JUSTICE COMMITTEE

AGENDA

9th Meeting, 2011 (Session 3)

Tuesday 15 March 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 its consideration of a draft report on the instrument being considered under items 3 and 4 should be taken in private at its next meeting.

2. **Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010:** The Committee will take evidence from—

   Chief Superintendent Paul Main, ACPOS Solicitor Access Implementation Team;

   and then from—

   Kenny MacAskill MSP, Cabinet Secretary for Justice;

   Gerry Bonnar, and Don McGillivray, Criminal Justice and Parole Division, Scottish Government;

   Alicia McKay, Scottish Government Legal Directorate, Scottish Government;

   Michelle Macleod, Head of Policy Division, Crown Office and Procurator Fiscal Service.

3. **Subordinate legislation:** The Committee will take evidence on the Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2011 (SSI 2011/162) from—

   Michael Clancy, Director of Law Reform, and Andrew Alexander, Secretary of the Legal Aid Negotiating Team, Law Society of Scotland;

   David O'Hagan, past President, and Gerry Sweeney, Committee Member, Glasgow Bar Association;
and then from—

Kenny MacAskill MSP, Cabinet Secretary for Justice;

Colin McKay, Deputy Director, Legal System Division, James How, Head of Access to Justice Team, and Fraser Gough, Scottish Government Legal Directorate, Scottish Government.

4. **Subordinate legislation:** James Kelly to move S3M-8085—

That the Justice Committee recommends that nothing further be done under the Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2011 (SSI 2011/162).

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

- the Officers of Court’s Professional Association (Scotland) Regulations 2011 (SSI 2011/90);
- the Licensing (Food Hygiene Requirements) (Scotland) Order 2011 (SSI 2011/128);
- the Parole Board (Scotland) Amendment Rules 2011 (SSI 2011/133);
- the Advice and Assistance and Civil Legal Aid (Special Urgency and Property Recovered or Preserved) (Scotland) Regulations 2011 (SSI 2011/134);
- the Extreme Pornography (Electronic Commerce Directive) (Scotland) Regulations 2011 (SSI 2011/137);
- the Extreme Pornography (Electronic Commerce Directive) (Scotland) Amendment Regulations 2011 (SSI 2011/170);
- the Insolvency Act 1986 Amendment (Appointment of Receivers) (Scotland) Regulations 2011 (SSI 2011/140);
- the Debt Arrangement Scheme (Scotland) Regulations 2011 (SSI 2011/141);
- the Police Grant (Carry-forward Percentages) (Scotland) Order 2011 (SSI 2011/148);
- the Licensing (Minor Variations) (Scotland) Regulations 2011 (SSI 2011/151);
- the Removing from Heritable Property (Form of Charge) (Scotland) Regulations 2011 (SSI 2011/158);
the Advice and Assistance and Legal Aid (Online Applications etc.) (Scotland) Regulations 2011 (SSI 2011/161);

the Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011 (SSI 2011/163);

Act of Sederunt (Fees of Shorthand Writers in the Sheriff Court) (Amendment) 2011 (SSI 2011/166).

6. **Annual report:** The Committee will consider a draft annual report for the parliamentary year from 9 May 2010 to 22 March 2011.

7. **Subordinate legislation (in private):** The Committee will consider a draft report on three affirmative instruments considered at its meeting on 8 March 2011.

8. **Legacy paper (in private):** The Committee will consider a revised draft report reflecting on its work during the current session and suggesting priorities for Session 4.

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The papers for this meeting are as follows—

**Agenda item 2**

- *Copy of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010*
- *SPICe briefing on Criminal Procedure: Responses to Cadder v HM Advocate*

Paper by SPICe (private paper) J/S3/11/9/1 (P)

**Agenda item 3**

- SSI cover note J/S3/11/9/2
- Letter from the Cabinet Secretary for Justice J/S3/11/9/3
- Written submission from the Glasgow Bar Association J/S3/11/9/4
- Written submission from the Law Society of Scotland (to follow) J/S3/11/9/5
- Other written submissions on SSI 2011/162 J/S3/11/9/6

*The Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2011 (SSI 2011/162)*

**Agenda item 5**

- SSI cover note J/S3/11/9/7
- *The Officers of Court’s Professional Association (Scotland) Regulations 2011 (SSI 2011/90)*
- SSI cover note J/S3/11/9/8
- *The Licensing (Food Hygiene Requirements) (Scotland) Order 2011 (SSI 2011/128)*
- SSI cover note J/S3/11/9/9
- *The Parole Board (Scotland) Amendment Rules 2011 (SSI 2011/133)*
- SSI cover note J/S3/11/9/10
- *The Advice and Assistance and Civil Legal Aid (Special Urgency and Property Recovered or Preserved) (Scotland) Regulations 2011 (SSI 2011/134)*
The Extreme Pornography (Electronic Commerce Directive) (Scotland) Regulations 2011 (SSI 2011/137)

The Extreme Pornography (Electronic Commerce Directive) (Scotland) Amendment Regulations 2011 (SSI 2011/170)

The Insolvency Act 1986 Amendment (Appointment of Receivers) (Scotland) Regulations 2011 (SSI 2011/140)

The Debt Arrangement Scheme (Scotland) Regulations 2011 (SSI 2011/141)

The Police Grant (Carry-forward Percentages) (Scotland) Order 2011 (SSI 2011/148)

The Licensing (Minor Variations) (Scotland) Regulations 2011 (SSI 2011/151)

The Removing from Heritable Property (Form of Charge) (Scotland) Regulations 2011 (SSI 2011/158)

The Advice and Assistance and Legal Aid (Online Applications etc.) (Scotland) Regulations 2011 (SSI 2011/161)

The Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011 (SSI 2011/163)
SSI cover note

**Act of Sederunt (Fees of Shorthand Writers in the Sheriff Court) (Amendment) 2011 (SSI 2011/166)**

**Agenda item 6**
Draft report

**Agenda item 7**
Draft report (private paper)

**Agenda item 8**
Draft report (private paper)

**Papers for information**
Letter from the Cabinet Secretary for Justice on the Scottish Government's consultation on financial contributions in criminal legal aid and changes to financial eligibility

Letter from the Cabinet Secretary for Justice on the Draft Budget 2011-12

Letter from Scottish and Southern Energy plc on the Long Leases (Scotland) Bill

**Additional papers for agenda item 5 (SSI 2011/141)**
Further written submission from the Carrington Dean Group

Letter from the Minister for Community Safety

**Additional paper for agenda item 3**
Written submission from Lesley Thomson, Area Procurator Fiscal, Glasgow
Justice Committee

9th Meeting, 2011 (Session 3), Tuesday 15 March 2011

SSI cover note

SSI title and number: The Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2011 (SSI 2011/162)

Type of Instrument: Negative

Coming into force: 22 March 2011

Justice Committee deadline to consider SSI: 21 March 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 pay solicitors only once for conducting a deferred sentence hearing, regardless of how many complaints are dealt with at the hearing; to widen the scope of what falls to be treated as a single matter, attracting only a single fixed payment; to reduce the fixed payment allowable to solicitors where the solicitor represents an accused in the same court on the same day in respect of more than one complaint; and to reduce the payment for cases before the Stipendiary Magistrate’s Court.

Justice Committee consideration:

2. The instrument was laid on 28 February 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.
Letter from the Cabinet Secretary for Justice to the Convener

These Regulations, which make a number of reductions and changes to summary criminal legal aid payments, are due to be considered by the Committee on 15 March. I would like to take this opportunity to provide you with some further information.

I set out in my letter to the Committee of 1 March (please see the annexe) the financial context in which we are working. In 2009-10, there were over 290,000 grants of legal assistance and legal assistance expenditure was £150.5 million. In 2010-11, total net expenditure on legal assistance is expected to rise due to the VAT increase, increases in fees and an increase in demand for civil legal assistance. Total cost to the taxpayer of criminal legal assistance in 2009-10 was just over £98 million. Of that, £52.8 million was spent on summary criminal legal assistance. Reducing expenditure in summary criminal legal assistance is therefore essential and also delivers savings in the required timescales, given that summary cases conclude more quickly than solemn or civil cases.

To maintain the long term sustainability of the system in these circumstances and to ensure money is used efficiently to target limited resources at those who need them most, we have had to make some difficult decisions. In coming to decisions we have consulted closely with the Scottish Legal Aid Board (“the Board”) and the Law Society of Scotland (“the Society”) to identify areas where savings can be made whilst still preserving access to justice. I would like to thank both the Board and the Society, in particular the criminal legal aid negotiating team, for their continued support and cooperation in this work.

The Society had originally indicated to me that its priority was to protect core fees. On 7 January 2011 the Society wrote to me outlining its revised position in relation to the Scottish Government’s original proposals to achieve savings of between £4.5m and £4.7m in 2011-12 through expansion of the Public Defence Solicitors’ Office (PDSO). This followed a meeting between myself and the Society in December 2010, during which I agreed to give the Society more time to consult with the profession. To inform these further consultations, the Board helpfully provided the Society with a number of different options as to how the necessary savings could be made.

The Society’s revised position, following these consultations, was that a more limited expansion of the PDSO along with reductions in fees would likely be more acceptable to the profession. The reduction in the Stipendiary Magistrate’s Court fee to £350 was part of this package. The proposals followed a meeting held on 6 January 2011, convened by the Society, at which representatives of 19 local faculties were present including members of the Glasgow Bar Association. At that
meeting, 18 out of the 19 faculties indicated that they could not support any further reduction of the proposed rate of £485 for the summary core fee. Members will be aware of the letter written to the Justice Committee on 7 January by the President of the Society, arguing that the savings proposals presented the best option for the profession and the public and commending the Government’s general approach. I responded to the Society’s letter to me of 7 January that, following consideration, I would proceed on the basis of these revised proposals. Subsequently, the Society made clear to me that during a meeting of the Council of the Society on 28 January, Council had re-affirmed its support for the stance taken by the Society’s criminal legal aid negotiating team in these negotiations.

The Society wrote to me again on the 4 February 2011 asking whether greater detail could be given on the issue of the proposed reduction in the Stipendiary Magistrate’s Court fee. I therefore met with representatives of the Society on 10 February 2011 to discuss this proposal and it was agreed to propose setting the fee for the Stipendiary Magistrate Court at £390 rather than £350. The fee reduction is not £200 as some have argued. The new fee will be £95 lower than the new summary core fee in sheriff court cases and £95 higher than the equivalent for JP court cases. It is also worth noting that the fee levels for a guilty plea in the JP court in Glasgow and elsewhere in the country is £150, where the plea has been tendered by the appointed solicitor. A plea of guilty tendered by the appointed solicitor in the Stipendiary Magistrate’s Court, under these Regulations, will be £390.

Across the sheriff courts overall numbers of summary criminal complaints registered have fallen significantly, from 95,226 in 2007/08 to 82,068 in 2009/10, whilst cases in the new justice of the peace courts have increased to over 56,750. From January to December 2010 a total of 5570 cases went to the Stipendiary Magistrate’s Court – representing just 8% of the total summary business in Glasgow. Members will have had an opportunity to consider the table contained in the Executive Note that accompanies these Regulations. As can be seen, this table suggests that the Stipendiary Magistrate’s Court is closer in profile to the JP court elsewhere. In addition, the evidence from the profile of legal aid and ABWOR cases across the country is that there is a much higher rate of early guilty pleas in the Stipendiary Magistrate’s Court than in Sheriff Courts across the country, suggesting that, over the piece, these cases tend to be resolved earlier and with less work required by the defending solicitor than the general run of Sheriff Court business.

Whilst it is fair to state that the Stipendiary Magistrate’s Court and the Sheriff Court have equivalent powers, the general presumption from the Crown would be to prosecute the more sensitive or complex cases that are appropriate for summary proceedings in the Sheriff Court. There is also a presumption from the Crown that certain more serious offences should be prosecuted in the Sheriff Court, such as knife crime, domestic abuse and offences with statutory aggravations for racially aggravated behaviour or other hate crime aggravations.

On this basis and in the context of the savings that need to be made, it is appropriate that the fee for Stipendiary Magistrate’s Court cases is set at a midpoint between JP

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and Sheriff Court cases (and is closer to the Sheriff Court level in respect of guilty pleas). This reflects the fact that the range of cases before the Stipendiary Magistrate’s Court sits between these two courts, and those cases which might have gone to a Sheriff Court in other parts of the country will generally be at the ‘lower’ end. The nature of fixed fees is such that it is necessary to look at the overall shape of business at a particular court and adopt a fee level which is broadly fair for that court, in comparison with other higher and lower courts. On that basis, it is reasonable to argue that solicitors are currently over remunerated in Glasgow for the range of business heard in the Stipendiary Magistrate’s Court, compared with the fees payable in both the Sheriff and JP courts. But recognising that cases before the Stipendiary Magistrate’s Court will hear more serious cases too, it is considered appropriate to pay more for Stipendiary Magistrate’s Court cases than JP cases.

I would like to take this opportunity to reassure the Committee that the Government will be working closely with the Board and the Society over the coming months to monitor the impacts of the legal aid savings.

Kenny MacAskill MSP  
Cabinet Secretary for Justice  
10 March 2011
Annexe

The Legal Aid and Advice and Assistance (Solicitors’ Travel Fees) (Scotland) (Regulations) 2011

Letter from the Cabinet Secretary for Justice

These Regulations are due to be considered by the Committee on 1 March. I would like to take this opportunity to provide you with some further information.

Members will be well aware of the financial context in which we are working, not least as a result of the Committee’s detailed work on the Draft Budget and its subsequent Report. In this Report, the Committee welcomed my assurances as to the Government’s approach to obtaining legal aid savings. In 2009-10, there were over 290,000 grants of legal assistance and legal assistance expenditure was £150.5 million. In 2010-11, total net expenditure on legal assistance is expected to rise due to the VAT increase, increases in fees and an increase in demand for civil legal assistance. To maintain the long term sustainability of the system in these circumstances and to ensure money is used efficiently to target limited resources at those who need them most, we have had to make some difficult decisions.

In coming to decisions we have consulted closely with the Scottish Legal Aid Board (“the Board”) and the Law Society of Scotland (“the Society”) to identify areas where savings can be made whilst still preserving access to justice. Members will be aware of the letter written to the Committee on 7 January by the President of the Society, arguing that the savings proposals present the best option for the profession and the public and commending the Government’s general approach. The savings proposals include an 8.5% cut to the Board’s administration costs, a larger percentage reduction than that being proposed on the fund, and a range of other savings measures predominantly on the criminal side (which accounts for almost 2/3 of the budget including in relation to travel costs).

These Regulations reduce the fees paid to solicitors and solicitors’ clerks for time spent travelling when providing advice and assistance and legal aid. The change will bring travel fees in Scotland more into line with fees paid in other jurisdictions, such as England and Wales and Northern Ireland, where travel is not paid at the same rate as for other work such as appearances in court or meetings with clients. The changes will encourage local supply and produce the required savings on a total travel cost to the fund of in excess of £8m per year (including mileage). But there is no suggestion that solicitors will no longer be paid for travelling. Solicitors will still be paid for time spent travelling; they will still be paid a mileage rate for travelling; and they will still be paid for the costs reasonably incurred, such as travel by rail or air. The Regulations still allow waiting time to be paid at the full hourly rate (unlike in England and Wales). In many situations there are alternatives to travel. Solicitors can make contact with clients by telephone, they can use local agents and arrange for meetings to take place before, for example, court hearings. But in other cases travel is required and will still be paid at appropriate rates. The changes will not, of course, affect summary criminal cases where a fixed fee is paid for each case (a level of travel is included in the fixed fee). Solicitors will still be able to apply to the Board for summary cases to be given ‘exceptional’ status in order to charge detailed fees – but
this would only relate to the exceptionality of the circumstances of the case and not the travel required.

I am aware that particular concerns have been raised, including with the Committee, in relation to mental health. The Board will shortly publish its best value review in this area, following extensive consultation with stakeholders (including the Mental Health Tribunal for Scotland and the Mental Welfare Commission). The purpose of the review was to identify whether persons who became subject to the provisions of the Mental Health (Care and Treatment) (Scotland) Act 2003 could access appropriate legal advice, assistance and representation in a manner which represents best value for the Fund. The review was set against a backdrop of yearly escalating case costs in the public funding of such legal services, since the inception of the new tribunal system in 2005. These costs have risen from £1.8m in 2006 to £4.1m in 2010. In particular, the review will point to excessive travel costs being incurred and will make a number of recommendations in this area, including that the long term solution is likely to be the introduction of fixed or block fees for mental health work designed to reflect and encourage best practice in this sensitive field. The Board’s discussions with a number of firms in rural areas that carry out some mental health work indicate that several wish to do more of this work locally. The Government believes the best value review is an important piece of work, involving a particularly vulnerable client group, and will actively consider the recommendations.

The Board is closely monitoring the situation with respect to the legal aid savings generally. I appreciate, however, that as a result of the savings being made that there are some practitioners in particular areas who may choose to withdraw or reduce provision. In the short term, unless active steps are taken to maintain access, we recognise that this may result in difficulties in some specialised areas of provision until alternative suppliers emerge. As a result I have asked the Board to put in place arrangements, using available powers (including, if necessary, grant funding powers), to meet particular local needs in cases where private firms are unable or unwilling to take on business. This would primarily be with the intention of providing the necessary cover, for example by using the Civil Legal Assistance Office network more widely or for different types of case.

Kenny MacAskill MSP  
Cabinet Secretary for Justice  
24 February 2011
Justice Committee

9th Meeting, 2011 (Session 3), Tuesday 15 March 2011

The Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 2011
(SSI 2011/162)

Written submission from the Glasgow Bar Association

1. The Glasgow Bar Association (“the GBA”) was formed in 1959. The objects of the Association, as contained in its constitution, include the promotion of access to legal services and access to justice and to consider and, if necessary, formulate proposals and initiate action for law reform and to consider and monitor proposals made by other bodies for law reform. The GBA also offers legal education programmes and sponsors and supports legal education and debate at Scotland’s Universities.

2. Today the GBA remains a strong, independent body. Its current member levels sit at around three hundred, by far the biggest Bar Association in the country. The GBA would encourage the Justice Committee to continue to seek its views on all legislative matters and is grateful to the Justice Committee for inviting our submission and indeed acceding to our request for oral evidence on these Regulations.

3. The Glasgow Bar Association (GBA) are opposed to these Regulations as drafted. We deal with the regulations in the order of the proposed cut to the core case fee payable for defending prosecutions in the Stipendiary Magistrates Court first, and the others following:

NOTE: Lesley Thomson, Procurator Fiscal for Glasgow: “If the option of Glasgow Stipendiary Magistrate Court were not available to me, these are all cases that I would expect to be in Glasgow Sheriff Court”. (Appendix H)

Current position

In the Justice of the Peace Court, cases may be dealt with by a Stipendiary (Stip) Magistrate. Such cases carry the same fee rate as Sheriff Court cases. Stips have the same powers of sentence as Sheriffs.

Proposed changes

The proposed reduction of the core fees, while not welcomed, are acknowledged as being a relevant budgetary induced cut.

Reduction of the Stip. case core fee to the proposed level, such as to create substantial differential in payment rates between Sheriff and Stip. cases is opposed.

Background to proposals

The Cabinet Secretary for Justice, the Scottish Legal Aid Board (SLAB) and the Law Society of Scotland through their Negotiating Team (LSSNT) engaged in discussions...
regarding the proposed budget cuts from around September 2010. The LSSNT proposed to the Government the cut in the Stipendiary Magistrate core case fee in early November 2010. This proposal, and certain other proposals, without costings or details, were circulated to solicitors by the Law Society of Scotland on 23rd December 2010 at the start of the Christmas break. The LSS held a meeting on 6th January 2011 with the Deans of Faculty, which was the first “hearing” on the detail of proposals. The Deans had no opportunity to consult with the wider members who remained wholly uninformed. 6th January 2011 was the first opportunity for even the Deans of Faculty to consider options and proposals being suggested. Glasgow naturally voiced opposition to the suggestion that Glasgow, the only jurisdiction in Scotland which has Stips, should be singled out for disparate, inappropriate, differential, treatment. The proposal which was made by the LSSNT in the first instance, is wholly flawed and without merit. “Consultation” requires to be appropriate in the circumstances. No such appropriate Consultation has been undertaken.

The Government and SLAB negotiated with the LSSNT on the basis of non disclosure of the information to the general solicitor population. The failure to consult has led to flaws in the reasoning of those engaged in the purported Consultation.

LSSNT confirmed that part of the rationale for supporting a reduction of Stip. fee, although recognising they have the same sentencing powers as Sheriffs was that it, “does not deal with aggravated matters”. In so stating, the LSSNT misinformed itself. Please refer to Appendix D attached hereto, showing that these cases are indeed aggravated by allegations of breaches of bail conditions.

The LSSNT pointed to the early resolution rate of guilty pleas at around 47% in the Justice of the Peace court, as opposed to the Sheriff Court rate of around 22% as being, “indicative of less complex cases”. Again they were incorrect. Please refer to Appendix H and the comments in paragraph 3 made by Area Procurator Fiscal, Lesley Thomson.

The LSSNT, and, apparently, SLAB and the Government make no reference whatsoever to considerations that might affect the level of service capable of being provided at such a reduced fee rate.

**Nature of cases in stipendiary courts**

Refer to Appendix A. This is a full list of Charges in cases dealt with in a Stipendiary Court on 1st March 2011, as provided by the Justice of the Peace Court Clerk to GBA.

The types of cases vary but are all of a type which would, in jurisdictions other than Glasgow, be prosecuted at Sheriff Court level.

**Appendix B.** As above but for 3rd March 2011.

**Appendix C.** As above but for 8th March 2011.
Please refer to Appendix D. This is an example of a Complaint type. It demonstrates an assault with a weapon to injury and it is aggravated by an allegation of breach of a bail order. The second Charge is a breach of the peace which is again aggravated. It should be noted that the written notes on the Complaint indicate that the case was set to call in Court 6, a Stipendiary Court.

Appendix E should be referred to as another example of a typical Complaint. The Charge is a breach of the peace by brandishing a weapon. The second Charge is possession of an offensive weapon. Again, this case was set for Stipendiary court.

Appendix F is a further example of a Complaint dealing with an offensive weapon and an assault to injury. The case was again listed for Stipendiary court.

Appendix G1 is a further Complaint example. On the 3 Charges we see, in Charge 1, there is culpable and reckless conduct (giving endangerment to police safety). Charge 2 deals with a Misuse of Drugs Act matter, being concerned in the supply of Class C drugs and Charge 3 is a Misuse of Drugs Act matter dealing with possession of a Class B drug.

It should be noted in the written notes that Court 6 (Stipendiary Court) is listed and in the top corner, the pen note of “Tfer” indicates this court case was initially set down to call in the Sheriff Court but was later transferred to the Stipendiary Court.

Appendix G2 is a list of previous convictions relating to the accused person in G1. It should be noted that the last conviction was a Sheriff and Jury matter for a Misuse of Drugs Act case where a Community Service Order was imposed, being a direct alternative to a custodial sentence. Accordingly, conviction on Charge 2, where these previous convictions are labelled, makes custody a likelihood and to be dealt with by a Stip Magistrate with the same sentencing powers as a Sheriff.

Appendix H. This is a letter to GBA President, Ken Waddell, dated 9th March 2011 from Lesley Thomson, Glasgow Area Procurator Fiscal.

Paragraph 3 confirms in clear and specific terms that the cases prosecuted in Glasgow Stip Courts are all Sheriff Court level cases.

It is important to note that the Area Procurator Fiscal commences Paragraph 3 of her letter by acknowledging that both Sheriff and Stipendiary Magistrates have equivalent powers of sentencing.

Accordingly, the Procurator Fiscal in Glasgow decides which cases are suitable for Sheriff Court level prosecution. Some sensitive/complex/aggravated cases are then marked for the Sheriff Court and the rest which remain Sheriff Court level prosecutions are set for Stipendiary Courts.

SLAB consider the Regulations 7 and 9 will give effect to policy objectives. In dealing with their fourth policy objective, to reduce the payment for cases before the Stipendiary Magistrates Court, they highlight that a key aspect of Summary Justice Reforms was a development of better appointed and trained lay Magistrates in the JP Courts who would be able to deal with more serious cases. They conclude,
erroneously, that this has resulted in more serious cases now being routinely prosecuted at JP Court level all over the country. They make statistical analysis of case types which are a distortion of fact. SLAB conclude that cases in Stipendiary Magistrate Courts are now generally closer to cases in JP Courts elsewhere as opposed to Sheriff Court cases. They further suggest that in Glasgow, cases can be programmed into either Stipendiary or JP Court for convenience based on available court slots as opposed to the seriousness of the case. Appendix H at a stroke, exposes the lack of understanding on the part of SLAB (and LSSNT) and the Government. Further, in recent time the Scottish Court Service have closed numerous District Courts in jurisdictions throughout Scotland. Where those District Courts have closed the cases are now prosecuted in the Sheriff Court. Accordingly, the true position throughout Scotland is that Sheriff Court cases in jurisdictions 
outwith Glasgow now include cases that would be dealt with by lay Magistrates in the Justice of the Peace Court in Glasgow. Suggestion by SLAB that the seriousness of the case is not a criteria for selection of Stipendiary Magistrates Court as a forum is wholly inaccurate.

Moreover, the Scottish Legal Aid Board propose the Stipendiary Magistrate core fee cuts would attract savings of £398,909.33 to the Legal Aid fund in 2011-2012 and around £652,500 for a full year.

SLAB’s produced figures indicate that of the Summary Applications granted (2009-2010 figures) in Sheriff Courts the figure was £47,644. In Justice of the Peace Courts the figure was £8,166. The grants of ABWOR at Summary level totalled £47,142: rounding down, 102,000 cases were dealt with. The projected savings that SLAB anticipate from Stipendiary cuts equate to a figure below £4 per year for the current year and around just under £6 in the next year. A single £5 cut to the core fee of all Summary Legal Aid grants of Legal Aid and ABWOR would achieve the same saving. The benefit would be an equitable distribution of the budgetary cut throughout all cases in Scotland. A cut of £5 per case is approximately a further 1% cut to the core fee. The current proposed reduction to Stipendiary fees is around 25%. Fairness and equity demand that the core fee throughout Scotland by cut to avoid the inappropriate proposed regulatory cuts to Stipendiary fees.

Regulation 5 proposes to insert into the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999 a new Clause (5B) with sub-clauses (a), (b) and (c).

Effect of proposed change

Where a duty solicitor enters a not guilty plea at the first calling of a case and a plea of guilty is tendered before commencement of Trial, the fee payable to the solicitor nominated on the Legal Aid Certificate will be restricted to one half.

Issues

No account appears to have been taken of cases where Complaints may carry multiple Charges and an eventual “Guilty” plea may relate to only one Charge or to a lesser Charge under deletion of some part of the Charge. Accordingly, the Regulations proposed take no account of work done or representations made by the solicitor acting OR of any change in the Crown position. Often the Crown will issue,
at first calling, an, “acceptable plea letter” which specifies what plea is acceptable to the Crown e.g. on a Complaint bearing 5 Charges the Crown may indicate that they would accept guilty pleas to Charges 1, 2 and 4. If subsequently the Crown change their position, for example, after representations, Defence reports, etc., are available the plea acceptable to them may be less than first indicated. In such scenarios reduction to a half fee would be neither justified nor appropriate.

Moreover, the proposed Regulation 5, when inserting new section (5B)(b), deals with the tendering of a single plea of not guilty and takes no account of Complaints which bear multiple Charges. A difficulty will occur where an accused, for example, tenders a plea of guilty to Charge 1 on the Complaint and pleas of not guilty to Charges 2 and 3. Whilst the Crown may accept the guilty plea to Charge 1 and proceed to Trial on the other Charges, they may also reject the pleas as tendered as a whole in which case not guilty pleas will be entered (with the court Minute indicating that the plea has been offered). Subsequently, and before Trial, if the Crown position alters they may accept the plea initially tendered. Again, to propose a reduction of fee in such scenarios is wholly inappropriate.

**Regulations 7 to 9**

These deal with reductions and alterations to the current fee provisions for Summary cases in Sheriff and Justice of the Peace courts.

The proposal in Regulation 9 deals with the reduction of the core fee payable in such cases.

**Possible effects if the regulations are passed**

There will be a significant diminution in fee income to existing solicitor firms. This is over and above the 14% savings in summary case fees delivered by solicitors since SJR in 2008. This will affect service availability in Glasgow within the Justice of the Peace Court. Legal firms cannot maintain the level of service currently given to Sheriff Court level prosecutions under such diminished pay scales. Solicitors will inevitably require to cut costs. Loss of staff is inevitably a consequence. Both legally qualified assistants and unqualified support staff will be the casualties.

There is also a probability that a number of firms will choose to close offices with the solicitors becoming sole practitioners and working either from home or using the court as a base. This will reduce the service available to the public by street based offices.

A further realistic consequence and concern is that the current level of service provided in such cases would require to be reduced, bringing with it an increased possibility of error and a consequent likely, increase in miscarriages of justice.

**Summary**

- There has been no consultation with the profession leading up to the promulgation of these Regulations.
The rationale and basis for the proposals to reduce the above mentioned fee levels is flawed and inept.

Fairness requires an equitable cut in core fee rates throughout Summary prosecutions in Scotland as opposed to unfair, excessive cuts to the Stipendiary fee which principally affects Glasgow.

Service levels provided will drop.

Jobs will be lost.

Justice will not be served if these regulations are passed.

Glasgow Bar Association
10 March 2011
Appendix A

Stipendiary Court – 1st March 2011

Cases  Charges

1.  1. Reset
    2. Criminal Justice & Lic (Scot) Act 2010 Sec 38(1)
    3. CP(S)A 1995 Section 22(2)

2.  1. Civic Govt (S) Act 1982 Sec 47
    2,3,4 Police (Scotland) Act 1967 Sec 41(1)(a)

3.  Road Traffic Act 1988 Section 3

4.  Road Traffic Act 1988 Section 38(1)

5.  Attempt Open Lockfast Place with intent (while on bail)

6.  Road Traffic Act 1988 Section 2

7.  Road Traffic Act 1988 Section 143(1)&(2) (while on bail)

8.  Misuse of Drugs Act 1971 Section 23(4)(A)

9.  1. Breach of the Peace
    2. Criminal Law (Consolidation)(Scot) Act '95 Section 52(1)&(3)

10. Theft by Shoplifting (while on bail)

11. Theft of Motor Vehicle (while on bail)

12. Road Traffic Act 1968 Section 5(1)(a)

13. Assault to Injury

14. Road Traffic Act 1988 Section 3

15. Theft by Opening Lockfast Motor Vehicle (3 charges)

16. Criminal Law (Consolidation Act 1995 Section 47(1)
Appendix B

Slipendary Court – 3rd March 2011

Cases | Charges
--- | ---
1 | 1. Theft by Shoplifting  
2. Criminal Procedure (Scot) Act 1995 Sec 22(2)
2 | 1. Breach of the Peace  
2. Police (Scot) Act 1967 Sec 41(1)(a)
3 | 1. Civic Govt (Scot) Act 1982 Sec 97(1)  
2. Malicious Damage
4 | 1. Crime & Justice & Lic (Scot) Act 2010 Sec 38(1) (Sexual Aggravation)
5 | Road Traffic Act 1968 Sec 3
6 | 1. Police (Scot) Act 1967 Sec 41(1)(a)  
2. Assault (football aggravation)
7 | Road Traffic Act 1968 Section 2
8 | Waste Police Time
9 | Criminal Justice & Lic (Scot) Act 2010 Sec 38(1)
10 | Road Traffic Act 1968 Section 2
11 | Misuse of Drugs Act 1971 Sec 5(2) (while on bail)
12 | Social Security Administration Act 1992 Sec 111A(1A)
13 | Road Traffic Act 1968 Section 3
14 | 1. Road Traffic Act 1968 Section 3  
2. Road Traffic Act 1968 Section 170(2)&(4)  
3. Road Traffic Act 1968 Section 170(2)&(4)
15 | 1. Road Traffic Act 1968 Section 3
16 | 2. Road Traffic Act 1968 Section 170(2)&(4)
17 | 1. Road Traffic Act 1968 Section 18(4)  
2. Road Traffic Act 1968 Section 87(1)  
3. Road Traffic Act 1968 Section 143(1)(A)&(2)
18 | 1. Assault to injury (while on bail)  
2. Breach of the Peace
19 | Road Traffic Act 1968 Section 2
20 | Assault to Injury
21 | Culpable & Reckless Conduct
22 | 1. Criminal Justice & Lic (Scot) Act 2010 Sec 38(1)  
2. Police (Scot) Act 1967 Section 41(1)(a)
23 | Misuse of Drugs Act 1971 Sec 5(2)
24 | Road Traffic Act 1968 Section 143(1)&(2)
25 | Road Traffic Act 1968 Section 41D(B)
26 | Social Security Administration Act 1992 Section 111A(1A)
27 | Social Security Administration Act 1992 Section 111A(1)(A)
28 | 1. Criminal Justice & Lic (Scot) Act 2010 Section 38(1)  
2. Criminal Justice & Lic (Scot) Act 2010 Section 38(1)  
3. Police (Scotland) Act 1967 Section 41(1)(a)  
4. Police (Scotland) Act 1967 Section 41(1)(a)

8
Appendix C

Stipendiary Court – 8th March 2011

<table>
<thead>
<tr>
<th>Case</th>
<th>Charge</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Theft by Opening Lockfast Motor Vehicle</td>
</tr>
<tr>
<td>2.</td>
<td>1. Criminal Law (Consolidation) (Scot) Act 1995 Sec 47(1)</td>
</tr>
<tr>
<td></td>
<td>2. Criminal Justice &amp; Lic (Scot) Act 1995 Sec 38(4)</td>
</tr>
<tr>
<td></td>
<td>3. Assault</td>
</tr>
<tr>
<td>3.</td>
<td>Road Traffic Act 1960 Section 5(1)(A)</td>
</tr>
<tr>
<td>4.</td>
<td>Road Traffic Act 1988 Section 3</td>
</tr>
<tr>
<td>5.</td>
<td>Assault to Injury</td>
</tr>
<tr>
<td>6.</td>
<td>Road Traffic Act 1988 Section 7(6)</td>
</tr>
<tr>
<td>7.</td>
<td>Theft of Motor Vehicle</td>
</tr>
<tr>
<td>8.</td>
<td>Assault to Injury</td>
</tr>
<tr>
<td>9.</td>
<td>Theft by Shoplifting</td>
</tr>
<tr>
<td>10.</td>
<td>1. Police (Scotland) Act 1967 Section 41(1)(a)</td>
</tr>
<tr>
<td></td>
<td>2. Misuse of Drugs Act 1971 Section 23(4)(A)</td>
</tr>
<tr>
<td>11.</td>
<td>Assault to Injury</td>
</tr>
<tr>
<td>12.</td>
<td>Road Traffic Regulation Act 1964 Sec 17 (speed 72 mph in a 50 zone)</td>
</tr>
<tr>
<td>13.</td>
<td>1. Theft</td>
</tr>
<tr>
<td></td>
<td>2. Attempt Theft</td>
</tr>
<tr>
<td>14.</td>
<td>Theft by Opening Lockfast Motor Vehicle (3 charges)</td>
</tr>
<tr>
<td>15.</td>
<td>Criminal Law (Consolidation) Scotland Act 1995 Section 47</td>
</tr>
<tr>
<td>16.</td>
<td>Civic Government (Scotland) Act 1982 Sec 57(1)</td>
</tr>
<tr>
<td>17.</td>
<td>Civic Government (Scotland) Act 1982 Sec 57(1)</td>
</tr>
<tr>
<td>18.</td>
<td>Breach of the Peace</td>
</tr>
<tr>
<td>19.</td>
<td>1. Breach of the Peace</td>
</tr>
<tr>
<td></td>
<td>2. Police (Scotland) Act 1967 Section 41(1)(a)</td>
</tr>
<tr>
<td></td>
<td>3. Police (Scotland) Act 1967 Section 41(1)(a)</td>
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<td></td>
<td>4. Police (Scotland) Act 1967 Section 41(1)(a)</td>
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<tr>
<td></td>
<td>5. Police (Scotland) Act 1967 Section 41(1)(a)</td>
</tr>
<tr>
<td>20.</td>
<td>Assault to Injury</td>
</tr>
</tbody>
</table>
Appendix D

Under the Criminal Procedure (Scotland) Act, 1995

IN THE JUSTICE OF THE PEACE COURT OF CITY OF GLASGOW

The COMPLAINT of the PROCURATOR FISCAL against

Date of Birth: 

The charge(s) against you is/are that

1. On 24th October 2010 at Kincapsed Drive, Glasgow, you did assault a person at the care of Drumchapel Police Office and did hit him on the head with a bottle to his injury, and did commit this offence while on bail, having been granted bail on 12 April 2010 at Glasgow Sheriff Court.

2. On 24th October 2010 at Kincapsed Drive, Glasgow, you did conduct yourself in a disorderly manner about, swear and oncomit a breach of the peace and did commit this offence while on bail, having been granted bail on 12 April 2010.

Procurator Fiscal Depute

20. The Court Assents at a.m. within the JUSTICE OF THE PEACE Court House, as a Diet in this case.

20.4.10.

Clerk of Court

12.11.11 2pm
Appendix E

15. Feb. 2011 15:15

Under the Criminal Procedure (Scotland) Act, 1995

IN THE JUSTICE OF THE PEACE COURT OF CITY OF GLASGOW

The COMPLAINT of the PROCURATOR FISCAL against

[redacted]

Date of Birth: 20.09.1956

The charge against you is that

(001) on 23rd August 2010 at Old Dumbarton Rd, Glasgow you did conduct yourself in a disorderly manner shout, swear, utter threats and did brandish a stick and commit a breach of the peace.

(002) on 23 August 2010 at LOCUS: TYPE LOCUS you did without lawful authority or reasonable excuse have with you in a public place an offensive weapon, namely a stick;

CONTRARY to the Criminal Law (Consolidation) (Scotland) Act 1995, Section 47(1)

Procurator Fiscal Depute

Diet 20 , at u.m., within the JUSTICE OF THE PEACE Court-House, as a Diet in this case.

Clerk of Court
Appendix F

UNDER THE CRIMINAL PROCEDURE (SCOTLAND) ACT, 1995

IN THE JUSTICE OF THE PEACE COURT OF CITY OF GLASGOW

The COMPLAINT of the PROCURATOR FISCAL against

Date of Birth: 03.06

Date of Birth: 10.06

The charge(s) against you state that

[Criminal Law (Consolidation) (Scotland) Act 1995, Section 47(1)

On 11th October 2010 at George Square, Glasgow you did without lawful authority or reasonable excuse have with you in a public place an offensive weapon, namely a knife,

Contrary to the Criminal Law (Consolidation) (Scotland) Act 1995, Section 126]

On 11th October 2010 at George Square, Glasgow you did assault

C/O Glasgow City Centre Police Office and did repeatedly punch him on the head and cause him all to his injury

The Court assigns

Date: 20

at

in the JUSTICE OF THE PEACE Court House,

as a Defendent case

Clerk of Court
Appendix G1

Under the Criminal Procedure (Scotland) Act, 1995

IN THE JUSTICE OF THE PEACE COURT OF CITY OF GLASGOW

The COMPLAINT of the PROCURATOR FISCAL against

[Redacted]

Glasgow, STRATHCLYDE
Date of Birth: [Redacted]

The charge(s) against you is that

(001) on 5th January 2011 at Killin Street, Glasgow you, [Redacted], did culpably and recklessly having been asked by police officers carrying out a search of the house whether there was any article within the house that could injure police officers, did fail to disclose that you had a Bladeless articles within your address to the endangerment of injury to police officers.

(002) on 5th January 2011 at Killin Street, Glasgow you, [Redacted], were concerned in the supply of a controlled drug, namely Clonazepam, a Class C drug specified in Part III of Schedule 2 to the Misuse of Drugs Act 1971 to another or others in contravention of Section 4(1) of the aforementioned Act;

CONTRARY to the Misuse of Drugs Act 1971, Section 4(3)(b)

(003) on 5th January 2011 at Killin Street, Glasgow you, [Redacted], did have in your possession a controlled drug, namely Amphetamine a Class B drug specified in Part II of Schedule 2 to the Misuse of Drugs Act 1971 in contravention of Section 5(1) of said Act;

CONTRARY to the Misuse of Drugs Act 1971, Section 5(2)

Diet 20 of the Court Jails 20 , at , within the JUSTICE OF THE PEACE Court-House, as a Class in this case

Clerk of Court

[Handwritten signatures]
### Appendix G2

**NOTICE OF PREVIOUS CONVICTIONS APPLYING TO**

In the event of your being convicted of the charge(s) in the Complaint it is intended to place before the Court the following previous conviction(s) applying to you.

<table>
<thead>
<tr>
<th>DATE</th>
<th>COURT - PLACE &amp; TYPE OF OFFENCE</th>
<th>OFFENCE</th>
<th>CASE REF. NO.</th>
</tr>
</thead>
<tbody>
<tr>
<td>07/11/1990</td>
<td>GLASGOW &amp; DISTRICT - OFFENCES AGAINST TRAFFIC ACT 1963</td>
<td>C1 157/90, 160/90, 161/90</td>
<td>D8810105711</td>
</tr>
<tr>
<td>31/08/1991</td>
<td>GLASGOW &amp; DISTRICT - OFFENCES AGAINST TRAFFIC ACT 1963</td>
<td>C1 163/91, 164/91, 165/91</td>
<td>D8810105712</td>
</tr>
<tr>
<td>04/10/1992</td>
<td>GLASGOW &amp; DISTRICT - OFFENCES AGAINST TRAFFIC ACT 1963</td>
<td>C1 173/92, 174/92, 175/92</td>
<td>D8810105714</td>
</tr>
<tr>
<td>12/05/1989</td>
<td>GLASGOW &amp; DISTRICT - OFFENCES AGAINST TRAFFIC ACT 1963</td>
<td>C1 179/89, 180/89, 181/89</td>
<td>D8810105715</td>
</tr>
<tr>
<td>23/10/2000</td>
<td>GLASGOW &amp; DISTRICT - OFFENCES AGAINST TRAFFIC ACT 1963</td>
<td>C1 184/00, 185/00, 186/00</td>
<td>D8810105716</td>
</tr>
<tr>
<td>03/11/2000</td>
<td>GLASGOW &amp; DISTRICT - OFFENCES AGAINST TRAFFIC ACT 1963</td>
<td>C1 189/00, 190/00, 191/00</td>
<td>D8810105717</td>
</tr>
<tr>
<td>29/09/2000</td>
<td>GLASGOW &amp; DISTRICT - OFFENCES AGAINST TRAFFIC ACT 1963</td>
<td>C1 195/00, 196/00, 197/00</td>
<td>D8810105718</td>
</tr>
<tr>
<td>14/04/2010</td>
<td>GLASGOW &amp; DISTRICT - OFFENCES AGAINST TRAFFIC ACT 1963</td>
<td>C1 199/10, 200/10, 201/10</td>
<td>D8810105719</td>
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<tr>
<td>05/05/2010</td>
<td>GLASGOW &amp; DISTRICT - OFFENCES AGAINST TRAFFIC ACT 1963</td>
<td>C1 203/10, 204/10, 205/10</td>
<td>D8810105720</td>
</tr>
</tbody>
</table>
Appendix H

Crown Office and Procurator Fiscal Service
Procurator Fiscal's Office
10 Ballater Street, Glasgow G5 9PS

LESLEY THOMSON, Area Procurator Fiscal

Mr K Waddell
GBA President

Telephone: 0844 561 2063
Fax: 0844 561 2443

Dear Ken

GLASGOW STIPENDIARY MAGISTRATE CASES

I refer to the email request yesterday from the GBA asking me to confirm "(1) the criteria used when marking case for Stip Court prosecutions and (2) that the Stip cases are such that if in another jurisdiction without Stips these would be marked for the Sheriff Court."

Guidance in relation to case marking in COPFS is confidential and therefore I am not able to provide you with the guidance available to deputes when considering marking cases.

However, as you are aware both the Stipendiary Magistrates Court and the Sheriff Court have equivalent powers in relation to sentencing. We generally prosecute the more sensitive or complex cases that are appropriate for summary proceedings in Glasgow Sheriff Court and there are also presumptions as part of COPFs policy that certain offences (eg offences of racially aggravated behaviour, hate crime, aggravations domestic abuse and knife crime) should be prosecuted in the Sheriff Court. While the cases that are prosecuted in Glasgow Stipendiary Magistrates Court will not include any of the foregoing I can confirm that the other types of cases in the Stip courts are all of a Sheriff Court level. If the option of Glasgow Stipendiary Magistrate Court were not available to me these are all cases that I would expect to be in Glasgow Sheriff Court.

Kind regards

LESLEY THOMSON
Area Procurator Fiscal

www.copfs.gov.uk
Justice Committee

9th Meeting, 2011 (Session 3), Tuesday 15 March 2011

The Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2011 (SSI 2011/162)

Written submission from the Law Society of Scotland

General comments

Since the publication of the Scottish Government (SG) draft Budget 2011-12 on 17 November, the Law Society has been involved in discussions with SG and with Scottish Legal Aid Board (SLAB) on cuts to criminal legal assistance. For the Society, there have been three broad concerns in these discussions: to maintain appropriate access to justice for legal aid clients; to ensure proper payment for work carried out; and to uphold overall fairness within the context of public sector savings required by government.

Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2011

There are a number of measures within the statutory instrument, including those around multiple deferred sentences, failure to appear payments, multiple guilty pleas, pleas of guilty as a duty solicitor and summary core fees at JP, stipendiary and Sheriff levels. These regulations are anticipated to save £2.89m in the financial year 2011-12. The Justice Committee can move to annul these regulations, though this would involve all measures proposed by the government failing. As there is no practicable opportunity to lay further regulations before the return of Parliament from summer recess, there is a risk that the cuts would need to be significantly deeper than those proposed by these regulations, simply because so much of the financial year 2011-12 will have already passed.

Background

The original proposal from Scottish Government was that the Public Defence Solicitors’ Office network be expanded, to achieve a saving of £4.5m in the 2011-12 financial year. It was felt that this proposal would not be in the interests of the profession, not least in that this saving would require a £3.5m capital investment – for four new offices and 41 new staff - in order to save the required £4.5m: in effect, the cost to the Legal Aid Fund would be almost double that required by government. The Law Society asked the Cabinet Secretary for Justice whether this proposal could be withdrawn and he indicated that he was not committed to any particular cut but did need to make the required savings from legal aid for the financial year 2011-12.

In the limited time for consultation and with the limited information available, the Society did consult with its members, emailing registered criminal practitioners with the government’s PDSO expansion proposals and with the alternative scenarios inviting feedback. A meeting of representatives of local faculties was also organised for 6 January, so that the Society’s criminal legal aid team could take guidance from the profession. At that meeting, the proposals found in the Criminal Legal Aid (Fixed
Payments) (Scotland) Amendment Regulations 2011 were agreed as the least unpalatable option. This position was communicated to the Cabinet Secretary for Justice, as were the concerns raised by the Glasgow representatives, in a letter from the Society’s President, Jamie Millar.

Consultation

The Society consulted broadly with its members on the regulations within a very tight timescale. The Government published the budget on 17 November 2010 and any regulations needed to be agreed, drafted and laid before Parliament prorogued for the election. The time for consultation was very limited, however, the Society provided all criminal legal assistance practitioners and Deans and Secretaries of local Faculties of solicitors with full details of the discussions on the criminal legal aid cuts and the Government’s cost projections as they applied to various scenarios inviting comment and input. The Society’s position as communicated to the Cabinet Secretary for Justice was agreed by representatives of the local Faculties on 6 January. That meeting included representatives from 19 faculties across Scotland (including Glasgow).

Stipendiary Courts

The regulations propose to reduce the fixed payment for proceedings in the Stipendiary Magistrate’s court in Glasgow. The Society’s position is that the Stipendiary Magistrate Court is a hybrid court for which a hybrid payment is a reasonable reflection for the work carried out.

The marking policy of the Crown Office is confidential but Crown Office has indicated that more sensitive or complex proceedings are usually allocated to the Sheriff Court rather than the Stipendiary Court.

There is a presumption that offences involving the use of knives, domestic violence and racial or hate crime aggravations will be heard before the Sheriff rather than the Stipendiary Magistrate. The statistics attached indicate that the Stipendiary magistrate court does not deal with cases such as breaches of community service or liberty orders, offences under the Emergency Workers (Scotland) Act 2005, the Children and Young Persons (Scotland) Act 1937, the Firearms Act 1968, the Sex Offenders Act 1997, the Education (Scotland) Act 1996 and has negligible involvement with breaches of bail conditions, ASBOs or probation orders, fraud, offences under the Communications Acts, sexual offences, robbery, culpable and reckless conduct, abduction, embezzlement and a range of other offences.

The Stipendiary Magistrate Court is therefore not the direct equivalent of the Sheriff Court although the current fixed payment structure under the Criminal Legal Aid (Fixed Payment) (Scotland) Regulations 1999 is the same for both courts. The early resolution rate for the Stipendiary Court, 47.1% as opposed to 25.8% in Glasgow Sheriff Court, suggests that cases in the Stipendiary Magistrate court are easier to resolve.

Custody Cases

The custody court in Glasgow is presided over by a Stipendiary Magistrate who hears all custody cases at first instance. While those accused who plead not guilty
are then allocated to the appropriate court, those who plead guilty have their cases disposed of by the Stipendiary Magistrate.

In JP custody cases elsewhere in Scotland the fixed payment is £150 however for similar cases at the Stipendiary Magistrate Court in Glasgow the fixed payment is £515. There are around 1700 cases per annum where the fixed payment is significantly higher than the fixed payment for cases outwith Glasgow.

**JP Cases**

For the majority of offences, there is no single determining factor on which court a case should be allocated to, JP, stipendiary magistrate or Sheriff in Glasgow, or JP and Sheriff elsewhere in Scotland. The information included in the Executive Note to the regulations, attached to this paper, indicates that in over two thirds of cases, the stipendiary magistrate is closer in profile to the JP Court than to the Sheriff Court; it is only in just over 10% of cases that the stipendiary court is closer in profile to the Sheriff Court than the JP Court.

Bearing in mind that one of the outcomes of the summary justice reforms was a more robust court at district level, the amount of cases before the JP has increased at a time when direct measures are also diverting less serious cases from the system. This increase in JP cases is shown in Glasgow, as JP cases have increased from 5946 to 8252 in the last three years.

**Conclusion**

The Society has consulted with the profession on the package of measures contained in these regulations. Reaching this stage has been part of a difficult process over a very short time period, in which we have tried to provide the profession with as much information as practicable and as promptly as possible.

The stipendiary magistrate is a different court to either the JP or Sheriff Courts: different in personnel, different in its operation from the courts elsewhere in Scotland and different in its mix of cases. It is a hybrid court that deals with simpler, less complex cases than the sheriff court and, equally, deals with JP custody cases at first instance. This is, however, a complex issue and the Society has asked the Cabinet Secretary to review the stipendiary fee and, if the savings obtained through these regulations exceed projections to reinvest that surplus in the fixed payment system. This request will be renewed when the next administration is installed after the election.

Should you require any further information, or have any questions, please do not hesitate to get in touch.

Michael P Clancy  
Director, Law Reform  
14 March 2011
Submission from G. Sweeney

The European Convention on Human Rights states:

**Article 6 – Right to a fair Trial**

**Article 6(3)** ‘Everyone charged with a criminal offence has the following minimum rights:

(c) ‘to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interest of justice so require;’

**Article 14 – Prohibition of Discrimination**

‘The enjoyments of rights and freedoms set forth in this Convention shall be secured without discrimination on any ground…’

Given the above, and the responsibility of Scottish Parliament on the act compatibly with the Convention, how can it be that the Justice Committee are even considering whether to sanction that a Scottish Citizen, who pleads not guilty with the involvement of a ‘duty agent’, should be penalized by suffering the loss of half of the resources available to his defence compared to an accused who please not guilty without ‘duty agent’ involvement?

For the Justice Committee to sanction such a regulation, would be to promote an act of the Scottish Parliament which was incompatible with the Convention, and a breach of responsibilities under Schedule 6 of the Scotland Act 1998.

G. Sweeney
23 February 2011
Submission from Kinloch and Co, Solicitors

I am a practising solicitor in Glasgow. I am self employed and have been in practice with my own business for 25 years. We provide predominantly legal aid, both civil and criminal in a deprived area of Glasgow. My admin staff are local. I employ 3 solicitors and 4 admin staff.

I fully understand and accept that savings must be made in the next financial year. I cannot understand or accept the LSS proposal re the reduction in Stip fee’s. This will cause me to make one lawyer and at least one fulltime admin staff to be laid off. I understand that an across the board further reduction of £6 in summary fixed fee cases achieves the same savings. Glasgow is facing a reduction of 14% whereas the rest of Scotland is facing 8%. Glasgow practitioners and their client’s are facing inequitable reductions.

This is the most serious challenge 300 Glasgow solicitors and their admin staff have faced. There is only 1400 criminal solicitors in Scotland, is this proposal fair ? I have complained to the President of the LSS, and have received no reply to date

David Kinloch
25 February 2011

Submission from Livingstone Brown Solicitors

I am writing to you in your capacity as convener of the Justice Committee of the Scottish Parliament. I understand that you will shortly be considering proposed Regulations introduced by the Scottish Government, the Criminal Legal Aid (Fixed Payment) (Scotland) Amendment Regulations 2011. I am a solicitor based on Glasgow. I am a Partner of Livingstone Brown, Scotland’s largest provider of legal aid services.

I accept entirely that in these difficult economic times, all aspects of the Government’s budget require to be scrutinised. That said, I think it is important that politicians do not lose sight of the fact that the legal aid system in Scotland represents real value for money for the tax payer. The system allows citizens of modest means to secure access to justice, and representation by the very best solicitors, for a fraction of the cost that individuals or companies would require to pay solicitors acting in a private capacity.

The current legal aid system was set up in 1986, with the passing of the Legal Aid (Scotland) Act 1986. At that time, the deliberate aim was to peg payments for legal aid work close to, but slightly below, the equivalent charging rates for private business. Over time, the differential between the two has grown considerably. Figures were released a few years ago which showed that the Scottish Government was paying its own legal advisors many times the level of payment that would be attracted in a legal aid case. Paralegals (unqualified advisors, who have no formal legal training) were paid
considerably more than the most experienced solicitors could hope to receive for legal aid business. Despite this, my firm, and the profession in general, has been keen to support changes to the legal aid structure designed to improve the quality of service, and accountability to the tax payer.

Notwithstanding all of this, I have no difficulty in principle with the legal aid budget taking its share of the overall cuts in budget. However, it is important that any cuts are equitable and proportionate.

One of the changes proposed by the draft Regulations causes particular concern. That is the proposed reduction in the fixed payment for cases before the Stipendiary Magistrates Court in Glasgow from £515 to £390. This cut seems arbitrary, and lacking in any justification whatsoever, particularly as the payments for corresponding Sheriff Court cases are to be reduced from £515 to £485.

The Stipendiary Magistrates Court is a historical anacronism, that exists only in Glasgow. It is essentially an extension of the Sheriff Court. The Stipendiary Magistrates have identical powers and jurisdiction to Sheriffs sitting in summary criminal cases. This means that the Stipendiary Court acts as an overspill for the Sheriff Court in Glasgow. The Procurator Fiscal, who brings all prosecutions, only marks cases for the Stipendiary Magistrates Court that would otherwise go to the Sheriff Court. It is not an extension of the District or JP Court, even though it is physically accommodated within that court's building.

In this regard, it is worth having a look at the Scottish Judiciary's own website, which makes it clear that the Stipendiary Magistrates Court is simply an extension of the Sheriff Court. All of the legislation that governs criminal procedure makes it clear that reference to the Sheriff Court should be extended to mean reference to the Sheriff Court and the Stipendiary Magistrates Court.

Against this background, it is very hard to understand why the Scottish Government now proposes to introduce a differential between the Stipendiary Court and the Sheriff Court in respect of legal aid payments. I suspect that this has arisen because of a misunderstanding of certain statistics. I am told that reference was made by the Scottish Legal Aid Board to a different rate of first diet disposals in the Stipendiary Court as against the Sheriff Court; apparently the former has a higher rate of pleas of guilty for accused persons appearing from custody than is the case in the latter. This figure is, however, illusory.

There is no Justice of the Peace custody Court in Glasgow, as there is in other jurisdictions. If somebody fails to appear for a Trial before a Justice in another jurisdiction, they will be arrested and brought before that Justice. In Glasgow, they would be arrested and brought before the Stipendiary Magistrate, who deals with all custody matters for both the JP and the Stipendiary Courts. If an individual is brought before the Stipendiary Magistrate in connection with a case that is marked to be dealt with by a Justice, the relevant fixed fee will only be that related to the Justice Court. In
the circumstances, the fact that there is no Justice of the Peace custody Court in Glasgow does not lead to a higher rate of legal aid payments in Glasgow. However, the reality is that people tend to plead guilty more often in the Justice Court (where the cases are less serious) than in the Sheriff Court. The fact that the Stipendiary Court has a higher rate of early pleas than the Sheriff Court is simply a reflection of the fact that it also has to deal with Justice custodies. To use a single figure for the plead out rate in the Stipendiary Court fails to take account of this important fact, and misrepresents the true nature of work that is done in the Stipendiary Court.

The upshot of all of this is to effectively create a differential between the payments for summary criminal cases in Glasgow and the payments for elsewhere in the country. An accused person facing a relatively serious charge before the summary Court in Glasgow can expect their solicitor to be paid considerably less than an accused person in any other part of the country. That has an impact on access to justice. It is discriminatory. It is, I think, likely to be viewed as contrary to an individual's Convention rights.

The practical result of such a change being made is that solicitors in Glasgow will be less likely to accept instructions in the Stipendiary Magistrates Court. That will have an impact on the quality of representation in the Court, and the value for money that the tax payers receive. It will also, I am sure, lead to a number of devolution issues being raised in the Stipendiary Magistrates Court, with all of the consequences that that might bring.

I appreciate that, following representations made by the former chair of the Justice Committee, Bill Aitken, the Government suggested that the proposed fixed fee for the Stipendiary Court could be changed from £350 (the original proposal) to £390. With respect, that entirely misses the point. There is no justification whatsoever for a differential to be inserted into the system between the Sheriff Court on one hand and the Stipendiary Magistrates Court on the other.

It seems to me that a much more equitable and reasonable way of proceeding is to simply share the proposed cut across the budget for summary fixed fees in general, thereby maintaining the link between the Stipendiary and the Sheriff Court, but reducing the fixed fee payable in both to a degree sufficient to cover the difference. I am told that that would represent a cut of only a few pounds from the fixed fee level that is currently proposed.

I would be grateful if this matter could be given full consideration in the course of your deliberations.

Stuart Munro
Partner, Livingstone Brown
2 March 2011
Submission from Liam Ewing

Summary

That the proposed reduction to the fixed payment fee for stipendiary magistrate cases in Glasgow, is unfair and discriminatory in its impact on the legal profession in Glasgow.

That the European Convention on Human Rights provides that effective representation by a lawyer is an essential feature of a fair trial. This requires free legal assistance where the interests of justice require it.

That whilst legal aid may be provided by way of fixed payments –such schemes must allow for fair remuneration for the work that the lawyer is required to do.

That the discriminatory impact of the regulations is such as to give rise to a potential breach of article 6 taken with article 14.

That this in turn leads to the probability of numerous “Cadder “ type challenges in trials, in both the Justice of the Peace courts and the Sheriff court.

It is submitted that the current proposal for reduction of the stipendiary magistrate fee has the potential to give rise to a breach of an accused person’s Convention rights, namely article 6 and 14.

1. Background

In all areas of Scotland –other than Glasgow-the two courts of summary jurisdiction\(^1\) are the Sheriff court and the Justice of the Peace court\(^2\). In Glasgow the Justice of the Peace court also has stipendiary magistrates. They unlike other justices are legally qualified and have the same powers as sheriffs.

In practice in Glasgow this results in the “stip courts” being used as an overspill for the Sheriff court which remains by some margin, Scotland’s busiest. What this means is that serious cases, which elsewhere in Scotland would be dealt with by a sheriff, are routinely prosecuted in the Justice of the Peace court.

By way of illustration within the last few days, a 20 witness embezzlement case called in the stipendiary court whilst another case calling the same day in Ayr Sheriff court-dealt with the theft of a jar of honey.

2. The Convention rights

2.1 Article 6-The right to a fair trial

\(^1\) Sitting without a jury
\(^2\) Previously called the district court
The rights under the Convention which are in issue are those which are set out in articles 6(1) and 6(3). Article 6(1) states that in the determination of a criminal charge against him everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. This article sets out the fundamental and absolute right to a fair trial. The respects in which the appellants’ right to a fair trial is said to be prejudiced are to be found in article 6(3). This article states that everyone charged with a criminal offence has the following, among other, minimum rights:

“(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”

In Pointrimol v France 3 it was stated

“Although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial.” 4

2.2 Unsurprisingly the Convention jurisprudence recognises the right of member states to introduce measure to ensure that legal aid schemes are cost effective. 5 However in Artico v Italy 6 the European Court of Human Rights emphasised that the assistance which is provided should be “practical” and “effective”, not “illusory” or “theoretical” in view of the prominent place held in a democratic society by the right to a fair trial. Accordingly a breach will occur regardless of the provision of legal aid or assistance, where it does not provide effective assistance to an accused person. Lastly it should be noted that it is not necessary for a contravention of Article 6(3)(c) that the accused should have suffered damage as a result of the contravention. He need not show that with an effective representative the trial would have gone differently or that the outcome would have been different. Where in a serious case an accused has no effective representation that fact may be enough to constitute a contravention.

2.3 Article 14-The prohibition of Discrimination

3 (1993) 18 EHRR 130 at paragraph 34
5 MvUK No9728/82 see also van Dijk and van Hoof 6.9.4
HRR 1 at paragraph 32
“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

It will be understood that this is not a freestanding right. It is a prohibition of discrimination in relation only to the substantive rights set out in the Convention. Nonetheless its importance should not be understated. In *DH v Czech Republic* it was stated that discrimination meant treating persons in relevantly similar situations differently, without an objective and reasonable justification. It was also held that a measure that has a disproportionately prejudicial effect on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group.

3. Legal Aid and the fixed payments

3.1 The fixed payments regime came into force on 1 April 1999. It applies only to “relevant criminal legal aid”, which means criminal legal aid provided by a solicitor in relation to summary proceedings. It provides for fixed payments to be made in respect of the professional services provided by the solicitor and specified outlays.

The 1999 Regulations provide separate lists of fixed payments for proceedings in the justice of the peace court (other than those before a stipendiary magistrate), and proceedings in the sheriff court or in the justice of the peace court (where they are before a stipendiary magistrate), a fixed payment be paid for:

“All work up to and including:
(i) any diet at which a plea of guilty is made and accepted or plea in mitigation is made;

…

(iii) the first 30 minutes of conducting any trial.

3.2 Exceptional cases

The 1999 regulations also provide for the granting of legal aid on non-fixed payment basis in exceptional cases.

3.3 The payments

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7 Belgian logistics case(no 2)(1968) 1 EHHR 252
8 (2008) 47 EHHR 3
9 in the exercise of powers to prescribe fixed fees given to the Secretary of State by section 33(3A) of the 1986 Act, which was inserted by section 51 of the Crime and Punishment (Scotland) Act 1997
10 other than the various proceedings which are described as “excluded proceedings”. These include any reference on a devolution issue under paragraph 9 of Schedule 6 to the Scotland Act 1998; SI 1999/1820 Schedule 2 paragraph 168
11 Schedule 1
12 Regulation 4A
Currently the sheriff court/stipendiary payment is £515 and the justice of the peace court is £315.\textsuperscript{13}

The issue raised by such a scheme is whether in every case it provides sufficient payment to the solicitor to ensure that an accused person receives effective representation and is able to adequately prepare his defence. Shortly after the fixed payment scheme was introduced it was subject to challenge on the basis of its purported incompatibility with article 6(3) (d) in the case of Buchanan v MacLean.

4. The rationale for fixed payments

The fixed fee regime was subject to scrutiny in the Privy Council\textsuperscript{14} in Buchanan v MacLean. On the issue of how the level of the fixed payment was arrived at it was noted,

“Their Lordships understand that the fixed fee regime was arrived at after consultation with the Law Society of Scotland. The annual spending on criminal legal aid in summary cases in the district court and in the sheriff court was aggregated, and the annual figure was then weighted in favour of the amount spent in the sheriff court where the more important work was done. The results were then examined according to areas of spending and the relative importance of the work done in each case. The Advocate Depute, Mr Drummond Young QC, said that the objective was to design a scheme where the total amount expended on summary criminal legal aid annually equated with the amount expended under the old scheme in the previous year.”

The aggregated figure for the last year before fixed payments for summary cases which didn’t proceed to trial was £843.\textsuperscript{15} If a further adjustment is made to take account of VAT a figure of £700 is perhaps appropriate. The rational underlying a system of fixed payments was put in this way,

“…The first assumption is that a solicitor … can expect to be instructed in a variety of cases, some of which may involve more work and the incurring of more outlays than others. An advantage of the fixed fee regime is that the cost and delay of taxation is avoided. A disadvantage is that the solicitor may not be fully remunerated for his work and his prescribed outlays in all the cases which he undertakes. But he is expected to take the rough with the smooth or, as the Advocate Depute put it, the good with the bad. \textit{It can be assumed that from his point of view what matters is his overall return over a given period.}\textsuperscript{16}

On the issue of whether such schemes were compatible with Convention rights it was stated

\textsuperscript{13} Further payments are available if the trial proceeds beyond this period.  
\textsuperscript{14} A similar case would now be heard on appeal in the Supreme Court  
\textsuperscript{15} Appendix 3 to the 1998-1999 Report by the Scottish Legal Aid Board.  
\textsuperscript{16} Emphasis added
“Inevitably any such scheme contemplates that in a proportion of cases the solicitor will be acting without reasonable remuneration. This may lead to a situation such as that in Glendinning where there is a direct breach of the convention because the requisite legal assistance is not being given to the accused or an indirect breach where the legal assistance is being given on a basis which negates the equality of arms. It is true that a fixed fee system does not necessarily have this effect in all cases; indeed, unless unduly parsimonious, it will probably involve an element of over-generous remuneration in a proportion of cases. **So it will always be necessary to ask in any individual case whether it comes into the category equivalent to that in Glendinning where the disparity is such as to amount to a denial of equality of arms and a fair trial.**”

“There is much to be said for schemes of legal aid which reduce the bureaucracy involved **provided that they do not undermine the principle that the lawyer should receive fair remuneration for the work which he is required to do.**”

5. Summary

It can be seen that whilst the Convention does not in any sense prevent legal aid being made available on the basis of fixed payments it requires that the lawyer receive fair remuneration for the required work. What is fair has to be seen in the round over a number of cases over a given period.

6. Conclusion

The current proposal to reduce the stipendiary magistrate fee if implemented could re-open the whole issue of the compatibility of the fixed payment scheme with the Convention. If a comparison was made between 100 identical cases both within and without Glasgow – a significant number of the Glasgow cases would be prosecuted before a stipendiary magistrate.

The effect of this would be that the overall level of remuneration in Glasgow for the same number of cases would be significantly lower. It seems hard to envisage a situation that the Crown could argue that what passed for fair remuneration in say Dumbarton was materially higher than required in neighbouring Glasgow.

6.2 One possibility is of course that the grant of exceptional legal aid might be considered. Currently this is only granted in very limited cases where a case is felt to lie out with what the Board term the “swings and roundabouts” of a fixed payment system. In any given year only 200 or so such applications are granted relative to ordinary grants of in excess of 50,000.

6.3 What will be immediately apparent is that what is out with the range of normal cases will –if the proposal is implemented – be different in Glasgow than elsewhere in
Scotland. This effect will be exacerbated by the regulations These reduce by half the block payment where the solicitor was originally instructed as the duty solicitor thereby ensuring that the overall payment received by Glasgow solicitors will fall even further.

What would appear to be inarguable is that an accused person in Glasgow will be treated differently in the level of remuneration provided to his or her solicitor, as to an accused in a similar position elsewhere in Scotland.

Such potential discrimination will apply not just to individual cases before the stipendiary magistrates court but will effect the overall remuneration paid to solicitor across a number of cases, including those prosecuted in the Sheriff court. In the absence of the grant of a much larger number of exceptional legal aid certificates, this gives rise to the prospect of a large number of human rights challenges, both in the sheriff court and the stipendiary magistrate’s courts.

Liam Ewing
2 March 2011
Justice Committee

9th Meeting, 2011 (Session 3), Tuesday 15 March 2011

SSI cover note

SSI title and number: The Officers of Court’s Professional Association (Scotland) Regulations 2011 (SSI 2011/90)

Type of Instrument: Negative

Coming into force: 1 April 2011

Justice Committee deadline to consider SSI: 16 March 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 designate the Society of Messengers-at-Arms and Sheriff Officers as the professional association for officers of court.

Justice Committee consideration:

2. The instrument was laid on 14 February 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 24th Report, 2011*

**The Officers of Court’s Professional Association (Scotland) Regulations 2011**
*(SSI 2011/90)*

1. The purpose of this instrument is to designate a professional association, membership of which is to be compulsory, for all messenger-at-arms and sheriff officers in order to maintain and enhance standards of professionalism.

2. Correspondence between the Committee and the Scottish Government is reproduced in the appendix.

3. Regulation 11(2)(a) imposes a statutory obligation on the Society that the annual membership fee for 2011 must be in accordance with the resolution agreed by the Society on 15 January 2011. However, from the face of the instrument, there is no indication as to whether, or where, this resolution has been recorded, and the content of the resolution. The Scottish Government has now advised that the resolution is recorded in the Society’s minutes and a copy will be provided to every member and new member. However, the resolution will not be publicly available. While there is unlikely to be any practical effect due to the omission of any indication as to where a copy of the resolution may be obtained or inspected, the Committee considers that, in accordance with proper drafting practice, the instrument or the Explanatory Note should have stated either where the resolution was recorded, together with an indication of the content of the resolution (as disclosed by the Government’s response) or where a copy of the resolution may be obtained or inspected.

4. The Committee reports, under the general reporting ground, that this instrument has failed to follow proper drafting practice in that regulation 11 limits the annual membership fee which the society of Messengers-at Arms and Sheriff Officers may charge for 2011 by reference to an external document but does not state where the document may be obtained or inspected.

5. The Committee accepts the Scottish Government’s view that this is unlikely to have any practical effect on the operation of the instrument.
Appendix

The Officers of Court’s Professional Association (Scotland) Regulations 2011 (SSI 2011/90)

On 23 February 2011 the Scottish Government was asked:

1. *Does the Government considers that the reference to the resolution in Regulation 11(2)(a) is sufficient to identify the document referred to?*

2. *Can the Government explain why there is no footnote to the instrument or any statement in the Explanatory Note as to where a copy of the resolution may be obtained or inspected and what effect does the Government think this may have?*

The Scottish Government responds as follows:

1. The Government considers that the reference to the resolution in regulation 11(2)(a) is sufficient to identify the resolution. The resolution is recorded in the formal minutes of the Society meeting under the head “Annual Subscription” (at £535 per member, the same as the previous year) and as having been agreed by the meeting. The Society routinely sends the minutes to every member, and will send a copy to every new member of the Society.

2. As the resolution is identified with certainty and will be publicised to each officer of court liable to pay the fee, it is not considered that there is any effect of the lack of indication where a copy may be obtained or inspected. A copy may be obtained from the Society by any officer affected.
Justice Committee

9th Meeting, 2011 (Session 3), Tuesday 15 March 2011

SSI cover note

SSI title and number: The Licensing (Food Hygiene Requirements) (Scotland) Order 2011 (SSI 2011/128)

Type of Instrument: Negative

Coming into force: 28 March 2011

Justice Committee deadline to consider SSI: 16 March 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 update legislation with which any food hygiene certificate should show compliance before a street trader’s licence can be granted.

Justice Committee consideration:

2. The instrument was laid on 21 February 2011 and the Justice Committee has been designated as lead committee. The Scottish Government has revoked this Order and re-made the instrument (SSI 2011/177), which will be considered by the Committee at its meeting on 16 March 2011.

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 24th Report, 2011*

**The Licensing (Food Hygiene Requirements) (Scotland) Order 2011**  
(SSI 2011/128)

1. This Order purports to specify the requirements with which premises must comply to obtain a food hygiene certificate for the purposes of a premises licence application and a street traders’ licence application.

2. When an application is made for a premises licence under the Licensing (Scotland) Act 2005 (“the 2005 Act”), or for a street trader’s licence under the Civic Government (Scotland) Act 1982 (“the 1982 Act”), and it is intended to supply food from the licensed premises, it is necessary to produce a food hygiene certificate from the food authority with the application.

3. The Criminal Justice and Licensing (Scotland) Act 2010 (“the 2010 Act”) will amend section 39 of the 1982 Act and section 50 of the 2005 Act so that a food hygiene certificate will have to state that the premises comply with such requirements as the Scottish Ministers specify by order (sections 175 and 186 of the 2010 Act).

4. This Order purports to be made in terms of section 39 of the 1982 Act and section 50 of the 2005 Act, i.e. those Acts as amended by sections 175 and 186 of the 2010 Act. However, those sections of the 2010 Act are not yet in force. We understand from the Scottish Government that the intention is to commence those sections on 28 March 2011, but a Commencement Order has not yet been made.

5. Correspondence between the Committee and the Scottish Government is reproduced in the appendix.

*Questions 1 and 2 – anticipatory exercise of powers*

6. The Scottish Ministers do not dispute that sections 39 of the 1982 Act and 50 of the 2005 Act, as they presently stand, do not confer powers to make this Order. They take the view that they may exercise the powers in section 39(4) of the 1982 Act and 50(7) of the 2005 Act as if they had been amended on the basis that this constitutes an anticipatory exercise of powers provided by the 2010 Act. They consider that they may do so in terms of section 4 of the Interpretation and Legislative Reform (Scotland) Act 2010, on the basis that sections 175 and 186 of the 2010 Act confer powers, and that exercise of those powers prior to the coming into force of those sections is necessary to give full effect to the 2010 Act.

7. The Committee considers that this analysis is ill-founded. It proceeds on the basis that sections 175 and 186 of the 2010 Act confer powers to make subordinate legislation which are necessary to be exercised in anticipation of the 2010 Act having full effect. However, sections 175 and 186 modify existing provisions of primary legislation which are already in force. It is necessary to exercise them so that
existing licensing schemes under the Civic Government (Scotland) Act 1982 and the Licensing (Scotland) Act 2005 have proper effect, not so that the 2010 Act has full effect.

8. There is doubt as to whether the anticipatory exercise of those powers is permitted in terms of section 4 of the Interpretation and Legislative Reform (Scotland) Act 2010. The Committee understands that this is consistent with the view which has previously been expressed by the JCSI where the “new provisions” contained only the powers themselves.

9. The Committee takes the view that it is doubtful whether this Order is *intra vires*, as the enabling powers relied upon are not in force and there is a doubt as to whether this Order can be said to constitute an anticipatory use of those powers permitted by section 4 of the Interpretation and Legislative Reform (Scotland) Act 2010.

**Question 3**

10. Section 39(4) of the 1982 Act as amended provides that a licensing authority must refuse an application for a street traders’ licence unless a certificate from the food authority is produced which states that the vehicle, kiosk or moveable stall (“the premises”) complies with the requirements specified by Scottish Ministers by order. Power is accordingly given to Scottish Ministers to specify the requirements with which the premises must comply.

11. Article 2(1) of this Order, however, provides that (for the purposes of issuing a certificate under section 39(4)) a food authority must state in the certificate that the premises comply with all relevant requirements of “specified Community provisions” (which are defined elsewhere, and are the requirements which must be complied with).

12. The Scottish Government’s response does not adequately explain how a provision which appears to require a food authority to make certain statements in a certificate can be said to constitute specification of certain requirements in accordance with the limitations of the enabling power. In the Committee’s view article 2 does not specify requirements. It seeks to dictate the terms of the certificate. Accordingly, it is doubtful whether article 2 of the Order is *intra vires*.

**Question 4**

13. A similar issue arises in respect of section 50(7) of the 2005 Act. As amended, it provides that a food hygiene certificate is one signed on behalf of a food authority stating that the subject premises comply with such requirements as the Scottish Ministers may specify by order. Accordingly, the power only provides for Ministers to specify the requirements with which the premises must comply in order for a certificate to be granted.

14. Article 3(1) of this Order provides that a food hygiene certificate is one signed on behalf of a food authority stating that the subject premises comply with all relevant requirements of “specified Community provisions”.

15. The Scottish Government’s response does not adequately explain how a provision which bears to define what a food hygiene certificate is, can be said to constitute specification of certain requirements. The Scottish Government again
states that the principal purpose of article 3 is to set out “clearly” the requirements with which the subject premises may comply for a certificate to be granted. The Committee considers that it does not do so. Rather, it defines what a food hygiene certificate is. It is therefore doubtful whether article 2 of the Order is *intra vires*.

16. The Committee notes that the Scottish Government has decided to revoke this Order and to re-make provision specifying the necessary requirements before the enabling powers are brought into force so as to address these points. However, that revoking Order has not yet been laid. The Committee will consider the new instrument in due course.

17. The Committee reports that there is a doubt whether the Order is *intra vires*, in that the powers under which it are made are not yet in force, and it seems to be doubtful whether the exercise of powers inserted by the 2010 Act can be necessary or expedient, simply for the purpose of giving effect to the provisions in the 2010 Act which insert those powers into existing legislation. Instead, it seems that what it is necessary to give effect to are the provisions of the Civic Government (Scotland) Act 1982 and the Licensing (Scotland) Act 2005 to which these powers relate. This appears to be outside the scope of section 4 of the Interpretation and Legislative Reform (Scotland) Act 2010 on which the Government seeks to rely.

18. The Committee also reports that it is doubtful whether article 2 of the Order is *intra vires*, in that while the enabling powers permit the Scottish Ministers to specify certain requirements with which vehicles, kiosks and moveable stalls must comply to obtain a food hygiene certificate, article 2 appears instead to impose a duty on food authorities to make certain statements in granting a food hygiene certificate.

19. The Committee reports that it is doubtful whether article 3 of the Order is *intra vires*, in that while the enabling powers permit the Scottish Ministers to specify certain requirements with which subject premises must comply to obtain a food hygiene certificate, article 3 appears instead to redefine what a food hygiene certificate is.

20. Finally, the Committee welcomes the Scottish Ministers’ further consideration of these matters and their intention to revoke this Order and to re-make it in early course.
Appendix

The Licensing (Food Hygiene Requirements) (Scotland) Order 2011 (SSI 2011/128)

On 24 February 2011 the Scottish Government was asked:

1. To explain the vires to make the Order under section 39(4) and (5) of the Civic Government (Scotland) Act 1982 (“the 1982 Act”) and under section 50(7) and (7A) of the Licensing (Scotland) Act 2005 (“the 2005 Act”), as amended by sections 175 and 186 of the Criminal Justice and Licensing (Scotland) Act 2010 (“the 2010 Act”) respectively, when neither section 175 nor 186 of the 2010 Act is in force.

2. To the extent that this is considered to be an anticipatory exercise of powers under section 4 of the Interpretation and Legislative Reform (Scotland) Act 2010, to explain the basis for this view given that the new powers conferred by the amendments made by sections 175 and 186 of the 2010 Act do not appear to relate to giving full effect to the 2010 Act, but rather to giving full effect to provisions of the 1982 Act and the 2005 Act respectively which are already in force.

3. To explain why regulation 2(1) is within vires of section 39(4) as amended, since instead of specifying the requirements with which a vehicle, kiosk or moveable stall must comply (as the power permits), it appears instead to impose a duty on a food authority to state in the certificate that the vehicle, kiosk or moveable stall complies with all relevant requirements of the Specified Community provisions.

4. To explain why regulation 3 is within vires of section 50(7) as amended, since instead of specifying the requirements compliance with which are to be stated on a food hygiene certificate (as the power permits), it appears instead to redefine what a food hygiene certificate is, by stating that a food hygiene certificate is “a certificate... stating that the subject premises comply with all relevant requirements of the Specified Community provisions”.

The Scottish Government responds as follows:

1. This is an anticipatory use of powers under section 4 of the Interpretation and Legislative Reform (Scotland) Act 2010.

2. Section 4 of the 2010 Act permits the use of a power which has not yet been brought into force where it is necessary or expedient to do so for the purpose of giving full effect to the Act at or after the time when the provision conferring the power comes into force. The provisions of the Licensing (Food Hygiene Requirements) (Scotland) Order 2011 are required to give full effect to sections 175 and 186 of the 2010 Act.

At present, licensing authorities are required to refuse applications under section 39 of the 1982 Act and are unable to process applications under section 50 of the 2005 Act unless satisfactory food hygiene certification is provided by the applicant. On the commencement of sections 175 and 186 of the 2010 Act, this certification will be confirmation from the food authority that
the applicant's business (be that a licensed premises or a street trader's stall) complies with requirements set out by Ministers.

Without having an Order in place on the commencement of those sections specifying the relevant requirements with which street traders or premises licence applicants must comply, it would be impossible for food authorities to provide the necessary certification required by applicants.

The Order being discussed is necessary to give full effect to the powers created by sections 175 and 186 of the 2010 Act which powers come into force, by virtue of the Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No. 8) Order 2011, on the 28th March 2011. This means that this Order gives full effect to sections 175 and 186 at the time when those provisions come into force. The powers conferred by sections 175 and 186 can therefore be used in accordance with section 4 of the Interpretation and Legislative reform (Scotland) Act 2010.

3. Section 39(4) of the 1982 Act requires a licensing authority to refuse a street traders' licence application unless a certificate by the food authority is provided to them. Section 39(4) enables the Scottish Ministers to specify the requirements with which this certificate must document compliance. The Scottish Government submits that article 2 of the Order does not place any additional obligation on food authorities to make certain statements in a certificate issued under section 39(4) of the 1982 Act, as amended by section 175 of the 2010 Act. However, where a food authority is issuing a food hygiene certificate to an applicant for a street trader's licence, the licensing authority must refuse the application for a street trader's licence unless the certificate complies with certain requirements. The principal purpose of article 2 is to set out clearly the requirements that a certificate issued under section 39(4) of the 1982 Act must reference. The Scottish Government’s position is that this is within the vires of section 39(4) of the 1982 Act as amended by section 175 of the 2010 Act.

4. The Scottish Government submits that article 3 of the Order does not redefine what a food hygiene certificate is. Section 50(1) of the 2005 Act provides that a premises licence application must be accompanied by a food hygiene certificate where food is to be supplied on the premises. Accordingly, where a food hygiene certificate is required but not provided the licence application is incomplete and cannot be processed by the licensing board. Section 50(7) of the 2005, Act as amended by section 186 of the 2010 Act, enables the Scottish Ministers to specify the requirements with which a food hygiene certificate must document compliance. The principal purpose of article 3 is to set out clearly the requirements that a food hygiene certificate must reference. The Scottish Government’s position is that this is within the vires of section 50(7) of the 2005 Act as amended by section 186 of the 2010 Act.
Justice Committee

9th Meeting, 2011 (Session 3), Tuesday 15 March 2011

SSI cover note

SSI title and number: The Parole Board (Scotland) Amendment Rules 2011 (SSI 2011/133)

Type of Instrument: Negative

Coming into force: 1 May 2011

Justice Committee deadline to consider SSI: 16 March 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 amend the 2001 Rules so that extended sentence prisoners, who are recalled to custody during the custodial term of their sentence, are treated the same as all other determinate sentence prisoners.

Justice Committee consideration:

2. The instrument was laid on 23 February 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 24th Report, 2011

The Parole Board (Scotland) Amendment Rules 2011 (SSI 2011/133)

1. This instrument amends the Parole Board (Scotland) Rules 2001 ('the 2001 Rules'). The 2001 Rules make provision with respect to the proceedings of the Parole Board, and this instrument amends the Rules, and inserts new Rules (15A to 15H), in connection with the holding of oral hearings by the Board.

2. Correspondence between the Committee and the Scottish Government is reproduced in the appendix.

3. There is some additional wording omitted which should have been included for clarity and precision as to the amendments which are being made to rule 2(1). It is paragraph (c) of the definition of “prisoner” that is to be amended. The Committee accepts that the intention is clear as there is no sub-paragraph (c) in rule 2(1) and no other definition which contains a paragraph (c). The Committee considers that it is therefore unlikely to have any practical effect on the operation of the instrument, but the provision should have been more clearly and precisely drafted.

4. The Committee reports under the general reporting ground that this instrument contains a minor drafting error in not clearly specifying in the operative text which provision of the 2001 Rules is being amended by Regulation 3(b).

5. The Committee accepts the Scottish Government’s view that this is unlikely to have any practical effect on the operation of the instrument.

Appendix

The Parole Board (Scotland) Amendment Rules 2011 (SSI 2011/133)

On 24th February 2011, the Scottish Government was asked:

The words “in the definition of “prisoner”” appear to have been omitted from Regulation 3(b) as there is no sub-paragraph (c) in rule 2(1) of the Parole Board (Scotland) Rules 2001. Can the Government explain what effect it thinks that this omission may have?

The Scottish Government responds as follows:

The Scottish Government does not consider that the omission of the words “in the definition of “prisoner” “affects the operation of rule 3(b). While those words should have been included, it is clear when looking at rule 3(b) of SSI 2011/133, in the context of rule 2(1) of the 2001 Rules, what the intention of the provision is, since there is no other subparagraph (c) in rule 2(1) that could be referred to. In our view the provision achieves the intended policy and there is no need to amend the provision.
Justice Committee

9th Meeting, 2011 (Session 3), Tuesday 15 March 2011

SSI cover note

SSI title and number: The Advice and Assistance and Civil Legal Aid (Special Urgency and Property Recovered or Preserved) (Scotland) Regulations 2011 (SSI 2011/134)

Type of Instrument: Negative

Coming into force: 1 April 2011

Justice Committee deadline to consider SSI: 16 March 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 delete a small number of exceptions to the general rule of “clawback” in order to make savings on the Scottish Legal Aid Fund.

Justice Committee consideration:

2. The instrument was laid on 23 February 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

Letter from the Scottish Government

Thank you for your e-mail of 8 March seeking further background in relation to the above instrument. 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 following the £1.3bn cut to Scotland’s budget next year. As you are aware, this has meant that the legal aid and advice budget for financial year 2011-12 be set at £142.3m, compared to £155m in 2010-11. The overall intention of the various legal aid savings measures is to preserve the current scope and eligibility of legal aid, whilst also reflecting the principle that that those who can pay a contribution to their costs should do so. The specific changes in these Regulations have been the subject of consultations with the Law Society of Scotland, which issued a mailshot to its members in relation to the proposals. The Government has published an Equalities Impact Assessment (EQIA) in respect of the legal aid savings generally, also covering these Regulations.

The effect of regulation 3 of these Regulations is to remove certain categories of property recovered or preserved from the automatic exemption provided for in regulation 16(2) of the Advice and Assistance (Scotland) Regulations 1996 (“the 1996 Regulations”). The way in which this has been done is to identify categories which, by their nature, would tend to justify being exempt from the normal rules whereby the client should pay their own legal expenses, for example benefits related cases. These exemptions all stay. The categories of exemptions which will be removed as a result of these Regulations are those which are not, by their very nature, likely to justify continued exemption.

This can be seen in the context of regulation 16(2)(h) of the 1996 Regulations, which is the specific regulation to which Robert Brown MSP drew attention in the Committee meeting on Tuesday. Here the exemption related to household furniture and tools of trade has been left whilst the exemption related to any ‘dwelling’ has been removed. It is difficult to envisage a situation where it would be appropriate to sell household furniture or tools of trade recovered or preserved for the client as a result of advice and assistance given to a person by a solicitor, in order to pay the fees of that solicitor. On the other hand the circumstances in which it might be appropriate to take into account the client’s dwelling are much more varied. For example, it may be entirely appropriate that the client borrow what could be a relatively small amount of money, a few hundred pounds, on the strength of significant equity in their home (dwelling relates to the property in which the client lives). The Scottish Legal Aid Board (“the Board”) are aware of cases where, following advice being given to a client and, say, a minute of agreement being adjusted, that the matrimonial home may be transferred in whole to the client leaving the client with equity in hundreds of thousands of pounds but faced with a legal bill in hundreds of pounds. £2,000 would be at the top end of an advice and assistance account. Depending on the whole circumstances of the client, it might be entirely appropriate to borrow on the strength of the equity in the house, placing that client in exactly the same position as a privately paying client. And in addition the Board would be in a position under the new regime to take a standard security over the property and wait until the property is disposed of or the client is in a position to pay.
over the coming months and years. It would not necessarily be the case that immediate arrangements would have to be made for payment from equity in the dwelling.

Two further points should be borne in mind. First, a client will always be able to make application to the Board under the ‘hardship provisions’ according to the circumstances of the case. These provisions are set out at regulation 16(3)(a) of the 1996 Regulations. The provisions make clear that the Board may authorise that the requirement created by section 12(3)(c) of the Legal Aid (Scotland) Act 1986 that, before recourse to the Fund, fees or outlays shall be paid to the solicitor out of any property which is recovered or preserved for the client shall not apply in cases where the Board are satisfied on application that such payment would cause grave hardship or distress to the client. The Board has issued clear guidance on the way in which it exercises this discretion and the factors to be taken into account in arriving at a decision. Second, we are only talking here about removing the exemption in relation to the ‘dwelling’ in the 1996 Regulations, which covers advice and assistance. There is currently no such exemption in the relevant civil legal aid Regulations (the Civil Legal Aid (Scotland) Regulations 2002). That is anomalous against a background in civil legal aid where much more significant sums may be involved.

Overall savings costs for these Regulations are set out in the Executive Note. It is estimated that removing the particular automatic exemption related to the dwelling from the 1996 Regulations will save £125,000 in 2011-12, £357,000 in 2012-13, £450,000 in 2013-14 and £500,000 for a full year.

I hope that this is helpful and provides further clarification of the intention behind the Regulations and their purpose.

James How
Team Leader, Access to Justice
10 March 2011
Justice Committee

9th Meeting, 2011 (Session 3), Tuesday 15 March 2011

SSI cover note

SSI title and number: The Extreme Pornography (Electronic Commerce Directive) (Scotland) Regulations 2011 (SSI 2011/137)

Type of Instrument: Negative

Coming into force: 28 March 2011

Justice Committee deadline to consider SSI: 16 March 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 ensure that the offence of possession of extreme pornography is compatible with EU law.

Justice Committee consideration:

2. The instrument was laid on 23 February 2011 and the Justice Committee has been designated as lead committee. This instrument has been corrected by SSI 2011/170, which will be considered later in the meeting.

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 24th Report, 2011

The Extreme Pornography (Electronic Commerce Directive) (Scotland) Regulations 2011 (SSI 2011/137)


2. Correspondence between the Committee and the Scottish Government is reproduced in the appendix.

3. The second question was asked for information purposes since a commencement order bringing new section 51A into force has not yet been laid. An order will be laid shortly and that section will come into force on 28 March 2011. These regulations will come into force at the same time – which is important to ensure that the operation of the offence is compatible with EU law.

4. Question 1 relates to whether or not the scope of the exception for mere conduits is sufficiently clear. In order for a service provider to be entitled to the benefit of the exception from liability, it must do none of the things listed at regulation 4(2). This list is conjoined with a single “or” which the Committee suggested might indicate that the list was of alternative rather than cumulative conditions. By way of contrast the Committee noted that regulation 5(3) has a list of alternatives which is similarly conjoined with a single “or”.

5. The Scottish Government has responded to this by amending regulations (SSI 2011/170) which change the “or” in regulation 4(2) to “and”.

6. The Committee considers that the amendment made (and the explanatory note to the amending instrument) now makes it clear what the legislative intention is.

7. The Committee reports that the meaning and effect of regulation 4 of these regulations could be clearer in that the transmission condition is only to be satisfied (and consequently conduct excepted from the offence of possession of extreme pornography) where the service provider does none of the things listed in regulation 4(2) as opposed to where one of the prohibited actions is complied with but not another.
Appendix

The Extreme Pornography (Electronic Commerce Directive) (Scotland) Regulations 2011 (SSI 2011/137)

On 23 February 2011 the Scottish Government was asked:

1. To confirm whether the intention is that the transmission condition specified in regulation 4(2) is only satisfied where a service provider does not do any of the things listed in paragraphs (a) to (c) and, if so, whether the use of the conjunction “or” only after (b) makes clear that these are cumulative conditions and not alternatives, in comparison with the drafting of regulation 5(3) where the same approach is used where it appears the intention is to provide a list of alternatives?

2. To confirm when it is intended that section 51A of the Civic Government (Scotland) Act 1982 is to come into force and when provision to this effect will be made?

The Scottish Government responds as follows:

1. The transmission condition in regulation 4(2) is only satisfied where a service provider does not do any of the things listed in paragraphs (a) to (c). On reflection, whilst we consider that the use of the conjunction “or” would have the desired legal effect, on balance we agree that the use of the conjunction “or” only after paragraph (b) does not make it as clear as it might that these are cumulative conditions and not alternatives. To address this we have laid amending Regulations which will substitute ‘and’ for ‘or’.

2. Section 51A of the Civic Government (Scotland) Act 1982 will come into force on 28 March 2011. Provision to that effect is being made in the Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No 8, Transitional and Savings Provisions) Order 2010, which will be laid in early course. You may wish to note that the amending Regulations referred to in reply to question 1 will also come into force on 28 March 2011.
SSI title and number: The Extreme Pornography (Electronic Commerce Directive) (Scotland) Amendment Regulations 2011 (SSI 2011/170)

Type of Instrument: Negative

Coming into force: 28 March 2011

Justice Committee deadline to consider SSI: 16 March 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 Extreme Pornography (Electronic Commerce Directive) (Scotland) Regulations 2011 (SSI 2011/137) to make clear that the “transmission condition” consists of cumulative, not alternative requirements. (Further explanation of the rationale for this change is provided in the cover note for SSI 2011/137.)

Justice Committee consideration:

2. The instrument was laid on 1 March 2011 and the Justice Committee has been designated as lead committee. This instrument corrects SSI 2011/137 considered earlier in the meeting.

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.
Justice Committee

9th Meeting, 2011 (Session 3), Tuesday 15 March 2011

SSI cover note

SSI title and number: The Insolvency Act 1986 Amendment (Appointment of Receivers) (Scotland) Regulations 2011 (SSI 2011/140)

Type of Instrument: Negative

Coming into force: 17 March 2011

Justice Committee deadline to consider SSI: 16 March 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 make provision for the power to appoint a receiver over the property in Scotland of a company in respect of which the courts of another EU member state have jurisdiction to open insolvency proceedings.

Justice Committee consideration:

2. The instrument was laid on 22 February 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 24th Report, 2011*

**The Insolvency Act 1986 Amendment (Appointment of Receivers) (Scotland) Regulations 2011 (SSI 2011/140) (Justice Committee)**

1. These Regulations amend section 51 of the Insolvency Act 1986 (“the 1986 Act”) so as to permit the appointment of a receiver to enforce floating charges granted by a company over property in Scotland in situations where the Court of Session does not have jurisdiction to wind up the company.

2. These Regulations are made for the purpose of dealing with a matter arising out of the coming into force of Council Regulation (EC) No. 1346/2000 on insolvency proceedings (“the Council Regulation”), which altered the jurisdiction of the Court of Session to wind up companies. It inadvertently altered the law on the appointment of receivers in section 51 of the 1986 Act because the power to appoint depends on the Court of Session having jurisdiction to wind up a company.

3. These Regulations are made under section 2(2) of the European Communities Act 1972. Where regulations are made under that section, the Scottish Ministers may elect for affirmative procedure to apply to them (by laying a draft before the Parliament). If they do not, negative procedure applies. In this case, the Scottish Ministers considered the appropriate level of scrutiny to be negative procedure.

4. On the basis, these Regulations effect a substantive change to Scots law (and amend primary legislation to do so), and given that they are being made nearly nine years after the Council Regulation came into force, it appeared that these Regulations might more appropriately have been subject to affirmative procedure. The Committee asked the Scottish Government to explain why negative procedure was considered appropriate.

5. Correspondence between the Committee and the Scottish Government is reproduced in the appendix.

6. The Government takes the view that, because the law is only being amended so as to reinstate the position before the coming into force of the Council Regulation, the amendment is of fairly minor importance. However, their response does not address the lengthy delay between the coming into force of the Council Regulation and the making of these Regulations, during which time the law has been substantively altered. Given that nearly nine years have elapsed, the amendments made by these Regulations appear to go beyond simply reinstating the law to the position prior to the coming into force of the Council Regulation. The response also appears to disregard the fact that it has been necessary to amend primary legislation to achieve the effect which Ministers seek.

The Committee draws to the attention of the lead Committee the fact that the Scottish Ministers have elected to make these Regulations subject to negative procedure when the Committee considers that affirmative procedure would have been more appropriate, given that the Regulations effect a substantive change in the law and require to modify primary legislation to do so.
Appendix

The Insolvency Act 1986 Amendment (Appointment of Receivers) (Scotland) Regulations 2011 (SSI 2011/140)

On 24 February the Scottish Government was asked:

Although the Regulations bear to reinstate Scots law to the position prior to the coming into force of Council Regulation (E.C.) No. 1346/2000 on 31 May 2002, the law on the appointment of receivers was altered at that date and had now been in force in that form for over 8 years and 9 months. The Regulations accordingly effect a substantive change in the law relating to the appointment of receivers. Given the significance of this change in the law (which requires the amendment of primary legislation), the Scottish Government is asked why it is considered appropriate that this instrument be subject to negative procedure.

The Scottish Government responds as follows:

The Council Regulation mentioned above altered the jurisdiction of the Court of Session in insolvency proceedings. The change which it made to the law on the appointment of receivers set out in section 51 of the Insolvency Act 1986 was unintended and resulted purely from the reference in that section to the winding-up jurisdiction of the Court of Session. Although we are not aware of any cases in which it has caused a difficulty so far, the undesirability of the change was confirmed by the consultation carried out between July and October 2010.

The Regulations reinstate the position on the appointment of receivers to that which existed prior to the coming into force of the Council Regulation. They ensure that the law set out in section 51 remains as Parliament intended. Given the nature of the changes made and in particular, the fact that the changes are simply directed at reinstating the long established position before the Regulation had this unintended consequence, the Scottish Government considers that the negative procedure provides the appropriate level of scrutiny.
Justice Committee

9th Meeting, 2011 (Session 3), Tuesday 15 March 2011

SSI cover note

SSI title and number: The Debt Arrangement Scheme (Scotland) Regulations 2011 (SSI 2011/141)

Type of Instrument: Negative

Coming into force: 1 July 2011

Justice Committee deadline to consider SSI: 16 March 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 provide for more categories of money adviser to be approved to give advice to debtors in respect of the Debt Arrangement Scheme.

Justice Committee consideration:

2. The instrument was laid on 22 February 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 24th Report, 2011

The Debt Arrangement Scheme (Scotland) Regulations 2011 (SSI 2011/141)

1. These Regulations set out detailed provisions for the operation of the debt arrangement scheme created by Part 1 of the Debt Arrangement and Attachment (Scotland) Act 2002 (“the 2002 Act”).

2. Correspondence between the Committee and the Scottish Government is reproduced in the appendix.

Question 1

3. Regulation 32(6) provides that an employer’s liability to make payment under an instruction will be extinguished one year after the liability to make payment arose, unless court proceedings for payment are commenced within the year. The Scottish Ministers take the view that this constitutes provision for the failure of an employer to comply with its duty to comply with a payment instruction from the debtor in terms of section 6 of the 2002 Act (section 7(1)(d)). They also observe that section 7(2)(p) gives specific power to regulate the manner in which a DPP affects the rights of third parties.

4. The Committee is content that the provision in question does fall within the powers cited by the Scottish Ministers, and is content with the explanation offered.

Question 2

5. The Scottish Government accepts that the reference to “form 3” is incorrect and intends to correct it at the next legislative opportunity. The Committee accepts the Scottish Ministers’ view that the error is unlikely to affect the operation of the regulation.

Question 3

6. These Regulations create two classes of money adviser: those whose services are provided free to the debtor, and those who charge a fee. The latter are subject to ongoing obligations in relation to the debtor and the DPP (and so are referred to as “continuing money advisers” in the Regulations). By contrast, where initial advice was given by a free-sector money adviser, the DAS Administrator handles the ongoing administration of the DPP. The Executive Note points out that removing this burden from free-sector money advisers is one of the objectives of these Regulations.

7. The Scottish Government suggests that regulation 39(2) was not intended to apply to the DAS Administrator. When a DPP is varied, regulation 39(2) requires a continuing money adviser to notify an employer to whom a payment instruction has been given. There is no such requirement on the DAS Administrator (who is dealing with the ongoing administration of all other DPPs).

8. It does not appear that the position under the 2004 Regulations assists the Ministers’ arguments. Under those Regulations, there was no distinction between money advisers who charged a fee and those who did not. There was no
requirement in regulation 40 (the equivalent to regulation 39) for a money adviser to notify a variation to the debtor’s employer at all.

9. It also appears that the reference in the Scottish Government’s response to regulation 27(2)(g) should instead be to regulation 27(2)(i). The Government contends that a debtor’s duty under that regulation to give all notices and intimations required is sufficiently wide to include the giving of a new payment instruction to an employer following a variation to the DPP. However, this duty applies to a debtor regardless of whether there is a continuing money adviser or not. It remains unclear why regulation 39(2) applies only to debtors with continuing money advisers. The Committee considers that the equivalent duty on the debtor personally to notify an employer where there is no continuing money adviser is unclear. The Government has not addressed the apparent inconsistency with regulation 46(2) which was highlighted to them by the Committee.

10. The Committee reports under the general reporting ground that regulation 37(4) contains a minor drafting error in that it erroneously refers to form 3 instead of form 4, but that it accepts that this is unlikely to affect the operation of the regulation.

11. The Committee welcomes the Scottish Government’s undertaking to correct this error at the first legislative opportunity.

12. The Committee reports that the form or meaning of regulation 39(2) could be clearer, in that on the face of it the duty contained therein applies only to continuing money advisers, when the Government’s intention is that it will apply also to debtors who do not have a continuing money adviser, and this is not apparent from the wording of regulation 39(2).
Appendix

The Debt Arrangement Scheme (Scotland) Regulations 2011 (SSI 2011/141)

On 25 February 2011 the Scottish Government was asked:

1. To explain what powers are being relied upon to make regulation 32(6), in that it appears to provide for the prescription of an employer’s obligation to make payment. Is the basis for doing so clear?

2. Whether the reference in regulation 37(4) to “form 3” ought in fact to be a reference to “form 4”, and if so to explain the effect of this error.

3. Whether regulation 39(2) is intended to apply also to the DAS Administrator as it does to a continuing money adviser? As regulation 39(2) stands an employer to whom a payment instruction is addressed will only be notified of the outcome of a variation to the debt payment plan if there is a continuing money adviser. Is this not inconsistent with the provision made in regulation 46(2) whereby either the DAS Administrator or the continuing money adviser must intimate the completion of the debt payment programme to such an employer?

The Scottish Government responds as follows:

1. Regulation 32(6) is made under section 7(1)(d) of the Debt Arrangement and Attachment (Scotland) Act 2002—provision for failure of an employer to comply with the duty to comply with a payment instruction to a debtor’s employer. We consider the basis for making this provision clear, as a restriction on the duration of the liability arising under from a payment instruction under regulation 32.

There is also specific power in section 7(2)(p) and (3) of the Act to provide for the manner in which a debt payment programme affects the rights of third parties, and to make different provision for different matters.

2. The reference in parentheses at the end of regulation 37(4) should be to “form 4” and we thank the Committee for pointing this out. We consider the intention of the Regulations is nonetheless clear—the parenthesis is only to indicate that disposable income assessed for the purposes of the categories in regulation 37(3) is not applied against the actual figures submitted in the initial application for approval of a debt payment programme (form 1), but rather assessed on the same basis as those figures are submitted, but in the application for a variation seeking a payment holiday. The Government will correct the typographical error at the next legislative opportunity.

3. Regulation 39(2) was not intended to apply also to the DAS Administrator, as under the current Debt Arrangement Scheme (Scotland) Regulations 2004 (SSI 2004/468 as amended). It is a standard condition of a debt payment programme that the debtor gives all notices and intimations which he or she requires to give under the regulations (regulation 27(2)(g)). Where a variation is agreed and this method of payment is used the debtor would require to
submit a new mandate to his or her employer directly under regulation 32 in view of section 6 of the 2002 Act. There would be no need for the DAS Administrator to notify the employer.

A continuing money adviser may be assisting the debtor in the variation process. It was accordingly considered that he or she should have the function of notifying an employer where a variation is agreed which affects a payment instruction.
Justice Committee

9th Meeting, 2011 (Session 3), Tuesday 15 March 2011

The Debt Arrangement Scheme (Scotland) Regulations 2011 (SSI 2011/141)

Written submissions received

Submission from The Carrington Dean Group

[Note by the Clerk: This submission was originally sent to the Subordinate Legislation Committee prior to its consideration of the Regulations on 8 March 2011. The Subordinate Legislation Committee agreed at that meeting to pass the letter to the Justice Committee, as the points it raises are in relation to the policy of the instrument, rather than its technical drafting.]

We, The Carrington Dean Group, are writing to object, on legal grounds, to a number of the proposals contained in the DAS Regulations 2011.

We understand that the Committee has sought its own independent legal advice on the substantive points raised by our solicitors, Maclay, Murray and Spens LLP, in a letter to the Minister. We also understand that this matter has been taken off the Agenda for your meeting tomorrow, 1 March.

By way of background, we are a small business employing 68 people. We are a professional services group which provides advice to individuals and companies in financial difficulty. We offer the full range of personal debt solutions and we have thousands of clients in constituencies and regions throughout Scotland. We are regulated by the Institute of Chartered Accountants and give clients free best advice. We act as Money Advisers and also Payment Processors under the DAS.

We consider that these proposals, if implemented, will extend the role of the State to certain functions and commercial activities which, to date, have been performed adequately by private sector providers such as ourselves.

We have summarised below our reasons for objecting to the proposals:

a) Requirement to direct individuals who approach us directly to Public Sector

The proposals state that individuals with financial problems who might contact us as private sector money advisers have to be directed to public sector providers. When the DAS was initially launched in 2004 this same provision was included but it was revoked in 2007 to encourage private sector money advisers to become involved with the DAS. By reinserting this in potential legislation, this will disadvantage private sector money advice providers such as ourselves and be in breach of Article 107 of the Treaty for the Functioning of the European Union. Accordingly, rather than encouraging private sector involvement, this will actively discourage it. This is at odds with the fact that the main driving factor for reform has been the issue of lack of capacity in the
public sector, whereas substantial capacity already exists in the private sector, without adding to costs to be borne by the public purse.

b) Distortion of the Market
Money Advisers go through the whole advice process with the client, gathering information and verifying matters, carrying out variations and assisting clients with issues such as creditor harassments. They also appoint Payment Processors (‘PPs’). The PPs collect funds from individuals in DAS repayment programmes and distribute them on a weekly or monthly basis to the clients’ creditors over the term of the DAS repayment programmes. Accordingly, while we act as Money Advisers and as a PP in our own right, we also work closely with Money Advisers in Councils and Citizens Advice Offices throughout Scotland. It is generally considered that Money Advisers appoint PPs on the basis of how effectively they work with the Money Adviser. PPs are allowed to charge Creditors up to a maximum of 10% of the funds handled by them.

It is now proposed that the DAS Administrator, for approving DAS schemes, will charge 2% of the funds ingathered by the PPs. Approval of DAS schemes only takes a matter of minutes at the start of the scheme. Accordingly PPs would then be restricted to charging a maximum of 8% (previously 10%). Accordingly, the people who actually do the work throughout the period are suffering a reduction by 20% of the amount they can charge. Also the DAS Administrator’s charge is not related to work which is to be carried out over the period, yet it amounts to 25% of what a PP could charge.

The nature of the operation of payment processing requires significant investment in software and technology. Accordingly, any substantial imposed reductions in charges will undoubtedly result in a distortion of the market, potentially reducing the numbers of private sector providers and thereby limiting choice with the consequent potential impact on front line Money Advisers that they support. None of the funds generated by the DAS Administrator would go to frontline services and Money Advisers. There will also be no reduction in the Money Advisers’ role.

This restriction in charges could also result in what is an open market becoming dominated by one very large entity or eventually it being taken over by the State. The DAS Administrator, on the other hand, has included in her business plan a necessary IT investment of £200,000 but no additional staff costs are anticipated. One would assume, therefore, that the software will merely be a reporting function generating instructions, for example, to notify a Money Adviser of a variation to be carried out. In essence this is the insertion of the DAS Administrator to create a role for which it can raise funds – where such a role does not currently exist or indeed is required. Payment Processors already produce reports, etc, for Money Advisers.

c) Tax Raising
We consider this 2% levy as a form of taxation with PPs acting as tax collectors, collecting and accounting for this.
d) Conflict of Interest
We believe the nature of the application fee as a percentage being applied by the DAS Administrator creates an unacceptable conflict of interest in their role as decision makers as to whether a programme should be approved or not. In practice where a programme is not approved - no fee would be paid, but where a programme is approved the DAS Administrator will benefit by being entitled to 2% of the total debt being repaid through the programme. This will potentially bring the scheme into disrepute as it could appear that the DAS Administrator is approving programmes for self-interest reasons merely to increase funding.

e) Moral Law – Treatment of the Poor
We also consider that there is a Moral Law issue here in the way in which individuals are treated by the State. For example, an individual on benefits with no assets who cannot pay their debts can make themselves bankrupt (Low Income Low Assets) by completing a form and paying a fee of £100 to the State.

On the other hand, a person who has a disposable income and has assets, e.g. a house and car, but who cannot repay their debts as they fall due, can potentially enter a DAS and pay back their debts without interest over an extended period, and yet they pay £0 to the State for providing this service over many years. We consider that this inconsistency of treatment is not fair or reasonable.

We believe this instrument is being driven through primarily as a cleaning up exercise by the Government and, considering it is an instrument subject to negative procedure, fear it may not receive the proper scrutiny it requires. We would urge the Subordinate Legislation Committee to ensure it receives an appropriate level of scrutiny. We believe many of the provisions contained in these regulations will attract cross party support, and for that reason we believe that, even if implementation is delayed briefly, this will allow proper consideration of the issues we have raised.

The proposals that are being made by the Minister, although well intentioned, will cost the public purse at least £200,000 in set up costs, and seriously distort what is an open and functioning market. We do not believe they will add significantly to increase capacity in front line services. Many of the functions that are required to be carried out to set up and maintain debt payment programmes will still have to be performed by front line money advisers. We do not, therefore, accept the proposals will deliver the benefits promised to resolve the problem of lack of capacity in the free sector and it will further hinder the participation of the private sector.

I would be happy to appear before the Committee, if that would be considered useful.

Peter C Dean
Managing Director
28 February 2011
Submission from Desmond Middleton

I have been a frontline Money Adviser for over 23 years working in the voluntary sector (local advice centre, later with 2 CABs) and local authority sector (Strathclyde Regional Council, South Lanarkshire Council, East Ayrshire Council and now Argyll & Bute Council).

Why is DAS still only available to a “Gated Community”? The Debt Arrangement Scheme is simply a good common sense idea. Scots can identify what they can afford to pay and then take responsibility for making regular payments. It is less complex than many loan agreements which they enter into daily, often with more complex contractual terms which can be varied at the whim of the creditor.

The goal of money advice should be to empower individuals to act responsibly and at an early point to avoid financial crisis. Where individuals struggle with the application process they will still be able to turn to their local advice agencies. I believe that the new regulations will stimulate access to the Debt Arrangement Scheme. The patchwork nature of access will be eroded. I have assisted with DAS applications from 5 other local authority areas simply because individuals could not get onto the books of a local approved adviser.

This search by Scots for an approved adviser becomes a stumbling block both uncertain and daunting, carried out during a financial crisis. It encourages Scots to choose, the lurid promotion of destructive but available trust deeds or consolidation loans as their way out. The new regulations should have put DAS on a par with the bankruptcy process. The current proposal is a compromise. Most debt ridden Scots can only choose more debt. I now see individuals offered consolidation loans from their banks which charge running account interest at almost twice the level of standard overdraft interest. Their bank considers this to be the best way to deal with debt.

Why are banks not offering DAS to debt ridden customers? They would be paid in full and it would end borrowing beyond the point of over commitment. Recognise the local economy, I think the proposal for payment holidays would recognise that many rural Scots rely on self employed seasonal work (fishing, forestry and tourism), the proposed payment holiday to cover the dip in seasonal income would assist in the completion of DPPs.

Desmond Middleton
3 February 2011
Submission from Citizens Advice Scotland

Summary

- Citizens Advice Scotland (CAS) welcomes the new Debt Arrangement Scheme (DAS) regulations. We believe that the changes to the regulations will ensure that more debtors are able to access the scheme to deal with their debts and will free money advisers to help more debtors.
- The recent recession and subsequent public sector cuts has created an increased demand for money advice and debt solutions in Scotland. The Scottish Government has sought to meet this increased demand through expanding access to bankruptcy through the LILA route and the Certificate of Sequestration.
- However, there remains a group of debtors who have income to offer to creditors and who do not want to be made bankrupt, but who do not currently qualify for DAS. The changes to the DAS regulations will allow many of these debtors the opportunity to use the scheme to repay their debts.

Introduction

1. Citizens Advice Scotland (CAS) is the umbrella organisation for Scotland’s network of 80 Citizens Advice Bureau (CAB) offices. These bureaux deliver frontline advice services through service points across the country, from the city centres of Glasgow and Edinburgh to the Highlands, Islands and rural Borders communities.

2. During 2009-10, 135,032 new debt issues were dealt with by bureaux in Scotland – over a quarter of all the issues brought by clients. Bureaux helped clients with more than 370 debt issues for every day of the year.

Background

3. The Debt Arrangement Scheme (DAS) was introduced in November 2004. CAS has been involved in its development for almost 15 years, and are currently involved in its delivery. We consider DAS to be a critical element in the options available to debt clients, as it provides welcome relief to those who can repay their debts, but need respite from mounting interest and charges, and protection from diligence.

4. Applications to the scheme were initially lower than expected. However, the scheme was amended in June 2007 to allow for the freezing of interest and charges as soon as a Debt Payment Programme (DPP) under DAS is approved. Applications to DAS have increased following the reforms to the scheme.

5. However, in September 2008, CAS published a research report looking at the impact of the changes made to DAS on CAB debt clients. The report found that despite the amendments to the scheme:

- Four in every five CAB debt clients still could not qualify for DAS, mainly due to insufficient disposable income to offer to creditors

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1 Restricted Access, Citizens Advice Scotland (2008)
• One in every five CAB debt clients who did have some disposable income to offer to creditors were excluded from DAS as their debts would take too long to repay
• One in every four CAB debt clients could not access DAS or any other debt management option
• One in every ten CAB debt clients had debts of over £10,000 but had no access to any debt management option

6. The report concluded that the scheme is an effective debt solution for many clients, but that many who would benefit from access to the scheme found themselves outside of the regulations.

7. A review of DAS carried out during 2008 by the Accountant in Bankruptcy found similar problems, with the advantages of leaving the rules unchanged "significantly outweighed by the disadvantages." The review found that leaving the scheme alone would not address the low uptake of DAS, with debtors forced to opt for insolvency and creditors receiving little of the debts owed. DAS worked well for those who could access it, but too many debtors remained on the fringes of the scheme. There is therefore a clear mandate for changing the regulations of DAS to ensure greater access to debtors.

8. This briefing outlines our views on the new DAS regulations under the following headings:

   • The role of money advisers
   • Single debts
   • Joint DPPs
   • Payment holidays
   • Creditors

Money advisers

9. The regulations provide for the DAS Administrator to undertake ongoing administration of DPPs from money advisers who do not charge. In our consultation response to the Accountant in Bankruptcy, bureau money advisers were unanimous in their view that the DAS administrator should take on more of the administrative duties. This move should allow money advisers to allocate more of their time and resources towards helping more debtors.

10. The regulations will keep the money advice gateway into DAS, but will increase the number of money advisers that will be able to provide access to the scheme. Money advisers in citizens advice bureaux who are not individually DAS accredited will therefore be able to offer this debt solution to clients in the future. This is to be welcomed as it will ensure that access to the scheme is as wide as possible, and diminishes the possibility that workload and geographical location threaten access to DAS. The free DAS advice network should expand as a result.

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2 The Debt Arrangement Scheme (Scotland) Regulations: Executive Note
Single debts

11. We welcome the inclusion of debtors with single debts to the scheme, as it will provide a welcome breathing space in which to repay a single debt, while being afforded protection from formal enforcement. It may also prevent further indebtedness, as in our experience, clients can take out further credit to help finance an original debt which subsequently becomes unmanageable.

12. Our Drowning in Debt research\(^3\) in 2009 found that 5% of CAB debt clients held a single debt. While this is a minority of clients, the inclusion of single debts in the scheme will potentially open access to the scheme for this group of clients, which in 2009/10 would have been around 1,000 bureau debt clients.

Joint DPPs

13. The new regulations aim to increase access to DAS by creating a DPP for couples with debts for which they are jointly and severally liable.

14. Our Drowning in Debt research\(^4\) indicated that around 1 in 7 bureau debt clients had a joint responsibility for their debts alongside a spouse or partner – around 2,500 debt clients in 2009/10. In our consultation response, money advisers considered that widening the scope of a DPP to allow joint DPPs for debtors with joint obligations would be welcome.

Payment holidays

15. The new regulations will enable the debtor to defer payments for a period of six months where the debtor’s disposable income has reduced by 50% or more. Given the current economic climate of poor economic growth and cuts in public spending, the inclusion of the payment holiday in the regulations is very welcome.

Creditors

16. Money advisers have helped a number of clients whose creditors continue to contact them asking for payments despite the debt being included in a DPP. This suggests that awareness and understanding of DAS amongst creditors could be improved. The new regulations seek to simplify the process, forms and notices to and from creditors and allows for increased use of electronic transfer of information. We hope that these changes will increase creditor understanding and involvement in DAS.

17. DAS is a preferrable route for creditors when compared to sequestration and trust deeds in that they receive a greater proportion of the money that is owed. Therefore, expanding access to DAS would stand to benefit both debtors and creditors.

\(^3\) Drowning in Debt, Citizens Advice Scotland (2009)
\(^4\) Ibid
Conclusion

18. The Debt Arrangement Scheme works well for debtors who are able to access it. However, the current form of the scheme is inaccessible for many debtors who would benefit from it, while the scheme can place significant administrative burdens on money advisers. The proposed amendments to DAS would go some way towards alleviating these problems. We hope that the changes will both increase the number of debtors who are able to access the scheme, which benefits both creditors and debtors, and allow money advisers some space in which to help the growing number of clients that require their support.

Keith Dryburgh
Social Policy Officer
10 March 2011
## Justice Committee

**9th Meeting, 2011 (Session 3), Tuesday 15 March 2011**

### SSI cover note

<table>
<thead>
<tr>
<th>SSI title and number:</th>
<th>The Police Grant (Carry-forward Percentages) (Scotland) Order 2011 (SSI 2011/148)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Type of Instrument:</td>
<td>Negative</td>
</tr>
<tr>
<td>Coming into force:</td>
<td>In accordance with article 1</td>
</tr>
<tr>
<td>Justice Committee deadline to consider SSI:</td>
<td>16 March 2011</td>
</tr>
<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 increase the amount that police authorities and joint police boards are allowed to carry forward from one year to the next, from 3% to 4%. The total carry forward limit, year-on-year, will be increased from 5% to 8%.

### Justice Committee consideration:

2. The instrument was laid on 23 February 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.
Justice Committee

9th Meeting, 2011 (Session 3), Tuesday 15 March 2011

SSI cover note

SSI title and number: The Licensing (Minor Variations) (Scotland) Regulations 2011 (SSI 2011/151)

Type of Instrument: Negative

Coming into force: 28 March 2011

Justice Committee deadline to consider SSI: 16 March 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 prescribe a number of situations where an application to vary a premises licence should be treated as a minor variation and therefore be granted automatically by the licensing board.

Justice Committee consideration:

2. The instrument was laid on 23 February 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.

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Justice Committee

9th Meeting, 2011 (Session 3), Tuesday 15 March 2011

SSI cover note

SSI title and number: The Removing from Heritable Property (Form of Charge) (Scotland) Regulations 2011 (SSI 2011/158)

Type of Instrument: Negative

Coming into force: 4 April 2011

Justice Committee deadline to consider SSI: 16 March 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 prescribe the form of charge required to be served by an officer of the court before removing a person, and any effects that person may have, from heritable property by virtue of a court decree or warrant.

Justice Committee consideration:

2. The instrument was laid on 25 February 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.

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Justice Committee

9th Meeting, 2011 (Session 3), Tuesday 15 March 2011

SSI cover note

SSI title and number: The Advice and Assistance and Legal Aid (Online Applications etc.) (Scotland) Regulations 2011 (SSI 2011/161)

Type of Instrument: Negative

Coming into force: 1 April 2011

Justice Committee deadline to consider SSI: 16 March 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 allow the Scottish Legal Aid Board to determine the form in which applications should be made to it, which may include an online form.

Justice Committee consideration:

2. The instrument was laid on 28 February 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.

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Justice Committee

9th Meeting, 2011 (Session 3), Tuesday 15 March 2011

SSI cover note

SSI title and number: The Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011 (SSI 2011/163)

Type of Instrument: Negative

Coming into force: In accordance with regulation 1

Justice Committee deadline to consider SSI: 16 March 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 ensure that Scottish practice conforms to the standards of ECHR by placing a duty on the Scottish Legal Aid Board to arrange for solicitors to be available to provide advice and assistance to any person before they are questioned by police.

Justice Committee consideration:

2. The instrument was laid on 28 February 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.

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Justice Committee

9th Meeting, 2011 (Session 3), Tuesday 15 March 2011

The Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011
(SSI 2011/163)

Written submission from the Glasgow Bar Association

1. The Glasgow Bar Association (“the GBA”) was formed in 1959. The objects of the Association, as contained in its constitution, include the promotion of access to legal services and access to justice and to consider and, if necessary, formulate proposals and initiate action for law reform and to consider and monitor proposals made by other bodies for law reform. The GBA also offers legal education programmes and sponsors and supports legal education and debate at Scotland’s Universities.

2. Today the GBA remains a strong, independent body. Its current member levels sit at around three hundred, by far the biggest Bar Association in the country. The GBA would encourage the Justice Committee to continue to seek its views on all legislative matters and is grateful to the Justice Committee for inviting our submission.

3. The Glasgow Bar Association (GBA) are opposed to these Regulations as drafted.

4. The Duty Scheme

Persons who are taken in to custody by the police have the right to have a solicitor notified.¹ Many choose to have their own solicitor notified whilst others will seek advice from the duty solicitor. Each jurisdiction maintains a duty scheme, in effect a list or rota of solicitors willing to act as a duty solicitor. In addition to performing a public duty—for which a limited payment is received—the opportunity of nomination as duty solicitor is an important source of new business for many legal firms.

Recently such schemes have been unilaterally amended by SLAB to provide that 35% of the scheme be made over to the PDSO. Additionally (and controversially) in Glasgow that 35% has been scheduled so as to ensure that the PDSO are “the duty solicitor” each weekend. This amendment to the duty scheme, most unfortunately, was implemented without ANY consultation with Glasgow solicitors. In seeking to appoint solicitors to the duty solicitors’ roll, SLAB has a duty to follow the rules on public procurement which are intended to remove any distortion of competition as between public and private contractors. The application of competition law considerations would require that SLAB exercise their powers in making arrangements for duty solicitors in a manner that avoids the distortion of the competition that would naturally otherwise result from a free and open market. By amending the duty plan in the way that it has done, by allocating every weekend duty slot to its own solicitors, the PDSO, SLAB it will be argued is in breach of such requirements.

¹ S15 of the Criminal Procedure (Scotland ) Act 1995
5. The Duty Solicitor

Current regulations set out the arrangements for the duty solicitor. The duty solicitor attends at identification parades and with persons who appear from custody on or at the first court appearance and for certain other limited purposes. It is only in cases where the charge is murder, attempted murder or culpable homicide that she/he is required to attend upon an accused person in the police station.

Such assistance is provided without any means assessment—that is free of cost to the detained person. Payments to a solicitor who acts as duty solicitor are only made in relation to identification parades and court appearances.

In certain circumstances advice and assistance may be available to cover a visit to an accused person in custody—who for example is to be interviewed by police. Such advice and assistance is not available to those who do not qualify on financial grounds. Where summary legal aid is subsequently granted any sums paid are subsumed within the core fee payment -so in effect the solicitor receives no additional payment for this work.

6. Changes Brought About by the New Regulations

The new regulations with the exception of regulation 3 re-enact this general scheme. Regulation 3 additionally provides for a duty solicitor in relation to the pre-interview consultation with a solicitor, required by s15 A of the 1995 Act. Importantly it also states that advice and assistance in such circumstances can only be provided by the duty solicitor. It would appear from the executive note and the later commencement date of this regulation, that it may be envisaged that a discrete duty scheme will operate in relation to these consultations.

7. Impact of Regulation 3

The effect of regulation 3 is to reduce the choice of legal representative available to a detained person. Currently in terms of the Legal Aid (Scotland) Act 1986 a detained person can choose the solicitor to provide them with such advice. The new regulation ensures that such a solicitor would receive no payment for any consultation.

It is also unclear as to how the scheme would operate in practice. A person who is taken in to custody might elect to have their own solicitor notified. They then if they are to be interviewed by the police, require to consult with a duty solicitor who is the only person entitled to payment. If a solicitor is required to be present during the police interview presumably a detained person can elect to choose his solicitor-who may not have conducted the pre-interview consultation.

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2 Regulation 5 of the Criminal Legal Aid Regulations 1996  
3 Regulation 6 of the Criminal Fees Regulations 1989  
4 There are additional payments available under advice and assistance where a telephone interview takes place during anti-social hours or a police station visit takes more than 2 hours.  
5 As inserted by the Criminal Procedure (Legal Assistance, Detention and Appeals (Scotland) Act 2010 following the decision in Cadder.  
6 S31(1)(a) and assuming that person qualifies for a grant of advice and assistance.
In effectively excluding the solicitor most likely to have knowledge of the detained person, the regulation undercuts the rationale of the enactment of s15A. That solicitor will often be in a position to advise the police, that the detained person is vulnerable by dint of mental health issues or learning difficulties or of other circumstances which might impact upon the conduct of an interview.

Conclusion

The changes brought about by regulation 3 must be seen in the context of an alteration to the operation of the duty scheme which has already taken place without subordinate legislation. It furthers a process of expansion of the role of the PDSO, which has not been sanctioned by Parliament or even the subject of any meaningful public debate.

Glasgow Bar Association
10 March 2011
SSI title and number: Act of Sederunt (Fees of Shorthand Writers in the Sheriff Court) (Amendment) 2011 (SSI 2011/166)

Type of Instrument: Negative

Coming into force: 2 May 2011

Justice Committee deadline to consider SSI: 16 March 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 increase the fees payable to shorthand writers in the Sheriff Court by 3.6%.

Justice Committee consideration:

2. The instrument was laid on 28 February 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.
The Committee reports to the Parliament as follows—

Introduction

1. This report covers the work of the Justice Committee during the parliamentary year 9 May 2010 to 22 March 2011. The final 10 months of Session 3 proved to be another busy time for the Committee, with committee agendas dominated by consideration of primary legislation.

Bills

*Criminal Justice and Licensing (Scotland) Bill*

2. The Committee’s meeting on 11 May 2010 saw it conclude its consideration of the Bill at Stage 2, having agreed over 500 amendments to the Bill over the course of seven meetings.

*Legal Services (Scotland) Bill*

3. The Legal Services (Scotland) Bill proposed changes to the provision and regulation of legal services in Scotland. Opinion within the legal profession on key elements of the Bill was divided and was reflected in the Committee’s consideration of almost 400 amendments at Stage 2 over four meetings in June 2010.

*Damages (Scotland) Bill*

4. Introduced by Bill Butler MSP, this proposed legislation sought to reform the law of damages for wrongful death in accordance with recommendations by the Scottish Law Commission. Its aim was to make the law simpler, clearer and more consistent, and to reduce the distress and delay caused to victims and relatives.

5. In its Stage 1 report, the Committee supported the general aims of the Bill but was split in its view on whether there should be a fixed 25% deduction for reasonable living expenses in relation to the victim’s claim. The Committee was also concerned about the level of controversy surrounding other elements of the Bill, and whether there was time to resolve these issues before the end of the current Parliamentary session.

6. However, the amendments lodged at Stage 2 enabled a compromise to be reached with regard to the 25% deduction and other issues to be clarified. The Bill subsequently passed Stage 3 on 3 March 2011.
Domestic Abuse (Scotland) Bill
7. This Member’s Bill, introduced by Rhoda Grant, aimed to increase access to justice for victims of domestic abuse. It was also intended to enable police and prosecutors to provide a more robust response to breached civil protection orders which in turn was intended to deter abusers from further abusive action.

8. While the Committee unanimously supported the general principles of the Bill at Stage 1, it opposed a proposal to remove means testing of anyone applying for civil legal aid to pursue a protective order in a domestic abuse case. The Committee believed that the removal of means testing would create an inequality between the pursuer and the defender.

9. Many of the Committee’s concerns were addressed by Stage 2 amendments and undertakings were given by the Minister and Rhoda Grant to further discuss some remaining matters in advance of Stage 3. The Bill passed Stage 3 on Wednesday 16 March (TBC).

Double Jeopardy (Scotland) Bill
10. The Bill, which was based on a Scottish Law Commission report, was aimed at codifying in statute the established principle that a person should not normally be prosecuted a second time for the same offence, or on a new charge arising from the same actions. The Bill also proposed a number of exceptions to this principle, including where the original trial was “tainted” by an offence against the course of justice, where there is new evidence that an acquitted person has confessed to the offence, or where other new evidence of guilt emerges.

11. While the Committee unanimously supported the Bill at Stage 1, it suggested that rather than having a list of qualifying offences as outlined in a schedule to the Bill, consideration should be given to extending the new evidence exception to apply only to cases originally prosecuted on indictment, or tried in the High Court. The Scottish Government subsequently lodged an amendment at Stage 2 to limit the new evidence exception to proceedings which were originally tried in the High Court. The Bill is to be considered at Stage 3 on the final day of Session 3.

Long Leases (Scotland) Bill
12. The aim of the Bill was principally to convert to ownership qualifying ultra-long leases (that is, leases for a period of more than 175 years with more than 100 years still to run). It was based on recommendations by the Scottish Law Commission and was intended to be the final part of the major package of land reform that began with the legislation to abolish feudal tenure considered by the Parliament in Session 1.

13. Although the Committee published its Stage 1 report in March 2011, no time has been allocated for a Stage 1 debate, and the Bill will fall on dissolution. Nevertheless, the Committee hopes that its report, which highlights a number of issues, would help inform the incoming Administration any future Committee should a similar Bill be introduced in Session 4.

Commissioner for Victims and Witnesses (Scotland) Bill
14. The Bill, introduced by David Stewart MSP, was intended to establish a commissioner to promote and safeguard the interests of victims and witnesses of
crime and antisocial behaviour. Unfortunately, due to the volume of legislation which the Committee had to consider prior to dissolution, it was not possible to carry out a Stage 1 inquiry into this Bill. Mr Stewart was, however, given an opportunity at the end of the session to put on the record his general case for having introduced the legislation.

Criminal Sentencing (Equity Fines) Scotland Bill

15. This Member’s Bill, introduced by Bill Wilson, sought to enable courts, in sentencing an organisation, to require the organisation to issue additional shares at below-market price in order to pay a fine.

16. When the Bill was introduced, the Presiding Officer made a statement that it was not, in his opinion, within the legislative competence of the Parliament. The Committee gave Dr Wilson an opportunity to set out his own view on this point, both in written and oral evidence, before concluding that the Bill was indeed ultra vires as its subject-matter related to the regulation and operation of business associations, a reserved matter. Accordingly, the Convener lodged a motion inviting the Parliament to reject the general principles of the Bill at Stage 1, under Rule 9.14.18(b). However, Dr Wilson withdrew the Bill before the motion could be taken by the Parliament.

Inquiries and Reports

Draft Budget 2011-12

17. This year the Committee concentrated its scrutiny on police spending and on community penalties, with particular reference to the planned introduction of Community Payback Orders (CPO) under provisions in the Criminal Justice and Licensing (Scotland) Act 2010. While the Committee made no specific proposals to amend the Scottish Government’s draft budget, it was concerned at the effect of the budget on police support staff and whether the level of funding for the coming year would adequately support the increase in CPOs.

Issues raised by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010

18. At the very end of the session, the Committee held two evidence-sessions to examine some of the issues raised by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010. This Act resulted from an Emergency Bill introduced by the Scottish Government immediately after the UK Supreme Court judgment in the case of Cadder v. HMA to the effect that detaining suspects for up to six hours for questioning in a police station, without the right to have a solicitor present, was incompatible with the European Convention on Human Rights.

Subordinate Legislation

19. The Committee considered 21 affirmative and 52 negative statutory instruments during the course of the parliamentary year. In spite of the high volume of instruments under consideration, the Committee ensured that each instrument was given due scrutiny. In relation to an instrument proposing changes to fixed fees for criminal legal aid work (including reduced fees for cases considered by the Stipendiary Magistrates Court in Glasgow), the Committee
invited representatives of the legal profession to give oral evidence before considering a motion recommending annulment of the instrument.

Petitions

20. No new petitions have been referred to the Committee in the past year by the Public Petitions Committee. PE1063, which was referred to the Committee in 2008 and concerns “no win-no fee” arrangements in the Scottish legal system, remains live. The Scottish Government has signalled its intention to consult in this area and the Committee has accordingly deferred making a final decision on this petition pending this consultation.

Equalities

21. Equalities issues continued to be mainstreamed throughout the Justice Committee’s work. A specific example was the Committee’s consideration of the Domestic Abuse (Scotland) Bill during which it made a particular point of seeking evidence from an organisation representing the views of black and minority ethnic victims of domestic abuse. The Committee was aware that particular issues for black and minority ethnic victims of domestic abuse can arise.

Meetings

22. During the parliamentary year (9 May 2010 to 22 March 2011) the Committee met 32 times, all of which took place in the Scottish Parliament building in Edinburgh. Four meetings took place entirely in private and 27 others involved items taken in private. The items taken in private were mostly to consider draft reports, but also included reviewing oral evidence taken earlier in the same meeting, consideration of the Committee’s work programme, and adviser appointments.
Justice Committee

9th Meeting, 2011 (Session 3), Tuesday 15 March 2011

Letter from the Cabinet Secretary for Justice

Introduction of Financial Contributions in Criminal Legal Aid and Changes to Financial Eligibility: A Consultation Paper

You will wish to be aware that the Scottish Government is today issuing a consultation paper on the proposal to introduce financial contributions into criminal legal aid and on some further changes to financial eligibility. This proposal would bring criminal legal aid into line with civil legal aid and advice and assistance generally, where the need to collect contributions is an established part of the Scottish legal aid system. Financial contributions in criminal legal aid already exist in several other jurisdictions. The proposal would require primary legislation and would deliver savings in an estimated range of £2.8 to £5.0 million per annum on the legal aid budget.

The consultation paper will issue to relevant stakeholders and is available on the Scottish Government’s website at: http://www.scotland.gov.uk/Publications/2011/03/08135507.

The consultation seeks views on the general principles of introducing the requirement to pay financial contributions in criminal legal aid. The closing date for responses is 1 June 2011.

Kenny MacAskill MSP
Cabinet Secretary for Justice
9 March 2011
Justice Committee  
9th Meeting, 2011 (Session 3), Tuesday 15 March 2011  

Letter from the Cabinet Secretary for Justice  

Justice Committee Report on the Draft Budget 2011-12

I have noted the comments made by the Committee in its report on the draft budget on several areas of the Justice portfolio’s spending plans for 2011-12. The Committee also asked me to provide more detailed information as to the extent to which the budget is dependent on the closure of current prisons or parts of prisons.

As you will be aware, many areas of the Justice portfolio are having to generate savings in 2011-12, to deal with the consequences of the most dramatic reduction in public spending imposed on Scotland by any UK Government. The Scottish Prison Service is no exception.

In his letter to the Committee of 25 November 2010, John Ewing, Chief Executive of SPS, explained how he intended to generate efficiency savings, as set out in the following statement:

“SPS propose to generate the required efficiency savings through the introduction of additional efficiency savings and the improved utilisation of the prison estate. SPS will be working in partnership with staff and trade unions to implement proposals to meet this budgetary challenge.”

You may be aware that since the rules governing which prisoners are eligible to be placed in open estate prisons were tightened in 2008, the Open Estate has been operating at significantly under capacity. It is therefore entirely appropriate for SPS to look at whether savings could be made by rationalising this estate. With that aim in mind the SPS has announced that it is considering closing the Noranside facility. The SPS estimate that closure would generate savings of some £2.5m annually.

While SPS are therefore considering a range of options for generating the required efficiency savings in 2011-12, no final decisions on whether to close current prisons or parts of prisons have been made at the current time.

Kenny MacAskill MSP  
Cabinet Secretary for Justice  
8 March 2011
Justice Committee

9th Meeting, 2011 (Session 3), Tuesday 15 March 2011

Letter from Scottish and Southern Energy plc group of companies

Long Leases (Scotland) Bill

We refer to your letter of 27 January 2011 to Mr Mike Gettinby of Scotland Gas Networks plc (please see the annexe) regarding the effect of the Long Leases (Scotland) Bill. Scotland Gas Networks plc is part of the Scottish and Southern Energy plc group of companies (SSE), which includes Scottish Hydro Electric Power Distribution plc and Scottish Hydro Electric Transmission Limited who hold the licenses for the distribution and transmission of electricity in the north of Scotland.

We note that the Scottish Government has amended the draft Bill to exclude those leases which operate solely for the purpose of providing access to pipes and cables from the provisions of the Bill. We understand this amendment followed observations that ultra long leases may have been constituted by some utility companies to enable them to acquire access rights to pipes and cables.

SSE group companies’ acquire the majority of our rights for overhead lines and underground cables against the background of our statutory right to obtain necessary wayleaves in terms of the Electricity Act 1989. These rights are generally constituted by either wayleave agreements, acquisition of Deeds of Servitude granted by the relevant landowner in our favour or by way of statutory necessary wayleave. In respect of gas infrastructure access rights are generally acquired by way of Deeds of Servitude as the Gas Act 1986 contains no provisions for the acquisition of necessary wayleaves. The only circumstances where we may acquire leasehold rights, are in respect of some electricity substations and gas governors, however these are generally for terms of no more than 99 years. We are not aware of any ultra long leaseholds that we have acquired.

It would appear that section 1(4)(b) of the Bill currently provides that it is only rights of access to the pipes and cables that are to be excluded from the provisions of the Bill and not to the right to locate and keep the pipes and cables within the land itself. Our view is that in circumstances where ultra long leases have been acquired for the purposes of acquiring the right to locate and keep pipes and cables in the land and thereafter take all necessary rights of access then the provisions of the Bill should apply to the effect that these rights are converted into heritable and irredeemable servitude rights rather than outright ownership. This position is consistent with the provisions of section 77 of the Title Conditions (Scotland) Act relating to the competency of servitude rights for pipes and cables.

We hope this clarifies our position on the Bill but if you require anything further then please do not hesitate to contact us.

Please note that this response is solely on behalf of SSE and does not necessarily reflect the views of other statutory undertakers such as Scottish Power who operate the Distribution and Transmission networks in the south of Scotland.
Dear [Name],

I am writing on behalf of the Justice Committee to seek the views of utilities and telecoms companies who might have a view on a particular provision in this Bill. The Bill and accompanying documents can be accessed here:

http://www.scottish.parliament.uk/s3/committees/justice/inquiries/LongLeases/LongLeases.htm

By way of the background, Kenny MacAskill, the Cabinet Secretary for Justice introduced the Long Leases (Scotland) Bill in the Scottish Parliament on 10 November 2010. The Bill has been referred to the Justice Committee to consider the general principles of the Bill. The Bill itself is based on a draft Bill produced by the Scottish Law Commission in December 2006. The purpose of this Bill now under consideration by the Committee is to convert ultra-long leases (those granted for more than 175 years with more than 100 years left to run) into ownership. On an appointed day, all qualifying leases will convert automatically into ownership, unless the tenant chooses to opt-out. In some cases, compensatory and additional payments will be payable to the landlord by the tenant and some leasehold conditions will be preserved as real burdens in the title deeds.

The Scottish Government has made three main changes to the Scottish Law Commission’s draft Bill; one in particular is to exclude leases let solely for access for pipes and cables. This was added after some consultees indicated that there were ultra-long leases granted in favour of utility and telecom companies for strips of land for cables and pipes. The change made now provides an exclusion (at section 1(4)(b)) that “a lease does not so comply if it is one operating for the sole purpose of allowing access (including work) to pipes or cables”.

The Committee would be grateful for any views you might have on the wording of this exclusion, whether it is sufficiently comprehensive in its terms and whether as currently drafted it will cover all eventualities or whether, in your view, it is too narrowly drafted.

I look forward to hearing from you.

Clerk to the Justice Committee
27 January 2011
Justice Committee

9th Meeting, 2011 (Session 3), Tuesday 15 March 2011

The Debt Arrangement Scheme (Scotland) Regulations 2011 (SSI 2011/141)

Further written submission from the Carrington Dean Group

Letter to the Minister for Community Safety from Maclay, Murray and Spens LLP [who act for the Carrington Dean Group], copied to the Convener of the Justice Committee

Debt Arrangement Scheme (Scotland) Regulations 2011

We refer to previous correspondence in relation to the above on behalf of our clients. Our clients, whilst supportive of many aspects of the proposed changes have, as you may be aware, raised a range of policy and legal concerns in relation to aspects which could have a significant commercial impact on their business. Our clients recognise that the legislation may be well intentioned and have appreciated the attention given to dealing with those concerns by the AiB in response, although significant concerns remain. In this letter, we would wish to share Senior Counsel’s Opinion that aspects of this legislation are ultra vires, in particular that the 2% levy is an unlawful measure of taxation. We would also raise a separate doubt as to the existence of any power to limit the class of persons entitled to be acting as payments distributors.

Tax

The enclosed Opinion of Senior Counsel [please see the annexe] is, on the basis set out in the Opinion, categorical to the effect that the 2% levy is challengeable as an unlawful measure of taxation. It is outwith the powers set out in the Debt Arrangement and Attachment (Scotland) Act 2002 and, indeed, is therefore also outwith the powers of the Parliament under the Scotland Act 1998.

Limitation of the Class

In reviewing Section 7, it also appeared to our clients that, whilst the Scottish Government is entitled to identify a class of persons to act as payment distributors, there is no power to limit such a class or those operating as such members of such a class within Section 7. That may be something which the AiB will take into account in due course.

Given the above, our clients have strong grounds to proceed to challenge the Regulations as ultra vires. Our clients would do so reluctantly. We would welcome receiving the views of the Scottish Government in relation to the above.

We have copied this letter to the Justice Committee and to the AiB.

Catriona Munro
Partner, Maclay Murray and Spens LLP
14 March 2011
Annexe

Opinion of Senior Counsel

for

Carrington Dean Ltd
Memorialists

MacKay Murray & Spens
ref: MD
Opinion of Senior Counsel

for

Carrington Dean Ltd
Memorialists

I refer to agents' email of instruction dated 10 March 2011, and to my subsequent discussions by telephone with them earlier today. This Opinion is perhaps slightly briefer than might otherwise have been the case, as a result of (a) the familiarity of agents and the Memorialists with the subject matter; and (b) the tight timescales involved, in that I understand that the Memorialists wish to have my views in advance of Tuesday 15 March 2011.

I am asked for my views on whether or not there are grounds for arguing that the Debt Arrangement Scheme (Scotland) Regulations (SSI 2011/141) are ultra vires in a particular respect. (The Regulations are not, in fact, yet in force, though they are due to become law in July of this year). In particular, I am asked for my views as to the legality of Regulation 5 thereof, which provides as follows:

5.— Fees

(1) A fee for consideration of an application for approval or variation of a debt payment programme must be paid to the DAS Administrator.

(2) That fee may not be charged to the debtor and is to be charged to all creditors taking part in the debt payment programme.

(3) The fee payable is 2% of any sum due to be paid to a creditor in a distribution made by the payments distributor, and must be paid from the sum due to be paid to each creditor.

(4) The fee must be remitted to the DAS Administrator by the payments distributor for that programme.

In terms of regulation 2(1), the “DAS Administrator” means the Scottish Ministers or anyone to whom the functions of the Ministers is delegated. The functions have been delegated to the Accountant in Bankruptcy ("AiB").

The question posed by agents is whether or not the fee payable under reg.5 is challengeable as amounting to an unlawful tax. In my opinion, for the reasons which follow, reg.5 is so challengeable.
The starting point is the enabling statute. As the preamble to the 2011 Regulations makes clear, they are purportedly made “in exercise of the powers conferred by sections 2(3)(d), 4(5), 5(4), 6(1), 7 and 62(2) of the Debt Arrangement and Attachment (Scotland) Act 2002”.

Section 1 of the 2002 Act introduced the concept of “the ‘debt arrangement scheme’ under which individuals may arrange for their debts to be paid under debt payment programmes”. That latter concept, the “debt payment programme”, is “a programme which provides for the payment of money owed by a debtor”, and which, amongst other things, allows the debtor to forestall enforcement of debts by diligence or bankruptcy. Such programmes have been operated successfully for some years. The Memorialists operate a successful business as “money advisers” and “payment distributors” as defined in the Act, and in terms the Debt Arrangement Scheme (Scotland) Regulations 2004 as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2007.

The power to impose a “fee” of 2% of the sum due to be paid to a creditor (such sum to be deducted from the money paid to the creditor) can only derive from s.7 of the Act (as expanded by s.62(2) to cover purposes incidental to the powers in s.7). Section 7 includes the following powers:

“7 Debt payment programmes: power to make further provision

(1) The Scottish Ministers may, by regulations, make such further provision as they think fit in connection with—

(a) applications for the approval, or for the variation, of debt payment programmes;

(b) the manner in which such programmes are to operate, including conditions with which debtors, creditors, payments distributors or money advisers must comply...

(2) The regulations may, in particular, make provision about—...

(y) the determination, and charging, by the Scottish Ministers of fees in respect of—

(i) the consideration of applications for the approval, or the variation, of a debt payment programme.”

Section 7(7)(y) of the Act accordingly clearly provides authority for the levying of a fee in respect of “consideration of an application for approval or variation of a debt payment programme”, and thus Regulation 5(1) is lawful. The more interesting question is whether the same can be said of Reg.5(3).

That Regulation, it will be recalled, stipulates a fee of “2% of any sum due to be paid to a creditor in a distribution made by the payments distributor”. Accordingly, this would mean, for a debt payment programme which results in payment of a total of £10,000 to the creditors, an amount of £200 being payable to the Scottish Ministers (or, in reality, AIB as their delegate).

It is, of course, clear on authority that there is nothing to prevent a public body such as the Scottish Ministers from charging for services rendered by it, where there would otherwise be
no duty on the part of the public body to provide those services\(^1\), as long as the "power to charge is given by express words or by necessary implication"\(^2\). Equally, however, it is necessary to draw a dividing line between seeking payment for services rendered, which is lawful, and imposition of taxation, which (absent Parliamentary authority) is not. In Attorney-General v. Wilt's United Dairies Ltd\(^3\), Atkin LJ said:

"... if an officer of the executive seeks to justify a charge upon the subject made for the use of the Crown (which includes all the purposes of the public revenue), he must show, in clear terms, that Parliament has authorised the particular charge. The intention of the legislature is to be inferred from the language used, and the grant of powers may, though not expressed, have to be implied as necessarily arising from the words of a statute; but in view of the historic struggle of the legislature to secure for itself the sole power to levy money upon the subject, its complete success in that struggle, the elaborate means adopted by the Representative House to control the amount, the conditions and the purposes of the levy, the circumstances would be remarkable indeed which would induce the court to believe that the legislature had sacrificed all the well known checks and precautions, and, not in express words, but merely by implication, had entrusted a minister of the Crown with undefined and unlimited powers of imposing charges upon the subject for purposes connected with his department\(^4\).

In the same case, Scrutton LJ adopted the following dictum of Wilde C.J. in Gosling v. Veley\(^5\):

"The rule of law that no pecuniary burden can be imposed upon the subjects of this country, by whatever name it may be called, whether tax, due, rate or toll, except under clear and distinct legal authority, established by those who seek to impose the burden, has been so often the subject of legal decision that it may be deemed a legal axiom, and requires no authority to be cited in support of it."

It is, of course, the case that taxation is a Reserved Matter, with the result that (with certain exceptions such as the power to raise or lower the rate of income tax, or relating to local taxation, which exceptions are inapplicable here) the Scottish Ministers are not empowered to impose taxes\(^6\).

As I have said already, it is generally lawful for a public body, including the Scottish Ministers, to charge payment for services rendered unless there is a right to have such services provided for free. The question is whether the 2% stipulated in Reg.5(3) qualifies as such a payment. To my mind, it is arguable that it does not.

This is because the lack of any obvious relationship between the fee charged and the service provided. There is no particular reason disclosed in the papers sent to me, nor can I think of any, why the work undertaken by the AIB in approving or varying a debt payment programme

\(^1\) China Navigation Co Ltd v Attorney General [1932] 2 K.B. 197
\(^2\) McCarthy & Stone (Developments) Ltd v Richmond upon Thames LBC [1992] 2 A.C. 48 at 70
\(^3\) Attorney-General v. Wilt's United Dairies Ltd. (1921) 37 T.L.R. 884; (1922) 38 T.L.R. 781
\(^4\) (1850) 12 Q.B. 328, 407
will be proportionately more onerous with the level of debt involved. Even if one could so argue, the level of debt involved is not the yardstick – rather, it is the amount of debt recovered. The potential disparity is shown in the following examples:

A. A simple debt payment plan involving only two creditors seeking a total debt of £200,000, and obtaining total recovery of £100,000. The fee payable would be £2,000.

B. The same simple debt payment plan resulting in full recovery of the £200,000. The fee payable would be £4,000.

C. A complex debt payment plan arising from an individual with multiple (say, 15) credit card and other creditors, with a total debt of £30,000. The fee payable would be £600.

Example C is the most onerous, yet produces the lowest fee. Examples A and B involve exactly the same amount of work (on the part of the AIB) but have entirely different levels of fee. In none of the examples is there an obvious correlation between the service provided and the fee charged.

That is, it would appear, because the intention is that the 2% fee structure be used to fund the system as a whole. This is apparent from various documents provided to me, some of which I list as follows:

- In a seminar run by AIB in October 2010 in advance of the inception of the new system, the following statement is made in the AIB Powerpoint presentation:
  
  “AIB will be able to fund the DAS system and process through retaining part of the distribution fee.”

- In the Business Regulatory Impact Document published in connection with the introduction of the new regime, the following is stated:

  “The extension of the role of the DAS Administrator will require AIB to reallocate staff to the DAS team to carry out these duties. The DAS Administrator will introduce a fee for the consideration of a DPP application which is 2% of any sum due to be paid to a creditor in a distribution. This fee will off-set the DAS Administrator costs of recording a DPP, the IT system, supervision, advertising and administration, which are currently paid from the public purse, and the removal of the current fee for searching the DAS Register....

Running costs

Table 3 shows the calculations for the annual ongoing costs of running the new system, assuming that the life of the IT system is 5 years.

System Depreciation (£250K over 5 years): £50,000
Training costs for AiB staff and Money Advisers: £20,000

AiB Staff Costs (5 * A3): £120,000

AiB Staff Costs (1 * B1): £35,000

DAS Publications: £45,000

Share of AiB Fixed Cost: £85,000

These costs will be recovered by an application fee for DAS via a percentage deduction from DPP payment distribution.

41. In 2009/10 under the existing DAS arrangements there were 1,417 DPPs agreed, quarter one of 2010/11 uptake of DPP was 495. This level of uptake supports the assumed level of uptake of 2,000 used for calculation of income from DPP. Based on a sample of 1,000 DPPs already in existence we have calculated the average length of a DPP to be 8.7 years and the average value to be £27,000.

42. Using these calculations an application fee of 2% will cover the anticipated annual costs over a 5 year period.”

It would appear from these documents that the intention is that the DAS process will be self-funding, with all costs covered by the reg.5(3) 2% fee and no need for fiscal input from the Scottish Ministers. That is not accepted by AiB, however, as can be seen from the following:

- In a letter from AiB dated 1 March 2011, it is said:

  “AiB are not entitled to profit from any statutory fee, nor will funds ingathered under DAS be used to cross subsidise another statutory function. The functions of the DAS Administrator which AiB carries out are the functions of the Scottish Ministers, and the fees are payable to AiB on behalf of the Scottish Ministers. The purpose of the DPP application fee is to off-set these costs and in future the fee may, through efficiencies or greater DPP volumes, be reduced, providing greater returns to creditors. The fee is set at a level which does have a relation to the costs of the functions undertaken by the DAS Administrator in approving debt payment programmes. Approval cannot be carried out without essential incidental functions in registering the debt payment programme. This is clearly envisaged by the 2002 Act.”

- In a subsequent AiB letter, dated 7 March 2011, the following is argued:

  “The application fee is to cover costs associated with the DAS Administrator’s functions related to the application.”

As I see it, however, there can be little doubt, from the Regulatory Impact Document and indeed from the AiB letters, that the intention is that the 2% fee should result in the AiB’s role being self-funding. That gives rise to two objections.
First, the statutory authority under s.7 of the 2002 Act is only to levy fees for “the consideration of applications for the approval, or the variation, of a debt payment programme”. That seems to me to indicate that the fee payable should only be referable to the service afforded: namely the consideration of the application. A system of percentage payments, in which higher debt recoveries subsidise cases where lower recoveries are made (and indeed costs which are not related to the application in question at all, such as costs incurred for an unsuccessful application, advertising costs, or costs referable to searches of the DAS Register) arguably strays outside the statutory permission.

Secondly, the foregoing point is strengthened when one bears in mind the need to construe the Act so as to avoid it impermissibly imposing taxation\(^6\). While the dividing line between a charge for services rendered and a “tax” is often difficult to draw, some support may be gleaned from the Advice of the Privy Council in the case of Lower Mainland Dairy Products Sales Adjustment Committee v Crystal Dairy, Limited\(^2\). There, an Adjustment Committee for dairy products was created in British Columbia. A farmer selling fluid milk had to pay to the Committee a levy assessed according to the quantity of milk he had sold. The total of these levies was to be apportioned by the Committee among the farmers who had sold milk products. The expenses of the Committee were to be met by a further levy on the farmers. The question arose as to whether these two levies were taxes. Lord Thankerton said:

“In the opinion of their Lordships, the adjustment levies are taxes. They are compulsorily imposed by a statutory Committee .... They are enforceable by law... Their Lordships are of opinion that the Committee is a public authority, and that the imposition of these levies is for public purposes... The fact that the moneys so recovered are distributed as a bonus among the traders in the manufactured products market does not, in their Lordships' opinion, affect the taxing character of the levies made... While not saying that these elements are exhaustive of the elements which might be found in other cases to point to the same conclusion, their Lordships are of opinion that they are sufficient to characterize the adjustment levies in the present case as taxes... It seems to follow that the expenses levies in the present case, which are ancillary to the adjustment levies, must also be characterized as taxes.”

Similar considerations apply here. The charges are compulsory; they are enforceable; the AIB is a public authority; and the imposition of the fees is plainly for public purposes (to ensure the funding of the scheme as a whole).

A similar conclusion is vouched for by extracts from two textbooks.

Firstly, in McFadden & Lazarowicz on The Scottish Parliament (4th ed)\(^4\), the authors opine:

“The Scotland Act 1998 places no general restrictions on the Scottish parliament from introducing charges for services provided by the Scottish Government, or which other bodies provide on its behalf. Accordingly, it has the power to raise finance in such a way as long as the activity to be supported is one which falls within its general remit. If

\(^6\) Daymond v South West Water [1976] AC 609

\(^2\) [1933] A.C. 168

\(^4\) p.137
the level of charge made, however, was such as to raise income in excess of the cost of the provision of the service, it is suggested that the excess amount of the charge might well be regarded as in reality a tax, which would therefore be beyond the powers of the Scottish Parliament to impose..."

Secondly, and to similar effect, Bennion on Statutory Interpretation (5th ed), derives from the decision in Wilts already referred to the following proposition:

"...while charges may be made for the issue of licences, or for any other services provided under statute, the revenue from them must not exceed the cost of administering the service."9

The "cost of administering the service" in the present case would be the cost of considering applications. The AIB seem to recognize that it would be illegitimate to use revenue obtained for consideration of applications in order to support other activities. Thus their letter of 1 March 2011 says "funds ingathered under DAS [will not] be used to cross subsidise another statutory function". However, a brief consideration of the other activities of the AIB under DAS indicates that it is not only the cost of considering applications which is being funded by the fees therefor. There will be things such as advertising costs; the costs of administering debt payment plans incepted by "free sector" advisers (since those costs are not related in any way to the consideration of an application); costs of administering and allowing inspection of the DAS Register; and costs incurred in the tendering process regarding approval as a "payments distributor". As it cannot be said that the sole statutory function of the AIB under DAS is to consider applications, a scheme whereby the whole costs of those statutory functions is to be covered be a percentage fee rather than a flat rate referable to costs of applications seems to me to be challengeable as an unlawful mode of taxation.

I trust the above is clear, and should be happy to answer any questions which may arise.

Roddy Dunlop QC
Axiom Advocates
11 March 2011.

9 cf. Congreve v Home Office [1976] QB 629
Justice Committee

9th Meeting, 2011 (Session 3), Tuesday 15 March 2011

Letter from the Minister for Community Safety

The Debt Arrangement Scheme (Scotland) Regulations 2011 (SSI 2011/141)

In advance of your meeting on 15 March at which the Committee will, among other things, consider the Debt Arrangement Scheme (Scotland) Regulations 2011, I am writing to address points raised in correspondence to the Subordinate Legislation Committee by The Carrington Dean Group.

I will address The Carrington Dean Group's reasons for objecting to the instrument under the headings in their letter.

Requirement to direct individuals who approach us directly to Public Sector
The requirement on fee charging money advisers merely to inform debtors about the availability of money advice free of charge is not an unlawful state aid. Normally for the provision of a service to be classed as "economic" there must be some form of remuneration, and case law has evidenced that the provision of a free service by an organisation is not "economic" in nature and thus not in breach of State aid rules.

This provision was included in the scheme at its inception in 2004 and removed in 2007 to encourage private sector money advisers to become involved in DAS. Very few private sector money advisers currently offer DAS; revoking this requirement does not therefore appear to have acted as an incentive.

Feedback obtained during the public consultation and subsequent workshops strongly supported the idea that debtors should be made aware of all their options before choosing any debt solution. The Scottish Ministers support this principle and agree that debtors should understand their options prior to paying significant sums of money for a statutory scheme. It is ultimately the debtor's choice whether to pay for the service. However, if a debtor does not know that they can access a similar service free of charge, how can they make an informed decision? Feedback from stakeholders suggests that a key benefit in the private sector is that waiting times may be much shorter and competition in the market will eventually set the appropriate cost for DAS.

Distortion of the Market
Until recently there have been three approved payments distributors providing this service for debtors, with one firm distributing payments from over 90% of all Debt Payment Programmes (DPPs). Under the DAS regulations the debtor can only chose one of these providers and if they are not satisfied with that service they cannot chose any other firm to provide the service, it must be one of the approved payments distributors. From past performance, debtors do not switch payments distributors.

When the Accountant in Bankruptcy (AiB) consulted on this proposal, there was little specific feedback on the issue, but those who did respond, including several...
creditors, individuals, the Law Society for Scotland and Carrington Dean responded positively in favour of competitive tender with a view to achieving best value. Respondents commented that DAS is intended to be a low cost solution and a tender process would ensure transparency of these costs. The Regulations as they now stand have the benefit of a tender process, but AiB is not taking on payments distributors' functions, following comments received during the consultation.

The 2% fee for applications is charged on all debt payments programmes approved, across the Board. An approved payments distributor or processor will be involved in every case, so the fee will introduce no distortion into any market.

There is no financial incentive in any event as creditors, who are the ultimate beneficiary of the distribution service, do not decide who provides the service. It is generally at present the money adviser who selects the payments distributor for the debtor at point of application and although they currently have a stake in how the service is provided, they are not necessarily focused on best value for money, or potential returns to creditors.

We consider that choice and output will potentially benefit from the tendering exercise, as may value for money for creditors; there is no basis in the revised Regulations for considering that those things will be reduced.

**Tax Raising**

The 2% fee for consideration of applications for approval and variation of debt payment programmes is charged on all debt payments programmes which are approved. It is charged to the creditor from the monies distributed under the Scheme.

It is in no way a tax, but a straightforward statutory fee under charging powers in the Debt Arrangement and Attachment (Scotland) Act 2002 which allows such a fee to be charged, and for different fees to be charged in relation to different matters. The public purse has been carrying the costs of the consideration and essential registration and administration of the Scheme since 2004, save in respect of search fees which are also being removed under the revised Regulations.

**Conflict of Interest**

The function of granting approvals is carried out by the DAS Administrator in a neutral and non-biased way. The DAS Administrator can only approve applications where they meet all the requirements under the legislation, and is bound by strict criteria under the Act and the Regulations as to whether it must approve a debt payment programme or otherwise. It could not take into account fee revenue in doing so. The DAS Administrator cannot give advice and cannot 'sell' DAS to encourage more debtors to choose this debt relief option over any other. This system will not change under the new DAS Regulations. It may be added that nor is the DAS Administrator competing with private providers under the scheme. At present, applications for approval of a DPP are made through a bespoke DAS IT system. This system is now out of date and needs replaced. A replacement IT system will overcome many of the problems identified with the current system by facilitating electronic applications and administration of DPPs from a centralised system.
**Moral Law – Treatment of the Poor**

There is very little to compare between bankruptcy and the Debt Arrangement Scheme, except that they are both statutory schemes for debt relief. [Fundamentally, there is nothing to prevent someone who is insolvent from applying for entry to the DAS Scheme if they have not been made bankrupt].

Bankruptcy is considered to be the last resort for debtors who have completely exhausted their financial means and are effectively insolvent. It is also intended to relieve the debtor from the burden of the debts rather than to encourage repayment of debt. The payment of £100 per application is charged to cover the consideration of the bankruptcy applications. The fee has remained consistent since its introduction on 1 April 2008 and is now significantly discounted by the public purse.

On the other hand, the Debt Arrangement Scheme is designed to enable people with some disposable income to repay their debts while protecting their home from diligence. DAS should also be as low cost as possible in order to return as much money as possible to creditors. Most stakeholders did not think that an up front fee for DAS desirable as it might dissuade potential clients from choosing DAS. We do not think that it is an unfair, or even unusual practice for different services to cost different amounts.

I hope this letter has been helpful in addressing the concerns raised.

Fergus Ewing MSP
Minister for Community Safety
14 March 2011
Justice Committee

9th Meeting, 2011 (Session 3), Tuesday 15 March 2011

The Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2011 (SSI 2011/162)

Written submission from Lesley Thomson, Area Procurator Fiscal, Glasgow

Briefing notes – Stipendiary Magistrate Cases within Procurator Fiscal’s Office, Glasgow

Background
I now provide information in relation to the operation of Stipendiary Magistrate business within my office. The only request I have had about this prior to today was an e-mail from the President of the GBA, Ken Waddell, in relation to COPFS marking policy. He enquired about those cases which are marked for the Stipendiary Magistrates Court. I attach a copy of my response of 9 March 2011.

My position remains as contained in that letter namely those cases that are marked for the Stipendiary Magistrates Court in Glasgow, are cases which would in other jurisdictions be in the Sheriff Court. I understand that there may be confusion as to the day to day operation of the 6 courts in Court that are Stipendiary Magistrate and Justice Courts. It may be helpful if I explain the processes around dealing with the business in the Stipendiary Magistrates Court. I am aware that there have been references to this being a hybrid court. Unfortunately, that is not a helpful term in explaining its operation. It is important to note there is a clear distinction to be made between decision making in relation to the appropriate forum for a criminal case and thereafter the administrative arrangements of that criminal case in order to make the most efficient use of court time.

Case Marking Process
The Procurator Fiscal Deputies marking cases in the Glasgow office (as in all other parts of COPFS) follow the principles of Summary Justice Reform. That means that case marking decisions are outcome focussed, requiring the depute to decide on the most appropriate outcome for the offender, the victim and the wider community and the most suitable option to achieve it always with the overarching objectives of (a) reducing offending and re-offending and (b) maintaining and improving public confidence in the criminal justice system.

The deputes will ensure that in assessing the sentencing objective and the desired practical outcome, that appropriate use is made of direct measures and the Justice court.

In addition, in Glasgow only, in considering cases of a Sheriff Court level, deputes must also give consideration to putting those Sheriff Court level cases into the Glasgow Stipendiary Magistrates Court. There is guidance
within the Glasgow office as to these cases which are appropriate for the Stipendiary Magistrates Court and other cases which should be in the Sheriff Court. In addition, there are presumptions that other categories of cases, eg race crime, knife crime etc as mentioned in my letter, will be in the Sheriff Court. This is not a choice which is available to any other part of COPFS as only Glasgow has Stipendiary Magistrates and only Glasgow is able to deal with this level of Sheriff Court business in a different forum.

Practical Processes (flow charts attached)

1) In general, Justice cases call in Justice Courts and Stip cases call in Stip Courts. There are exceptions to ensure efficient use of court resources. The custody court (Court 1) is the main exception.

2) The depute marking cases, whether it is a custody case, an undertaking case, an initiating warrant or a cited case is required to indicate whether that case is being marked for the Stipendiary Magistrates Court or the Justice of the Peace Court. That instruction is then on the case papers, is in the FOS system and determines the route of that case thereafter. The depute in court then knows from the paperwork, before a case calls, whether it is a Stipendiary Magistrate case or a Justice of the Peace case. In addition, it is obviously important that those dealing with the case, ie the Clerks and either the Lay Justice or the Magistrate know that they have the correct case in front of them. The principal complaint is contained on a form F1 and that principal complaint reflects the marking decision as the signatory at the bottom of the complaint (the search warrant paragraph) will either state “Magistrate” for a Stipendiary Magistrate or “Justice” for a Lay Justice case.

3) Cited cases are thereafter allocated a pleading diet in either a Stipendiary Magistrate Court or a Justice of the Peace Court and these courts sit separately. On those occasions where initiating warrants are dealt with by invitation, they will also be allocated to either a Stipendiary Magistrate Court for Stip cases or a Justice of the Peace Court for Justice cases and they will call in those separate courts.

4) Custodies and undertakings, (and warrant cases) having been marked as Stipendiary Magistrate or Justice of the Peace cases, will all call in court 1 at Glasgow Sheriff Court. Court 1 in Glasgow Sheriff Court is a Stipendiary Magistrates Court which sits in the Sheriff Court building. The other Stip and Justice Courts sit in the JP building at St Andrew’s Street, Glasgow. As indicated above, both the Clerk and the Magistrate presiding can tell from the paperwork whether the case has been marked to proceed in the Stipendiary Magistrates Court or in the Justice of the Peace Court. Further, in the custody court (court 1), the practice is that the depute in court will either be asked by an agent, or indeed will offer the information when the case is calling that it is a Stipendiary Magistrate or a Justice of the Peace case. This then puts into the public forum what is already contained on the principal
complaint. If a plea of not guilty is entered, the clerk will allocate the Stipendiary Magistrate cases to appropriate intermediate and trial diets for the Stipendiary Magistrates Courts and Justice of the Peace cases to appropriate intermediate and trial diets for the Justice of the Peace Courts. Pleas of guilty that do not need any reports will be dealt with by the Stipendiary Magistrate at the time as Justice cases. Deferred Stip cases will be allocated to a Stip Court and deferred Justice cases to a JP Court.

5) At trial diets, there will be occasions where, as a result of the amount of business, a Stipendiary Magistrate will hear Justice of the Peace cases. This is an arrangement in place to ensure the most effective use of court time. It has been agreed at Local Criminal Justice Board that when that requires to happen, then the Clerk will announce to the court that the court is changing from sitting in its Stipendiary Magistrate capacity to sitting in its Justice of the Peace capacity.

Dealing with the comments which I have seen in correspondence since Friday, I have the following additional comments to make:-

1) In relation to my letter, I was referring to cases marked by my deputes to proceed as Stipendiary Magistrate cases. I do not call Justice cases calling in Court 1 Stip cases. I remain of the view that these Stip cases are all ones which I would expect to see in the Sheriff Court in other jurisdictions. (I am doing nothing other than stating the obvious).

2) I agree that there are administrative arrangements in place for the efficient running of Stipendiary and Justice of the Peace Courts that mean Justice cases will call before a Stipendiary Magistrate. On those occasions, as I have explained above, the Clerk and the Magistrate and PF all know they are dealing with either a Stipendiary or a Justice case in order that it can be dealt with correctly from a sentencing perspective. In addition, when that happens at the trial stage, it has been agreed the Clerk will make that announcement. I have difficulty in understanding why the defence agent is not aware of the forum of his/her case also.

3) For the further avoidance of doubt therefore, if there was no Stipendiary Magistrates Court to deal with custody cases then those marked for the Stipendiary Magistrates Court would be in the Sheriff Court and those marked for the Justice of the Peace Court would be in one of my Justice of the Peace Courts which would then require to sit on a custody basis every day also.

I attach flowcharts explaining each process and I am more than happy to provide any further clarification should it be required.

Lesley Thomson
Area Procurator Fiscal
14 March 2011
CASE CALLS

STIP

CWP  PG  NG

JUSTICE

CWP  PG  NG

CWP – STAYS IN COURT 5
PG – CASE CAN BE DISPOSED OF BY STIP
PG – SENTENCE DEFERRED – FOLLOWS THE STIP FOR SENTENCE
NG – TRIAL ASSIGNED IN COURT 5 OR 6

CWP – STAYS IN COURT 3
PG – CASE CAN BE DISPOSED OF BY JP
PG – SENTENCE DEFERRED – FOLLOWS THE JP FOR SENTENCE OR CALLS IN JP TRIALS COURT (AM) FOR DISPOSAL
NG – TRIAL ASSIGNED IN COURT 3 OR 4
CASE CALLS IN COURT 1

STIP

PG

NG

JUSTICE

PG

NG

PG – CASE CAN BE DISPOSED OF BY STIP
PG – SENTENCE DEFERRED – FOLLOWS THE STIP FOR SENTENCE
NG – TRIAL ASSIGNED IN COURT 5 OR 6

PG – CASE CAN BE DISPOSED OF BY STIP
PG – SENTENCE DEFERRED – CALLS IN JP TRIALS COURT (AM) FOR DISPOSAL
NG – TRIAL ASSIGNED IN COURT 3 OR 4
STIP / JUSTICE CUSTODY CASE

POLICE LIST RECEIVED

DEPUTE MARKS CASE WITH APPROPRIATE FORUM

STIP

JUSTICE

CASE SCHEDULED FOR COURT

COURT 1

F1 CREATED

FI DISPLAYS MAGISTRATE

F1 DISPLAYS JUSTICE

COURT 1
CASE CALLS IN COURT 1

STIP

PG

NG

JUSTICE

PG

NG

PG – CASE CAN BE DISPOSED OF BY STIP
PG – SENTENCE DEFERRED – CALLS IN JP TRIALS
NG – TRIAL ASSIGNED IN COURT 5 OR 6

PG – CASE CAN BE DISPOSED OF BY STIP
PG – SENTENCE DEFERRED – CALLS IN JP TRIALS
NG – TRIAL ASSIGNED IN COURT 3 OR 4
STIP / JUSTICE WARRANT CRAVE CASE

CASE RECEIVED

DEPUTE MARKS CASE WITH APPROPRIATE FORUM

STIP

JUSTICE

WARRANT MARKING ADDED

F1 CREATED & SENT TO CLERKS

F1 DISPLAYS MAGISTRATE

F1 DISPLAYS JUSTICE

CASE PROCESSED IN CLERKS OFFICE
CASE CALLS IN COURT 1

STIP

PG

NG

JUSTICE

PG

NG

PG – CASE CAN BE DISPOSED OF BY STIP
PG – SENTENCE DEFERRED – FOLLOWS THE STIP FOR SENTENCE
NG – TRIAL ASSIGNED IN COURT 5 OR 6

PG – CASE CAN BE DISPOSED OF BY STIP
PG – SENTENCE DEFERRED – CALLS IN JP TRIALS COURT (AM) FOR DISPOSAL
NG – TRIAL ASSIGNED IN COURT 3 OR 4