JUSTICE COMMITTEE

AGENDA

4th Meeting, 2011 (Session 3)

Tuesday 1 February 2011

The Committee will meet at 10.00 am in Committee Room 2.

1. **Decision on taking business in private:** The Committee will decide whether to take item 6 in private.

2. **Long Leases (Scotland) Bill:** The Committee will take evidence on the Bill at Stage 1 from—

   Iain Strachan, Principal Solicitor, Legal and Administrative Services, and Bill Miller, City Development Department, City of Edinburgh Council;

   Richard Brown, Managing Director, City Property (Glasgow) LLP;

   Andy Young, Head of Asset Management, City of Glasgow Council;

   Andrew Ferguson, Solicitor, Fife Council, and Vice President of the Society of Local Authority Lawyers and Administrators in Scotland (SOLAR);

   and then from—

   Professor Robert Rennie, Professor of Conveyancing, University of Glasgow;

   Professor Angus McAllister, Professor of Law, University of the West of Scotland.

3. **Damages (Scotland) Bill:** The Committee will consider the Bill at Stage 2.

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

   the Civil Legal Aid (Scotland) Amendment Regulations 2010 (SSI 2010/461);
the Advice and Assistance (Scotland) Amendment Regulations 2010 (SSI 2010/462).

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

   the Community Payback Orders (Prescribed Persons for Consultation) (Scotland) Regulations 2011 (SSI 2011/1);

   the Restriction of Liberty Order and Restricted Movement Requirement (Scotland) Regulations 2011 (SSI 2011/3);

   the draft Disposal of Court Records (Scotland) Amendment Regulations 2011.

6. **Work programme:** The Committee will consider its work programme.

7. **Long Leases (Scotland) Bill (in private):** The Committee will consider the main themes arising from the oral evidence heard earlier in the meeting.

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Clerk to the Justice Committee  
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The Scottish Parliament  
Edinburgh  
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The papers for this meeting are as follows—

**Agenda item 2**

*All written submissions on the Long Leases (Scotland) Bill*

*Copy of the Long Leases (Scotland) Bill and all accompanying documents*

*SPICe briefing: Long Leases (Scotland) Bill*

Paper by SPICe (private paper)  
J/S3/11/4/1 (P)

Letter from the Scottish Government on the Long Leases (Scotland) Bill  
J/S3/11/4/2

**Agenda item 3**

*Copy of the Damages (Scotland) Bill and all accompanying documents*

**Agenda item 4**

Response from the Cabinet Secretary for Justice  
J/S3/11/4/3

*The Civil Legal Aid (Scotland) Amendment Regulations 2010 (SSI 2010/461)*

*The Advice and Assistance (Scotland) Amendment Regulations 2010 (SSI 2010/462)*

**Agenda item 5**

SSI cover note  
J/S3/11/4/4

*Community Payback Orders (Prescribed Persons for Consultation) (Scotland) Regulations 2011 (SSI 2011/1)*

SSI cover note  
J/S3/11/4/5

*The Restriction of Liberty Order and Restricted Movement Requirement (Scotland) Regulations 2011 (SSI 2011/3)*

SSI cover note  
J/S3/11/4/6

*The Disposal of Court Records (Scotland) Amendment Regulations 2011 (SSI 2011/draft)*
Agenda item 6

Paper by the Clerk J/S3/11/4/7

Papers for information

Letter from the Minister for Community Safety on the Domestic Abuse (Scotland) Bill J/S3/11/4/8


Scottish Government update on EU issues J/S3/11/4/10
Justice Committee

4th Meeting, 2011 (Session 3), Tuesday 1 February 2011

Long Leases (Scotland) Bill

Response from the Scottish Government

At my meeting with the Justice Committee on 11 January¹ to discuss the Long Leases (Scotland) Bill, I was asked what the reasons were for granting such long leases.

As I mentioned, the best information I am aware on this is contained in the Report of the Scottish Leases Committee, published by the Scottish Home Department in 1952. The Committee was chaired by Lord Guthrie and the report is generally known as the Guthrie Report. I attach the following relevant extracts from the report: paragraphs 42-46 and Appendix V.

Simon Stockwell
Justice Directorate
Civil Law Division
26 January 2011

¹ Note by the Clerk: This was an informal briefing session, which took place in private.
Reasons for Grants of Ground Leases

42. Why were ground leases granted frequently in certain districts of Scotland, mainly between about 1770 and perhaps 1860, but in some areas even before 1770, and with a considerable, though reduced, general frequency between 1860 and 1900?

43. The use of ground leases, so far as it became general in certain parts of Scotland in the eighteenth and nineteenth centuries, can be attributed primarily to some prohibition in the titles under which land was held. Thus, as stated in Part II, many landed estates were held under a deed of entail by which sub-letting was precluded. For many years the power of granting leases of entailed land for any specified number of years, unless expressly prohibited by the entail, was not called in question, but in about 1736 an opinion was entertained that leases of unusual endurance might be held to be equivalent to an alienation of the property and thus to fall under the prohibitions contained in entails. Thereafter until the Entail Improvement Act was passed in 1770 it seems to have been widely accepted that heirs of entail could not grant even long leases of land, unless, as was the case in some deeds of entail, the prohibition of alienation was followed by a permissive clause giving the heirs in possession power to grant leases of the lands for such space of time as they should think fit provided a certain rent was obtained (Sandford on Entails, Second Edition, 1842). Apart from entails, many absolute proprietors held their land on a title containing an express prohibition against sub-letting. Again, land held on burgage tenure (that is, the tenure under which property in royal burghs was held) could not be sub-let. These prohibitions were in force when the industrial development of Scotland was taking place and houses for the workers were required in the vicinity of the new mines and mills, and those landowners who could not grant feu rights found in ground leases an expedient whereby building development in their districts could take place in much the same way as if they had been free to grant feu rights of their land. The terms of section 4 of the Entail Improvement Act, 1770, record the injurious effects on development of the restrictions held to prevent the granting of even long leases of entailed land and show that in the circumstances of that period the granting of ground leases of entailed land for 99 years was regarded as a benefit to the community—

"And whereas the building of villages and houses upon entailed estates may, in many cases, be beneficial to the publick, and might often be undertaken and executed if heirs of entail were impowered to encourage the same by granting long leases of land for the purpose of building, be it therefore enacted . . . to be in the power of every proprietor of an entailed estate to grant leases of land for the purpose of building for any number of years not exceeding ninety-nine years."

Building leases under the 1770 Act were to be voidable if one dwelling house at least, not under the value of £10, were not built on each half acre within ten years from the date of the lease, and the houses built were to be kept in proper habitable repair.
44. It happened that relatively rapid development of some industrial areas of Scotland was taking place at a time when entails of land affected a large part of Scotland. In an article in the Edinburgh Review for 1826 it was estimated that “one half of the soil of Scotland” was entailed and the following figures were quoted from the then recently published “Expediency of the Law of Entails” by Patrick Irvine, W.S.:

| Scottish Entails known before 1685 | 24 |
| Entails granted between 1685 and 1825 | 1591 |
| Of which 1591 there were recorded between 1785 and 1805 | 360 |
| 1805 and 1825 | 459 |

As 342 of the 1591 entails granted from 1685 onwards related to the period from 1811 to 1825 and Sir John Sinclair's General Report of the Agricultural State and Political Circumstances of Scotland in 1814 showed that about one third of the real property of Scotland, estimated by its valued rent, was then held under entail, Irvine estimated that by 1825 entails, including unrecorded entails, fettered at least one half of the whole territorial property of Scotland. We understand that the number of entailts continued to increase until 1872 when the peak number of 2199 was reached, but by then the process of removing the restrictions on the right of an heir of entail to sub-feu part of his estate had already begun (paragraph 22).

45. In some estates where neither an entail nor a prohibition in an unentailed title barred the granting of sub-feus, other factors must have influenced the landowners when they decided to use ground leases. In north Ayrshire, for instance, we were told that some landowners held doubts as to the competency or propriety of sub-tenuring even in the absence of any express or implied prohibition, and on other estates in that district the excellent relationship existing between the landowner and the community led to the use of the simple and inexpensive tack, which required no elaborate formalities, either at its granting or on subsequent transmissions, in preference to the grant of a feu. In some areas the use of ground leases may have been a practice continued from pre-Reformation times. Moreover, the owner of land may have preferred to lease his land rather than to feu it in order to retain some control over the land with a view to its re-development in future. It may be, too, that here and there a landowner or a factor with experience of the English leasehold system did introduce ground leases in order to secure ultimate reversion to the estate of the buildings erected on the leased land. In fact we read of a 99 years tack with a clause providing that the “ground is let for the special purpose of building a house or houses thereupon, for the benefit and improvement of the—estate”, but as we also read of the strong local protests provoked by the practice of the estate concerned such a practice would seem to have been unusual.

46. An indication of how small a part ground leases were assumed to have in Scotland's system of land tenure in the first half of the last century and of some of the reasons for their use is given in the Third Report of the Royal Law Commissioners and the evidence published with that Report in 1838. Some notes about the references to ground leases made in that Report are in Appendix IV.
APPENDIX V

Notes of the evidence with regard to ground leases in northern Ayrshire submitted to the Committee by Mr. James Campbell, W.S., of Saltcoats. (Paragraph 57(2))

1. Mr. Campbell told the Committee that in Northern Ayrshire the majority of existing tacks date from around 1730 to around 1845, though in some parts the use of tacks may have continued until the simplification of the feudal procedures and investitures by the Acts of 1858 and 1859, and that the main reasons for adopting the tack in preference to a feu were the following:

(a) In the early part of the period the notion of an annual monetary return for a small feu, as opposed to the old idea of personal services, was not yet fully developed.

(b) The avoidance or evasion of either actual or understood prohibitions against the feuing of untenanted or wadset lands.

(c) The dislike of creating new feudal estates, coupled with an actual doubt, even when no entail difficulties existed, as to the competency or propriety of sub-feuing. For example, in 1750 a vassal holding a considerable town area in feu granted tacks of parts for 741 years for small tacks duties. Similarly, the two tenures were not granted in the same areas in the same period.

(d) The vast majority of tacks, particularly those prior to 1800, were granted because the tack itself was a simple inegal contract, which not only required no elaborate and expensive procedures and formalities, either at its granting or on subsequent transmissions, but could be expressed and written by the landowner's factor or bailie or by himself or, most commonly, of all, by the parish clerk or parish schoolmaster and could pass from father to son simply "jure cunnundrum," and to an assignee by the simplest of writings.

Mr. Campbell is quite certain that in no case during the period when tacks were being granted in this district would there ever be an expectation by the lessor of ultimate or immediate gain to him or his remote successors from the reversionary interest in whatever buildings or other improvements the tackmen might erect, and that attitude of disinclination to the premises erected on leased land has continued to such an extent that in his memorandum Mr. Campbell referred to the conception that valuable buildings erected or purchased by the leasee might actually revert from him to the ground landlord as being "so completely repugnant to Scottish ideas of land tenure as to give rise in most people to the self-seeking assumption that such an eventuality could never happen and that something would necessarily "turn up" to prevent it."

2. Broadly, these Ayrshire tacks fall into two classes with regard to duration, dependent on when they were granted. Between 1700 and about 1800, when the tack was really intended as a cheap and practical and virtually perpetual substitute for a permanent feu, by far the commonest duration was 19 times 19 years—or 361 years, but 39 times 19 years—or 741 years, 2,000 years and even 9,999 years are all to be met with. The duration is often complicated by being for a life or series of lives and 19 times 19 years thereafter. From about 1800 to about 1845, a period during which the reason for granting a tack in place of a feu was more often because of entail difficulties, the more usual period was 198 years, a renewal fine being payable at the end of the 99th year. But in immediate exception to this, a great part of the town of Ardrossan (which was laid out on a hitherto unbuildable site between 1832 and 1833 as a planned "New Town") by the then Earl of Eglinton is held on leases for 999 years. Thus only in the cases of the 198 year tacks are the expiry dates within anything like appreciable distance, those of the 361 year group, the next nearest group, being some 200 years off.

3. The tack duties due under the eighteenth-century Ayrshire tacks are small and sometimes practically nominal in relation to modern money values, but they probably correspond to contemporary feu duties for similar subjects elsewhere. The great majority of these tacks, however, contain contractual obligations for payment of casualties of double the tack duty on the entry of heirs and of the full annual rent on the entry of singular succession. In Mr. Campbell's view, there is no doubt at all that these casualties were intended to correspond exactly to the casualties of relief and composition in feudal subjects, precisely the same rules and practice as applied to feudal casualties being applied to them, and their collection and settlement being based on the feudal rules, modified to meet the changed economic situation. Calculation of any money payment in lieu of bulls of wheat is done by reference to the Flax Prices current at the renewal date. In the second class of tacks, the 1800/1845 group, the tack duty is generally at the then feuing rate (probably about one-third to one-half of an equivalent modern feu-duty). In the 198 year tacks it is usual to have a duplicate of a bull of wheat or its equivalent payable every nineteenth year over and above the tack duty for that year, and a renewal fine of, say, 12 bulls of wheat at the 99th year. In the 999 year tacks of the same group it is usual to find a stipulation for quadruple the tack duty every nineteenth year. The committee were most interested to learn these details of the Ayrshire casualties and duplancises, as they knew that in other parts of Scotland some old ground leases provide for casualties which continue to be exigible, not having been covered by the redemption provisions of the Feudal Casualties (Scotland) Act, 1914.
4. Mr. Campbell told the Committee that the granting in place of an assignation, by a tacksman, of a sub-tack of the whole of the subjects in his possession under the principal tack was and still is a common practice, especially as regards the eighteenth-century tacks, the reason for this being—

(a) To avoid "entering" the assignee with the ground landlord and so becoming liable for a casualty. The principal tacksman remained "entered" with the ground landlord; and on his death his heir (if he could be found and was agreeable) was tendered in his place. At the present day a refinement on this practice is to grant both an assignation and a sub-tack to the purchaser and to leave the assigner entered with the ground landlord until the assignee or his successors should decide to enter in his place. In most of these cases avoidance of a casualty is the prime consideration. In others the extent of ground in the principal tack may be large enough for the tacksman to grant genuine sub-tacks of building status at adequate modern sub-tack duties, so that the mid-right comes to have a value of its own. In such cases the composition by a purchaser of the principal tacksman's rights will not relate to the renewal of the buildings erected by the several sub-tacksmen but simply to the sub-tack duties being received by the principal tacksman, which in Canada may greatly exceed the original tack duty.

(b) To meet the requirement of the Registration of Leases Act that the lease, or a recognised extract thereof, must itself be produced and registered to obtain the benefit of the Act. While many of these old tacks were in fact registered in the Sheriff Court or Community Court Books for preservation at some time or other, many were not so registered. As these rents were sometimes very brief and informal, were generally written on fairly flimsy stamped paper and were retained, not in safe custody in an agent's strongroom, but by the tacksman himself, and have passed from hand to hand through some two centuries, the wonder is, Mr. Campbell commented to us, not that so many have disappeared but that any have survived at all. Where the tack was missing, and no extract could be produced to enable a recorded title to be obtained, the then tacksman in possession granted a sub-tack in favour of his assignee; it was this sub-tack which was recorded under the Act and formed the basis of the assignee's title and of the title of his successors. But for the liability to casualty, the loss of many of the original grants would probably have been got over by approaching the ground landlord for a new tack.

5. In many instances, particularly in the business and shopping areas in towns such as Ballater and Stonehaven, these old Ayrshire tacks have been converted into fees, often in the case of longer tacks, although they gave almost permanent security of tenure, because the local tacksman was anxious to obtain a fully marketable title. These conversions were and are carried through by mutual arrangement between the lessee and the lessor, the gain to the latter being, we were told, "a reasonable feu-duty at a modern hiring rate, as opposed to a tack duty of a few shillings, or even a few pence, which probably cost more to collect than the net sum collected." No premium or payment has ever been known by Mr. Campbell to be paid to the superior [lessee] for the loss of his reversionary interest. Equally, no allowance has been in use to be given to the owner [lessor] in respect of the unexpired period for which the property would have remained liable only in a small or even nominal feu-duty. It is, he says, an invariable rule that the owner [lessor] seeking a conversion relieves the superior [owner] of the expenses of the new File Contract. It is thought by him to be correct that "No premium or payment has hitherto been exacted from the owner [lessor] in relation to the value of the buildings erected by him or his predecessors on the ground by virtue of the lease, expressed or implied, of appropriating these at an approaching expiry... the feu-duty accepted on conversion has at all times been based on a comparative contemporary hiring rate for the site as unoccupied and without any regard to the value or otherwise of the buildings then existing on the site."

6. These old Ayrshire tacks have probably been more trouble to the conveyancers of Scotland than to the lessees holding under them. Mr. Campbell suggests that most agents in districts where ground leases are common will have had experience of requests from outside agents, acting for a purchaser and uncustomed to the tenure, for a personal assurance that the lessee's title is really good and marketable.
Justice Committee

4th Meeting, 2011 (Session 3), Tuesday 1 February 2011

Letter from the Cabinet Secretary for Justice to the Convener

The Civil Legal Aid (Scotland) Amendment Regulations 2010 (SSI 2010/461) and the Advice and Assistance (Scotland) Amendment Regulations 2010 (SSI 2010/462)

Thank you for your letter of 26 January [please see Annexe B] seeking further information on both of the above instruments. I welcome the opportunity to explain further the policy intention.

The intention is to contribute to ensuring that, going forward, legal aid can continue to be targeted at those who need it most. The £1.3bn cut to Scotland’s budget next year has necessitated that the legal aid and advice budget for financial year 2011-12 be set at £142.3m, compared to £155m in 2010-11. This is set out in the Government’s draft Budget and represents an overall reduction of 8.2%. I have separately asked the Scottish Legal Aid Board to make savings of £1.1m (8.5%) in 2011-12 on its administration costs. This is a bigger proportion of savings than will be delivered on the Fund. The savings will be delivered through a combination of measures, including an expanded role for the Public Defence Solicitor’s Office (PDSO). My overall intention will be to preserve as much as possible existing levels of access to justice.

Turning to these specific proposals, the intention is to return to the previous practice in the legal aid scheme of taking the assets of those who owe an obligation of aliment to a child into account in admitting children to advice and assistance or when children apply for civil legal aid. I set out in Annexe A references to the Regulations that originally contained these provisions.

In the current economic climate, and to ensure that we can continue to target legal assistance generally where it is most needed, it is right that if (for example) the family of a child who makes an application has extensive resources then account should be taken of those resources. It is after all likely that anyone who owes an obligation of aliment to a child will have an interest in an application made by that child. In cases where a child’s family, for example, does not have sufficient resources to make them ineligible for legal assistance then it will still of course be available. And when those resources are available the option is always open to take a case privately.

The Committee has drawn particular attention to the provision included in the Regulations that this particular aspect of the Regulations would not apply “if its application in the particular circumstances would be unjust or inequitable”. The Committee will see from Annexe A that this provision in similar form was a part of the original Regulations. It was also an aspect that, during consultations on these Regulations, the Law Society of Scotland pointed out as being of particular importance. This provision is designed to ensure that these provisions do not lead to unjust or inequitable results for the child or anyone else concerned in the particular
circumstances. There are some cases where parents’ assets should be disregarded, perhaps where there is a conflict of interest between a child and its parents or where a child is taking an action against someone who owes them an obligation of aliment. Other examples of an unjust or inequitable situation could be where the person with the obligation of aliment does not support the raising of the court action or where the person had no contact at all with the child.

The Committee has also expressed concern about the discretionary element of this particular provision. But decisions will need to be made on the merits of particular cases - and merits tests such as ‘reasonableness’ and ‘probable cause’ are already very well established features of the legal aid scheme.

I hope the Committee will find this response helpful. The savings that these Regulations will deliver are significant in the context of the overall savings that need to be made in the Fund in 2011-12 and have been developed over several months in consultation with the Law Society of Scotland and the Scottish Legal Aid Board.

Kenny MacAskill MSP
Cabinet Secretary for Justice
27 January 2011

Annexe A

1. Parents’ assets used to be taken into account when assessing a child’s eligibility for advice and assistance. The relevant provision is to be found in paragraph 4 of Schedule 2 to the Advice and Assistance (Scotland) Regulations 1987 [SI1987 No.32 (s32)], which states:

“The resources of any person who, under section 26(3) and (5) of the Social Security Act 1986 is liable to maintain a child or who usually contributes substantially to a child’s maintenance, or who has care and control by reason of any contract for some temporary purpose, may be treated as the resources of the child, if, having regard to all the circumstances, including the age and resources of the child and to any conflict of interest, it appears just and equitable to do so.”

2. This paragraph was omitted by regulation 4 of the Advice and Assistance (Scotland) (Amendment) Regulations 1990 [1990 No. 632 (s80)].

3. In relation to civil legal aid, the Civil Legal Aid (Scotland) Regulations 1987 [1987 No. 381 (s31)] were amended by regulation 4 of the Civil Legal Aid (Scotland) Amendment Regulations 1990 [1990 No. 631 (s79)] by adding; 6A An application by or on behalf of a child under the upper age limit of compulsory school age in terms of regulation 6 above shall be determined in terms of Part III below.”

4. Part III related to Assessment of Resources. Regulation 12 stated:

12 “Where an application for an award of legal aid is made on or behalf of a child-
(a) shall, unless the Board considers that it would be inequitable in all the circumstances to do so, be determined and taken into account in addition to the child’s resources the resources of any person (other than a person who has a contrary interest in the proceedings in respect of which the application is made) by whom an obligation of aliment within the meaning of the Family Law (Scotland) Act 1985 is owed to the child and with whom the child is living; and

(b) the resources of the child shall include any sum payable under the Order of a court or under any agreement to any person for the purpose of the maintenance of the child.”

5. Regulation 12 was omitted by amending regulation 6 of the 1990 SI.

Annexe B

Letter from the Convener to the Cabinet Secretary for Justice

The Civil Legal Aid (Scotland) Amendment Regulations 2010 (SSI 2010/461) and the Advice and Assistance (Scotland) Amendment Regulations 2010 (SSI 2010/462)

I am writing in relation to the above instruments, which were considered by the Justice Committee at its meeting yesterday (extract from Official Report attached). The Committee agreed to write to the Scottish Government seeking further information on both instruments and to consider the instruments again at its next meeting.

SSI 2010/461 requires “the resources of any person who owes an obligation of aliment to a child” to be treated as part of the child’s own resources in the context of a civil legal aid application, but provides that this may not apply “if its application in the particular circumstances would be unjust or inequitable”. It was observed that this discretionary element is quite broad and the Committee agreed to seek more details from the Scottish Government on the background to the instrument and its financial implications.

SSI 2010/462 makes equivalent provision in relation to an application by a child for civil advice and assistance, and the Committee therefore had similar questions as with the first set of Regulations and again agreed to seek further information from the Scottish Government.

In order to allow the Committee to consider your response at its next meeting, I would be grateful to receive the response no later than Friday 28 January 2011.

Bill Aitken MSP
Convener, Justice Committee
26 January 2011
Justice Committee

4th Meeting, 2011 (Session 3), Tuesday 1 February 2011

SSI cover note

SSI title and number: The Community Payback Orders (Prescribed Persons for Consultation) (Scotland) Regulations 2011 (SSI 2011/1)

Type of Instrument: Negative

Coming into force: 1 February 2011

Justice Committee deadline to consider SSI: 21 February 2011

Motion for annulment lodged: No

SSI drawn to Parliament’s attention by Sub Leg Committee: Yes (please see the annexe)

Purpose of Instrument:

1. The purpose of the instrument is to set out the list of prescribed persons whom local authorities must consult about the nature of unpaid work and other activities that those subject to a community payback order are to undertake.

Justice Committee consideration:

2. The instrument was laid on 7 January 2011 and the Justice Committee has been designated as lead committee.

3. Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. All negative instruments are considered by the Subordinate Legislation Committee (on various technical grounds) and by the relevant lead committee (on policy grounds). Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument. If the motion is agreed to, the Parliamentary Bureau must then lodge a motion to annul the instrument for consideration by the Parliament. If that is also agreed to, Scottish Ministers must revoke the instrument.

4. Each negative instrument appears on a committee agenda at the first opportunity after the Subordinate Legislation Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow correspondence to be entered into or a Minister or officials invited to give evidence. In other cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.
Annexe

*Extract from the Subordinate Legislation Committee’s 7th Report 2011*

**The Community Payback Orders (Prescribed Persons for Consultation) (Scotland) Regulations 2011 (SSI 2011/1)**

1. Local authorities are required under the Criminal Procedure (Scotland) Act 1995 to consult “prescribed persons” about the nature of unpaid work and other activities to be undertaken by offenders upon whom community payback orders are imposed. This instrument sets out a list of prescribed persons that must be consulted by local authorities so as to satisfy the obligation on them under the Act.

2. The relevant order making provision is set out at section 227ZL of the Criminal Justice (Scotland) Act 1995. Subsection (1) provides that each local authority must, for each year, consult prescribed persons about the nature of unpaid work and other activities to be undertaken by offenders residing in the local authority’s area on whom community payback orders are imposed. Section 227ZL(2) states that, with reference to subsection (1), “prescribed persons” means such persons, or class or classes of person, as may be prescribed by the Scottish Ministers by regulations made by statutory instrument. The Committee asked whether the descriptions which are set out at paragraphs (e) to (g) of regulation 2, in referring to “one or more” (body) properly refer to a person or class of person for the purposes of section 227ZL(2).

3. The Government’s response clarifies that the use of the expression “one or more” within paragraphs (e) to (g) of regulation 2 reflects the policy intention. The intention is that the requirement to consult can be fulfilled by consulting only one each of the bodies referred to in paragraphs (e) to (g). The response does not however answer the question which had been asked as to whether a reference in the terms provided for at paragraphs (e) to (g) properly prescribes a person or class of person.

4. The Committee considers that the terms of the power set out in section 227ZL are limited. It can only be used to prescribe those persons who are to be consulted either individually or by reference to a particular class. In relation to the provision made at paragraphs (e) to (g) of regulation 2, the Committee considers that the approach taken seeks to modify the effect of the primary legislation in a manner which narrows the consultation requirement made within the primary legislation. To that extent, the reference to “one or more” of the bodies referred to represents what appears to be an unusual or unexpected use of the powers conferred by the parent statute.

5. The Committee reports this instrument on the basis that the use of the expression “one or more” which is used at regulation 2(e) to (g), in the context of the intended prescription of persons, or a class or classes or person, for the purposes of section 227ZL(2) of the Criminal Procedure (Scotland) Act 1995, appears to represent an unusual or unexpected use of the powers conferred by the parent statute.
Appendix

The Community Payback Orders (Prescribed Persons for Consultation) (Scotland) Regulations 2011 (SSI 2011/1)

On 14 January 2011 the Scottish Government was asked:

The Scottish Government is asked to explain the significance of the expression “one or more” which is used at regulation 2(e) to (g) in the prescription of persons set out in that regulation, and whether it considers that it properly refers to a person or class of person for the purposes of section 227ZL(2).

Taking the example of regulation 2(e), can “one or more community council” be said to be a “prescribed person” for section 227ZL(2) purposes, and should reference not have been made to “any community councils” or to “community councils” (which is also the approach taken within paragraphs (c) and (d) of regulation 2)?

The Scottish Government responds as follows:

The expression “one or more” was used at regulation 2(e) to (g) to clarify that the requirement to consult can be fulfilled by consulting only one of each of these classes of person. Taking into consideration comments received during the consultation that was carried out before these Regulations were made, the Scottish Government decided not to refer to “any community council” or “community councils”, because of the perceived implication among stakeholders that this meant that all community councils within a local authority area must be consulted. This was a concern in some areas such as the Northern Community Justice Authority where community councils number into the hundreds. The Scottish Government has drawn up guidance to accompany this SSI to make clear that while local authorities are encouraged to consult more widely, only one of each of the bodies referred to in paragraphs (e) to (g) of regulation 2 must be consulted to fulfil the legal requirement.
Justice Committee  

4th Meeting, 2011 (Session 3), Tuesday 1 February 2011  

SSI cover note  

<table>
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<tr>
<th>SSI title and number:</th>
<th>The Restriction of Liberty Order and Restricted Movement Requirement (Scotland) Regulations 2011 (SSI 2011/3)</th>
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<tr>
<td>Type of Instrument:</td>
<td>Negative</td>
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<tr>
<td>Coming into force:</td>
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<td>21 February 2011</td>
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<tr>
<td>Motion for annulment lodged:</td>
<td>No</td>
</tr>
<tr>
<td>SSI drawn to Parliament’s attention by Sub Leg Committee:</td>
<td>No</td>
</tr>
</tbody>
</table>

Purpose of Instrument:

1. The purpose of the instrument is to revoke the current regulations in respect of Restriction of Liberty Orders (RLO) and to make a new set of regulations which will specify the courts which may impose an RLO or a Restricted Movement Requirement (which is a new sanction for breach of a Community Payback Order), the methods of monitoring compliance, and the devices that may be used. The methods will be the same as those currently used to monitor compliance with RLOs, and the devices are very largely the same.

Justice Committee consideration:

2. The instrument was laid on 13 January 2011 and the Justice Committee has been designated as lead committee.

3. Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. All negative instruments are considered by the Subordinate Legislation Committee (on various technical grounds) and by the relevant lead committee (on policy grounds). Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument. If the motion is agreed to, the Parliamentary Bureau must then lodge a motion to annul the instrument for consideration by the Parliament. If that is also agreed to, Scottish Ministers must revoke the instrument.

4. Each negative instrument appears on a committee agenda at the first opportunity after the Subordinate Legislation Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually
be continued to a later meeting to allow correspondence to be entered into or a Minister or officials invited to give evidence. In other cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.
SSI cover note

SSI title and number: The draft Disposal of Court Records (Scotland) Amendment Regulations 2011

Type of Instrument: Draft Negative

Coming into force: 4 April 2011

Justice Committee deadline to consider SSI: 28 February 2011

Motion for annulment lodged: No

SSI drawn to Parliament’s attention by Sub Leg Committee: No

Purpose of Instrument:

1. The purpose of the instrument is to amend the Disposal of Court Records (Scotland) Regulations to take account of the disposal of justice of the peace court records. These will be disposed in the same manner as for sheriff court records.

Justice Committee consideration:

2. The instrument was laid on 18 January 2011 and the Justice Committee has been designated as lead committee.

3. Draft negative instruments are instruments that may not be made if the Parliament so resolves within a period of 40 days after they are laid. All negative instruments are considered by the Subordinate Legislation Committee (on various technical grounds) and by the relevant lead committee (on policy grounds). Under Rule 10.5, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending that the instrument be not made. If the motion is agreed to, the Parliamentary Bureau must then lodge a motion to propose that the instrument be not made, for consideration by the Parliament. If that is also agreed to, Scottish Ministers may not make the instrument.

4. Each negative instrument appears on a committee agenda at the first opportunity after the Subordinate Legislation Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow correspondence to be entered into or a Minister or officials invited to give evidence. In other cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.
Justice Committee

4th Meeting, 2011 (Session 3), Tuesday 1 February 2011

Committee work programme

Background

1. The Committee reviewed its work programme on 7 December 2010 and largely agreed its priorities for the remaining meetings of the session. This note provides an update on the current position and invites a decision on one new request that has been received to give oral evidence to the Committee. There are two further decisions to be taken on matters arising from previous work programme decisions.

2. A table indicating the expected distribution of work (covering Bills and one-off evidence sessions, but not including some smaller items such as SSIs) is set out in table format in Annexe A.

Bills

3. The remaining Bills before the Committee are as follows (referred to in the order in which the Committee agreed to deal with them).

*Damages (Scotland) Bill – Bill Butler*

4. Following the Stage 2 proceedings today (1 February), it will be for the Bureau to propose to the Parliament a time for the Stage 3 proceedings in the Chamber.

*Domestic Abuse (Scotland) Bill – Rhoda Grant*

5. The Bill’s general principles have been agreed to, and Stage 2 is scheduled for next week’s meeting (8 February). Again, it will then fall to the Bureau to propose a time for Stage 3.

*Double Jeopardy (Scotland) Bill – Scottish Government*

6. The Committee’s Stage 1 report has now been published, and the Stage 1 debate will take place on 3 February. Stage 2 is scheduled for the Committee’s meeting on 1 March. This should allow Stage 3 to be taken in the Chamber prior to dissolution.

*Long Leases (Scotland) Bill – Scottish Government*

7. The Committee is still conducting its Stage 1 inquiry, with a view to completing a Stage 1 report by the beginning of March. This should allow a Stage 1 debate in the Chamber prior to dissolution, subject to time being available, but it is not expected that there will be time for the Bill to complete its remaining stages in the current session.
Commissioner for Victims and Witnesses (Scotland) Bill – David Stewart

8. The Committee agreed in December, in response to a request by Mr Stewart, to invite him to give oral evidence on his Bill, recognising that time constraints precluded a full Stage 1 inquiry. This evidence-session has now been arranged for 8 March.

Budget scrutiny

9. The Committee’s report to the Finance Committee has now been published as an annexe to that Committee report on the draft budget. The Scottish Government has been requested to respond formally to the Justice Committee’s report.

European scrutiny

10. The Committee has agreed its priorities arising from the EU Commission work programme for 2011, primarily through a list of issues to be tracked by the Parliament’s European Officer. The Committee has also now appointed Bill Butler as EU Reporter during a pilot of a new “early warning system” that began on 31 January. It will therefore be for the EU Reporter to consider each week any EU legislative proposals relevant to the Committee remit and flag up any that he considers merit consideration by the Committee.

11. The European Commission has now published its work programme for 2011 (CWP). Previously the EERC has consulted with subject committees on the CWP with a view to identifying those EU proposals within devolved areas that have the potential to impact on Scotland. The Convener of the EERC has written to all subject committees proposing that, given the proximity of the Scottish elections, any consideration of EU priorities should form part of each Committee’s legacy paper. The Committee is invited to agree to this course of action.

Legislative consent memorandums

12. No further LCMs are anticipated during the remainder of the current session.

Proposed new scrutiny topic

13. Professor John McNeill, the Police Complaints Commissioner for Scotland, wrote to the Convener on 19 January (see Annexe B), seeking an opportunity to give evidence to the Committee. His particular concern is the proposal by the Scottish Government to transfer the functions of his office (PCCS) to that of the Scottish Public Services Ombudsman (SPSO)\(^1\). Professor McNeill believes that such a move would be “a retrogressive step”.

\(^1\) The Cabinet Secretary wrote to inform the Committee of this proposal on 14 December, and the letter was circulated for the 21 December meeting (paper J/S3/10/37/10). This is
14. In view of the volume of other Committee business scheduled for the remaining meetings of the session, the only opportunity to take oral evidence from Professor McNeill would be on Tuesday 22 February. As this would be an addition to the Committee’s agreed work programme, it is for the Committee to decide whether to invite him to give evidence on that day.

Update on existing scrutiny topics

15. During previous work programme discussions, the Committee agreed to undertake scrutiny work on a number of topics as and when time allowed. At the December meeting, the Committee agreed to delete from the list a number that had been completed or were no longer current. The following paragraphs consist of a brief update on those remaining.

Access to justice

16. Although it has not proved possible to conduct an inquiry on this topic (originally flagged up by Robert Brown, in particular), the Committee agreed in December to highlight this topic in its legacy paper as a candidate for inquiry by its successor committee.

Administrative Justice Steering Group

17. The Committee agreed in September 2009 to hold a one-off evidence session on issues arising from the final report of the Administrative Justice Steering Group, chaired by Lord Philip, recommending the creation of a Scottish Tribunals Service covering both devolved and reserved tribunals.

18. At its meeting on 21 September 2010, the Committee agreed to seek an update from the Scottish Committee of the Administrative Justice and Tribunals Council (SCAJTC) on the result of a consultation it was then running on taking forward the Philip recommendations. At the time, the SCAJTC expected to provide advice to Ministers, based on the outcome of the consultation, in December. It is now understood that the SCAJTC report has just gone to Ministers or will do so imminently.

19. On 30 September, during a debate in the Parliament on tribunal reform, the Cabinet Secretary announced that a Scottish Tribunal Service was to be established from 1 December 2010, initially as a delivery unit of the Scottish Government covering five tribunals. He also said that he had understood to be an informal consultation, so no consultation document has been published. It is understood that consultees include police forces, police boards, HMRC, HMICS, SPSO, COSLA, ACPOS, ASPS and SCDEA.

2 The consultation document is available here: http://www.ajtc.gov.uk/docs/tribunal-reform-scotland-discussion-paper.pdf

3 The Official Report is available at: http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-10/sor0930-02.htm#Col29182

4 These are currently the Lands Tribunal for Scotland, the Scottish Charity Appeals Panel, the Mental Health Tribunal and the Pensions Appeals Tribunal. Discussions are ongoing with the...
discussed with the Lord Chancellor how this might fit with the UK Government’s policy of creating a unified judicial structure for England and Wales, and was hopeful these discussions would lead to judicial leadership of tribunals in Scotland being transferred to the Lord President, and administrative responsibility being devolved to Scottish Ministers.

20. At the 7 December meeting, the Committee noted the UK Government’s announcement (as part of its review of public bodies) that the AJTC is to be abolished, and agreed to write to the Cabinet Secretary for clarification about the longer term future of the Scottish Committee. In his reply (circulated as paper 6 for the last meeting), the Cabinet Secretary said that the UK Government had assured him that the SCAJTC would continue to exist at least until 31 August 2011, and would therefore continue to be available in the interim to advise the Scottish Government on tribunal reform. He went on “We have not yet made a decision on whether any of the Scottish Committee’s functions should continue to be exercised after its abolition, and if so by whom.”

21. In view of other pressures on Committee time, it is unlikely now to be possible to hold the one-off evidence session on tribunal reform envisaged in September 2009. However, the Committee may wish to write again to the Cabinet Secretary asking for a more general update on the issue of tribunal reform (including what advice it has received from the SCAJTC, and what progress has been made in discussions with the UK Government). Such a letter could also ask the Cabinet Secretary, further to his recent letter, when he expects to decide whether or not to maintain the SCAJTC’s functions after its abolition, what he sees as the main considerations for and against, and who he sees as candidates for taking on those functions (should that be the decision).

Criminal Procedures (Legal Assistance, Detention and Appeals) (Scotland Act) 2010

22. At the December meeting, the Committee considered a suggestion by Robert Brown to undertake some scrutiny of the above Act, which was passed by the Parliament under Emergency Bill procedures following the decision of the UK Supreme Court in Cadder v. HMA. The Committee agreed to invite some of those who had voiced concerns at the time about the content of the Bill and about the use of the Emergency Bill procedure, and then to invite the Cabinet Secretary to respond to those concerns.

23. For the first panel, to be heard on 8 March, the following have been invited:

- Professor Alan Miller (Chair, Scottish Human Rights Commission)
- Alan McCreadie, Secretary of the Criminal Law Committee (and/or a member of the Committee), Law Society of Scotland

Private Renting Housing Panel and the Additional Support Needs Tribunal with a view to bringing them within the new system by the end of the financial year.
• John McGovern, former President, Glasgow Bar Association
• John Scott, member of Scottish working group, and Jodie Blackstock, senior legal officer, Justice.

24. The Cabinet Secretary will then be heard on 15 March.

25. In addition to those invited for the first panel (listed above), there are others who commented at the time (such as the Faculty of Advocates and Scottish Criminal Cases Review Commission) who could be given an opportunity to submit written evidence.

26. In addition, the Committee agreed in December to include in its legacy paper a suggestion that its successor committee might conduct post-legislative scrutiny of the 2010 Act following completion of the review currently being undertaken by Lord Carloway. Lord Carloway’s remit is to review Scottish criminal law in the aftermath of the Cadder decision, including “the extent to which issues raised during the passage of the Criminal Procedures (Legal Assistance, Detention and Appeals) (Scotland Act) 2010 may need further consideration, and the extent to which the provisions of the Act may need amendment or replacement”.  

Laser pens

27. The Committee considered, at the December meeting, a request by Wendy Alexander to investigate the dangerous misuse of laser pens (or laser pointers). The Committee agreed to include reference to this proposal in its legacy paper.

Final reports of the session

Annual report 2010-11

28. The Committee is obliged under standing orders to prepare an annual report on its work during each “Parliamentary year”. The fourth and final such report of the session, for obvious reasons, has to be signed off prior to the end of the Parliamentary year it covers. To minimise the extent to which it must anticipate work not completed at the time it is prepared, it is expected that the annual report will be considered at the Committee’s meeting on 15 March (expected to be the final meeting of the Committee).

Legacy paper, Session 3

29. Although it is not a requirement in the same way, it has become normal practice for committees to prepare “legacy papers” at the end of a session.

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6 As dissolution is scheduled for midnight on 22 March, it would be possible for a final meeting to be held on that day; but it is not anticipated this date will be used unless there is urgent business requiring it.
These are also committee reports, and – for similar reasons – are usually considered as one of the concluding bits of committee business. To ensure that the Committee has two opportunities to consider its legacy paper, a first draft will be circulated for the 8 March meeting.

30. One theme of most legacy papers has been an overview of the work undertaken by the Committee throughout the session, together with any reflections on the methods of scrutiny the Committee has employed and how successful those have been in practice. A second theme has usually been to anticipate some of the challenges and opportunities of the next session, and make suggestions for inquiries or other bits of scrutiny work that a successor committee might wish to undertake. As noted earlier in this paper, a number of such suggestions have already been made.

31. The Conveners Group recently published its own Session 3 legacy paper, in which it recommended (paragraph 15) that all current subject committees include in their legacy papers suggestions of areas that would benefit from post-legislative scrutiny. Post-legislative scrutiny is usually understood to mean a review of a body of legislation (for example, an Act and associated subordinate legislation) a few years after commencement to see whether it is working as anticipated (including by reference to cost, practical impact, transitional issues etc.).

Conclusion

32. The Committee is invited to note the contents of this paper, and to decide:

- that the outcome of any deliberation on the 2011 Commission Work Programme should be included in the legacy paper (see paragraph 11 above)
- whether to invite Professor John McNeill to give oral evidence on 22 February (see paragraphs 13 and 14 above)
- whether to write to the Cabinet Secretary seeking further information on tribunal reform (see paragraph 21 above)
- whether to invite written evidence on the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act to supplement the oral evidence already arranged (see paragraph 25 above).

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## Current work programme

**Note:** This is a provisional indication of when most remaining business (other than SSIs and other minor items) will be dealt with. All dates are provisional until Committee agendas are published.

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<thead>
<tr>
<th>Date</th>
<th>Event</th>
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<tbody>
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<td>8 February</td>
<td>Long Leases – evidence session 4</td>
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<tr>
<td></td>
<td>Domestic Abuse – Stage 2</td>
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<tr>
<td></td>
<td><strong>Recess: 12 February to 20 February</strong></td>
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<tr>
<td>22 February</td>
<td>Long Leases – issues paper/first draft report</td>
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<td>Police Complaints Commissioner (t.b.c.)</td>
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<tr>
<td>1 March</td>
<td>Long Leases – draft report and sign-off</td>
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<td>Double Jeopardy – Stage 2</td>
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<tr>
<td>8 March</td>
<td>Commissioner for Victims and Witnesses (Scotland) Bill – evidence session (David Stewart)</td>
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<td></td>
<td>Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 – panel</td>
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<td>Legacy paper – first draft report</td>
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<td>15 March</td>
<td>Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 – Cabinet Secretary</td>
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<td>Legacy paper – sign-off</td>
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<td>Annual report</td>
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<td>22 March</td>
<td><strong>Dissolution</strong></td>
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**Key:**

- Domestic Abuse Bill
- Double Jeopardy Bill
- Long Leases Bill
- One-off evidence sessions
- Final reports
Annexe B

Letter to the Convener from Professor John McNeill, Police Complaints Commissioner for Scotland

I am writing to thank you once again for the supportive comments you made in your letter of 7 December, on the approach that I am taking to carrying out my duties as Police Complaints Commissioner for Scotland.

In that letter you raise the possibility of me giving evidence to the Justice Committee. I would welcome this opportunity and hope that a date can be found before the dissolution of the current Parliament.

As you will be aware, the Justice Secretary is currently consulting on a proposal to move the functions of the PCCS to the Scottish Public Services Ombudsman, a move that I believe would be a retrogressive step. I will send a copy of my response to the members of the Justice Committee at the beginning of February. You may consider it helpful for me to attend the Committee around that time to answer any questions arising from the proposal and my response.

I look forward to hearing from the Committee Clerk, if a suitable window can be found.

Professor John McNeill
19 January 2011
Letter from the Minister for Community Safety to the Convener

Domestic Abuse (Scotland) Bill

As you know, in Wednesday’s Stage 1 debate on the Domestic Abuse (Scotland) Bill, I undertook to share the enclosed correspondence relating to the Bill:

1. My letter to Rhoda Grant MSP including information provided by the Scottish Legal Aid Board about the steps it can take in cases involving domestic abuse [see Annexe A].

2. The Lord Advocate’s letter to Rhoda Grant MSP about the difficulties that could arise for prosecutors if it is not clear which interdicts relate to domestic abuse [see Annexe B].

I look forward to the Committee’s consideration of the Bill at Stage 2.

Fergus Ewing MSP
Minister for Community Safety
21 January 2011
Annexe A: Letter from the Minister for Community Safety to Rhoda Grant MSP

Domestic Abuse (Scotland) Bill

As you know, the Government is supportive of your Bill generally but we do have concerns about costs and we are opposed to section 2. When we met on 22 December, you indicated that you would consider removing section 2 of the Bill, if the Government and the Scottish Legal Aid Board could provide you with reassurance on the provision of legal aid for victims of domestic abuse.

I have been working with the Board since then and they have now provided me with a comprehensive statement of their support for victims of domestic abuse. A copy of this statement is attached.

I hope you agree with me that this is a helpful and comprehensive statement and that you do now feel able to remove section 2 from the Bill. I am happy to discuss any issues arising with you at any time.

Finally, my officials and I will continue to work closely with you and your officials on the Bill. I am very grateful to you for the co-operative way you and your team are working with us.

Fergus Ewing MSP
Minister for Community Safety
19 January 2011

Scottish Legal Aid Board

Statement in respect of civil legal aid in relation to domestic abuse protective orders

Key points

- The Scottish Legal Aid Board applies the statutory tests for civil legal aid and must apply these consistently across different types of case
- Where an applicant is unable to access resources due to having fled the home, we can initially assess them as having no access to resources for legal aid purposes, enabling their case to proceed, with reassessment only undertaken once access to resources has been re-established.
- In urgent situations, solicitors are able to take initial steps in seeking a protective order without a full civil legal aid application having first to be considered by the Board.
- Of those applying in 2009/10 for civil legal aid in relation to protective orders, only 1% were assessed as ineligible on financial grounds
- Of the cases granted in 2009/10, 81% had no contribution to pay. Income-based contributions are paid via interest free instalments over a period of between 20 and 48 months depending on the size of the contribution.
• Where a contribution significantly exceeds the solicitor's estimate of the likely cost of the case, the amount collected can be reduced to reflect this lower amount
• Where the cost of the case turns out to be lower than the amount of contribution paid, the difference will be refunded to the client
• The Board and Scottish Government have made several changes over the last ten years to make it easier for those experiencing domestic abuse to access legal assistance:
  o Extending the contribution instalment period from 10 months to up to 48 months
  o Restricting the amount connected to the solicitor's estimate of the cost of the case
  o Revising the special urgency arrangements so that solicitors no longer require up front payment from the client of substantial funds
  o Following discussion with Scottish Women's Aid, opening the Civil Legal Assistance Office in Inverness and Lochgilphead, including domestic abuse in the remit of the offices
  o Inviting Scottish Women's Aid to be members of the Access to Justice Forum to be established by the Board to assist in its role of monitoring the availability and accessibility of legal services.

Application of the statutory tests for legal aid

The Scottish Legal Aid Board is responsible for administering the legal aid system in Scotland. This includes the application of statutory tests in relation to both the means and merits of cases. For civil legal aid, the legal aid legislation and regulations specify fixed limits for disposable income and allowances for dependents. They also set out the kinds of the income the Board should take into account in making an assessment. The Board therefore has relatively little discretion in calculating an applicant's disposable income and has no discretion to disregard the statutory limits on disposable income: should the applicant's disposable income exceed the limits, they will be ineligible.

Financial assessment in emergency situations

Where a person is unable to access any resources, for example if they have had to leave the home as a matter of urgency and do not have access to bank accounts, we can assess them as having no access to resources for legal aid purposes. In this case, no contribution will be assessed at the outset, although we retain our right to assess any resources that subsequently become available to the applicant once their circumstances change. The applicant may therefore be assessed as able to pay a contribution on subsequent reassessment.

Outcome of financial assessments

The position in 2008/09 was that, of the 1371 financial assessments completed by the Board in cases containing at least one crave relating to a protective order, 97% were assessed as eligible, 77% with no contribution. Only 3% of applicants (43 cases) were assessed as ineligible. In 2009/10, this percentage had fallen to 1%
(18 cases) as a result of the extension of financial eligibility. A larger number of cases are refused because the merits test is not satisfied, regardless of the applicant's resources.

We have undertaken more detailed analysis of the cases granted in 2009/10 with a primary category relating to a protective order. This shows that 81% of grants involved no contribution at all. Of those cases with a contribution, 49% were for less than £1000. The average contribution was £1366, although this was skewed slightly by the presence of a small number of much higher contributions. The higher contributions were a result of the extension in April 2009 of financial eligibility to those with disposable incomes of up to £25,000 (now £25,450).

Payment of contributions

Prior to 2000, the Board collected all contributions in 10 monthly interest-free instalments. Concerned that this period for repayment made it difficult for some applicants to proceed, the Board sought the agreement of Scottish Ministers to extend the time period for collection of contributions of over £500. This change reduced the proportion of applicants deciding not to proceed.

In 2001, the Board carried out research with remaining applicants who decided not to proceed with a grant of civil legal aid with a contribution. The research found that most of these applicants had decided not to proceed because they had been asked for too much by way of contribution. Of these, one third reported that they would have been more likely to proceed had they been given longer to pay. This response was particularly prevalent amongst female respondents. A quarter also considered that they would have been more likely to proceed had they known that they might not be required to pay the full amount if the case cost less than the assessed contribution.

Following this research, the Board proposed that the extension of instalment periods should apply to all contributions, not just those of over £500. Scottish Ministers agreed and the Board subsequently introduced the instalment framework set out below.

Normally, we will allow contributions of-

- up to £500 to be paid in 20 monthly instalments
- £501-£1,000 to be paid in 30 monthly instalments
- £1,001-£1,500 to be paid in 36 monthly instalments
- £1,501-£2,000 to be paid in 42 monthly instalments
- over £2,000 to be paid in 48 monthly instalments

If a client finds these instalment levels unaffordable, we may, depending on the individual circumstances, be prepared to review them and to allow them to pay the contribution over a longer period.

Restricting contributions to the estimated case cost

At the same time, we introduced the system whereby the amount we collect from the applicant can be limited to the solicitor’s estimate of the cost of the case. If a client has an assessed contribution of £2500 but the solicitor estimates that the case is only
going to cost £1300, we will normally allow the latter amount to be paid, usually over 20 months. This is on the proviso that, should the solicitor's estimate be exceeded, the applicant will still be liable for the remainder of the originally assessed contribution or the final cost of the case, whichever is lower.

**Revised special urgency procedures**

Also in 2001, the Board undertook focus groups with solicitors who provided services under the special urgency provisions, which allow an action to be commenced prior to a full civil legal aid application being submitted and considered by the Board. This research was prompted by discussions with Scottish Women's Aid, which suggested that victims of domestic abuse often had difficulty securing the services of a solicitor for urgent work, as the practice at the time was for a solicitor to request an upfront payment to cover the cost of the work done should the applicant subsequently turn out to be ineligible.

As a result of the research, Scottish Ministers agreed to the introduction of a revised special urgency system which removes the risk from the solicitor that they will not be paid for work undertaken in good faith. Under this revised system, the applicant agrees to pay any contribution subsequently assessed by the Board or to reimburse us for the cost of work already done should they turn out not to be eligible. The introduction of this system was widely welcomed as it addressed what was considered to be one of the most significant barriers to access to protective orders.

**Civil legal assistance office (CLAO)**

Despite these improvements, the Board remained concerned that some seeking interdicts were having difficulty finding a solicitor willing to undertake the work under civil legal aid. Extended discussions of this issue with Scottish Women's Aid over several years led to the development of the Board's proposal for a civil legal assistance office in which solicitors employed by the Board would provide a general casework service for those unable to find a solicitor in private practice willing and able to act for them. Although the scope of the offices' work was to be wide, there was to be a specific focus on domestic violence, with the establishment of referral links with Women's Aid groups one of the early objectives.

The Board opened an office in Inverness in early 2008. At the same time, the Board's ongoing project in Lochgilphead took on a more casework orientated approach. Both offices have good links with and take cases on referral to local women's aid groups. The Board also intended to open similar offices in Edinburgh and Glasgow, but following representations by the Family Law Association and Glasgow Bar Association that they were not needed, these plans were not implemented.

**Monitoring of availability and accessibility of legal services**

The Board continues to monitor supply of legal aid services across the country and advises Scottish Ministers should any potential problems become apparent. This role has recently been formalised in the Legal Services (Scotland) Act 2010, which gives
the Board a duty to monitor the availability and accessibility of legal services and to advise Scottish Ministers accordingly.

As part of its implementation of this new role, Scottish Ministers have asked the Board to set up an Access to Justice Forum, involving representatives of professional bodies and user groups. Scottish Women's Aid have been invited to join this group. The Board hopes that this will provide a useful vehicle for raising any difficulties experienced by those seeking legal assistance, including in relation to domestic abuse.

Taken together, these measures (extended instalment periods, restricting contributions to the solicitor's estimate, the revised special urgency procedures, the development of the CLAO and the Access to Justice Forum) can be seen to have both improved access to justice for those experiencing domestic abuse and signal the Board's ongoing commitment to promoting access for this group.
Annexe B: Letter from the Lord Advocate to Rhoda Grant

Thank you for your letter of 23 November 2010 concerning possible amendments to the Domestic Abuse (Scotland) Bill.

Section 1 of the proposed Bill relates to the scope of a civil order, and as such, the proposed amendment is more appropriately a matter to be addressed by Scottish Government officials. I understand from my officials that Scottish Government officials propose to reply to you directly on this point. The removal of the definition of domestic abuse from the Bill does, however, have potential implications for the prosecution of breaches of interdicts under section 3(1) of the Bill. In order to prosecute such offences, the police and prosecutors must be satisfied that the breach falls within the terms of section 3(1). While the terms of the interdict will be a matter for the civil proceedings, to avoid any difficulties in the criminal context, the interdict will require to make it clear that the Sheriff has deemed the conduct referred to in the interdict to amount to domestic abuse.

Without a clear definition of what amounts to domestic abuse, there is the possibility that such interdicts will be challenged on their facts. Although this will be an issue to be addressed by the civil court, it should be highlighted that such challenges may result in motions to adjourn any criminal proceedings until the issue has been resolved.

Elish Angiolini QC
Lord Advocate
17 January 2011
Justice Committee

4th Meeting, 2011 (Session 3), Tuesday 1 February 2011

Letter from the Commissioner for Public Appointments in Scotland to the Convener

Parole Board for Scotland

I read with interest the Official Report of the Justice Committee meeting held on 21 December 2010.

During the meeting the Committee questioned the Cabinet Secretary for Justice on proposals to amend the list of specified authorities contained in the Public Appointments and Public Bodies etc. (Scotland) Act 2003, so that the position of Lord Commissioner of Justiciary on the Parole Board for Scotland is no longer subject to my regulatory remit.

During evidence it became clear that two appointments have been made to this post without reference to the Code of Practice for Ministerial Appointments to Public Bodies in Scotland (the Code). You will know that I am required by the 2003 Act to report such cases to the Scottish Parliament. I intend to submit a report on the Parole Board for Scotland to the Scottish Parliament on 24 January. I would be happy to send you a copy of the report if that would be of interest.¹

I would like to take this opportunity to clarify the situation regarding ministerial appointments in Scotland. Appointments are made by the Scottish Ministers, not by my organisation. The rules referred to by the Cabinet Secretary in the meeting are, I believe, the principles and practices set out in the Code. These explain what is required to provide a fair and open ministerial appointments process that is subject to independent scrutiny. When a nomination is made by the Lord President the requirements for openness and independent scrutiny will not be met; there may be other requirements that are not met, although I cannot be specific about these as I do not know the process the Lord President will use.

Contrary to the Cabinet Secretary’s suggestion, the Code does not specify the appointment criteria for a particular post or body. These are determined by the Scottish Ministers and all criteria must be suited to the body and the post to be filled.

I believe it important to highlight the role of OCPAS and the Code so that any misperceptions inadvertently created as a result of the evidence and the Official Report may be corrected. If it would be helpful, I could meet you or the full Committee to provide information on my work to inform any future debate on ministerial appointments.

¹ Note by the Clerk: This is now available at: http://www.publicappointments.org/site/uploads/publications/441025745638add37c5e42679b73aa7.pdf
Karen Carlton
Commissioner for Public Appointments in Scotland
21 January 2011

**Note by the Clerk:** The Justice Committee’s report on the draft Public Appointments and Public Bodies etc. (Scotland) Act 2003 (Amendment of Specified Authorities) Order 2011 is available at:


The draft Order was approved by the Parliament on 12 January 2011.
Justice Committee

4th Meeting, 2011 (Session 3), Tuesday 1 February 2011

Updates from the Scottish Government on EU JHA

Hungarian Presidency of the Council of the EU – Justice and Home Affairs prospects

General

The Hungarian Presidency of the EU began on 1 January and will run to 30 June 2011.

Hungary's general approach is described as being built around four headline priorities:

- Growth, jobs and social inclusion
- A stronger and deeper Europe – ‘build on the foundations and save the future’
- A Union close to its citizens
- Responsibly enlarging and globally engaging

Within this the "human factor" - the service of European citizens – is the common theme. In this respect it resonates with the Stockholm Programme of justice priorities, which also states that citizens must be at the heart of what the EU does in that area.

Overall, Hungary appears to be content to focus on delivering a competent ‘technical’ Presidency, trying to ensure that the negotiating machinery and processes function effectively, and without having many eye catching initiatives of their own.

In JHA they will therefore in the main take forward the inherited agenda, trying to bring to fruition negotiations which have been ongoing under previous Presidencies, while seeking also to make a start on new initiatives recently published by the Commission, or then expected during their time at the helm. The main dossiers with a devolved interest are highlighted below.

Main criminal and police initiatives

European Investigation Order (EIO).

The stated objective is to create a single, efficient and flexible instrument for obtaining evidence located in another Member State in the framework of criminal proceedings, based on the principle of mutual recognition. It is widely accepted that current arrangements (built up over a period of time) are fragmentary, and do not always fit together in a coherent fashion; and agreement therefore with the aim of trying to establish a more comprehensive system. Nonetheless, negotiations under the Belgian Presidency have become becalmed amongst discussions on a series of higher level matters of principle. The Hungarians therefore face the challenge of taking forward this complex dossier, with a view to achieving a general approach
among the Member States, and perhaps to facilitate the start of negotiations with the European Parliament.

**European Protection Order (EPO).**
The initiative for an EPO aims to facilitate protection granted to victims of crime, including domestic violence, who move between EU Member States. The European Parliament has presented its detailed views under the Belgian Presidency, and, on this basis, agreement on the operative provisions has been largely secured. However, there remains a lack of consensus on the complex matter of legal base (civil law protection measures). It will therefore fall to the Hungarians to decide how to proceed now, bearing in mind that the Commission is due to publish further proposals on this matter in the first half of 2011, as part of a general package reviewing the treatment of victims within the EU. Apart from the EPO dossier, this review may propose revised EU legislation in these matters more generally, which are already currently covered, for example, by a Framework Decision on the treatment of victims in criminal proceedings.

**Combating child sexual exploitation.**
The Belgian Presidency's achievement of a general agreement among Member States on the terms of the draft Directive to combat child sexual exploitation, including child pornography, will leave the Hungarians in charge of negotiating agreement with the European Parliament. Discussions are expected to start early in the New Year.

Work on the **Procedural Rights Roadmap**, agreed in 2009, will continue. The second measure, on the **right to information in criminal proceedings** (the so-called “letter of rights”), made good progress under the Belgians, with intensive negotiations securing a general approach among Member States on a text to take forward to Trilogue with the European Parliament, which the Hungarians will oversee. We also understand that the Commission are now making detailed preparation for the next measure in the Roadmap, on **access to a lawyer**, which may therefore be published during the Hungarian Presidency and thus require initial handling. It is believed that a draft Directive in this area will cover, inter alia, matters such as: timing of access by a lawyer to suspect/accused; the role of the lawyer during interviews; choice of lawyer; and possibly the issue of the provision of ‘double defence’ in cross border cases, such as in the EAW (i.e. provision of legal advice in the executing State as well as the issuing one). These matters to some extent cover the same ground as the recent Cadder case in Scotland.

On the use of airline **Passenger Name Records** (PNR) to combat serious crime and terrorism, the negotiating mandates for agreements with Australia, Canada and the USA have now been agreed, and the Hungarians will be tasked with steering negotiations accordingly. If the awaited Commission initiative for a similar PNR regime within the EU is published, then that will also require initial handling. A new proposed Directive on **Attacks on Information Systems** (computer ‘botnets’) has been published, as part of a wider work programme in the area of cybercrime, and the Hungarians are actively laying the ground with preparatory papers for negotiations to start early in 2011.
With regard to other new legislation which is likely to, or may, appear during the Hungarian Presidency, it is believed that the Commission are currently preparing a revised Data Protection Directive. This draft Directive will straddle all areas where the EU has competence to make provision, but within this there will be an important chapter dealing with law enforcement issues. There may also to be a move to revise the Data Retention Directive (telephone/electronic contact records), which the Commission are currently reviewing; and the Commission are also thought to be considering an internal EU Terrorist Finance Tracking initiative, similar to an EU/US initiative on this matter.

With regard to non legislative matters, an important dossier is expected to be continued work on implementing the Internal Security Strategy (ISS) agreed at the February 2010 JHA Council, and recently followed up by a Commission Communication in November proposing a way ahead. The ISS seeks to bring more coherence to the work of existing EU bodies and groups, such as Europol and Eurojust, and of relevant national authorities, by a sharpening of focus and better definition of common threats and challenge. The Commission document sets out five priority areas: disrupting organised crime; tackling terrorism; cyberspace security; border security; and civil contingencies and proposes specific initiatives for action.

It is also expected that they will prepare a best practice manual on organised crime, and seek to maintain progress on the delayed SIS II (Schengen Information System).

**Main civil initiatives**

The Presidency has announced that it will pay special attention to the rights of children and therefore has as objectives the presentation and summary of the EU’s achievements in the field of childhood policy and a review of good practices with the involvement of L’Europe de l’Enfance (an Intergovernmental Group which is part of the European Forum on the Rights of the Child and whose aim is to introduce the mainstreaming of children's policies and the rights of the child in all EU policies).

The proposed Regulation on jurisdiction, applicable law, recognition and enforcement in relation to Succession and Wills is expected to be the main civil dossier for the Presidency, which has said that it will host a conference on the subject towards the end of March.

A public consultation on the proposed measure on jurisdiction, applicable law, recognition and enforcement in relation to Matrimonial Property Regimes is planned to be launched in February: the actual timing will depend on when the proposal is published by the Commission.

The Presidency is to host a conference in June on the practical operation of the Brussels IIa Regulation on parental child abduction in the context of the European Judicial Network, whose June meeting will also be devoted to the subject.
The review of the Brussels I Regulation on cross-border recognition and enforcement of civil obligations is planned to be launched in February, to be followed by a series of meetings in the subsequent months.

The Presidency will continue the efforts to secure ratification by all Member States of the 1996 Hague Convention on Protection of Children, and to complete negotiations on the proposed Council Decision for conclusion by the EU of the 2007 Hague Convention on family maintenance. Both of these were objectives of the previous Belgian Presidency but still remain outstanding.

EU and International Law Branch
Civil Law Division
Scottish Government
January 2011
### Proposed Regulation of the Parliament and Council on jurisdiction, applicable law, recognition and enforcement in matters of Succession (Devolved)

Following the European Commission’s Green Paper (March 2005), a draft legislative proposal dealing with cross-border EU successions was published in October 2009.

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<td>Proposed Regulation of the Parliament and Council on jurisdiction, applicable law, recognition and enforcement in matters of Succession (Devolved)</td>
<td>Scottish Government officials worked with the UK Ministry of Justice to produce a UK-wide consultation document on whether the UK should opt-in to this proposal. The vast majority of respondents north and south of the Border did not support a UK opt-in. The three main areas of concern are i) the potential problems – particularly for charities and trusts – relating to ‘clawback’ as a result of the application of the succession laws of some other Member States; ii) a lack of an adequately defined connecting factor which could lead to inappropriate results and create legal uncertainty; and iii) the fact that the rules on jurisdiction would not apply to notaries in civil legal systems (thus creating an unbalanced situation in relation to court-based systems). There are also concerns about the proposals for a European Certificate of Succession. In light of such difficulties, and after consultation with the Scottish Government, the UK Government announced on 16 December 2009 that the UK would not opt in to the proposal. Nevertheless, the UK and Scottish Governments believe that in principle a revised proposal could bring benefits to citizens and therefore have engaged with the negotiations in the hope of achieving an outcome that would be acceptable from the UK perspective.</td>
<td>This complex area has already been the subject of unsuccessful attempts at worldwide regulation in the Hague. A universally acceptable EU solution may therefore be difficult to arrive at. The Scottish Government will continue to co-operate with the UK Ministry of Justice in managing UK participation in the negotiations and in deciding whether the UK should adopt any finally concluded instrument.</td>
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<td>Proposed Council Regulation implementing enhanced co-operation in the area of the law applicable to divorce and legal separation (Rome III) (Devolved)</td>
<td>The UK’s response to the European Commission’s 2005 Green Paper highlighted serious concerns around applying foreign law to cross-border divorce situations. The UK, supported by the Scottish Government, opted out of the Commission’s subsequent proposals as there were concerns that applying the law of foreign jurisdictions in the UK could involve considerable practical difficulties, cause delay and increase costs. The former Justice 1 Committee supported that decision. By May 2008 it was clear that a number of Member States would not accept a Regulation on the lines proposed and it was withdrawn. Nine Member States then asked the Commission to bring forward a proposal for enhanced co-operation, which was eventually adopted by 14 States at the December 2010 JHA Council meeting.</td>
<td>The UK (and Scottish) position remains that it has no intention of participating in this measure.</td>
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<td>Directive on Alternative Dispute Resolution – Mediation (Devolved)</td>
<td>This Directive needs to be transposed by May 2011. Scotland is on track to implement in full within the timeframe and Scottish Government lawyers are currently working on drafting the necessary legislation</td>
<td>Some issues still require to be fully resolved and Scottish Government lawyers are in discussion with their UK Counterparts. In particular, further consideration is being given to how best to implement the requirements regarding confidentiality of mediation and prescription and limitation periods.</td>
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<td>This Directive aims to facilitate alternative methods of settling disputes and simplify access to justice in civil and commercial matters. It seeks to promote the use of mediation by citizens and businesses for all civil and commercial law disputes. The Directive will apply to processes where two or more parties to cross-border disputes attempt voluntarily to reach amicable agreement with mediator assistance.</td>
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<td>Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions relating to maintenance obligations (Devolved)</td>
<td>The UK, supported by the Scottish Government, did not opt into the draft instrument, largely for the same concerns about applicable law as with the ‘Rome III’ proposals. However, it was subsequently agreed to put the applicable law provisions in an optional protocol rather than the body of the Regulation. This paved the way for UK participation. The finalised Regulation was agreed in October 2008 and the UK then opted in. The Regulation was published as Regulation (EC) No 4/2009.</td>
<td>The new Regulation will enter into force in June 2011. Implementation will require minor changes to domestic law, for instance to ensure that public bodies are able to share data for the purposes of the Regulation, which are being taken forward by the UK Ministry of Justice with input from the Scottish Government.</td>
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**European Judicial Network in Civil and Commercial matters (EJN) - Revised Council Decision**

The 2001 Council Decision which established the EJN has been amended in the light of a Commission report from 2006 into the functioning of the Network. Negotiations on the Commission’s proposal to amend the EJN Council Decision took place under the 2008 French Presidency. A Scottish Government official participated in all the negotiations. We supported the proposal as it would improve the way the EJN functions; and ensure that this important tool for facilitating cross-border co-operation between the EU’s legal authorities continues to take account of Scotland’s distinct legal identity. The final agreed text was adopted at the June 2009 JHA Council. The revised Decision entered into force on 1 January 2011, in the lead up to which the Scottish EJN contact point worked with the judiciary, the legal profession and other relevant stakeholders in relation to implementation measures. Discussions are ongoing within the EJN on further practical measures in pursuance of the 2009 Council Decision. Implementation of the Decision was discussed at the EJN annual meeting on 20-21 January 2011 which was attended by an SG official.
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<td><strong>Green Paper on Matrimonial Property Regimes</strong> (Devolved) Green Paper published July 2007 to address issues about matrimonial property regimes and property consequences of potentially equivalent relationships, and provide solutions through the harmonisation of conflict rules in cross-border situations that increasingly arise where property is concurrently located in several Member States and is to be distributed upon divorce/ separation.</td>
<td>Extensive consultation with key stakeholders took place in Scotland and rest of UK on the basis of which the UK submitted an initial, sceptical, response at the end of April 2007. The response indicated that the proposals did not adequately reflect the position of common-law jurisdictions such as Scotland and England, nor had they been prepared with proper regard for better regulation principles. The Commission was expected to adopt a draft proposal in the course of Autumn 2010 but this has not yet happened, in part due to slow progress in the negotiations on the draft proposal on succession.</td>
<td>We await hearing when and how this will be taken forward: it does not feature among the published priorities of the Hungarian Presidency that began on 1 January 2011.</td>
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<p>| Proposed Common Frame of Reference for European contract law (CFR) (Devolved). The CFR would contain definitions, general principles and model regulations, and it will serve as a practical aid for legislation at EU level. | The European Council reaffirmed that the CFR should be a non-binding set of fundamental principles, definitions and model rules to be used by the lawmakers at Union level to ensure greater coherence and quality in the lawmaking process. These conclusions have been generally acceptable to the Scottish Government (and the UK). In the <em>Stockholm Programme</em>, the new multi-annual justice work programme for the period 2010-2014, the Commission was invited to submit a proposal on a CFR. The Commission published a Green Paper on <em>policy options for progress towards a European Contract Law</em> in July 2010. The consultation runs until 31 January 2011. | The Scottish Government and UK Government’s Ministry of Justice worked together to develop a Call for Evidence, which ran from 18 August to 27 November, on the Commission’s Green Paper. In addition, the Scottish Government and the Law Society of Scotland held a Discussion Forum with interested parties on 16 December 2010. Responses to the Call for Evidence and dialogue with stakeholders will inform the Governments’ approach to responding to the Commission’s consultation document and subsequent proposals. |</p>
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<td><strong>Review of Regulation 44/2001, Brussels I, on jurisdiction, recognition and enforcement of judgements in civil and commercial matters. (Devolved)</strong> Green Paper published on 21 April 2009</td>
<td>In April 2009, the European Commission published a report on an academic review of the application of the Regulation. This was accompanied by a Green Paper, launching a public consultation on ways to improve the operation of the Regulation by end June 2009. Scottish stakeholders were informed about the consultation and encouraged to respond. After examining responses to its consultation, the European Commission employed consultants to carry out an impact assessment with view to possible revisions of the Regulation. The impact assessment process was completed in July 2010; and selected Scottish stakeholders will be interviewed.</td>
<td>The Commission published their proposals to recast the Brussels I Regulations, together with an impact assessment report, in December 2010. A UK-wide consultation in the joint names of the UK and Scottish Governments and the Northern Ireland Executive on whether the UK should opt-in to the Regulation and on the actual proposals was launched on 22 December with a closing date of 11 February. The deadline for the UK exercising its opt-in is 14 March.</td>
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<td><strong>Framework Decision on Mutual Recognition of Confiscation Orders.</strong> <em>(Reserved/devolved)</em>&lt;br&gt;This FD applies the principle of mutual recognition to seizure of assets. The effect, in general, is that an order to confiscate assets made by a court in one EU jurisdiction can be enforced in any other.</td>
<td>Published on 6 October 2006 as Council Framework Decision 2006/783/JHA.</td>
<td>Implementation deadline was 24 November 2008. Current proceeds of crime legislation is contained in a single UK wide statute, but implementation involves both devolved and reserved issues and Scottish Government policy leads are therefore in contact with Home Office counterparts on this matter. The current assessment is that primary legislation is required and Home Office need to identify a suitable legislative slot. At that point a decision will be taken as to whether separate Scottish provisions are required or whether the legislation can extend to Scotland by way of a legislative consent motion.</td>
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<td><strong>Framework Decision on the European Evidence Warrant.</strong> <em>(Mainly devolved)</em>&lt;br&gt;This FD applies the principle of mutual recognition to the provision of certain types of readily available evidence in cross border criminal proceedings. It will begin to replace traditional mutual legal assistance by, for example, creating deadlines to respond and limiting grounds for refusal.</td>
<td>Published on 18 December 2008 as Council Framework Decision 2008/978/JHA.</td>
<td>Implementation was required by 19 January 2011. Many of the functions related to mutual legal assistance are matters of criminal procedure, and are dealt with in operational terms for Scottish interests by the Crown Office. The current UK mutual legal assistance provisions are largely to be found in the Crime (International Co-operation) Act 2003. An affirmative order-making power designed to implement the FD was enacted in the Criminal Justice and Licensing (Scotland) Act 2010. Scottish leads are currently considering implementation in the context of ongoing EU negotiations over the proposed European Investigation Order Directive.</td>
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<td>Framework Decision on Taking into Account Convictions in the Member States of the EU in the course of new Criminal Proceedings. (Devolved)</td>
<td>Published on 24 July 2008 as Council Framework Decision 2008/675/JHA.</td>
<td>Implementation was required by 15 August 2010. There were already provisions in the Criminal Procedure (Scotland) Act 1995 relating to taking account of EU previous convictions in some cases. However, further legislation was required to ensure implementation in Scotland, and provisions to this effect have been enacted by the Criminal Justice and Licensing (Scotland) Act 2010, coming into force on 13 December 2010. ACPOS and COPFS are preparing guidelines for practitioners with regard to the practical application of these new measures.</td>
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<td>Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving the deprivation of liberty for the purpose of their enforcement in the European Union. (Devolved)</td>
<td>Published on 27 November 2008 as Council Framework Decision 2008/909/JHA.</td>
<td>Implementation is required by 5 December 2011. Due to changes made in the Criminal Justice and Immigration Act 2008, the UK is already largely compliant with the FD. However, there is still a minor amendment required to the Repatriation of Prisoners Act 1984 (to provide for transit), before the UK can fully implement the FD and for which a suitable legislative vehicle is being sought.</td>
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<td><strong>Framework Decision on the European Supervision Order</strong> (<strong>mutual recognition of supervision measures as an alternative to provisional detention.)</strong> (<strong>Devolved</strong>)</td>
<td>Published on 23 October 2009 as Council Framework Decision 2009/829/JHA.</td>
<td>Implementation is required by 1 December 2012. It is likely that implementing legislation will be required in Scotland. This will be assessed by policy leads and legal advisers in due course.</td>
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<td>The broad aim of this measure is to allow the substitution, in suitable cases, (<strong>where bail would be considered for a national in the same circumstances</strong>) of pre-trial detention for defendants in criminal proceedings arising in other Member States, with a non-custodial supervision measure in the person's normal place of residence i.e. a type of bail, which would be mutually recognised.</td>
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<td><strong>Proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters provided for by Title IV of the TEU.</strong> (<strong>Reserved</strong>)</td>
<td>Published on 27 November 2008 as Council Framework Decision 2008/977/JHA.</td>
<td>Implementation was required by 27 November 2010. Legislation in this area is reserved. It is thought that the UK is already largely compliant with the terms of the Framework Decision, but UK policy leads and legal advisers are currently carrying out a detailed assessment of the of the FD to ensure that all provisions are covered.</td>
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<td>This initiative aims to improve mutual trust in police and judicial co-operation in criminal matters, by making detailed provisions in relation to the area of data protection in the 3rd Pillar.</td>
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<td>Framework Decision on recognition and supervision of suspended sentences and alternative sanctions. (Devolved)</td>
<td>Published on 27 November 2008 as Council Framework Decision 2008/947/JHA.</td>
<td>Implementation deadline is 6 December 2011. Provisions were included in the Criminal Justice and Licensing (Scotland) Act 2010 which will enable Scottish Ministers to modify existing primary legislation by way of an affirmative SSI solely for the purpose of implementing our obligations in relation to the Framework Decision. An Implementation Board has been convened to consider the practical implications of implementation and to develop a process for the transfer in and out of relevant judgements. This Board is also considering the legislative requirements and will help develop the policy instructions for this legislation.</td>
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<td>Framework Decision on the fight against organised crime. (Devolved/Reserved)</td>
<td>Published on 24 October 2008 as Council Framework Decision 2008/841/JHA.</td>
<td>Implementation deadline was 11 May 2010. Existing offences within Scots law, for example conspiracy, already facilitate compliance with the FD provisions. In addition, Scotland is well placed in meeting the terms of this Framework Decision as specific offences tackling all levels of serious organised crime were included in the Criminal Justice and Licensing (Scotland) Act 2010, which were commenced on 13 December 2010.</td>
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<td>Framework Decision on combating racism and xenophobia (Devolved/Reserved)</td>
<td>Formally published on 28 November 2008 as Council Framework Decision 2008/913/JHA.</td>
<td>The implementation deadline was 28 November 2010. Legislation in the UK, including the Scottish aspects, is already compliant with the terms of the FD.</td>
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<td>Framework Decision on the Transmission to and Keeping by the Member State of Nationality of Information on Criminal Convictions. (Devolved)</td>
<td>Given technical issues in relation to connecting criminal record offices electronically, this aspect was not been included in the FD text agreed at the June 2007 JHA Council. However, an implementing Council Decision on the establishment of the European Criminal Records Information System (ECRIS) was published by the Commission on 27 May 2008. In line with article 11 of the Framework Decision, the CD provides for a computerised electronic exchange system between Member States, in a standardised format, which should facilitate exchanges in a uniform and easily computer translatable fashion. The FD was formally published as Council Framework Decision 2009/315/JHA on 26 February 2009 and the CD as Council Decision 2009/316/JHA on 6 April 2009.</td>
<td>Implementation of the Council Decision is due by 7 April 2012 and the Framework Decision by 27 April 2012. At this stage, subject to confirmation, it is not thought that any major new legislation will be required. Scottish criminal record office officials (SPSA since April 2007) ACPOS and SG policy leads have been involved in assessment of this dossier from an early point, and continue to be engaged as implementation is progressed. The UK is currently one of 15 Member States participating in the Network of Judicial Registers (NJR) Group which has been working towards the electronic exchange of criminal records for a number of years and which was the catalyst for the ECRIS Decision. The UK application which interfaces with other NJR countries, the European Information Management System (EIMS), went live on 17/11/10 and electronic exchange information with some NJR partners has commenced. The technical specifications for ECRIS are due to be published by the EU Commission in December 2010. Following this a decision will be taken as to whether the UK interface with ECRIS will be achieved through the current EIMS system or by using Reference Implementation software provided by the Commission.</td>
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| **Prüm Convention**  
(Devolved/Reserved) | The Council Decision, Implementing Agreement and Technical Annex were published on Wednesday 6 August 2008 in the Official Journal as per link: [http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2008:210:SOM:EN:HTML](http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2008:210:SOM:EN:HTML). | The effective date for UK implementation of Prüm will be 3 years and 20 days from 6 August 2008 – a target date of August 2011. The National Police Improvement Agency is managing implementation, with oversight from a UK-wide Steering Group. A Scoping Study has been conducted to define the parameters of this work and lay the ground for implementation. The results are currently being analysed. Scotland, of course, has its own DNA and fingerprint legislation, and Scottish officials and experts are involved in the implementation for the UK, in respect of these devolved interests, including in the Steering Group. A Strategic Outline Business Case was completed by NPIA in April 2010 and outlines various options and associated costs for the delivery of Prum. Following further consideration by the Home Office it is expected that a full Business Case will be commissioned. Scottish Government officials and experts continue to be involved through membership of the Prum Stakeholders Group to ensure that Scotland’s interests are fully represented. |
| The Convention was initially agreed between 7 Member States, outside the EU legislative framework, and makes provision for closer co-operation in a range of areas, such as DNA and fingerprint exchanges, joint police operations, etc. It was agreed to extract from the Convention a selection of key 3rd Pillar measures, mainly in the area of information exchange, and convert them into an EU Council Decision. Therefore, provisions on, for example, air marshals and cross border “hot pursuit” were not included. For information exchanges, the provisions operate on an “anonymous” hit/no hit basis. If a hit is confirmed then more detailed information has to be requested in accordance with national law, using conventional mutual legal assistance channels if appropriate. | |

Scotland, of course, has its own DNA and fingerprint legislation, and Scottish officials and experts are involved in the implementation for the UK, in respect of these devolved interests, including in the Steering Group. A Strategic Outline Business Case was completed by NPIA in April 2010 and outlines various options and associated costs for the delivery of Prum. Following further consideration by the Home Office it is expected that a full Business Case will be commissioned. Scottish Government officials and experts continue to be involved through membership of the Prum Stakeholders Group to ensure that Scotland’s interests are fully represented.
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| **Framework Decision on the enforcement of judgements in absentia**  
(Devolved)  
The object of this FD is to (a) underline the procedural rights of persons subject to criminal proceedings; (b) facilitate criminal judicial cooperation by clarifying mutual recognition of decisions between Member States; and (c) promote greater consistency in mutual recognition instruments where judgements in absentia may be a factor. It amends 5 existing FDs that deal with the issue. In general, the main purpose is to clarify where the responsibilities lie between issuing and executing authorities. | Formally published as Council Framework Decision 2009/299/JHA on 26/2/2009. | The implementation deadline is 28 April 2011. As this is a measure of limited scope, with no substantive harmonisation proposed, then it is not thought that there are any implications for purely domestic provision. However, further detailed analysis will be needed to determine whether any refinements will be required to UK provisions with regard to the Framework Decisions in question. |
| **Framework Decision amending FD 2002/475/JHA on combating terrorism**  
(Reserved/Devolved)  
The original FD approximates the definition of terrorist offences in all Member States and determines the cases in which Member States are obliged to assume jurisdiction over terrorist offences. It includes specific measures on protection of and assistance to victims. The amending FD aims to update the earlier FD, aligning it with the recent Council of Europe Convention on prevention of terrorism by including public provocation to commit terrorist offences, recruitment for terrorism and training for terrorism within scope. | Published as Council Framework Decision 2008/919/JHA on 28/11/2008. | The implementation deadline was 9 December 2010.  
Subject to final assessment, it is thought that domestic law in the UK, including Scotland, is largely compliant with the new provisions. |
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<td>Framework Decision on prevention and settlement of conflicts of jurisdiction. (Devolved)</td>
<td>The text was formally published as FD 2009/948/JHA. Following intensive negotiations an outcome acceptable to delegations was agreed, which restricted scope to potential ne bis in idem (double jeopardy) cases and which focused on promoting direct discussions between prosecutors.</td>
<td>The implementation deadline is 15 June 2012. Policy leads are considering whether any changes to domestic legislation will be required to comply with the FD.</td>
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### Next Steps | Current Position | Next Steps
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Proposal for a Directive on preventing and combating trafficking in human beings, and protecting victims, replacing Framework Decision 2002/629/JHA (Reserved/Devolved.)

This proposed Directive would replace the 2002 FD on Trafficking, which established the rules under which all Member States have to legislate for human trafficking. It seeks to establish minimum rules concerning the definition of criminal offences and sanctions in the area of trafficking in human beings and also aims to introduce common provisions to strengthen the prevention of the crime and the protection of its victims.

Agreement and adoption of a 2009 proposal for a FD was not possible before the entry into force of the Lisbon Treaty on 1 December 2009. The FD therefore fell, and was been re-tabled as this Directive, on 29 March 2010. The proposal builds on the Council of Europe Convention on Action against Trafficking in Human Beings, which the UK ratified in December 2008, becoming bound by its terms in April 2009.

Under the terms of its opt in Protocol, the UK Government decided not to opt in to this Directive. The Scottish Government was consulted as part of this process and argued that the UK ought to opt in.

Given that the Council (Member States) position was already established Trilogue negotiations with the European Parliament commenced, and there was MS agreement in principle to a text at the December JHA Council. The EU Parliament debated the agreed text at its Plenary Session on 14 December and voted in favour of the Directive, thereby achieving a ‘first reading’ deal. It is the first criminal law instrument to be agreed under the Lisbon Treaty.

The text will now need to be scrutinised by jurist linguists before it can be formally adopted and published.

Under the terms of its opt in Protocol, the UK can request to participate in the Directive at any time after its adoption. There is as yet no information available as to whether the UK Government will seek to exercise this option. Scottish law is already compliant with the terms of the Directive.

If the UK decides against opting into the Directive post adoption it will remain bound by the terms of the 2002 FD.
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<td>Proposal for a Directive on combating the sexual abuse, and sexual exploitation of children and pornography, repealing existing Framework Decision 2004/68/JHA (Reserved/Devolved.)</td>
<td>The draft Directive was published 29 March 2010, following the failure of the proposed 3rd Pillar amendment FD to clear all institutional hurdles before the Lisbon Treaty came into force on 1 December 2009. The policy aims of the Directive as tabled are in principle unobjectionable, but there are concerns over some articles and the UK negotiating line, for example, is to ensure that consensual legal sexual activity amongst persons above the age of consent is not inadvertently criminalised. There is also a broader approach in the proposed provisions than currently exists in the original FD, and the CoE Convention, regarding the sharing of disqualification and conviction information, and similarly regarding extra-territorial jurisdiction for criminal offences. Under the terms of its opt in Protocol, the UK Government decided to opt in to this Directive. The Scottish Government was consulted as part of this process and supported the UKG position. Working group negotiations proceeded under the Belgian Presidency with a view to achieving an agreed Council (Member State) position. While there is general agreement on most issues there is currently still a lack of consensus on internet blocking provisions, although the Presidency apparently believe that there is enough common ground overall to begin Trilogue negotiations. The UKG is content that UK negotiating objectives have thus far been met.</td>
<td>Co-decision with the European Parliament applies to this dossier and it is expected that Trilogue negotiations will commence at some point in 2011 under the Hungarian Presidency.</td>
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<td>Directive on the right to interpretation and translation in criminal proceedings (Devolved)</td>
<td>This proposal seeks to set out EU minimum standards, building on and consistent with those recognised under ECHR, under which suspects or defendants are provided with interpretation and translation in connection with criminal proceedings. Separate articles deal with interpretation rights and translation rights. Member States will have a duty to ascertain whether an interpreter is required, including by consulting the person concerned. With regard to both interpretation and translation there is provision for a review of decisions to turn down requests, although this can be done via existing domestic procedures. Competent national authorities are under a duty to ensure the translation of essential documents. There is no exhaustive list, but as a minimum, it must include the detention order, the charge/indictment and any judgement. However, an oral translation may be permitted in appropriate circumstances provided this does not affect the fairness of the proceedings. MS must meet the costs and take measures to ensure the quality of interpretation/translation.</td>
<td>Members States must take the measures necessary to implement the Directive by 27 October 2013. The Scottish Government will be assessing what measures may be required to ensure implementation in Scotland.</td>
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<td>The draft Directive was tabled as a Member State (MS) initiative early in 2010 following the failure of a proposed 3rd Pillar FD to clear all institutional hurdles before the Lisbon Treaty came into force on 1 December 2009. As significant work had already been completed on the Member State side, negotiations were successfully concluded by the Spanish Presidency, including a first Reading agreement with the European Parliament. Under the terms of its opt in Protocol, the UK Government decided to opt in to this Directive. The Scottish Government was consulted as part of this process and supported the UKG position. Scottish policy leads are content that translation and interpretation provision already meets high standards domestically. The Directive also to EAW proceedings. Following the successful conclusion of the negotiations the Directive was formally adopted by the Council (Member States) at the October JHA Council and was published as Directive 2010/64/EU on 27 October 2010.</td>
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It is the first part of a new package of measures on minimum rights for defendants/suspects in criminal proceedings in the EU, to replace an earlier proposal for an overarching measure which failed to achieve consensus.

The package of measures is outlined in a “Roadmap”, whose overall purpose is to establish...
minimum standards in the EU by bringing forward a series of bespoke measures in key areas of criminal procedure such as translation, information on rights, access to legal advice, communication rights, measures for vulnerable suspects, etc. The aim is to promote mutual trust and understanding among EU legal systems which are increasingly expected to accept and implement judicial decisions from one another in developing the common area of “freedom, security and justice” through mutual recognition.
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<td>Directive on the European Protection Order (EPO)</td>
<td>While there is a wide consensus that this is a valuable initiative in assisting in the cross border protection of victims, the issue of scope has been problematic from the outset. EU Member States approach protection orders in different ways with some being purely based in civil proceedings, some purely criminal and some, like Scotland and rest of the UK, using a mixture of civil and criminal proceedings with a mixture of sanctions. The Directive was, however, been brought under a purely criminal legal base (Article 82(1) TFEU) (MS civil law initiatives are not allowed under the Lisbon Treaty) and some MS (including the UK), and the Commission, have questioned whether it is sufficient to capture the different type of orders found throughout the EU e.g. civil protection measures. As a result of this lack of consensus on the legal base it has not been possible to agree a general approach among Member States, although informal Trilogue negotiations with the European Parliament have meantime taken place under the Belgian Presidency, with considerable progress reported on non legal base matters. The Commission has reserved its position and it appears likely that they will bring forward their own initiative in 2011 to include civil protection measures as well. Under the terms of its opt in Protocol, the UK Government decided to opt in to this Directive. The Scottish Government was consulted as part of this process and supported the UKG position.</td>
<td>It will be for the Hungarian Presidency to assess the most appropriate way to proceed now. While this may simply mean waiting until the Commission table their proposal, on the other hand, given progress with the European Parliament on non legal base provisions, there may be some pressure to move to conclude a more restricted Directive in the first instance covering criminal law measures alone. At Scottish level, there are, of course, proposals to change the law on civil protection orders through the Domestic Abuse (Scotland) Bill, introduced by Rhoda Grant MSP.</td>
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Spain, along with several other like minded Member States (MS), tabled this initiative to coincide with their Presidency of the Council of the EU in January 2010.

The aim of an EPO is that where a victim has been granted a protection order in one MS e.g. an interdict, this MS can issue an EPO, at the victim's request, to extend this protection to the receiving jurisdiction without the need to raise separate proceedings which could lead to a break in continuity of protection. The Member State that the victim has moved to would then use the EPO to make the nearest equivalent order in accordance with its own national law. The draft Directive covers, inter alia, the scope of the EPO, when it is to be issued, its form, and the respective roles of the issuing and executing States.

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<td>Directive regarding the European Investigation Order in criminal matters (EIO) (Mainly devolved)</td>
<td>As an initiative of the Belgian Presidency significant time has already been spent in working group negotiations over the last 6 months. However, there is thus far limited progress to report, discussions having become bogged down in relation to several key matters of principle, as follows:</td>
<td>Negotiations will continue under the Hungarian Presidency with the objective of moving towards an agreed Member State position to facilitate negotiations with the European Parliament.</td>
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<td>- Which authorities should be able to issue an EIO (judicial only, or other)?</td>
<td>Progress has been slow to date, and while this may change under the new Presidency in 2011, the complexities which have thus far been revealed in discussions would tend to indicate that it may be some time before a new provision is agreed and then implemented into national law.</td>
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<td>- Scope of the instrument, and whether it should cover all areas identified in the original draft.</td>
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<td>- Whether grounds for refusal ought to be refined according to the type of evidence sought, with more flexibility for executing authorities to refuse with regard to more complicated requests/matters not possible in the domestic law of the executing State.</td>
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<td>- Proportionality – i.e. approach to be used in trivial requests.</td>
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<td>Under the terms of its opt in Protocol, the UK Government decided to opt in to this Directive. The Scottish Government was consulted as part of this process and supported the UKG position.</td>
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<td>The main UK negotiating objectives include the proportionality issue, the flexibility to be able to continue using central authorities to deal with incoming requests and the need to maintain some flexibility with regard to requests which may require coercive measures/measures not available under domestic law.</td>
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<td>It is intended that the EIO will replace the patchwork of current mutual legal assistance provision in the EU, including the EEW, and is viewed as being an investigative counterpart to the European Arrest Warrant (EAW).</td>
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Directive on the provision of information in criminal proceedings ("letter of rights")
(Devolved)

The proposal aims to set common minimum standards regarding the right to information in criminal proceedings throughout the EU. This forms the second step of the procedural rights Roadmap (adopted in November 2009 and subsequently included in the Stockholm Programme) and was published by the Commission in July 2010.

The draft text seeks to make provision to give suspected/accused persons information, both oral and written, about their procedural rights. This is to include information about the right of access to a lawyer, the right to be informed of the charge, the right to interpretation and translation, information about detention periods, and the right to remain silent. For arrested persons, such information must be provided in written form (a "letter of rights"). The draft Directive also includes provisions on the right to access to material evidence, being an attempt to address disclosure of evidence issues. It also applies to European Arrest Warrant (EAW) proceedings. Finally, non binding examples of letters of rights, both in the domestic context and with regard to the EAW, are provided.

The Belgian Presidency devoted considerable effort to making progress on this dossier with a view to maintaining overall progress on the procedural rights Roadmap. In this regard the Commission also indicated that they were willing to be flexible.

Most attention has focused on the elements relating to the provision of material evidence required by the defendant to prepare for the trial. It became clear during the negotiations that there was a considerable difference of procedure and understanding, mainly, but not exclusively, between the common law jurisdictions and the rest. This was reflected, for instance, in discussions around the concept of the ‘case file’ as found in many continental jurisdictions, but not within the UK. However, given the desire to make progress alluded to above, the negotiations proceeded in a fashion which facilitated a solution acceptable to all. The negotiations also provided important clarification with regard to the way in which the Directive will relate to national law i.e. information about ‘procedural rights as they apply under national law’.

Under the terms of its opt in Protocol, the UK Government decided to opt in to this Directive. The Scottish Government was consulted as part of this process and supported the UKG position, including support of deploying the emergency brake procedure if the disclosure concerns could not be resolved.

The main UK negotiating objective was to ensure...
that the disclosure provisions within the UK were not compromised by the Directive. The SG fully supported this stance, bearing in mind the differences between Scotland and the rest of the UK in this regard.

The SG is satisfied that the current wording in the Directive does not run counter to the legislative scheme on disclosure in the Criminal Justice & Licensing (Scotland) Act 2010.
Directive on attacks against information systems (and repealing Council Framework Decision 2005/222/JHA)
(Mainly reserved)

This draft Directive seeks to address the threat from large-scale attacks on information systems by ensuring that Member States have adequate legislation to allow the prosecution and punishment of those organising, committing or supporting large-scale attacks. It also seeks to ensure that Member States respond quickly to requests from other Member States for exchange of information in cyber crime cases.

This proposal takes into account new methods of committing cybercrime, especially the use of botnets. The term 'botnet' indicates a network of computers infected by malicious software (computer virus). Such a network of compromised computers ('zombies') may be activated to perform specific actions, such as attacking information systems (cyber attacks). These 'zombies' can be controlled – often without the knowledge of the users of the compromised computers – by another computer.

It is very difficult to trace the perpetrators, as the computers that make up the botnet and carry out the attack may be in a different location from the offender himself.

The draft proposal was published by the Commission on 30 September 2010.

There have as yet been no substantive negotiations, only presentations to various Council bodies of the proposal by the Commission, including at the JHA Council in November.

The main domestic legislation in the UK potentially affected by the draft proposal is believed to be the Computer Misuse Act 1990, which is in a reserved area.

Serious negotiations will commence under the Hungarian Presidency.

The UK JHA opt-in Protocol applies to this dossier. The UK has intimated that it will opt-in.