



JUSTICE 1 COMMITTEE

AGENDA

20th Meeting, 2006 (Session 2)

Wednesday 31 May 2006

The Committee will meet at 9.30 am in Committee Room 6.

1. **Criminal Proceedings etc. (Reform) (Scotland) Bill:** The Committee will take evidence at Stage 1 of the Bill from—

Elish Angiolini QC, Solicitor General for Scotland, Scott Pattison, Head of Policy Unit and Jim Brisbane, Deputy Crown Agent, Crown Office and Procurator Fiscal Service; and

Hugh Henry MSP, Deputy Minister for Justice, Wilma Dickson, Head of Criminal Procedure Division, and Noel Rehfisch, Bill Team Leader, Scottish Executive.

2. **Subordinate Legislation:** Hugh Henry MSP (Deputy Minister for Justice) to move S2M-4448—

That the Justice 1 Committee recommends that the draft Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2006 be approved.

3. **Subordinate Legislation:** The Committee will take evidence from Gillian Mawdsley and Phil Burns, Justice Department, Scottish Executive, in relation to the following negative instruments—

the Advice and Assistance (Scotland) Amendment (No.2) Regulations 2006, (SSI 2006/233); and

the Criminal Legal Aid (Summary Justice Pilot Courts and Bail Conditions) (Scotland) Regulations 2006 (SSI 2006/234).

4. **Subordinate Legislation:** The Committee will take evidence from Anne Cairns, Office of the Solicitor to the Scottish Executive and Christina Phillips, Justice Department, Scottish Executive, in relation to the following negative instruments—

the Divorce (Religious Bodies) (Scotland) Regulations 2006, (SSI 2006/253);

the Divorce and Dissolution etc. (Pension Protection Fund) (Scotland) Regulations 2006, (SSI 2006/254); and

the Parental Responsibilities and Parental Rights Agreement (Scotland) Amendment Regulations 2006, (SSI 2006/255).

5. **Criminal Proceedings etc. (Reform) (Scotland) Bill (in private):** The Committee will consider the main themes arising from the evidence sessions to date on the Criminal Proceedings etc. (Reform) (Scotland) Bill, in order to inform the drafting of its Stage 1 report.

Callum Thomson
Clerk to the Committee

Papers for the meeting—

Agenda item 1

Note by SPICe and Committee Adviser (PRIVATE PAPER)	J1/S2/06/20/1
Correspondence from Scottish Executive Bill Team, dated 23 May 2006	J1/S2/06/20/2
Correspondence from Minister for Justice, dated 25 May 2006	J1/S2/06/20/11
Subordinate Legislation Committee Report on the Criminal Proceedings etc. (Reform) (Scotland) Bill	J1/S2/06/20/3

Agenda item 2

Note by the Clerk on the draft Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2006	J1/S2/06/20/4
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Agenda item 3

Note by the Clerk on SSI 2006/233	J1/S2/06/20/5
Note by the Clerk on SSI 2006/234	J1/S2/06/20/6

Agenda item 4

Note by the Clerk on SSI 2006/253	J1/S2/06/20/7
Note by the Clerk on SSI 2006/254	J1/S2/06/20/8
Note by the Clerk on SSI 2006/255	J1/S2/06/20/9

Agenda item 5

Note by the Clerk (PRIVATE PAPER) (to follow)	J1/S2/06/20/10
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Forthcoming meetings—

Wednesday 7 June, Committee Room 2;
Wednesday 14 June, Committee Room 6;
Wednesday 20 June, Committee Room TBC;
Wednesday 21 June, Committee Room 1.



SCOTTISH EXECUTIVE

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23 May 2006

Dear Lewis

CRIMINAL PROCEEDINGS ETC. (REFORM) (SCOTLAND) BILL FOLLOW UP TO EVIDENCE SESSION HELD ON 10 MAY

Following our participation in the 'round-table' discussion session on 10 May, you emailed me regarding three issues on which the Committee sought further information. We have now been able to collect that information and I would be grateful if you could bring this letter to the attention of the Committee.

At the round table session, there was some discussion of the work that the Scottish Court Service (SCS) is undertaking in relation to planning for court unification and keeping abreast of the operation of district courts in the lead up to unification. Nicola Brown from the District Courts Association (DCA) made reference to certain operational difficulties relating to the software currently used by district courts and the lack of an effective interface with DVLA systems.

Apart from Glasgow (who have developed and maintained their own IT system) and Moray (who have a paper-based system) district courts across Scotland are supported by the same IT system and supplier. SCS has been and continues to be in close contact with this supplier and a range of options is being examined to ensure ongoing support and effective transition during the period of court unification.

With reference to the issue of electronic availability of DVLA statements, it is understood that the lack of availability of an electronic DVLA 'interface' with district courts is a long-standing issue, which is not caused by any inefficiency with the current IT system used by the majority of district courts. The process of unification will have no adverse impact on the development of an electronic interface between district courts and the DVLA. It is understood that the DVLA are taking forward their own work to resolve this issue, so that district courts will be able to access DVLA records electronically in future. No definite timescale has been set for the completion of that work by DVLA although it is hoped that recent progress will be maintained. The process of court unification will ensure that, in future, JP Courts will have electronic access to DVLA statements.



We also undertook to provide the Committee, in collaboration with Phyllis Hands from the DCA, with the available statistics concerning the number of JPs assigned to a particular court and the number of days that each sat on the bench. The attached table provides the information for each Justice of the Peace area – unfortunately the information is not available broken down by individual district courts.

JP Area	No JPs ¹	Size of bench	Sittings a year
Aberdeen City	15	1	17.0
Aberdeenshire	35	1 or 3	9.0
Angus	13	1	5.0
Argyll and Bute	17	1	8.0
Clackmannanshire	8	1	16.0
Comhairle nan Eilean Siar	3	1	4.0
Dumfries and Galloway	41	3	8.0
Dundee	11	1	24.0
East Ayrshire	21	1	12.0
East Dunbartonshire	11	1	10.0
East Lothian	19	3	10.0
East Renfrewshire	7	1	10.0
Edinburgh	24	1	12.0
Falkirk	5	1	26.0
Fife	15	1	26.0
Glasgow	35	1	32.0
Highland	57	1 or 3	8.5
Inverclyde	17	1	13.0
Midlothian	11	1	6.0
Moray	10	3	11.0
North Ayrshire	26	3	10.0
North Lanarkshire	38	1	15.0
Perth and Kinross	10	1	30.0
Renfrewshire	15	1	12.0
Scottish Borders	22	1 or 3	6.0
South Ayrshire	25	3	12.0
South Lanarkshire	32	1	8.0
Stirling	13	3	12.0
West Dunbartonshire	18	1	7.0
West Lothian	17	1	17.0
Total	591		12.7

Finally members raised the issue of the Crown Office and Procurator Fiscal Service's (COPFS) national case marking policy. Interest focused on the effect that the proposals in the Bill, coupled with the revised marking policy, would have on the distribution of business across the summary

¹ (1) In most cases, the figures for the number of bench-sitting JPs and the number of sittings per JP per year relate to the year up to October 2004. East Ayrshire, East Dunbartonshire, East Lothian, East Renfrewshire, Glasgow, Inverclyde, Midlothian and Scottish Borders have all submitted changes to the 2004 figures during May 2006. These changes have been incorporated into the table, which represents the most up to date information available.

court system. This was raised in the context of concerns aired in evidence over a possible lack of business for JP courts to deal with in the future.

As you will be aware, the COPFS is developing a revised case marking policy. The detail of the revised policy will be confidential, for sound public policy reasons, but the broad principles behind it will be available in a revised version of the prosecution code published by the COPFS.

The COPFS has made it clear that it intends to use the JP court to maximum effect. The aim of the revised policy will be to maximise the use of alternatives to prosecution in suitable cases while making effective and appropriate use of the JP and sheriff courts. The policy will centre on selecting the appropriate option in each case, based on its particular facts and circumstances, and balancing desired outcomes such as deterrence, restitution and retribution.

It is anticipated that the increased use of alternatives to prosecution will take cases out of the court system – an indication of the likely level of shift is provided in the Financial Memorandum to the Bill. This should allow courts to process the remaining cases more quickly. That is one of the key objectives of the Bill. However the district and JP Courts will continue to play a significant role in the summary justice system. Even allowing for the impact of alternatives, a large number of the cases currently heard by the district courts would continue to be heard in those courts.

In addition, the COPFS anticipate that there will be scope for broadening the range of cases appropriate for prosecution in the JP court, taking account of its maximum sentencing powers. This will allow for some movement in business from the sheriff court, including cases involving offences of violence, disorder and vandalism. However, the offence category and the sentencing powers of the district court are only two out of a number of factors to be taken into account: the nature and seriousness of the offences in any case will form the basis of decisions about the appropriate prosecution forum.

As mentioned in our letter of 4 May, it is also Ministers' intention to seek to give JPs the power to disqualify people from driving, in cases other than those involving 'totting up' disqualifications. The changes to legislation are reserved and would require a section 104 order. This should allow a range of cases currently marked to the Sheriff Courts because of the possibility of disqualification to be heard in the JP courts in future.

Members will be aware that the provisions of the Bill also allow the Scottish Ministers to increase the sentencing limits of JPs by order, to a maximum level set down in the Bill (6 months imprisonment or a fine up to level 5 on the standard scale). Whilst it would not be Ministers' intention to use this power in the immediate future, as there would be a need to evaluate the range of changes made to the summary court system and their effectiveness, it does emphasise the fact that Ministers are considering an increased level of responsibility for JPs in the longer term.

I hope that this information is helpful.

Yours sincerely

NOEL REHFISCH
Criminal Proceedings etc. (Reform) (Scotland) Bill Team



Subordinate Legislation Committee

Criminal Proceedings etc. (Reform) (Scotland) Bill at Stage 1

The Committee reports to the lead Committee as follows—

Introduction

1. At its meetings on 9 May and 23 May, the Subordinate Legislation Committee considered the delegated powers provisions in the Criminal Proceedings etc. (Reform) (Scotland) Bill at Stage 1. The Committee submits this report to the Justice 1 Committee, as the lead Committee for the Bill, under Rule 9.6.2 of Standing Orders.
2. The Executive provided the Parliament with a delegated powers memorandum¹.
3. The Committee's correspondence with the Executive is reproduced in the Annex.

Delegated Powers Provisions

4. The Committee considered each of the delegated powers provisions in the Bill. The Committee approves without further comment provisions in the following: sections 4, 6(2), 7(1), 16, 21, 35(3), 40, 43 (new section 226D(10)), 43 (new section 226I(1)), 44(1), 44(2), 46(2), 46(6), 51(1), 56(1), 69, 71(1) and the schedule, paragraph 23(4).

Section 7(2) – Power to make provision in relation to use of electronic documentation, storage and communication – New Section 305A(2) of the Criminal Procedure (Scotland) Act 1995

5. The Committee noted that the terms “electronic complaint” and “electronic communication” are not defined for the purposes of subsection (2). It further noted that the definitions of the terms in subsections (8) and (9) of new section 305A of the 1995 Act will apply only in relation to that Act, but will not apply to section 7(2) because that subsection is not inserted into the 1995 Act and is a free-standing provision.

¹ [Delegated Powers Memorandum](#)

6. The Executive, in its response, agreed that the terms “electronic complaint” and “electronic signature” are not defined for the purposes of subsection (2) and is giving further consideration to whether the reference to “electronic complaint” should be explicitly linked to the definition contained in subsection (8) of new section 305A.

7. In relation to the definition of “electronic signature” the Executive explained why it considers that an order under subsection (2) could adopt the definition in the Electronic Communications Act 2000 if this definition is suitable, but could also modify the definition if necessary. Provision is already made in subsection (10) of new section 305A for the Scottish Ministers to modify the definition of “electronic signature” for the purposes of the 1995 Act. A modified definition may also be required for orders made under section 7(2). The Executive has indicated that it will consider whether the terms used in subsection (2) should refer back to the definitions in subsection (9) of section 305A.

8. The Committee welcomes the commitment by the Executive to consider these matters further and agrees to monitor the position at Stage 2. The Committee is content that the power is subject to negative procedure.

Section 35(4) – Power to increase maximum term of imprisonment to 12 months

9. The Committee asked the Executive why the generic translation in subsection (2) could not be applied to powers in Acts as well as to actual penalties.

10. In its response, the Executive indicated that it will reconsider the drafting of the provision to see whether the generic translation should be applied in this way. **The Committee welcomes the commitment given by the Executive to reconsider the drafting of this provision, and agrees to monitor the position at Stage 2.**

11. It was also not clear to the Committee that the definition of “relevant power” in subsection (6) would be sufficient to cover provisions such as the restriction on the use of powers conferred by section 2(2) of the European Communities Act 1972 contained in Schedule 2 paragraph 1(1)(d) to that Act. The Executive was asked to comment.

12. In its response, the Executive explained that, in its view, the definition of “relevant power” would be sufficient to cover such provisions. The Executive’s intention is that section 35(4) of the Bill should enable Ministers to amend the reference to “three months” in paragraph 1(1)(d) to “twelve months”.

13. The Committee is content with the Executive’s response and that the power is subject to negative procedure.

14. The Committee however also observed that the definition of “relevant penalty provision” includes “instrument” whereas the definition of “relevant power” does not. Although it is unusual, it is not unknown for powers to make delegated legislation to be conferred by instruments as well as Acts, the Committee suggests

that an amendment may be required to harmonise the definitions if only in the interests of clarity. **The Committee draws the attention of the lead Committee to this point. It agreed to write to the Executive on this point, however the lead Committee may also wish to pursue this with the Executive.**

Section 36(1) – Power to amend the maximum length of imprisonment, level of fine or amount of caution in a JP court in section 79(6) or (7) of the 1995 Act; and

Section 36(2) – Power to amend the maximum length of imprisonment, level of fine in a JP court in any enactment other than section 7(6) and 7(7) of the Criminal Procedure (Scotland) Act 1995

15. The Committee considered that the order-making power in section 36(1) and the power in section 36(2) are significant but was not clear why these powers are not on the face of the Bill. The Executive was asked to expand on its reasons for delegating these powers.

16. The Executive, in its response, set out its reasons for taking delegated powers which are intended to ensure flexibility. It adds that the period to be prescribed by any order under either power is also subject to a cap, as set out in section 36(3).

17. In the light of the Executive’s response, the Committee is now content with the proposed powers. It is also content that the powers are subject to affirmative procedure which will ensure that there is a greater degree of control over their exercise.

Section 39(1)(f) – Power to make provision for fixed penalty discounts – New Section 302(7A) of the Criminal Procedure (Scotland) Act 1995

18. The Committee asked the Executive on whether the use of the word “may” in paragraph (a) of new subsection (7A), would preclude the order requiring a discount to be applied in appropriate circumstances.

19. The Executive, in its response, accepted that the use of the word “may” could suggest that any order which makes provision for discounting will leave open some form of discretion for the prosecutor as to whether a discount should be applied or not. The Executive is giving further consideration as to whether an amendment is needed to put beyond doubt the fact that any order made under subsection (7A) could require a discount to be applied in appropriate circumstances. **The Committee welcomes the Executive’s commitment to consider an amendment and agrees to monitor the position at Stage 2. It is content that the power is subject to negative procedure.**

Section 39(2) – Power to prescribe the maximum level of compensation offer – New Section 302A(8) of the Criminal Procedure (Scotland) Act 1995

20. The Committee was content that the Executive had made a case for delegating powers in relation to prescribing the maximum level of a compensation offer. However, it considered that the amount of compensation was a sensitive

issue and questioned why an order made by Ministers under section 302A(8) of the 1995 Act was subject only to negative procedure. The Executive was asked to clarify why it had taken this approach, and why it did not consider that affirmative procedure may be more appropriate.

21. The Executive, in its response, observed that there are limitations on the use of the powers and that the amount cannot exceed level 5 on the standard scale (presently £5000).

22. It further explained that there is precedent for the power in the provisions relating to fiscal fines (Section 302 Criminal Procedure (Scotland) Act 1995) and that it supports a consistent approach to financial alternatives to prosecution.

23. The Committee is content the Executive's response and with the section as drafted.

Section 43 – Power to make further provision as to fines enforcement officers and their functions – New Section 226A(4) of the 1995 Act

24. The Committee noted that the scope of this power is very wide and that there is very little detail on the face of the Bill as to how it is to be used. The Committee asked the Executive for more detail on the proposed contents of any regulations made under the power; and asked that sample Regulations be made available to Parliament during the course of the Bill's passage.

25. The Executive supplied further information on the possible contents of regulations made under this power. The Executive explained that it recognises the importance of the provision and that this is why it has proposed affirmative procedure for the exercise of the power. Unfortunately, the Executive was not able to provide sample regulations as it intends to refine the functions, responsibilities and powers of fines enforcement officers in light of their introduction in practice. **The Committee is content with the Executive's response. It is also content that the power is subject to affirmative procedure.**

Section 43 – Power to make detailed provision regulating execution of relevant diligences by a fines enforcement officer – New Section 226F(6) of the Criminal Procedure (Scotland) Act 1995

26. The Committee was concerned about the width of this power and that it could be used to modify or extend without restriction, the types of diligence that can be used. The Executive was asked to provide further explanation of why it considers that negative procedure is appropriate; and whether it could give an indication of the types of diligence that might be included in the Regulations.

27. In its helpful response, the Executive said that it did not believe for the reasons given, that the power could be used to extend the types of diligence that can be used by fines enforcement officers to types of diligence other than arrestment of earnings and arrestment of funds standing in accounts held at any bank, building society or other financial institution. It explained that the purpose of taking the power is to allow detailed provision as to how fines enforcement officers will exercise these powers to be made in regulations. **The Committee is content**

with the Executive's response and that it has made a case for the power as drafted. It is content also that the power is subject to negative procedure.

Section 50(2) – Power to provide that a JP court is to be constituted by one JP only

28. The Committee asked the Executive why it had decided that changes to the JP bench should be contained in subordinate legislation and not on the face of the Bill. It had taken the view that these should be set out in the Bill, but commenced in stages as appropriate by a series of commencement orders, as had been the case in relation to the Title Conditions (Scotland) Bill.

29. The Executive, in its response, explained that it had not made a final decision that JP courts will be constituted by one JP only, and would like to decide whether to make this change once the impact of other changes to the JP court can be assessed. It therefore does not wish to include the provision in primary legislation, since it might not be commenced. The Executive also wishes to retain the flexibility to make this change in future if a bench of one JP is seen as being preferable to benches of more than one JP.

30. The Committee notes that the Executive has not yet made up its mind on this matter. However, it considers that the Executive should still have set out a clear statement of its policy on the face of the Bill, and if in light of experience it decided not to commence certain provisions, then it need not do so. The Committee is aware that it is not unknown for provisions in Acts never to be commenced or to be commenced after a number of years.

31. The Committee is not convinced by Executive's arguments, and is of the view that the Executive should state its policy now on whether there should be changes to the JP bench and provide for this in the Bill. It considers that this is the proper way to proceed.

32. The Committee felt strongly about this issue and agreed to write to the Executive. It draws the attention of the lead Committee to this and invites it to pursue the matter with the Executive.

33. The Committee also noted that there is no indication of how it is intended that the functions in subsection (5) will be conferred. The Committee assumed that Ministers will issue directions but asked the Executive to clarify its intentions in this regard, and on whether these functions should be conferred by way of statutory instrument.

34. In its response, the Executive explained that Ministers' ability to confer other functions upon clerks of court allows them to make practice directions. This means that the Scottish Court Service, acting on behalf of the Scottish Ministers, can set out the additional responsibilities which will form part of clerks' job descriptions, in addition to providing legal advice to the court. The Executive added that setting out these responsibilities is seen as a largely administrative process, which does not need to be subject to Parliamentary scrutiny. By contrast, the Executive indicated that the requirement that a legally qualified clerk should act as the legal adviser in each JP court (except for those presided over by a stipendiary magistrate) is seen

as being an essential element in the lay justice system, which needs to be set out in legislation.

35. The Committee is not convinced by the Executive's argument and considers that the conferral of functions upon clerks of court under subsection 5(b) should be by way of statutory instrument subject to negative procedure.

36. The Committee draws the attention of the lead Committee to the Executive's response. The Committee's recommends that the conferral of functions in subsection (5)(b) should be by way of statutory instrument subject to negative procedure.

Section 51(4) – Power to repeal provisions of the District Courts (Scotland) Act 1975

Section 51(5) – Power to apply enactments relating to JP courts to remaining district courts

Section 51(6) – Power to modify enactments for the purpose of the continued operation of remaining district courts; and

Section 51(7) – Power to make provision relating to the jurisdiction and powers of remaining district courts

37. The Committee noted that the powers in these subsections are all subject to negative procedure. However, in the absence of any restrictions on the use of these powers, and in light of the fact that they will be used to modify the application of primary legislation, the Committee asked the Executive if it could restrict these powers. If not, the Committee considered that affirmative procedure would be more appropriate in each case.

38. In its response, the Executive states that the regulation-making powers in these sections are provided to ensure that an appropriate statutory framework can be maintained for the operation of both JP courts and District Courts during the transitional period.

39. The powers in each of these sections are directly associated with facilitating the disestablishment of all district courts, with the effect that, at the end of the transitional period, the district courts cease to exist. The Executive has undertaken to give further consideration to whether the limited purpose of the order-making powers require to be set out in the Bill.

40. In support of the negative procedure, the Executive explains that the powers are likely to be exercised a number of times and that the relevant instruments are likely to be similar in content, which suggests that the negative procedure provides the right level of scrutiny.

41. The Committee is content with the provisions which it accepts as necessary. It welcomes the Executive's commitment to consider whether the limited purpose of the order-making powers require to be set out in the Bill, and will monitor the position at Stage 2.

Section 54(5) – Power to regulate procedure and consultation to be followed in certain appointment processes for Justices of the Peace

42. It was not clear to the Committee from the Delegated Powers Memorandum whether Ministers intend to exercise the power conferred by this section, and it noted that there is no obligation upon Ministers to do so. The Committee asked the Executive to clarify its intentions in this regard.

43. The Executive, in its response, kindly provided a copy of the draft Order for information which is attached in the Annex; and explained that it *does* intend to exercise the power conferred by this section.

44. The Committee also asked the Executive why the power is subject to negative and not affirmative procedure as is the case with the existing power in the District Courts (Scotland) Act 1975 as inserted by the Bail, Judicial Appointments etc. (Scotland) Act 2000.

45. In its response, the Executive explained that the power would be used in relation to technical issues involving procedure and consultation. It did however agree to give further consideration to the procedure.

46. The Committee noted however, that if it was to recommend that the power in section 54 should be subject to affirmative procedure, then unless the procedure is also changed for orders under section 56, it would not be possible to combine the two powers in the same instrument. It is not good practice to combine powers subject to two different procedures in the same instrument.

47. The Committee was content that section 56 powers did not require to be subject to affirmative procedure, so if section 54 powers were to be subject to affirmative procedure, either the procedure for section 56 would have to be amended, or the powers exercised separately. The Committee was convinced however of the utility of combining the powers and was alive to the practical difficulties if one instrument was confirmed by Parliament, but not the other. After consideration, it accepted that the balance of convenience favoured negative procedure for section 54.

48. The Committee agreed on balance, but with some reluctance, that the power in section 54 should be subject to negative procedure.

49. The Committee also noted that while Ministers are bound to comply with the provisions of the Order, and there was no express power to provide exemptions, there would appear to be nothing in the power which would prevent it from being drafted so as in effect provide for exemptions from its provisions. The Executive was asked to clarify its drafting of the power.

50. The Executive observed that the current draft Order does not contain provisions for exemptions from its provisions. Future orders, or a revised version of the current Order, could however include such exemptions. The Executive considers that it is reasonable that any order could include exemptions.

51. **In the light of the further explanation provided by the Executive, the Committee is content with the power as drafted.**

Section 54(7)(a) – Power to specify the date on which the current appointment of justices of the peace ceases to have effect

52. The Committee noted that this provision allows Ministers to specify the date on which JPs' current appointments will cease and that the precise date on which JPs' appointments will cease, has yet to be determined. The Committee asked the Executive why it has not included a date in the Bill.

53. The Executive, in its response, expanded on its reasons why setting a specific date for the new appointments at this stage would be inappropriate; and why in its view the date should be set by order, rather than being included on the face of the Bill. **The Committee is content with the Executive's response and that the power is subject to negative procedure.**

Section 55 - Conditions of office

54. The Committee noted that subsections (4) and (5) empower Ministers to make a scheme for the payment of allowances to JPs, and that the scheme will not take the form of a statutory instrument.

55. The Committee considered it odd that a scheme of this nature should be determined by Ministers. It also noted that section 17 of the Criminal Procedure (Scotland) Act 1975 (the section it will replace) contains a similar provision but in that case the power is exercisable by way of statutory instrument subject to negative procedure. The Committee asked the Executive why it has chosen not to provide for this power also to be exercised in the same form.

56. The Executive, in its response, takes the view that in this case the balance is best struck through allowing Ministers to determine the scheme for the payment of allowances to JPs. It added that alterations to any such scheme would often be relatively minor – perhaps to take account of inflation. The proposed approach would also mean that rates of allowances could be increased without the requirement for Parliamentary approval.

57. **The Committee accepts the Executive's position and agrees that there is no need for the scheme to be made by way of statutory instrument and subject to Parliamentary control.**

Section 58(6) – Power to make provision for tribunals for the removal of Justices of the Peace

58. The Committee noted that this power is subject to negative procedure but that it replaces a power in the 1975 Act that is subject to affirmative procedure. The Committee's initial view was that in this case, the power should be subject to affirmative procedure. The Executive was asked to provide further justification of its choice of procedure.

59. In its response, the Executive takes the view that the provisions included in the order would be of a largely technical nature. It has however noted the

Committee's comments, and has agreed that it will give further consideration to this point. **The Committee welcomes the Executive's commitment to give further consideration to the procedure to be adopted, and will monitor the position at Stage 2.**

60. The Committee also asked the Executive whether it is proposed to list the Tribunal in Schedule 1 to the Tribunals and Inquiries Act so that any order under the power will have the benefit of input from the Scottish Committee of the Council on Tribunals.

61. In its response, the Executive indicated that Tribunals constituted under section 9A of the 1975 Act are not currently included in Schedule 1 to the Tribunals and Inquiries Act 1992, and that in most respects the arrangements for tribunals under this Bill will be very similar to those for tribunals established under that Act. The Executive did agree however to consider further the question of whether these tribunals should be included in Schedule 1 to the 1992 Act and undertook to consult the Scottish Committee of the Council on Tribunals.

62. The Committee welcomes the Executive's commitment to consider this point further and to consult with the Scottish Committee on the Council on Tribunals. It agreed monitor the position at Stage 2.

Section 61(9) – Power to regulate procedure/consultation to be followed in making appointments of stipendiary magistrates

63. The Committee noted that while Ministers are bound to comply with the order once it is made, there is nothing in the Bill which requires them to make an order in the first place. The Committee was uncertain therefore what the effect would be of the requirement on Ministers to comply with the provisions of such an order, and asked the Executive to clarify this.

64. The Executive, in its response, confirmed that Ministers intend to use the order-making power. As is the case with the order-making power at section 54(5), an order drafted under section 61(9) could include exemptions from its own provisions. The Executive considered it to be reasonable that such an order could include exemptions. **The Committee is content with the Executive's response in this regard.**

65. The Committee also questioned the power under section 54(5) on the detail of the appointments process in relation to stipendiary magistrates at section 61(9) and (10). It noted that the 1975 Act (in relation to JPs in section 9(8A)) prescribes affirmative procedure, and yet the current Bill proposes only negative procedure. The Executive was asked to clarify why it proposes negative procedure in this instance.

66. In its response, the Executive indicated that there are no precisely equivalent powers in the 1975 Act to those set out in section 61(9) and (10), since under that Act stipendiary magistrates were appointed by local authorities. It does recognise however that the provisions relating to justices of the peace in section 9(8A) of the 1975 Act are broadly comparable to those relating to stipendiary magistrates at section 61(9) and (10).

67. As with section 54(5) of the Bill, the Executive took the view that this power would be used to set out some quite technical issues relating to procedure and consultation. In addition, unlike the provision in section 9(8A) of the 1975 Act, key principles which may be followed in appointing stipendiary magistrates – such as the involvement of lay people – are set out in the Bill. The Executive acknowledged the importance of judicial appointments procedures generally, however, and agreed to give further consideration to this issue.

68. The Committee welcomes the Executive’s commitment to give further consideration to the procedure and agreed to monitor the position at Stage 2.

Section 61(12) – power to specify the date on which the current appointment of stipendiary magistrates ceases to have effect

69. The Committee asked the Executive to clarify whether the day mentioned in paragraph (b) of subsection (12) is the same day that is mentioned in paragraph (a). The words “that purpose” in paragraph (b) were considered confusing and the Committee was unsure whether this is the purpose of paragraph (b) or the purpose of paragraph (a).

70. The Executive, in its response, explained that the words “that purpose” in paragraph (b) refer back to the reference to “purpose” in paragraph (a). The day mentioned in paragraph (b) is therefore the same day as that mentioned in paragraph (a). The Executive agreed to consider this point further, and bring forward an amendment if clarification of the provision is considered necessary. **Although this is a relatively minor drafting point, the Committee welcomed the Executive’s commitment to consider it further and agreed to monitor the position at Stage 2.**

ANNEX**CORRESPONDENCE BETWEEN THE SUBORDINATE LEGISLATION COMMITTEE AND THE SCOTTISH EXECUTIVE**

The questions raised by the Committee are repeated below along with the Executive's comments in response. For the avoidance of doubt, all references to "the 1995 Act" are to the Criminal Procedure (Scotland) Act 1995 (c.46) and all references to "the 1975 Act" are to the District Courts (Scotland) Act 1975 (c.20).

Section 7(2) – Power to make provision In relation to use of electronic documentation, storage and communication – New Section 305a(2) of the Criminal Procedure (Scotland) Act 1995

The Committee notes that the terms "electronic complaint" and "electronic communication" are not defined for the purposes of subsection (2). The Committee notes that the definitions of the terms in subsections (8) and (9) of new section 305A of the 1995 Act will apply only in relation to that Act, but will not apply to section 7(2) because that subsection is not inserted into the 1995 Act and is a free-standing provision. The Committee does not believe that section 70(2) addresses this problem as it refers to section 307 of the 1995 Act whereas in terms in question are defined in section 305A. The Executive is asked to comment.

Executive response

The Executive agrees that the terms "electronic complaint" and "electronic signature" are not defined for the purposes of subsection (2). Further consideration will be given to whether the reference to "electronic complaint" should be explicitly linked to the definition contained in subsection (8) of new section 305A.

In relation to the definition of "electronic signature" the Executive considers that an order under subsection (2) could adopt the definition in the Electronic Communications Act 2000 if this definition is suitable, but could also modify the definition if necessary. Provision is already made in subsection (10) of new section 305A for the Scottish Ministers to modify the definition of "electronic signature" for the purposes of the 1995 Act. A modified definition may also be required for orders made under section 7(2). Nevertheless, the Executive will consider whether the terms used in subsection (2) should refer back to the definitions in subsection (9) of section 305A.

Section 35(4) – Power to increase maximum term of imprisonment to 12 months

The Committee raises two points on this power. It is not clear to the Committee why the generic translation in subsection (2) cannot be applied to powers in Acts as well as to actual penalties. This might avoid problems that would arise should a power be overlooked. Amending instruments for this type of purpose can often be

overlooked, particularly as a result of the passage of time. The Executive is asked to comment.

Executive response

The Executive will give further consideration to whether the generic translation in subsection (2) should be applied to powers in Acts as well as to actual penalties.

It was also not clear to the Committee that the definition of “relevant power” in subsection (6) would be sufficient to cover provisions such as the restriction on the use of powers conferred by section 2(2) of the European Communities Act 1972 contained in Schedule 2 paragraph 1(1)(d) to that Act. The Executive is asked to comment.

Executive response

The Executive considers that the definition of “relevant power” would be sufficient to cover the power to legislate contained in section 2(2) of the European Communities Act, as restricted by paragraph 1(1)(d) of Schedule 2 to that Act. The Executive’s intention is that section 35(4) of the Bill should enable Ministers to amend the reference to “three months” in paragraph 1(1)(d) to “twelve months”. If the Parliament has ongoing concerns about the definition of “relevant power” then the Executive would welcome further clarification as to the nature of these concerns.

Section 36(1) – Power to amend the maximum length of imprisonment, level of fine or amount of caution in a JP court in section 796) or (7) of the 1995 Act; and

Section 36(2) – Power to amend the maximum length of imprisonment, level of fine in a JP court in any enactment other than s7(6) and 7(7) of the Criminal Procedure (Scotland) Act 1995

The Committee considers that the order-making power in section 36(1) and the power in section 36(2) are significant and is not clear why these powers are not on the face of the Bill. The Executive is asked to expand on its thinking for delegating these powers.

Executive response

Under section 36 of the Bill, Ministers may by order amend the sentencing powers of JPs. However, any order is subject to a cap, as set out in section 36(3). This ensures that there is some flexibility as to the actual sentencing level which Ministers decide upon. For example, Ministers could increase the custodial sentencing powers of the JP court to 3, 4, 5 or 6 months.

If the maximum sentencing powers of the JP court were to be included in primary legislation, this flexibility would not exist. Instead, Ministers would

have to take a decision now on what the appropriate sentencing limits of JP courts in the future might be, and would then have to decide at a subsequent date whether to commence that section of the Bill.

The Executive holds the view that it would be preferable for Ministers to retain flexibility on the precise level at which JPs' sentencing powers are set at in the future. This will allow future decisions to take into account issues such as the impact of training and appraisal in the JP courts, and also the overall levels of summary court business. For this reason, the powers are delegated rather than included in primary legislation, but are made subject to the affirmative procedure to ensure that appropriate scrutiny is afforded to any order introduced under this section. In considering this section of the Bill itself, the Parliament will no doubt give consideration as to whether a sentencing maximum of up to 6 months would be appropriate in the JP courts in future – that upper maximum limit appears in section 36(3) of the Bill.

Section 39(1)(F) – Power to make provision for fixed penalty discounts – New Section 302(7a) of the Criminal Procedure (Scotland) Act 1995

The Committee questions whether the use of the word “may” in paragraph (a) of new subsection (7A), would preclude the order requiring a discount to be applied in appropriate circumstances. The Executive is asked to clarify the position.

Executive response

The purpose of a discount scheme, if applied, would be to increase the timeous payment rate for fixed penalties. The Executive accepts that there could be an argument that the use of the word “may” in paragraph (a) of new subsection (7A) could suggest that any order which makes provision for discounting will leave open some form of discretion for the prosecutor as to whether a discount should be applied or not. Further consideration will be given to whether an amendment is needed to put beyond doubt the fact that any order made under subsection (7A) could require a discount to be applied in appropriate circumstances.

Section 39(2) – Power to prescribe the maximum level of compensation offer – New Section 302A(8) of The Criminal Procedure (Scotland) Act 1995

The Committee is content that the Executive has made a case for delegating powers in relation to prescribing the maximum level of a compensation offer. However, the amount of compensation is a sensitive issue and the Committee questions why an order made by Ministers under section 302A(8) of the 1995 Act is subject only to negative procedure. The Executive is asked to clarify why it has taken this approach, and why it did not consider that affirmative procedure may be more appropriate.

Executive response

Although the maximum level of a compensation offer is to be prescribed by Ministers, the amount cannot exceed level 5 on the standard scale (presently £5000).

The compensation offer is a new alternative to prosecution, but one which will be offered by prosecutors, and subsequently enforced, in much the same way as the existing alternative to prosecution (the “fiscal fine”). Existing sections 302(7) and (8) of the 1995 Act provides for a scale of fiscal fines to be set by Ministers by order, subject to negative procedure, with a maximum limit of level 1 on the standard scale. Presently the maximum fiscal fine which can be offered is £100, although level 1 is £200. The Bill will amend the maximum limit to level 2 (£500).

There is therefore precedent for the provision at section 302A(8) – an overall maximum fixed by statute, with the actual maximum prescribed from time to time by order subject to negative procedure. It is not understood that in respect of the fiscal fine this has proved contentious or troublesome. It is also submitted that there is much to be said for a consistent approach to financial alternatives to prosecution.

Section 43 – Power to make further provision as to fines enforcement officers and their functions – New Section 303za(14) of the Criminal Procedure (Scotland) Act 1995

The Committee notes that the scope of this power is very wide and that there is very little detail on the face of the Bill as to how the power is to be used. The Committee asks the Executive for more detail on the proposed contents of any regulations made under the power; and asks that sample Regulations be made available to Parliament during the course of the Bill’s passage.

Executive response

New section 303ZA(14) of the 1995 Act relates to the power to prescribe the kinds of activity that may be performed as part of a work order. The question asked appears to relate to the power in new section 226A(4), inserted by section 43 of the Bill.

The power allows Ministers, by regulations made under the affirmative procedure, to make further provision as to fines enforcement officers (FEOs) and their functions. The principle of establishing FEOs is contained in the Bill itself, along with a framework for their operation and powers which, it is intended, will provide them with the range of powers and responsibilities necessary to conduct that role effectively. The regulation making power is required to ensure that any practical difficulties relating to the operation of the new statutory scheme for FEOs can be resolved (whilst still being subject to Parliamentary consideration) and to ensure that the range of functions and responsibilities that the FEO has remain up to date and appropriate in future.

Regulations made under this power could, for example, provide more detail relating to the procedure to be followed in respect of the exercise of any of the powers to be conferred upon FEOs in new sections 226C to 226G of the 1995 Act. They could also be used to confer new duties and powers on the FEO if the view is taken in future that further powers would achieve the policy intention of maximising fine collection whilst minimising the use of prison as a punishment for default. It is for this reason that the affirmative procedure has been selected for this power, as it is recognised that any proposed new duties or powers should be considered by the Parliament.

It will not be possible to provide sample regulations to the Parliament during the course of the Bill's passage in respect of this power as it is intended to ensure that the functions, responsibilities and powers of FEOs can be refined and developed in the light of their introduction in practice. The provisions in new sections 226B to 226H of the 1995 Act (to be inserted by section 43 of the Bill) seek to set out in full the extent of the powers and functions that FEOs will have when initially introduced. But it may prove desirable, or even necessary, to make further provision in respect of FEOs in the light of reviewing their initial phase of operation. The content of any regulations made under this power would, therefore, be the product of experience and evaluation.

Section 43 – Power to make detailed provision regulating execution of relevant diligences by a fines enforcement officer – New Section 226f(6) of the Criminal Procedure (Scotland) Act 1995

The Committee notes that the power is wide and can modify or extend without restriction, the types of diligence that can be used. The Committee notes that the Executive is unable to give any indication of the type of provision that might be included in the Regulations. The Committee considers that these Regulations could contain a degree of detail that would be unsuitable for primary legislation. The Executive is asked to comment; to provide further explanation of why it considers that negative procedure is appropriate; and whether it can give the Committee an indication of the types of diligence that might be included in the Regulations.

Executive response

New section 226F(3) of the 1995 Act (as inserted by section 43 of the Bill) makes clear that the types of diligence an FEO will be entitled to execute will be restricted to arrestment of earnings and arrestment of funds standing in accounts held at any bank, building society or other financial institution. It is submitted therefore that the power in new section 226F(6) could not be used to extend the types of diligence that can be used by the FEO.

The purpose of taking the power in new section 226F(6) is to allow detailed provision as to how FEOs will exercise these powers to be made in regulations. The Committee will be aware that the law of bankruptcy and diligence is undergoing a comprehensive review at present, by means of the

Bankruptcy and Diligence Bill. By taking the power to make detailed regulations in respect of how FEOs will exercise these powers the Executive can ensure that the procedures to be followed will be fully in accordance with the provisions of the Bankruptcy and Diligence Bill once it is passed by the Parliament. Further specification of the matters that may be contained in the regulations is set out in section 226F(7). Given that the power extends only to making provision in relation to the two types of diligence set out in new section 226F(3) the Executive submits that the negative procedure is appropriate.

Section 50(2) – Power to provide that a JP Court is to be constituted by one JP only

The Committee questions why the Executive has decided that changes to the JP bench should be contained in subordinate legislation and not on the face of the Bill. Given that the policy intention is that change will happen over time in every area, the Committee wonders whether this should be set out on the face of the Bill. It takes the view that when the Executive is ready, and new ways of working are in place, then the provision to commence could be brought into force at that time, and that this might be preferable to leaving this to be rolled out through subordinate legislation. In other words the change should be set out in the Bill, but commenced in stages by a series of commencement orders as was done for the Title Conditions (Scotland) Bill. The Executive is asked to comment.

Executive response

The Executive has not made a final decision that JP courts definitely will be constituted by one JP only. The Executive would like to decide whether to make this change once the impact of other changes to the JP court can be assessed. For this reason, the Executive does not wish to include the provision in primary legislation, since it might not be commenced. The Executive does however wish to retain the flexibility to make this change in future if a bench of one JP is seen as being preferable to benches of more than one JP – for example for reasons of ensuring consistency. Any such change would be made by an order subject to affirmative procedure.

The Committee also notes that there is no indication of how it is intended that the functions in subsection (5) will be conferred. The Committee assumes that Ministers will issue directions but questions whether these functions should be conferred by way of statutory instrument. The Executive is asked to clarify its intentions in this regard.

Executive response

Ministers’ ability to confer other functions upon clerks of court allows them to make practice directions. This means that the Scottish Court Service, acting on behalf of the Scottish Ministers, can set out the additional responsibilities which will form part of clerks’ job descriptions, in addition to providing legal advice to the court. Setting out these responsibilities is seen as a largely administrative process, which does not need to be subject to

Parliamentary scrutiny. By contrast, the requirement that a legally qualified clerk should act as the legal adviser in each JP court (except for those presided over by a stipendiary magistrate) is seen as being an essential element in the lay justice system, which needs to be set out in legislation.

Section 51(4) – Power to repeal provisions of the District Courts (Scotland) Act 1975

The Committee notes that the delegated powers in this provision are very wide and largely consequential on other provisions in the Bill. However, the Committee considers that the policy might not be wholly covered by the ancillary powers conferred by section 69 and that an express provision is necessary.

The Committee considers that the power could be subject to negative procedure if the Bill was amended to make clearer the purpose of the provision which is described in the DPM. If the Executive is not minded to make the purpose clear in this way, the Committee considers that affirmative procedure would be more appropriate. The Executive is asked to comment.

Section 51(5) – Power to apply enactments relating to JP Courts to remaining District Courts

The Committee notes that this power is subject to negative procedure. However, in the absence of any restrictions on the use of the powers in the Bill, and in light of the fact that powers will be used to modify the application of primary legislation, the Committee asks whether the Executive could restrict the powers in the Bill. If not, the Committee considers that affirmative procedure would be more appropriate. The Executive is asked to comment.

Section 51(6) – Power to modify enactments for the purpose of the continued operation of remaining District Courts; and

Section 51(7) – Power to make provision relating to the jurisdiction and powers of remaining District Courts

The Committee notes the importance of the powers in these subsections, and raises the same point in relation to both as it does on the power in subsection (5). The Executive is asked to comment.

Executive response

The regulation making powers in sections 51(4) to 51(7) are provided to ensure that an appropriate statutory framework can be maintained for the operation of both JP courts and District Courts during the transitional period when some District Courts will have been replaced by JP Courts in those Sheriffdoms that have been subject to court unification, but others will continue to operate. It is the Executive's intention to repeal the District Courts (Scotland) Act 1975 in its entirety once the court unification process is complete – it will be replaced by the provisions of this Bill. However, during the transitional period it will be necessary for the 1975 Act to

continue to apply in the areas where unification has not taken place. It may also prove necessary to make changes to the 1975 or 1995 Acts in order to ensure consistent provision of court services across the mixed economy of district and JP courts that will exist as the transition is under way.

These provisions will be entirely transitional in nature and will cease to have effect at such point as court unification is completed and the organisational and procedural arrangements are dictated in full by the new provisions introduced in this Bill and under the 1995 Act more generally. As such these powers are directly associated with facilitating the disestablishment of all district courts, with the effect that, at the end of the transitional period, the district courts (taken as a whole) cease to exist (see section 51(2) of the Bill). The Executive will, however, give further consideration to whether the limited purpose of the order making powers that appear in this provision require to be set out in the Bill.

It should be noted that, as the process of court unification will be phased in across Scotland on a Sheriffdom by Sheriffdom basis it is likely that the powers conferred under sections 51(4) to (7) will be used on a number of occasions – possibly making identical provision in respect of a different area as the process of phasing progresses. In order to make best use of Parliamentary time it is submitted that the negative procedure would be appropriate in these circumstances.

Section 54(5) – Power to regulate procedure and consultation to be followed in certain appointment processes for Justices of the Peace

It is not clear from the DPM whether Ministers intend to exercise the power conferred by this section, and the Committee notes that there is no obligation upon them to do so. The Committee seeks clarification of the Executive's intentions in this respect.

Executive response

The Executive does intend to exercise the power conferred by this section. A draft order has been sent to the Justice 1 Committee, and is attached with this response.

The Committee notes that while Ministers are bound to comply with the provisions of the order, there would appear to be nothing in the power which would prevent the order from containing its own provisions for exemptions from its provisions. The Executive is asked to clarify its drafting of the power.

Executive response

The Committee will note that the current draft order does not contain provisions for exemptions from its provisions. Future orders, or a revised version of the current order, could however include such exemptions. The Executive thinks that it is reasonable that any order could include exemptions. For example, it might make sense to waive the requirement to

publicly advertise for lay vacancies to Justice of the Peace Advisory Committees, if public advertisements had been placed for lay vacancies to the same Committee less than three months beforehand, and an adequate shortlist of candidates had been identified from that previous campaign.

The Committee also notes that the existing power in section 9(8A) of the District Courts (Scotland) Act 1975, as inserted by the Bail, Judicial Appointments etc. (Scotland) Act 2000 is exercisable by affirmative rather than negative instrument. The Committee therefore asks the Executive to explain why the power in section 54(5) of the Bill is not also subject to affirmative procedure.

Executive response

The Executive took the view that this power would be used to set out some quite technical issues relating to procedure and consultation. For example, the Bill itself makes it clear at section 54(6) that lay people may be involved in the recruitment of justices of the peace (no equivalent principle is set out in the comparable provision under section 9(8A) of the 1975 Act) and the Committee will note that the draft of the Order to be made under this power sets out in more detail the nature of that lay involvement. However, the Executive acknowledges the importance of judicial appointments procedures generally and will give further consideration to this issue.

Section 54(7)(a) – Power to specify the date on which the current appointment of Justices of the Peace ceases to have effect

The Committee notes that this provision allows Ministers to specify the date on which JPs' current appointments will cease and that the precise date on which JPs' appointments will cease, has yet to be determined.

In order to allow the Committee to consider whether negative procedure is appropriate, the Committee asks the Executive why it has not included a date in the Bill.

Executive response

Under section 55(2) of the Bill, the appointment of justices of the peace will be made subject to conditions relating to training, appraisal, and JPs' availability for court business. It will therefore be necessary, when JPs' new appointments begin, for the basis of a programme of training and appraisal to have been established, and for sheriffs principal to have been able to make an accurate assessment of an appropriate minimum sitting requirement for JPs within the sheriffdom. It was therefore considered that setting a specific date for the new appointments at this stage would be inappropriate. This is the reason why the date can be set by order, rather than being included on the face of the Bill.

Section 55 - Conditions of Office

Although not covered in the DPM, the Committee notes that subsections (4) and (5) empower Ministers to make a scheme for the payment of allowances to JPs. This scheme will not take the form of a statutory instrument.

The Committee considers it odd that a scheme of this nature should be determined by Ministers. It also noted that section 17 of the 1975 Act contains a similar provision but in that case the power (except in so far as relating to rates of allowances) is exercisable by way of statutory instrument subject to negative procedure. The Committee asks the Executive why it has chosen not to provide for this power also to be exercised in the form of a negative statutory instrument.

Executive response

There is always a balance to be struck in administering such schemes between the need for due scrutiny, and the desirability of administrative simplicity. The Executive takes the view that in this case that balance is best struck through allowing Ministers to determine the scheme for the payment of allowances to JPs. Alterations to any such scheme would often be relatively minor – perhaps to take account of inflation. The proposed approach means that rates of allowances – for example mileage or loss of earnings allowances – could if necessary be increased without the requirement for Parliamentary approval.

Section 58(6) – Power to make provision for Tribunals for the removal of Justices of the Peace

The Committee notes that the power is subject to negative procedure but that it replaces a power in the 1975 Act that is subject to affirmative procedure. The Committee's initial view is that in this case, the power should be subject to affirmative procedure. The Executive is asked to provide further justification of its choice of procedure.

Executive response

The Executive's view is that the provisions included in the order would be of a largely technical nature – the Bill itself sets out such matters as the composition of the tribunal. The Executive has however noted the Committee's initial view, and will give further consideration to this point.

The Committee also seeks clarification of the Executive's intentions with regard to whether it is proposed to list the Tribunal in Schedule 1 to the Tribunals and Inquiries Act so that any order under the power will have the benefit of input from the Scottish Committee of the Council on Tribunals. The Executive is asked for clarification.

Executive response

Tribunals constituted under section 9A of the 1975 Act are not currently included in Schedule 1 of the Tribunals and Inquiries Act 1992 (the 1992 Act). In most respects, the arrangements for tribunals under this Bill will be very similar to those for tribunals established under the 1975 Act. The Executive will however consider further the question of whether these tribunals should be included in Schedule 1 of the 1992 Act. It will consult the Scottish Committee of the Council on Tribunals on this issue.

Section 61(9) – Power to regulate procedure/consultation to be followed in making appointments of stipendiary magistrates

The Committee was puzzled by the drafting of this provision. While Ministers are bound to comply with the order once it is made, the Committee notes that there is nothing in the Bill which requires them to make an order in the first place. Also, the power appears to be sufficiently wide to allow for the inclusion of exemptions from its provisions. The Committee was uncertain therefore what the effect would be of the requirement on Ministers to comply with the provisions of such an order. The Executive is asked to clarify the effect of the requirement on Ministers.

Executive response

Ministers intend to use the order-making power in section 61(9). As is the case with the order-making power at section 54(5) an order drafted under section 61(9) could include exemptions from its own provisions. As already mentioned in respect of the power under section 54(5) the Executive considers it to be reasonable that such an order could include exemptions.

The Committee also questions the detail of the appointments process in relation to JPs. It notes that the equivalent power in the 1975 Act (in section 9(8A)) prescribes affirmative procedure, and yet the current Bill proposes only negative procedure. The Executive is asked to clarify why it proposes negative procedure in this instance.

Executive response

It is assumed that this question refers to the provisions relating to stipendiary magistrates at section 61(9) and (10), since similar questions relating to JPs are set out in paragraph 19 of the Committee's letter. There are no precisely equivalent powers to those set out in section 61(9) and (10) in the 1975 Act, since under that Act stipendiary magistrates were appointed by local authorities (see section 5 of the 1975 Act). We do however recognise that the provisions relating to justices of the peace in section 9(8A) of the 1975 Act are broadly comparable to those relating to stipendiary magistrates at section 61(9) and (10) of the Bill.

As with section 54(5) of the Bill, the Executive took the view that this power would be used to set out some quite technical issues relating to procedure and consultation. In addition, unlike the provision in section 9(8A) of the

1975 Act, key principles which may be followed in appointing stipendiary magistrates – such as the involvement of lay people – are set out in the Bill. The Executive acknowledges the importance of judicial appointments procedures generally, however, and will give further consideration to this issue.

Section 61(12) – Power to specify the date on which the current appointment of stipendiary magistrates ceases to have effect

The Committee was unclear whether the day mentioned in paragraph (b) of subsection (12) is the same day that is mentioned in paragraph (a). The words “that purpose” in paragraph (b) were considered confusing and the Committee was unsure whether this is the purpose of paragraph (b) or the purpose of paragraph (a). The Executive is asked for clarification.

Executive response

The words “that purpose” in paragraph (b) refer back to the reference to “purpose” in paragraph (a). The day mentioned in paragraph (b) is therefore the same day as that mentioned in paragraph (a). The Executive will however consider this point further, and bring forward an amendment if clarification of the provision is considered necessary.

I hope these comments are helpful in assisting the Committee’s scrutiny of the Delegated Powers Memorandum. Please do not hesitate to get back in touch if you have any further queries.

SCOTTISH STATUTORY INSTRUMENTS

2007 No.

CRIMINAL LAW

The Justices of the Peace (Scotland) Order 2007

<i>Made</i> - - - -	2007
<i>Laid before the Scottish Parliament</i> - -	2007
<i>Coming into force</i> - -	2007

The Scottish Ministers, in exercise of the powers conferred by sections 54(5) and (6), 56 and 68(2) of the Criminal Proceedings etc. (Reform) (Scotland) Act 2006 and all other powers enabling them in that behalf, and with the approval of the Lord President, hereby make the following Order:

Citation and commencement

1. This Order may be cited as the Justices of the Peace (Scotland) Order 2007 and shall come into force on 2007.

Interpretation

2. In this Order—

“the Act” means the Criminal Proceedings etc. (Reform) (Scotland) Act 2006;

“appointed member” means a member of a JPAC appointed by the sheriff principal;

“the Board” means the body known as the Judicial Appointments Board for Scotland which provides advice to the Scottish Ministers concerning judicial appointments;

“JAC” means a Justices’ Appraisal Committee established in accordance with this Order;

“JPAC” means a Justice of the Peace Advisory Committee established in accordance with this Order;

“JTC” means a Justices’ Training Committee established in accordance with this Order.

Appointment of JPs

3.—(1) Subject to paragraph (2), the Scottish Ministers may appoint a person as a JP for a sheriffdom only if that person has been recommended for appointment by the JPAC for that sheriffdom.

(2) Paragraph (1) does not apply to—

- (a) an appointment under section 54(7)(b) of the Act; or
- (b) a reappointment under section 57(2) of the Act.

(3) In making decisions as to which persons to recommend for appointment as JPs, a JPAC—

- (a) shall act in accordance with procedures approved by the Board;
- (b) may have regard to recommendations submitted to it by other persons.

(4) A JPAC may not recommend a person for appointment as a JP unless that person has undertaken a course of training approved for the purposes of this paragraph by the Lord President.

Formation of a JPAC

4.—(1) There shall be a JPAC for each sheriffdom.

(2) The sheriff principal of the sheriffdom shall be the convener of that sheriffdom’s JPAC and shall appoint the other members of it.

Appointments to JPAC

5.—(1) The sheriff principal shall from time to time make appointments so that, in addition to the sheriff principal, there are no less than seven, and no more than ten, members of the JPAC.

(2) In making appointments under paragraph (1), the sheriff principal shall ensure that—

- (a) the number of appointed members of the JPAC who are JPs is equal to, or greater than, the number of such members who are not JPs; and
- (b) at least 3 appointed members of the JPAC are persons who are not—
 - (i) a JP;
 - (ii) the holder of any other judicial office;
 - (iii) a solicitor; or
 - (iv) an advocate.

(3) The sheriff principal may not appoint a sheriff to be a member of the JPAC whilst another sheriff is such a member.

(4) No person may be appointed as a member of a JPAC if that person is—

- (a) a Member of Parliament;
- (b) a Member of the Scottish Parliament; or
- (c) a local authority councillor,

and a person shall cease to be a member of a JPAC on becoming a person described in sub-paragraph (a), (b) or (c).

JPAC – terms of appointment

6.—(1) Subject to paragraph (2), every appointed member of a JPAC shall be appointed for a term of 5 years and, on the expiry of that term, may be re-appointed for one further term of 5 years only.

(2) An appointed member of a JPAC shall cease to act as such on attaining 70 years of age.

Appointments to JPAC – procedure

7.—(1) No person may be appointed as a member of a JPAC without having been interviewed by a panel comprising—

- (a) the convener of that JPAC, or a sheriff having jurisdiction in the relevant area nominated by the convener; and
- (b) two JPs for the relevant area, each of whom has been a JP for 5 years.

(2) In sub-paragraphs (a) and (b) of paragraph (1), the “relevant area” is the sheriffdom in respect of which the JPAC is formed except that, in the case of an interview under paragraph (1) held prior to [], the “relevant area” in sub-paragraph (b) of that paragraph is a commission area any part of which falls within that sheriffdom.

(3) In making appointments to the JPAC, the sheriff principal—

- (a) shall bring the existence of a vacancy to the attention of—
 - (i) all JPs appointed for the sheriffdom; or

- (ii) in the case of a vacancy arising before [], all JPs appointed for a commission area any part of which falls within the sheriffdom, if the vacancy is one which the sheriff principal intends should be filled by a JP; and
- (b) shall arrange for the existence of a vacancy to be advertised in a newspaper circulating in the sheriffdom if the vacancy is one which the sheriff principal intends should be filled by a person who is not the holder of a judicial office.

Formation of a JTC

- 8.—(1) There shall be a JTC for each sheriffdom.
- (2) The members of a JTC shall be—
- (a) the members of the JAC for the sheriffdom in question;
 - (b) a sheriff having jurisdiction in the sheriffdom nominated by the sheriff principal of that sheriffdom;
 - (c) a person nominated by the Scottish Ministers who is—
 - (i) under section 50 of the Act the clerk of a JP court within the sheriffdom; or
 - (ii) so long as that section is not in force in the sheriffdom, the clerk of a district court within that sheriffdom under section 7 of the District Courts (Scotland) Act 1975.
- (3) The person referred to in sub-paragraph (c) of paragraph (2) is to act as legal adviser to the JTC.
- (4) In respect of each JTC, the Scottish Ministers are to appoint a person who will be entitled to attend meetings of that JTC but will not be a member of it.

Functions of a JTC

- 9.—(1) The JTC for a sheriffdom shall—
- (a) consider the training needs of the JPs in that sheriffdom; and
 - (b) no later than the end of February each year, provide to the Lord President and the sheriff principal of that sheriffdom a training plan for the period of the following April to March.
- (2) The training plan shall include information as to—
- (a) the proposed types of training;
 - (b) the number of JPs who are to receive training;
 - (c) the place or places where the training is likely to be provided; and
 - (d) the proposed dates of the training.
- (3) No later than 30th September each year, the JTC for a sheriffdom shall provide to the Lord President and the sheriff principal of that sheriffdom an annual report on training which was undertaken in the preceding April to March.
- (4) The annual report shall include information as to—
- (a) the types of training which have taken place in that period;
 - (b) evaluating the training which has taken place;
 - (c) the cost of the training;
 - (d) the number of JPs who attended the training; and
 - (e) any substantial respects in which the training which has taken place has differed from the training which was proposed in the training plan for that period.

Training requirement – existing JPs

- 10.—(1) The requirement in paragraph (2) applies in the case of a JP who ceases to hold office as described in section 54(7)(a) of the Act and who is appointed as a JP for a sheriffdom.

(2) Within 2 years of starting to act as a JP for a sheriffdom, the JP shall undertake a training course of a type approved for the purposes of this paragraph by the Lord President.

(3) The requirement specified in paragraph (2) shall not apply in the case of a JP who—

- (a) has, prior to starting to act as a JP for a sheriffdom, undertaken a training course such as is described in that paragraph; or
- (b) is aged 67 or over on starting to act as a JP for a sheriffdom.

Training requirement

11.—(1) Every JP shall, during each term of appointment, undertake at least such minimum period of approved training as is set down from time to time by the Lord President.

(2) In paragraph (1), “approved training” is training of a type approved for the purposes of this article by the Lord President.

Formation of a JAC

12.—(1) There shall be a JAC for each sheriffdom.

(2) A JAC shall have six members who shall be appointed by a vote of all JPs for the sheriffdom.

(3) A person may be appointed as a member of a JAC for a sheriffdom only if that person is a JP for that sheriffdom.

(4) A person shall cease to be a member of a JAC for a sheriffdom when that person is no longer a JP for that sheriffdom.

JAC – terms of appointment

13.—(1) Paragraphs (2) and (3) apply as regards the terms of appointment of the first members of a JAC following its establishment.

(2) 2 members shall hold office for a term of 1 year, 2 members for a term of 2 years, and the remaining 2 members for a term of 3 years.

(3) The members of a JAC shall decide which members are to serve for which terms referred to in paragraph (2) and, if they are unable to agree, the length of their terms shall be determined by lot.

(4) Except as provided for in paragraphs (1) and (2), every member of a JAC shall be appointed for a term of 3 years.

JAC – procedures

14.—(1) A JAC meeting shall be quorate if there are 3 members at the meeting.

(2) A JAC may arrange for any of its functions to be carried out by a sub-committee appointed by it.

(3) A person may not be appointed by a JAC of a sheriffdom to be a member of one of that JAC’s sub-committees unless that person is a JP for that sheriffdom.

Appraisal of JPs

15.—(1) Every JAC shall establish a scheme to appraise the performance on the bench of JPs.

(2) The JAC shall select JPs to conduct appraisals (“the appraising justices”) and it may also arrange for a JP for another sheriffdom to conduct appraisals.

(3) The JAC shall determine the intervals at which justices are to be appraised.

(4) The JAC shall establish a procedure for conducting appraisals, which shall include the following elements—

- (a) the notification that will be given to the justice to be appraised (“the appraised justice”);
- (b) a procedure for the appraising justice to record his assessment and for notifying the appraised justice and the JAC of that assessment;

- (c) a procedure for enabling the appraised justice to discuss the assessment with the appraising justice and a procedure enabling the appraised justice to challenge the assessment to a person other than the appraising justice;
 - (d) a procedure for the appraising justice to notify the convener of the JAC of any action required following the appraisal; and
 - (e) the time limits for these procedures.
- (5) The JAC shall publish its scheme to the JPs.

St. Andrew's House,
Edinburgh

A member of the Scottish Executive
2007

SSI Cover Note For Committee Meeting

SSI title and number: The draft Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2006 (SSI 2006/draft)

Type of Instrument: Affirmative

Meeting: 20th Meeting, 2006 (Session 2)
Wednesday 31 May 2006

Date circulated to members: Thursday 25 May 2006

Minister to attend Justice 1 Committee meeting Hugh Henry MSP, Deputy Minister for Justice

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

Affirmative Instrument – Procedure

1. The Justice 1 Committee has been designated lead committee and is required to report to the Parliament by 5 June 2006.
2. The draft Order was laid on 3 May 2006. Under Rule 10.6.1(b), the Order is subject to affirmative resolution before it can be made, it is for the Justice 1 Committee to recommend to the Parliament whether the Order should be approved. The Minister for Justice has, by motion S2M-4448 (set out in the agenda), proposed that the Committee recommends the approval of the Order. The Deputy Minister for Justice will attend in order to speak to and move the motion. The debate may last for up to 90 minutes.
3. At the end of the debate, the Committee must decide whether or not to agree to the motion, and then report to the Parliament accordingly. Such a report need only be a short statement of the Committee's recommendation.
4. The motion will be considered by the Parliament on 7 June 2006.

**Justice 1
Committee**

31 May 2006

SSI Cover Note For Committee Meeting

SSI title and number: The Advice and Assistance (Scotland) Amendment (No.2) Regulations 2006, (SSI 2006/233)

Type of Instrument: Negative

Meeting: 20th Meeting, 2006 (Session 2)
Wednesday 31 May 2006

Date circulated to members: Thursday 25 May 2006

Justice 1 Committee deadline to consider SSI: 5 June 2006

Motion for annulment lodged No

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

If members have any queries or points of clarification on the instrument which they wish to have raised with the Scottish Executive in advance of the meeting, please could these be passed to the Clerk to the Committee as soon as possible, to allow sufficient time for a response to be received in advance of the Committee meeting.

**Justice 1
Committee**

31 May 2006

SSI Cover Note For Committee Meeting

SSI title and number: The Criminal Legal Aid (Summary Justice Pilot Courts and Bail Conditions) (Scotland) Regulations 2006 (SSI 2006/234)

Type of Instrument: Negative

Meeting: 20th Meeting, 2006 (Session 2)
Wednesday 31 May 2006

Date circulated to members: Thursday 25 May 2006

Justice 1 Committee deadline to consider SSI: 5 June 2006

Motion for annulment lodged No

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

If members have any queries or points of clarification on the instrument which they wish to have raised with the Scottish Executive in advance of the meeting, please could these be passed to the Clerk to the Committee as soon as possible, to allow sufficient time for a response to be received in advance of the Committee meeting.

SSI Cover Note For Committee Meeting

SSI title and number: The Divorce (Religious Bodies) (Scotland) Regulations 2006 (SSI 2006/253)

Type of Instrument: Negative

Meeting: 20th Meeting, 2006 (Session 2)
Wednesday 31 May 2006

Date circulated to members: Thursday 25 May 2006

Justice 1 Committee deadline to consider SSI: 12 June 2006

Motion for annulment lodged No

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

If members have any queries or points of clarification on the instrument which they wish to have raised with the Scottish Executive in advance of the meeting, please could these be passed to the Clerk to the Committee as soon as possible, to allow sufficient time for a response to be received in advance of the Committee meeting.

SSI Cover Note For Committee Meeting

SSI title and number: The Divorce and Dissolution etc. (Pension Protection Fund) (Scotland) Regulations, (SSI 2006/254)

Type of Instrument: Negative

Meeting: 20th Meeting, 2006 (Session 2)
Wednesday 31 May 2006

Date circulated to members: Thursday 25 May 2006

Justice 1 Committee deadline to consider SSI: 12 June 2006

Motion for annulment lodged No

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

If members have any queries or points of clarification on the instrument which they wish to have raised with the Scottish Executive in advance of the meeting, please could these be passed to the Clerk to the Committee as soon as possible, to allow sufficient time for a response to be received in advance of the Committee meeting.

**Justice 1
Committee**

31 May 2006

SSI Cover Note For Committee Meeting

SSI title and number: The Parental Responsibilities and Parental Rights Agreement (Scotland) Amendment Regulations 2006, (SSI 2006/255)

Type of Instrument: Negative

Meeting: 20th Meeting, 2006 (Session 2)
Wednesday 31 May 2006

Date circulated to members: Thursday 25 May 2006

Justice 1 Committee deadline to consider SSI: 12 June 2006

Motion for annulment lodged No

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

If members have any queries or points of clarification on the instrument which they wish to have raised with the Scottish Executive in advance of the meeting, please could these be passed to the Clerk to the Committee as soon as possible, to allow sufficient time for a response to be received in advance of the Committee meeting.



SCOTTISH EXECUTIVE

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Our ref: CPR Bill Amendment

25 May 2006

Dear Pauline

I am writing in relation to the Criminal Proceedings Etc (Reform) (Scotland) Bill. I wish to provide you with early notification of a proposed Executive amendment ahead of Stage 2 of the Bill.

The Executive propose to amend the bail law to provide that a court which, in solemn or summary proceedings, sets bail for an alleged sex offender without imposing any special conditions must explain why it did not consider such conditions necessary.

This change would underline the importance of looking systematically at all the options for reducing the risk posed by alleged sex offenders, short of custody. It will also give an indication of what the Executive considers important without constraining the courts, and help to promote a consistency of approach.

As a result of this change we would expect a small increase in the use of special conditions including movement restriction conditions. This proposal would not itself generate financial implications, nor should it impact on the prison population.

The Deputy Minister for Justice will be appearing before you to give evidence on 31 May 2006 and he will be happy to answer any questions you may have on this matter.

CATHY JAMIESON