs are made under the Sea Fisheries (Shellfish) Act 1967 (the 1967 Act) and are granted to a particular person or body (referred to as a “grantee”). They cover named species of shellfish within a specific area of inshore or tidal waters. ROs remain in force for a fixed period not normally exceeding 20 years. They enable the grantee of the RO, with the consent of Scottish Ministers, to impose restrictions and regulations in relation to the dredging, fishing for and taking of shellfish of specified kinds within the defined RO area. There should be clear linkage between stock assessment, the aims of the Order and the proposed regulatory measures. In effect, an RO grants management responsibility for a local shellfishery to the grantee and allows the grantee to issue licences, and/or impose the payment of tolls or royalties before fishermen may be granted access to the regulated fishery.

The only existing RO is the Shetland RO, granted in 1999. Applications for two other ROs – the proposed Highland and Solway Orders - are currently under consideration. The proposed Solway Regulating Order was laid before Parliament on Friday 10 February. Subject to the Parliamentary process it will come into force on 13 March. It is likely that the fishery would be opened by the grantee a few days later. The proposed Highland Regulating Order is about to be subject to an independent inquiry; a process provided for in the 1967 Act.

2. Background to the Consultation

It has become clear that there is a fundamental difficulty with Regulating Orders in that there are insufficient powers under existing statute for them to be effectively enforced. Currently, a management organisation set up by a grantee to run a RO has sole responsibility for enforcement but does not have express powers of enforcement conferred upon it to enable it to do so. The Scottish Fisheries Protection Agency (SFPA), which enforces all other relevant sea fisheries legislation in Scotland, has no powers to enforce any restrictions or regulations made under a RO.

The original aim was to include proposals for the enforcement of ROs in the Aquaculture and Fisheries Bill due later this year. However, in October 2005, the Minister for Justice agreed that provisions relating to the enforcement of ROs could be included in the Police, Public Order and Criminal Justice (Scotland) Bill during the stage 2 consideration of that Bill. This would enable any new powers to be on the statute book by the autumn of 2006, which is
significantly earlier than would be the case using Aquaculture and Fisheries Bill alternative. The new powers would allow any Solway Regulating Order to be effectively enforced by the grantee and the SFPA with support from the Police as required. The powers will help to prevent illegal fishing and conserve stocks. Crucially, they will also help to address health and safety concerns and help to prevent loss of life in the dangerous circumstances which the Solway cockle fishery presents. The new powers will also allow the more effective enforcement of the Shetland Regulating Order and of any subsequent ROs.

3. The Consultation Process

On 18 January 2006, The Scottish Executive Environment and Rural Affairs Department published a consultation document “Proposed Legislation Giving Powers to Enforce Regulating Orders”. The aim of the consultation was to obtain views on possible approaches to improving the enforcement of Regulating Orders. The consultation paper was sent to 150 individuals and organisations. A copy of the paper is attached as further background.

A period of four weeks was given for consultation with the date for responses being 15 February. This period was significantly shorter that the Executive’s standard 12 week duration for consultation exercises. The decision on a shorter period was taken on the basis of exceptional circumstances which were and are being faced, in particular on the Solway where life is being endangered, and which the new powers will seek to address. The short duration has understandably elicited some criticism from some parts of the fishing industry. In response to this we have agreed that responses will be accepted and considered up to 2 weeks beyond the original deadline meaning that consultees who require more time will have until 1 March to submit their responses.

The consultation document set out the background to the consultation, highlighted the key topics for consideration and posed a number of questions to which responses were invited. The questions focused on who should be empowered to enforce Regulating Orders (ROs) whether that should be both the Scottish Fisheries Protection Agency (SFPA) and the grantee of an RO jointly, the SFPA solely, the grantee solely or some other arrangement. The consultation paper also listed suggested powers (based on the SFPA’s existing powers) for enforcing ROs and asked if respondents felt that these were appropriate. A final question asked respondents if they had any additional changes that they would like to see in relation to the enforcement of ROs or fisheries legislation more generally.

The majority of the consultation papers were issued by email. The paper was also made available on the Scottish Executive website for any interested individuals. The content of the paper itself was set out as clearly and simply as possible in order to facilitate responses within the timescale.

In the consultation paper, we also offered to hold face to face meetings during the consultation period for interested parties. This offer was not taken up. The offer was taken, however, to highlight the main issues to key stakeholders involved in the Solway Regulating Order when we met with them on Wednesday 1 February.
4. **Who Responded to the Consultation**

A total of 18 responses have been received so far, with about 5 or so more being expected. One response which was made up of a completed respondent information form but with no substantive comments or means of identifying the respondent. This response has not been included in the analysis below. The table at Annex A contains a full list of those organisations and individuals who responded to the consultation paper and are content for their response to be made public.

3 individuals and 14 organisations responded. 10 responses were made up of written comments and 7 responding to the specific questions set out in the consultation paper.

5. **Summary of Responses**

A summary of the responses received to the questions contained in the consultation paper is set out below:

**Question 1:** Should both the grantee and the SFPA have the ability to enforce a RO thus enabling different situations and circumstances to be met?

5 respondents agreed that both the SFPA and the RO grantee should have the ability to enforce a RO. 5 disagreed and 7 did not address the specific question.

**Question 2:** Is it your view that the grantee should have sole powers to enforce ROs?

The majority of respondents (10) do not support the grantee having sole powers to enforce ROs. No one specifically agreed with this proposal. 7 respondents did not address the specific question.

**Question 3:** Is it your view that the SFPA should have sole powers to enforce ROs?

5 respondents agreed that the SFPA should have sole powers to enforce ROs. 5 disagreed and 7 did not address the specific question.

**Question 4:** Would you prefer another arrangement? If so, please provide details.

No one said they would prefer another arrangement for enforcing ROs. 6 respondents stated definitively that they would not prefer another arrangement and 11 respondents did not address the specific question.

**Question 5:** Are the powers set out above appropriate powers for enforcing ROs? Alternatively, do you think that some other arrangement should be put in place. Please provide details.
5 responded that they thought the powers as set out in Section 5.2 of the consultation paper were appropriate for enforcing ROs. 1 respondent disagreed (specifically in relation to giving the powers set out at Section 5.2 to RO grantees) and 11 respondents did not address the specific question in their response.

**Question 6:** In addition to the proposals at 5 above, are there any additional changes that you would like to see in relation to enforcement of ROs or fisheries legislation more generally?

5 respondents suggested additional changes. 2 respondents did not have any additional changes to make and 10 did not address the specific question. The following suggestions were made:

- Status of “reporting agency” in terms of submission of reports to the Procurator Fiscal should be afforded to the grantee if this is not already in place.
- The question of any breaches of the order being a scheduled offence in relation to the Proceeds of Crime may be worthy of consideration.
- Legal liability for those engaged in unsustainable activities (whether technically permissible or not) by a general duty being imposed to fish reasonably.
- More balanced representation of all the sectors involved in SEERAD’s management.
- The incorporation of the UK biodiversity plan into fisheries administrative law.
- The establishment of statutory no take zones following the Royal Commission on Environmental Pollution report.
- Consider an offence of illegal possession of shellfish.
- Need for realistic fines to deter illegal fishing.
- Enforcement powers should extend beyond the RO area.

6. **Summary of Key Themes**

Overall, those responding to this consultation tended to focus on a number of distinct and often conflicting themes. These included themes which were directly relevant to this consultation including:

- No support for the grantee having sole powers for enforcing a RO
- Equal support for both the SFPA and the grantee and the SFPA alone to have powers to enforce ROs
- Support for the improved enforcement of ROs
- Need for improved enforcement to prevent illegal fishing on the Solway Firth under any future RO
Other themes that emerged from the responses did not relate directly to this consultation but were more about respondents’ views on ROs either generally or specifically. These included:

- Support for ROs generally as a fisheries management tool
- Objections to ROs generally as a fisheries management tool (and therefore, to any improved enforcement powers proposed)
- Objections to specific ROs

ENVIRONMENT AND RURAL AFFAIRS DEPARTMENT
20 FEBRUARY 2006
A review of the operation and effectiveness of the sex offender notification regime in Scotland, carried out on behalf of the Executive by Professor George Irving in 2005, found that there was a need for more efficient risk assessment and risk management within the system. The resulting report “Registering the Risk” produced 36 recommendations to improve the system most of which were accepted by the Executive. The Executive intends to implement three of the recommendations by lodging amendments to the Police, Public Order and Criminal Justice (Scotland) Bill (the Police Bill) currently before the Parliament.

The recommendations the Executive intends to take forward by amendment to the Police Bill relate to:

- extending the notification requirements in relation to the Sex Offenders Register (Recommendation 1)
- making it obligatory for relevant sex offenders to participate in the risk assessment process by making themselves available for interview and allowing access to their accommodation for this purpose (Recommendation 7), and
- giving police the power of entry to the home or place of residence of sex offenders for the purposes of undertaking a risk assessment, monitoring their activities and validating the information contained in the Register, but not the power of search (Recommendation 19)

This briefing gives some policy background to these three recommendations by providing information on the system currently in place in Scotland for monitoring sex offenders. In order to present a fuller picture of measures adopted to deal with concerns about sex offenders, it also provides information on the system for preventing unsuitable people working with children.

**Notification requirements**

The **Sex Offenders Act 1997** (the 1997 Act) introduced a requirement for those who have committed certain serious sexual offences, including rape and indecent assault, to register their name and address with the police (this is what is often referred to as the Sex Offenders Register). Offenders are required to register with their local police whenever they move residence throughout the period when registration is required, and failure to register is a criminal offence. The Act applies across the United Kingdom, and sex offenders moving between jurisdictions within the United Kingdom have
identical registration requirements, and commit the same offence in each jurisdiction if they fail to register.

The **Criminal Justice and Court Services Act 2000** (the 2000 Act) introduced significant changes to the notification and registration regime including:

- a reduction in the initial period during which offenders must register from 14 days to 3 days and a requirement that initial notification to the police be in person
- a new power for the police, on initial notification, to take fingerprints and photographs of the offender
- a provision enabling the Scottish Ministers to prescribe by regulations those police stations at which notifications may be made
- an increase in the maximum penalty for a failure to comply with the 1997 Act’s requirements from six months to five years imprisonment on indictment
- a new requirement that a relevant offender must notify the police of his or her intention to leave the United Kingdom (including for holidays) and of his or her return

In 2000/01, the Home Office and Scottish Executive jointly reviewed and consulted on the 1997 Act and on sexual offences more broadly. The proposals from the joint review fed into a white paper, *Protecting the Public* (Cm 5668), published in November 2002. As a result, the Sexual Offences Bill was introduced in the House of Lords on 29 January 2003. The resulting **Sexual Offences Act 2003** (the 2003 Act) came into force on 1 May 2004.

The 2003 Act repealed the 1997 Act in its entirety, together with Schedule 5 of the 2000 Act. Schedule 5 contained the amendments to the 1997 Act listed above. The notification requirements of the Sex Offenders Act 1997, as amended by the 2000 Act, were replaced by **Part 2** of the 2003 Act.

Under Section 83 of the 2003 Act a relevant offender\(^2\) is currently required to give notification of his:

- date of birth
- national insurance number
- name or names on the relevant date (i.e. date on which convicted of a relevant offence or found not guilty by reason of insanity)
- home address on the relevant date

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1 Following a joint review of the Sex Offenders Act by the UK Government and the Scottish Executive, the Executive introduced motion S1M-1240 to the Parliament to enable Westminster to extend these provisions of the Criminal Justice and Court Services Bill to Scotland.

2 Relevant offenders are those who were convicted of a relevant offence, or were found to be under a disability and to have done the act charged in respect of such an offence, or found not guilty by reason of insanity. Relevant offences are listed in Schedule 3 to the 2003 Act and include: rape, abduction of woman or girl with intent to rape, assault with intent to rape or ravish, indecent assault and lewd, indecent or libidinous behaviour or practices.
name on the date on which notification is given and, where he uses one or more other names on that date, each of those names
home address on the date on which notification is given
address of any other premises in the United Kingdom at which, at the time the notification is given, he regularly resides or stays

Proposed amendment to the Police Bill - Extension of notification requirements
Irving argues that the police require more comprehensive information about sex offenders to enable them to conduct more accurate risk assessments and to better monitor sex offenders in the community. He recommends, therefore, that notification requirements should be extended to include: household details – partner, other occupants, children; main associates; leisure activities; employment; vehicle and access thereto; telephone numbers; computers – internet access; bank account details (for tracking purposes if necessary); passport details; provision of a DNA sample if not already taken at the time of charge or conviction.

The risk assessment process
The need for improvements in the way serious violent and sexual offenders were assessed and monitored in the community was identified in the report of the MacLean Committee on Serious Violent and Sexual Offenders. The Committee was set up in March 1999 and reported to the Scottish Parliament in June 2000. MacLean produced a number of recommendations relating to sentencing disposals for and management and treatment of high risk offenders, including high risk sex offenders. These included proposals for a new authority to assess the risk to the public posed by violent and sexual offenders (Recommendation 5) and a new sentence – the Order for Lifelong Restriction, for certain categories of violent and sexual offender who present a continuing threat of re-offending (Recommendation 12).

Risk Management Authority
The Risk Management Authority (RMA) was established by section 3 of the Criminal Justice (Scotland) Act 2003. The role of the RMA is to ensure the effective assessment, management and minimisation of risk of serious violent and sexual offenders. It is also intended to be the national centre for expert advice on offender risk assessment and management. The RMA is directly accountable to the Scottish Ministers. The 2003 Act also established the Order for Lifelong Restriction (OLR) as a new High Court disposal for high risk sexual and violent offenders. Before an OLR can be imposed, the court must make a Risk Assessment Order under which a risk assessment is prepared by an assessor accredited by the RMA. The offender may also instruct his own risk assessment, and has the opportunity to challenge the report prepared for the court.

The Expert Panel on Sex Offending
The Expert Panel on Sex Offending was set up in 1998 under the Chairmanship of Lady Cosgrove. Although established earlier, the Expert Panel reported after the MacLean Committee. While the MacLean Committee
dealt only with serious violent and sexual offenders, the *Report of the Expert Panel on Sex Offending* produced 73 recommendations for improving risk assessment, risk management and monitoring sex offenders more generally. Most of the recommendations were accepted by the Executive and, where necessary, given legislative effect including:

- a requirement for judges to ask for both a social enquiry report and a psychological assessment where an offender is convicted on indictment of a sexual offence, or an offence with a significant sexual element
- amendments to broaden the scope of offences to which the notification requirements apply
- extension of the requirement to provide notification to include any offender convicted of any crime containing a sexual element, at the discretion of the sentencing judge
- placing a statutory duty on Chief Constables and Chief Social Work Officers to establish joint arrangements for assessing, monitoring and managing risk.

**The Management of Offenders etc (Scotland) Act**

The Management of Offenders etc (Scotland) Act 2005 (the 2005 Act) makes various changes in relation to the assessment and management of risk. These include placing a duty on the responsible authorities within a local authority to establish joint arrangements for the assessment and management of risks posed by certain categories of offender, including those subject to the sex offender notification requirements under Part 2 of the Sexual Offences Act 2003. It also gives the Scottish Ministers an order making power to compel other agencies to co-operate with the relevant authorities to implement these arrangements. The 2005 Act also gives the court, in the case of a mentally disordered offender who meets both the risk criteria for an OLR and the criteria for a Compulsion Order, the power to choose between these two disposals.

**Proposed amendment to the Police Bill – obligatory participation of sex offenders in risk assessment process**

As noted in Registering the Risk (p9), the Expert Panel observed that “… no requirement is placed on the offender to comply with the [risk assessment] process.” The Expert Panel, therefore, made a similar recommendation to that made later by Irving:

> Sex offenders, whether or not subject to the notification requirements of the Sex Offenders Act 1997, should be required to comply with the risk assessment process to the extent of making themselves available to the appropriate agencies for interview and of allowing access to their home for the purpose of risk assessment. (Recommendation 48)

**Police powers of entry**

In general the police in Scotland do not have the right to enter a person’s house or other private premises without their permission. However, they can enter without a search warrant under any of the following circumstances:
• when in close pursuit of someone who has committed, or attempted to commit, a serious crime
• to quell a disturbance
• if they hear cries for help or of distress
• to enforce an arrest warrant

Proposed amendment to Police Bill – police right of entry to a sex offender's home or residence
The police have no greater powers of entry in relation to the homes or places of residence of sex offenders, than they do for any other individual or group. The joint review of sex offender registration carried out by the Home Office and Scottish Executive in 2000 considered the issue of whether the police should have the power of entry to a sex offender's home or residence. The review team concluded that a power of entry could not be justified on the grounds that observing an offender and their belongings at an address one day does not mean that they will be there the next. The review group recognised that there was a problem with keeping an offender's details up to date, but decided that the way to deal with this was by requiring annual re-notification (Section 85 of the Sexual Offences Act 2003) rather than increasing police powers to visit them.

Despite the fact that the police have no specific powers of entry to a sex offender’s home, a research study for the Home Office “Where Are They Now?: An evaluation of sex offender registration in England and Wales” (July 2000) found that almost all offenders co-operated with home visits.

Nevertheless, Irving has identified a concern that some sex offenders do not co-operate in this way. He recommends, therefore, that there should be a statutory police power of entry to the home or residence of a registered sex offender, to check that his details are correct or to help with risk assessment. (Recommendation 19)

Protecting children
The following sections provide some background on measures in place in Scotland for preventing unsuitable people from working with children.

Disqualified from Working with Children List
Lord Cullen’s 1996 report of the Public Inquiry into the shootings at Dunblane Primary School, and the Children’s Safeguards Review (the Kent Report) in England and Wales, identified the need for adequate checks on the suitability of people working with children and young people. At this time the only list of individuals deemed unsuitable to work with children in Scotland was List 1R maintained by the Scottish Executive Education Department. This list, now discontinued, held details of those who had been struck off, or refused admission to the Register of the General Teaching Council for Scotland.

Following an Executive consultation “Protecting Children, Securing their Safety”, a new list “the Disqualified from Working with Children List” (DWCL)
was established by the Protection of Children (Scotland) Act 2003. The DWCL is maintained by the Scottish Ministers and is designed to prevent people who have harmed children in the past working with children, in paid or voluntary work. People may be referred to the DWCL either by their employer, if they have harmed a child or put a child at risk of harm and been dismissed or moved as a consequence, or by the courts if they are convicted (or acquitted on grounds of insanity) of certain offences involving children which demonstrates their unsuitability.

The list and accompanying measures came into force in January 2005 and provide that:

- disqualified people commit an offence if they apply for work or continue to work with children
- organisations must refer people in child care positions to the list if they harm a child or put a child at risk and are dismissed or moved away from contact with children as a consequence
- organisations can check whether people they are considering appointing to child care positions are disqualified
- organisations can make retrospective referrals to the list if they have appropriate evidence
- organisations which fail to check whether people they are considering appointing to a child care position are on the list commit an offence

**Disclosure System**

The system under which information on an individual’s criminal convictions can be disclosed to employers is operated by Disclosure Scotland which was established in 2002 by Part V of the Police Act 1997. Disclosure Scotland is part of the Scottish Criminal Record Office.

There are three levels of disclosure: basic, standard and enhanced. All applications for disclosure are initiated by the applicant. An employer, therefore, cannot require a disclosure without the agreement of the applicant. The basic disclosure results in one certificate being issued to the applicant. In the case of the standard and enhanced disclosures, the application must be countersigned by an authorised person who will receive a copy of the certificate that is issued to the applicant.

In a basic disclosure only convictions which are unspent under the Rehabilitation of Offenders Act 1974 are disclosed. Under a standard disclosure both spent and unspent convictions are disclosed and, where the applicant is applying to work with children, whether the applicant is on the DWCL or the equivalent lists held in other UK jurisdictions.

In addition to the information provided by a standard disclosure the police have discretion in an enhanced disclosure to disclose non-conviction information that they consider relevant to the position being considered. Applicants for jobs (paid or unpaid) working with children or vulnerable adults are currently eligible for either a standard or enhanced disclosure depending on the regularity of the contact.
The Executive plans to introduce interim changes to the current disclosure arrangements to allow those posts working with children and vulnerable adults, which are currently only eligible for a standard disclosure check, to be eligible for an enhanced check. This change will be implemented by summer 2006.

**Relationship between the Sex Offenders Register and the DWCL**

An enhanced disclosure is required for anyone who works with children or applies for a childcare position as defined by Schedule 2 of the *Protection of Children (Scotland) Act 2003*. This is intended to ensure that full disclosure is made of past offences and convictions before anyone is employed to work with children. Under the provisions of this Act, applicants and countersignatories within Registered Bodies must state specifically on the Disclosure Scotland application form that the application relates to a childcare position and provide details of the position involved. Disclosure Scotland then cross check the application against the DWCL.

However, the Register covers a wide range of sexual offences and not just those involving children. Unlike those on the DWCL, individuals on the Sex Register are not automatically barred from working with children. However, employers are required to take all past convictions and, in some cases non-conviction information, into account in making recruitment decisions.

**Intelligence sharing between police forces**

Shared intelligence is crucial to the effective monitoring of sex offenders as the Sex Offenders Register currently does not contain all those who are known to have committed, or are suspected of committing, sexual offences. Since 1992, the Scottish Police have had a shared database which flags up the fact that local intelligence is held about particular individuals by police forces. To further assist intelligence sharing the Scottish police have developed a common IT system - the Scottish Intelligence Database (SID) and introduced a new computerised database, the Violent and Sex Offenders Register (VISOR), developed in England and Wales. It is planned to link VISOR to SID and this should help standardise the information held by Scottish police forces on sex offenders and facilitate the exchange of information.

Denis Oag  
SPICe Research  
15 February 2006

**Note**

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

REGULATING ORDERS

and the Police, Public Order and Criminal Justice (Scotland) Bill

This briefing has been prepared for members of the Justice 2 Committee. It provides some background information on the Scottish Executive’s proposals to introduce new powers to enforce Regulating Orders through Stage 2 amendments of the Police, Public Order and Criminal Justice (Scotland) Bill. The briefing describes:

- What Regulating Orders are
- Why a change to the law is needed
- The Executive’s proposals

WHAT ARE REGULATING ORDERS?

Sea fisheries in EU waters are managed under the Common Fisheries Policy (CFP). There is a general principle of equal access by fishermen from all Member States throughout EU waters. The exception to this is in inshore waters, where waters within 12 miles of “territorial baselines” are managed by the coastal state. Scottish Ministers are responsible for managing these fisheries in the inshore waters around Scotland. The way the territorial baselines are drawn around the West coast of Scotland mean that these inshore waters include the Minches and the Sea of the Hebrides, which contain valuable fisheries. Low volume, high value catches of shellfish are particularly important for inshore fishermen.

Foreign fishermen can only fish in the 6-12 mile zone where they have done so historically, and waters within 0-6 miles are completely reserved to fishermen of the coastal state.

Scottish Ministers can make Regulating Orders under section 1 of the Sea Fisheries (Shellfish) Act 1967. A Regulating Order gives local fishermen (‘the grantee’) powers to manage inshore fisheries for the species of shellfish named in the order for a fixed period of up to 20 years. The grantee can make regulations with the consent of Scottish Ministers, regulating the methods of fishing for shellfish in the area covered by the order. They can also establish a licensing scheme for the shellfish fishery to limit the amount of fishing in the area, and can charge for the costs of accessing the fishery through a licensing or permit scheme.

So far only one Regulating Order has been made in Scotland, this was made in 1999 and covers the whole of the 0-6 mile zone around Shetland. The grantee is the Shetland Shellfish Management Organisation. Applications for two other orders, covering the Solway Firth and the Highlands are currently being considered by Ministers.

The Scottish Executive published an Inshore Fisheries Strategy in 2005. The Strategy had been drawn up with stakeholders in the Inshore Fisheries Advisory Group. An important element of the Strategy is to establish inshore fisheries groups covering all Scotland’s inshore waters. These groups will be responsible for managing the inshore fisheries within their areas. The Scottish Executive consultation paper on regulating orders explains that
these would be one potential management tool that inshore fisheries groups could consider.

WHY IS LEGISLATION NEEDED?
The Scottish Fisheries Protection Agency (SFPA) is an Executive Agency with responsibility for the enforcement of fisheries legislation and regulations in the seas around Scotland and in Scottish ports. It does not have any powers of enforcement under the Sea Fisheries (Shellfish) Act 1967.

The 1967 Act gives grantees of a regulating order the power to “carry into effect and enforce such restrictions and regulations” as are made under the order. However, as the Scottish Executive’s consultation paper notes “this general power – which would not extend to boarding vessels or to searching premises – is insufficient to allow enforcement to be fully effective.”

The experience on Shetland has also shown that the grantee is likely to have limited resources for enforcement and is unlikely to be able to afford e.g. a patrol boat or sophisticated surveillance equipment. They may also lack the necessary skills and experience of enforcement, especially to produce evidence to a standard required by the procurator to prosecute an offence.

WHAT ARE THE SCOTTISH EXECUTIVE’S PROPOSALS?
Recognising the difficulties of enforcing this legislation, the Scottish Executive undertook in its Partnership Agreement of 2003 to “legislate to permit enforcement of Regulating Orders within the range of activities of the SFPA”.

The Scottish Executive’s policy intention is that the grantee should be responsible for ensuring that enforcement arrangements are in place. The grantee could do this by carrying out enforcement itself, by making arrangements through a memorandum of understanding for the SFPA to carry out enforcement, or jointly enforcing the order. There could also be a role for the SFPA in the recruitment, appointment and training of officers who would be employed by or seconded to the grantee.

The Executive proposes to base the new enforcement powers on the powers the SFPA has to enforce other fisheries legislation. These are listed in the consultation paper as follows:

In relation to fishing boats:

- to require a boat to stop and to board the boat with or without persons assigned to assist
- to search the boat for any fishery products or fishing gear on board the boat
- to require persons on board the boat to do anything which appears to that officer to be necessary for facilitating the examination
- to examine fishery products, fishing gear and equipment on board the boat
- to seize fishery products and fishing gear where an offence is suspected
- to require the production of any document relating to the boat
- to inspect and take copies of and retain possession of such documents while any search, inspection or examination is being carried out
- to seize and detain documents where an offence is suspected
to require the master or any person for the time being in charge of the boat to render documents on a computer system into visible and legible form and to produce them in a form that can be taken away
where an offence is suspected to require the master of a boat to take the boat, or the officer himself take the boat, to the nearest convenient port and detain it

On land (land/premises/vehicles):

- to enter and inspect any land/premises/vehicles used for the treatment, storage or sale of sea fish and for carrying out business in connection with the operation of fishing boats or activities connected therewith
- when inspecting such premises to take with that officer such other persons as appear to that officer necessary and any equipment or materials
- to examine any fishery products on such land/premises/vehicles and to require any persons on the land/premises/vehicles to do anything which appears to that officer necessary for facilitating the examination
- to search for or examine fishery products in such land/premises/vehicles
- to seize fishery products where an offence is suspected
- to require any persons to produce any documents which are in the custody or possession of that person relating to the catching, landing, transportation, sale or disposal of any fishery products
- to inspect and take copies of any such document produced or found on the land/premises/vehicles
- to require any appropriate or responsible person to render documents on a computer system into visible and legible form and to produce them in a form that can be taken away
- to seize and detain documents where an offence is suspected
- to stop, and, if necessary, direct a vehicle to some other place to facilitate inspection

The Executive proposes that these powers would be available to the grantee to enforce the provisions of a regulating order within the area covered by the regulating order, and available to the SFPA to enforce regulating orders in any area. The Executive is currently consulting on these proposed powers and arrangements for the enforcement of regulating orders. The results of this consultation should be available to the Justice 2 Committee prior to any such amendments being lodged to the Police, Public Order and Criminal Justice (Scotland) Bill.

Tom Edwards
SPICe
8/02/06
Note by the Clerk

**Purpose**

1. The attached legislative consent memorandum (LCM) from the Scottish Executive concerns the Police and Justice Bill currently before the UK Parliament. This includes a draft motion, which will be lodged by the Minister for Justice, asking the Parliament to agree that the UK Parliament should consider certain provisions in the Bill which will legislate in devolved areas. The detail of these provisions is set out in the memorandum.

2. This paper sets out the likely timetable for consideration of the LCM and invites the Committee to agree its approach.

**Background**

3. The Police and Justice Bill was introduced in the House of Commons on 25 January 2006 and can be found on the UK Parliament website at: [http://www.publications.parliament.uk/pa/cm200506/cmbills/119/2006119.htm](http://www.publications.parliament.uk/pa/cm200506/cmbills/119/2006119.htm)

A copy of the Bill and Explanatory Notes are attached for members information.

4. Scottish Executive officials have confirmed that there is no overlap or connection between this bill and the Police, Criminal Justice and Public Order (Scotland) Bill currently being considered by the Committee.

**Timetable**

5. The LCM was lodged on Thursday 9 February and will be considered by the Bureau on 21 February. It is understood that it is likely to be referred to the Justice 2 Committee. The clerks only became aware that a LCM was required when it was lodged two weeks after the bill's introduction at Westminster (in line with standing orders rule 9B.3.1(a)).

6. It is understood that the final amending stage in the House of Commons will take place in the week beginning 27 March. It is normal for the Parliament’s consent to be sought before this stage. Standing Orders provide that a motion will not normally be taken earlier than the fifth sitting day after the day on which the lead committee’s report is published (rule 9B.2.3). A suggested timetable, which would allow the Committee to report in time for Parliament to consider the motion, is set out below.

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
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<tbody>
<tr>
<td>28 February</td>
<td>Consideration by Subordinate Legislation Committee</td>
</tr>
<tr>
<td>7 March</td>
<td>Committee takes oral evidence</td>
</tr>
<tr>
<td>14 March</td>
<td>Committee considers draft report (any amendments to the draft report would then have to be agreed by correspondence)</td>
</tr>
<tr>
<td>16 March</td>
<td>Committee’s report published</td>
</tr>
</tbody>
</table>
23 March    Motion considered by Parliament

Approach

Oral Evidence
7. The Committee will presumably wish to take evidence from the Minister for Justice. The Committee will also wish to consider whether it wishes to hear oral evidence from anyone else. The timetable for hearing any further oral evidence would be very limited given the Committee’s commitment to the Police Bill stage 2 proceedings. Given that the provisions in the bill are fairly specific, members may consider that seeking written evidence (in time for the oral evidence session with the Minister) would be sufficient. Even so, this would only give organisations about two weeks to respond.

- Does the Committee wish to seek oral evidence from the Minister for Justice?
- Does the Committee wish to seek any oral evidence in addition to this?

Written evidence
8. Organisations we have identified who might have an interest are:

- ACPOS, the Scottish Police Information Strategy (which will become part of the Scottish Police Services Authority) and Her Majesty’s Inspectorate of Constabulary in relation to the establishment of the National Policing Improvement Agency and the establishment of the Justice, Community Safety and Custody inspectorate; and

- the Law Society of Scotland in relation to the amendments to the Computer Misuse Act and the Extradition Act.

- Does the Committee wish to seek written evidence from the organisations listed above?
- Does the Committee wish to seek any written evidence in addition to that listed above?

Conclusion
9. The Committee is invited to agree its approach to this memorandum and to note the timetable required in order to stay in step with the Westminster Parliamentary timetable.

Clerk to the Committee
February 2006
JUSTICE 2 COMMITTEE

Committee Adviser for Legal Profession and Legal Aid (Scotland) Bill

Note by the Clerk

Background

1. It is expected that the Legal Profession and Legal Aid (Scotland) Bill will be introduced in March 2006. It is anticipated that the Justice 2 Committee may be designated as the lead Committee on the Bill once it is introduced.

2. The Bill, when introduced, is likely to include a range of provisions regarding the establishment of the Scottish Legal Complaints Commission. This new body will act as a gateway to receive those complaints about lawyers which cannot be resolved at source. The new body will take over the handling of complaints about inadequate professional service from the legal professional bodies, the Scottish Legal Services Ombudsman and the Scottish Solicitors Discipline Tribunal. The legal professional bodies and their discipline tribunals will however retain responsibility for professional discipline and the Commission will refer complaints about the conduct of lawyers to those bodies, but will have powers to oversee the way in which conduct complaints are handled. The Commission will be led by a board which will have a non-lawyer majority and a non-lawyer Chair.

3. The Bill is also likely to include a limited number of provisions regarding the administration and operation of the Scottish Legal Aid Fund.

4. As these are likely to be complex and technical provisions it is suggested that the appointment of an adviser would assist the Committee in its scrutiny of the Bill.

5. The proposed adviser role and specification is attached at Annexe A.

Next steps

6. If the Committee agrees to appoint an adviser, approval from the Bureau is required before specific candidates can be considered.

7. It is envisaged that the Committee would then consider possible candidates for appointment at a future meeting, in late March.

Recommendation

8. The Committee is invited to consider the following issues:

   • Does the Committee agree to appoint an adviser to assist in the scrutiny of the Legal Profession and Legal Aid (Scotland) Bill?

   • Does the Committee agree the role and specification of the adviser?
JUSTICE 2 COMMITTEE

Committee Adviser for Legal Profession and Legal Aid (Scotland) Bill

Specification for Appointment

Background and remit

The Legal Profession and Legal Aid (Scotland) Bill is expected to be introduced in March 2006. It is anticipated that the Justice 2 Committee will be designated as the lead Committee on the Bill once it is introduced.

The Bill, when introduced, is likely to include a range of provisions regarding the establishment of the Scottish Legal Complaints Commission. This new body will act as a gateway to receive those complaints about lawyers which cannot be resolved at source. The new body will take over the handling of complaints about inadequate professional service from the legal professional bodies, the Scottish Legal Services Ombudsman and the Scottish Solicitors Discipline Tribunal. The legal professional bodies and their discipline tribunals will however retain responsibility for professional discipline and the Commission will refer complaints about the conduct of lawyers to those bodies, but will have powers to oversee the way in which conduct complaints are handled. The Commission will be led by a board which will have a non-lawyer majority and a non-lawyer Chair.

The Bill is also likely to include a limited number of provisions regarding the administration and operation of the Scottish Legal Aid Fund.

The Bill is likely to include some complex and technical provisions, and the Committee would benefit from expert advice in relation to these provisions. In addition, the provisions in relation to the regulation of the legal profession in the Bill are expected to be relatively high profile.

Adviser duties

The role of the adviser will be to assist the Committee in all aspects of the scrutiny process and, in particular, to provide expert advice on lines of questioning for committee witnesses, to summarise written evidence received by the Committee, and to contribute to draft and final reports in conjunction with the Committee as required.

The adviser will be expected to attend evidence-taking sessions where possible and, in particular, those meetings held to discuss draft reports. The adviser would report to the Committee through the Clerk and may be asked to submit papers to the Committee.

Time Commitment

The adviser must be able to demonstrate that he or she has sufficient time to undertake the work over the period of the scrutiny of the Bill. It is anticipated that a maximum equivalent of 15 days will be required. As a rough guide, it is anticipated
that the adviser would be appointed in late March, with oral evidence sessions on the Bill taking place in late April and May, with consideration of a draft report in June 2006.

Specifically, the Committee meets weekly on a Tuesday afternoon at the Scottish Parliament, Edinburgh and the adviser will be expected to be available at these times. Meeting times vary, but are generally scheduled from 2.00 pm to 5.00 pm. The following provides an indicative division of time:

- Overview of relevant documentation  1 day
- Preparation of lines of questioning  2 days
- Attending meetings 4 days
- Summarising written evidence received 4 days
- Providing additional briefings as required 1 day
- Assisting the Committee in drafting its Stage 1 report 3 days

**Person specification**

The adviser would be expected to have a detailed understanding of the current procedure for dealing with complaints against legal practitioners. Alternatively, the adviser may be able to display a thorough understanding of the issues arising from self-regulation of professional bodies, or the application of complaints procedures in relation to such bodies. A thorough knowledge of the current legal aid system in Scotland would also be desirable. The adviser would be expected to have proven analytical and interpretative skills and the ability to analyse evidence from a wide range of sources. The adviser should also have good communication skills, the ability to present information in an accessible style and, crucially, the ability to work to short deadlines.

The adviser must be able to advise the Committee dispassionately on the basis of available evidence without seeking to persuade it of any particular outcome or approach that he or she may favour, and should not be involved in any capacity that would compromise his or her ability so to act.

The adviser’s duties may involve handling confidential and sensitive material. The adviser will be required to maintain absolute confidentiality about the matters under consideration or which come before him or her. The successful candidate will be required to declare any interests relevant to the subject matter of the Bill, pecuniary or otherwise, in advance of the award of any contract.
“THE 2004/05 AUDIT OF THE SCOTTISH PRISON SERVICE”

At its meeting on 7 February 2006 the Audit Committee considered a follow-up response from the Scottish Prison Service on the section 22 report by the Auditor General for Scotland entitled “The 2004/05 Audit of the Scottish Prison Service” The Committee agreed to note the response and take no further action at this time.

Shelagh McKinlay
Clerk to the Committee
EXTRACT FROM THE OFFICIAL REPORT OF THE AUDIT COMMITTEE
MEETING OF 20 SEPTEMBER 2005

"The 2004/05 Audit of the Scottish Prison Service"

12:09

The Convener: Item 6 is a section 22 report on the Scottish Prison Service. I invite Caroline Gardner to speak to us on that, with assistance from Bob Leishman.

Caroline Gardner: Given the time constraints, I will try to be brief. However, it is worth setting out some of the background to the report.

Last year, the Auditor General for Scotland issued a section 22 report on the 2003-04 accounts of the Scottish Prison Service to bring to the committee's attention the creation of a provision and a contingent liability to reflect the potential costs of settling court cases arising from prison conditions. This 2004-05 section 22 report updates the position and details some recent developments.

By way of background, I point out that, in April 2004, Lord Bonomy issued his judgment in the case of Robert Napier v the Scottish ministers. The judgment, which was upheld on appeal, described the triple vices of prison conditions: slopping out, overcrowding and poor regime. Lord Bonomy found that the Scottish Prison Service had acted in a manner incompatible with article 3 of the European convention on human rights and that, as a result, Mr Napier had suffered loss, injury and damage. The court awarded Mr Napier damages of £2,000 plus interest because his eczema had been exacerbated by having to spend long periods in a shared cell in which he had to slop out.

Immediately on that judgment, the SPS created in its 2003-04 accounts a provision of £26 million to reflect its possible liabilities from other court cases brought by prisoners who had been held in conditions similar to those that Mr Napier was held in. At the same time, it created a contingent liability of £136 million in respect of other cases that might arise in connection with the ECHR. However, I stress that merely being held in conditions affected by the so-called triple vices does not automatically mean that a prisoner is eligible for compensation. In each case, the prisoner has to demonstrate that the conditions in which he was held had some negative effect on him that breached his human rights.

The SPS's 2004-05 accounts show that the provision has been increased by £18 million to £44 million. However, the contingent liability has been reduced by £112 million to £24 million. Although the underlying circumstances have not altered significantly, the changes reflect the fact that the

Col 1296

SPS now has better information on the number of prisoners who are likely to be involved and the possible value of any settlement.

I point out also that, in settling the case against Mr Napier, the SPS incurred costs of £1.5 million, including almost £1 million in respect of the legal aid that Mr Napier received in bringing his action. This case illustrates the potential for a significant amount of public money to be spent as a result of decisions that different parts of the justice system have taken about the same case. Given that that raises issues for the
wider justice system, the SPS has agreed to discuss with the Scottish Executive Justice Department the best way of resolving similar actions that might be brought by prisoners.

Scottish ministers have now proposed a scheme for settling out of court cases of personal injury that have been caused or exacerbated by slopping out. The SPS considers that settlement costs through its alternative dispute resolution scheme could be substantially lower than the cost of pursuing such cases through the courts. It is also developing a strategy to deal with other compensation claims that have different characteristics from those of the Napier case.

I am sorry that so much information underlies this relatively short section 22 report, but I thought that I should clarify the background to it. We will do our best to answer members’ questions.

The Convener: I do not think that you could have briefed us on this section 22 report in any other way. All the information that you have highlighted is highly pertinent.

Margaret Smith: On alternative dispute resolution—and forgive me if I am straying beyond this section 22 report—

The Convener: Please try not to.

Margaret Smith: When I was a member of the Justice 1 Committee, the committee received evidence on alternative dispute resolution. I know that the European Union had been considering whether to make such schemes statutory; however, people have backed off from such a move.

The Justice 1 Committee found that Governments elsewhere—including the United Kingdom Government—were making much more use of ADR than the Scottish Executive seemed to be making. In fact, at the time, our committee suggested that the Executive should consider whether making greater use of such schemes, particularly in the NHS, would save money, because the cases were less likely to end up in protracted court proceedings. Has the Scottish Executive been using ADR to its fullest extent? It is now being used in the Scottish Prison Service, so there is a sense that the Executive is moving towards its use, but there is perhaps a wider issue. I do not think that the Executive has embraced ADR fully, although it produces almost a win-win situation as it avoids the need to finance many of the disputes in which people find themselves with major bodies such as the Scottish Prison Service and the NHS.

There was a question in there, but there was a comment as well.

12:15

Caroline Gardner: I think that I recognise the question. You may know more about this from the work of the Justice 1 Committee than we know from the work that we have done on the issue. Having said that, we understand that there has been little take-up, to date, of the alternative dispute resolution procedure that has been launched in the SPS, as it is a recent initiative.
This is obviously a sensitive area. Nobody is looking to limit people's rights to take legal action when they feel that they have been damaged; on the other hand, if it is possible to avoid claims being raised unnecessarily by having another way of resolving the dispute, that must be in everybody's interest, as you say. The point was raised in the section 22 report because of the potential for the procedure to be used not only within the justice system, which is where it started out, but in other areas where it may be appropriate. The health service is the obvious example of a body against which cases are sometimes raised that could have been avoided by better handling of a situation earlier on. Overall, the question that you may want to ask of the Executive, in some form, is how it is taking the matter forward.

Mr Welsh: The last sentence in paragraph 9 of the Auditor General's report states:

"Except for HMP Peterhead, where Ministers are considering options, it is expected that slopping-out will be completely eradicated one year after completion of both the two new prisons that the Scottish Prison Service plans to procure (subject to prisoner numbers)."

It says, "plans to procure". What sort of dates are attached to that?

Caroline Gardner: There are plans in hand to procure two new prisons to relieve some of the pressure on prisoner numbers. I am not sure what the latest dates for that are—perhaps Bob Leishman can help out.

Bob Leishman (Audit Scotland): I do not think that we have specific dates yet. Both contracts are about to go out to tender.

Mr Welsh: This is just whimsy, but how much does a new prison cost?

Bob Leishman: We will find out when we get the tenders.

Mr Welsh: Point taken.

The Convener: The committee is interested in value for money. At first glance, some members might be concerned that incurring legal costs of £1.5 million in defending an action that resulted in an award of £2,000 is somewhat out of kilter. However, I imagine that the £1.5 million was really incurred in trying to avert a potential liability of £44 million, which has now been allowed for. How the matter proceeds will still be of interest to the committee. In moving to ADR to reduce legal costs, which makes sense, it will be important to see the reduction in legal costs that can be obtained relative to the actual liabilities that are given out.

The judgment call that was made was obviously a policy decision and is not for the committee to go into; nonetheless, it will be interesting to see whether ADR brings any savings and whether there are lessons for other departments in it. I do not think that we should get into the question of whether or not the initial outlays were appropriate.

Susan Deacon: Andrew Welsh has raised the question of developments in the prison estate, and the Peterhead question is mentioned in the final paragraph of the Auditor General's report. What legitimate interest does the committee have in decisions about the estate? There is an issue because the longer that it takes to
effect change in that area, the more cases there will be to resolve in future—potentially, at least.

The Convener: I think that is a question for me rather than for Caroline Gardner. The extent to which the liabilities will be removed by the introduction of the new prisons is difficult to pin down. Tenders are going out for up to two prisons but, in the end, only one might be provided. From the evidence, it seems that progress is being made at a number of prisons. Therefore, the question is a bit like asking, "How long is a piece of string?" It will be easier for us to see where we are when we come to consider the issue again, possibly in a year's time. By that time, a section 22 report might not be required because all the matters will have been cleared up, but as the reports are laid before Parliament, we can either have the matter as an agenda item or Audit Scotland can write to us to update us on it. Certainly, if members want to be updated on that, we can ask for that.

Mr Welsh: It would certainly be interesting. Unless it is solved, the problem will continue. Either the slopping-out situation is resolved or there will be further out-of-court settlements and so on. According to paragraph 9 of the report, slopping out will not be ended until the new prisons are completed, so the problem is a continuing one.

The Convener: The existing prison estate can be changed but we cannot get an answer to our question yet, in as much as further new prisons are required.

Caroline Gardner: The risk of claims comes in situations in which the two conditions—shared cells and slopping out—are met. According to the Scottish Prison Service, there is now no shared use of slopping-out accommodation in the prison estate. Ending slopping out relies on building new prisons because of the obvious physical limitations of the current estate. A step in the right direction has been made, but the work is not complete.

The Convener: We will discuss these matters further under agenda item 8. Are there any other points that need to be made at this point?

Mrs Mulligan: Caroline Gardner said that two conditions had to be met and that one of them was overcrowding. How do we get a feel for whether policies that are designed to reduce the number of prisoners are reducing overcrowding?

The Convener: You used the word "policies"; that is the difficulty. We must consider the effect of changes in policy after the fact. Given that the Sentencing Commission is yet to deliver its report, there might be changes in policy, which will have an impact, but that is not for us to determine. We can consider the management of policies after they have been changed.

Mrs Mulligan: I am just not sure how we would measure people not ending up in prison in a way that will enable us to decide whether those policies have had an impact.

The Convener: Caroline Gardner might want to help me out here, but it strikes me that, in the comparison between this year's section 22 report and the previous report, there has been a change in liabilities, both real and contingent. That shows that
there is a movement, either in the effect of policy or in the degree of accuracy with which the information and numbers are understood. I would expect that, next year, there will be a fine tuning of the current situation or, possibly, a change in the situation because of changes in policies relating to bail conditions and so on.

**Caroline Gardner:** That is right. All that I can say on the bigger picture is that, earlier in the year, we produced a report on preventing reoffending, which obviously relates to the question of managing prisoner numbers. At some point, the committee might also want to explore the question of capital planning for the prison estate. I would think that the committee would want to use each issue as a way in to the policy question of the number of prisoners, which is a matter for Scottish ministers rather than for this committee or Audit Scotland.

**Susan Deacon:** I reinforce that point. It is important that we distinguish between our self-denying ordinance not to seek to determine the policy or express views on it and the Audit Committee’s pivotal role in making the linkages in thinking and debate between various policies and the resource questions that we are concerned with. Frankly, those issues are considered in compartments far too often. We in the Parliament are quite capable of having debates in which we focus solely on the issue before us and talk about knock-on resource implications only when we must consider issues through an audit prism.

I feel quite strongly that this is an area in which it is perfectly legitimate that we should flag up the linkages between the policy areas and the areas that we and Audit Scotland are concerned with, while not expressing an opinion about the direction of travel in the various policy areas.

**The Convener:** The difficulty at this point is that we are straying into agenda item 8. I would like to compartmentalise our discussion so that we can focus more clearly.

**Mr Welsh:** We cannot deal with policy; only ministers can clarify their policy decisions. However, unless those decisions—whatever they might be—are taken, there will be an on-going case to answer in respect of the effect of the continuing situation on the public purse. It might be useful if we could find out from ministers what action they propose to take.

**The Convener:** We can go on to discuss that under agenda item 8. If there are no questions that are pertinent to our finding out the information that we require to enable us to discuss matters further, we will move into private session. I thank Caroline Gardner and Bob Leishman for their attendance.

12:26
THE POLICE ACT 1997 AMENDMENT (SCOTLAND) ORDER 2006

I am grateful to the Justice 2 Committee for their consideration of the above draft affirmative order at their meeting on Tuesday 17 January. At that meeting, I agreed to revert to the Committee with any examples of which the Scottish Executive are aware where ancillary powers were used to amend an Act to create delegated powers. I have also taken the opportunity to make some further brief general comments on the exercise of the enabling power, in response to the SLC’s view that its use in the above order is unusual.

Enabling power

The enabling power for this instrument, section 173(1)(a) of the Serious Organised Crime and Police Act 2005 (“the 2005 Act”), is to make such “supplementary, incidental or consequential provision” as is considered appropriate for the general purposes, or any purpose, of the 2005 Act, or in consequence of that Act.

The House of Lords at Select Committee, in their special report on delegated powers and regulatory reform (Select Committee on delegated powers and regulatory reform 3rd Report, 11 December 2002, Appendix 2, paragraph 5), considered the wording of similar provisions where amendment of primary legislation was permitted where it is “consequential, incidental, supplementary and transitional”. That Committee noted,
"incidental or supplementary provision might, for example, fill in detail which is consistent with the provisions of the Act but missing from it, or make changes, to other Acts, which represent the exercise of a choice brought about by the enabling Act and which are not necessarily a direct consequence of that Act."

The SLC took evidence from the Scottish Executive on the exercise of ancillary powers in October and November 2004. In her letter of 26 October 2004 to the Convener of the SLC, the Minister for Parliamentary Business Margaret Curran MSP explained that the purpose of such a power is to enable unforeseen situations to be addressed, and that it is inherently not generally possible to foresee when unforeseen situations are likely to arise. Further evidence was given by officials on the exercise of such powers at an evidence session on 9 November 2004.

As one would expect, the exercise of the power in this instrument was therefore determined by the surrounding facts and circumstances. Each exercise of ancillary powers is likely to be different because it will relate to its own facts and circumstances. As I explained at the meeting, the changes made to delegated powers in sections 112(1), 114(1) and 116(1) of the Police Act 1997, enabling the making of electronic applications and the prescription of ways in which fees can be paid, are consistent with provisions inserted into the Police Act 1997 by the 2005 Act. That provision was very much supplemental; it did not relate to a new policy initiative, but merely corrected an unforeseen glitch. The manner in which the ancillary power is exercised on this occasion is therefore informed by the particular circumstances of the amending Act (the 2005 Act) and the Police Act 1997.

We have, however, undertaken the requested review to try to locate examples of the exercise of ancillary powers similar to that in the above instrument.

**Exercise of power in instrument**

We can provide the Committee with two examples in which delegated powers in Acts have been amended by ancillary powers, although they have not been created as such.

The first example is a use of the power in section 58(1) of the Local Government in Scotland Act 2003. Section 41(2) of that Act had amended section 93 of the Local Government Finance Act 1992 to add a regulation-making power. Article 2 of the Local Government in Scotland Act 2003 (Ancillary Provision) Order 2003 (S.S.I. 2003/567) was used to provide by whom the power was exercisable and what statutory procedure applied to its exercise.

The second example we have identified of ancillary powers being used to amend delegated powers is found in paragraph 32(23) of the Schedule to the Mental Health (Care and Treatment) (Scotland) Act 2003 (Modification of Enactments) Order 2005 (S.S.I. 2005/465). That paragraph corrects the provision specifying the statutory procedure applicable to delegated powers.
Conclusion

I trust the Committee finds this further information of assistance. I would conclude, however, that the nature of a power to make supplementary provision is such that it is likely that any such powers will be used on a relatively infrequent basis. Further, the use of such powers depends heavily on surrounding circumstances. For these reasons, it is not necessarily surprising that we have not identified examples of its use wholly in point with its use in the draft Police Act 1997 Amendment (Scotland) Order 2006.

Yours sincerely,

Hugh Henry

HUGH HENRY
Please note that this Pre-Council Report is based on a provisional agenda which was published in December and may be subject to change. At this stage we do not know which Ministers will be representing the UK. This is the first formal JHA Council of the Austrian Presidency.

CRIMINAL JUDICIAL CO-OPERATION

(poss) Framework Decision on the application of the principle of mutual recognition to the enforcement of sentences.

This draft Framework Decision on the application of the principle of mutual recognition to the enforcement of sentences was introduced in January 2005, but did not enter the working group until later in the year. The initiative deals with the conditions under which a custodial sentence imposed in one Member State can be enforced in another. Negotiations are at a relatively early stage and so a general approach may still be some way off. Amongst the issues requiring further negotiation are the extent to which dual criminality should be a factor when considering transfers and the extent to which prisoners themselves should have a say in the matter of transfer.

A Scottish Prison Service Official is attending the Working Group meetings as part of the UK delegation.

Framework Decision establishing a European Evidence Warrant

The European Evidence Warrant (EEW) is a draft Framework Decision which would apply the principle of mutual recognition to obtaining certain types of evidence. There is general agreement between Member States that the executing State should be responsible for deciding the method and procedures for executing an EEW, that the issuing State should be obliged to ensure that the EEW is necessary and proportionate and that human rights should be protected by the insertion of a human rights clause. However, the precise formula on obligations in relation to coercive measures in the executing State still needs to be finalised.

Significant progress was made during the UK Presidency, but it was not however possible to reach a general approach. Although negotiations are well advanced, final agreement has yet to be reached on a number of matters, including, the precise obligation with regard to requests which may require search and seizure; the procedure where EEWs will be validated when they are not issued by a judicial authority; and the extent to which it ought to be possible to refuse requests for assistance on grounds of territoriality and essential national security. It is hoped that it will nonetheless be possible to arrive at a general approach during the Austrian Presidency, with formal adoption at some point in 2006.

A Scottish Executive official has attended Working Group meetings as part of the UK delegation.
Framework Decision on certain procedural rights in criminal proceedings.

This is a draft Framework Decision which seeks to define a set of common minimum rights for suspects and accused in criminal proceedings throughout the EU to facilitate the application of the principle of mutual recognition. Progress has been slow, mainly due to the difficulty in arriving at a common approach where procedure may vary in its detail across different jurisdictions in the EU.

A Scottish Executive official has been participating as part of the UK delegation at Working Group meetings in Brussels.

CIVIL JUDICIAL CO-OPERATION

Proposal for a Regulation of the European Parliament and of the Council creating a European order for payment procedure.

This is a proposal for a simplified procedure for obtaining and enforcing a judgement in uncontested claims. Member States confirmed that the scope of the instrument should be limited to cross-border cases. The final Council of the UK Presidency in December 2005 approved, in general, the text of the regulation and listed the finalisation and adoption of it as a priority for 2006. Specification of the forms mentioned in the regulations is one issue to be finalised.

Scottish Executive officials have attended Working Group meetings in Brussels as part of the UK Delegation.


The proposed regulation would govern which country’s law should apply to a civil dispute about a non-contractual obligation which has an international element. Non-contractual obligations cover an extremely wide range of cases, anything from road traffic accidents to liability for defective products to medical negligence. However, the regulation would not harmonise national laws on these subjects, only their conflict rules determining which country’s law should apply when there are international elements to the case. The most politically sensitive aspect of Rome II is defamation, where the search continues for a solution which will do justice between parties while protecting freedom of expression of the media.

The Proposal was first published by the Commission in 2003. It is at the later stages of negotiations in Working Group. The Austrian Presidency hopes to put this to Council in February or April at the latest. The intention is that this proposal be finalised and adopted in 2006. The European Parliament has already considered the dossier and proposed amendments.

POLICE AND JUDICIAL CO-OPERATION

Framework Decision on the fight against organised crime.
This initiative was published by the Commission in January 2005 and working group consideration commenced shortly afterwards. It proposes, amongst other things, creating specific offences of directing a criminal organisation and active participation in a criminal organisation. It would repeal an existing EU Council Joint Action of 1998 on the subject, with the Commission arguing that a harmonised approach is necessary to tackle organised crime across the EU. If adopted in its original form it would require changes to the law in both England and Scotland, as both jurisdictions generally rely on conspiracy provisions to tackle this aspect of criminality. However, as this is a very technical area, with different approaches across the EU, progress has been quite slow.

The Scottish Executive has been fully consulted by the Home Office unit which is leading negotiations for the UK, and has contributed to the development of the UK negotiating line.

**ASYLUM AND IMMIGRATION**

*(poss) Green Paper on European Migration Network*

**Commission Communication on the establishment of structures involving the national asylum services of the Member States for promoting co-operation.**

The Executive has a co-ordination role with regard to the provision of services for asylum seekers and refugees. Any change to operations in Scotland will be for the Home Office to implement

**GENERAL**

**Follow-up to the Court’s judgement of 13 September 2005 (Case C-176/03 Commission v Council).**

*In September 2005 the European Court of Justice gave judgement in Case C-176/03. The court found that the council had in this case legislated under the incorrect treaty base, therefore annulling the Framework Decision on Environmental Pollution.*

The ECJ judgement reaffirms that, as a general rule, criminal law and measures to facilitate police and judicial co-operation should continue to be agreed unanimously under the Third Pillar.

*A Scottish Executive Official is working with HMG colleagues to consider the full implications of how this matter develops in affecting devolved issues.*

**JD: EU JHA STRATEGY UNIT**

25 January 2006