



The Scottish Parliament
Pàrlamaid na h-Alba

JUSTICE COMMITTEE

AGENDA

8th Meeting, 2016 (Session 5)

Tuesday 1 November 2016

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

1. **Subordinate legislation:** The Committee will take evidence on the—

Sheriff Court Simple Procedure (Limits on Award of Expenses) Order 2016 [draft];

Courts Reform (Scotland) Act 2014 (Relevant Officer and Consequential Provisions) Order 2016 [draft];

from—

Annabelle Ewing, Minister for Community Safety and Legal Affairs, Walter Drummond-Murray, Civil Law and Legal System Division, and Greig Walker, Directorate for Legal Services, Scottish Government.

2. **Subordinate legislation:** Annabelle Ewing (Minister for Community Safety and Legal Affairs) to move—

S5M-01714—That the Justice Committee recommends that the Sheriff Court Simple Procedure (Limits on Award of Expenses) Order 2016 [draft] be approved.

S5M-02128—That the Justice Committee recommends that the Courts Reform (Scotland) Act 2014 (Relevant Officer and Consequential Provisions) Order 2016 [draft] be approved.

3. **Subordinate legislation:** The Committee will take evidence on the Maximum Number of Judges (Scotland) Order 2016 [draft] from—

Annabelle Ewing, Minister for Community Safety and Legal Affairs, Walter Drummond-Murray, Civil Law and Legal System Division, and Greig Walker, Directorate for Legal Services, Scottish Government.

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

S5M-01715—That the Justice Committee recommends that the Maximum Number of Judges (Scotland) Order 2016 [draft] be approved;

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

Civil Legal Aid (Scotland) (Fees) Amendment Regulations 2016 (SSI 2016/290);

Civil Legal Aid (Scotland) (Fees) Amendment (No. 2) Regulations 2016 (SSI 2016/317).

6. **The future of British Transport Police in Scotland:** The Committee will take evidence, in round-table format, from—

Chief Superintendent Gordon Crossan, President, Association of Scottish Police Superintendents;

Deputy Chief Constable Adrian Hanstock, British Transport Police;

Nigel Goodband, Chairman, and Darren Townsend, General Secretary, British Transport Police Federation Scotland;

Assistant Chief Constable Bernard Higgins, Operations and Justice, Police Scotland;

Professor Nick Fyfe, Founding Director, Scottish Institute for Policing Research;

John Foley, Chief Executive, Scottish Police Authority.

7. **Inquiry into the role and purpose of the Crown Office and Procurator Fiscal Service:** The Committee will take evidence from—

Liz Dahl, Chief Executive, Circle;

Steve Farrell, Lead Organiser for Scotland, Community;

Professor Nancy Loucks, Chief Executive, Families Outside;

Audrey Howard, Social Work Scotland.

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The papers for this meeting are as follows—

Agenda items 1 and 2

Paper by the clerk - Affirmative SSIs J/S5/16/8/1

Agenda items 3 and 4

Paper by the clerk - Affirmative SSI J/S5/16/8/2

Agenda item 5

Paper by the clerk - Negative SSIs J/S5/16/8/3

Agenda item 6

Paper by the clerk - Future of BTP in Scotland J/S5/16/8/4

Private paper - Future of BTP in Scotland J/S5/16/8/5 (P)

[Written submission from British Transport Police](#)

[Written submission from British Transport Federation Scotland](#)

[Written submission from the Scottish Institute for Policing Research](#)

Agenda item 7

Paper by the clerk - Inquiry into COPFS J/S5/16/8/6

Private paper - Inquiry into COPFS J/S5/16/8/7 (P)

[Written submission from Circle](#)

[Written submission from Families Outside](#)

Justice Committee

8th Meeting, 2016 (Session 5), Tuesday 1 November 2016

Subordinate legislation

Note by the clerk

Purpose

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

- [Sheriff Court Simple Procedure \(Limits on Award of Expenses\) Order 2016 \[draft\]](#)
- [Courts Reform \(Scotland\) Act 2014 \(Relevant Officer and Consequential Provisions\) Order 2016 \[draft\]](#)

**SHERIFF COURT SIMPLE PROCEDURE (LIMITS ON AWARD OF EXPENSES)
ORDER 2016 [DRAFT]**

Introduction

2. This instrument is made under by section 81 of the Courts Reform (Scotland) Act 2014. The Order supports the introduction of the new simple procedure on 28 November 2016. Simple procedure is a new form of sheriff court procedure established by Chapter 1 of Part 3 of the Courts Reform (Scotland) Act 2014 and will replace the existing small claims and summary cause procedures.

3. Further details on the purpose of the instrument can be found in the policy note (see below).

Policy Note: Sheriff Court Simple Procedure (Limits on Award of Expenses) Order 2016 [draft]

Background

The Courts Reform (Scotland) Act 2014 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'.

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.parliament.scot/parliamentarybusiness/Bills/72771.aspx>

Policy Objectives

The order supports the introduction of the new simple procedure on 28 November 2016. Simple procedure is a new form of sheriff court procedure established by

Chapter 1 of Part 3 of the Act and will replace the existing small claims and summary cause procedures. Simple procedure is designed to be a speedy, inexpensive and informal procedure, usable by people who do not have legal representation to sort out problems about matters of lower monetary value. New Simple Procedure Rules 2016 have been developed by the Scottish Civil Justice Council using plain language and a flow-chart to make the rules as straightforward as possible for users. Simple procedure is to be introduced in two phases with the first phase commencing on 28 November 2016.

Generally, the law of expenses in Scotland is that the unsuccessful party pays a portion of the successful party's expenses. However for small claims it has been recognised that the cost of obtaining legal representation will often be disproportionate to the sum sued for. Therefore the Small Claims (Scotland) Order 1988 restricts the recoverability of expenses in small claims by reference to the monetary value of the claim.

The key policy objective of the order is to preserve the effect of the Small Claims (Scotland) Order 1988 for equivalent simple procedure cases. Articles 2 and 3 of the order, which limit the award of expenses, restate article 4 of the 1988 Order. Article 4 of the order, which excepts personal injury and certain other actions from the limitation on the award of expenses, restates article 2(a) of the 1988 Order. The 1988 Order is proposed to be revoked, subject to savings provision for small claims raised before 28 November 2016.

Consultation

Technical engagement on the drafting of the order has been had with the Lord President's Private Office. 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.gov.scot/Publications/2013/02/5302 and www.gov.scot/Publications/2013/05/6753.

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

Impact assessments

An Equality Impact Assessment (EQIA) for the Bill was published on the Scottish Government website at <http://www.gov.scot/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.gov.scot/Resource/0044/00446226.pdf. The Bill has no significant financial effects on the Scottish Government, local government or on business.

COURTS REFORM (SCOTLAND) ACT 2014 (RELEVANT OFFICER AND CONSEQUENTIAL PROVISIONS) ORDER 2016 [DRAFT]

Introduction

4. This instrument is made under sections 107(4) and 137 of the Courts Reform (Scotland) Act 2014. The Order specifies the auditor of the Sheriff Appeal Court as a “relevant officer”.

5. Further details on the purpose of the instrument can be found in the policy note (see below).

Policy Note: Courts Reform (Scotland) Act 2014 (Relevant Officer and Consequential Provisions) Order 2016 [draft]

Background

The Courts Reform (Scotland) Act 2014 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’.

The policy objectives relating to the 2014 Act are fully described in the Policy Memorandum which accompanied the Bill for the 2014 Act (“the Bill”). The link below shows the passage of the Bill through Parliament and includes the Policy Memorandum. <http://www.parliament.scot/parliamentarybusiness/Bills/72771.aspx>

Policy Objectives

The instrument has two functions: to specify the auditor of the Sheriff Appeal Court as a “relevant officer” and to make provision in consequence of provisions of the 2014 Act.

Relevant officer

Section 107(3) of the 2014 Act lists “relevant officers” including the Auditor of the Court of Session and the auditor of a sheriff court. Section 107(1) is a power of the Scottish Ministers concerning the charging of fees by relevant officers. The first auditor of the Sheriff Appeal Court was appointed on 18 July 2016 and that office is added to the list of relevant officers in section 107(3). This means that fees orders under section 107(1) may provide for the charging of fees by the auditor of the Sheriff Appeal Court.

Consequential modifications

The Order supports the introduction of the new simple procedure on 28 November 2016. Simple procedure is a new form of sheriff court procedure established by Chapter 1 of Part 3 of the 2014 Act and will replace the existing small claims and summary cause procedures. Simple procedure is designed to be a speedy, inexpensive and informal procedure, usable by people who do not have legal representation to sort out problems about matters of lower monetary value. New Simple Procedure Rules 2016 have been developed by the Scottish Civil Justice Council using plain language and a flow-chart to make the rules as straightforward as

possible for users. Simple procedure is to be introduced in two phases with the first phase commencing on 28 November 2016. Schedule 1 of the Order principally makes consequential modifications relating to the first phase of simple procedure including the repeal of the law of small claims, leaving the general law of summary cause procedure in place for the time being. Schedule 1 is subject to the transitional provision found in the related Commencement Order, therefore some cases will continue to be subject to the old law. Schedule 1 also includes modifications of the transitory provisions from previous Orders to reflect that simple procedure is now to be commenced in two phases. Lastly, there are modifications included in schedule 1 which are unrelated to simple procedure but where there is a natural opportunity to make modifications consequential on the 2014 Act.

Sections 100 and 101 of the 2014 Act – making provision for vexatious litigation orders – are to be commenced on 28 November 2016. These sections replace the Vexatious Actions (Scotland) Act 1898 and therefore, subject to transitional provision, that Act is repealed by paragraph 27 of schedule 5 of the 2014 Act. Schedule 2 makes consequential modifications where the 1898 Act is referenced on the statute book.

The Sheriff Appeal Court (Criminal) was commenced on 22 September 2015 and the Sheriff Appeal Court (Civil) commenced on 1 January 2016. Schedule 3 makes consequential modifications relating to the Court. Paragraphs 1 and 9 (concerning children's legal aid) are inter-related, as are paragraphs 4 and 8 (concerning antisocial behaviour legislation). Schedule 3 is subject to the transitional provision in the earlier Commencement Order reflecting that there will be transitional civil appeals heard by sheriffs principal.

The law on sheriffs is now contained in Part 1 of the 2014 Act. The new office of summary sheriff was commenced on 1 April 2016 and the office of stipendiary magistrate was abolished on the same date (all stipendiary magistrates became summary sheriffs). Schedule 4 makes consequential modifications so that the statute book reflects the prevailing position for these judicial offices. In the case of paragraph 5, which concerns the Justices of the Peace (Scotland) Order 2007, amendments are not made to the articles of that Order which may be amended by the Lord President of the Court of Session under section 69 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007.

The modifications provided for in the Order are additional to those provided for in the 2014 Act itself, S.I. 2015/700, S.S.I. 2015/150, 2015/338, 2015/402 and 2016/142. To the extent that consequential modifications have not been made contemporaneously to the commencements which they relate the Scottish Government considers there to be no adverse impact since the modifications are minor and consequential in nature.

Commencement

The Order is to come into force on 28 November 2016 which, as mentioned, is the date of phase one implementation of simple procedure.

Consultation

Technical engagement on the drafting of the instrument has been had with the Lord President's Private Office, the UK Government and the Crown Office and Procurator Fiscal Service. No formal consultation has taken place on the Order as it is being

made as a consequence of the 2014 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.gov.scot/Publications/2013/02/5302 and www.gov.scot/Publications/2013/05/6753.

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

Impact assessments

An Equality Impact Assessment (EQIA) for the Bill was published on the Scottish Government website at <http://www.gov.scot/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.gov.scot/Resource/0044/00446226.pdf. The Bill has no significant financial effects on the Scottish Government, local government or on business.

DELEGATED POWERS AND LAW REFORM COMMITTEE CONSIDERATION

6. The Delegated Powers and Law Reform Committee considered the instruments at its meeting on 27 September 2016 and agreed that it did not need to draw them to the attention of the Parliament on any grounds within its remit.

JUSTICE COMMITTEE CONSIDERATION

7. The Justice Committee is required to report to the Parliament on the instruments by 10 November 2016. The Minister for Community Safety and Legal Affairs has lodged motions S5M-01714 and S5M-02128 proposing that the Committee recommends approval of the instruments. The Minister is due to attend the meeting on 1 November to answer any questions on the instruments and to move the motions for approval.

8. It is for the Committee to decide whether or not to agree to these motions, and then to report to the Parliament by 10 November 2016. Thereafter, the Parliament will be invited to approve the instruments.

9. **The Committee is asked to delegate to the Convener authority to approve the report on the instruments for publication.**

Justice Committee

8th Meeting, 2016 (Session 5), Tuesday 1 November 2016

Subordinate legislation

Note by the clerk

Purpose

1. This paper invites the Committee to consider the following affirmative instrument:
 - [Maximum Number of Judges \(Scotland\) Order 2016 \[draft\]](#)

MAXIMUM NUMBER OF JUDGES (SCOTLAND) ORDER 2016 [DRAFT]

Introduction

2. This instrument is made under by section 1(2) of the Court of Session Act 1988. by section 1(2) of the Court of Session Act 1988.
3. Further details on the purpose of the instrument can be found in the policy note (see below).

Policy Note: Maximum Number of Judges (Scotland) Order 2016 [draft]

Policy Objectives

1. The maximum number of judges of the Court of Session is 34, specified in section 1(1) of the 1988 Act, as amended by the Maximum Number of Judges (Scotland) Order 2004 (SSI 2004/499).
2. The Order increases by one the maximum number of judges of the Court of Session, to 35.
3. Section 1(2) of the 1988 Act enables Her Majesty by Order in Council to increase the maximum number of persons who may be appointed as judges of the Court. Section 1(3) provides that no recommendation shall be made to Her Majesty to make an Order unless a draft has been approved by resolution of the Scottish Parliament.
4. An increase in the number of judges of the Court of Session is required as a consequence of the appointment of Lady Smith as Chair of the Scottish Child Abuse Inquiry (“the Inquiry”) on 1 August 2016. Lady Smith is an Inner House judge of the Court of Session on secondment to the Inquiry. During the secondment, Lady Smith will not be available to sit in court however she remains a judge for the purposes of the statutory limit in section 1(1) of the 1988 Act.
5. The Inquiry is expected to last until at least October 2019. An additional judge is required to meet the demands of the business in the Court of Session (civil

business) and the High Court (criminal business). Options, other than appointment of an additional judge, were considered:

- a) Short-term increase in number of judges of the Court of Session – It is not possible to increase the maximum number of judges for a specified period of time as there is no legislative power to allow this where the absence is caused by a judge chairing a public inquiry.
 - b) Increased reliance on Temporary Judges – Section 20B of the Judiciary and Courts (Scotland) Act 2008 provides for the appointment of temporary judges. The Lord President, head of the judiciary in Scotland, does not consider this a realistic option. The serious nature of much of court business, with a high proportion of cases involving allegations of sexual abuse, make it important that cases are tried, if possible, by full-time rather than temporary judges. Further, given the potential length of the Inquiry, reliance on temporary judges to conduct the business of the High Court and the Court of Session is not sustainable.
6. The Lord President has been consulted and considers that the appointment of an additional judge to maintain a full complement is required to ensure the efficient disposal of business in the Scottish Courts.
 7. It was necessary to make an appointment to the Inner House from among the Outer House judges to cover the absence of Lady Smith. The elevation of Lord Turnbull to the Inner House took effect on 1 September 2016. This appointment is within the statutory maximum number of judges in the Inner House in terms of section 2(2) of the 1988 Act. Once this Order is made, the Judicial Appointments Board for Scotland will be asked to make a recommendation to Scottish Ministers for the appointment of a new judge to fill the resultant vacancy in the Outer House.

Consultation

8. To comply with the requirements of section 1(3A) of the 1988 Act, the Lord President has been consulted on the draft Order.

Equality Impact Assessment

9. There is no direct impact on the protected characteristics. The Judicial Appointments Board for Scotland are responsible for recommending individuals suitable for appointment to the office of Judge of the Court of Session. In carrying out its functions, the Board has a statutory obligation to have regard to the need to encourage diversity in the range of individuals available for selection to be recommended for appointment to a judicial office.

Financial Effects

10. The increase in the number of judges will be cost neutral as far as the budgets for judicial salaries and pensions are concerned. The Inquiry will meet the costs of Lady Smith's salary and pension.

11. The Cabinet Secretary for Justice confirms that no Business and Regulatory Impact Assessment is necessary as the instrument has no financial effects on the Scottish Government, local government or on business.

DELEGATED POWERS AND LAW REFORM COMMITTEE CONSIDERATION

4. The Delegated Powers and Law Reform Committee considered the instrument at its meeting on 25 October 2016 and agreed that it did not need to draw it to the attention of the Parliament on any grounds within its remit.

JUSTICE COMMITTEE CONSIDERATION

5. The Justice Committee is required to report to the Parliament on the instrument by 10 November 2016. The Minister for Community Safety and Legal Affairs has lodged motion S5M-01715 proposing that the Committee recommends approval of the instrument. The Minister is due to attend the meeting on 1 November to answer any questions on the instrument and to move the motion for approval.

6. It is for the Committee to decide whether or not to agree to the motion, and then to report to the Parliament by 10 November 2016. Thereafter, the Parliament will be invited to approve the instrument.

- 7. The Committee is asked to delegate to the Convener authority to approve the report on the instrument for publication.**

Justice Committee**8th Meeting, 2016 (Session 5), Tuesday 1 November 2016****Subordinate legislation****Note by the clerk****Purpose**

1. This paper invites the Committee to consider the following negative instruments:
 - [Civil Legal Aid \(Scotland\) \(Fees\) Amendment Regulations 2016 \(SSI 2016/290\)](#) [see page 3];
 - [Civil Legal Aid \(Scotland\) \(Fees\) Amendment \(No. 2\) Regulations 2016 \(SSI 2016/317\)](#) [see page 11].
2. If the Committee agrees to report to the Parliament on either of the instruments it is required to do so by 7 November and 28 November 2016 respectively.

Procedure for negative instruments

3. Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. This means they become law unless they are annulled by the Parliament. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds).
4. Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument.
5. If the motion is agreed to by the lead committee, the Parliamentary Bureau must then lodge a motion to annul the instrument to be considered by the Parliament as a whole. If that motion is also agreed to, the Scottish Ministers must revoke the instrument.
6. Each negative instrument appears on the Justice Committee’s agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow the Committee to gather more information or to invite a Minister to give evidence on the instrument. Members should however note that, for scheduling reasons, it is not *always* possible to continue an instrument to the following week. For this reason, if any Member has significant concerns about a negative instrument, they are encouraged to make this known to the clerks in advance of the meeting.
7. In many cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.

Guidance on subordinate legislation

8. Further guidance on subordinate legislation is available on the Delegated Powers and Law Reform Committee's web page at:

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>

Recommendation

9. **The Committee is invited to consider the instruments.**

**CIVIL LEGAL AID (SCOTLAND) (FEES) AMENDMENT REGULATIONS 2016
(SSI 2016/290)**

Introduction

10. The instrument is made under sections 33(2)(a) and (3) of the Legal Aid (Scotland) Act 1986. The Regulations amend the Civil Legal Aid (Scotland) (Fees) Regulations 1989 to provide for the fees of solicitors in simple procedure cases (within the meaning of section 72(3) of the Courts Reform (Scotland) Act 2014.

11. The instrument comes into force on 28 November 2016.

DELEGATED POWERS AND LAW REFORM COMMITTEE CONSIDERATION

12. The Delegated Powers and Law Reform (DPLR) Committee considered this instrument at its meeting on 27 September 2016 and agreed to draw it to the attention of the Parliament because the instrument contains the following drafting errors:

13. Regulation 2(2)(c) of the instrument contains a drafting error. New regulation 5(2)(ba) in the Civil Legal Aid (Scotland) Fees Regulations 1989 ('the 1989 Regulations') as inserted by regulation 2(2)(c) of the instrument defines a simple procedure case with reference to section 72(3) of the Courts Reform (Scotland) Act 2014 ('the 2014 Act'). Section 72(3) does not contain a definition of simple procedure case. Rather it lists types of proceedings which may only be brought subject to simple procedure. The definition of "simple procedure case" is found instead in section 72(9) of the 2014 Act.

14. The DPLR Committee noted that the Scottish Government intends to amend the definition of "simple procedure case" in the 1989 Regulations some time in advance of the date on which the remaining provisions of the 2014 Act relating to simple procedure come into force. That date is expected to be no earlier than September 2017.

15. There is a drafting error in paragraph 2 of the table of civil legal aid fees in new Schedule 2A to the 1989 Regulations as inserted by regulation 2(3) and the schedule to this instrument. The entry in paragraph 2 sets a fee for time spent by a solicitor or solicitor's clerk in carrying out work "other than that prescribed in paragraphs 3 to 6" of the table. The reference should be to work "other than that prescribed in paragraphs 3 to 7".

16. The DPLR Committee noted that the Scottish Government intends to correct this error by correction slip but called on the Scottish Government to correct the error by amending instrument rather than by correction slip, as the error did not appear to members of the Committee to be self-evident in nature. Justice Committee Members may wish to note that the Scottish Government ultimately decided to lodge the second negative instrument being considered at the Justice Committee's 1 November meeting (see below) in order to address the drafting concerns raised by the DPLR Committee, with both instruments coming into effect on the same day.

Extract from the Delegated Powers and Law Reform Committee's 7th Report 2016**Civil Legal Aid (Scotland) (Fees) Amendment Regulations 2016 (SSI 2016/290) (Justice)**

1. The Regulations amend the Civil Legal Aid (Scotland) Fees Regulations 1989 ('the 1989 Regulations') to provide for the legal aid fees allowable to solicitors in simple procedure cases in the sheriff court.
2. The fees in such cases are to be calculated in accordance with new Schedule 2A of the 1989 Regulations, as inserted by this instrument. Schedule 2A provides for detailed fees at a rate equivalent to those presently allowable to solicitors for assistance by way of representation in terms of the Advice and Assistance (Scotland) Regulations 1996.
3. The Regulations are subject to the negative procedure and will come into force on 28 November 2016.
4. In considering the instrument, the Committee sought clarification from the Scottish Government regarding two apparent drafting errors. The correspondence is reproduced in the Annexe.
5. In relation to the first error, the Scottish Government's response acknowledges that its policy intention (of applying the new legal aid fees schedule to all simple procedure cases) "would better be achieved by referring to simple procedure cases within the meaning of section 72(9) [of the 2014 Act], rather than referring (as in the present instrument) to section 72(3)."
6. However the Scottish Government considers that the reference in the present instrument to section 72(3) covers all of the simple procedure cases which might arise under those provisions of the Act which will be in force as of 28 November 2016, and so achieves the stated policy.
7. The Committee accepts that section 72(3) lists all the types of case which may be brought subject to simple procedure in the first phase of commencement of the provisions relating to simple procedure, and which have effect from 28 November 2016. However the Committee's view is that the section 72(3) does not contain a definition of the term "simple procedure case". Rather it lists types of proceedings which may only be brought subject to simple procedure. In order to find out what a simple procedure case is, the reader needs to look to section 72(9).
8. While it is likely that in practice "simple procedure case" as it is used in the instrument would be given its intended meaning by users of the instrument, it would as the Government acknowledges have been better to use the definition in section 72(9). That was the approach taken in the other three instruments laid recently which give effect to the limited implementation of simple procedure under the 2014 Act.
9. Not using that definition on this occasion necessitates a further amendment to the 1989 Regulations some time in advance of the second phase of

commencement of the simple procedure provisions, and the Government has undertaken to make such an amendment. Had the full section 72(9) definition been used in this instrument however, no such amendment would be needed.

10. In relation to the second error, the Scottish Government acknowledges that there has been an error in paragraph 2 of the table of fees as set out in the schedule to the instrument. The entry in paragraph 2 sets a fee for time spent by a solicitor or a solicitor's clerk in carrying out work "other than that prescribed in paragraphs 3 to 6" of the table. There is no exception for work prescribed in paragraph 7 of the table (photocopying).
11. The Scottish Government's response confirms that the policy intention is not to allow a fee for time spent by a solicitor or solicitor's clerk on photocopying. The relevant reference should accordingly be to work "other than that prescribed in paragraphs 3 to 7" (not "3 to 6").
12. The Government considers that this is a self-evident error, particularly in the context of a clear statement in the Explanatory Note to the instrument that the fees prescribed are equivalent to those presently allowable to solicitors for advice by way of representation under the Advice and Assistance (Scotland) Regulations 1996. It accordingly proposes to correct the error by correction slip.
13. The Committee considers that the error is relatively minor in nature and is unlikely in practice to interfere with delivery of the Government's policy, given that users of the instrument are likely to be aware of the intended read-across to current legal aid fees in other forms of court action.
14. However the Committee does not consider that the error is self-evident in nature. As drafted, the provision enables time spent photocopying to be charged for by solicitors under paragraph 2 rather than in accordance with paragraph 7 of the table of fees. It is not inconceivable that that could correctly give effect to the policy intention. It is necessary to look beyond the instrument, specifically to the Schedule to the Advice and Assistance (Scotland) Regulations 1996, to confirm what the policy intention actually is. Accordingly the Committee does not find the error to be one which could only be interpreted in one way.
15. **The Committee draws the Parliament's attention to the instrument under the general reporting ground in the following respects:**
 - I. **Regulation 2(2)(c) of the instrument contains a drafting error. New regulation 5(2)(ba) in the Civil Legal Aid (Scotland) Fees Regulations 1989 ('the 1989 Regulations') as inserted by regulation 2(2)(c) of the instrument defines a simple procedure case with reference to section 72(3) of the Courts Reform (Scotland) Act 2014 ('the 2014 Act'). Section 72(3) does not contain a definition of simple procedure case. Rather it lists types of proceedings which may only be brought subject to simple procedure. The definition of "simple procedure case" is found instead in section 72(9) of the 2014 Act.**

The Committee notes that the Scottish Government intends to amend the definition of "simple procedure case" in the 1989 Regulations some time in advance of the date on which the remaining provisions of the

2014 Act relating to simple procedure come into force. That date is expected to be no earlier than September 2017.

- II. There is a drafting error in paragraph 2 of the table of civil legal aid fees in new Schedule 2A to the 1989 Regulations as inserted by regulation 2(3) and the schedule to this instrument. The entry in paragraph 2 sets a fee for time spent by a solicitor or solicitor's clerk in carrying out work "other than that prescribed in paragraphs 3 to 6" of the table. The reference should be to work "other than that prescribed in paragraphs 3 to 7".

16. The Committee notes that the Scottish Government intends to correct this error by correction slip but calls on the Scottish Government to correct the error by amending instrument rather than by correction slip, as the error does not appear to members of the Committee to be self-evident in nature.

ANNEXE

On 16 September 2016, the Scottish Government was asked:

1. Regulation 2(2)(c) of the instrument inserts new regulation 5(2)(ba) in the Civil Legal Aid (Scotland) (Fees) Regulations 1989 ('the 1989 Regulations'). That sub-paragraph defines a simple procedure case with reference to section 72(3) of the Courts Reform (Scotland) Act 2014.

It appears however that section 72(3) of the 2014 Act does not list all proceedings which come within the definition of "simple procedure case" for the purposes of Part 3 of the 2014 Act. Instead, a wider definition of "simple procedure case" for the purposes of Part 3 is provided in section 72(9) of the 2014 Act. Section 72(9) provides:

Proceedings that—

- (a) are subject to simple procedure under subsection (3) or by virtue of any other enactment,
 - (b) are brought subject to simple procedure under [section 74](#), or
 - (c) are continued subject to simple procedure by virtue of [section 78 or 79](#),
- are referred to in this Part as a "*simple procedure case*".

We note that the section 72(9) definition of "simple procedure case" is also used elsewhere in the 2014 Act in relation to legal aid. Paragraph 23 of schedule 5 amends Part 2 of Schedule 2 of the Legal Aid (Scotland) Act 1986 to provide that civil legal aid is not available in certain categories of simple procedure case (i.e. proceedings equivalent to what are currently small claims). "Simple procedure case" is defined here - in new paragraph 3A of Part 2 of Schedule 2 - with reference to section 72(9) of the 2014 Act, and not to section 72(3).

Accordingly:

- a) Is it the Scottish Government's policy intention that the legal aid fees for *all* simple procedure cases for which civil legal aid is available are to be calculated in accordance with new Schedule 2A of the 1989 Regulations?
- b) If so, please explain how regulation 2(2)(c) of the instrument gives effect to that policy intention, standing that it refers to simple procedure cases within the

meaning of section 72(3) of the 2014 Act as opposed to within the meaning of section 72(9) of that Act?

2. Regulation 5(3) and the schedule to the instrument insert new Schedule 2A in the 1989 Regulations. The entry in paragraph 2 of the table of fees contained in that schedule sets a fee for time spent (a) by a solicitor and (b) by a solicitor's clerk in carrying out work "other than that prescribed in paragraphs 3 to 6" of the table. However there appears to be no exception for work prescribed in paragraph 7 of the table (photocopying).

By contrast, time spent carrying out photocopying work is excluded from the fee which may be charged under paragraph 2 in the equivalent table of fees for sheriff court proceedings (Schedule 5 of the 1989 Regulations), on which the fee structure for simple procedure cases is said to be based. Paragraph 6 is the paragraph dealing with photocopying fees in Schedule 5 of the 1989 Regulations, whereas the equivalent provision in new Schedule 2A is paragraph 7.

- a) Please explain if it is the policy intention that the fee for time spent by a solicitor or solicitor's clerk on photocopying as prescribed in paragraph 7 is to be calculated in accordance with paragraph 2 of the table of fees in new Schedule 2A to the 1989 Regulations.
- b) If not, is any corrective action proposed in respect of paragraph 2?

The Scottish Government responded as follows:

1. (a) It is the policy intention that the legal aid fees for all simple procedure cases for which civil legal aid is available should be calculated in accordance with new Schedule 2A of the 1989 Regulations.

(b) The Scottish Government thanks the Committee for pointing out that this policy would better be achieved by referring to simple procedure cases within the meaning of section 72(9), rather than referring (as in the present instrument) to section 72(3).

However, the Scottish Government considers that the present reference to section 72(3) covers all of the simple procedure cases which might arise under the provisions of the Act which will be in force as of 28th November 2016, and so achieves the stated policy.

When the remaining provisions of the Act relating to simple procedure are fully commenced, which is expected to be no earlier than September 2017, it will be necessary to refer to the definition of a simple procedure case in section 72(9). The Scottish Government will make this amendment at that time, or earlier should an appropriate opportunity arise.

2. The Scottish Government thanks the Committee for pointing out this typographical error. The policy intention is not to allow a fee for time spent by a solicitor or solicitor's clerk on photocopying. The reference should be to work "other than that prescribed in paragraphs 3 to 7" (not "3 to 6").

The Scottish Government considers that this is a self-evident error, particularly in the context of a clear statement in the Explanatory Note that the fees prescribed in inserted Schedule 2A are equivalent to those presently allowable to solicitors for

assistance by way of representation in terms of schedule 3 of the Advice and Assistance (Scotland) Regulations 1996 (S.I. 1996/2447).

The Scottish Government proposes to correct this minor error by correction slip

JUSTICE COMMITTEE CONSIDERATION

13. If the Committee agrees to report to the Parliament on this instrument, it is required to do so by 7 November 2016.

Policy Note: Civil Legal Aid (Scotland) (Fees) Amendment Regulations 2016 (SSI 2016/290)

Policy Objectives

Legal aid is currently available for a wide range of proceedings in Scottish courts. The Courts Reform (Scotland) Act 2014 (“the 2014 Act”) introduced reforms to modernise and enhance the efficiency of the Scottish civil justice system. Provisions are being commenced on 28 November 2016 to bring into force the new ‘simple procedure’ (provided for at section 72(3) of the 2014 Act) to replace current summary cause and small claims procedures.

Simple procedure applies to cases worth £5000 or less. Over time, these will be dealt with mainly by the new summary sheriffs that were introduced by the 2014 Act.

The 2014 Act contains a provision (at paragraph 23 of Schedule 5) to make civil legal aid available in simple procedure cases, excluding those that are broadly equivalent to small claims (which are not eligible for civil legal aid). The policy objective of this instrument is to adapt the framework and arrangements for the payment of fees to solicitors in the Civil Legal Aid (Scotland) (Fees) Regulations 1989 (‘the 1989 Regulations’) to accommodate simple procedure.

Regulation 2(2) and (3) amend the 1989 Regulations to provide for fees in simple procedure cases to be calculated in accordance with a new Schedule 2A. This will provide detailed fees (based on the structure at Schedule 5 of the 1989 Regulations) at a rate equivalent to those presently allowable to solicitors for assistance by way of representation (‘ABWOR’, in terms of schedule 3 of the Advice and Assistance (Scotland) Regulations 1996, ‘the 1996 Regulations’).

In short, this is essentially a hybrid structure which takes the detailed, ‘time and line’ fee table from the 1989 Regulations and applies the fee rate from the 1996 Regulations. Overall this creates a fee regime for simple procedure which we anticipate will provide a preferable fee provision over the current summary cause block fee regime.

We consider the use of a detailed fee structure is preferable to a block fee structure (as is currently available for summary cause cases) for the introduction of a new procedure. This is because it allows solicitors to be able to charge on a detailed basis to reflect the work actually done. We consider the rate for simple procedure work is appropriately set at a level below that available for ordinary procedure and work undertaken in higher courts. ABWOR rates are currently used for work before the Mental Health Tribunal and Immigration Tribunal and the level of work for simple procedure is considered likely to be equivalent.

Legal aid provision for summary cause cases is based on a block fee structure that we understand is poorly regarded by solicitors undertaking legal aid work of this nature. This results in few solicitors undertaking legal aid summary cause work and many people requiring publicly funded legal assistance access this via law centres and the Civil Legal Assistance Office (directly funded from the Legal Aid Fund). The summary cause block fee table does not reflect the changes being brought in by simple procedure and would not present a suitable model.

Regulation 2(4) amends Schedule 7 of the 1989 Regulations to allow a case to be certified as an “exceptional case” by the Scottish Legal Aid Board (‘SLAB’) if the Schedule 2A fees would not provide reasonable remuneration for the work due to the volume or complexity of the case. If SLAB certifies the case as exceptional, a solicitor’s fees are to be calculated in accordance with the Schedule 5 detailed fees (which cover the rate payable in ordinary procedure, the Sheriff Appeal Court and Court of Session).

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 Law Society questioned the rationale behind the choice of fee structure and the move away from the summary cause block fee table. They highlighted differences and perceived gaps in the new fee table. We provided reassurance and clarification that the differences and perceived gaps in the new fee regime were due to the difference in approach to fee structure – a move from block/inclusive fees to detailed fees. We explained solicitors would be able to use the detailed structure to charge on each element of work that make up the blocks (where these are relevant to a simple procedure case). We also amended the draft regulations in relation to a charge per sheet in the new Schedule 2A at Paragraph 4(a), highlighted by the Law Society, to make clear this charge was per sheet with no restriction on the number of sheets.

Block fees are used in the case of well-established processes where the work pattern is predictable and relatively stable. With the introduction of an entirely new procedure, we considered it fairer for solicitors to be able to charge on a detailed basis to reflect the work actually done. The use of detailed fees also allows information to be gathered on the structure of a ‘typical’ case which is required for the creation of a block fee. We anticipate that over time, once practice is settled, we may be able to move to a block fee structure, if appropriate.

The Faculty of Advocates requested confirmation that their fees remained unchanged under Regulations 9 and 10(1) and schedule 4 of the 1989 Regulations. We provided this confirmation. The Auditor of the Court of Session made no comment on the draft regulations.

Impact Assessments

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

Following screening, a child rights and wellbeing impact assessment was not completed. Although children and young people may be involved in a simple

procedure case, the availability of publicly-funded legal assistance to them is not affected by this policy.

Solicitors providing representation in a simple procedure case involving children and young people will be affected by the policy in terms of the fees they will be able to charge.

Financial Effects

A Business and Regulatory Impact Assessment (BRIA) has been completed and is attached. The impact of this policy on business is that civil legal aid arrangements, in relation to fees for solicitors, will be available for the new simple procedure.

We have not been able to accurately assess the cost of the fee structure provided for in the regulations as there is no data on how simple procedure cases will progress and what numbers may involve publicly funded legal assistance. It is not expected that total case volumes will change significantly with the introduction of simple procedure. However, the profile of cases and the numbers involving legal representation may change. While some people will still require or prefer legal representation in these cases, simple procedure is intended to be a quick, cheap and informal process so as to be convenient for party litigants. This makes any assessment of costs to the Legal Aid Fund challenging but we have worked with the Scottish Legal Aid Board to model a suitable range. We would expect any increase in costs to be modest, in the region of £93,000. This would represent a 43% increase in current costs on summary cause – from £215,000 to £308,000 per year.

**CIVIL LEGAL AID (SCOTLAND) (FEES) AMENDMENT (NO. 2) REGULATIONS
2016 (SSI 2016/317)**

Introduction

14. The instrument is made under sections 33(2)(a) and (3) of the Legal Aid (Scotland) Act 1986. The Regulations correct drafting errors in the Civil Legal Aid (Scotland) (Fees) Amendment Regulations 2016 (SSI 2016/290). (In this connection, Justice Committee Members may find it helpful to note the comments in paragraph 16 of page 3 above.)

15. The instrument comes into force on 28 November 2016, the same day as the instrument it amends.

DELEGATED POWERS AND LAW REFORM COMMITTEE CONSIDERATION

16. The Delegated Powers and Law Reform (DPLR) Committee considered this instrument at its meeting on 25 October 2016 and agreed that it did not need to draw it to the attention of the Parliament on any grounds within its remit.

JUSTICE COMMITTEE CONSIDERATION

17. If the Committee agrees to report to the Parliament on this instrument, it is required to do so by 28 November 2016.

Justice Committee

8th Meeting, 2016 (Session 5), Tuesday 1 November 2016

Roundtable evidence session into the Future of the British Transport Police in Scotland

Note by the clerk

Introduction

1. The Committee has agreed to hold a one-off roundtable evidence session into the future of the British Transport Police in Scotland.
2. In November 2014 the Smith Commission published its [final report](#) detailing Heads of Agreement on the further devolution of powers to the Scottish Parliament which said that: “the functions of the British Transport Police in Scotland will be a devolved matter.” The UK Parliament has since passed the Scotland Act 2016, which included provisions to transfer legislative competence, and enable the transfer of executive competence, over the policing of railways and railway property in Scotland to the Scottish Parliament.
3. Following publication of the Smith Commission’s proposals, the British Transport Police Authority published [Options for the devolution of transport policing in Scotland](#) (January 2015 – updated April 2015). The paper examined the implications of devolution on existing arrangements and how the challenges of policing the rail network might be met in future. The paper proposed three options for the devolution of railway policing.

Scottish Government consultation

4. In June 2016, the Scottish Government published its consultation: [The Integration of the British Transport Police in Scotland into Police Scotland](#). The consultation paper sets out proposed arrangements to integrate the BTP in Scotland into Police Scotland. It invites views on how all those responsible can ensure a smooth transition towards integration; ensure railway policing in Scotland is subject to appropriate oversight by the Scottish Parliament; and maintain railway policing as a specialism. The consultation closed on 24 August 2016 and the Scottish Government is currently considering the responses which have been submitted with a view to introducing legislation in this Parliamentary session.

Committee consideration

5. The roundtable evidence session will focus on the Scottish Government’s proposal to make use of the new devolution power over the railway policing in order to integrate the BTP in Scotland into Police Scotland. The Committee will hear from representatives of the Scottish Police Authority, Police Scotland, the Association of Scottish Police Superintendents, Nick Fyfe, founding Director of the Scottish Institute for Policing Research, the British Transport Police Federation and the British Transport Police. It is likely that witnesses will be asked their views on this proposal and on possible alternative approaches, practical issues around its implementation, and the views of senior management and rank-and-file officers within the forces.
- 6.
7. Written submissions from the BTP Federation and the BTPA can be found at Annexe A to this paper. It is understood that Professor Fyfe aims to provide a late submission. If so, this will be posted online following receipt.

Written submission from the British Transport Police Federation

1.0 Introduction

- 1.1 The British Transport Police Federation (BTPF) would like to thank the committee on behalf of all BTPF members in being able to provide an officers perspective to this very important policy area. Our members do have concerns over the proposed integration of BTP Scotland into Police Scotland but it has always remained the BTPF position to work with the Scottish Government to seek the best possible outcome for both our members and the travelling public of Scotland.
- 1.2 The BTPF sincerely hopes that the views of those most affected by the proposed integration of the BTP in Scotland into Police Scotland, namely the BTP police officers required to transition into Police Scotland, will be given due consideration in the final decision for integration.
- 1.3 The British Transport Police, in partnership with the eight legacy forces in Scotland, Association of Chief Police Officers Scotland (ACPOS) and railway operators in Scotland, has reduced crime on the Scottish railway network by 56% since 2005 (compared to a reduction in crime of 38% across Scotland nationally).
- 1.4 This considerable achievement is in the face of passenger numbers rising by over 45% since 2005/6. Public satisfaction in the services provided by BTP remain high. These achievements have been recognised and acknowledged by the Scottish Government.
- 1.5 The BTPF welcomes the assurance from the Scottish Government that, should BTP officers transition to Police Scotland, they will suffer no detriment to their current pay and pension arrangements, and that all current protections and privileges would be migrated intact.

2.0 Maintaining BTP as part of a specialist rail function.

- 2.1 The BTP is one of the most inspected and reviewed police forces in the UK. On every occasion since the creation of the British Transport Police Authority (BTPA) in 2001 these reviews have concluded that passengers and the railway industry are best served by a specialist railway policing service. BTP is already accountable to a number of departments and organisations, ranging from the Department for Transport (DFT) through to Her Majesty's Inspectorate of Constabulary (HMIC) inspections (including Scotland), BTPA, the rail industry, their employees, Transport Focus Groups, and the millions of travelling passengers.
- 2.2 One of the last inspections by HMIC Scotland with the BTP Crime Audit resulted in no recommendations being made to BTP Scotland or BTP as a force, which highlights the already significant accountability within current structures.
- 2.3 We would ask that the Justice Committee takes account of the experience and knowledge provided by the BTP in its delivery of policing services to the railway. Passenger satisfaction is up 7 percentage points on the UK average and this no

small part down to the successful policing model delivered by BTP. We would seek that these high standards are maintained for the benefit of the travelling public.

- 2.4 Further to point 2.1 the BTP is also accountable to organisations that are external to the policing environment. These are rail industry specific and include the Railway Accident Investigation Bureau (RAIB) and the Office of Rail Regulators (ORR). In the event of major incidents on the rail network, these organisations take primacy until such time as scenes are handed back to the BTP.
- 2.5 Our view for the best way to maintain, as far as possible, the current excellent BTP service is by introducing greater accountability to the SPA through the collaborative setting of future policing objectives. In this way we maintain the excellent service delivery of the BTP while acknowledging the Smith recommendations around greater accountability and the transfer of the functions of the British Transport Police in Scotland but not the dismantling of the BTP in Scotland. This most importantly would provide a greater say in the railway policing of Scotland by the Scottish people and the SPA.
- 2.6 In both the Justice Committee reports (session 4, 2016) and in the Year 1 summary report (Evaluation of Police and Fire Reform 2016) reference is made to both the Police service of Scotland and the Fire Service being on a journey as part of the reform for both organisations. The BTP within its current format is an established and successful model which provides certainty of policing and structure to both the public and the serving officers employed within.
- 2.7 The BTPF feel that the current climate of policing within Scotland does not lend itself at this stage to integrating the BTP and what is a successful model of policing. As previously mentioned Police Scotland as a model is still very much in its infancy with change projects still being undertaken. No evidence to date has been able to state clearly what if any advantage there would be in dismantling the current BTP model of policing in Scotland and integrating it within a geographical routine form of policing.
- 2.8 The BTPF has concerns regarding the potential for interruptions to the level of service provided for estimated 21 million passengers who make cross-border journeys annually. The BTPF believe passengers should expect to receive a consistent level of service from the start to the conclusion of their journey and that this is best delivered by the current model of a national railway policing service.
- 2.9 A further concern for the BTPF is the potential for BTP officers in Scotland to be abstracted from their core rail policing duties in order to bolster the resilience of Police Scotland. This has the potential to dilute the specialism of BTP officers, and compromise our role within the industry which funds us, as well as with the travelling public.

3.0 Operational Considerations

- 3.1 An operational concern for the BTPF is the potential for BTP officers in Scotland to be abstracted from their core rail policing duties in order to bolster the resilience of Police Scotland. This has the potential to dilute the specialism of BTP officers, and compromise our role within the industry which funds us, as well as with the

travelling public. BTP although specialist in nature by virtue of the environment that it polices still has a community to safeguard and a neighbourhood role. Within the research document entitled 'Evaluation of Police and Fire Reform: Year 1 Summary Report (2016)' mention is made that while Police Scotland has benefitted from the integration of specialist units when dealing with major incidents there are concerns around the ability to deliver more localised neighbourhood style of policing. The BTP in Scotland currently delivers a successful combination of both specialist and neighbourhood style policing within its current model. This may be affected should the status of the BTP in Scotland be changed.

- 3.2 Senior managers within BTP have extensive experience in leading specialist teams working in a specialised policing environment. The concern for the BTPF is that this may not be reflected in the skills and experience of senior managers within Police Scotland. Therefore, there are likely to be cost and abstraction implications in order that relevant training can be provided.
- 3.3 Such a lack of knowledge and experience could also have wider cost implications. Service delays resulting from fatalities lead to fines for the Train Operating Companies. BTP's understanding of the railway environment allows it to achieve, on average, a handback time of 90 minutes after a fatality has occurred on the network, whilst still respecting the dignity of the deceased and fulfilling its statutory requirements. . Analysis has shown that geographic forces, on average, take over 50% longer to hand back the railway to operators, which causes extra delay and cost to passengers and train operators.
- 3.4 BTP officers have an affinity with the industry that it serves and this arises from time spent within the specialist railway environment building up skills and knowledge of the industry that come from working within. This offers a service to the public which is far more than just policing. BTP officers because of their working environment are able to not only protect the public in the traditional sense of the justice arena but also by assisting them with queries related to the rail environment. Our preferred option would be for BTP officers to remain as part of BTP, but with a greater level of accountability to the SPA and the travelling public in Scotland. This would result in the SPA playing an integral part in the setting of future policing objectives for the BTP in Scotland.
- 3.5 BTP officer placements within the industry provide an advisory role on crime prevention, share public order knowledge, and perform safeguarding roles. At present this is added value we provide to the industry, though it has proved to be a valuable resource to guide and advise on best practice to maximise safety and efficiency. The SPA should ensure a similar provision of expertise, both to protect rail industry and for public safety.
- 3.6 The indirect benefit to the economy of the current successful operating model could be undermined were the travelling public or the Train Operating Companies to experience a crisis of confidence. Indeed, the benefits to the economy of a safe rail network has been recognised by the Scottish Government.
- 3.7 Policing priorities on the railway are different to those of policing generally. The rail industry expects to see a return for the service which they are funding, and BTP officers with a proven knowledge and affinity for the industry environment must

balance objectives that impact on security and safe travel for passengers with those objectives that ensure the smooth running of trains.

- 3.8 Delays to the rail industry create a domino effect. Trains and passengers are affected not just at the location of any given incident, but could be just as inconvenienced many miles away because of the knock on effect. If not managed safely and efficiently, such incidents can become both dangerous and expensive to the Train Operating Companies and passengers.
- 3.9 There is a great responsibility given to policing the railway network to ensure safe but speedy passage to trains and passengers. Any failure to properly control such incidents could significantly impact on working relationships. BTP is tasked with providing sufficient resources to the rail network to ensure confidence from both the Train Operating Companies and the public that we can ensure business as usual in the quickest and safest way possible.

BTP has the foundations in place to ensure that all incidents are policed in a timely fashion, and are communicated without delay to the industry. The SPA needs to ensure these provisions are preserved and maintained so the rail industry and passengers alike retain clear and open channels of communication, and the SPA can effectively manage expectations of railway policing, and understand the priorities of passengers and the industry.

4.0 The future of BTP Officers within Scotland

- 4.1 Our preferred option would be for BTP officers to remain as part of BTP, but with a greater level of accountability to the SPA and the travelling public in Scotland. This would result in the SPA playing an integral part in the setting of future policing objectives for the BTP in Scotland.
- 4.2 It is important to note that BTPF members in Scotland are contracted employees, the BTPF would welcome clarity on the legal mechanism for transferring employees from contracted employee status to Crown Servant status. Without this clarity and detail uncertainty will prevail which may have a cost implication for the Scottish Government later if there were legal challenges around redundancy or indeed officers wishing to leave because of a fundamental change to their terms and conditions. It is imperative that we receive this clarification at the earliest opportunity.
- 4.3 The BTPF feel legislation relating to terms and conditions, and pensions, should be made clear at the earliest possible opportunity and agreed in advance of Primary legislation. There is already a degree of uncertainty amongst BTP officers and that uncertainty could lead to early retirement, resignation or transfer into other areas of the BTP within the UK. This could have a knock on effect in how rail policing is delivered in Scotland and could present issues for Police Scotland in terms of back filling posts and the training that would be required to accomplish that.

Transparency in the design of the workplace transfer at an early stage would go a long way to alleviate concerns from BTP officers in Scotland and provide considerable reassurance and would help to cement trust in a proposition that to make it clear BTP officers in Scotland do not want. Any assurance from the

Scottish Government that there will be no detriment should a transition to Police Scotland take place will be gratefully received by our members in Scotland.

4.4 Should any transition of BTP officers to Police Scotland take place, consideration should be given to:

4.4.1 Pay scales, BTP officers endured a two-year incremental pay freeze as outlined in the Winsor Report (2011). The pay scales in England and Wales now only have 7 pay points compared to the Scottish equivalent which has 11. Any transfer onto the Police Scotland pay scale could have a detrimental impact on certain officers depending on their length of service, which also has a knock-on effect on their pensions.

4.4.2 Officers in receipt of unsocial hours allowance. Police Scotland did not adopt this Winsor recommendation, and retain the Competency Related Threshold Payment. If BTP Scotland officers are required to have a 12-month period of proving their competence to qualify for CRTP (and not receive the unsocial hours' allowance) this would in essence become a significant pay cut.

4.4.3 BTP officers are also protected by a 'movement of officers' policy. In the event of a transition to Police Scotland, this protection should remain in place to prevent BTP officers being moved into areas where Police Scotland lacks resources. Clearly, if officers agree to volunteer to move due to career opportunities then they should be entitled to surrender their protection.

4.4.4 Finally, there are officers who are protected by legislation for their travel, and travel for their families. This entitlement to staff travel and privilege travel should not be removed, but the question is whether ATOC will uphold these entitlements in the event of officers no longer being directly employed within the rail industry.

4.5 These are but a few of the concerns that will affect the retention of staff and officers, who may well view the loss of such protections and entitlements as reason enough to seek alternative employment.

4.6 BTPF believe the negotiations around terms and conditions should begin in earnest, and at the earliest opportunity. The BTPF is to date grateful for some informal discussions with government representatives around this issue but the detailed content thus far is lacking and does not create confidence in the process.

5.0 Pension Matters

5.1 There are currently three main pension schemes that affect members of the BTPFSF, namely the 1970 (30 year), 2007 (35 year) and the CARE (career average) schemes. None of the three pension schemes mirror exactly any of the Home Office schemes or Police Scotland schemes, but the closest is the CARE scheme. Police Scotland only offers Career Average Schemes to new joiners. The Smith Commission report was very clear that there should be no detriment suffered arising out of any devolution issues, officers currently in either of the BTP 1970 or 2007 schemes would suffer a detriment if moved to a career average scheme.

- 5.2 Additionally there is the issue of employer contributions, trustees, the set-up of the pensions' management committee, 1970 and 2007 scheme members paying different levels of contributions in comparison to Police Scotland colleagues.
- 5.3 Pensions are a major concern for many BTP officers, who would need precise figures with regards to the yearly cost for the employer contributions for the 1970 and 2007 schemes. They would need reassurance that these two schemes will continue in their present state. Obviously, this is less problematic for those officers who are on the CARE scheme than the 1970/2007 schemes.
- 5.4 There is potential for considerable financial detriment to BTPF members, and a clear difference in contribution levels between the BTP scheme and Police Scotland's scheme.
- 5.5 The BTPF scheme is a private trust scheme, and the potential for detriment extends beyond current serving officers as these changes will not just affect BTP Scotland officers, but BTP officers and retired officers on schemes that they leave. Scottish officers will no longer be contributing to the support of the retired officers in Scotland, leaving BTP to pay for retired Scottish officers without further contributions from BTP officers in Scotland.
- 5.6 BTP pensions allow officers to benefit from continuing to work past 55 without detriment to their pensions. In fact, those officers choosing to work past the age of 55, and in some cases past 60, may have already taken their pension and may be still contributing to their scheme. This could create problems, and age discrimination may become an issue because of any pension alterations.
- 5.7 Additionally, there may be officers protected by the equality act who are able to continue working in a role that offers reasonable adjustments. SPA should continue with those adjustments, and allow those officers to continue employment. The SPA should provide assurances for those in roles currently provided with reasonable adjustments under the Equality Act.

6.0 Financial Implications

- 6.1 There is potential for a significant cost implication from pension assimilation from the different pension schemes of BTP officers. If the Scottish Government were to become a participating employer for the purposes of managing the pension schemes then there may be a further cost implication around the negotiation of complexities with the Railway Pension Company Trustee Limited (RPCTL)
- 6.2 SPA would also be expected to manage the estimated £92 million pension liability currently administered by the BTPA.
- 6.3 BTPF members have redundancy/resettlement conditions within their T&C's, which should also transfer across with any transition of BTP officers in Scotland to Police Scotland as part of the no detriment assurance from Scottish Government.
- 6.4 There are also a number of other protections and privileges currently afforded to all BTP officers, including the free travel provision for officers and their families, which alone has an estimated value of approximately £20,000 per officer.

- 6.5 In the event of any transition, additional training costs may impact Police Scotland in a time of tight fiscal responsibility in policing. These costs will be ongoing, and given the potential loss of BTP Scotland officers through retirement, illness or resignation due to uncertainty about any proposed transition, there will be significant initial training costs associated with the specialised BTP work environment.

British Transport Police Federation
24 October 2016

Written submission from the British Transport Police

1. Introduction

- 1.1 British Transport Police (BTP) would like to thank the Committee for inviting evidence relating to this important structural and policy area. BTP recognises and acknowledges the decision taken by elected members in Westminster and the Scottish Parliament following their evaluation of the recommendations made by the Smith Commission, and the Force wishes to signal its commitment to working constructively with Police Scotland and the Scottish Government in its objective to devolve matters related to transport policing in Scotland. BTP's intention is to offer constructive, professional and where appropriate expert opinion, to help present a credible devolved position which avoids any detriment to Scotland or other component parts of the UK, minimises risk to passengers, staff and the transportation of freight and does not increase costs to train operating companies.
- 1.2 It is suggested that in matters of policing the majority of intentions to transform the approach to delivery of services are eminently possible and the police service has a credible reputation of demonstrating that it can be responsive and capable of adapting to change. The introduction of legislation to bring about changes to organisational structures, logistics and staff terms and conditions is reasonably straightforward, however it is arguably more complex to replicate organisational culture and attitude, and maintain focus on critical interdependencies. One immediate question arising from the position as outlined in the Scottish Government's consultation paper¹ is how in practice will the plans to merge the two forces in Scotland embed and sustain BTP's specialist 'transport policing ethos' within a significantly larger, more complex and diverse organisation. In short, how will Police Scotland ensure that it is able to preserve and act effectively in the interests of the industry when faced with potentially higher profile community concerns? It might be that it proves unrealistic to meet the challenge of tackling high-impact crimes such as domestic abuse, violent and anti-social behaviour and increases in domestic burglary, all critical drivers of public confidence, and also meet the expectations of the rail industry by providing consistent visible patrols by officers attuned to the specific risks of the railway as well as deliver integrated joint problem-solving activities at locations that can affect the free-running of the network (e.g. level crossings, trespass hotspots, fatality scenes). Police Scotland will need to consider how it retains a dedicated transport command unit to maintain the service expectations that currently provided by BTP's Scottish division. In order to help colleagues better understand and work through the complexity of the issues surrounding the provision of railway policing, BTP has arranged a workshop to apprise Scottish policing, transport and political interests of the principal challenges associated with the devolution proposals.
- 1.3 BTP's formal response to the consultation addressed the majority of the issues that it believes officials will need to take into account for the Government's stated ambition is taken forward. These points have been summarised below to assist Members' consideration of those factors to be established in future provision of services.

¹ https://consult.scotland.gov.uk/police-division/transport-police/user_uploads/j432616.pdf

2. Maintenance of the Specialist, Risk-Based Policing Approach in Scotland

2.1 There is a distinctly recognised difference between policing in a transport environment and that in 'geographic' forces. This has been acknowledged by each of the various government, industry and police-related reviews that have inspected BTP and BTPA over the last fifteen years². For example in 2006 when the Transport Select Committee examined the reforms to BTP's governance arrangements, including the creation of BTPA, it concluded that:

"The railways are a specialised environment, with specialised needs, and need a specialised Force..."

2.3 The rationale for this conclusion was primarily founded on consideration of BTP's effective national role and coordinated approach to tackling terrorism, its deep-rooted understanding of railway policing and the ability of the Force to apply a consistent, network-wide approach that recognised the implications and impacts to the railway industry.

2.4 More recently, the 2014 Triennial Review of BTPA agreed with these findings:

"It is difficult to see how the national plans and strategies which are essential for the delivery of effective policing across a national network could be readily developed where 43 different forces were involved in delivering the service. The review therefore has not found any reason to dissent from the conclusion of previous reviews that a national police force for the railway should be retained."

2.5 BTP offers discretionary, value-adding services over and above those which it is statutorily obliged to provide. For example, BTP's approach to managing fatal incidents on the railway includes the setting of demanding national and local response and hand-back targets, use of sensitive categorisation processes to determine level of suspicion, body retrieval strategies (including complex recovery), management plans for people that are vulnerable or in crisis, preventative analysis and focussed target hardening activities, couple with close engagement with the Crown Office and Procurator Fiscal Service to develop national agreements to meet coronial expectations. BTP is able to offer these through its specialist function, focus on safeguarding and commercial awareness, whilst still meeting its statutory and 'traditional' policing responsibilities.

2.6 The success of this approach developed over many years, underscored by industry confidence in the Force, helps define the specialist 'ethos' of transport policing that allows the Force to retain a deep and clear understanding of the requirements of the railway and its stakeholders. At the most strategic level, organisational direction is set in close consultation with stakeholders, and is driven by the priorities of the

² e.g. HMIC (2004): *British Transport Police – A report by Her Majesty's Inspectorate of Constabulary*
House of Commons Transport Committee 12th Report of Session 2003-04 (2004): *British Transport Police*
DfT (2004): *Government Response to the Twelfth Report of the Committee: British Transport Police*
DfT (2006) *Transport Select Committee Future of the British Transport Police*
DfT (2014) *Triennial Review of the British Transport Police Authority Part 1 Report*

railway industry, its passengers and staff. At the operational level train operating companies have an explicit confidence in BTP's ability to respond swiftly to incidents affecting the railway and restore services promptly and safely.

- 2.7 Repeated threats have resulted in BTP developing the experience to promptly risk assess and safely manage critical events on the network using highly focused judgement and validation techniques, perhaps evidenced most acutely through the effective handling of unattended items or bomb threats, an activity which must be managed proportionately if the railways are not to be brought to a standstill daily.
- 2.8 The success of this approach is unparalleled when compared against other transport policing organisations across the world. Over a 10 year period, of the 2.5 million unattended items assessed observing BTP's carefully developed procedures, all but 36,000 were immediately eliminated as not being suspicious by BTP's specialists and major station closures have been averted. Since 1992, BTP has assessed almost 10,000 threat messages. Of these, only 53 led to large-scale evacuation with just half of that number subsequently linked to an explosion or the discovery of a bomb. These outcomes are in stark contrast to still current experiences where geographic forces have carried out the assessment and immediately closed stations or platforms and introduced wide-reaching restrictive cordons.
- 2.9 Undoubtedly the threat from terrorism remains the most fundamental risk to both the public and the critical national infrastructure for the UK as a whole, and the longstanding threat to transport infrastructure is very real. Analysis of CT incidents shows that transport-related targets account for almost a third of all high-profile attacks, with 35% of these attacks involving bombs placed on trains or buses.
- 2.10 By raising the threat level in August 2014 to 'severe', the Home Secretary confirmed the reality of this risk and signalled that there are significant examples of UK-based terrorist groups planning attacks against the West, as well as an escalation in extremist left and right-wing groups and the still real threat from dissident republican groups in Northern Ireland. Furthermore, the nature of the threat is changing, with intensified danger from 'lone-actors' using low sophistication, high impact attacks in crowded places including railway carriages and stations (e.g. Leytonstone attack in 2015 and North-Greenwich suspicious device in 2016).
- 2.11 These developments have underlined the importance of ensuring there is an integrated approach to counter-terrorism, which is cross-border and closely coordinated, to ensure that there is a swift response to any developing intelligence or actual risk – an attack in Scotland may well be prevented in England. Equally, any perceived vulnerability arising from disjointed protective arrangements could be exploited by those planning an attack. It is therefore important for officials to consider how a devolved model could retain the current seamless counter terrorism approach and awareness of the impact any incident may have to other parts of the infrastructure, as well as enable a swift and assured tactical response.
- 2.12 The benefits of BTP's approach to reducing disruption and the significant costs attributed to delays can also be illustrated by how it manages railway-specific incidents such as fatalities on the network and cable theft incidents. BTP's risk-based approach, coupled with a deep understanding of the commercial imperatives

of the network, has ensured that passengers are kept safe (for example, by not exiting stationary trains) and are faced with the minimum of disruption to their journeys. Analysis³ has shown that incidents last between 33% (cable theft) and 50% (fatality incidents) longer if BTP does not attend first and a more generalist approach is adopted by geographic forces. The specialisms developed in these respects will need to be preserved in any new model.

2.14 Although in the short term it is believed that the transfer of current BTP staff would help preserve the transport policing ethos and retain specialist knowledge, together with the related performance and relationship benefits, there is the potential that this would not be sustainable in the long term without the continued direct strategic leadership and protection of the transport policing model.

3. End-to-End Network Policing

3.1 BTP's current cross-border jurisdiction enables very effective consequence management when incidents occur. This is important as the after-effects of an incident on the network can often have a much wider impact with delays, disruption and risk occurring far from the initial point of impact. 21 million journeys are made between Scotland and England each year and BTP's cross-border functionality allows all movements between the two nations to be policed in a manner that is unconstrained by the geographic boundaries or legal frameworks that the railway cuts across.

3.3 As detailed in BTP's submission to the consultation paper, one important area which is currently policed in a seamless manner is the policing implications involved in the high volume and frequently unpredictable behaviour of football supporters. These regular and significant passenger movements are coordinated between BTP Scottish Division and BTP's B and C Divisions which guarantees seamless command and control arrangements, intelligence sharing and with no question over jurisdictional powers. Another example of interdependent cross-border activity is the policing of late night trains leaving Carlisle and travelling to Dumfries and further north which is currently coordinated by BTP's Scottish Division and Pennine Sub Division in a joined up manner which not only provides continuity of reassurance to passengers and rail staff, but is also highly valued by the industry as an operational commitment to reducing anti-social behaviour and crime.

3.4 During the recent Euro 2016 tournament, BTP's capability to minimise the likelihood of anti-social behaviour or more serious levels of public disorder was recognised by the French authorities who requested that BTP officers escort football fans through the entirety of their journey in France, not just up to the point that they entered French jurisdiction. This approach took into account the importance of consistent and continuous monitoring of fans' behaviour in order to quickly spot any escalation of behaviour that could be missed by more than one police service being responsible for different points of a single journey.

3.5 This approach is also important in terms of victim care as when crime or disorder occurs on the railway, often the exact location of the incident cannot be pinpointed. Currently, as BTP is responsible for policing the whole network, it is less relevant

³ BTP 2013 incident analysis

where the crime happened in order for the necessary processes to be put into action immediately. If another force became responsible this could introduce a degree of discussion over legitimacy of jurisdiction or some debate may occur over who would record, respond and investigate a crime. This could be distressing for victims and therefore cause breakdown in the obligations set out in the Victim Code and introduce unnecessary delay in delivering justice.

- 3.6 Officials may wish to take account of the importance of retaining this uninterrupted chain of command and oversight when considering how to ensure the effective policing of cross jurisdictional journeys in the future.

4. Infrastructure Policing Review

- 4.1 In November of last year, the Government published the Strategic Defence and Security Review which included a commitment to “*integrate infrastructure policing further and to review the options to do this*”. The functions of BTP, the Ministry of Defence Police, the Civil Nuclear Constabulary, Highways England Traffic Officer Service and the Home Office police forces’ strategic road network and airports policing capabilities are all within scope of the review. Subsequently, Phase 1 of the Review, which took place during last autumn, recommended that the following two options be explored:

- i. establishment of a National Infrastructure Constabulary which would combine the functions of Civil Nuclear Constabulary, the Ministry of Defence Police, British Transport Police, Highways England Traffic Officer Service, the Home Office police forces’ strategic road network and airports policing capabilities
- ii. establishment of both a Transport Infrastructure Constabulary and an Armed Infrastructure Constabulary. The Transport Infrastructure Constabulary would bring together the functions carried out by BTP, Highways England Traffic Officer Service and the roads and airport policing elements of Home Office forces. The Armed Infrastructure Constabulary would involve the incorporation of functions currently carried out by the MDP and the CNC.

- 4.2 It is not yet clear how the Scottish Government’s proposals would complement this model of coordinated national policing which is based on the principle of even greater integration of infrastructure policing, rather than what might be seen as a regionalised model as proposed within the consultation paper. It is perhaps important to consider how the final devolved model in Scotland will be consistent with UK Government’s policy in this area.

5. Transfer of Staff

- 5.1 BTP officers and staff are contracted employees and its officers are appointed as constables rather holding the status of Crown Servants. It is important that the legal and contractual issues accompanying any transfer of staff are fully understood and comprehensively stipulated in order to provide certainty for staff and to prevent unwarranted cost to funding stakeholders.

5.2 It is also not yet clear what legal mechanisms will be used to achieve these particular ambitions of the consultation paper. If it is felt that TUPE Regulations are unlikely to be applicable and there are long standing and complex terms and condition (including provision of free travel, redundancy and resettlement entitlements) that will need to be factored into any remuneration package. It would be helpful if the Scottish Government was able to provide clarity on the intended design of the workforce transfer process as soon as possible to help BTP manage staff expectations and anxieties with regard to these personal and highly emotive issues.

6. Pension Arrangements

6.1 This is another area where the provision of timely and detailed information would assist in reassuring those members of staff that will be affected by the devolved arrangements. There appear to be two broad options associated with the arrangement for future pensions:

- i. that the existing pension funds are left structurally unchanged, with transferees continuing to pay into their schemes post-devolution
- ii. that the benefits (and corresponding assets) for the affected Scottish members are transferred into a new scheme.

The Scottish Government will need to consider how to provide appropriate benefits to protected members in the future.

6.2 The Scottish Government should also recognise the interests of the constituent pensions stakeholders, for example trustees of the Schemes, those in receipt of pensions, contributing staff and representatives of staff associations. These bodies will need to be satisfied that any new arrangements will not introduce any detrimental impact to officers and staff, either in Police Scotland or for those in receipt of a BTP pension in England and Wales, or BTP's Scottish Division. There are also ancillary safeguarded legacy travel rights that apply to some serving officers, staff and pensioners and arrangements that safeguard and protect these rights should also be detailed.

7. Stakeholder Relations

7.1 BTP's strategic direction is decided in consultation with its principal stakeholders and operational delivery is driven by the priorities of the railway. On a day-to-day basis operational issues can and are raised by stakeholders with Chief Officers to have a direct focus on railway policing issues. This includes the East and West Coast mainlines that have key termini in London and Scotland. Factors affecting any part of those routes will ordinarily be raised with the strategic delivery team at force headquarters. Similar arrangements will need to be created for matters occurring in Police Scotland's jurisdiction.

- 7.2 At a local level BTP's Scottish Division is sensitive to the priorities and requirements of their railway community. Policing priorities are determined following consultation with the rail industry, passenger groups and rail staff representatives. Stakeholder consultation events are held on a regular basis with specific policing priority presentations taking place in November and December so that joint policing priorities can be decided for the year ahead.
- 7.3 This flexibility to manage significant concerns, that might not always be rooted in a policing or crime concern, at all levels of the organisation, and the level of dynamic responsiveness that this brings is highly valued by stakeholders. BTP's approach to protecting vulnerable people on the network is an example of this. As a national police service dealing with a largely transient population, BTP encounters significant numbers of vulnerable people suffering from mental health conditions, behavioural disorders and learning difficulties on a daily basis. Some of these individuals present a significant risk of harm to themselves which all too often results in tragedy with the loss of life by suicide on the rail network.
- 7.4 In 2015-16, 2,397 vulnerable people were monitored and assisted through suicide prevention plans, 1,317 suicidal adults were subject of Care Act 2014 referrals and over 2,500 mental health interventions took place. BTP also recorded almost 1,300 life-saving interventions. The primary focus of BTP is to save lives. Nonetheless the railway does face a substantial number of fatalities each year and as well as the obvious human tragedy and anguish associated with fatal incidents, each case has a substantial disruptive effect to rail operators and the traveling public. Network Rail estimates the average cost of a fatality is £198k (£230k with all associated operational costs). Indeed, it is estimated that the total cost of suicide related disruption to the rail industry exceeds £60m per year. The potential cost avoidance to the rail industry through life-saving interventions carried out during 2015-16 has been estimated between £239m and £251m⁴ with a further societal saving of over £2bn⁵.
- 7.5 A challenge for any new model will be how this level of safeguarding can be maintained in the face of the competing and diverse public and community requirements that Police Scotland will inevitably be required to manage. If a high level of dedicated public protection in this regard cannot be guaranteed this will arguably cause detriment to the Scottish railway industry and travelling community.

8. Options to Achieve Devolved Status

- 8.1 In order to assist the Scottish Government, in 2015 BTP and the BTPA assessed how some of the intended benefits of devolution might be achieved by examining three possible alternative approaches that meet the objectives of the Smith Commission. These options are outlined in full in the '*Options for the devolution of transport policing in Scotland*' discussion document, produced in January 2015⁶. A summary of each is outlined below for reference.

⁴ Based on Network Rail and TfL estimates

⁵ Knapp, M., McDaid, M., Parsonage M. (eds) (2011) Mental Health Promotion and Mental Illness Prevention: The Economic case. PSSRU, LSE and Political Science

⁶ <http://www.btp.police.uk/pdf/BTP-Scottish%20Options%20Paper%2017-4-2015-Appendix.pdf>

- 8.2 Option 1 presents an arguably simpler route to achieve devolution through administrative means, rather than legislation. It seeks to achieve some of the essential components of devolution in a relatively simple, cost-effective way, whilst placing an obligation on the British Transport Police Authority (BTPA) to defray the cost of BTP to the rail industry and retain responsibility for delivery of obligations in respect of employment matters and pensions. This option could introduce measures to increase BTP's accountability to Scottish institutions on its responsibilities and initiatives in place to keep the people of Scotland safe. It also outlines the greater role the Scottish Police Authority (SPA) could play in new arrangements for scrutiny and performance monitoring. It recommends a change of branding for the BTP in Scotland, with a renewed Scottish identity.
- 8.3 Option 2 introduces a hybrid of measures, both legislative and administrative, to support devolution of transport policing in Scotland. Statutory amendments would guarantee that BTP continue to align to principles set in Scottish Law as well as to Strategic Police Priorities set by Scottish Ministers. It would enshrine in statute the arrangements by which the Scottish Government would give direction to the British Transport Police Authority and ultimately stipulate the direction for policing of the railways in Scotland. In essence, the option would make explicit the requirement for the Chief Constable of the BTP to engage with, and be accountable to, Scottish institutions in much the same way as their counterpart in Police Scotland.
- 8.4 Whilst anticipating that under this option the BTPA would retain its responsibilities for pensions, employment contracts and for defraying the costs of policing to the rail industry, this option proposes that planning and strategy-setting for railways policing in Scotland be reviewed to enable greater involvement by the SPA. Option 2 also identifies and describes the changes needed to allow for greater cooperation and mutual assistance between the BTP and Police Scotland. As with Option 1, this model would potentially bring about a renewed image and identity for the BTP's presence in Scotland (which could be known as Transport Police Scotland).
- 8.5 Option 3 (Scottish Government proposed option) is the most complex route to devolution as it would in effect involve dismantling BTP and absorbing its Scottish operations into Police Scotland. The challenges associated with providing duplicate central support functions and the dual accountability to the industry and public for service provision appear excessive and are considered likely to add additional costs.

9. Summary

- 9.1 BTP remains fully committed to safeguarding the protection of all of those who use the railways in Scotland, England and Wales and will continue to work with our partners, the Scottish Parliament and the UK Parliament to implement any approved outcome swiftly and efficiently.

British Transport Police
25 October 2016

Justice Committee

8th Meeting, 2016 (Session 5), Tuesday 1 November 2016

Inquiry into the role and purpose of the Crown Office and Procurator Fiscal Service

Note by the clerk

Introduction

1. The Committee agreed to hold an inquiry into the role and purpose of the Crown Office and Procurator Fiscal Service (COPFS) at its Business Planning Event in August. At its 6th September meeting, it agreed to this remit—

“The COPFS is Scotland’s independent prosecution service, acting in the public interest to help bring offenders to justice. The core role of the COPFS is to consider reports about crime from the police and other agencies, to decide whether it is in the public interest to prosecute them, and, if so, to deploy the resources that are necessary to help ensure that justice is done.

“The Committee’s inquiry will focus on this core role, examining in particular—

- The effectiveness and efficiency of the COPFS, and how well it works with other stakeholders in the criminal justice system;
- Whether the COPFS has the resources and skillsets it needs to carry out its core role;
- The COPFS’s responsiveness to new challenges and opportunities including the evolving nature of crime in 21st century Scotland, advances in technology, and changes in the delivery of court services that may affect access to justice;
- How the COPFS protects and supports witnesses and victims of crime.

“The Committee will also take evidence on the role and function of the Inspectorate of Prosecution in Scotland. (The IPS is the independent inspectorate for the COPFS.)

“The inquiry will not consider the COPFS’s two other roles of establishing the cause of sudden, unexplained or suspicious deaths or investigating allegations of criminal conduct against police officers, except in relation to the general issue of whether the COPFS has the resources it needs to carry out its purpose.”

2. The Committee issued a [call for evidence](#), with a closing date of 19 October 2016. All [written responses](#) to the call for evidence can be found on the Committee’s [inquiry page](#).

Committee consideration

3. As part of its inquiry the Committee visited the Lord Advocate in Chambers Street on 20 September 2016 and met with the Lord Advocate, the Solicitor General, the Crown Agent and various staff from the COPFS.

4. On 4 October 2016 the Committee met with individuals who had experience of the criminal justice system as victims and witnesses and heard of the difficulties they faced during the process. Notes of the meetings are available [here](#).

5. The Committee's first formal evidence session was on 25 October, when it heard first from SACRO, Scottish Women's Aid, Rape Crisis Scotland and Victim Support Scotland. It then heard from a panel of legal representatives, comprising the Law Society of Scotland, and members of the Glasgow, Edinburgh and Aberdeen Bar Associations.

6. At the 1 November meeting, the Committee will take evidence from the following in a single panel—

- Steve Farrell, Lead Organiser in Scotland, [Community](#) union, representing G4S staff
- Liz Dahl, Chief Executive Officer, [Circle](#)
- Professor Nancy Loucks, Chief Executive, [Families Outside](#)

The focus of the session is expected to be mainly, but not exclusively, on the experience of accused people within the criminal justice system and on those who work with them, with particular attention on how the COPFS interacts with accused people.

7. Circle and Families Outside have provided written evidence, which is set out in Annexe A. Also included is a submission from Sharon Mercado, a support worker for Families Outside, which Professor Loucks would be content to speak to as well.

Written submission from Circle

Thank you for the opportunity to provide written evidence in relation to the above inquiry. Circle works with families affected by imprisonment, parental substance misuse and who require additional support in their early years. The families are often living in poverty and have poor mental health as a result of trauma, loss and abuse in their histories. Circle aims to work alongside families to build upon families' strengths and enhance their parenting capacities to promote adult and children's wellbeing.

Whilst several of the families we work with will come into contact with the justice system, Circle have developed services which interface with the justice system at specific points which are relevant. These are based within the 'Families Affected by Imprisonment' team and include the following: Fathers' Workers based in Addiewell; Shine Women's Mentoring Public Social Partnership and the Women's Outreach Team aimed at women who may face custody.

1. Please outline how well you consider the COPFS works with other stakeholders in the criminal justice system, so as to provide a —joined up and complementary service that helps meet the ends of justice.

We understand from the COPSF Code for Crown Prosecutors that there is a public interest test applied to the 'marking' process. In particular prosecutors should take into account the views expressed by the victim about the impact that the offence has had. In appropriate cases this may also include the views of the family. In particular, we welcome the introduction of Child and Family Impact statements however as yet have had no experience of them being operational. We also wonder how these will fit into Getting It Right For Every Child principles and processes. This will help bring a comprehensive and important viewpoint into the COPFS process.

There may be specific consideration given to the health and wellbeing of the victim/victim's family within this test. In terms of the families we work with there is a high incidence of poor mental health and consideration needs to be given as to how best to support victims/family in relation to COPFS and wider justice processes i.e. Whom is best placed to do this? Where does the relationship lie? Is there sufficient training for staff? Is an advocacy service appropriate for this particular issue? Are there particular groups that experience a higher incidence of this? For example, women whom have offended.

Circle Family Support Workers have contact with COPFS at the request of family members who have been victims and witnesses and also when they have offended. This can be at different stages of the justice process from arrest, through to sentencing and through-care. Each request is given tailored individual support by staff who have developed a trusting, reliable relationship with the individual and their family as part of the whole family approach we adopt. For example, we may support victims, individuals who offend and family members to attend court proceedings. This includes preparation before-hand i.e. discussing the different roles of professionals; what to expect in terms of the Court setting; the emotional impact that can be anticipated and experienced throughout the process; practicalities in terms child care and travel; linking in with Victim and Witness Support Services; managing the Court outcome as a family, including minimising the impact of parental imprisonment.

As an organisation we have developed a specific service to promote greater use of restriction of liberty orders amongst women who face custodial sentences (Lanarkshire). As such we are keen that COPFS have increased awareness of the changing landscape in terms of the provision of appropriate support in the community. This project responds directly to the Women's Commission report (Dame E. Angiolini) which highlights the disproportionate use of custody for women as an inequality. We provide the women and their families' with holistic support, including parenting support as we view this service as important not just to challenge a gender inequality in the justice system, but as an important response to the prevention and early intervention agenda highlighted by the Christie commission. Could this be put on the training agenda for COPFS?

2. How well does the COPFS respond to the needs of victims of crimes and to witnesses (especially vulnerable witnesses) in criminal cases and meet its legal obligations towards them?

We would like to take the opportunity to highlight the 'justice journey' of a mother who accessed Circle support through their Shine Women's Mentoring Partnership. She was the alleged victim of rape. The Family Support Worker provided emotional support after the disclosure had been made and the case had proceeded to Court. The mother did not have any clothes to wear to High Court and she was assisted to source some appropriate clothes. She was accompanied to Court twice and the accused did not appear for Court on both occasions. This mother was re-traumatised on each occasion. There was at least six weeks to wait for the third and final Court proceeding, which led to a not proven verdict. The mother relapsed into alcohol misuse as a coping strategy.

When she was more settled and Court was not a feature, this mother had remained in contact with her daughter who had kinship care arrangements. When she relapsed her contact reduced, which had an impact on her daughter's wellbeing. We are concerned about the stress, anxiety and emotional trauma the process creates for victims, witnesses and their families. Anything we and COPFS can do as an organisation to minimise the detrimental impact of this aspect of the justice process would be welcome.

Whilst we are not best placed to comment in terms of detailed knowledge of COPFS processes, we suggest that COPFS could prioritise cases where there are known vulnerabilities amongst victims and witnesses and/or where families are affected. They could speed up the process of informing victims and witnesses who face vulnerabilities in relation to notification of Court appearances. We have also observed how the quality of sharing of information by COPFS with our staff is inconsistent and perhaps some guidelines would be useful to inform this. Could the issues highlighted be linked to COPFS training in relation to the 'Framework for the Support of Families Affected by the Criminal Justice System' developed by the Community Justice Authorities in June 2015?

As we are keen to intervene early as a principle, we would welcome greater use by COPFS of diversions where this is in the interests of the victim and public and when vulnerabilities exist in relation to any party, including where families are affected.

Liz Dahl
Chief Executive Officer

Written submission from Families Outside

Families Outside is a national independent charity that works on behalf of families affected by imprisonment in Scotland. We do this through a comprehensive national family support service that serves both families and the professionals who work with them, through direct support in person or by telephone; through delivery of training; and through development of policy and practice.

Families Outside is grateful for the opportunity to comment on the Justice Committee's Inquiry into the role and purpose of the Crown Office and Procurator Fiscal Service (COPFS). We do not feel we are in a position to respond to all of the questions in the Call for Evidence but will answer the ones we can and comment more generally about the principles involved. We are happy to elaborate on any of these should the Committee require additional information.

1. Please outline your views on the overall efficiency and effectiveness of the COPFS in its core role of considering reports about crime from the police and bringing prosecutions. Are there ways in which the services provided by the COPFS could be improved – for instance, through increased use of technology, further reforms to criminal procedure, or better case management? If so, do those changes also bring risks, in terms of the overall interests of justice or of access to justice (bearing in mind the differing needs of people across Scotland; urban and rural communities, economically disadvantaged people, vulnerable groups, etc)?

Our main experience relating to this question is about contacts witnesses receive for court dates. In reminding people of court dates, contact and especially reminders via text or social media tend to be more effective than contact via post or email. The most deprived households may have unstable accommodation and may not have access to the internet, so communication by mobile phone using texts or social media may be the most reliable way of reaching people. However, contact from the COPFS tend to be more traditional and formal, often in language difficult for less literate people to understand. A 'plain English' basic template and method for communication, including timely reminders, may well increase attendance at court.

Reliable attendance at court is critical for an efficient service. Cases can be delayed for months or even years due to non-appearance of witnesses or administrative delays. Witnesses may receive no explanation for these delays, yet the impact of uncertainty and delay can take a toll on the mental and physical health of those involved. Add this to the cost of travel and transport, especially for people in more remote areas, and the cost of time off work, and the 'knock-on' effects of court delays are considerable. The attached appendix (also submitted separately as a response to the consultation) gives a statement from one of our employees who has lived through this both as a defendant and as a witness, to outline what his experience can be like.

2. Please outline how well you consider the COPFS works with other stakeholders in the criminal justice system, so as to provide a —joined up and complementary service that helps meet the ends of justice. Other stakeholders might, for instance, include the police, defence lawyers, the courts, the prison service, criminal justice social work, and third party organisations working with victims or offenders.

Our interest here is the need to include families as much as possible throughout the criminal justice process. One reason we have little to feed back from the families' perspective is that families are so rarely included in discussions with the COPFS. Most of the families we support have little or no contact with the COPFS, as the focus is entirely on the accused. Unless a family member is a witness, someone may go through the entire justice process without the family ever knowing the person has been accused or convicted. An interview conducted for No One Knows, as part of its programme of research on offenders with learning difficulties and learning disabilities, told the story of a prisoner who did not know how to reach his mother when he was sent to prison. By the time he received help with this, three weeks after his imprisonment, his mother had assumed he was dead.

Families must be considered as stakeholders in the criminal justice process. Decisions made by the COPFS have an impact beyond the person accused, remanded, or convicted. The COPFS should take into account the potential impact of a prosecution or bail decision on the family left behind. In its 2011 Day of General Discussion, the UN Committee on the Rights of the Child recommended that child impact assessments be conducted for both custodial and community penalties (admittedly sentencing decisions, but the decision to oppose bail would have similar implications) to ensure any such penalty did not have an unduly detrimental effect on children and for children to be offered appropriate support. This is not current practice in Scotland, and the new Criminal Justice (Scotland) Act 2016 only requires information to be collected about children once someone is already in custody.

The Framework for Support to Families Affected by the Criminal Justice System, signed off by all eight Community Justice Authorities and now shared on the Knowledge Hub for the transition to Community Planning Partnerships, highlights the role the COPFS should play in engaging with and supporting families. The Framework states clearly the importance of COPFS engagement with families, as well as the necessity for training of COPFS staff to raise awareness of the impact of their decisions on families. We commend implementation of this Framework at the earliest possible stage.

3. Does the COPFS as presently constituted have the resources and skillsets it needs to carry out its core role effectively? And is it appropriately —future-proofed— for instance to deal with new technologies available to criminals, changes in the overall profile of crime in 21st century Scotland, or withdrawal from the European Union? If not, what additional capacities does the COPFS need?

We do not feel we are best placed to respond to this question.

4. How well does the COPFS respond to the needs of victims of crimes and to witnesses (especially vulnerable witnesses) in criminal cases and meet its legal obligations towards them?

Again, the appendix below sets out the personal experience of one of our members of staff in this regard. From what we understand, her experience of unexplained delays and stress is not unusual. Our work at Families Outside is to support children and families affected by imprisonment, but families can be the victims and witnesses as well. This in itself can lead to breakdowns in relationships within families, as well as deeply conflicting emotions and loyalties for individuals. This adds to what is already a very stressful experience and requires sensitivity and full communication from the professionals involved. The feedback we have received is that the COPFS fulfils its legal obligations and processes, but that the

delays and frustrations and lack of communication along the way reflects a system lacking in consideration of the impact on individuals as human beings.

5. The Inspectorate of Prosecution in Scotland is the independent, statutory inspectorate for the COPFS. What is your awareness of the existence and role of the IPS and of its effectiveness in carrying out that role? How effective has it been in carrying out its role? Does it appear to have the resources it needs?

We have no prior awareness of the IPS and therefore cannot comment further.

Families Outside appreciates the opportunity to comment on this issue. In sum, we are not aware of the family being considered as a stakeholder in COPFS processes or decisions. This is something we view as an important oversight in the work of this service, especially in view of the guidance agreed in the Framework for Support to Families Affected by the Criminal Justice System. We are happy to provide further information should the Justice Committee find this of use.

Prof Nancy Loucks OBE
Chief Executive
Families Outside

Written submission from Sharon Mercado (Families Outside)

RESPONSE TO QUESTIONS TO CONSIDER

1. I have had direct experience of dealing with the COPFS during my role as a restorative justice worker throughout 2012/2013, covering three different locations. The role of the PF was to read the reports submitted to them from the police and other agencies and if the case met the criteria refer to restorative justice services. Restorative Justice reduces the costs of bringing cases to court and offers the accused the opportunity to avoid criminal proceedings by means of RJ. However, it is very much a post code lottery on whether cases are dealt with by RJ. It depends on accessibility of an RJ service in the area of where the accused/victim live and even if the case meets RJ criteria on whether the PF is forward thinking enough to refer to RJ. Having had discussions with the police in the area where I worked, they often recommended the use of RJ. Although in reality the numbers of cases referred to RJ services are low.

In my own personal experience as a defendant, my criminal case took almost 2 years from my 1st interview with the police to disposal following a court case. There appeared to be many delays along the way. I frequently rang my solicitor who checked with COPFS to check progress and was often told they are waiting on certain reports and information. This heightened my anxiety and did have an effect on my mental health. There should be more efficient ways to deal with cases which would speed the processes up. Although my solicitor dealt with most of the issues as efficiently as he could, the delay and administration caused more public money being spent in terms of legal aid. This experience is echoed by many of the accused I work with now in my role as community justice mentor. People are prevented from moving on due to the length of time it is taking to deal with outstanding charges.

Technology should play a big part in speeding up processes. However, despite the advances made in this area, not all agencies have the right systems to be able to send classified confidential information. This often means that reports can take longer to be received and or sent, and creates further delays. Using technology can also bring risks associated with the sending and receiving of classified information. Overall access to reports and the dangers of cybercrime needs to be addressed, to encourage usage.

2. In my view there is room for improvement in the relationship the COPFS has with other stakeholders, specifically the 3rd sector. If it is disclosed in a report that the accused or victim is working with a 3rd sector agency then they should be contacted to gain further information for submission in the case.

In the most recent case I was involved in, (which also took almost 2 years to get be heard), I was a witness to the event. However, having given statements to the police, Sodexo and the SPS, and on each occasion informed them of my role with Families Outside, on no occasion were my employees contacted. So much more information could have been given about my role when the alleged offence was committed and the relationships between the agencies involved with this particular case. Trying to contact COPFS to gain more information after having been cited was extremely difficult. I took several attempts to speak to someone as the phone system cannot cope with the volume of calls it receives. However, no one was able to answer my query concerning my issue of being called as a witness for the prosecution when I believed I should be there for the defence. If COPFS

had contacted my employer, a 3rd sector agency working within the field of criminal justice, the PF could have gained so much more information.

3. It would save time and money if instead of bringing those currently in custody from prison to a court which could be some distance away, they are linked up via video-link/skype etc., especially if only in court for a pleading or intermediate diet. This type of technology is currently used but not on a regular basis. However, there would need to be time and money invested into the COPFS and also the SPS for this to become a norm. As with all technologies there is a need for a robust system to prevent cybercrime. Crime is changing and COPFS need to be kept up to date with systems in place to prevent such problems.

In view of the paperwork I have received from the COPFS for various cases, there appears to be a general overuse of paperwork, most of which is unnecessary.

4. Accessibility to information about proceedings is lacking and difficult to obtain. What information that is given is not helpful. For example;

Recently I was a witness to an alleged crime (I did not count myself as a victim). The incident took place in 5 November 2014 and was finally dismissed (case not called), in September 2016. (Almost 2 years from the incident date).

When I was cited;

- The paperwork went to the prison where I work on an ad hoc basis, despite giving my home address for correspondence. This meant there was a several week delay before I received the paperwork and citation as no one from the prison was able to pass the paperwork on to me until I was physically present at the prison. This happened several times throughout the proceedings.

- I had no idea what incident I had been cited for, and no idea what the alleged offender had been charged with. The information on the citation is very limited. When I rang the COPFS, (helpline not direct to the office you require), it took several attempts to get to speak to someone, phone lines are permanently busy or you are asked to leave a message, which is not helpful when you are working and have limited time available to speak to someone.

- After managing to speak to I believe a clerk at the COPFS, all I was given is the section he was charged under, which to a lay person means nothing. Fortunately I was able to work out what offence it was from the internet.

- I was cited three times, the 1st two occasions, involved waiting in a very busy witness waiting room all morning until I was finally told the case would not be heard. This was due to on the 1st hearing the accused not showing up for his case and on the 2nd hearing, there was not enough time due to previous cases over running. On the 3rd attempt, I was called to speak to the prosecution lawyer who wanted to ask my opinion on whether the accused's case should go ahead, as the statement I had previously given did not merit a prosecution. I went over the events of the date of the alleged offence again, as the lawyer decided to recommend the case be dropped.

- On a personal level, having to attend court three times was stressful. The matter could have been dealt with better in my opinion and saved a lot of time (mostly mine) and money.

I feel putting lots of witnesses together in a large stuffy room, (most courts are the same), it not good for witnesses, especially vulnerable ones. Whilst due care and consideration is given to witnesses who are victims of serious crimes (rape, domestic abuse, violent

assaults etc.), no thought is given to witnesses who are feeling especially agitated or nervous and would like time and space alone.

5. I have never heard of the Inspectorate of Prosecution. I might have received information about this when I was cited, but do not remember. There are no prominent notices within the court about this.