11th Meeting, 2006 (Session 2), 19 April 2006, Supplementary Written Evidence

SUPPLEMENTARY SUBMISSION FROM THE SCOTTISH EXECUTIVE BILL TEAM

Follow up to official evidence – 19 April

Thank you for giving us the opportunity to submit oral evidence to the Justice 1 Committee on 19 April in respect of this Bill. A number of issues were raised during the session on which we undertook to follow up in writing. This letter provides further information on those issues which I trust will be of assistance as the Committee continue to take evidence on the Bill.

For ease of reference I attach three annexes, dealing with the issues raised during the session:

- **Annex 1** responds to the Committee's desire to see the Bill's proposals in the context of the overall work underway on summary justice reform, so that they can satisfy themselves that a speedier and more efficient system will be achieved. We also promised to consider whether there should be further legislative provision relating to the management of summary criminal business in addition to that currently enacted and proposed in the Bill (with particular reference to the intermediate diet) and the annex picks up this issue also;

- **Annex 2** responds to a number of points made by the Committee in other areas of the Bill. It covers:

  - The objectives of the Executive's Bail and Remand provisions, in the light of the Committee's concerns about the reference in the Policy Memorandum to 'codification' and about the use of an non-exhaustive list of considerations relevant to the grant of bail;
  - Further detail on the provisions in the Bill relating to alternatives to prosecution – particularly the 'work order' and the operation of disclosure of accepted fiscal fines;
  - Concerns raised by Committee members about the operation of the proposed power for a Fines Enforcement Officer to seize a vehicle; and
  - Some additional points in relation to lay justice reform.

- **Annex 3** is a draft of the regulations that Ministers intend to make under the powers conferred by sections 54 and 56 of the Bill to make provision for the appointment, training and appraisal of JPs, with a covering explanation of how we envisage these regulations will work in practice. I note that a number of those submitting written evidence express a desire for more information on training and appraisal issues in particular. I hope this additional level of detail is helpful to the Committee in preparing for the 'round table' evidence session on lay justice on 10 May.

I hope this response is helpful and would be happy to provide any further information that the Committee may require.

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Head of Criminal Procedure Division

ANNEX 1 - IMPROVING SPEED AND EFFECTIVENESS IN PROCESSING CASES THROUGH THE SUMMARY JUSTICE SYSTEM

Committee members sought clarification as to how the reforms will lead to summary cases being dealt with more quickly and effectively in future. Ministers are of the view that this will be achieved by taking forward work on two fronts in parallel – legislative change to improve procedures and create capacity within the system, coupled with a programme of joint work between the agencies whose task it is to make the system operate effectively, ensuring that those agencies are prepared for changes in the law and that those changes will deliver practical results.

Legislative change to improve procedures and create capacity within the system

In its report the McInnes Committee identified a number of the detailed procedural changes required in the summary justice system by considering the trajectory of a summary criminal case and making recommendations for change aimed at eliminating waste and promoting good practice at every stage of the system. The majority of those recommendations have now been adopted as measures in the Bill. Each of these will, at its own point in the process, provide for more effective case handling and promote the speedy disposal of summary business. Without repeating those measures in detail examples include:

- provision allowing written pleas of not guilty to be dealt with administratively, freeing up judicial time for other cases;

- provision allowing outstanding cases to be combined against a single accused in a wider range of circumstances, reducing the number of outstanding cases in respect of a single accused; and

- bringing the procedure in relation to the agreement of uncontroversial evidence in summary cases into line with the position in solemn cases, ensuring that only those who genuinely need to give evidence in a case are cited to attend the trial.

Changes such as these will, cumulatively, play their part in ensuring that there is no incentive for cases to "churn" in the system and will also free up court time, allowing other business to be heard as quickly as possible. More fundamentally the proposal to increase the jurisdiction of the Sheriff sitting summarily will allow a number of appropriate cases to be managed through a less intensive process in future – freeing up further capacity in the system to deal quickly with cases. The use by the Crown of a wider range and level of alternatives to prosecution in future will also create capacity in the summary court system – ensuring that those cases which genuinely require prosecution are processed as quickly as possible and frees up legal time to allow fiscals to communicate with defence agents about cases.

Taken individually, therefore, a number of the Bill's provisions will help to promote increased speed and effectiveness in the summary justice system.

The Committee expressed a desire for more detailed description of summary justice case handling, particularly in relation to the use of the intermediate diet. We are of the view that where an intermediate diet has been deemed necessary it should:

- Be held at the right time – so that the defence can come to it fully prepared but there is sufficient time before the trial to complete any further work without rescheduling the trial diet; and

- Like the preliminary hearing in the High Court, and the first diet in the sheriff court, be used to best effect by all parties, including the court, to ensure that parties are prepared for the trial diet.

Much of the work underway between stakeholders (see below) is focused on ensuring that the intermediate diet achieves the purposes identified for it in section 148 of the Criminal Procedure(Scotland) Act 1995 – establishing whether the case is ready to go to trial, clarifying the plea and ascertaining whether evidence has been agreed as far as possible. As with the High Court reform, buy-in from all the stakeholders, particularly from judges and the legal profession, will be critical to ensuring that there is real change on the ground.

The Intermediate Diet

Section 148 of the 1995 Act already contains detailed provisions in relation to intermediate diets:

- the diet is for the purpose of ascertaining whether the case is likely to proceed to trial on the appointed date
- the court is to ascertain the state of preparation of the parties
- the court should confirm whether the accused intends to adhere to the plea of not guilty (in practice the court generally asks the accused to tender a plea, and the Act provides that a plea of guilty can be tendered)
- the court should explore the extent to which the parties have complied with their duty to identify and agree non-contentious evidence
- the court can ask any question of the parties for these purposes
- it can also operate as an interim diet for the purposes of prosecution of sexual offences

In addition, the Bill makes a number of changes which would further reinforce the intermediate diet:

- amendment to provide that the court "may", rather than "shall", adjourn a trial diet where it considers that the case is unlikely to proceed (s18). This is in line with the recommendation of the McInnes Report (para 20.14). The Committee was of the view that this change was consistent with the more proactive role it envisaged for the judiciary in management of intermediate diets;
- certain special and other defences can only be relied on if these are intimated by the intermediate diet (s19). This amends the position currently to be found in ss149 and 149A of the 1995 Act. Particulars of the defence, together with details of witnesses to be called, require to be given. This should help to ensure that defence solicitors are fully and properly instructed by the intermediate diet, and reflects also the proposed increase in summary sentencing power in the Bill;
- provision in connection with uncontroversial evidence (s20). This brings the position in summary cases into line with that in solemn cases, as amended by the 'Bonomy' legislation. Section 258 of the Act is amended to provide, in short, that a party can serve a notice of uncontroversial evidence on the other parties; that the time period for service of such a notice, and challenge of a notice, is to be calculated by reference to the intermediate diet; and that the court can disregard a challenge to a notice if it regards it as unjustified. In most cases the intermediate diet would provide the ideal opportunity to deal with these matters, having regard to the time limits involved;
- a duty on solicitors engaged by accused persons for the purposes of their defence at a trial to notify the court and the prosecutor of the fact that they have been engaged (s21). The purpose of this duty is to allow for the service of documents on the solicitor, which should help to ensure that the case is in a better state of preparation by the intermediate diet. It will also assist the Crown in discharging its obligations in relation to disclosure of evidence, which in turn should ensure better defence preparation by the intermediate diet.

It can therefore be seen that many of the provisions which will be introduced by the Bill form part of a framework for greater and more proactive judicial management of intermediate diets.

It may also be worth noting that as the Vulnerable Witnesses (Scotland) Act 2004 is rolled out to summary proceedings, provisions will come into effect making clear that the intermediate diet is to be used to ascertain whether special measures for vulnerable witnesses are required.

When considering further amendment, we are keen to avoid creating unnecessary bureaucracy. Summary cases can range from the simple breach of the peace to the complex fraud.

The breach of the peace case may involve two eye-witnesses, the evidence of both of whom may be disputed by the accused. At the intermediate diet in such a case, the court will wish to confirm if the accused

maintains his plea of not guilty. If he does, there will be no scope for the agreement of evidence and the court will wish simply to ensure that both parties are prepared for trial and that the witnesses are cited and available to attend.

In the complex fraud case, however, there may be tens of witnesses, including some expert witnesses. The evidence of some may be formal and uncontested, while that of others will be contentious. There may be many productions and certificated evidence procedures may be invoked. There may be forensic evidence. At the intermediate diet, the court will wish to explore, in some detail, issues such as the extent to which evidence may be agreed and witnesses excused attendance and also the likely duration of the trial.

The reforms being introduced are intended to recognise that a "one size fits all" solution might not apply to all summary cases.

We will, however, consider further with Ministers and the judiciary the scope to include more detail about the conduct of the intermediate diet on the face of the Bill, or through Act of Adjournal. One option might be to introduce through Act of Adjournal a form for the court to complete to confirm that the various steps identified for the hearing have been completed. This would also serve to focus on the role of the judge in successful management of intermediate diets. And it could pick up certain points which represent current good practice but are not specified on the face of the 1995 Act, such as confirmation that the accused is aware of the terms of section 196 (which provides that, when passing sentence, the court must take account of the stage at which the offender indicated an intention to plead guilty). The McInnes report recommended that this latter point be addressed at an intermediate diet, but made no recommendation in relation to formal legislative change.

In terms of amendments to the Bill, legislation for both preliminary hearings and first diets requires parties to confirm that they have identified the witnesses they regard as essential for trial. This could be extended to summary proceedings.

The Committee will appreciate that this area will require further consideration with other stakeholders, including the judiciary, and that we cannot give them an immediate reply on how we intend to proceed. We can, however, undertake to write to the Committee in advance of Stage 2 to let them know whether we intend to make further provision in legislation or through Act of Adjournal in relation to the intermediate diet.

Joint work to ensure that change is delivered on the ground

With our partners in the justice system, we are working to ensure that the Bill will deliver the changes sought on the ground. This work is informed by some of the lessons learned from the local system redesign work in West Lothian and Grampian, and builds on the experience which criminal justice agencies have acquired in delivering specialist courts such as the Youth Court and the Drug Court. It is being carried out under the auspices of the National Criminal Justice Board.

The National Criminal Justice Board

The Board was set up in November 2003 on the recommendation of the report on "Proposals for the Integration of the Aims, Objectives and Targets in the Scottish Criminal Justice System" by the then Crown Agent, Andrew Normand. It exists to oversee at a strategic level the operation and performance of the criminal justice system and to ensure co-ordinated and consistent planning. The Board is chaired by the Head of the Justice Department at the Scottish Executive and consists of the chief officers of Scotland's criminal justice agencies, representatives from ADSW, ACPOS SCRA and the District Courts Association, the Sheriffs Principal and senior officials from the Justice Department.

The Board's strategy for the criminal justice system is based around four goals:

- The public have confidence that the criminal justice system is accessible, effective and serves all communities fairly;
- Victims and witnesses receive a consistent, high standard of service from all criminal justice agencies;
- Continuous improvement is delivered by using more efficient and effective processes; and
- To contribute to the reduction of re-offending by efficient case handling and robust enforcement of appropriate disposals.

The proposed changes to the summary justice system which are contained within the Bill provide the opportunity to look at the processes and practices of all partners in the criminal justice system, and if necessary to change them to achieve the maximum benefits from the proposals. In addition the recent cases of *Holland* and *Sinclair,* which demand full disclosure by the Crown, have a major impact on how the system works.

As the Committee will know, summary justice covers the vast majority of cases. In 2004 – 2005, 795 cases were determined in the High Court, 3874 cases in Sheriff Solemn courts, and over 139,000 cases in the summary courts. In considering summary case handling our work seeks to balance the importance of a more streamlined procedure with the need to retain some flexibility. Not every case requires an intermediate diet, for example, and it is important for courts to have discretion to deal only with issues relevant to the particular case. As discussed at the Committee, different sheriffdoms and local courts face different challenges, and it is important to leave scope for local protocols in relation to case handling. Local criminal justice boards (see box for details) are working across Scotland to improve joint local case handling; the work to which the Committee referred in Grampian and West Lothian reflects local initiative and we want to leave scope for that initiative as we move forward.

Local Criminal Justice Boards take a joint approach to promote a more efficient and effective criminal justice system. There are eleven criminal justice boards across Scotland: Argyll & Clyde, Ayrshire, Central, Dumfries & Galloway, Fife, Glasgow, Grampian, Highlands & Islands, Lanarkshire, Lothian & Borders and Tayside. The core membership consists of the Sheriff Principal (as chair), the Area Procurator Fiscal, the Court Service Area Director and the Chief Constable or Assistant Chief Constable from the local police force. Some local boards have sought to expand their membership to include, for example, Directors of Social Work. The boards meet 3 or 4 times per year and focus on continuous improvement to court and criminal justice processes.

For example, we will work towards developing recognised procedures formalising the opportunity for communication between procurators fiscal and the defence before the intermediate diet in larger jurisdictions – this already happens in many areas and we will seek to build on existing good practice. No such change may be required in smaller jurisdictions, where lines of communication can be easier to maintain.

We are, however, in no doubt that the summary justice system must operate on the basis of a substantial common core of good practice committing partners to more effective ways of joint working, and this is what those partners are all working together to create.

To deliver this work, the National Criminal Justice Board has set up a System Model Project Board. The group is chaired by the Secretary to the National Board and contains representation from ACPOS, COPFS, Scottish Court Service, SLAB, the District Courts Association, the Association of Directors of Social Work and officials from the Justice Department. The remit of the System Model Project is to develop an over-arching model of how the summary justice system will operate in practice and allow agencies to develop their own task instructions on that basis. Its basic aims are to:

- Reduce “wasted” court hearings;
- Increase pleas at first calling;
- Provide a more meaningful intermediate diet;
- Continue to provide victims and witnesses with a high standard of service; and
- Introduce more efficient and effective processes.

The programme of work is being developed in three distinct workstreams. These are:

- ACPOS/COPFS workstream – broadly speaking dealing with the cases which are reported to the procurator fiscal, how decisions are made, how cases are commenced and disclosure of evidence;
- Courts workstream – dealing mainly with issues of court programming. The Sheriffs Principal and Sheriffs Association have been invited to contribute; and
- Legal Aid workstream – looking at whether changes to the legal aid regulations can support the system.

It is expected that recommendations as to the basic model will be completed by the end of June. This timetable was designed to enable us to share this work in progress with the Committee in advance of Stage 2 of the Bill.

The starting point of the work of the System Model Project Board is to look at how cases are initiated. The Summary Justice Review Committee identified that there is currently a delay between the commission of an offence by an accused and the first calling of the case in court because most cases start by citation of the accused to court. An alternative means to start a case is by an undertaking, where the police release the accused from the police station to attend at court on a specified date. Undertakings are currently used to "fast-track" certain types of case, often drink drive cases. As we discussed with the Committee, we are considering ways in which we can make more and better use of undertakings to appear in order to reduce the time between the commission of the offence and first calling of the case. This work also involves reviewing the capacity of the police, the courts and the Crown to deal with a system which is 'front-loaded' in this way; as the Committee noted, there is no point in simply shifting delay from the pre-court to the court stage. So this is part of a wider review of the capacity of the system as a whole.

The expected outcomes of this stream of work will be clarity about the types of case which are suitable for the use of undertakings and agreed timescales for the handling of such cases - in particular, for police reporting of undertakings to the Procurator Fiscal, and for Procurator Fiscal decision making on cases reported.

In order that the best possible decisions can be taken at this stage work is going on between ACPOS and COPFS in the context of the System Model Project Board to find ways of making best use of the police reporting process. This work will include looking at ways to include the dates when civilian witnesses are available to give evidence. This will be vital when trials are being fixed as there will be more certainty that the trial can go ahead and will not have to be postponed due to the fact that witnesses cannot attend.

Work is also under way on the best use of the intermediate diet. Customarily the intermediate diet is held approximately two weeks before the trial. Often if a problem which may affect whether the trial goes ahead is discovered, there is insufficient time between the intermediate diet and the trial to get things back on track. Consequently the trial cannot go ahead, victims and witnesses are inconvenienced, and the trial is delayed. Consideration is being given to what time period between intermediate and trial diets might best allow issues of this nature to be addressed and allow sufficient time for most problems to be cleared up, so there will be greater certainty that the trials will go ahead on the date fixed. This will help to minimise the churn of cases and increase the speed of the criminal justice system.

As we emphasised at the Committee session, we recognise that for the intermediate diet to work most effectively the defence needs to be fully aware of the case against their client. The Crown is working on the premise that disclosure to the defence should ordinarily take place a minimum of 28 days prior to the intermediate diet. This would give the defence solicitor four weeks to consider the full Crown case with his or her client. As such, solicitors should be in a position where they are able to state definitively whether their client is pleading guilty or not guilty at the intermediate diet, as they will have had one month to consider the Crown case with their client, and all practitioners and the judiciary will be aware of this fact. Our goal is reduced "churn" of cases at intermediate diets, and an increase in pleas of guilty prior to the trial diet, thus reducing the average time it takes to dispose of a case, and more importantly resulting in less inconvenience to victims and witnesses.

It is crucial that intermediate diets are treated with the importance that they deserve. They present an opportunity for the accused to plead guilty with minimum inconvenience to victims and witnesses. By doing so it is likely that they will attract a sentence discount in terms of section 196 of the 1995 Act.

We are working closely with the Scottish Legal Aid Board to develop a package of proposed changes to summary criminal legal aid regulations to complement the system model. These changes will take into account the significant changes already made to the summary criminal system such as sentence discounting and early disclosure by the Crown. They will also encourage early preparedness and early disposal of cases where appropriate. This is likely to mean changes to many aspects of the current legal aid system including the operation of the duty solicitor scheme (currently to be piloted in work being carried out in Grampian and West Lothian) and the structure of the feeing arrangements to ensure that early preparation and progress is appropriately rewarded. We propose to consult with the Law Society of Scotland on these proposals as they are developed.

As we have mentioned to the Finance and Justice Committees, a parallel priority is to establish better 'real time' management information about the system, so that at national and local level blockages can be addressed quickly and decision makers at both levels have the information they need to make choices which ensure that the criminal justice system operates efficiently and effectively. Work is underway on a management information scorecard to meet this need. It is anticipated that the live version of phase one of the scorecard will be available by November 2006.

Further information to the Committee

We hope this is helpful in setting out more fully the work underway to ensure that summary justice reform delivers more efficient, effective justice in relation to the less serious offences dealt with through alternatives to prosecution and in Scotland's summary courts.

As noted above, we will ensure that before Stage 2 of the Bill we share with the Committee the emerging results of the work on the system model. We envisage that that will be helpful to the Committee in its consideration of any further provision which it considers to be required on the face of the Bill.

If the Committee would like a more formal oral presentation of the work described above at any stage, we should be happy to provide one.

ANNEX 2 - SPECIFIC POINTS RAISED BY COMMITTEE MEMBERS ON ASPECTS OF THE BILL

The Bail proposals in the Bill; 'codification' and the non-exhaustive list in new Section 23C(2)

The Committee clearly felt that the use of the word 'codification' in the accompanying documents suggested an exhaustive approach, with every detail set out on the face of legislation. There was therefore concern about the non-exhaustive list in section 23C(2). The point was made that there was some risk of a 'two tier' approach, in which the considerations listed in section 23C(2) were seen as having more weight than others which might be relevant in a particular case, but which were not specifically mentioned. We note related concerns from at least one consultee, whose concerns focused on the need to avoid impinging on judicial discretion.

It might be helpful to say upfront that in using the word 'codification' in the accompanying documents, we were simply trying to reflect the fact that the Bill puts on the face of legislation the general right to bail and the grounds recognised in Scots common law and ECHR case law for refusal of bail. At present, as the Explanatory Notes say, statute determines the process for bail (which offences are bailable, when bail may be sought and the conditions on which it may be granted) but is silent on the reasons for grant or refusal of bail. The Bill seeks to set all aspects of the framework for bail on the face of the law.

This was not intended to mean that every detail not just of the framework, but also of the considerations which the court was entitled to take into account, was prescribed on the face of the Bill. If the use of the word 'codification' has therefore been misleading, we apologise. Under ECHR the court as an independent and impartial tribunal considering a decision on bail must be able to take all relevant considerations into account – and must be able to take its own decision in the context of ECHR case law as to what those relevant considerations are. As Ministers said in the Bail and Remand Action Plan

"We will illustrate the matters which the court could take into account when assessing whether reasons for refusal of bail exist – for example, the circumstances of the offence and the accused's history of convictions, background and circumstances. But there will be no erosion of the court's right to take all the facts and circumstances into account and to take the final decision to bail or remand in every case."

So new Section 23C sets out the reasons which ECHR has recognised for refusal of bail and also a non-exhaustive list of potentially relevant considerations for the court. The list reflects the principal considerations which have been recognised in ECHR case law, and was intended to be helpful both to the court and also to members of the public who sought to understand the basis on which bail decisions were taken.

In the Bail and Remand Action Plan Ministers set out their strategy for making the bail system more transparent. Requiring reasons to be given for all bail decisions was part of that strategy, as was setting out the bail framework on the face of the law. The non-exhaustive list was intended to be a helpful contribution to increased transparency.

More generally, we agree with comments made by the Committee to the effect that the provisions in section 1 of the Bill which set out the reasons for refusing bail and the non-exhaustive list of the considerations which a court may take into account do not change the law. They reflect the law as it stands, taking into account Scots common law and ECHR case law. They are intended to make clear to all – including members of the public – what the ECHR reasons for grant or refusal of bail are and what kind of considerations are relevant when the court is making its bail decision. But as the Bail and Remand Action Plan underlines, they do not alter the right of the court to take the bail decision in every case.

Alternatives to prosecution - the 'work order' and disclosure of fiscal fines

The work order (section 40)

The work order is an alternative to prosecution. While the offences for which it may be appropriate are a matter for the Lord Advocate and prosecution policy, it follows that it will be used in respect of low tariff offences which can be dealt with appropriately other than by prosecution. The view of the Crown is that the work order will be appropriate for low level offences which can be viewed as offences against the community. Depending on the nature of the work available in each area, work orders may be particularly useful in dealing with offences such as breach of the peace or minor vandalism.

The intention is that it should be another option for the procurator fiscal in cases where s/he takes the view that an alternative would be appropriate.

Procurators fiscal will be trained and receive guidance from the Lord Advocate on the use of work orders.

The Bill provides that the maximum number of hours in a work order is 50. This is different to community service orders, which comprise a minimum of 80 hours and a maximum of 240 or 300 hours depending on whether the order is in relation to a summary or solemn matter. In addition, of course, a community service order can only be imposed on conviction. A work order does not require a finding or admission of guilt, and a completed work order will not result in a conviction.

The type of work to be carried out under such an order can be prescribed by the Scottish Ministers. The Lord Advocate has stated to Parliament that he envisages that communities may be consulted about the type of work to be done. This could operate in a similar way to the arrangement for community consultation in the operation of community reparation orders.

The nature of the cases in which work orders will be imposed will be a matter for COPFS policy. A decision to offer a work order will be taken, on the basis of the nature of the offence and the circumstances of the offender – for instance his or her record of previous offending - as to whether the case is one which merits prosecution, or which properly can be dealt with on the basis of an alternative to prosecution. If the view is that an alternative is appropriate, a decision will thereafter be taken on which alternative option is most appropriate in the circumstances of the case. This would again include consideration of the nature of the offence and the circumstances of the accused. At this stage it might be appropriate to take into account the means of the accused.

As with all alternatives to prosecution, however, it has to be borne in mind that these initially are offers made by the prosecutor; they are no more than that, until accepted. We consider that there are advantages in procurators fiscal being able to offer this alternative in appropriate circumstances, which might include a situation where someone with little money might be able to avoid an unnecessary appearance in court, or someone in a job might seem an appropriate candidate for a short period of unpaid work. As with all prosecution decisions, each case will be considered on its merits. It is not intended that accused people should be offered a choice of alternatives, so it is quite possible that someone with means will nonetheless be offered a work order. In any case the *principal* determining criterion for using work orders will be the nature of the offence.

The work order will operate in much the same way as other alternatives to start with – the offer will be made by the Procurator Fiscal. If the order is completed satisfactorily, no conviction will be recorded against the accused, and the community will have had the benefit of unpaid work. It should therefore represent swift and restorative justice.

As with other alternatives, the Bill makes provision for the information which must be contained in any offer of a work order.

If the offer is declined, or the order is not completed, the case will be referred back to the Procurator Fiscal to decide what further action to take. In most cases it is anticipated this will mean that prosecution ensues.

The offer will, however, be on the same terms as the present regime for alternatives – the accused will require to take positive action to accept. If no action is taken, refusal will be deemed. Time limits for this procedure are in the Bill.

If the offer is accepted, responsibility for supervision of the order will fall to the relevant local authority. There will be a need, it is anticipated, for some form of assessment of the accused to take place. It may be that supervision by fully qualified staff will not always be necessary. There may be an issue around having convicted and non-convicted persons on the same work placement. These and other issues are under consideration, and will be worked through with stakeholders.

The work order will be piloted. It is anticipated that there will be two pilots – one in an urban area, and one in a rural area. Pilot sites have not yet been identified, but work is ongoing in that regard. Pilots will not be able to start until the legislation is available, so we would anticipate that they will run from 2007, with full evaluation which would be made available to the Committee and other stakeholders.

The effect of a completed work order will be the same as for any other accepted alternative. Prosecution will not be possible. No conviction will be recorded. The Procurator Fiscal will be advised whether or not the order has been completed, so that further action can take place where appropriate.

Disclosure of fiscal fines in subsequent proceedings and other appropriate circumstances

The Bill proposes that accepted alternatives to prosecution (such as fiscal fines) should be capable of being treated as if they were previous convictions for a period of two years after acceptance, if the accused offends again and comes before a court. This is done simply by amending those parts of the Criminal Procedure (Scotland) Act 1995 which refer to the laying of previous convictions before the court on conviction.

The intention is that on conviction in court, the prosecutor, in addition to giving the court a list of previous convictions will also provide details of accepted alternatives which fall within the relevant period. This is in line with the recommendation of the McInnes Committee (paras 11.15-11.17). There is no provision in the Bill that the new offence requires to be analogous to the matter which attracted the alternative. As with a previous conviction, the procurator fiscal can always exercise discretion not to disclose a particular matter if s/he regards it as inappropriate to do so.

The Bill provides only for disclosure of accepted alternatives to prosecution *to the court* and does not impact on the mechanism of other disclosure regimes. It is significant that this provision will not impact on the majority of individuals to whom offers are made, but rather on the minority who re-offend, in which case relevant previous accepted offers will be made known to the court.

Fines Enforcement Officer's powers to seize a vehicle

Members raised some concerns regarding the provision in section 43 of the Bill empowering Fines Enforcement Officers (FEOs) to seize a vehicle as a sanction aimed at securing payment of outstanding fines. Those concerns centred on protecting the interests of third parties who may claim to be the genuine "owner" of a vehicle which is registered in the fine defaulter's name.

As you will be aware, section 43 of the Bill inserts a new section 226D into the Criminal Procedure (Scotland) Act 1995, which makes provision in respect of the seizure of vehicles by FEOs. The effect of section 226D(3)(a) is that a FEO is only able to seize a vehicle if it is registered with the DVLA in the fine defaulter's name. Subsections (10) and (11) of section 226D provide for the Scottish Ministers to make regulations in respect of the detailed operation of seizures under section 226D (including provisions '…for protecting the interests of owners of vehicles apart from offenders'). Section 226H provides the fine defaulter with the right to apply to court for a review of an FEOs decision to make a seizure order.

Two issues have been raised in connection with these powers:

- Are there sufficient safeguards for the fine defaulter, who must be the vehicle's registered keeper? and
- Are there sufficient safeguards for the owner of the vehicle, where he or she is not also its registered keeper?

On the first, the provisions as introduced provide a number of safeguards for the fine defaulter should s/he wish to dispute the actions of the FEO in seizing a vehicle. Those safeguards include, for example, the defaulter being able to make contact with the FEO and discuss outstanding fines in advance of any seizure taking place and (where seizure does take place) the right to seek review of that decision in court and provide evidence in respect of personal or family circumstances that make the seizure or disposal of a vehicle an unreasonable course of action for the FEO to take, in spite of the outstanding fines due. It would be for the court to determine, in light of all the information put before it, whether to confirm, revoke or vary the actions of the FEO in such a situation.

On the second, we agree with the Committee that, in the absence of any regulations under subsection (10) the current drafting of section 226D would, in theory, allow the court to dispose of a vehicle where the fine defaulter is the registered keeper, but someone else has paid for or owns the vehicle (e.g. a company car). We are considering the best way to ensure that these provisions allow the FEO to seize a vehicle in

appropriate circumstances but also ensure that someone other than the fine defaulter cannot be deprived of their property.

In this context consideration has been given to the approach taken to this procedure in England and Wales (where fines officers were given the power to seize vehicles following the introduction of the Courts Act 2003 and associated regulations). The position taken was to refer to the registered keeper of a vehicle in the Act itself and provide, through regulations, the right for any interested third party to make submissions to the court in respect of any seizure made by the fines officer, with a view to upholding or setting aside that course of action. This approach protects the rights of third parties while ensuring that FEOs can exercise seizure powers in appropriate circumstances. In the absence of such powers, the FEO may be left with little choice but to return the case to court, where imprisonment may eventually be imposed in default of the fine.

We can confirm that the rights of third parties can and will be protected. Regulations under 226D(11)(c) could, for example, require the FEO to make reasonable enquiries to determine whether the vehicle is owned by the offender. They could also provide an appeal mechanism for third parties, possibly along the lines of that in the English model. We are looking at the options for making the necessary provision, whether by regulations, further amendment on the face of the Bill, or both.

It would be our intention to give the Committee the details of our proposed approach in advance of consideration of this section of the Bill at Stage 2.

Lay Justice Reform – Additional Points

We have noted the committee's concern about the possibility that the legislation, as currently drafted, could allow some full JPs who do not have recent experience of sitting on the bench to take up an appointment, without there being sufficient safeguards in place to ensure that such JPs would be able to perform their judicial functions to a high standard. Several stakeholders have also, independently, made their concerns about that point known to us. We are currently investigating possible ways of amending the legislation to provide additional safeguards in this area. (There is of course a need, in doing this, to ensure that people who hold judicial office are not, in effect, removed from that office without good reason.)

We are also aware, from the session on 19 April and from the written evidence submitted to the committee, that some concerns have been expressed about the impact on district court business of an increased use in alternatives to prosecution. One point which is not covered within the Bill, but is mentioned in the Policy Memorandum and which is worth highlighting, is that Ministers wish justices of the peace to have broader powers to disqualify people from driving, something that they can currently only do in "totting-up" cases. This would allow them to proceed straight to disqualification regardless of the number of "points" already on an individual's licence, and should allow a transfer of business from the sheriff courts to district courts. This requires an amendment to section 50 of the Road Traffic Offenders Act 1988, which is reserved legislation. We are therefore taking steps to secure a section 104 order in order to make this amendment.

ANNEX 3 - DRAFT OF THE JUSTICES OF THE PEACE (SCOTLAND) ORDER 2007

BACKGROUND INFORMATION

Content of the draft Justices of the Peace (Scotland) Order 2007

The draft order contains clauses relating to the appointment, training and appraisal of JPs.

This annex summarises the content of the draft order. Several of the provisions of this order relating to the composition and functions of the training and appraisal committees are similar to provisions which apply in England and Wales under the Justices of the Peace (Training and Appraisal) Rules 2005. In particular, those rules provide for an elected committee of JPs to oversee the appraisal of JPs, and for a legal assessor and district judge to sit on the Magistrates' Area Training Committee. One difference between our order and the 2005 Rules is that under the English and Welsh 2005 rules, training committees have a wider territorial jurisdiction than the appraisal committees, whereas under our order both the training and the appraisal committees will have responsibilities across their sheriffdom.

Appointment

The order makes it clear that Ministers may only appoint somebody as a JP if that person has been recommended for appointment by the JPAC for the sheriffdom. In making appointments, JPACs must act in accordance with recruitment procedures which have been agreed by the Judicial Appointments Board. These procedures (which are likely to cover such issues as public advertisement and structured interviews) are intended to ensure that the recruitment process for JPS operates across the country according to consistent standards of transparency and rigour.

The order makes it mandatory for somebody to have completed a training scheme approved by the Lord President before the JPAC can recommend them for appointment.

There will be one JPAC in each sheriffdom. Each JPAC will be chaired by the Sheriff Principal. In addition to the sheriff principal, there will be 7-10 other committee members. At least half of these other members must be justices of the peace. At least three members must be lay members- meaning that they must not hold any judicial office, or be a solicitor or an advocate.

JPAC members will sit for a maximum of two five-year terms. They will be chosen by an interview panel comprising the sheriff principal or a sheriff and two justices of the peace who have held office for at least five years. All "lay" vacancies must be publicly advertised within the sheriffdom, and all JP vacancies must be brought to the attention of all JPs within the sheriffdom.

Appraisal

The order makes provision for each sheriffdom to have a justices' appraisal committee. Each committee shall have six members, who will be JPs, and who will be appointed by a vote of all of the JPs within the sheriffdom. The fact that the committee is comprised entirely of JPs reflects the point that, in order to safeguard judicial independence, the appraisal of justices of the peace should be kept entirely within the judiciary.

Each appraisal committee will be required to select the JPs within the sheriffdom who will be responsible for conducting appraisals. The appraisal committee will also be responsible for establishing a procedure for conducting appraisals. This procedure will take account of the need to notify a JP that they are going to be appraised; the need for a JP to be able to challenge the assessment of their performance which is made during the course of the appraisal; and the possible need for the appraising justice to notify the appraisal committee of any follow up action which is required as a result of the appraisal.

If a JP's appraisals suggested that they were unable to adequately perform the functions of a JP, we envisage that the appraisal committee would be able to recommend to the sheriff principal that he request the establishment of a tribunal to investigate whether the JP should be removed from office under section 58(5)(2) of the Bill. An order will be drafted under section 58(6) of the Bill to cover the procedures for the tribunal. This order will replace the existing Justices of the Peace (Tribunal) (Scotland) Regulations 2001. Under section 58(6)(b) of the Bill the new order will be able to authorise the appraisal committee within each

sheriffdom to make a recommendation to the sheriff principal that they request the establishment of the tribunal.

Training

The order states that there will be a justices' training committee in each sheriffdom. All members of the justices' appraisal committee will be members of the training committee. This is because there are strong links between appraisal and training; in particular, the outcomes of appraisals are likely to inform the training committee's assessment of the training which is required within the sheriffdom.

In addition to the JPs on the appraisal committee, each training committee will also have a legal adviser (assessor) to the JP court and a sheriff. Section 8(4) of the draft order allows a member of the Scottish Court Service (SCS) to attend meetings of the training committee, without being a member of the committee. This ensures that SCS is kept informed of decisions about training which may have resource implications for it.

The training committee will be required to provide an annual training plan, setting out what types of training it intends to make available over the next year. It is also required to publish a report on the training which has been carried out within the sheriffdom during the previous years. These plans and reports must be provided to the Sheriff Principal of the relevant sheriffdom and the Lord President – allowing the Judicial Studies Committee to assess the amount of training which is being provided in each area.

We envisage that both the training and the appraisal committees will receive guidance from the Lord President (through the Judicial Studies Committee) on how they exercise their functions. In addition, the Lord President can specify a minimum amount of approved training which JPs must undertake during their term of appointment. The Lord President will also approve the course of "refresher" training which all JPs must undertake within two years of starting to act as a JP for the sheriffdom. Discussions with the Judicial Studies Committee and the District Courts Association will take place before the total amount of training required of JPs – and the likely split between nationally prescribed and locally determined training – is decided.

SCOTTISH STATUTORY INSTRUMENTS

2007 No.

CRIMINAL LAW

The Justices of the Peace (Scotland) Order 2007

Made - - - -	*2007*
Laid before the Scottish Parliament - -	*2007*
Coming into force - -	*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.—• 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.

(1) 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.

(2) 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.

(3) 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.—• There shall be a JPAC for each sheriffdom.

(1) 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.—• 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.

(1) 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.

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

(3) 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.—• 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.

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

Appointments to JPAC – procedure

7.—• 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.—• There shall be a JTC for each sheriffdom.

(1) 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.

(2) The person referred to in sub-paragraph (c) of paragraph (2) is to act as legal adviser to the JTC.

(3) 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.—• 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.—• 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.

(1) 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.

(2) 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.—• 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.

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

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

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

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

(1) 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.

(2) 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.

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

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

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

(1) 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.

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

(3) 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.

(4) The JAC shall publish its scheme to the JPs.

St. Andrew's House,
Edinburgh
2007

A member of the Scottish Executive