



JUSTICE COMMITTEE

AGENDA

18th Meeting, 2013 (Session 4)

Tuesday 4 June 2013

The Committee will meet at 9.45 am in Committee Room 2.

1. **Decision on taking business in private:** The Committee will decide whether to take item 6 in private.
2. **Subordinate legislation:** The Committee will take evidence on the Children's Legal Assistance (Scotland) Regulations 2013 [draft] from—

Kenny MacAskill, Cabinet Secretary for Justice;

Kit Wyeth, Head of Children's Hearing Team, Catriona MacKenzie, Legal Aid Policy Manager, and Felicity Cullen, Legal Services, Scottish Government.

3. **Subordinate legislation:** Cabinet Secretary for Justice to move—

S4M-06775—That the Justice Committee recommends that the Children's Legal Assistance (Scotland) Regulations 2013 [draft] be approved.

4. **Scottish Court Service:** The Committee will take evidence on the Scottish Court Service's report "Shaping Scotland's Court Services" from—

Kenny MacAskill, Cabinet Secretary for Justice;

Robert Sandeman, Civil Law and Legal System Division, Cameron Stewart, Courts Reform Bill Team Leader, and Nicholas Duffy, Legal Services, Scottish Government;

and then from—

Rt Hon Lord Gill, Lord President of the Court of Session;

Eric McQueen, Chief Executive, Scottish Court Service; and Kathryn MacGregor, Legal Secretary to the Lord President.

5. **Consideration of current petitions:** The Committee will consider the following current petitions—

Petition PE1370 by Justice for Megrahi calling on the Scottish Parliament to urge the Scottish Government to open an independent inquiry into the 2001 Kamp van Zeist conviction of Abdelbaset Ali Mohmed al-Megrahi for the bombing of Pan Am flight 103 in December 1988;

Petition PE1449 by Accountability Scotland calling on the Scottish Parliament to urge the Scottish Government to preserve an independent Scottish Administrative Justice Council when the UK AJTC system is abolished, ensuring the new body has a critical user-interface to enable base-roots input from the public and that it has complete independence from political or civil service influence.

6. **Tribunals (Scotland) Bill:** The Committee will further consider its approach to the scrutiny of the Bill at Stage 1.

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The papers for this meeting are as follows—

Agenda item 2

SSI cover note

J/S4/13/18/1

[Children's Legal Assistance \(Scotland\) Regulations 2013 \[draft\]](#)

Agenda item 4

Paper by the clerk and SPICe (private paper)

J/S4/13/18/2 (P)

["Shaping Scotland's Court Services"](#)

["Shaping Scotland's Court Services": An analysis of consultation responses](#)

[Written submissions received](#)

Agenda item 5

Paper by the clerk

J/S4/13/18/3

Paper by the clerk

J/S4/13/18/4

Agenda item 6

Paper by the clerk (private paper)

J/S4/13/18/5 (P)

Justice Committee

18th Meeting, 2013 (Session 4), Tuesday 4 June 2013

Subordinate legislation

Purpose

1. This paper invites the Committee to consider the following affirmative instrument:
 - Children's Legal Assistance (Scotland) Regulations 2013 [draft]
2. Further details of the procedure for affirmative instruments are set out in Annexe A to this paper.

Children's Legal Assistance (Scotland) Regulations 2013 [draft]

Purpose of instrument

3. This instrument amends a number of regulations relating to legal assistance and legal aid to reflect the introduction of bespoke provisions regarding children's legal aid as a result of the Children's Hearings (Scotland) Act 2011, which comes into force on 24 June. The aims of the instrument are to:
 - make provision for the availability of advice and assistance, in the form of ABWOR, in certain circumstances at children's hearings and in court proceedings for children, relevant persons and others;
 - set out processes about how to apply for children's legal aid, reflecting the transfer of the decision-making power to grant children's legal aid from the court to the Scottish Legal Aid Board, and making more detailed provision for matters such as review, change of circumstances and termination;
 - set out the definitions of disposable income and disposable capital for the purposes of contributions for children's legal aid; and
 - direct the provision by the Board of a national "duty solicitor" scheme to ensure the availability of a solicitor to a child, in certain circumstances, at children's hearings and in sheriff court proceedings throughout Scotland.
4. The instrument comes into force on 24 June 2013 (subject to the approval of the Parliament).
5. Further details on the purpose of the instrument can be found in the policy note at Annexe B and an electronic copy of the instrument is available at:
<http://www.legislation.gov.uk/sdsi/2013/9780111020401/contents>

Consultation

6. The policy note on the instrument confirms that a draft of the Regulations was shared with key stakeholders at the beginning of 2013, notably: Law Society of Scotland, Scottish Legal Aid Board, Children's Hearings Scotland, Children 1st, Scottish Children's Reporter Administration and Scottish Women's Aid.

Subordinate Legislation Committee consideration

7. The Subordinate Legislation Committee (SLC) considered this instrument at its meeting on 21 May and agreed to draw the Regulations to the attention of the Parliament on the general reporting ground. In particular, Regulation 3 does not cite the title of the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003 in accordance with the Scottish Statutory Instrument Regulations 2011. However, the SLC does note that the Scottish Government considers it is clear which instrument is being referred to, as the footnote states the year and the SSI number of the 2003 Regulations.

8. The relevant extract of the SLC's report on the instrument is reproduced at Annexe C.

Justice Committee consideration

9. The Justice Committee is required to report to the Parliament on this instrument by 15 June 2013.

ANNEXE A**Affirmative instruments: procedure**

10. The instrument is subject to affirmative procedure (Rule 10.6. of Standing Orders). The Cabinet Secretary for Justice has, by motion S4M-06775, proposed that the Committee recommends the approval of the instrument. The Cabinet Secretary will attend the Committee meeting on 4 June to answer any questions on the instrument, and then, under a separate agenda item, will be invited to speak to and move the motion for approval. It is for the Committee to decide whether or not to agree to the motion, and then to report to the Parliament accordingly by 15 June 2013. The Committee is asked to delegate to the Convener authority to approve the report for publication.

Policy Note

Children's Legal Assistance (Scotland) Regulations 2013 [draft]

The above instrument was made in exercise of the powers conferred by sections 9(1), (2)(a), and (c) to (dd), 28K(2), 28L(1), 31(9), 36(1), 36(2)(a), (c), (d) to (h) and 42 of the Legal Aid (Scotland) Act 1986. The instrument is subject to affirmative procedure.

POLICY OBJECTIVES

Overview

The overall policy aim is to provide a permanent, sustainable national scheme for the provision of state-funded legal representation in children's hearings and their associated court proceedings. The Children's Legal Assistance (Scotland) Regulations 2013 ("the Regulations") form part of this aim, as they provide the details of how children's legal aid will operate, and make assistance by way of representation (ABWOR) available to certain persons in certain circumstances.

The need for these provisions has come about because of the coming into force of the Children's Hearings (Scotland) Act 2011 ("the 2011 Act") on 24 June 2013, which makes provision for legal aid to be available for children's hearings for children and relevant persons.

The aims of the Regulations are to:

- Make provision for the availability of advice and assistance, in the form of ABWOR, in certain circumstances at children's hearings and in court proceedings for children, relevant persons and others;
- Set out processes about how to apply for children's legal aid, reflecting the transfer of the decision-making power to grant children's legal aid from the court to the Scottish Legal Aid Board ("the Board"), and making more detailed provision for matters such as review, changes of circumstances and termination;
- Set out the definitions of disposable income and disposable capital for the purposes of contributions for children's legal aid; and
- Direct the provision by the Board of a national "duty solicitor" scheme to ensure the availability of a solicitor to a child, in certain prescribed circumstances, at children's hearings and in sheriff court proceedings throughout Scotland.

Many of the provisions in these Regulations are similar to those previously made for children's hearings prior to the 2011 Act under the Legal Aid (Scotland) (Children) Regulations 1997 and to those currently made in respect of civil legal aid in the Civil Legal Aid (Scotland) Regulations 2002.

Background

Prior to 2002 state-funded representation was not available at children's hearings. In consequence of the case of *S v Miller* the Children's Hearings (Legal Representation) (Scotland) Rules 2002 (SSI 2002/63) introduced an interim scheme to provide state-funded representation for children appearing before children's hearings. Where the need for a legal representative was identified, one would be provided by the local authority from a panel of solicitors.

In 2009 this scheme was extended, in consequence of the case of *SK v Paterson*, by the Children's Hearings (Legal Representation) (Scotland) Amendment Rules 2009 (SSI 2009/211) to provide representation, in limited circumstances, to relevant persons due to attend children's hearings. "Relevant persons" broadly meant any person with statutory parental responsibilities in respect of the child or having charge or control over the child. The full definition is set out in section 93(2)(b) of the Children (Scotland) Act 1995. Representation was again arranged by the local authority from a panel of solicitors.

The 2011 Act now provides for children's legal aid to be available for children's hearings for children and relevant persons. To do so the 2011 Act inserts a number of new sections into the 1986 Act (sections 28B to 28S and 33B) and repeals the existing provisions about children's legal aid in section 29. By means of transitional provisions (to be made in a separate Order) assistance under section 29 will, however, continue to be available for ongoing proceedings under the Children (Scotland) Act 1995.

In summary, the 1986 Act (as amended) makes children's legal aid automatically available in relation to some applications and hearings under the 2011 Act, otherwise to obtain children's legal aid a person must apply to the Board. The financial eligibility criteria for children's legal aid are set out in section 28K. The availability of children's legal aid can be extended by regulations made under section 28L.

Advice and assistance is already available in respect of children under Part 2 of the 1986 Act. By its nature, most advice and assistance does not include representation at children's hearings. However, as set out below, these regulations make ABWOR (which is a form of advice and assistance) available for such hearings and some court proceedings.

Children's ABWOR

ABWOR allows solicitors to provide representation under the advice and assistance scheme, rather than by means of the more complex and formal legal aid scheme.

As set out in the Policy Memorandum that accompanied the Children's Hearings (Scotland) Bill, the Scottish Government has concluded that for practical reasons, legal representation for children and relevant persons who have appointed a solicitor to represent them in a children's hearing will best be provided under ABWOR rather than children's legal aid. This allows solicitors to assess their client's eligibility and to decide whether a grant of ABWOR can be made immediately, subject to later checking by the Board, rather than requiring the solicitor to make a full legal aid application to the Board on behalf of the client.

Part 2 of the Regulations provides that ABWOR is available in relation to children's hearings and some proceedings in the sheriff court for the child and relevant persons, and also other specified individuals. The processes for applying for ABWOR, and how it operates once granted, are already set out as regards civil (including children's) and criminal matters in the Advice and Assistance (Scotland) Regulations 1996 ("the 1996 Regulations").

The policy is that ABWOR should be available in relation to in two broad situations for the child and relevant persons involved in the proceedings. In urgent situations ABWOR should be available and granted by solicitors. In some of those cases

ABWOR is available without application of a financial eligibility test. The Board has the power under the 1996 Regulations to check later whether the solicitor has correctly applied the eligibility tests. In non-urgent situations ABWOR should be available by application in advance to the Board. A financial eligibility test applies in those cases.

Availability of ABWOR to a child

ABWOR is available to a child without a financial test and can be granted by a solicitor without prior approval from the Board in the following situations which are considered to be urgent - where:

- an application is made under section 48 of the 2011 Act for variation or termination of a child protection order (sheriff court),
- a children's hearing is arranged in relation to a child by virtue of section 45 or 46 of the 2011 Act,
- a children's hearing or a pre-hearing panel considers that it might be necessary to make a compulsory supervision order including a secure accommodation authorisation in relation to a child,
- a children's hearing to which section 69(3) of the 2011 Act applies is arranged in relation to a child, or
- an application is made to the sheriff for a child assessment order under section 35 of the 2011 Act or a child protection order under section 38 of the 2011 Act.

For all other children's hearings, ABWOR may be available if the child meets the financial eligibility test, and where the Board is satisfied that representation is necessary to allow the child to participate effectively in the circumstances set out in the Regulations. For example, where a hearing under section 69 of the 2011 Act takes place within 8 working days of a child protection order being granted (as described at section 54 of the 2011 Act), ABWOR is available if the child meets the financial eligibility test and if the Board is satisfied that representation is necessary to allow the child to participate effectively.

Availability of ABWOR to a relevant person

ABWOR is available, subject to a financial test and only where the solicitor is satisfied that representation is necessary to allow the person to participate effectively, where:

- an application is made under section 48 of the 2011 Act for variation or termination of a child protection order (sheriff court),
- a children's hearing is arranged in relation to a child by virtue of section 45 or 46 of the 2011 Act,
- a children's hearing or a pre-hearing panel considers that it might be necessary to make a compulsory supervision order including a secure accommodation authorisation in relation to a child,
- a children's hearing to which section 69(3) of the 2011 Act applies is arranged in relation to a child, or
- an application is made to the sheriff for a child assessment order under section 35 of the 2011 Act or a child protection order under section 38 of the 2011 Act.

For all other children's hearings, ABWOR may be available subject to a financial test and with the prior approval of the Board. The Board must be satisfied that ABWOR is required to allow the person to participate effectively in the circumstances out in the Regulations. For example, where a hearing under section 69 of the 2011 Act takes place within 8 working days of a child protection order being granted (as described at section 54 of the 2011 Act), ABWOR is available if the relevant person meets the

financial eligibility test and if the Board is satisfied that representation is necessary to allow the relevant person to participate effectively.

Further availability of ABWOR

ABWOR may be available to an individual to whom section 126 of the 2011 Act refers for a children's hearing at which there is a review of a contact direction, where the individual meets the financial eligibility test and if the Board approves. The Board must be satisfied that ABWOR is required to allow the individual to participate effectively in the circumstances set out in the Regulations.

ABWOR may be available to an individual to whom section 79(2)(a)(i) of the 2011 Act refers for a pre-hearing panel meeting where a determination under section 81 of that Act (of the person's claim to be a relevant person) is to be decided. To obtain ABWOR the person must meet the financial eligibility test and the Board must be satisfied that representation is necessary to allow the person to participate effectively. ABWOR is also available, provided the financial eligibility test is met and the Board approves that ABWOR is needed to allow effective participation, for a child and relevant person for such a hearing. These are the only circumstances in which ABWOR may be available for representation at a pre-hearing panel.

Effective participation test for ABWOR

The "effective participation test" is set out in regulation 3(5), which inserts regulation 14 into the Advice and Assistance (ABWOR) (Scotland) Regulations 2003 ("the 2003 Regulations"). When determining whether legal representation is required to allow a person to participate effectively, the solicitor or the Board must take account of:

- the complexity of the case, including the existence and difficulty of any points of law in issue;
- the nature of the legal issues involved;
- the ability of the person to consider and challenge any document or information in the hearings or proceedings without the assistance of a solicitor; and
- the ability of the person to present his or her views in an effective manner without the assistance of a solicitor.

Financial test for ABWOR

A "financial eligibility test" means the test set out in section 8 of the 1986 Act, which already applies to most ABWOR in civil and criminal matters. That test means a successful applicant's disposable income should not exceed £245 a week, or the applicant should receive certain benefits, and the applicant's disposable capital should not exceed £1,716. What constitutes disposable income and disposable capital are already set out in Schedule 2 to the 1996 Regulations.

All of the other provisions of the 1996 Regulations relating to ABWOR and the 2003 Regulations shall apply to children's ABWOR granted in the circumstances provided for in regulation 3.

Children's Legal Aid

Children's legal aid is the aid type for most court proceedings, for both the child and relevant persons. So, for example, children's legal aid is available for an appeal to the sheriff against a decision of a children's hearing or a grounds of referral proof before

the sheriff. It is also the aid type for onwards appeals to the sheriff principal and the Court of Session.

In deciding whether children's legal aid should be available, the Board must be satisfied in accordance with the 1986 Act that it is reasonable in the circumstances of the case, and that the expenses of the case could not be met without causing undue financial hardship to the applicant or their dependents. Where the applicant is a child, the Board must also be satisfied under section 28D of the 1986 Act that the grant of legal aid is in the child's best interests. In appeal cases the Board must be satisfied that the child or relevant person has substantial grounds for taking, or responding to, the appeal.

Under section 28B of the 1986 Act (as inserted by the 2011 Act), children's legal aid is available for:

- a) proceedings before a sheriff for variation or termination of a child protection order;
- b) proceedings –
 - i. at a children's hearing following the making of a child protection order;
 - ii. at a children's hearing or pre-hearing panel where it considers it might be necessary to make a compulsory supervision order including a secure accommodation authorisation;
 - iii. at a children's hearing following the arrest of a child and his or her detention in a place of safety; and
- c) proceedings before a sheriff, the sheriff principal or the Court of Session in connection with a children's hearing under Part 10 or 15 of the 2011 Act.

Part 3 of the Regulations deals with issues relating to the provision of children's legal aid; setting out how to apply for it; making provision for review or changes of circumstances; and circumstances in which it can be terminated, broadly reflecting the detailed provisions in the Civil Legal Aid (Scotland) Regulations 2002 ("the 2002 Regulations"). These provisions build on those inserted into the 1986 Act by the 2011 Act about conditions which may attach to a grant of children's legal aid and review of applications.

Extending availability of children's legal aid

Regulation 5 extends the provision of children's legal aid – already available to a child, a relevant person and at appeals relating to a deemed relevant person – to individuals to whom section 126 of the 2011 Act refers for a children's hearing at which there is a review of a contact direction.

Automatic children's legal aid

It is envisaged that children or relevant persons may instruct their own legal representative ahead of a children's hearing. As set out above, this will be funded, where appropriate, through the advice and assistance scheme (which includes ABWOR).

However, if this has not happened, automatic children's legal aid is available to the child in the circumstances set out in section 28C of the 1986 Act. This is intended to ensure that representation can be made available in urgent cases where a child is due to appear at a children's hearing and the issues are such that it would be inappropriate for the hearing to proceed without the child being legally represented.

The automatic grant of children's legal aid is only available for the purpose of the immediate hearing.

Under section 28C of the 1986 Act, automatic children's legal aid can be made available to a child where:

- there are proceedings before a sheriff for variation or termination of a child protection order;
- there is a children's hearing following the making of a child protection order;
- a children's hearing or pre-hearing panel considers it may be necessary to authorise the placement of the child in secure accommodation; or
- there is a children's hearing following the child being apprehended by the police if it has been decided that criminal proceedings are not going to be pursued.

This means that, as set out in section 28C(1)(c), children's legal aid will also be automatically made available in non-urgent cases where a deprivation of the child's liberty is in prospect but the child has not secured representation ahead of the hearing. In those situations, as when providing any child children's legal aid under section 28C, the Board will arrange for a solicitor to be available to provide that assistance to the child. This is provided for in Part 4 of the Regulations.

Applications for children's legal aid

Regulation 6 lists what are treated as distinct proceedings for children's legal aid. A legal aid certificate issued for any of the specified proceedings is not transferable and separate applications will be required for any other proceedings. A provision to this effect was previously made for children's hearings under regulation 3 of the 1997 Regulations.

Regulations 7 to 15 set out the process of applications for children's legal aid, building on the transfer (by the 2011 Act amendments to the 1986 Act) of the power to make children's legal aid available from the court to the Board.

Application on behalf of a child

Under regulation 8, applying for children's legal aid on behalf of a child falls to the child's relevant person (which includes a parent or person having parental responsibilities), safeguarder or other representative (other than a solicitor). It is the Scottish Government's intention to support the consistent use of safeguarders who have a clear role throughout the children's hearing process rather than an inconsistent and disparate mix of safeguarders and curators. Therefore, regulation 8 does not enable applications on behalf of children to be made by curators. The relevant person, safeguarder or other representative may then receive legal advice from a solicitor as to how to apply.

Financial eligibility

When deciding whether a person is eligible for children's legal aid the Board has to consider under the 1986 Act whether paying for representation privately would cause the person "undue hardship." To make this assessment, the Board needs to be able to calculate the person's disposable income and disposable capital – the person's income and capital after certain things have been deducted. How to determine what is disposable income and disposable capital is set out in the Schedules to the

Regulations. These Schedules repeat in most cases the provisions which apply in relation to income and capital in civil matters under the Civil Legal Aid (Scotland) Regulations 2002.

Depending on the financial circumstances of the applicant, a contribution may be payable for persons in receipt of children's legal aid under section 28K of the 1986 Act. Contributions have not previously existed for legal aid for children's matters. Contributions already exist for Advice and Assistance (A&A), including in children's matters.

The Scottish Government believe that those who can afford to pay towards their own legal advice and representation should do so. The alternative would be to provide all children's legal aid without requiring contributions. This would be inconsistent with the general approach across nearly all civil proceedings, that those who can afford to contribute to the costs of the action should do so.

Section 28K of the 1986 Act enables the Board to levy contributions towards the expenses of the case on those receiving children's legal aid. Contributions received by the Board will be paid into the Scottish Legal Aid Fund.

In accordance with section 28K, it is for the Board to determine the amount of any contribution payable. Any contribution in respect of disposable income is to be levied on disposable income exceeding the prescribed statutory threshold (currently £3,355 a year) and that the amount of that contribution must not exceed one third of the amount by which the person's disposable income exceeds the prescribed threshold. Section 28K also makes similar provision as regards disposable capital (for which the current statutory threshold is £7,504).

Regulation 16 provides that the Board must decide the amount of the contribution due by the applicant towards the cost of the legal aid provided. Those who do have to contribute can make payments over an extended period to minimise the impact of payment on them.

Matters of special urgency

Regulation 18 allows the Board to grant children's legal aid for court proceedings (not for children's hearings) in matters of special urgency, notwithstanding that the eligibility tests set out in the 1986 Act have not yet been shown to be met. Regulation 8 of the 1997 Regulations currently makes similar provision, but is restricted to the distinct proceedings of appeals to the sheriff principal and the Court of Session.

An example of where regulation 18 could be used would be where in relation to a proof on grounds of referral, a solicitor is only instructed in the sheriff court environs just before the proof is to be called. To prevent delay in the proceedings it would be open for the solicitor to contact the Board and request that his/her appearance at the proof be covered by special urgency children's legal aid. If special urgent children's legal aid is granted by the Board after the court appearance a full children's legal aid application must be submitted to the Board.

Another example of where regulation 18 could be used would be in relation to an appeal to the sheriff against a decision affecting a contact or permanence order under section 161 of the 2011 Act. This type of appeal must be heard and disposed of before the expiry of three days, beginning with the day on which the appeal is made. In this

situation it may prove difficult for an application for children's legal aid to be completed, submitted and decided before the appeal to the sheriff calls. Accordingly an application for special urgency children's legal aid in these circumstances could be made.

Notification of decision

Regulation 19 requires the Board to notify the applicant and the applicant's solicitor of its decision to grant or refuse children's legal aid. The regulation sets out the information the Board must provide in doing so.

Review of a refusal of children's legal aid/condition

When children's legal aid is granted, under section 28G of the 1986 Act it may be subject to conditions which are set by the Board. Section 28H of the 1986 Act provides that where the Board refuses an application, the applicant should be able to request a review of the Board's decision. It further provides that, where the applicant has been refused legal aid due to a failure to meet a condition imposed by the Board, the applicant may request a review of this condition.

Regulation 20 makes provision for review of a refusal to grant children's legal aid or of any condition imposed by the Board in granting the children's legal aid.

Employment of counsel

Regulation 21 makes provision about when counsel and others may be employed. In most cases the prior approval of the Board is required.

Changes of circumstances

Regulations 22 to 29 set out duties on the assisted person and his/her legal representatives to report changes in circumstances or new information to the Board.

The duty in regulation 22 to report a change in circumstances in relation to a child is a little wider than the corresponding provision for civil legal aid in the Civil Legal Aid (Scotland) Regulations 2002. This is because a number of different people may be involved in assisting or supporting a child. The regulation therefore applies to a solicitor, counsel, a relevant person, the child's safeguarder (if there is one) or any other representative of the child.

Regulation 23 also allows the Board to request information about changes in circumstances from an applicant for children's legal aid, a person receiving children's legal aid or the person's solicitor or counsel.

Termination of legal aid on change of circumstances

The circumstances in which the Board can terminate a grant of children's legal aid to a person are set out in regulations 30 to 33 and reflect the respective tests which must be met in order for a person to be eligible for children's legal aid. For example, where it is no longer "reasonable in the particular circumstances of the case" that a person should receive children's legal aid – which is part of the test for a child under section 28D of the 1986 Act, a relevant person under section 28E or 28F or an individual under regulation 5 of these Regulations – the Board can terminate the children's legal aid.

Termination on request by an assisted person

Regulation 34 is an innovation on the similar regulations which apply to civil legal aid. It allows for termination of legal aid where the assisted person has requested it. Termination in these circumstances is allowed where the person has paid any contribution due in full and has provided all necessary information to the Board in accordance with regulation 9.

Duty Solicitor Scheme for certain children's hearings

Part 4 of the Regulations (regulation 35) requires the Board to introduce a "duty solicitor" scheme for any proceedings to which section 28C of the 1986 Act applies, that is the circumstances in which automatic children's legal aid is available to a child. Automatic children's legal aid is only available to a child, and only in circumstances where ABWOR has not already been made available.

Where the Board arranges for a solicitor to be provided, the children's legal aid shall only be provided by that solicitor. The ability of a person under section 31(1) the 1986 Act to choose which solicitor represents them is disappplied.

CONSULTATION

A draft of the Regulations was shared with key stakeholders at the beginning of 2013, notably: Law Society of Scotland, Scottish Legal Aid Board, Children's Hearings Scotland, Children 1st, Scottish Children's Reporter Administration and Scottish Women's Aid.

Changes to the Regulations

A number of changes were made to the draft Regulations as part of this process.

The words "under the upper age limit of compulsory school age" after the word "child" were removed from regulation 8(2) to allow the same definition for a child to be used consistently in applications for legal assistance for all 2011 Act proceedings.

While it would be extremely unusual to do so due to the emergency nature of these hearings, it is possible for a sheriff to seek to hear from a child or relevant person at a Child Protection Order (CPO) or Child Assessment Order (CAO) hearing. The Regulations have therefore been amended to provide that ABWOR is available to a child or relevant person for an application to the sheriff for a CAO or CPO.

Respondents raised that, where there is sufficient time to arrange a pre-hearing panel, there would be enough time for an application for ABWOR to be made to the Board and for the Board to apply the effective participation test. Similarly, there would be sufficient time ahead of 8th working day hearings. Where the Regulations originally allowed for solicitors to apply the effective participation test in these circumstances, they have been amended to require an application to the Board.

There was some uncertainty as to the process relating to applications made for deferred hearings following a hearing held in the circumstances set out in section 28C(1), where some believed application should be made to the Board as there would be sufficient time. In the Board's view, treating deferred hearings as separate hearings

requiring an application to the Board would create significant double-handling. The Board cannot foresee a situation where they would refuse a further grant of ABWOR for a deferred hearing. Requiring an application to the Board for deferred hearings would therefore seem to add cost but no value. The draft Regulations have therefore been amended to include the circumstances set out in section 28C(2) as one of the situations where an application in advance to the Board is not required and the financial eligibility and effective participation tests are applied by the solicitor.

For proceedings that are treated as distinct for the purposes of an application for children's legal aid, an application to the sheriff to extend or vary an interim compulsory supervision order under section 98 of the 2011 Act will not be treated as distinct proceedings where the application arises as part of other proceedings under the 2011 Act and the person has already been granted children's legal aid. This means it will be treated in the same way as an application to the sheriff to further extend or vary an interim compulsory supervision order under section 99 of the 2011 Act.

In relation to applications by or on behalf of children, reference to a child's "legal representative" has been clarified to avoid confusion. The Board is also preparing guidance for solicitors on who can apply for children's legal assistance and on who can apply on behalf of a child or adult.

The Regulations have been amended to allow the child or relevant person to apply for ABWOR at a pre-hearing panel meeting where an individual is seeking to be deemed a relevant person, so that ABWOR is available to them as well as the individual.

In response to concerns regarding the inclusion of provision about the resources of a person owing a duty of aliment to a young person being included within that young person's resources, this provision has been removed from the Regulations.

Other considerations

Some concerns did not result in a change to the draft Regulations but further action will be taken.

The Board is devising child friendly material for the new children's hearings arrangements and a child friendly Code of Practice. The Board is liaising with organisations such as the Scottish Children's Reporter Administration (SCRA) and Children's Hearings Scotland on this. Part of the rationale for a child friendly Code is so children will know what they can and cannot expect.

There was concern that vulnerable individuals might face difficulties in accessing legal representation as there can be a number of obstacles to actually accessing legal advice, even where legal aid may be available. The Board already assists members of the public who struggle to find a legal aid lawyer and can do so with regard to children's legal assistance. Where Children's Hearings Scotland think representation may be needed, that recommendation can be referred to the Board, who will then try to link a solicitor to the case. The Board cannot compel solicitors or firms to take on particular cases, however.

The Board already provides guidance on issues relating to age of capacity and the ability of a child to give instructions in its criminal, civil and children's legal assistance handbooks. Currently, a child aged twelve or over is deemed to have capacity to

instruct a solicitor and, under twelve, the solicitor must be satisfied that a child is in a position to understand and give instructions. The Board may clarify the basis on which a solicitor has arrived at this conclusion.

There are certain circumstances where the normal duties of a solicitor will involve him or her providing services to children which fall within the meaning of regulated work as set out in the Protection of Vulnerable Groups (Scotland) Act 2007. Existing legislation provides that, where that happens, it would be appropriate for the solicitor to join the PVG Scheme.

The Board has a legal obligation to monitor compliance with the code of practice. Solicitors and firms on the register are required to comply with the code of practice under section 28P of the 1986 Act and there is, therefore, no need to repeat this requirement in regulations. Monitoring of the code will be undertaken through a combination of both peer review and compliance assurance by Board staff that may include on-site audits.

The Board has overall responsibility to ensure the quality of provision of children's legal assistance, including the training of solicitors. While the Board is not required to provide training, they are currently holding a series of roadshows throughout the country along with representatives of SCRA and CHS in preparation for implementation of the new system. The Board has also been providing the profession with updates and guidance in relation to children's legal assistance and in relation to the registration process. There is nothing to prevent other bodies from providing training. A number of organisations, such as the Law Society of Scotland, are making available training courses to help practitioners demonstrate compliance with certain of the required competencies for registration and further details of these are available on the Board's website.

The Board works to published key performance indicator (KPI) targets and has produced KPI's in relation to children's legal assistance which have been discussed with SCRA and CHS and which are designed to meet the requirements of the system. There are special urgency provisions in place to provide cover, to the extent necessary, to protect the applicant's position in such circumstances. While there is potential for delay in circumstances where the Board is waiting for information from solicitors and/or applicants, the Board will do its best to minimise such delay and, so far as possible, ensure that the delay is not transferred to the proceedings.

There was a concern that the Board doing a "back-end" check where ABWOR is provided by a solicitor might lead to an applicant suddenly finding themselves paying a contribution when they least expect it. This check stems from responsibilities placed on solicitors in 2008 when considering whether to grant advice and assistance to obtain financial and other documentation for the purpose of ascertaining an applicant's disposable capital and disposable income (under paragraph 2A(2) of Schedule 2 to the 1996 Regulations). Further amendments in 2011 introduced similar requirements in civil and children's cases. The check itself relates most specifically to regulation 22 of the 1996 Regulations, which gives the Board the power to withhold payment from the Fund or, if payment has been made, to recover it where payment is unjustified by reason of inadequate assessment or verification of any relevant factor. The check is intended to ensure that a grant of legal assistance is competent and will apply to the ABWOR for 2011 Act proceedings as it would for other ABWOR provision.

Guidance was issued for such cases by the Board. This guidance was prepared by the Board after consultation with the Law Society of Scotland and individual practitioners and sets out approaches consistent with existing good practices already in place in many firms. The guidance on verification of financial eligibility is also consistent with approaches adopted by the legal aid authorities in other jurisdictions in the UK and beyond. The guidance is not intended to act as a barrier to access to justice, nor to penalise practitioners who have acted and proceeded in good faith. As a result of consultations with practitioners and the Society, the Board has attempted to identify the difficulties that practitioners may encounter in certain circumstances or types of cases and to set out how such situations should be addressed.

In general terms, the Board seeks to support practitioners providing publicly-funded legal assistance by issuing guidance. This is intended to assist practitioners in all cases but especially where there may be issues of complexity, for example in the types of legal assistance that may be available in certain circumstances and where a solicitor is required to act at short notice.

IMPACT ASSESSMENTS

An equality impact assessment on the policy is being finalised and will be published once complete.

FINANCIAL EFFECTS

A Business and Regulatory Impact Assessment (BRIA) has been completed and is attached. The impact of this policy on business is that those appearing at 2011 Act proceedings could receive legal assistance if eligible and the agent could be remunerated for doing so. There may be some impact on solicitors' firms in familiarising themselves with the new regulations.

The estimated cost to the Scottish Legal Aid Fund is an additional £0.8m in 2013/14 and £3m in 2014/15. This has already been included in forecasts of expenditure for the Fund. There is uncertainty around the financial impact on the Fund, particularly in relation to ABWOR volumes and the level of additional demand to undertake this work. The Board will therefore continue to refine its forecast going forward.

Scottish Government
Justice Directorate
May 2013

ANNEXE C

Extract from the Subordinate Legislation Committee's 30th Report, 2013 (Session 4)

Children's Legal Assistance (Scotland) Regulations 2013 [draft]
(Justice Committee)

1. The overall purpose of these Regulations is to provide a permanent, sustainable national scheme for the provision of state-funded legal representation in children's hearings, and their associated court proceedings. The Regulations provide the details of how children's legal aid will operate, and make assistance by way of representation ("ABWOR") available to certain persons in certain circumstances.
2. The Regulations are scheduled by the Scottish Government to come into force on 24 June 2013 (subject to the approval of the Parliament).
3. In considering the instrument, the Committee asked the Scottish Government for clarification of certain points. The correspondence is reproduced in the Appendix.
4. The Scottish Government has acknowledged that the title of the Regulations which are referred to in the heading to, and the opening text of, regulation 3 is not cited in accordance with the Scottish Statutory Instrument Regulations 2011. Regulation 3 makes various amendments to the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003. However the title is partly abbreviated to "(ABWOR)".
5. The Government contends that the provision is not defective, taking into account that the footnote reference in regulation 3 gives "S.S.I. 2003/179" as the year and number of the instrument. The Scottish Statutory Instrument Regulations 2011 provide that a Scottish statutory instrument may either be cited by the full title, or by such a reference to the SSI year and number, without prejudice to any other valid mode of citation. The 2011 Regulations do not state that a failure to cite the full title or "S.S.I. 2003/179", for example, affects the validity of an instrument.
6. The Committee accepted that this particular error should not be reported on the more serious reporting ground that there appears to be defective drafting of the instrument. However the Committee does consider this to be a drafting error, and that the full titles of other Scottish statutory instruments which are referred to in an instrument should not be abbreviated in this way.
7. **The Committee draws the Regulations to the attention of the Parliament on the general reporting ground.**
8. **There is a drafting error in paragraph (1) of regulation 3, which provides that the Advice and Assistance (ABWOR) (Scotland) Regulations 2003 are amended in accordance with the remainder of the regulation. The Scottish Government accepts that regulation 3 does not cite the title in accordance with regulation 4 of the Scottish Statutory Instrument Regulations 2011, as it abbreviates "(Assistance by Way of Representation)" to "(ABWOR)".**
9. **The Committee notes, however, that the Scottish Government considers it is clear which instrument is being referred to, as the footnote to regulation 3(1) states the year and the SSI number of the 2003 Regulations.**

APPENDIX**Children's Legal Assistance (Scotland) Regulations 2013 [draft]****On 9 May 2013, the Scottish Government was asked:**

1. Section 31(1) of the Legal Aid (Scotland) Act 1986 provides that a person to whom legal aid or advice and assistance is made available may select the solicitor to advise or act for them, and the person is entitled to make the selection themselves.

Regulation 35(1) requires the Scottish Legal Aid Board to arrange for a duty solicitor for the purposes of providing to any child, children's legal aid under section 28C of the 1986 Act in relation to any proceedings as listed in that section. Regulation 35(2) provides for that purpose that section 31(1) does not apply, and the legal aid must be provided only by the solicitor made available.

Please clarify which power is relied on to make regulation 35 and why the provision is within that power, given that—

(i) subsection (9) of section 31 (cited in the preamble) enables Ministers by regulations to provide that subsection (1) shall not apply and the legal aid shall only be provided by the solicitor so made available, where a solicitor is available as mentioned in subsection (8). That subsection provides that the Board may arrange that in such circumstances as it may specify (at its discretion) a solicitor shall be available to provide legal aid; but

(ii) the powers in section 31 do not include a power to modify subsection (8) and regulation 35 places a duty on the Board to arrange for a solicitor solely to provide the legal aid?

2. Regulation 3(1) provides that the Advice and Assistance (ABWOR) (Scotland) Regulations 2003 are amended in accordance with the following provisions. Regulation 4 of the Scottish Statutory Instrument Regulations 2011 provides that an instrument may be cited by its title or by S.S.I. 1999/1 (for example).

The title of the 2003 Regulations is the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003. On what basis is it contended that the abbreviation of part of the title to "(ABWOR)" is a proper and valid citation of the instrument amended by regulation 3?

The Scottish Government responded as follows:

1. In answer to the first question, regulation 35 is made in exercise of the powers under sections 36(2)(a) and 31(9). Under section 36(2)(a) the Scottish Ministers can make provision as to the exercise by the Board of its functions under the Act. In this case the section 36(2)(a) power is being used to provide that the exercise by the Board of the section 31(8) function is to apply in the circumstances set out in the Regulations. In other words, that the circumstances in which a solicitor shall be made available by the Board are those set out in regulation 35(1). These are then cases where a solicitor is available as is mentioned in section 31(8) which enables the section 31(9) power to be used to disapply section 31(1).

In this respect, regulation 35 takes the same approach as the duty solicitor scheme set out in the Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011 made under equivalent powers, which in itself was partly a re-enactment of the previous duty solicitor schemes under the Criminal Legal Aid (Scotland) Regulations 1996 and the Criminal Legal Aid (Scotland) Regulations 1987.

2. In answer to the second question, the Scottish Government accepts that the title of the Regulations referred to in the heading to, and the opening text of, regulation 3 is not cited in accordance with regulation 4 of the Scottish Statutory Instrument Regulations 2011. The Scottish Government apologises for this and notes that the correct SSI number for the Regulations is cited in the footnote to which that opening text relates and no confusion should therefore be caused for the user by the abbreviation.

Justice Committee

18th Meeting, 2013 (Session 4), Tuesday 4 June 2013

Petition PE1370: inquiry into Megrahi conviction

Paper by the Clerk

Background

1. Petition PE1370 by Justice for Megrahi (JFM) calls on the Scottish Parliament to urge the Scottish Government to open an independent inquiry into the 2001 Kamp van Zeist conviction of Abdelbaset Ali Mohmed al-Megrahi for the bombing of Pan Am flight 103 in December 1988.
2. The petition was lodged on 1 November 2010. The petition was carried over to Session 4 and on 28 June 2011, the new Public Petitions Committee referred it to the Justice Committee for further consideration.
3. The Justice Committee last considered the petition at its meeting on 11 December 2012 where it agreed to keep the petition open pending allegations against the Crown Office and the police being investigated¹.

Recent Submissions

4. The petitioners have provided the Committee with an update on the complaints they have raised against the Crown Office and Procurator Fiscal Service (COPFS) and the police. The published versions are attached to this paper as an Annexe. Clerks have circulated the unredacted submissions to the Committee.
5. JFM's submissions give accounts of their recent interaction and correspondence with the Scottish Government, COPFS and the police.

Justice Directorate of the Scottish Government

6. JFM believes that without an independent inquiry into their allegations, there is a conflict of interest where Police Scotland and COPFS are investigating complaints against themselves.
7. JFM's submissions indicate that it has asked for an independent investigator to be appointed to look into their allegations against the COPFS and police. It believes that the Scottish Government has powers, under the Inquiries Act 2005, to appoint an independent investigator.
8. **The Committee is asked by JFM to write to the Scottish Government to ascertain whether it accepts JFM's assertion that it has the powers under the Inquiries Act 2005 (or any other Act or common law) to appoint an independent investigator and, if so, whether it would be willing to do so to investigate JFM's allegations.**

¹ The Scottish Parliament. *Official Report*, 11 December 2012.

Crown Office and Procurator Fiscal Service

9. JFM also has expressed concerns about how it has been portrayed in the press by the Lord Advocate while considerations of their allegations were being considered.

10. JFM requests that the Committee writes to COPFS to ask for comment or further information on the following points:

- a. **whether it will account for the public criticism of JFM when a police investigation of their allegations were imminent;**
- b. **what resources have been allocated to the investigation of JFM's allegations;**
- c. **whether it will keep JFM informed of developments in the investigation of their allegations; and**
- d. **whether it has instructed the police on how to proceed with the investigation into JFM's allegations.**

11. If the Committee agrees to write to COPFS, it is invited to consider whether it wishes to raise all or only some of the above points with COPFS.

Police

12. JFM's allegations are being taken forward by the police and investigations are ongoing. Supplement 1 (pages 9 and 10 of this paper) to the petitioners' submission gives an account of a meeting with former Chief Constable Shearer, who is heading up the investigation for Police Scotland.

Possible options for action

13. The Committee is invited to consider the petition and agree a course of action²:
- a. whether to keep the petition open or not;
 - b. whether to write to the Scottish Government on behalf of the petitioners asking for comments on its powers to appoint an independent investigator into JFM's allegations; and
 - c. whether to write to COPFS on behalf of the petitioners and in what terms to do so.

² Under Rule 15.6 of Standing Orders, the Committee may take such action as it considers appropriate to the petition.

ANNEXE**Submission provided by the petitioners on 2 April 2013****PE1370: Justice for Megrahi Allegations of criminality in relation to the Lockerbie investigation Report to Justice Committee on developments from 11th December 2012 to 31st March 2013****Introduction**

On 11th December 2012 the Justice Committee voted unanimously to maintain the status of PE1370 as open. The prime reason for this unanimity appeared to be that Committee members identified with the concerns of the Justice for Megrahi group (JFM) that the Cabinet Secretary for Justice Mr MacAskill had failed to agree to our request that he appoint an independent investigator into the eight criminal allegations we submitted on 9th November 2012. Instead Mr MacAskill determined that if we as a group wished to have our allegations investigated we should present them to officers of Dumfries and Galloway Constabulary and the Crown Office and Procurator Fiscal Service (COPFS). Given that both these bodies were central players in the Lockerbie investigation and the subsequent trial at Camp Zeist, and some of the allegations related to their own personnel, this raised anxiety that the matter would not be treated in an independent and even-handed manner, anxiety which Committee members appeared to share. The position of the Justice Committee may be best summarised by this statement by John Finnie MSP.

We should draw a distinction between complaints about service delivery by organisations such as the Crown Office and the police service, and serious accusations against individuals who work for those organisations. There are issues for others to speak about relating to confidential covers that are put on letters and what the expectations about them are from all sides. I certainly understand why the Justice for Megrahi people feel aggrieved about the manner in which the issue came into the public domain. I refer to the end of the first paragraph under the heading 'Discussion' on page 5 of paper 3. It seems to me that there is a classic catch-22 situation. There is understandable frustration where there are serious allegations for the Crown Office, which may be expected to act in the roles of judge, jury and accused. There are a number of unresolved issues. For that reason, I sincerely hope that committee members will agree to keep the petition open. That would certainly be the public expectation.

Having voted in support of PE1370, the Justice Committee agreed to hold the petition open "while the petitioners continue to pursue issues with the Scottish Government, the Crown Office and Procurator Fiscal Service and Dumfries and Galloway Constabulary." JFM is now in a position to report to the Committee on developments in relation to these bodies' responses to our allegations of criminality.

It is with the greatest regret that JFM finds itself unable to dispel either its own or the Justice Committee's reservations over the handling of the allegations. Since our documentation was handed over to Dumfries and Galloway Constabulary in November, other than a formal letter of receipt neither the police nor the COPFS has initiated any direct communication with us on the matter.

We have had no progress or status report, nor any indication that these authorities intend to interview JFM committee members about the matter. In addition we are greatly concerned that COPFS has continued to use the press to mount base and fallacious attacks on our organisation, just as it did following our original letter to Mr MacAskill in September. That attack in the *Scotsman*, discussed again below, has now been followed by the publication in the *Times* of an article entitled *Pro-Megrahi backers flayed by Lord Advocate*, which appeared on the very day of the 24th anniversary of the disaster.

A fulltext copy of that article is appended, and discussed below. JFM has no intention of indulging in debate by media. Since the last consideration of PE1370 by the Committee two further rounds of correspondence have been despatched to Dumfries and Galloway Constabulary and COPFS and one round to the Justice Directorate, and copies of these are also appended and discussed.

The Justice Directorate

In our letter of 18th January 2013, reiterating our original request of 13th September 2012, JFM asked the Justice Secretary to appoint a body independent of Lockerbie/Zeist to investigate our allegations. We do not and never have asked the Scottish Government to investigate these matters for themselves. Nevertheless in his reply dated 6th February 2013 Mr Rennick (writing on Mr MacAskill's behalf) persisted in misinterpreting our request as one for the government itself to mount an investigation. Mr Rennick insisted once again that our allegations should be dealt with by the police and the COPFS, despite their personnel being the subject of some of the allegations.

JFM is at a loss to devise a simpler and more accessible form of words to express its request that the government appoint an *independent investigator* in this matter rather than have to submit our allegations to bodies which are quite obviously acting in their own cause. We are therefore forced to conclude that the Justice Directorate is consciously misconstruing our request. The government has the requisite powers to appoint such an independent body to investigate our allegations, enshrined under section 1 and section 28 of the Inquiries Act 2005 (www.legislation.gov.uk/ukpga/2005/12/contents), and we find it incomprehensible that the Justice Directorate seems to be unaware of this.

For approximately a year and a half following the release of Mr al-Megrahi, the Scottish Government claimed that it did not have the power or remit to institute an inquiry into Lockerbie/ Zeist under its own auspices. It was only when the parliamentarians of the Public Petitions Committee interceded on our behalf that the government finally admitted that it did, in fact, possess such powers under the same 2005 Inquiries Act (see: the government response to question 3 in www.scottish.parliament.uk/S3_PublicPetitionsCommittee/Submissions_11/11-PE1370A.pdf). In light of this, we request that the Justice Committee make representations on our behalf to the government to ascertain whether or not the government accepts that it has the power under the same Act to appoint an independent investigator in the matter of our allegations, and if it does, why it is not invoking these powers.

The Crown Office and Procurator Fiscal Service

Committee members are already aware from our submission for consideration on 11th December 2012 that our private and confidential letter to Mr MacAskill of 13th September 2012 was passed to COPFS, who responded by going public in the *Scotsman* newspaper thus.

But the Crown Office yesterday branded the allegations “defamatory and entirely unfounded”. A spokesman added that one of the allegations had been investigated by the Scottish Criminal Cases Review Commission (SCCRC) which found no basis for appeal, while it was also found there was “no basis” for claims that any police officers or officials fabricated evidence. “It is a matter of the greatest concern that deliberately false and misleading allegations have been made in this way,” he added.

This remarkable tirade was of course based on only a brief outline of six of our allegations, as the full 39-page document detailing all eight allegations was not handed over to the police until November.

The only criticism the Crown Office makes here which has any degree of truth is that our allegations are defamatory. That is however a statement of the obvious given that we are accusing individuals of having broken the law. The remaining points are without exception entirely erroneous. Contrary to the insinuations in the article, our allegations are entirely unique, thoroughly researched and copiously referenced. At no time have they ever been the focus of any police, COPFS or SCCRC investigation.

For the benefit of members of the Committee, and to prove our *bona fides*, we attach the full text of the allegations as submitted to Dumfries and Galloway Constabulary, including an addendum submitted in March this year presenting additional evidence previously unknown to us which further underpins allegations 2, 3 and 4. The text is only slightly redacted to remove the names of the individual persons accused.

In the December Linklater interview Lord Advocate Mulholland states, “The appropriate place for voicing any concerns about the evidence is before a court of law, not in the court of public opinion, or the media.” Perhaps he ought to ask himself who consulted the court of public opinion first. Furthermore, we would be delighted to see our allegations come before a court of law; that is why we submitted them.

In his letter of 5 February 2013, Mr Miller stated on behalf of the Lord Advocate that the “appropriate mechanism” is being followed to investigate our allegations. However, the *Scotsman* article and the Linklater interview prove beyond any shadow of doubt that the Lord Advocate himself is adopting a double standard and treating our allegations in a manner which cannot be described as anything other than dismissive.

The casual reader could be forgiven for coming away from these media pronouncements with the understanding that JFM are “conspiracy theorists”; that our allegations are “without foundation”; that we have levelled criminal accusations

against the Zeist trial judges (their Lordships MacLean, Sutherland and Coulsfield); that we have also accused Lord Boyd of Duncansby (the Lord Advocate at the time of the trial) of perverting the course of justice; and finally, that Lord Advocate Mulholland has recently engaged the services of a legal body independent of the Crown (the mysterious 'outside counsel') to conduct an independent review of the evidence relating to our allegations, and that that body has concluded that the conviction of Mr al-Megrahi was sound.

[Redacted] Indeed, since accusations of defamation are growing ever more prevalent in this case, it is fair to say that Messrs Mulholland and Linklater have, in this one interview, defamed JFM committee members on several counts.

1. At no time, past or present, has JFM espoused any conspiracy theory in relation to Lockerbie/Zeist.

2. Committee members can judge for themselves whether or not our allegations are without foundation by perusing the allegations for themselves.

3. JFM has levelled no allegations of criminality against the Zeist trial judges, their Lordships MacLean, Sutherland and Coulsfield.

4. JFM has not levelled any allegations of criminality against Lord Boyd.

5. By far the worst example of economising with the truth evident in the Linklater/Mulholland interview concerns the fact that no "outside counsel" has studied our allegations at the invitation of Lord Advocate Mulholland. As is clear from Mr Miller's letter of 5th February 2013, the counsel referred to in the article was in fact engaged by Lord Advocate Angiolini in 2007 to study the Crown case prior to Mr al-Megrahi's second appeal. In other words, there was no independent counsel at all, simply a previously non-involved Advocate-Depute (i.e. internal counsel) reviewing the evidence at the time of the SCCRC report, five years before the JFM allegations were submitted. This makes the assertion about "independent review" highly disingenuous.

Lord Advocate Mulholland additionally states in the Linklater interview that he has read John Ashton's book, *Megrahi: You are my Jury*, and concluded that there is no evidence to support Mr Ashton's claims. In that case, what evidence does he wish to advance to invalidate the metallurgical test results described in the book which demonstrate that the shard of PCB usually referred to as PT/35b was not part of one of the 20 MST-13 timer units supplied to Libya? Furthermore, if he is dismissing the evidence in the book concerning PT/35b, is he also dismissing JFM allegations 5, 6 and 7, which all relate to the metallurgical discrepancy?

Mr Mulholland waxes lyrical on the subject of the SCCRC, however it was his office which was behind the government's emergency Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 section 7 appeals legislation (a.k.a. Cadder), which has effectively emasculated the SCCRC, allowing the judiciary rather than an independent arbiter the final say on whether or not any appeal should be heard. Such legislation makes a third appeal against Mr al-Megrahi's conviction much less likely to be permitted. On top of this, the Lord

Advocate and the government are fully aware that in today's Libya, the lethal political instability and factionalism render the odds of the al-Megrahi family applying for an appeal effectively zero.

Compare and contrast the Crown's presentation of information surrounding our allegations with the manner in which it presents the details of its own "ongoing investigation" into the involvement of other Libyan officials in the Lockerbie atrocity. While dismissing JFM's allegations out of hand Lord Advocate Mulholland hypes up the highly publicised Crown Office sideshow in pursuit of other Libyan nationals whom the Crown wishes to implicate in the downing of Pan Am 103. Every Crown initiative in this "ongoing, live investigation" of Libya is announced with a fanfare in the press. Come the end of each of these adventures however, the Crown is remarkably reticent to inform the public of their findings, with the normal response to press questions being something along the lines of, "it would not be appropriate to comment on a live inquiry."

One is left wondering why Mr Moussa Koussa, despite his reputation and the allegations levelled against him in years past in relation to Lockerbie, was released to freedom and his millions to live in Qatar following his 'debriefing'. What really happened after Lord Advocate Mulholland visited Libya in May of 2012 accompanied by FBI Director Robert Mueller? Just when does the Crown Office intend to provide substance to what increasingly appears to be a mirage of justice, and focus on the facts?

To date we have had no response of any substance from the authorities. We hope the Justice Committee will agree that it is JFM's right to be kept informed on how the Crown Office and Dumfries and Galloway Constabulary are progressing with our allegations. We therefore ask the Justice Committee to intercede on our behalf to extract the following information.

1. Answers to all the questions to Lord Advocate Mulholland and Chief Constable Shearer contained in our letters of 18th February 2013.
2. How many law officers (Crown Office and police) have been assigned to investigate our allegations?
3. When were they assigned to the case?
4. Why have no members of JFM been contacted with regard to the allegations?
5. In view of the fact that Mr Miller, in his letter of 5th February 2013, states that we will be contacted by police on the subject of our allegations, what instructions has Chief Constable Shearer received from the Crown Office regarding his contact with ourselves?

It seems intolerable that after five months JFM has not received so much as a status report, and we would ask the Committee to enquire on our behalf when the Crown Office intends to provide such a report with regard to the investigation of our allegations.

Dumfries and Galloway Constabulary

Other than formal acknowledgement of receipt and a brief email on 28th March, JFM has received no response from Chief Constable Shearer to our letters of 18th January 2013 and 18th February 2013. In light of this, JFM requests that the Justice Committee contact him and repeat the same questions we would like it to put to Lord Advocate Mulholland.

Reflection

This case has now become emblematic of an issue which affects each and every one of us. It poses profound and basic questions we ignore at our peril, namely: what do we perceive justice to be, what role ought it to play in our society and whom should it exist to serve? Our laws and how we apply them are the most fundamental descriptor of how we function as a cohesive and coherent society. They are effectively a portrait of our identity as a people. If, through complacency, we permit cosy, established authority to dictate terms and to brush under the carpet concerns over how justice is defined and dispensed for the sake of convenience, expediency and reputation, we will only have ourselves to blame for the consequences.

Some may question the relevance of our activities, a quarter of a century after the tragedy at Lockerbie, which occurred before many of the Scottish electorate were even born. Yes, we endeavour to seek justice for Mr al-Megrahi, the victims of the downing of Pan Am 103, their bereaved relatives and friends, and those ultimately responsible for this heinous act. However, fundamental to our motivation is our desire to reinstate the respect and stature of the Scottish criminal justice system, earned over centuries, yet now, sadly, in peril as a consequence of one misguided decision in a showcase trial.

The manner in which the Justice Directorate and the Crown Office are currently dealing with our entreaties is something which ought to be of deep concern to anyone who today falls under Scottish jurisdiction. We have a justice secretary who is abrogating his power to appoint an independent investigator to study submissions relating to 270 murders, and who affords the complainants the sole option of presenting their case before the very bodies that are being accused. [Redacted] One does not have to be involved in or even informed on the issues of Lockerbie/Zeist to appreciate the scandal that Messrs MacAskill and Mulholland are visiting on an already disgraced system. Indeed, if this is the attitude that these representatives of state find appropriate to adopt when dealing with an issue involving 270 miscarriages of justice, imagine how they might approach lesser more contemporary cases.

The Scottish Cabinet Secretary for Justice, Kenny MacAskill, says that "Scotland's Criminal Justice system is a cornerstone of our society, and it is paramount that there is total public confidence in it." We hope for the sake of the reputation of the Scottish criminal justice system that he will seek to prove this by backing up his words with deeds. We hope too that the Lord Advocate can be prevailed upon to serve the interests of justice rather than maintain his current stance of aggressively defending the indefensible.

The Committee of Justice for Megrahi, March 2013

Supplement 1: provided by the petitioners on 23 April 2013

On 2nd of April 2013, Justice for Megrahi (JFM) submitted its report covering the period 11th December 2012 to 31st March 2013 to the Justice Committee of the Scottish Parliament. What follows is a supplement to that report.

In relation to the criminal allegations lodged with the police, JFM representatives Superintendent of Police (Rtd) Mr Iain McKie and JFM Committee Secretary Mr Robert Forrester were invited to attend a meeting at 10 am on Tuesday 16th April at Cornwall Mount Police Headquarters, Dumfries. Police Scotland was represented by Senior Investigating Officer, Deputy Chief Constable Patrick Shearer, and Chief Inspector Mr William Sturgeon (Complaints).

The discussion covering practical matters and the process of the investigation. DCC Shearer informed us that since our allegations were handed over to him in November 2012, he had amassed a considerable quantity of documentary reference material on each of the allegations with which to provide a foundation to take the investigation forward to the interview stage.

We informed Mr Shearer that while we did not believe that his investigations could be independent, given that ex members of Dumfries and Galloway Police were subject to allegations, this was not in any way meant to reflect on Mr Shearer's or his team's integrity. We made it clear that we put our faith in him to do his job objectively and would assist in any way possible.

For further detail on the arrangements regarding the police investigation process, the full report of this meeting between the Police and JFM delegations sent to the JFM membership on 17th April may be accessed by members of the Justice Committee [on *The Lockerbie Case* blog].

We reiterated 'JFM's' position that we had reported our allegations to him under protest. Given that Mr Shearer's report would be submitted to the Crown Office/Lord Advocate, and that they would be the final arbiters in respect of our allegations, their previous public media statements dismissing them and defaming JFM made an impartial, objective and independent decision impossible.

The reasons for our deep distrust of the Lord Advocate, the Crown Office and the manner in which Mr MacAskill has handled this affair are presented in our report lodged with the Justice Committee on 2nd April and were repeated to Mr Shearer.

We cited the fact that Mr MacAskill had handed our private and confidential letter of 9th September 2012, outlining our allegations, over to the Crown Office. They in turn deemed it responsible to respond to it in the Scotsman of 24th September by defaming our organisation and dismissing our allegations as unfounded without their having had sight of anything other than an incomplete outline of only some of the allegations.

This was then followed up by an interview with Lord Advocate Mulholland conducted by Mr Magnus Linklater in the Times (Scotland Edition) on 21st December 2012, in

which the Lord Advocate, in the course of defaming us and seeking to dismiss our allegations out of hand yet again exposed economies with factual accuracy.

We further believe that the Lord Advocate's actions in this matter fail to reach the standards laid down by the International Association of Prosecutors in its 'Standards of Professional Responsibility and Statement of Essential Duties and Rights of Prosecutors'.

We also reminded Mr Shearer that numerous media reports had made it clear that the ongoing police investigations are not open and independent in that they are restricted to the Crown Office line that Mr Megrahi was guilty and that others from Libya might be involved. The whole thrust of police/Crown Office investigations to date has been to ascertain who was involved with him not probe evidence that he might have been wrongly convicted. The police therefore are acting under the instructions of a Crown Office that has already made it crystal clear that our allegations are being dismissed out of hand.

Finally we re-iterated our belief that this criminal investigation should be carried out by a body independent of the police/Crown Office, and will continue to press for that. We indicated however that we would welcome a statement to the media by the Crown Office and the Lord Advocate withdrawing the previous defamatory remarks levelled against 'JFM' and stating that our allegations are legitimate and will be investigated impartially and fairly.

In short, DCC Shearer was left in no doubt as to our strength of feeling on the subject of the scandalous conduct of the Lord Advocate and the Crown Office in this matter, and that we also made a clear distinction between the integrity of the police investigation and the prevailing attitude in the corridors of Chambers Street.

Mr Shearer thanked us for our attendance and stated that he would be in touch as his investigation continued.

In conclusion, it should be pointed out that Matthew Taylor of ITV Border News conducted interviews with the JFM delegation following the meeting.

**Robert Forrester, Secretary.
The Committee of Justice for Megrahi.**

Supplement 2: provided by the petitioners on 26 May 2013

Prior to the Justice Committee consideration of PE 1370 scheduled for 4th June, Justice for Megrahi wishes to apprise the Committee of the current situation and reiterate its own position as we see it in relation to our petition.

Subsequent to our supplement of 23rd April, in which we outline the meeting of 16th April between DCC Shearer of Police Scotland and committee members of Justice for Megrahi (convened to discuss our allegations of criminality), no further communication regarding developments relating to the investigation has been received by Justice for Megrahi from Police Scotland.

It is our understanding that the Justice Committee has already properly decided that as politicians they have no part to play in the actual investigation and assessment of these allegations. It is also our understanding that members feel they have no alternative but to accept the Justice Secretary's decision not to authorise a public inquiry although we hope they will reconsider this decision once all the facts are known.

In our submission of 2nd April, reporting on PE 1370 and our allegations, we stated that we believe the committee members have voiced clear concerns about the process and manner our allegations are being dealt with.

We reiterate the following points:

1. Justice Secretary MacAskill's refusal to accede to Justice for Megrahi's request to appoint an independent body to investigate our allegations (either under common law powers or under sections 1 and 28 of the Inquiries Act 2005) afforded us no alternative but to lodge them with the Crown Office and Police Scotland under protest. This has created a quite extraordinarily dubious situation in which both the Crown Office and Police Scotland are now cast in the roles of investigators, judge, jury and accused.

Indeed, this clear conflict of interest generated by Secretary MacAskill's approach to our request was all too obviously illustrated via condemnation of our organisation in the press, emanating from the Crown Office and Lord Advocate, prior even to any receipt by Justice for Megrahi of any reply from Mr MacAskill to our initial letter of 13th September 2012.

2. As we say in our last submission.

'The manner in which the Justice Directorate and the Crown Office are currently dealing with our entreaties is something which ought to be of deep concern to anyone who today falls under Scottish jurisdiction.'

We believe that the Justice Committee members understand that it is not the allegations themselves that is their direct concern but the arrogant, prejudicial and unaccountable manner in which they are being dealt with. We believe it is the committee's duty to ensure that issues of confidentiality, public officials acting in their own interests, prejudgement of our allegations and the maintenance of equity and

accountability are examined. Only the Justice Committee can protect the public interest when complainers like ourselves are subjected to such oppressive conduct at the hands of the state.

It is our hope that the Justice Committee, in their capacity of guardians of the public interest, will retain the current status of PE 1370 as open. We believe that this watching brief is required at the very least until Police Scotland has concluded its investigations into our allegations and the Crown Office has intimated what action, if any, it proposes to take on Police Scotland's report.

Justice for Megrahi wishes to thank the Justice Committee of the Scottish Parliament for its indulgence in this matter.

The Committee of Justice for Megrahi.

Justice Committee

18th Meeting, 2013 (Session 4), Tuesday 4 June 2013

Petition PE1449: Maintenance of a Scottish Council for Administrative Justice

Paper by the Clerk

Background

1. Petition PE1449 by Accountability Scotland calls on the Scottish Parliament to urge the Scottish Government to preserve an independent Scottish Administrative Justice Council when the UK AJTC system is abolished, ensuring the new body has a critical user-interface to enable base-roots input from the public and that it has complete independence from political or civil service influence.
2. The petition was lodged on 29 August 2012. The Public Petitions Committee considered the petition on 18 September 2012 and agreed to refer it to the Justice Committee for further consideration, under Rule 15.6.2.
3. The SPICe briefing on the petition¹ notes that :

The Administrative Justice and Tribunals Council (AJTC) is a UK-wide body with responsibility for overseeing administrative justice – covering tribunals, ombudsmen and statutory inquiries as well as other administrative justice functions such as complaints-handling in the public sector. The Scottish Committee of the AJTC oversees both reserved and devolved aspects of administrative justice in Scotland. Membership of the Scottish Committee includes the UK Parliamentary Ombudsman and the Scottish Public Services Ombudsmen plus additional members appointed by Scottish Ministers.

Consideration at Westminster

4. Since the SPICe briefing on Petition PE1449 was prepared, there have been several developments in relation to the future of the AJTC. The UK Government has published a draft order to abolish the Council which has been considered both in Westminster and the Scottish Parliament (by this Committee). Westminster's Justice Select Committee concluded in March 2013² that the abolition of the AJTC did not meet the statutory tests laid out in the Public Bodies Act 2011 and the UK Government should therefore reconsider its decision to abolish the AJTC. The House of Lords Secondary Legislation Scrutiny Committee came to a similar conclusion in May 2013³, stating "that the tests in the 2011 Act are not fully satisfied and the case for the complete abolition of the AJTC is not made". The 2011 Act requires that an order cannot be made if it does not improve the effectiveness of a

¹ <http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/Petitions%20briefings%20S4/PE12-1449.pdf>

² House of Commons. (2013) [Justice Committee- Eighth Report: Scrutiny of the draft Public Bodies \(Abolition of Administrative Justice and Tribunals Council\) Order 2013](#)

³ House of Lords. (2013) [Secondary Legislation Scrutiny Committee – Second Report of Session 2013-14.](#)

public service, or if it removes a necessary protection or prevents someone from exercising a right.

5. While committees of both Houses in Westminster have raised significant issues with the order, the Ministry of Justice has previously indicated that it will press ahead with the Order in its current form and there is no indication that the Ministry of Justice has changed this view.

Public Bodies Act consent memorandum

6. The Committee noted the concerns of the petitioners during its considerations of the Public Bodies Act consent memorandum (PBACM) on the Public Bodies (Abolition of the Administrative Justice and Tribunals Council) Order 2013. The Committee published its report on the PBACM on 2 May and the Scottish Parliament agreed to the Public Bodies Act consent motion on 21 May

Plans for replacement of the Scottish Committee of the AJTC

7. In her letter to the Committee on 18 March, the Minister for Community Safety and Legal Affairs noted the “importance of expert, external advice and scrutiny of administrative justice and tribunals falling within devolved competence in Scotland”⁴. She reiterated her intention to establish an interim expert advisory committee following the abolition of the AJTC. The Scottish Government’s longer term intention is to create a replacement Committee once a new structure for devolved tribunals has been established as part of a wider strategy for administrative justice in Scotland.

8. Through contact with Scottish Government officials, clerks understand that the Scottish Government is currently preparing for the interim committee and will be able to announce its intentions if and when the Public Bodies (Abolition of the Administrative Justice and Tribunals Council) Order 2013 is passed in Westminster.

Petitioners’ submissions

9. The petitioners strongly argue for the retention of the AJTC. They believe that failures of public bodies in the UK⁵ show that there is a “general failure of administrative justice” and that Scotland has “no checks and balances to ensure that [similar failures are] not happening in Scotland”.

10. The petitioners note the central role that the Scottish Public Services Ombudsman (SPSO) has in administrative justice in Scotland and provide several additional papers which outline concerns they have with the SPSO.

11. The petitioners would welcome the opportunity to comment once details for the interim expert advisory committee become known.

12. The petitioners’ substantive submissions are attached as an Annexe to this paper. The additional papers, relating to their concerns about the SPSO, are available to Members on request.

⁴http://www.scottish.parliament.uk/S4_JusticeCommittee/General%20Documents/20130318_MCSLA_to_CG2.pdf

⁵ Specifically cited are the failures in care of the Mid-Staffordshire NHS Foundation Trust, the Hillsborough disaster; and the NHS and Police Complaints Commission more generally.

Possible options for action

13. The Committee is invited to consider the petition and agree a course of action⁶. Possible options are:

- a. keep the petition open;
- b. to write to the Scottish Government asking that the Minister keep the Committee informed of any developments on the interim replacement to the Scottish Committee of the AJTC;
- c. close the petition.

⁶ Under Rule 15.6 of Standing Orders, the Committee may take such action as it considers appropriate to the petition.

ANNEXE**Submission provided by the petitioners on 23 May 2013****Submission of Accountability Scotland regarding Petition PEO1449**
(Maintenance of a Scottish Council for Administrative Justice)

Petition PEO1449 argues strongly for retention of the Scottish Committee of the AJTC or for its replacement with an independent committee with similar, but enhanced, remit. The case has also been argued by the Scottish Committee and in submissions of Accountability Scotland. Both the House of Lords and the Justice Committee of the House of Commons were critical of the original proposal to abolish the AJTC. The arguments do not require repetition here. We wish rather to emphasize the importance of the issue, because we believe that the dire state of administrative justice in Scotland (as in England) is not generally appreciated.

One cannot be unaware of examples of the breakdown of administrative justice as reported in the media – Hillsborough, Mid-Staffordshire, NHS more generally, Police Complaints Commission etc. However, these tend to be treated as unrelated issues rather than as separate manifestations of a general failure of administrative justice, so that the latter receives little comment. One must resist the temptation to dismiss these just as English issues. Rather they should be seen as warnings of Scottish problems waiting to hit the headlines.

It is extremely revealing that the PHSO received no competent complaints in regard to Mid Staffordshire NHS Trust. That the PHSO could remain unaware that so much was wrong demonstrates total failure of administrative justice. There are no checks and balances to ensure that this is not happening in Scotland.

Crucial to administrative justice in Scotland is the **Scottish Public Services Ombudsman** (SPSO) that effectively represents its pinnacle, given that the costs of judicial reviews are beyond the means both of complainants and of bodies under the SPSO's jurisdiction. To our knowledge Glasgow Health Board had wished to take a case to judicial review against the SPSO, but even it did not have the means to do so. It appears that the SPSO has made a valuable, but untested, contribution to complaint handling but, according to its own statistics, there is considerable dissatisfaction with its performance (see our accompanying reports to the SPCB). There is no proper external audit of its decisions in terms of fairness and the adequacy of its investigations. The SPSO is largely independent of the Scottish Parliament, but better scrutiny of its performance is possible, despite a common belief to the contrary (see the accompanying 'Article in Scottish Review 1'). Since the complaints process for 'bodies under jurisdiction' has been in place for a while and neither that process nor the SPSO has had independent oversight, we would ask that a new Scottish AJTC immediately carries out an independent review of the whole complaints handling process up to and including the SPSO. This would ensure that Parliament has adequate information to avert any Scottish 'Mid-Staffs' situation. The UK Parliament collectively was unaware of any massive problems in Mid Staffs until the publication of the report of Robert Francis QC. It was not in his remit to draw more general conclusions, though his report did call attention to the poor feedback to Parliament. Without accurate information the Government cannot be expected to act.

Something as serious is almost certainly happening in Scotland and we have evidence that points to this.

The SPSO is modelled on the UK's PHSO which has also been criticized. There have been calls in the UK Parliament for the role of the PHSO to be investigated.

Parliament must of course consider the **financial costs** of any new arrangements, weighing them up, not only in relation to justice, but also in relation to more measurable financial costs of injustice. We append another article from the Scottish Review that is about two head teachers suspended on full pay in circumstances that could be easily resolved. (The article happens also to illustrate problems with both Education Scotland and the SPSO, but, as regards the latter, we generally prefer to emphasize the statistical evidence from the SPSO rather than specific cases.) On the matter of financial costs resulting from failings in administrative justice we note the enormous difference between the small annual costs of the AJTC and its Scottish Committee (£700,000 for the whole UK) and the £13,000,000 spent on the fifth Mid Staffordshire investigation (conducted by Robert Francis QC). (The latter sum does not include the costs of the superseded reports.) The splendid AJTC document 'Right First Time' by Professor Alice Brown the former SPSO, has emphasized the potential savings achieved by early and effective resolution of complaints.

The consequences and implications of abolishing the AJTC, should this happen, seem not yet to have been fully considered in Westminster. This is shown by the evidence taken before the House of Lords Select Committee on Secondary Legislation regarding *Public Bodies (Abolition of the Administrative Justice and Tribunals Council) Order 2013*. (14th May 2013). The meeting demonstrated the lack of preparation for abolition that would potentially leave the Scottish citizen at a disadvantage.

We are aware that the second report of the House of Lords Scrutiny Committee has just been published, stating that the AJTC does not meet the criteria in Public Bodies Act to be abolished. If the Scottish Committee were nevertheless to be abolished, we would be concerned that its considerable knowledge base and expertise, and that of its support staff, would be lost.

Accompanying documents⁷:

Submissions to SPCB regarding SPSO

Article in Scottish Review 1: 'The ombudsman leaves too many punters still angry'

Article in Scottish Review 2: 'The continuing cover-up over school inspections'

Dr. Richard Burton, Secretary of Accountability Scotland
23 May 2013

⁷ Available to Members from the clerks on request.

Additional Submission 28 May

The Minister of Justice wrote in August 2011 to the Secretary of State that he had been considering what the Scottish Government might wish to put in the place of Scottish Committee of the AJTC. The Minister for Community Safety confirmed to the Justice Committee in September 2012 the Government's intention to create a non-statutory advisory committee.

Our concern is now with the details. The report of the Scottish Committee of the AJTC did not attempt to answer the question as to what the new body might actually do.

We were promised by the Justice Committee that we would be sent these and other details of the new body in order that we might comment. This has not happened as yet.

We would very much like to take up this offer once we have seen the shape and scope of the new body.

Dr. Richard Burton, Secretary of Accountability Scotland
28 May 2013