The Scottish Parliament
Pàrlamaid na h-Alba

JUSTICE COMMITTEE

AGENDA

24th Meeting, 2015 (Session 4)

Tuesday 8 September 2015

The Committee will meet at 10.00 am in the Mary Fairfax Somerville Room (CR2).

1. **Declaration of interests:** Margaret McDougall will be invited to declare any relevant interests.

2. **Decision on taking business in private:** The Committee will decide whether to take item 10 in private.

3. **Subordinate legislation:** The Committee will take evidence on the Courts Reform (Scotland) Act 2014 (Consequential Provisions No. 2) Order 2015 [draft] from—

   Paul Wheelhouse, Minister for Community Safety and Legal Affairs, Hazel Dalgard, Civil Law and Legal System Division, and Greig Walker, Directorate for Legal Services, Scottish Government.

4. **Subordinate legislation:** Paul Wheelhouse (Minister for Community Safety and Legal Affairs) to move—

   S4M-14087—That the Justice Committee recommends that the Courts Reform (Scotland) Act 2014 (Consequential Provisions No. 2) Order 2015 [draft] be approved.

5. **Subordinate legislation:** The Committee will take evidence on the Legal Aid and Advice and Assistance (Miscellaneous Amendments) (Scotland) Regulations 2015 [draft] from—

   Paul Wheelhouse, Minister for Community Safety and Legal Affairs, Denise Swanson, Head of Access to Justice Unit, Catriona MacKenzie, Civil Law and Legal System Division, and Alastair Smith, Directorate for Legal Services, Scottish Government.

6. **Subordinate legislation:** Paul Wheelhouse (Minister for Community Safety and Legal Affairs) to move—

   S4M-14088—That the Justice Committee recommends that the Legal Aid and Advice and Assistance (Miscellaneous Amendments) (Scotland) Regulations 2015 [draft] be approved.

7. **Subordinate legislation:** The Committee will consider the following instrument which is not subject to any parliamentary procedure—

   Act of Adjournal (Criminal Procedure Rules 1996 Amendment) (No. 4) (Sheriff Appeal Court) 2015 (SSI 2015/245).

8. **Criminal Justice (Scotland) Bill:** The Committee will consider the Bill at Stage 2 (Day 1).

9. **Declaration of interests:** Gavin Brown will be invited to declare any relevant interests.

10. **Apologies (Scotland) Bill:** The Committee will consider a draft Stage 1 report.

Peter McGrath
Clerk to the Justice Committee
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The papers for this meeting are as follows—

Agenda items 3 and 4

Paper by the clerk	J/S4/15/24/1
Courts Reform (Scotland) Act 2014 (Consequential Provisions No. 2) Order 2015	

Agenda items 5 and 6

Paper by the clerk	J/S4/15/24/2
Legal Aid and Advice and Assistance (Miscellaneous Amendments) (Scotland) Regulations 2015	

Agenda item 7

Paper by the clerk	J/S4/15/24/3
Act of Adjournal (Criminal Procedure Rules 1996 Amendment) (No. 4) (Sheriff Appeal Court) 2015 (SSI 2015/245)	

Agenda item 8

Criminal Justice (Scotland) Bill and all others associated documents	
SPICe Briefing: Criminal Justice (Scotland) Bill: Update	
Letter from the Scottish Government to the Committee	J/S4/15/24/4

Agenda item 10

Private paper	J/S4/15/24/5 (P)
Apologies (Scotland) Bill, accompanying documents and SPICe briefing	

Justice Committee

24th Meeting, 2015 (Session 4), Tuesday 8 September 2015

Subordinate legislation

Note by the clerk

Purpose

1. This paper invites the Committee to consider the following affirmative instrument:

COURTS REFORM (SCOTLAND) ACT 2014 (CONSEQUENTIAL PROVISIONS NO. 2) ORDER 2015 [DRAFT]

Introduction

2. This instrument is made under the powers conferred by section 137 of the Courts Reform (Scotland) Act 2014 and all other enabling powers.

3. The purpose of the instrument is to modify primary and secondary legislation in consequence of provisions of the Courts Reform (Scotland) Act 2014 Act commenced on 22 September 2015 by the Courts Reform (Scotland) Act 2014 (Commencement No. 3, Transitional and Saving Provisions) Order 2015 (SSI 2015/247).

4. The instrument comes into force on 22 September 2015.

5. Further details on the purpose of the instrument can be found in the policy note (see below) to this paper and an electronic copy of the instrument is available at: http://www.legislation.gov.uk/sdsi/2015/9780111028346/contents

Consultation

6. According to the policy note, the Lord President's private office and the Crown Office and Procurator Fiscal Service were engaged on technical aspects of the drafting of the Order. No formal consultation has taken place on the Order as it is being made as a consequence of the Act which had already been the subject of separate consultation exercises (the Scottish Government consulted on the Bill in early 2013).

Delegated Powers and Law Reform Committee consideration

7. The Delegated Powers and Law Reform Committee considered this instrument at its meeting on 23 June 2015 and agreed that it did not need to draw the attention of the Parliament to it on any grounds within its remit.

Justice Committee consideration

8. The Justice Committee is required to report to the Parliament on the instrument by 20 September 2015.

9. The instrument is subject to affirmative procedure (Rule 10.6 of Standing Orders). The Minister for Community Safety and Legal Affairs has lodged motion

S4M-14087 proposing that the Committee recommends approval of the instrument. The Minister is due to attend the meeting on 8 September to answer any questions on the instrument, and then, under a separate agenda item, to speak to and move the motion for approval. It is for the Committee to decide whether or not to agree to this motion, and then to report to the Parliament by 20 September 2015. Thereafter, the Parliament will be invited to approve the instrument.

10. **The Committee will be asked to delegate to the Convener authority to approve the report on the instrument for publication.**

Policy Note: Courts Reform (Scotland) Act 2014 (Consequential Provisions No. 2) Order 2015 [draft]

The above instrument is made in exercise of the powers conferred by section 137 of the Courts Reform (Scotland) Act 2014 ("the Act").

Policy objectives of the Act

The Act delivers an enabling framework to reform the civil courts both structurally and functionally in line with many of the recommendations of the Scottish Civil Courts Review. Reform of the civil courts forms part of the Scottish Government and multi-agency programme, "Making Justice Work" and is part of the 2014-2015 Programme for Government.

The policy objectives relating to the Act are fully described in the Policy Memorandum which accompanied the Bill for the Act ("the Bill"). The link below shows the passage of the Bill through Parliament and includes the Policy Memorandum.
http://www.scottish.parliament.uk/parliamentarybusiness/Bills/72771.aspx

Policy objectives of this instrument

This Order modifies primary and secondary legislation in consequence of provisions of the Act commenced on 22 September 2015 by the Courts Reform (Scotland) Act 2014 (Commencement No.3, Transitional and Saving Provisions) Order 2015 (S.S.I. 2015/247). With one exception the amendments are made in consequence of provisions of the Act which–

- Provide for the exclusive competence of a sheriff (formerly known as the privative jurisdiction) (Schedule 1); and
- Establish the Sheriff Appeal Court in respect of its criminal competence and jurisdiction (Schedule 2).

The modifications in this Order are additional to those provided for in the Act itself, the Courts Reform (Scotland) Act 2014 (Consequential Provisions and Modifications) Order 2015 (SI 2015/700) and the Courts Reform (Scotland) Act 2014 (Consequential Provisions) Order 2015 (SSI 2015/150).

Modifications

Modernised power of the Scottish Ministers to make court fees Orders
Article 2 of the Order modifies section 305(5) of the Criminal Procedure (Scotland) Act 1995 to reflect that the power of the Scottish Ministers to make court fees orders is now contained in section 107(1) of the Act.

Exclusive competence of a sheriff
The modifications in Schedule 1 to the Order concern the increase in a sheriff's exclusive competence (formerly known as privative jurisdiction) from £5,000 to £100,000, as provided for in section 39 of the Act.

Appeals from summary criminal proceedings made on or after 22 September 2015
Section 118 of and schedule 3 to the Act transfer to the Sheriff Appeal Court all the powers and jurisdiction of the High Court of Justiciary so far as relating to appeals from courts of summary criminal jurisdiction (sheriff courts and JP courts). In other words, summary criminal appeals on or after 22 September 2015 are to be directed to the Sheriff Appeal Court instead of the High Court. The High Court will continue to deal with solemn criminal appeals.

Schedule 2 to the Order includes modifications consequential on these changes. Where enactments provide for appeals relating to summary-only offences, the modification made is to simply replace references to the High Court with references to the Sheriff Appeal Court. See for example the modifications made to the Protection of Wild Mammals (Scotland) Act 2002 (paragraph 6), the Fur Farming (Prohibition) (Scotland) Act 2002 (paragraph 7), the Animal Health and Welfare (Scotland) Act 2006 (paragraph 10) and the Control of Dogs (Scotland) Act 2010 (paragraph 12).

In other instances, more complex modifications are required to reflect than an appeal arising out of solemn proceedings will continue to go to the High Court but an appeal arising out of summary proceedings will go to the Sheriff Appeal Court. The modifications made to the Proceeds of Crime (Scotland) Act 1995 for example (paragraph 4) refer to the "appropriate Appeal Court", as defined. In the particular case of section 96 of the Police, Public Order and Criminal Justice (Scotland) Act 2006 (paragraph 9) the Scottish Government considers that the tidiest legislative approach is to split out the possible modifications of section 96 into a new section 96A for the Sheriff Appeal Court.

Bail-related appeals made on or after 22 September 2015
Section 122 of the Act amends the Criminal Procedure (Scotland) Act 1995 with the result that appeals against bail decisions of sheriffs or JP courts on or after 22 September 2015 are to be directed to the Sheriff Appeal Court instead of the High Court. In the case of appeals against bail decisions of sheriffs it does not matter if the decision was in solemn or summary proceedings. Appeals against bail decisions of the High Court are unaffected.

In addition to the modifications already mentioned, Schedule 2 to the Order modifies sections 200, 201 and 245J of the Criminal Procedure (Scotland) Act 1995 in a similar manner because those sections provide for bail-related appeals (see paragraph 5(5) to (8)).

References to criminal courts in Scotland
Lastly, Schedule 2 to the Order inserts new entries for the Sheriff Appeal Court into relevant lists of Scottish criminal courts, for example those in the Restriction of Liberty Order etc. (Scotland) Regulations 2013 (paragraph 19) and the Mutual Recognition of Supervision Measures in the European Union (Scotland) Regulations 2014 (paragraph 20).

Commencement

The Order is scheduled to come into force on 22 September 2015 to coincide with the commencement of provisions in the Courts Reform (Scotland) Act 2014 (Commencement No.3, Transitional and Saving Provisions) Order 2015 (SSI 2015/247).

Consultation

Technical engagement on the drafting of the Order has been had with the Lord President's Private Office (particularly given interaction with the package of acts of sederunt and adjournal they are preparing) and the Crown Office and Procurator Fiscal. No formal consultation has taken place on the Order as it is being made as a consequence of the Act which has already been the subject of separate consultation exercises. The Scottish Government consulted on the Bill in early 2013. The consultations can be viewed on the Scottish Government website at www.scotland.gov.uk/Publications/2013/02/5302 and www.scotland.gov.uk/Publications/2013/05/6753

The analyses of consultation responses, published on the Scottish Government website can be viewed at www.scotland.gov.uk/Publications/2013/09/8038 and www.scotland.gov.uk/Publications/2013/05/6753

Impact Assessments

An Equality Impact Assessment (EQIA) for the Bill was published on the Scottish Government website at http://www.scotland.gov.uk/Publications/2014/03/9314 and the Bill was found to have no significant effects in relation to the protected characteristics.

Financial Effects

A Business and Regulatory Impact Assessment (BRIA) for the Bill was signed by the Cabinet Secretary for Justice on 5 March 2014 and published on the Scottish Government website at www.scotland.gov.uk/Resource/0044/00446226.pdf. The Bill has no significant financial effects on the Scottish Government, local government or on business.

Courts Reform Team
Civil Law and Legal System Division
Learning and Justice Directorate

Justice Committee

24th Meeting, 2015 (Session 4), Tuesday 8 September 2015

Subordinate legislation

Note by the clerk

Purpose

1. This paper invites the Committee to consider the following affirmative instrument:

LEGAL AID AND ADVICE AND ASSISTANCE (MISCELLANEOUS AMENDMENTS) (SCOTLAND) REGULATIONS 2015 [DRAFT]

Introduction

2. This instrument is made under the powers conferred by sections 9, 33(2), (3) and (3A) and 36(2)(c) of the Legal Aid (Scotland) Act 1986 and all other enabling powers.

2. The purpose of the instrument is to amend the Civil Legal Aid (Scotland) (Fees) Regulations 1989, the Criminal Legal Aid (Scotland) (Fees) Regulations 1989, the Criminal Legal Aid (Scotland) Regulations 1996, the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999 and the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003. The amendments—

- provide for the availability of criminal legal aid and assistance by way of representation in criminal appeals to the Sheriff Appeal Court (established by section 46 of the Courts Reform (Scotland) Act 2014) and in relation to appeals and references from that Court to the High Court of Justiciary;
- prescribe the fees payable to solicitors and counsel in relation to bail appeals to the Sheriff Appeal Court;
- revise the table of fees applying to junior counsel in judicial review proceedings to take account of the new procedure introduced by section 89 of the 2014 Act; and
- make provision in relation to the fees payable in relation to proceedings in an all-Scotland sheriff court established under section 41 of the 2014 Act and in relation to civil hearings for which no fee is otherwise prescribed.

3. The instrument comes into force on 22 September 2015.

4. Further details on the purpose of the instrument can be found in the policy note (see below) to this paper and an electronic copy of the instrument is available at: http://www.legislation.gov.uk/sdsi/2015/9780111028353/contents

Consultation

6. According to the policy note, draft provisions were shared with the Scottish Legal Aid Board, the Law Society of Scotland, the Faculty of Advocates and the Auditor of the Court of Session. The Board was content with the regulations, the

Faculty confirmed that it had no comment to make, and no comments were received from the Auditor. The Law Society raised three main points on the draft regulations:

- in respect of how it might affect solicitor advocates, that counsel fee levels for judicial review might not reflect the work involved in new procedures;
- that solicitor advocates would not be able to be paid counsel fees in the Sheriff Appeal Court, even where sanction for counsel is granted; and
- that solicitors representing clients in the Sheriff Appeal Court should be paid the same fee that junior counsel are currently paid for that work in the High Court.

Delegated Powers and Law Reform Committee consideration

7. The Delegated Powers and Law Reform Committee considered this instrument at its meeting on 23 June 2015 and agreed that it did not need to draw the attention of the Parliament to it on any grounds within its remit.

Justice Committee consideration

8. The Justice Committee is required to report to the Parliament on the instrument by 20 September 2015.

9. Written submissions have been received from Dalling Solicitors and Notaries on behalf of the Society of Solicitors and Procurators of Stirling and the Falkirk and District Faculty of Solicitors. These are reproduced at Annexe A.

10. The instrument is subject to affirmative procedure (Rule 10.6 of Standing Orders). The Minister for Community Safety and Legal Affairs has lodged motion S4M-14088 proposing that the Committee recommends approval of the instrument. The Minister is due to attend the meeting on 8 September to answer any questions on the instrument, and then, under a separate agenda item, to speak to and move the motion for approval. It is for the Committee to decide whether or not to agree to this motion, and then to report to the Parliament by 21 September 2015. Thereafter, the Parliament will be invited to approve the instrument.

11. **The Committee will be asked to delegate to the Convener authority to approve the report on the instrument for publication.**

Policy Note: Legal Aid and Advice and Assistance (Miscellaneous Amendments) (Scotland) Regulations 2015 [draft]

The above instrument is to be made in exercise of the powers conferred by sections 9, 33(2), (3) and (3A) and 36(2)(c) of the Legal Aid (Scotland) Act 1986. The instrument is subject to affirmative procedure.

Policy Objectives

Provisions in the Courts Reform (Scotland) Act 2014 are being implemented in September 2015, relating to: criminal proceedings in the Sheriff Appeal Court, all-Scotland sheriff courts for specified civil proceedings, and judicial review. The policy objective of this instrument is to adapt the framework and arrangements in existing regulations to accommodate these changes by:

- making available criminal legal aid and assistance by way of representation (ABWOR) in criminal appeals to the Sheriff Appeal Court, and for appeals and references from that court to the High Court of Justiciary;
- setting fees for representation at bail appeals;
- ensuring fees for counsel are available for new judicial review processes and in respect of appeal or referral from the Sheriff Appeal Court to the High Court; and
- applying detailed fees to work done by solicitors in all-Scotland sheriff courts.

Criminal appeals to the Sheriff Appeal Court
Regulation 4(2) makes appeals to the Sheriff Appeal Court against conviction, sentence, other disposal or acquittal distinct proceedings for the purposes of criminal legal aid. This means that these appeals will require a separate grant of legal assistance.

Solicitors will be paid detailed fees as set out in Part 1 of Schedule 1 to the Criminal Legal Aid (Scotland) Fees Regulations 1989 for criminal appeals to the Sheriff Appeal Court. Regulation 3(3) allows these fees to be paid.

ABWOR is currently available for an appeal to the High Court under section 174(1) of the Criminal Procedure (Scotland) Act 1995 arising from appeal to the competency, relevancy or plea in bar of trial. This is part of the same grant of ABWOR made for the initial proceedings. Regulation 6 ensures that ABWOR continues to be available for the appeal regardless of whether it takes place in the Sheriff Appeal Court or the High Court. These appeals to the High Court are excluded from the fee structure set out in the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999. This means detailed fees are paid to the solicitor for the appeal in addition to the fixed payments for the initial proceedings. Regulation 5(2) ensures this continues to be the case regardless of whether the appeal takes place in the High Court or the Sheriff Appeal Court.

Regulation 4(3) only allows the employment of counsel in the Sheriff Appeal Court with prior approval of the Scottish Legal Aid Board. Where counsel do represent a client in the Sheriff Appeal Court, regulation 3(4)(a)(i) allows them to be paid at the same rates as if the proceedings were taking place in the High Court.

Regulation 3(2) ensures that, where there is a dispute between the Scottish Legal Aid Board and a solicitor or counsel as to the amount of fees or outlays allowable for criminal proceedings in the Sheriff Appeal Court, the matter will be referred for taxation to the Auditor of the Court of Session.

Bail appeals
Bail appeals are not distinct proceedings for the purposes of criminal legal aid and therefore do not require a separate grant of legal assistance. Under the provisions of the Courts Reform (Scotland) Act 2014, they may take place in either the High Court or the Sheriff Appeal Court depending on the circumstances. This means that solicitors may represent clients in bail appeal proceedings before the Sheriff Appeal Court.

Regulation 5(3) makes a fee for representation at each diet or continued diet of a bail appeal available to a solicitor where counsel is not employed, in addition to the existing fee for non-advocacy work in relation to a bail appeal. Regulation 3(4)(b) and (d) aligns fees for junior and senior counsel with this structure by making the fee they

are currently paid for representation at a bail appeal diet available at any continued diet.

Appeals and referrals to the High Court from the Sheriff Appeal Court
The Sheriff Appeal Court may refer points of law to the High Court for consideration during the course of proceedings. These will not require a separate grant of legal assistance. Further, decisions of the Sheriff Appeal Court can be appealed to the High Court. Regulation 4(2) means that such appeals will require a separate grant of legal assistance.

Regulation 3(4)(c) and (e) make fees within a range available for junior counsel and senior counsel in both appeals and referrals to the High Court from the Sheriff Appeal Court. As with existing fees in a range for hearings, regulation 3(4)(a)(ii) ensures that counsel seeking a higher fee within the range must justify this by establishing that either an unusually high level of preparation was required or that novelty of the issues of law, unusually complex issues of fact, or issues of considerable legal significance had a significant effect on the conduct of the case.

Fees for counsel (civil)
New procedures for judicial review are being introduced by section 89 of the Courts Reform (Scotland) Act 2014. Regulation 2(2)(a) makes the junior counsel fee for a motion for first orders under the current system available for an oral hearing at permission stage or procedural hearing under the new procedure. It also makes the junior counsel fee for a first or second hearing under the current system available for a substantive hearing under the new procedure.

Regulation 2(2)(b) and (3) sets “catch-all” fees for representation at hearings by counsel in ordinary actions and in proceedings in the sheriff court respectively. These are intended to make sure a fee is payable to counsel for any new procedural hearings they are involved in as procedures continue to develop.

All-Scotland courts
Section 41 of the Courts Reform (Scotland) Act 2014 allows Scottish Ministers to allow a specified sheriff court to deal with specified types of civil proceedings for the whole of Scotland. This is being used to create a specialist personal injury court, which will use new procedures. The existing block fees will not be appropriate to the new procedure so regulation 2(4) makes detailed fees payable in those cases. As any new all-Scotland sheriff court could reasonably be expected to develop new procedures, regulation 2(4) also makes detailed fees payable for proceedings in any future all-Scotland sheriff court.

Consultation

Draft provisions were shared with the Scottish Legal Aid Board, the Law Society of Scotland, the Faculty of Advocates and the Auditor of the Court of Session. The Board is content with the regulations. The Faculty confirmed that it had no comment adverse or otherwise to make. No comments were received from the Auditor.

The Law Society raised three main points on the draft regulations:

- in respect of how it might affect solicitor advocates, that counsel fee levels for judicial review might not reflect the work involved in new procedures;

- that solicitor advocates would not be able to be paid counsel fees in the Sheriff Appeal Court, even where sanction for counsel is granted; and
- that solicitors representing clients in the Sheriff Appeal Court should be paid the same fee that junior counsel are currently paid for that work in the High Court.

Counsel predominantly provide representation in judicial review cases funded by legal aid. The Faculty of Advocates has expressed no concerns in relation to the fees being made available for this work.

Solicitor advocates may only charge counsel fees where they are using extended rights of audience, which they will not be doing in the Sheriff Appeal Court. The Scottish Government will consider this point in its discussion with both the Law Society and the Faculty on a range of issues affecting solicitor advocates and counsel.

The most flexible of the existing solicitor fee structures is being made available for Sheriff Appeal Court work, namely detailed fees. This flexibility accommodates any uncertainty in the types and amount of work that may arise from new procedures, by providing remuneration in line with the work actually and reasonably undertaken by the solicitor. Counsel fee rates will be paid for Sheriff Appeal Court work only to counsel, where sanction has been given to instruct them.

Impact Assessments

An equality impact assessment has been completed on the draft SSI and is attached. There are no equality impact issues.

Financial Effects

A Business and Regulatory Impact Assessment (BRIA) has been completed and is attached. The impact of this policy on business is that publicly-funded legal assistance will clearly be available for new courts and procedures, and fees will be available to solicitors and counsel doing that work. The shifting of work into the new courts means that there is a group of cases that currently require representation by counsel, which will no longer necessarily require counsel to be instructed. The Scottish Legal Aid Board estimates that this will reduce expenditure from the Legal Aid Fund by around £1.4 million per year.

Scottish Government
Justice Directorate
9th June 2015

Annexe A

Written submission from Dalling Solicitors and Notaries on behalf of the Society of Solicitors and Procurators of Stirling

Sheriff Appeal Court Legal Aid Provision

On behalf of the Society of Solicitors and Procurators of Stirling I write to alert the Justice Committee to our concerns regarding the inadequate provision for remuneration of solicitors appearing before the new Sheriff Appeal Court.

It is the view of my Society that the provisions do not equate to "reasonable remuneration" for the difficult and challenging work which would require to be undertaken for those persons who seek to avail themselves of remedies available from the new Sheriff Appeal Court. As the Committee may be aware the rates which have been fixed for remuneration are the legal aid rates originally set for summary criminal business in 1992. The base rate is £5.25 per quarter hour in connection with travelling to and from the court – a reduction from the 1992 rate. Although it had previously been envisaged that the Sheriff Appeal Court would sit locally that is not now to be the case and therefore travelling is unavoidable for any solicitor who will be appearing before the Appeal Sheriffs in Edinburgh. Rates increase to £10.55 per quarter hour non advocacy and £27.40 per half hour of advocacy, however all these times are conjoinable for work done on the same day. The rates fixed are wholly unreasonable.

It is the considered and indeed unanimous view of the Society that although informal assistance will be provided to convicted persons who wish to appeal conviction/conviction and sentence by, for example, the provision of the appropriate forms for completion, it is simply uneconomic to accept instructions on a legal aid basis in any case which is proceeding to the Sheriff Appeal court and no such instructions will be accepted.

In the field of criminal practice there already exists a considerable cross subsidy between fee paying clients and those who are legally aided. The suggestion that this should extend to the new and difficult area of summary appeal work at a rate of remuneration which is, quite literally from "the last century" is unpalatable, unrealistic and unworkable.

We would urge the Justice Committee to impress upon the Scottish Government and indeed the Scottish Legal Aid Board the need for realistic rates of pay in the field of criminal legal aid.

Kenneth A R Dalling
Solicitor
Secretary to the Society of Solicitors and Procurators of Stirling
28 August 2015

Written submission from Falkirk and District Faculty of Solicitors

I write on behalf of Falkirk and District Faculty of Solicitors to advise the Justice Committee of our grave concerns regarding the provision of legal aid for solicitors appearing before the new Sheriff Appeals Court.

It is clear that the provision made is inadequate. It does not amount to reasonable remuneration in any way. The rates that have been assigned were originally set in 1992.

It is difficult to envisage any other area of work in Scotland where professionals or indeed any other worker is expected to work at rate of pay fixed 23 years ago.

Additionally there is a fundamental access to Justice issue here because it is not going to be practical nor indeed possible for solicitors in Falkirk to carry out appeal work in the Sheriff Appeal Court at these rates where clients are eligible for legal aid.

The Sheriff Appeal Court will be sitting in Edinburgh. It is not difficult to see that £27.40 for a half hours representation in Edinburgh is not going to be sustainable. Travel to and from the Court itself will amount to about £21. The preparation fee that is proposed is less than 30% of the previous rate which is currently applicable.

Accordingly those persons in this jurisdiction who wish to mark an appeal to the Sheriff Appeal Court will not be able to be represented by their solicitor of choice who conducted the Trial here because it will not be sustainable financially for that to happen. They will receive informal advice about their rights of appeal and their methodology of appeal in line with current legal aid regulation. It is difficult to imagine how it can be that rates of pay set out in 1992 were even considered as appropriate in anyway.

Legal Aid rates in general require to be considered and increased as there has been no increase for the best part of quarter of a century. With the apparent reduction in the number of cases being prosecuted according to Scottish Government figures, it is of course now appropriate to consider adequately remunerating solicitors in the summary courts as well. It is difficult to imagine the medical profession being prepared to work at rates of pay which are the best part of a generation out of date.

The disclosure of the rates proposed for the new Sheriff Appeal Court was another shattering blow to the legal profession which is compelled to provide considerable amounts of pro bono work anyway due to the inadequacy of legal aid.

Further it is difficult to see how it can be expected that quality preparation and representation is likely to occur in a new Appeal Court environment where the remuneration offered to professionals having to prepare cases, consider legal submissions, prepare written legal submissions and thereafter make representations before a bench of 3 Judges is in any way possible in 2015 for a payment which is a generation out of date. It seems strangely imbalanced when the Sheriff sitting in the Appeal Court, the Prosecutor, the Clerk and the administrative staff will all be being paid at 2015 rates when the Defence Solicitors arguing the Appeal will be expected to work at 1992 rates.

We would urge the Scottish Government to listen to its electorate, consider the legal professions position and invite the Scottish Government to direct the Scottish Legal Aid Board to review their decision and thereafter provide "reasonable remuneration" for work that has to be prepared and presented to the Sheriff Appeal Court.

It will be apparent that the danger in not doing so will lead to a vast number of people being unrepresented in the Sheriff Appeal Court, the new project being seen as unworkable and ultimately and inevitably leading to a denial in access to justice to those who most need professional legal representation and may very well be in custody.

Please do all that you can therefore to redress the balance.

Gordon Addison
Secretary of Falkirk & District Faculty of Solicitors
26 August 2015

Written submission from the Law Society of Scotland

Introduction
The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

Background
The Legal Aid and Advice and Assistance (Miscellaneous Amendments) (Scotland) Regulations 2015 were laid in the Scottish Parliament on 9 June 2015. The Regulations make changes to legal aid payment structures in order to accommodate changes made by the Courts Reform Act 2014.

Comments
Regulation 3(3) provides that solicitors will be paid detailed fees as set out in Part 1 of Schedule 1 to the Criminal Legal Aid (Scotland) Fees Regulations 1989 for criminal appeals to the Sheriff Appeal Court.

The Impact of the Regulations
We expect the following impacts:

1. People who are eligible for legal aid will have difficulty in finding a solicitor to take on a summary criminal appeal

2. Where a legal aid client obtains sanction for counsel in the Sheriff Appeal Court he or she will be deprived of choice of representative: he or she will not be able to instruct a solicitor advocate as counsel in the Sheriff Appeal Court despite the significant experience of solicitor advocates in conducting summary appeals in the High Court

3. The changes will have a disproportionate impact on clients based outwith Edinburgh

We do not believe these outcomes will be positive for the justice system. We do not believe they were intended by the Scottish Civil Courts Review.

1. People will Have Difficulty in Finding a Solicitor

People who are eligible for legal aid will have difficulty in finding a solicitor to take on a summary criminal appeal. This is because it will be difficult for solicitors to act on behalf of these clients because of low payment.

Existing Arrangements
At present, summary criminal appeals are dealt with by both counsel and solicitor. Sanction for counsel is automatically granted for all summary appeals on the basis they are heard in the High Court. The work is chargeable:

- By the solicitor, under Part 1 of Schedule 1 of the 1989 Regulations "Part 1"; and
- By counsel, under Part 2 of Schedule 2[E] of the 1989 Regulations "Part 2"

Other than for the representation at the hearings, summary appeal work can be carried out by EITHER a solicitor OR an advocate or solicitor advocate.[1] There are certain items of work that are almost always carried out by the advocate or solicitor advocate because of their complexity and the block fees available under the Part 2 fees. For representation at the Appeal Court hearings, the advocate or solicitor advocate will charge for the advocacy under the Part 2 fees AND the solicitor will charge for supporting the advocacy under the Part 1 fees.

The Part 1 fee rates (fees payable to the solicitor) have not been adjusted since they were fixed in 1992. These detailed fees are not suitable for general summary criminal work and now only apply in limited circumstances, for example, where a block fee is not appropriate because of very significant numbers of witnesses and productions.[2]

New Arrangements
All summary criminal appeals will lie to the Sheriff Appeal Court. There will be provision to appeal a decision of the Sheriff Appeal Court to the High Court.[3] Such an onward appeal may only be made on a point of law, and only with the permission of the High Court. We would expect onward appeals to be extremely rare.[4]

Sanction for counsel will not be automatic in the Sheriff Appeal Court. The Regulations provide that employment of counsel in the Sheriff Appeal Court will need the prior approval of SLAB.[5] We do not expect sanction for counsel to be granted

[1] For example, if the solicitor carries out an item of work, he or she will charge under the Part 1 fees. If the advocate or solicitor advocate carries out the item of work, he or she will charge under the Part 2 fees.
[2] Under regulation 4A of the Criminal Legal Aid (Fixed Payment) (Scotland) Regulations 1999 a solicitor may seek to have a case designated as an exceptional case and is paid, as a result, detailed fees rather than a fixed payment. See Chapter 11.20 of the SLAB Handbook for details of the test to be applied.
[3] Section 119 of the Courts Reform (Scotland) Act 2014, amending the Criminal Procedure (Scotland) Act 1995
[4] Paragraph 135, Financial Memorandum to the Courts Reform (Scotland) Act 2014 - http://www.scottish.parliament.uk/S4_Bills/Courts%20Reform%20(Scotland)%20Bill/b46s4-introd-en.pdf
[5] Regulation 4(3)

regularly in the Sheriff Appeal Court.[6] In cases where sanction for counsel is not granted, the solicitor will be required to carry out all of the work in a summary criminal appeal, including the advocacy itself. The funding will come from the Part 1 fees only. This limits the funding available for a summary criminal appeal to the extent that the work will not be economically sustainable.

Examples of changes in funding for specific items of work[7]

A one hour hearing for an appeal against conviction:

- Under existing arrangements - **£292.20[8]**
- Under the new arrangements - **£54.80[9]**

A half-hour hearing for an appeal against sentence:

- Under existing arrangements - **£171.10[10]**
- Under the new arrangements - **£27.40[11]**

Preparing a 4-page written submission for an appeal against sentence:

- Under existing arrangements - **£100[12]**
- Under the new arrangements - **£24[13]**

Drafting a 3-page Adjustment to a Stated Case for an appeal against conviction:

- Under existing arrangements - **£82[14]**
- Under the new arrangements - **£18[15]**

We believe the fee levels under the new arrangements are inadequate. The rates of remuneration will make summary appeals work unsustainable having regard to the work involved as well as the overheads solicitors incur in preparing and presenting appeals. This will create an access to justice issue for clients.

There is an equality of arms issue. In July, we were advised by the Crown Office and Procurator Fiscal Service that Advocate Deputes, rather than Procurators Fiscal, would be appearing for the Crown in the Sheriff Appeal Court, at least initially.[16] This means that the state will be represented by a senior prosecutor, but legal aid appellants will be underfunded to the extent that they will be unlikely to be able to secure representation.

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[6] Given existing numbers of counsel instructed in lower courts as well as sections 132 and 133 of the Financial Memorandum to the Courts Reform (Scotland) Act 2014.

[7] Comparison of items of work in summary criminal appeal cases under existing arrangements in the High Court against same cases (where sanction for counsel has not been granted) in the Sheriff Appeal Court after regulations are implemented.

[8] Block fee of £250 paid to the Advocate or Solicitor Advocate and £42.20 paid to the solicitor. Existing arrangements allow £250 block fee for the Advocate/Solicitor Advocate PLUS £10.55 per quarter hour for the supporting solicitor.

[9] Fee to the solicitor will be £27.40 for the first half hour and £13.70 for each subsequent quarter hour.

[10] Block fee of £150 paid to the Advocate or Solicitor Advocate and £21.10 paid to the solicitor. Existing arrangements allow £150 block fee for the Advocate/Solicitor Advocate PLUS £10.55 per quarter hour for the supporting solicitor.

[11] Fee to the solicitor will be £27.40 for the first half hour and £13.70 for each subsequent quarter hour.

[12] Block Fee of £100 paid to the Advocate or Solicitor Advocate.

[13] Fee to the solicitor will be £6 per page.

[14] Block Fee of £82-£200 paid to the Advocate or Solicitor Advocate for stated case adjustments.

[15] Fee to the solicitor will be £6 per page.

[16] Email from COPFS dated 7 July

2. Where a legal aid client obtains sanction for counsel in the Sheriff Appeal Court he or she will be deprived of choice of representative

Solicitor advocates are experienced solicitors who obtain an extension of their rights of audience by undergoing additional training.

The existing legal aid legislation restricts solicitor advocates from the definition of counsel unless they are acting in connection with their extended rights of audience in the High Court.[17] This means that, in lower court cases, it is not possible to instruct solicitor advocates when sanction for counsel has been granted in a legal aid case. This anomaly will be carried over to work undertaken in the Sheriff Appeal Court.

This means that where a legal aid client obtains sanction for counsel in the Sheriff Appeal Court, he or she will have to select an advocate and not a solicitor advocate, despite the fact that solicitor advocates have been conducting summary criminal appeals as counsel in the High Court for over 20 years and have built up significant experience and expertise in this area.

SLAB may consider a request to allow a second solicitor to assist in the conduct of a summary appeal but, even if the second solicitor is a solicitor advocate, he or she will be restricted to the Part 1 fees.[18] Solicitor advocates are unlikely to be willing to continue to carry out this work for the significantly reduced levels of payment.

Where sanction for counsel is granted by SLAB, the legal aid payment available to the advocate will be the same as it is in the High Court. For example, the block fee payable to an advocate for presenting a summary appeal against conviction will be £250. A solicitor (whether or not a solicitor advocate) presenting the case in the Sheriff Appeal Court will receive only £27.40 for the first half hour and £13.70 for each subsequent quarter hour. For a half hour hearing, the solicitor or solicitor advocate will receive less than a ninth of the remuneration available to the advocate.

Where sanction for counsel is granted, the legal aid client will be restricted in his or her choice of representative. He or she will have no option but to choose an Advocate. The option to instruct a solicitor advocate as counsel will be available for private payers only. The arrangements deprive clients of choice of representative and restrict competition within the legal aid market place.

[17] The Criminal Legal Aid (Scotland)(Fees) Regulations 1989 regulations define “solicitor-advocate” as "a solicitor who, in relation to the proceedings, has exercised a right of audience conferred by virtue of section 25A (rights of audience in specified courts) of the Solicitors (Scotland) Act 1980”. It is worth noting that there is equivalency between an Advocate and Solicitor Advocate in private cases. The Tables of Applicable Fees within the Acts of Sederunt are the same for both Advocates (Counsel) and Solicitor Advocates - Acts of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993 (as amended)

[18] SLAB Draft Guidance, received by the Society on 25 August 2015

3. The changes will have a disproportionate impact on clients based outwith Edinburgh

Summary criminal appeals will continue to be administered centrally with work being focussed in Edinburgh.[19]

The regulations create practical problems. At present, much appeal work emanating from outside Edinburgh is referred to Edinburgh firms on an agency basis. The reduction in funding means that the Edinburgh-based referral network will cease to operate for summary appeals. For example, the Part 1 fee rates, by themselves, are too low to allow a solicitor or appellant to negotiate an agency fee with agents in Edinburgh.

It is not realistic to expect solicitors to travel to the Sheriff Appeal Court in Edinburgh for the low rates available. This will create difficulties for appellants based outwith Edinburgh. For example, where a person in Inverness is unfairly convicted, he or she is unlikely to be able to find an Inverness-based solicitor willing to travel to Edinburgh to conduct a 30 minute summary appeal hearing for remuneration of £27.40 and limited travel fees.

We recommend that steps are taken to ensure that appellants are able to engage with the centralised Sheriff Appeal Court through each of the local lower courts in Scotland, limiting the need for solicitors or unrepresented appellants to have to travel to Edinburgh, at least for pre-Hearing matters.

Alternative Suggestions

In our comments on the draft regulations we suggested that the Government introduce a block fee for summary appeals work. The Government responded that it lacked the time and data to introduce a block fee.[20] As an interim measure, we suggested that the High Court rate that is currently paid to junior counsel for conducting appeals could be adopted for this work. In other words, rather than limiting the solicitor to charging the Part 1 fees, the solicitor could be allowed to charge the Part 2 fees for certain items of work. This would allow time for costing work to be carried out for the introduction of a block fee whilst providing adequate remuneration in the interim. This would generate savings to the legal aid fund because SLAB would be paying for only one legal representative. The Government simply stated that these fees were reserved to counsel.[21]

Conclusion

The Part 1 Fees do not reflect the specialist type and amount of work that requires to be undertaken in a summary criminal appeal. It is disappointing there has been no attempt to review the complexity of the work to determine a reasonable remuneration for the solicitor. Preparing and presenting a summary criminal appeal is complex and requires skills not found elsewhere in summary criminal business. The work is time-consuming. Many hours of preparation are often necessary and complex documents are required to be drafted and submitted to the court before the full hearing. The work cannot be undertaken for the low levels of payment proposed.

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[19] SPICe Briefing, Courts Reform (Scotland) Bill, page 27
http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S4/SB_14-23.pdf

[20] Email from Scottish Government, 18 May 2015

[21] Policy Note to the Regulations

In 2013-14 there were 714 legal aid applications granted for summary criminal appeals.[22] Over the years, the number of appeals for summary criminal appeals has been on a gradual downward trend, reducing in line with summary criminal cases overall. However, the rate of summary cases being appealed has remained reasonably consistent at around 1.7%.[23] We expect a reduction in this rate and expect an increase in the number of unrepresented accused in summary appeals. We would encourage the Scottish Government to monitor the relevant statistics and we undertake to assist in this process.

Appeals from courts of summary criminal jurisdiction have made an important contribution to modern jurisprudence and have helped shape the law in Scotland.[24] A properly funded Sheriff Appeal Court would safeguard the integrity of Scots law and preserve access to justice by creating an accessible court structure. Unfortunately, the low payment rates means that legal aid clients will have serious difficulty in accessing the Sheriff Appeal Court.

In conclusion, the Society cannot support these regulations.

Matthew Thomson
Legal Aid Policy Officer
28 August 2015

[22] Data received from the Scottish Legal Aid Board, 27 July 2015
[23] Paragraph 136 of the Financial Memorandum to the Criminal Courts Reform (Scotland) Bill
[24] Some example of important summary appeal cases include: Starrs v Ruxton, 2000 J.C. 208, Ambrose v Harris 2011 SCCR 651, Speirs v Ruddy 2008 SLT 39

Justice Committee

24th Meeting, 2015 (Session 4), Tuesday 8 September 2015

Subordinate legislation

Note by the clerk

Purpose

1. This paper invites the Committee to consider the following instrument which is not subject to any parliamentary procedure:

- Act of Adjournal (Criminal Procedure Rules 1996 Amendment) (No. 4) (Sheriff Appeal Court) 2015 (SSI 2015/245)

ACT OF ADJOURNAL (CRIMINAL PROCEDURE RULES 1996 AMENDMENT) (NO. 4) (SHERIFF APPEAL COURT) 2015 (SSI 2015/245)

Introduction

2. The instrument was made under the powers conferred by section 305 of the Criminal Procedure (Scotland) Act 1995(1), and all other powers enabling it to do so.

3. The purpose of the instrument is to amend the Act of Adjournal (Criminal Procedure Rules) 1996 ("the Criminal Procedure Rules"), in consequence of the establishment of the Sheriff Appeal Court by the Courts Reform (Scotland) Act 2014 (—the 2014 Ac).

4. The instrument comes into force on 22 September 2015.

5. An electronic copy of the instrument is available at:
http://www.legislation.gov.uk/ssi/2015/245/contents/made

Delegated Powers and Law Reform Committee consideration

6. The Delegated Powers and Law Reform (DPLR) Committee considered this instrument at its meeting on 1 September 2015 and agreed to draw the attention of the Parliament to it as it contains minor drafting errors. The DPLR Committee noted that the Lord President's private office had subsequently laid an instrument (SSI 2015/295) to correct the errors, timeously for this instrument coming into force on 22 September 2015.

7. The relevant extract from the DPLR Committee's report on the instrument is reproduced on pages 2 and 3 of this paper.

Justice Committee consideration

8. The instrument was laid on 8 June 2015 and the Justice Committee has been designated as lead committee.

Procedure

9. This instrument is not subject to any parliamentary procedure. It has been referred to the Committee under Rule 10.1.3 of Standing Orders. However, there is no formal requirement for the Committee to consider it.

10. The Committee has agreed that these types of instruments will not normally be placed on a Committee agenda unless—

a. the DPLR Committee has drawn the instrument to the lead committee's attention on technical grounds; or
b. a member of the Justice Committee has proposed to the Convener that the instrument goes on the agenda, and the Convener agrees.

11. In addition, where the clerks are aware of particular issues with an instrument not subject to parliamentary procedure, they will draw this to the Convener's attention, for consideration of whether to put it on the agenda.

Recommendation

12. The Committee is invited to note the instrument and consider whether to make any comment on it. In particular, in light of the concerns raised by the DPLR Committee, the Committee is invited to endorse the conclusions reached in the DPLR Committee's report.

Extract from the Delegated Powers and Law Reform Committee 44th Report 2015

Act of Adjournal (Criminal Procedure Rules 1996 Amendment) (No. 4) (Sheriff Appeal Court) 2015 (SSI 2015/245)

1. This instrument amends the Act of Adjournal (Criminal Procedure Rules) 1996 (—the Criminal Procedure Rules‖), in consequence of the establishment of the Sheriff Appeal Court by the Courts Reform (Scotland) Act 2014 (—the 2014 Act‖). The instrument comes into force on 22 September 2015. However, the Rules as they applied immediately before 22 September 2015 continue to apply to various proceedings in the High Court of Justiciary which started before the 22 September 2015.

2. In considering the instrument, the Committee queried a number of drafting points with the Lord President's Private Office. The correspondence is reproduced at Annexe A. The instrument contains some minor drafting errors, which are corrected by the Act of Adjournal (Criminal Procedure Rules 1996 and Act of Adjournal (Criminal Procedure Rules 1996 Amendment) (No. 4) (Sheriff Appeal Court) 2015 Amendment) (Miscellaneous) 2015 (SSI 2015/295). The errors are explained in the following paragraph.

3. The Committee draws this instrument to the attention of the Parliament on the general reporting ground, as it contains some minor drafting errors:

(1) In paragraph 2(9), the references in the substituted rule 19.11(1)(a) and (b) of the Criminal Procedure Rules 1996 to sections 179(9) and 187(9)(a) should be followed by the words "of the Act of 1995".

(2) In paragraph 3, in the inserted rule 19E.4(1), the reference to section 194ZF(2)(a) should be followed by the words "of the Act of 1995".

(3) In paragraph 5(23)(b), the reference to paragraph 4 of Form 38 should refer instead to paragraph 5.

(4) In the Form 19E.2 which is inserted by the Schedule, the reference to rule 19E.2(4) should refer instead to rule 19E.2(5).

4. The Lord President's Private Office has subsequently laid an instrument (SSI 2015/295) to correct the errors, timeously for this instrument coming into force on 22 September 2015.

Annexe A

Act of Adjournal (Criminal Procedure Rules 1996 Amendment) (No. 4) (Sheriff Appeal Court) 2015 (SSI 2015/245) On 15 June 2015 the Lord President's Private Office was asked:

1. Generally speaking, where a section is referred to in this instrument, it is specified that it is a section of —the Act of 1995" (but the instrument does not refer exclusively to sections of the Criminal Procedure (Scotland) Act 1995). It appears that neither this instrument nor the Criminal Procedure Rules 1996 contain an interpretation provision to the effect that where a section is referred to, then unless the context otherwise requires it is assumed that a section of the Criminal Procedure (Scotland) Act 1995 is being referred to.

Within paragraph 2 of the instrument, the new rule 19.11(1)(a) and (b) of the Criminal Procedure Rules 1996 refers to sections, without further specification that they are sections —of the Act of 1995‖. Within paragraph 3, the following new rules also refer to particular sections, without further specification that they are sections "of the Act of 1995":

New rules 19D.5(2), 19E.1(2), 19E.3(1) (third line), 19E.3(1)(e), 19E.3(2) and (3), 19E.4(1).

Is this discrepancy in the various references to sections an omission, or would the provisions be clearer if a uniform approach was taken to referring to sections of "the Act of 1995"?

2. In paragraph 5(23)(b), should the insertion of "[or the prosecutor]" be made in paragraph 5 of Form 38 of the Criminal Procedure Rules 1996 rather than paragraph 4?

3. In Form 19E.2 of the Schedule (Form of extension of time by the President of the Sheriff Appeal Court), is there an error as the form refers to the powers conferred on the President by rule 19E.2(4) of the Criminal Procedure Rules 1996, but the power of extension is contained in new rule 19E.2(5), on page 7 of the instrument?

4. Is it proposed to take corrective action on the above matters?

The Lord President's Private Office responded as follows:

Question 1
We agree that neither the Criminal Procedure Rules 1996 ("the principal Rules") nor this instrument contain a general provision specifying that where a section is referred to then it is a section of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") unless the context otherwise requires. Rule 1.2(2) contains such a provision for internal references within the Rules, but in our view this is not in accordance with modern drafting practice and is more a reflection of prevailing practice when the principal Rules were drafted.

The principal Rules are now nearly 20 years old, and they have been amended frequently during that period. Inevitably, there are stylistic differences to be found depending on when provisions of the principal Rules were inserted or amended, and so we think it would be extremely difficult to ensure that the approach adopted is uniform throughout the instrument. There are other examples where uniformity of approach has given way to modern drafting practice – for example, new Chapters 19D and 19E have been drafted in a gender neutral way, although the principal Rules themselves are not gender neutral.

That being said, we accept that where we have amended an existing rule, e.g. by substituting a new rule 19.11, then it might have been desirable to ensure consistency with the approach taken in the rest of Chapter 19, i.e. the references to "the Act of 1995" should have been included immediately after the sections.

However, we think that the newly-inserted Chapters are in a slightly different position. Chapter 19D exists solely to provide a procedure for references made under section 175A of the 1995 Act. Accordingly, rule 19D.1 defines "reference" as a reference made by the Sheriff Appeal Court to the High Court for its opinion on a point of law under section 175A(1) of the Act of 1995. Given that rule 19D.5(2) contains the defined term —reference‖, we think it is reasonably clear that the reference to section 175A(3) must be to that section in the 1995 Act. If the text of the definition is substituted for the word —reference‖ then we do not consider that any doubt could arise in the mind of the reader. Accordingly, this was a stylistic decision rather than an omission, and we tend to think that inserting "of the Act of 1995" would simply make the provision more ornate than it needs to be. We do not consider that it would improve the clarity of rule 19D.5(2).

As far as Chapter 19E is concerned, we would make the following observations:

rule 19E.1(2): in this case, the full reference "section 194ZC(1) of the Act of 1995" is used in paragraph (1). We accordingly consider that it is appropriate (and in accordance with modern drafting practice) to use the shorthand reference "section 194ZC(1)" in the following paragraph. We do not think that any reasonable doubt arises as to the meaning of that paragraph when the rule is construed as a whole.

rules 19E.3(1) and 19E.3(1)(e): again, the full reference is used on the first occasion and a shorthand one is used on the second occasion. We think, if anything, that the position is stronger here as it is part of the same sentence – we note that no exception appears to have been taken to the same approach in rule 19E.2(1).

rules 19E.3(2) and (3): again, we take the view that there can be no reasonable doubt as to what is intended here. There are no intervening references to any other

enactment and when the rule is construed as a whole we think it is clear what is intended.

rule 19E.4(1): we accept that this rule has been drafted inconsistently with the other rules in the Chapter (where the approach has been to use the full reference on the first occasion that a section of the 1995 Act is encountered). We do not think that the reader is likely to be misled by the provision, but we consider that it would be desirable for it to be consistent with the rest of the Chapter.

Question 2
We are grateful to the DPLRC and its legal advisers for identifying this cross referencing error. The reference should be to paragraph 5 of Form 38, as suggested.

Question 3
Again, we are grateful that this cross-referencing error has been identified. The references to rule 19E.2(4) should instead be to rule 19E.2(5), as suggested.

Question 4
Standing the responses to the questions 1 to 3, we propose to make the following corrections by amending instrument before this instrument comes into force:

in paragraph 2(9), we will amend the references in substituted rule 19.11(1)(a) and (b) so that the references to sections 179(9) and 187(9)(a) are followed by the words “of the Act of 1995”;

in paragraph 3, we will amend inserted rule 19E.4(1) so that the reference to section 194ZF(2)(a) is followed by the words “of the Act of 1995”;

in paragraph 5(23)(b), we will correct the reference so it is to paragraph 5 instead of paragraph 4 of Form 38;

in new Form 19E.2, we will correct the references to rule 19E.2(4) so that they refer instead to rule 19E.2(5).

Justice Committee

24th Meeting, 2015 (Session 4), Tuesday 8 September 2015

Criminal Justice (Scotland) Bill

Letter from the Scottish Government to the Convener

Parliamentary scrutiny of the Criminal Justice (Scotland) Bill will re-commence in September and I am writing to provide an update to the Committee on the Bill, given the period of time which has elapsed since Stage 1.

Overview of the Bill's content

As set out in the Policy Memorandum, the Criminal Justice (Scotland) Bill is the legislative vehicle to take forward the next stage of essential reforms to the Scottish criminal justice system. The Bill achieves this by taking forward and further developing the majority of the recommendations of two independent reviews of key aspects of the criminal justice system. The Bill also includes a number of other key provisions which the Scottish Government considers also assist in meeting its overall objectives of ensuring a Safer and Stronger Scotland in which public services are high quality, continually improving, effective and responsive to local people's needs.

The Bill comprises three elements:

- Provisions which have been developed from the recommendations of Lord Carloway's Review of Scottish Criminal Law and Practice (these reforms would modernise arrest, custody and questioning procedures, enhance protections for the accused);
- Provisions which have been developed from the recommendations of Sheriff Principal Bowen's Independent Review of Sheriff and Jury Procedure (to enable and promote the efficient and effective management of sheriff and jury cases including enabling earlier communication between the prosecution and defence and help active judicial case management); and
- A number of additional relevant provisions which take forward a range of key justice priorities.

The additional provisions which are being taken forward by the Bill are intended to complement the reforms which are based on Lord Carloway and Sheriff Principal Bowen's recommendations by implementing a key range of justice priorities or efficiency measures. On introduction the additional provisions contained in the Bill were:

- Raising the maximum custodial sentences available to courts for handling offensive weapons offences, including knife possession, from four to five years;
- Making clearer the law on court powers to impose sentences on offenders who commit offences while on early release;

- Introducing a people trafficking criminal aggravation when sentencing for other crimes with a connection to people trafficking (this has now been superceded by the recent Human Trafficking and Exploitation (Scotland) Bill) ;
- Enabling increased use of live TV links;
- Changing the method of juror citation; and
- Retaining a collective bargaining mechanism in Scotland for the negotiation of police officer pay, following the Home Secretary's decision to abolish the UK Police Negotiating Board.

Parliamentary Process to date

The Bill was introduced to Parliament on 20 June 2013. Your Committee took evidence on the Bill over the course of 11 sessions, and on 6 February 2014 published its report on the Bill. I note that the Committee's Stage 1 Report supported the general principles of the Bill, with the exception of the corroboration reform, where a majority of the Committee recommended these provisions be removed. The Bill was then debated on 27 February 2014, and Parliament approved its general principles.

As you will recall alongside the Stage 1 consideration of this Bill, on 6 February 2014 Kenny MacAskill, the former Cabinet Secretary for Justice, announced that Lord Bonomy would head an independent reference group to consider what additional safeguards and changes to law and practice may be needed to Scotland's criminal justice system following the then planned abolition of the corroboration requirement in the Criminal Justice (Scotland) Bill. Lord Bonomy published his final report in April 2015 and this is available on the Scottish Government website.

The Scottish Government proposed abolishing the corroboration requirement to improve access to justice for victims of crimes committed in private, including domestic abuse and sexual offences. Following completion of Lord Bonomy's Post-corroboration Safeguards Review, it was clear that substantial additional changes would be required alongside abolition. Given this, and the lack of consensus on this reform, I announced to Parliament on 21 April 2015 that the Scottish Government accepted that abolition should not go forward in the Criminal Justice (Scotland) Bill, and I would instead consider and work with stakeholders towards a greater degree of consensus on a package of reforms. This work will begin later this year and will include consideration of Lord Bonomy's recommendations alongside the corroboration requirement itself.

I will now move on to address the parts of the Bill in order and provide an update to the Committee on the Scottish Government's position on the points raised in your Stage 1 report and advise on the amendments which I intend to lodge for the Committee's consideration at Stage 2.

Part 1 – Police powers

Part 1 of the Bill creates a new regime for arrest, custody and questioning of suspects. The underlying purpose of the changes is to:

- modernise and clarify the system of arrest, custody and questioning to ensure the rights of accused persons and the victims of crime remain appropriately balanced;
- simplify and clarify the process of arrest;
- ensure people are not unnecessarily or disproportionately held in custody;
- create flexibility to manage criminal investigations, balancing the needs of the enquiry, public safety and the fundamental human rights of suspects;
- set out clearly when a person's right to access a solicitor arises, how it is communicated and when these rights can be waived;
- provide powers to question a person after they have been officially accused of an offence;
- provide the highest standard of protection for children involved in the formal criminal justice process; and
- ensure vulnerable adult suspects are not disadvantaged during police procedures

Implementation – Training and i6

The Committee raised concerns at Stage 1 about the burden Part 1 of the Bill could place on Police Scotland, particularly alongside the implementation and roll-out of i6.

The Scottish Government continues to work closely with Police Scotland and the Scottish Police Authority on the practicalities and financial impact of implementing the Bill and its interaction with the i6 programme to ensure the timetable for implementation is achievable

Implementation had previously been planned for April 2016. Work is already well under way on developing the Police Scotland training programme. Taking into account the scale of the training exercise required – alongside the training requirements for the i6 roll-out, which is commencing this year – the Scottish Government believes it would be more appropriate to work towards implementation in autumn 2016.

Chapter 1 – Arrest

Terminology

In its Stage 1 report, the Committee accepted the benefit of simplifying the powers of arrest but commented that the new terminology could be confusing. In particular, the Committee said the public and the media may not be able to distinguish between a person who has been arrested but not "officially accused" and a person who has been arrested and has been "officially accused". Concerns were also expressed about the term "de-arrest" in relation to proposals to allow the police to release a person when the grounds for arrest no longer exist.

We continue to believe the terminology used is clear. The presumption of innocence remains after someone is arrested and whether a person is guilty, of course, is a matter for the courts. The Government agrees with Lord Carloway that having a single process – arrest – for taking a suspect into custody makes for a clearer

system. The term “de-arrest” is not used in the Bill and the Government does not intend to take this forward in the amendments planned for Stage 2.

Suspect anonymity
The Committee recognised that the issue of suspect anonymity is problematic but considered it merits further consideration and every effort should be made to ensure the reputation of the accused is not detrimentally affected by the provisions in the Bill.

The Scottish Government remains confident the police will make every effort to avoid disclosure of a suspect's identity to the media. The principle of innocent until proven guilty is well understood. There are no current plans to make changes to the current position.

Defining arrest
The Committee noted there was no consensus from witnesses on whether to define arrest but decided on balance they would rather have a definition in the Bill, and I am aware John Pentland has lodged an amendment which would define arrest.

The Scottish Government remains convinced that attempting to define arrest in the Bill is unnecessary. The Scottish Government believes leaving the term to take its natural meaning within the context of the Bill will allow the new system to operate smoothly and alongside other legislation which makes provision about arrest.

Arrest for attempts/conspiracy
In its Stage 1 report, the Committee highlighted the differing viewpoints of the police and the Scottish Human Rights Commission on scope for the police to arrest people who have done nothing wrong and called on the Scottish Government to further consider this issue.

We have continued to engage with stakeholders on this. The Bill as introduced only allows a police officer to arrest a person if they have reasonable grounds for suspecting that person has committed or is committing an offence. This would be sufficient to arrest a person on suspicion that they have attempted or are conspiring to commit an offence because attempts and conspiracies to commit offences are criminal offences in their own right.

There is nothing in the Bill which will permit the police to arrest a person without grounds for suspecting that person has committed an offence.

Release from arrest
The Committee wanted to ensure “de-arrest” does not lead to a situation where people are arrested without a proper assessment on whether arrest was appropriate.

The Scottish Government is persuaded that it should be possible for the police to release an arrested person, prior to arrival at a police station in certain circumstances. I intend to lodge amendments at Stage 2 to make provision for this.

The amendment will allow a person to be released prior to arriving at a police station only if there are no longer reasonable grounds to suspect the person of committing

the offence for which they were arrested or an offence arising from the same circumstances. The amendments will include a requirement to record the reasons why an arrestee is released before arriving at a police station.

The police have an equivalent power at present in relation to people they detain under section 14 of the Criminal Procedure (Scotland) Act 1995 and its use is very limited. On this basis, I would not expect the power to release an arrestee before arriving at a police station to be used often in practice.

It will continue to be possible to release a suspect where a constable charges the person with an offence and having done so decides that the person's presence at the police station will not be required.

Letter of rights
The Committee, in their Stage 1 report asked the Scottish Government to respond to the suggestion of some witnesses that information to be given to suspects as police stations should be provided both verbally and in writing with a view to ensuring that they clearly understand their rights.

Section 5 of the Bill places, on a statutory footing, that such information required to satisfy the EU Directive on the Right of Information in Criminal Proceedings, must be provided verbally or in writing as soon as reasonably practicable.

Since July 2013, a letter of rights, conveying information about the right of access to a lawyer has been provided to every suspect who is in a police station. The letter of rights was consulted on ahead of its introduction in July 2013. It was also welcomed by the Justice Committee at Stage One. This letter has been drafted in accessible language and is also available translated into 34 languages. In order to strengthen and simplify the advice that is given to all suspects, and to ensure compliance with the Directive, the Scottish Government worked with key stakeholders since 2013 to improve the letter of rights, and to also create separate versions designed to be accessible for children and those with learning difficulties and disabilities. Copies of all the letters can be found on the Scottish Government website.

In the course of discussions with stakeholders, various representatives made clear their opposition to requiring the police to verbally read the letter to all suspects. Police Scotland have indicated that they already endeavour to ensure all suspects understand their rights, reading the letter to suspects where necessary. However, they have estimated that reading the letter to all c.200,000 suspects processed each year would equate to an additional 16,666 hours of police time per annum.

I consider that the key issue is that individuals are provided with an effective and appropriately drafted letter of rights and given the opportunity to read and absorb the information.

.An officer having to read through the whole letter, may add to what is already a confusing and stressful situation. My view is that having the letter read out to all suspects would not represent an additional safeguard. However, as part of the development of I6, Police Scotland have now built in an additional question which they will ask suspects during the booking in process. Suspects will be asked whether

or not they wish the letter of rights to be read out to them. In my view, this is a proportionate way to address the understandable concerns that has been raised of the need to ensure all suspects fully understand their rights.

Given the above, I am convinced that the Bill offers the necessary safeguards and retains the flexibility to enable officers to read the letter of rights to suspects who wish them to do so.

Chapter 2 – Custody

Detention limits
The Bill as introduced allows a person to be kept in custody for a maximum of 12 hours. During Stage 1, the Scottish Government made a commitment to consider extending that in exceptional circumstances.

The Committee noted there were mixed views among members on whether detention beyond six hours is necessary. It recognised, however, there may also be situations where it could be necessary to consider extending beyond the 12 hour limit and sought further information on the exceptional circumstances in which such an extension might be granted, how often such extensions are likely to be granted and how the Scottish Government intends to ensure that extensions do not become the norm.

The Scottish Government listened to the evidence at Stage 1 and has continued to consider the appropriate detention limits. The purpose of the custody provisions is to strike an appropriate balance, ensuring no one is held unnecessarily or disproportionately, protecting the rights of suspects and victims while giving flexibility to carry out effective investigations. When the custody provisions are considered as a package, I believe it is clear the detention limit is not a target but the absolute maximum and the system is designed to ensure unnecessarily prolonged detentions cannot become the norm.

There are several safeguards built into the process. These include requirements for the initial custody authorisation to be given by a police officer who has not been involved in the investigation and for a mandatory custody review by an Inspector after six hours. In both cases, custody can only be authorised if the statutory test in section 10 of the Bill is satisfied. The provisions should also be read with the general duty on the police in section 41 to take every precaution to ensure a person is not unreasonably or unnecessarily held in police custody.

As the Committee noted in the Stage 1 report, statistics from June 2013 show the 80.4 per cent of people detained under the current legislation are held for up to six hours. 19.2 per cent of persons were detained for between six and 12 hours. Only 0.4 per cent of detainees (13 people in the month of June 2013) were held for a further period of up to 12 hours. Those 0.4 per cent of cases are the exceptional cases under the current legislation. The Stage 1 written evidence from Police Scotland includes detailed case studies of when such extensions are needed (see Appendix B of the written evidence submitted by Police Scotland in August 2013).

The Bill will create the new option of releasing a person on investigative liberation part way through the 12 hour custody period and arresting them again at a later stage. Investigative liberation will provide vital flexibility in investigations, allowing time for complex and technical examinations of documents, telephones and computers to take place. In order to balance the interests of justice and protect the public, investigative liberation will be limited to taking place over a 28 day period, and a person may be released subject to conditions.

Police Scotland have made the case that several factors can combine to create exceptional cases where extensions to the 12 hour period may be required. These factors tend to affect the timing of when interviews can start, rather than the length of the interviews required. Police Scotland have also provided assurances that the purpose of extensions is to ensure interviews are conducted in circumstances fair to suspects – and victims – and to allow the police to conclude enquiries properly and gather sufficient evidence in order to charge a suspect. Some possible factors include:

- Suspects and victims may be too exhausted, traumatised, drunk or under the influence of drugs to be interviewed immediately after an arrest takes place and the suspect is brought to a police station. This is more likely when people are arrested late at night. In such cases, best practice in the public interest – and the interest of fairness – is to allow people a period to sober up or rest before interview.

- Urgent work may be needed to interview victims, trace witnesses and conduct other investigations – for example, examine a crime scene – before or at the same time as interviewing a suspect. It may not be in the interests of public safety to release a person suspected of a serious and violent offence on investigative liberation while such investigations take place.

- In some cases, it is considered best practice to examine a crime scene during daylight hours, even if an initial arrest took place at night. This may apply, for example, to examination of bed clothes at a rape scene. Releasing a suspect on investigative liberation in these circumstances, immediately after a suspected murder or rape may not be safe for the victim or the suspect.

- Forensic medical examinations may be required before interviews can take place. In areas of rural Scotland, victims and suspects may need to travel to specialist police medical suites or for examination by a Police Casualty Surgeon. These examinations and the travel times involved may reduce the time remaining for conducting interviews within the 12 hour detention limit.

- Other people – for example, interpreters and appropriate adults – may be required before interviews can commence. It is in the interests of justice and human rights that such people are present at interviews but it may take time to assess what support is required for an individual suspect and then arrange for the specialists to attend. Delays are possible if a suspect's needs are not immediately evident because they are also drunk or on drugs. These factors can reduce the time available for conducting interviews and, in complex cases extending the detention period beyond 12 hours may become necessary.

It is possible to extend detention periods by a further 12 hours under the current legislation, but not under the Bill as introduced.

Suspects in serious and complex cases affected by the factors I have set out above would therefore have to be released under the Bill if the 12 hour period expired before the police had obtained sufficient evidence to charge them with an offence.

This is a complex issue and one where, as the Committee has noted, there is a range of views amongst stakeholders. I am therefore giving further consideration to the approach the Government wishes to take at Stage 2.

Investigative liberation – impact on private life

The Committee sought assurances that investigative liberation will not have an unnecessary impact on a suspect's private life.

The Scottish Government has considered this matter further. In addition to the existing safeguards in the Bill, I plan to lodge amendments to ensure investigation liberation conditions can only be imposed for 28 consecutive days and cannot include curfews.

Investigative liberation – notification of victims
The Committee asked the Scottish Government to work with COPFS to ensure that, where they may be at risk, complainers are always informed timeously of the suspect's release on investigative liberation and of any conditions applied.

The Scottish Government continues to discuss with stakeholders the processes which will be required as a result of the Bill, including the process of notifying complainers where a suspect is released on investigative liberation.

Investigative liberation – resource implications
The Committee noted there were resource implications relating to investigative liberation.

The Scottish Government will continue to work closely with Police Scotland in relation to implementation of the Bill to ensure Police Scotland has adequate resources to deal with investigative liberation.

Custody cases – times in custody/court sitting times
The Committee was not convinced that specifying time-limits for periods in custody was not necessary at this Stage in light of the Police Scotland led working Group that has been set up to consider the issue. This working group continues to report regularly to the Justice Board and is now developing possible options, involving a limited number of courts being open seven days a week supplemented by video conferencing for some first appearances, for possible piloting. I will of course keep the Committee informed once any final decision is taken with regard to these potential options

Chapter 4 - **Police interview**

The Committee welcomed the extension of the right to access to a solicitor to all suspects held in police custody. As Committee members will be aware, Lord Bonomy's Post-corroboration Safeguards Review Final Report recommended that "Scottish Ministers should forthwith abolish the requirement for some suspects to pay a contribution towards the cost of legal advice and assistance provided to them while they are in a police office". I have considered this recommendation and will bring forward regulations which will remove the requirement for suspects to pay a contribution towards the advice they receive at a police station.

I also intend to lodge an amendment to section 23 of the Bill. Section 3 of the Bill deals with information to be given *on arrest*. This is that a person must be informed that the person is under arrest; the reason for the arrest; that the person is under no obligation to say anything other than to give the information specified in section 26(3) (outlined above); that they have a right to have intimation sent to a solicitor under section 35 and access to a solicitor under section 36. Section 3 however <u>also</u> provides that a person must be informed of the general nature of the offence in respect of which the person is arrested. Section 23 as currently drafted does not contain the requirement to tell a suspect what offence they are suspected of committing. It is proposed therefore that an amendment be brought forward to section 23 to provide for this. The amendment will ensure consistency with section 3 and will act as an additional safeguard for suspects.

Post Charge Questioning
I remain of the view that, as recommended by Lord Carloway, post-charge questioning has an important role to play in the investigation of crime. I intend to introduce amendments to put beyond doubt that the suspect in this position is entitled to the same rights and protections as the suspect who is being questioned before charge; and, on top of that, to provide that the suspect must be informed of any conditions attached by the court to its authorisation of post-charge questioning (such as restrictions on the nature of the questions, or a time limit).

Chapter 5 - Child Suspects

In its Stage 1 report, the Committee noted that the Victims and Witnesses (Scotland) Bill defines a child as a person up to the age of 18 and asked the Scottish Government to explain why there appears to be inconsistency between the protections for under-18s in this Bill compared with this recent legislation. In our response we said:

> "While it might appear attractive to treat all individuals under 18 years consistently, the age-based laws which allow for 17 year olds to be living independently and marry reflect the quite different contexts and degrees of self-determination that can exist between a 10 and a 17 year old. The Scottish Government prefers an approach which would allow children aged 16 and 17 years to make their own decisions with safeguards in place to support them in this."

After further consideration following discussions with Police Scotland and the Scottish Children's Reporter Administration, we now believe amendments are required to improve the protections afforded to children in custody as the current Bill provisions are inconsistent with existing requirements set out in the Criminal Procedure (Scotland) Act 1995. Amendments will therefore be lodged at Stage 2 and relate to:

- young people aged 16 and 17 years of age who are subject to a Compulsory Supervision Order (or Interim Compulsory Supervisions Order) under the Children's Hearings (Scotland) Act 2011. It has been proposed the Bill should specifically set out that all children who are subject to such Orders, and specifically those aged 16 and 17 years of age, should be treated in the same way as those aged under 16 years of age. Most significantly, this will remove their right to waive access to a solicitor.

- the need for the Bill to make specific provisions for the protection of child suspects whilst in police custody. The inclusion of those provisions will necessitate the repeal of certain provisions currently set out in the 1995 Act, specifically in relation to children being held in a place of safety pending their appearance at court.

- The new provisions propose to retain the use of places of safety with the continued provision of the rights of access to a parent, guardian or responsible person and access to a solicitor.

Chapter 5 – vulnerable persons

The Bill makes provision relating to the support arrangements for certain vulnerable persons in police custody, at section 33. This was intended to reflect Lord Carloway's recommendations in relation to vulnerable adult suspects and, as he defined those under 18 as children, this section currently applies only to those over that age.

At Stage 1, however, it was suggested by organisations including Police Scotland and the Scottish Appropriate Adult Network that this provision be extended to include 16 and 17 year olds, to reflect current practice whereby appropriate adult support is available to vulnerable suspects aged 16 and over.

As the Bill already makes important distinctions between those under 16 years of age and those aged 16 and 17, and to avoid creating a potential disparity between the support provided for vulnerable suspects over 16 and those over 18, I consider that this safeguard should be extended. Amendments to apply section 33 to those over the age of 16 will be lodged at Stage 2.

Part 2 – Corroboration

As mentioned above, at this time, the Scottish Government accepts a consensus has not yet been reached about removing the requirement for corroboration in criminal cases. I am mindful members of your Committee have previously expressed

concerns about this reform going ahead in this Bill and Margaret Mitchell has lodged amendments to remove the relevant sections from the Bill. The consideration of these amendments is, of course, now a matter for the Committee but I can confirm the Government is supportive of removing the reform from this Bill. We also plan to lodge an amendment to remove the increase to the jury majority provision from the Bill as we consider this reform to be linked to the abolition of the corroboration reform. As I mentioned in my statement to Parliament in April, we will, however, begin further work on creating a wider package of reforms and Lord Bonomy's recommendations and the corroboration rule will be considered in this context.

In the meantime, I have considered whether any of the other suggestions made by Lord Bonomy can be taken forward at this stage. One of Lord Bonomy's recommendations was that the prosecutorial test – the criteria applied by prosecutors when deciding whether or not to initiate proceedings – should be published by the Lord Advocate. It seems reasonable to me that it should, and I am therefore considering whether to bring forward an appropriate amendment at stage 2.

Part 3 – Solemn Procedure

The Bill as introduced places a duty on the prosecution and the defence to prepare joint written record, advising on the state of preparedness of a case. This joint written record must be submitted to the court no less than two days before the first diet by the Procurator Fiscal. The purpose of the written record is to ensure cases proceed to trial in an orderly fashion with such matters as can be agreed in advance having been resolved.

There were concerns from a number of stakeholders that separate written records should instead be lodged by both the defence and the Procurator Fiscal. The Committee in their Stage 1 report commented: "The Committee welcomes the Cabinet Secretary's commitment to review whether the Bill could usefully be amended to allow individual written records on the state of preparedness of cases to be submitted by the defence and prosecution."

Since Stage 1, there have been ongoing discussions with Scottish Courts and Tribunals Service and the Crown Office and Procurator Fiscal Service on this issue. As a result of these discussions, the Scottish Government plans to bring forward amendments to the Bill to allow for a written record to be lodged separately by the Procurator Fiscal and the defence. I also intend to lodge amendments to provide the Criminal Courts Rules Council with the power to enable a joint written record to be a requirement in the future should that become necessary in light of experience with the separate written record.

Part 4 – Sentencing

The Bill includes provisions relating to the maximum penalties for handling offensive weapons and the sentencing of prisoners who commit new offences while on early release from existing sentences. These provisions were generally welcomed during Stage 1 scrutiny and no Scottish Government amendments are planned in this area at Stage 2.

Part 5 – Appeals and SCCRC

The Bill has a policy objective of speeding up appeals and it proposes that, when deciding whether to allow an appeal late, the test the High Court should apply is to ask itself whether there are exceptional circumstances for doing so.

The Committee noted concerns that, in applying a higher test for allowing late appeals, cases with merit may not be heard unless they meet an exceptional circumstances test. The Committee asked the Scottish Government to consider the Law Society of Scotland's recommendation that sections 76 and 77 be redrafted with an emphasis on the interests of justice.

The Scottish Government has considered these recommendations but remains of the view an "interests of justice" test would fail to get across that an appeal should be allowed to proceed in breach of the time limits in exceptional circumstances.

This part of the Bill also includes provisions relating to the powers of the High Court when considering appeal cases that originate by way of a reference from the Scottish Criminal Cases Review Commission (SCCRC). We note the Stage 1 report recommendation in this area to change the provisions so that the High Court would no longer consider 'interests of justice' when deciding SCCRC referred appeal cases.

Part 6 – Miscellaneous

Human trafficking

I intend to lodge amendments to remove Chapter 1 of Part 6 as these have now been superceded by provisions contained in the Human Trafficking and Exploitation (Scotland) Bill, which is currently before Parliament.

Police Negotiating Board for Scotland

This legislation will establish the Police Negotiating Board for Scotland, which will retain collective bargaining for police officer terms and conditions in Scotland, which has been abolished in the rest of the UK. In addition to the amendments I intend to lodge relating to the general operation and administration of the new body.
I will also lodge amendments to enable arbitration on matters under the remit of the PNBS, to be binding on the Scottish Ministers. This will be under specific circumstances as set out in regulations and in the PNBS constitution (the constitution will also be brought in to effect by regulations and therefore subject to Parliamentary scrutiny).

TV links and electronic signatures

The Bill includes provisions intended to allow for the greater use of TV links in court proceedings. Since stage 1, the Scottish Government has launched its Digital Strategy for Justice, which provides a framework for the greater use of digital technology throughout the justice system. So as well as minor amendments in

respect of the provisions on TV links, I intend to lodge amendments to permit more widespread use of electronic signatures in criminal proceedings, which will assist in ensuring that organisations can realise the full benefits of conducting business electronically.

Other Issues

The Committee asked to be kept updated on work in relation to the possibility of raising the minimum age of criminal responsibility. We note that Alison McInnes has lodged an amendment which would raise the age from eight to 12.

I can advise that policy in relation to the minimum age of criminal responsibility remains under active consideration and the underlying issues – including disclosure of criminal records, forensic samples, police investigatory powers, victims and community confidence – are complex. It is our view therefore that it is not appropriate to add such a substantial, complex and potentially controversial issue to the Bill without properly assessing these important underlying issues which are not addressed at all through Alison McInnes' amendment. Stage 2 of the Bill is also not the appropriate vehicle to address the issues.

We therefore intend to oppose the amendment on the basis that the underlying issues need to be fully worked through and there is a strong argument for further consultation before any change is committed to.

Police Investigation Review Commissioner (PIRC)

I also intend to rectify an omission in legislation to extend certain provisions under the Police Act 1997 to apply to directly employed staff rather than only "staff officers" of the Police Investigations and Review Commissioner. The definition of "staff officers" is a police officer seconded from the police service. The omission creates a problem for property interference authorisations by the PIRC under that legislation as the Commissioner does not have any seconded staff from the police service.

Stop and Search

An independent Advisory Group, chaired by John Scott QC, is examining the use of stop and search powers in Scotland, in particular whether consensual stop and search should continue, whether the practice overall should be subject to a code of practice and whether any additional steps require to be taken, including any consequent legislation or change in practice that may be necessary. The group will make its recommendations by the end of August.

Alison McInnes has already lodged amendments which would end consensual stop and search and introduce a statutory code of practice.

Once I have considered the Advisory Group's report and recommendations, I intend to lodge any appropriate amendments at Stage 2. As the Advisory Group is not due to report until the end of August, it would be helpful if the Committee could take this into account when scheduling its consideration of Stop and Search.

I hope this detailed update on the Bill is helpful to you and members of the Committee.

Michael Matheson
Cabinet Secretary for Justice
25 August 2015