

# **JUSTICE 1 COMMITTEE**

Wednesday 9 February 2005

Session 2

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# CONTENTS

Wednesday 9 February 2005

	<b>Col.</b>
<b>ITEM IN PRIVATE</b> .....	1585
<b>INTERNATIONAL ORGANISATIONS BILL</b> .....	1586
<b>SUBORDINATE LEGISLATION</b> .....	1594
Sexual Offences Act 2003 (Prescribed Police Stations) (Scotland) Amendment Regulations 2005 (SS1 2005/9) .....	1594
Part 1 Land Reform (Scotland) Act 2003: Draft Guidance for Local Authorities and National Park Authorities (SE/2005/14).....	1594

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## **JUSTICE 1 COMMITTEE** **4<sup>th</sup> Meeting 2005, Session 2**

### **CONVENER**

\*Pauline McNeill (Glasgow Kelvin) (Lab)

### **DEPUTY CONVENER**

\*Stewart Stevenson (Banff and Buchan) (SNP)

### **COMMITTEE MEMBERS**

\*Marlyn Glen (North East Scotland) (Lab)

\*Mr Bruce McFee (West of Scotland) (SNP)

\*Margaret Mitchell (Central Scotland) (Con)

\*Mrs Mary Mulligan (Linlithgow) (Lab)

\*Mr Jamie Stone (Caithness, Sutherland and Easter Ross) (LD)

\*attended

### **COMMITTEE SUBSTITUTES**

Brian Adam (Aberdeen North) (SNP)

Helen Eadie (Dunfermline East) (Lab)

Miss Annabel Goldie (West of Scotland) (Con)

Mike Pringle (Edinburgh South) (LD)

### **THE FOLLOWING GAVE EVIDENCE:**

Paul Cackette (Scottish Executive Justice Department)

Hugh Henry (Deputy Minister for Justice)

Daniel Jamieson (Scottish Executive Justice Department)

### **CLERK TO THE COMMITTEE**

Alison Walker

### **SENIOR ASSISTANT CLERK**

Douglas Wands

### **ASSISTANT CLERK**

Douglas Thornton

### **LOCATION**

Committee Room 2



## Scottish Parliament

### Justice 1 Committee

*Wednesday 9 February 2005*

[THE CONVENER *opened the meeting at 09:38*]

### Item in Private

**The Convener (Pauline McNeill):** I have received no apologies this morning. Mary Mulligan will join us as soon as she can.

I invite members of the committee to agree to take item 4 in private. The item relates to consideration of whether we want to appoint an adviser on the Family Law (Scotland) Bill, which is published today. Do we agree to take item 4 in private?

**Members** *indicated agreement.*

## International Organisations Bill

09:39

**The Convener:** Agenda item 2 is evidence on the International Organisations Bill, which is United Kingdom legislation. I welcome to the committee the Deputy Minister for Justice, Hugh Henry; Paul Cackette, who is head of the civil justice division of the Scottish Executive's Justice Department; and Daniel Jamieson, who is the policy officer of the criminal procedure branch.

I believe that the minister would like to make an opening statement.

**The Deputy Minister for Justice (Hugh Henry):** The bill, which is fairly short, deals with the conferral of privileges and immunities in connection with certain international organisations, namely the Commonwealth Secretariat, the Organisation for Security and Co-operation in Europe, the International Criminal Court, the European Court of Human Rights and the International Tribunal for the Law of the Sea. The bill also makes provision in relation to certain bodies that are established under the Treaty on European Union.

The purpose of the bill is to enable the United Kingdom to fulfil internationally undertaken commitments in relation to officials of those organisations. For the most part, existing legislative structures are sufficient to enable those privileges and immunities to be granted, but in different respects in relation to the various organisations, there are some legislative gaps that need to be filled and which can be filled only by primary legislation. The gaps are slightly different, depending on the organisation.

For example, immunities are given to officials of those organisations and to judges in the International Criminal Court for reasons that are similar to those that apply in relation to the granting of diplomatic immunity. In virtually every country in the world, it is recognised that diplomatic staff from another state need to be given certain protections by the host state from unwarranted and inappropriate interventions in their affairs that might, in practical ways, prejudice their ability to carry out their diplomatic duties. The same reasoning applies to judges and other officials of international agencies, who should enjoy freedom from intervention by the state in which those individuals happen to live or work at any one time.

When it comes to the making of the orders in council, conferring immunities within devolved areas, there will be an opportunity for scrutiny by the Scottish Parliament of what is proposed.

Over the years, the UK has entered into a number of international commitments in these areas. International relations is a matter that is reserved to the UK Government, although the implementation of the obligations in Scotland, in relation to devolved matters, is for the Scottish Executive. Since some of the privileges and immunities that are concerned are devolved, the need arises for a Sewel motion, if it is agreed by the Parliament that the full implementation of these international obligations should be done through this bill.

Without the provisions, a failure would exist on behalf of the United Kingdom to implement its international obligations, but in relation to Scotland only. In my view, that would be unfortunate.

I hope that this summary has been helpful in setting out the underlying purposes of the bill and explaining why the Executive considers that it is sensible to proceed with a Sewel motion in this case.

**Stewart Stevenson (Banff and Buchan) (SNP):** Before dealing with matters of substance in the bill, I would like to expand my understanding— with the help of the minister's officials, I suspect— of precommencement enactments and what they actually mean. Section 53(3)(c) of the Scotland Act 1998, which appears to contain the applicable definition, says that precommencement enactment means

“subordinate legislation under section 106, to the extent that the legislation states that it is to be treated as a precommencement enactment.”

Is that correct with regard to the organisations to which the International Organisations Bill relates? Part of my reason for asking is that the explanatory notes that accompany the bill make no reference to clause 10 and provide no explanation. I want to be quite clear that I know where we are coming from.

**Paul Cackette (Scottish Executive Justice Department):** For all the organisations that deal with the pre-devolution enactments, the answer to your question is yes. The situation is slightly different with regard to the International Criminal Court, because it was created by legislation that was passed after devolution, which means that the precommencement enactment does not come into play.

**Stewart Stevenson:** Part III of schedule 4 to the Scotland Act 1998 appears to list a series of acts to which sections 53 and 54 of that act apply. I say “appears to” because I am genuinely asking for enlightenment. Is the effect of the International Organisations Bill to extend part III of schedule 4 or is that not necessary, given the way in which section 53 is cast?

**Paul Cackette:** The effect of the designation of certain of the bodies and enactments as precommencement enactments is aimed at the subordinate legislation—the orders in council— through which the privilege and immunities will ultimately be granted. That will arise under section 118 of the Scotland Act 1998. That is the section that tells us what happened to pre-devolution enactments and contains references to approval by the UK Parliament. Where that section applies, in so far as the functions fall within devolved competence and are separately exercisable as regards Scotland, the effect is that, at devolution, those functions become functions of the Scottish ministers. Consequently, post-devolution, deeming those to be precommencement enactments triggers section 118 of the Scotland Act 1998.

09:45

**Stewart Stevenson:** I can see why sections 53(3)(a) and 53(3)(b) would not apply, as they refer to pre-existing legislation. That is fine.

Let us remain on a relatively technical note, for the moment. Why is the International Criminal Court not part of this? The criminal justice system is a devolved matter. Is there a specific reason why the ICC does not fall within the ambit of the provision in clause 10 of the bill? Only clauses 4, 5, 7 and 8 are to be taken to be precommencement enactments.

**Paul Cackette:** Clauses 4, 5, 7 and 8 concern legislation that was passed prior to 1998—the Commonwealth Secretariat Act 1966 and the International Organisations Act 1968. Because the International Criminal Court was established by an enactment in 2001, what it does already reflects the devolution settlement and arrangements are in place for scrutiny by the Scottish Parliament of orders in council that are made in the International Criminal Court.

**Stewart Stevenson:** My final technical question may also have some policy implications. What powers does the Scottish Parliament have over precommencement enactments? The intention in the bill is to deliver to us the right to be consulted; however, do we have the powers that we would have under the negative procedure to move that nothing further be done with regard to an instrument, thereby affecting the outcome directly? Or do we simply have the opportunity to place on record the Parliament's views, while it is entirely up to others elsewhere to decide what account—if any—they take of those views?

**Paul Cackette:** In relation to devolved matters, more than consent is required: the approval of the Scottish Parliament is required. The procedure regarding the International Criminal Court is different from that which is used for the other

organisations. Nevertheless, a draft order in council under the International Criminal Court requires the approval of the Scottish Parliament before it can be submitted for approval by Her Majesty. A full debate is required, and if the decision is taken not to pass the order, it cannot go further.

**Stewart Stevenson:** In practical terms, therefore, the process is identical to that which is used for Scottish statutory instruments under the affirmative or negative resolution procedure.

**Paul Cackette:** Yes.

**Stewart Stevenson:** Even though an order in council is a different kind of animal.

**Paul Cackette:** Indeed.

**The Convener:** My questions are a bit more basic than Stewart Stevenson's. We have a note from the clerk and your letter, but those do not give me much understanding of what this is about. What privileges and immunities are we talking about? You said that they are similar to diplomatic immunities. Can you give the committee some idea of what we are talking about?

**Hugh Henry:** Someone could have immunity from arrest and detention; from income tax and customs duty; from local taxation; or from the jurisdiction of the civil courts. That does not mean that judges would never pay any taxation on their income; special arrangements are in place, albeit that they fall outwith the remit of the UK taxation authorities. Generally, however, those are some of the areas that would be affected.

**The Convener:** Which immunities and privileges are devolved to Scotland?

**Paul Cackette:** The only immunity regarding obligation to pay moneys would be immunity from council tax as a local taxation.

**Hugh Henry:** There could also be privileges and immunities in relation to other matters, such as road traffic offences of speeding and parking.

**The Convener:** What is the reason for conferring privileges and immunities on certain members of international organisations?

**Hugh Henry:** In essence, the logic is the same as that which applies to diplomatic immunity, in relation to which there are longstanding international conventions; it is about the ability of judges to operate in the country in which they are located without undue harassment and interference. There have been high-profile, contentious cases in which diplomats in different countries—not just in the UK—committed acts that caused concern. However, in general I think that it is accepted that a degree of freedom and immunity enables a person to operate without fear of harassment and gives comfort to people who

accept postings abroad. For example a judge could accept a posting to the Netherlands to operate in the International Criminal Court without having to worry about being open to intimidation or harassment because of their job and position in society. The bill would give greater protection to the ability of such judges to act independently of any pressure that they might be under, irrespective of the jurisdiction in which they were operating.

Officials have reminded me that the UK is obliged to confer privileges and immunities on witnesses who testify in the ICC, which could be important. We can imagine that people might be worried that in another country or jurisdiction they might be open to undue pressure. It is important that people should be able to operate without fear of prejudice.

**The Convener:** I do not think that we have a list of the people who would be covered.

**Daniel Jamieson (Scottish Executive Justice Department):** The UK has entered into a specific agreement with the ICC—I suppose that that is the case for all the organisations. If it would help, I can put on the record a list of the principal characters who would enjoy privileges and immunities.

**The Convener:** That would be helpful. We have a list of organisations, but we do not have a list of the people within the organisations who would be protected.

**Daniel Jamieson:** The agreement on the privileges and immunities of the International Criminal Court, which was drawn up in 2002, specifies certain categories of individuals who are connected with the ICC: representatives of states participating in the proceedings of the ICC; the judges, prosecutor, deputy prosecutors and registrar—the registrar is the chief official; the deputy registrar, staff of the office of the prosecutor and staff of the registry; other locally recruited personnel working for the ICC; counsel and persons assisting defence counsel; witnesses giving testimony and appearing before the ICC; victims participating in the proceedings of the ICC; experts performing functions for the ICC; and other persons required to be present at the seat of the ICC. Those are the principal people who would be covered by the ICC's privileges and immunities agreement.

**Stewart Stevenson:** Although that explanation was useful, I want to focus on what the bill says. Subsection (3) of the new section that clause 5 seeks to insert in the International Organisations Act 1968 includes the phrase

“and members of their families who form part of their households.”

That is the first of three such references. The same phrase is used in clause 6(2)(a), and clause 7 refers to

“members of the family of a judge”.

I recognise that the people who are directly involved require particular levels of immunity and I acknowledge that the families of judges and others who are involved require certain levels of immunity so that they are not put under pressure, although I am not sure that they need the same levels of immunity. I am not at all clear what privileges members of such people’s households ought properly to have, because they are not directly engaged in the work of any of the international bodies in question. I accept that the issue goes beyond the Scottish Parliament, but I believe that it would cause public disquiet if a household servant of a foreign national had carte-blanche to park on double yellow lines anywhere in Edinburgh whenever they wanted to, even though that privilege was in no way connected to the work of the bodies that we are discussing. I have used the mildest of examples; much more substantial offences could be committed than the one that I have just described.

**Hugh Henry:** There are two separate issues. Stewart Stevenson referred to members of the household of judges and other staff who might be located here, but the bill refers to

“members of their families who form part of their households.”

In other words, the provision is more specific than Mr Stevenson has indicated.

Stewart Stevenson was right to recognise that the issue goes beyond the Scottish Parliament. In fact, it lies at the heart of international treaties and obligations. There are incidents that can cause disquiet not just in this country, but elsewhere. Nevertheless, it would be difficult to unravel an agreement that had international implications. I do not think that we would be able to be selective about opting out of an international agreement.

**Stewart Stevenson:** The minister was correct to draw back my definition; I must bring my reading glasses to the meetings. Nevertheless, we do not want the provision under consideration to become a licence for members of the family of the staff of such a body who form part of their household to ride roughshod over the law when to do so would be in no way related to the operation of the body in question. All that it would be proper for me to seek from the minister is an assurance that he will make every endeavour to ensure that, under the bill, such people will not have the opportunity to behave in a range of illegal ways from the minor to the important. Such privileges are designed for people with diplomatic status.

**Hugh Henry:** The only assurance that I can give Stewart Stevenson and the committee is that we would enforce our obligations under the international treaties and would apply them fairly and consistently. Beyond that, I do not think that it would be proper for me to speculate on how we might approach a particular individual in respect of an undefined act.

**Paul Cackette:** If I may, I will add that the bodies concerned can waive the immunities that are granted. We should bear in mind the fact that some of the bodies that we are talking about are international courts. I would worry more about situations in which an offence such as a serious criminal offence had been committed. In such circumstances, I would certainly hope that bodies such as the European Court of Human Rights and the International Criminal Court would not seek to avoid the consequences in the domestic legal system of what a judge or a member of their family had done. Obviously, the decision whether to waive immunity is at their discretion, but there is a power to waive immunity in appropriate circumstances and one would hope that such international organisations would act sensibly in such circumstances.

10:00

**Daniel Jamieson:** With regard to the ICC in particular, it is not a matter of carte-blanche for everybody on the list that I read out. The effect of clause 6, which would add

“and members of their families who form part of their households”

applies only to judges, the prosecutor, the deputy prosecutors and the registrar. Therefore, only the top officials of the ICC would be covered by the amendment.

I confirm the point that my colleague made earlier. There is detailed provision in the ICC agreement on privileges and immunities for those privileges and immunities to be waived. The terms that are used are that they

“are granted in the interest of the good administration of justice and not for the personal benefit of the individuals themselves.”

Such privileges and immunities may be waived in accordance with paragraph 5 of article 48 of the Rome Statute on the International Criminal Court. Of course, we cannot waive them, but the International Criminal Court could do so if it thought that anything that its officials were doing would bring it into disrepute.

**Stewart Stevenson:** That is because of the proposed amendment to the International Criminal Court Act 2001, which I have not read.

**Daniel Jamieson:** Yes.



**Stewart Stevenson:** Okay. Thank you.

**The Convener:** The committee is not obliged to report on the Sewel motion, but it may do so if it wishes. If members wish to do so, they should indicate what they wish to say.

**Stewart Stevenson:** I think that the *Official Report* of the meeting will be sufficient for the future.

**The Convener:** It is agreed that there will be no report.

I thank the Deputy Minister for Justice and his officials.

## Subordinate Legislation

### **Sexual Offences Act 2003 (Prescribed Police Stations) (Scotland) Amendment Regulations 2005 (SSI 2005/9)**

10:02

**The Convener:** Agenda item 3 is subordinate legislation. I refer members to the note that has been prepared by the clerk, which sets out the background to the Sexual Offences Act 2003 (Prescribed Police Stations) (Scotland) Amendment Regulations 2005 (SSI 2005/9). The instrument is subject to the negative procedure. Do members wish to make any comments on the instrument or do they simply wish to note it?

**Stewart Stevenson:** I consulted the constituency member for the area concerned and he is content. Therefore, I am also content.

**The Convener:** Okay.

### **Part 1 Land Reform (Scotland) Act 2003: Draft Guidance for Local Authorities and National Park Authorities (SE/2005/14)**

**The Convener:** I refer members to a note that was prepared by the clerks, which sets out the background to the Part 1 Land Reform (Scotland) Act 2003: Draft Guidance for Local Authorities and National Park Authorities (SE/2005/14). We have received further correspondence from the Deputy Minister for Environment and Rural Development, which is attached to the note. Members will know that this is the second time that we have had the draft guidance in front of us. Do members wish to comment on it?

**Stewart Stevenson:** The Executive has responded appropriately, but I want to make an observation on funding. We have a breakdown, and it is slightly ironic that Glasgow appears to have £758,000 in 2005-06 for core paths whereas Aberdeenshire, which includes most of Grampian's prime walking area, will get £285,000, which is around a quarter of that. That is more an issue to do with how the funding formulae for local government work. The Executive should reconsider that matter in another context.

**The Convener:** Members will notice that the intention is to review the guidance, which we wanted to ensure. That is helpful. The guidance under the act does not meet our expectations in toto and we thought that it was important to complete it. We have made it clear that we expect the guidance to be reviewed.

**Mr Bruce McFee (West of Scotland) (SNP):** Do we have any indication from the minister of

whether the funds have been separately identified within local authorities' budgets?

**The Convener:** A table is attached to the correspondence. Stewart Stevenson was referring to that table when he mentioned the Glasgow and Aberdeenshire figures.

**Stewart Stevenson:** My reading of the table is that the answer to Bruce McFee's question would be no. In providing the figures of £2.5 million, £4.7 million and £6.5 million over 2001-04, the Executive is saying that it has distributed that money pro rata as an identical increment on each council's allocation, but it has not ring fenced the funding or identified it in any way. According to the letter, the funding has been reverse engineered.

**Mr McFee:** That is what I was asking. I wanted to know whether the question had been answered specifically as opposed to us having to draw the information out of the tables. I would not necessarily argue for ring fencing. The original correspondence from Perth and Kinross Council suggested that there had been no indication that a specific amount had been granted by the Scottish Executive to cover the obligations. The minister indicated that separate amounts had been identified to the local authority and I asked him whether he wanted to reconsider that answer and come back to us. Do I take it that what we have in front of us is the minister coming back to us and not saying yes?

**The Convener:** That is my presumption and it is why we got the letter today. You might not be content with that, but it is your answer.

**Mr McFee:** I just wanted to get the explanation from the minister. The explanation that the committee was given at the time was not correct.

**The Convener:** Whether it is in this committee or another, I am pretty certain that we will come back to the issue of the core path network. I believe that the access code will be launched today.

**Stewart Stevenson:** I think that it was launched yesterday in East Lothian.

**The Convener:** I think that something is going on today as well. However, I am sure that the issue of the core path network will stay live for many months to come.

Our next agenda item is on family law reform. As members agreed earlier, we will take the item in private.

10.08

*Meeting continued in private until 13:39.*

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