

# **JUSTICE COMMITTEE**

Tuesday 28 April 2009

Session 3

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## JUSTICE COMMITTEE 12<sup>th</sup> Meeting 2009, Session 3

### CONVENER

\*Bill Aitken (Glasgow) (Con)

### DEPUTY CONVENER

\*Bill Butler (Glasgow Anniesland) (Lab)

### COMMITTEE MEMBERS

\*Robert Brown (Glasgow) (LD)  
\*Angela Constance (Livingston) (SNP)  
\*Cathie Craigie (Cumbernauld and Kilsyth) (Lab)  
\*Nigel Don (North East Scotland) (SNP)  
\*Paul Martin (Glasgow Springburn) (Lab)  
\*Stewart Maxwell (West of Scotland) (SNP)

### COMMITTEE SUBSTITUTES

Aileen Campbell (South of Scotland) (SNP)  
John Lamont (Roxburgh and Berwickshire) (Con)  
Mike Pringle (Edinburgh South) (LD)  
Dr Richard Simpson (Mid Scotland and Fife) (Lab)

\*attended

### THE FOLLOWING GAVE EVIDENCE:

Sharon Bell (Accountant in Bankruptcy)  
Kenny MacAskill (Cabinet Secretary for Justice)

### CLERK TO THE COMMITTEE

Douglas Wands

### SENIOR ASSISTANT CLERK

Anne Peat

### ASSISTANT CLERK

Andrew Proudfoot

### LOCATION

Committee Room 1



## Scottish Parliament

### Justice Committee

*Tuesday 28 April 2009*

[THE CONVENER *opened the meeting at 10:19*]

### Decision on Taking Business in Private

**The Convener (Bill Aitken):** Good morning, ladies and gentlemen. I remind everyone to switch off mobile phones. We have an apology from Paul Martin, who has other business but may arrive later.

Under agenda item 1, I ask the committee to agree to take in private item 6, which is consideration of the evidence that we will take on the legislative consent memorandum on the Coroners and Justice Bill, and any future consideration of a draft report.

**Members indicated agreement.**

## Coroners and Justice Bill

10:19

**The Convener:** Item 2 is consideration of the Coroners and Justice Bill, which is United Kingdom legislation. Members have received a background paper and the second legislative consent memorandum on the bill. As you will recall, Scottish ministers decided not to progress the earlier LCM that was lodged, and the LCM that we are now considering takes account of amendments that have been made to the bill at Westminster. The data-sharing provisions that concerned the committee have been deleted and provisions have been inserted on the investigation of deaths of members of the armed forces and other personnel overseas.

I welcome Kenny MacAskill, the Cabinet Secretary for Justice; Gerard Bonnar, head of summary justice reform branch, criminal procedure division; Andrew McConnell, policy adviser, enterprise and industry division; and Lachlan Stuart, branch head, legal system division of the Scottish Government. I invite Mr MacAskill to make some opening remarks, after which we will proceed to questions.

**The Cabinet Secretary for Justice (Kenny MacAskill):** Following my appearance before the committee on 10 February 2009, I appear once again to promote the LCM for the UK Coroners and Justice Bill, in which three sets of provisions touch on devolved matters. Members will note that they are not quite the same as those that we discussed in February. Proposals on the European Union directive on services in the internal market and on criminal memoirs remain in the bill but, as the convener pointed out, proposals relating to information-sharing gateways have been withdrawn.

Amendments to the bill have inserted provisions allowing for inquiries to be held in Scotland into the deaths of Scottish service personnel while abroad on active service. I am ready to answer further questions from members on either criminal memoirs or EU service provisions, but I do not propose in these remarks to add to what I have already said. Instead, I will focus on the new issue of service deaths abroad.

The amendments to the bill represent an agreement that has been reached between the Scottish Government and the UK Government. That agreement took some time to conclude, because Scotland's separate jurisdiction requires respect and because the UK Government's defence reservation is well guarded. However, I am pleased to say that under the new arrangements we will be able to investigate in

Scotland the deaths of Scottish service personnel while abroad on active service.

That is the nub of the matter. Some of the operational protocols are still being worked on and the Ministry of Defence and the Crown Office are diligently progressing those issues. As the protocols do not form part of the legislation, they can be reviewed if and when the Crown Office develops greater experience of investigating such circumstances. We must all sincerely hope that such a review will be unnecessary.

The arrangements have been warmly and widely welcomed, especially by representatives of bereaved service families, and I am pleased to promote them to the committee.

**The Convener:** I am a little bit uncertain about the mechanics of the process. Will the fatal accident inquiry be held automatically at the sheriff court in the area where the deceased was domiciled or to which the deceased had a connection, or will it happen only on application?

**Kenny MacAskill:** My understanding is that such issues will be discussed and resolved by the Ministry of Defence and the Crown Office. Initially, it will be for the MOD to decide which cases can be dealt with appropriately here and then to discuss and decide with the Crown Office the appropriate forum for dealing with them.

**The Convener:** Will the deceased's relatives be able to have an input into the considerations?

**Kenny MacAskill:** They will be able to input through the MOD. I understand that a filtering system operates, because relatives might have moved or because the person in question might have been stationed in an area for only a very short time. We have taken the view that each case is individual and unique and that just because someone was based in a certain area it does not necessarily follow that their families would wish an inquiry to be held there. As a result, we are happy to have some flexibility on this issue.

**Bill Butler (Glasgow Anniesland) (Lab):** How does the LCM tie in with Lord Cullen's wider review of fatal accident inquiries?

**Kenny MacAskill:** It is, to some extent, tangential. Lord Cullen's review on the broader aspects of FAs predates this legislation, although consideration of both matters has run in parallel. When Lord Cullen reports, he will, of course, have to comment on this matter, but our view is that the LCM resolves the immediate problem. As I said, it contains mechanisms to deal with circumstances that might change depending on combat zones and whatever else. Lord Cullen's review will proceed independently and separately.

**Robert Brown (Glasgow) (LD):** I welcome the way in which the data-sharing provisions were

dealt with after I had raised the original question. The subsequent crumbling of the Scottish and UK Governments on the issue has been quite gratifying.

However, on the issue of fatal accidents involving and sudden deaths of service personnel, I echo the convener's comment that the proposed means of tackling the matter is curious. When a death occurs in Scotland, the matter is usually reported to the Crown through the channel of the police. Decisions are then taken in that regard. I appreciate that complications may arise: someone who dies abroad may not have a connection with Scotland simply because they are Scottish. Equally, someone could have established a connection with Scotland. The matter is complicated, but the provisions appear to be a sideways way of going about things. Why did the Crown not seek to put in place a direct reporting mechanism, from the appropriate authorities and at the right time, instead of seeking to create something that comes by way of a by-blow of the chief coroner of England and Wales?

**Kenny MacAskill:** There are a variety of reasons for that. First, given that defence matters are reserved, there could be good military reasons for the MOD wanting things to be dealt with in a particular way in some cases. We have simply come at the issue from the point of view of a Government that is trying to do what is right to limit trauma and pain for the bereaved.

As I said, the initial filtering will be done by the MOD, which will have the call on whether the matter should be passed to the Crown. For example, in the case of multiple deaths, it may be easier for only one jurisdiction to be involved, even if difficulties arise for one family.

We are talking about the need for flexibility. As in the case of FAs, the initial decision is made not at St Andrew's house but at the Ministry of Defence, which then works in collaboration with the Crown. To be fair to the Crown, it is stepping up to the plate and the mark. This will not be easy for the Crown, which will have to ensure that its staff are resourced and appraised on the matter. Staff will go down south to learn how things are being done.

Some decisions have a military dimension that goes beyond the powers of this Government. We are seeking to deal with those matters that are ceded to us. We want to ensure that cases involving Scottish citizens or people who have lived in Scotland can be dealt with as well as possible.

**Robert Brown:** When will the arrangements come into effect? Secondly, when there is disagreement between the Crown Office in Scotland and the relevant authorities in London—

the chief coroner and so forth—how can an issue of significance be pressed? I am thinking of relatives in Scotland when a sole death has occurred.

**Kenny MacAskill:** On the first question, we understand that royal assent will be given by November. On the second question, we hope—as is the case with the on-going negotiations—not to have any unseemly spats. I understand that the Crown does not have the power or right to make demands as such. That said, the opportunity is there for it to indicate that difficulties may arise. There may also be instances in which the Crown takes the view that it is not appropriate for a case to be dealt with in Scotland, although that would be surprising.

We are coming at this in a spirit of establishing the protocols and seeking to work towards what is right. Disputes may arise in some cases, for example where the family is not satisfied. There may be good reasons for that, for example when multiple deaths are involved or when there are family divisions. Tragically, difficulties can arise at times; for example, the widow may take a different view from that of the parents of the deceased.

Difficulties always arise. However, as we did in sorting out the legislation, we are proceeding in a spirit of where there is a will, there is a way. This is not about a turf war but about doing what is right. When we recognise that, we will manage to resolve matters. Ultimately, the powers and decisions rest with the Ministry of Defence. On who takes responsibility in Scotland, once the MOD hands over to the Crown, it will deal with the matter. We are talking about the need for mutual respect and co-operation.

**Robert Brown:** I think that we all share your view on that, and the hope that you expressed earlier on the need for the process to come into practice.

**Nigel Don (North East Scotland) (SNP):** The focus is on servicemen who die in combat, but there are a number of other circumstances in which the legislation might be relevant. For example, there are people who are nowhere near the scene of combat but who die in accidents—I understand that that happens quite often—or those who die while they are out of the country on training but, again, nowhere near a theatre of war. There are also medical staff who are not signed up but who are in the theatre of war doing their bit and who do not come back. Are the regulations or protocols being drawn up widely enough to cover those circumstances?

10:30

**Kenny MacAskill:** We believe that they will be wide enough. The position of the Crown and the

Government has been that we do not uniformly investigate the deaths of Scottish citizens abroad, whether they have been caused by a car crash or something else. The provisions are meant to apply to combat and active service, but they are drawn in a way that we believe would allow them to be used in a wider capacity—questions around aviation, for example, have been addressed. The provisions are drawn in such a way as to provide latitude.

Such matters are up for discussion. We cannot preclude all instances, but if issues of secrecy arise around what somebody is doing, the matter would not be passed to the Crown for investigation here; we will deal with more routine matters—although that is not to downplay the trauma or significance involved, or the roles that individuals have been performing in the service of their country.

We do not anticipate any difficulties. We believe that the provisions have been drawn in a way that covers medical orderlies and others. When we talk about active service, that does not simply signify front-line soldiers; it covers others who serve in the military in an area in which there is conflict, whether in front-line combat or operations elsewhere. Somebody who is serving in a combat zone might be involved in a car crash that is not related to combat, for example. Is it appropriate for such cases to be covered? Those matters must be resolved, and they are for the judgment of the Ministry of Defence.

**Stewart Maxwell (West of Scotland) (SNP):** Once the legislation comes into force, it will be very much to the benefit of the relatives of the deceased individual. However, given that much of the pressure around holding FAs here in Scotland has been on the basis of the backlog and the time that is required, as well as the distance and inconvenience to relatives, will the provisions be enforced only for those cases going forward—that is, those that relate to deaths that happen after the legislation comes into force—or will the Crown be able to consider and take on board cases that are sitting in the queue?

My second question is unrelated to the first. As you mentioned, multiple deaths might result from an accident—for example, an accident involving an aircraft might lead to many deaths from the one incident. Some of the people who are killed might be from south of the border, and some from Scotland. How would that be dealt with?

**Kenny MacAskill:** On the first question, the provisions will apply only to new situations. The backlog would otherwise be compounded. We already have a backlog, and part of the reason for Scotland having the proposed powers is to alleviate the current pressures in the coroner's department. If we were to put all cases on hold,

the backlog would simply increase. The provisions will apply to situations that arise once the legislation comes in.

Multiple cases will initially be a matter for the Ministry of Defence to decide on, in conjunction with and presumably following discussions with the bereaved families, as the convener suggested. There might be instances in which multiple hearings could theoretically take place, although they will probably be few, given the cost and the difficulty. To an extent, we must allow those in charge to make a judgment and to work out what is best. We are trying to allow some inquiry to be conducted, so that people get closure and understanding and so that the damage is mitigated and limited. I do not think that we can give a precise answer to that point. It is a matter of establishing protocols and discussing it. Hopefully, good sense prevails.

**Stewart Maxwell:** I am not quite sure that I understood the answer to the first question. I accept that the provisions should apply only to new cases, once the protocol or whatever it is comes into effect, but I do not quite understand how dealing with a backlog—by transferring some of the cases in the queue to Scotland—would make things worse.

**Kenny MacAskill:** It would be a question of some cases that could go to Scotland not proceeding over the next few weeks, for example, and instead being put on hold. It is not simply a matter of the legislative process being introduced in November; the Crown will require to set up the department and to ensure that the necessary experience is in place. We would be looking for a continual run-on. The likelihood is that the Crown will not be in a position to proceed until significantly into 2010. If cases have already been delayed, and if everything that was going to Scotland was put on hold, by the time that Scotland was ready there might have been a considerable increase in the backlog.

An instance might arise in which it would be in the interests of the Ministry of Defence, in discussion with the Crown and the families, to put proceedings on hold rather than to commence immediately, but—

**Stewart Maxwell:** I understand what you are saying. Of course, we would not want to hold up any case because we were waiting for the Crown to get ready—that is not what I was suggesting at all. I was talking about a situation in which the system was up and running and ready to take cases, and there still being Scottish cases that had been in the queue from before November.

**Kenny MacAskill:** I assume that some of the practical discussions that are going on between the Crown and the MOD will involve attempts to

alleviate the problem that is being faced in England. If we can take some of the Scottish cases, that will reduce the backlog and provide some speed for the families.

**Robert Brown:** Is there power to take the earlier cases, even as an option? That seems to be what you are suggesting. However, I thought that you had said before that there was no power to take the cases that were in the queue before the commencement date.

**Kenny MacAskill:** We will need to check that. Our understanding is that, to some extent, the Crown will get the cases that the Ministry of Defence wishes to give it. As I said, we are not involved in any sort of turf war; we will do what is appropriate to alleviate the trauma for the individuals concerned. There are military decisions to be made about which avenues are appropriate and, clearly, the Crown has to be privy to those discussions.

Common sense suggests to me that, as soon as royal assent is given and the system is up, it would not simply be for new cases and could be used to deal with cases that have been lying in the pile. Those are matters for discussion. To some extent, various protocols are involved, but I am happy to investigate and get back to the committee with chapter and verse on where we are and what the likely commencement date is.

**The Convener:** That would be helpful. As we have no further questions, I thank you for your attendance and say merely that we all fervently hope that the legislation will be used rarely, if at all.

10:37

*Meeting suspended.*

10:38

*On resuming—*

## **Offences (Aggravation by Prejudice) (Scotland) Bill: Stage 2**

**The Convener:** Item 3 concerns stage 2 of the Offences (Aggravation by Prejudice) (Scotland) Bill. As there are—uniquely, in my experience—no stage 2 amendments, the committee is simply required to agree to the sections and the long title.

*Sections 1 to 3 agreed to.*

*Long title agreed to.*

**The Convener:** That concludes stage 2 proceedings. That must be some kind of record.

## **Subordinate Legislation**

### **Diligence against Earnings (Variation) (Scotland) Regulations 2009 (SSI 2009/98)**

### **Diligence against Earnings (Variation) (Scotland) Revocation Regulations 2009 (SSI 2009/133)**

10:38

**The Convener:** Item 4 concerns two pieces of subordinate legislation, the second of which, SSI 2009/133, revokes the first, SSI 2009/98.

The Subordinate Legislation Committee reported to the Parliament that, in respect of the revoking instrument, it was satisfied with the explanation that was given by the Scottish Government in its letter to the Presiding Officer regarding its failure to lay the revoking order before the Parliament no fewer than 21 days before it comes into force.

A submission has been received from the human resources and payroll special interest group of the Business Application Software Developers Association. Scottish Government officials have been invited to appear before the committee to discuss the submission and the reason for the laying of a revoking instrument so soon after the initial regulations were laid. The officials are Sharon Bell, who is the head of the policy development branch at the Accountant in Bankruptcy, and Graham Fisher, who is a solicitor in the Scottish Government's legal directorate. Good morning to both.

We will proceed to questions. The most obvious question to ask is: what happened?

**Sharon Bell (Accountant in Bankruptcy):** We have worked on the original regulations with stakeholders since November 2007. It is unfortunate that information about the regulations was not disseminated to the stakeholders' developers in time for them to make the changes. We had no forewarning that the developers required time to make the changes before the regulations were to come into force. As soon as we were notified of the difficulty, we spoke to our solicitors and to the Minister for Community Safety and decided to revoke the regulations. That was the cleanest and clearest way to deal with the problem.

**The Convener:** There is no doubt about that. Once you got on to the issue, you dealt with it in the only way that you could in the circumstances. However, I am somewhat intrigued by how the problem arose. Surely the process is fairly regularly used and all the changes should have been in place.

**Sharon Bell:** That most certainly should have been the case. We relied on our stakeholders to disseminate the information directly to their information technology developers. I believe that our stakeholders held discussions, but that they were not formalised. We have now taken the initiative to have direct discussions with payroll IT developers, to ensure that such a situation does not arise again.

**The Convener:** So you guarantee that such a situation will not recur in the years ahead.

**Sharon Bell:** I most certainly do. I apologise to the committee and the Parliament for our error.

**Bill Butler:** Sometimes, perhaps guarantees should not be given. However, we take that guarantee, which is on the record. I have a few questions, as I am sure other members have. First, why were the changes not forwarded to the payroll software developers earlier?

**Sharon Bell:** I cannot comment—I do not know the answer. We spoke to our stakeholders, which include several major organisations, such as the Institute of Payroll Professionals, HM Revenue and Customs and local authorities. Some of those stakeholders disseminated the information directly to their developers and did the development in readiness for the 6 April start date, but others did not.

**Bill Butler:** Which stakeholders did not forward the material?

**Sharon Bell:** I do not know exactly.

**Bill Butler:** Can that be found out?

**Sharon Bell:** It could be, but I do not know exactly.

**Bill Butler:** Will you find that out?

**Sharon Bell:** I will attempt to find out the information.

**Bill Butler:** I do not see why that should be very difficult. You will have to find out that information to allow the Government to be content that it can

“bring forward a replacement instrument before the summer recess.”

Are you sure that that will be possible?

**Sharon Bell:** I have spoken to the BASDA, Pegasus developers and several other developers and I am committed to meeting all the IT developers in mid-May to go through the regulations and to discuss future development work directly with them. We are jumping a step—we are going directly to developers rather than working with stakeholders, which is what we normally do.

**Bill Butler:** Sure—but my question was whether you are content to say that replacement

regulations will appear before the committee before the summer recess.

**Sharon Bell:** I am very hopeful that that will happen.

**Bill Butler:** But you are not sure. Okay—I understand that.

The software developers talk about the great difficulty in modifying

“the core calculation of all payroll systems”.

I guess that that process is complicated, which is why I am a bit surprised that you even hope that the replacement regulations will come to the committee before the summer recess, which is only eight weeks away.

**Sharon Bell:** The actual process is difficult, but we normally mitigate the cost of the work by tying it in with other work that IT developers are doing for employers. We understand that other changes will be introduced later this year, in approximately October or November. Although the replacement instrument would be laid before the committee before the summer recess, the actual change would not be introduced until later in the year, along with those other payroll changes. That would allow the information to be disseminated to all the developers so that the development work could take place along with the other changes that will be introduced later this year.

10:45

**Bill Butler:** When will that happen?

**Sharon Bell:** Approximately at either the beginning or the end of October. The change would tie in with the minimum wage changes that happen at around that time.

**Bill Butler:** That seems a more credible explanation, for which I am grateful.

I have a couple of other questions. Will there be closer working relationships on future changes?

**Sharon Bell:** There most certainly will be.

**Bill Butler:** Finally, I ask for a guarantee that the committee will be given the names—we do not necessarily need the addresses—of the stakeholders that did not play the game.

**Sharon Bell:** I will do that.

**Robert Brown:** I want to follow up one or two points. By way of background information, will the delay in introducing the changes adversely affect some individuals who would have benefited from the greater flexibility of the new arrangements?

**Sharon Bell:** There will be a knock-on effect on debtors. The whole idea behind the original regulations was to make things fairer by uprating

the value of the deduction from a debtor's arrested earnings. There will be a slight delay in that uprating. That is why we are keen to work with the developers to introduce the change quickly later this year.

**Robert Brown:** In the original regulations, the first change that would have been made was:

"for '£12' ... substitute '£13.50'".

Presumably, the software can handle that sort of change.

**Sharon Bell:** The software can handle all the changes that need to be made. I have already spoken to all the software developers and they have confirmed that. The issue was just the timing of the introduction of those changes.

**Robert Brown:** With respect, employers are used to dealing with complicated payroll changes that come through every so often because of, for example, the budget or the uprating of court charges that come before our committee from time to time. On the face of it, one would have thought that the software could cope with such changes. I appreciate that, in the tables in the schedule to the regulations, the new way in which the deductions would be spread might cause some difficulty. However, surely to goodness a straightforward change from £12 to £13.50 would not require major software adaptation. Surely that must be a matter of pressing a button.

**Sharon Bell:** I would have thought so, but I am not an IT developer so I do not know exactly what is required. I understand that the changes involved are quite simple. When I spoke to developers who have made the changes to ask them to hold off from implementing those changes at the moment, I was told that the actual process of making the change was very simple.

**Robert Brown:** Do the civil servants who deal with such matters have access to payroll expertise within the civil service? That would seem desirable and necessary so that people can understand what is happening.

**Sharon Bell:** We have had access to payroll expertise as well as developer and IT expertise. I do not know what else I can add to that.

**Robert Brown:** Presumably, there is an old file from the 2006 changes. Did no one read the file, or did the changes not arise in the same way then?

**Sharon Bell:** The 2006 changes involved just a slight amendment to the values. We looked at the file, but that change was very simple. The difficulty is that the replacement tables in the schedule to the regulations would introduce a formula, which is what has caused the developers most concern.

**Robert Brown:** I have a final question, which is on the timescales. Given what has been said about when it should be possible to introduce the changes, why did the Government not just make an amending instrument to delay the coming into force date of the regulations? Would not avoiding the need for additional parliamentary time have been simpler, or are you not confident that it will be possible to introduce the change within the timescale that you indicated to Mr Butler?

**Sharon Bell:** I felt that it would be clearer to all the developers and to everybody else to revoke the regulations rather than delay matters. I had to speak to the developers to find out exactly when they were making another amendment to their payroll IT development to ensure that the date that I chose for the coming into force of the regulations would coincide with when they were going to do an extra release. I therefore needed to speak to them about that first.

**The Convener:** This is a highly unsatisfactory situation. Too much is going wrong with subordinate legislation and it takes up far too much time. However, the committee is required to proceed. Are members content to note the instruments?

**Members indicated agreement.**

**The Convener:** I thank Sharon Bell for her attendance. I suspend the meeting briefly.

10:50

*Meeting suspended.*

10:51

*On resuming—*

### **European Communities (European Order for Payment) (Scotland) Regulations 2009 (SSI 2009/99)**

**The Convener:** We have two further instruments to consider. The Subordinate Legislation Committee reported the first—SSI 2009/99—to this committee and to the Parliament in relation to a failure to follow normal drafting practice in the preamble. Do members have any questions?

**Robert Brown:** It crossed my mind that quite elaborate time-to-pay arrangements and other things are involved. The regulations do not entirely say so, but I assume that such arrangements will continue. Will they be applied when a European order for payment arrives and comes before the sheriff court? It is quite important to see how all that ties in.

**The Convener:** I had assumed that the arrangements would continue. That would seem

the obvious, commonsense approach, but perhaps we should seek clarification on that by means of a letter.

**Robert Brown:** There is a linked question about legal aid, as it is not entirely clear whether legal aid would be available in such cases. If I have understood the situation correctly, an order for payment would go no further if opposed, so I suppose that legal aid may not be needed. Can we clarify how that fits in? It is quite complicated, is it not?

**The Convener:** We will clarify that by correspondence. Again, the instrument is untidy. However, are members generally content to note the instrument?

**Members** *indicated agreement.*

### **Charities and Benevolent Fundraising (Scotland) Regulations 2009 (SSI 2009/121)**

**The Convener:** The Subordinate Legislation Committee reported SSI 2009/121 to this committee and to the Parliament on the grounds that it was partially satisfied with the Government's response to an issue that it raised, but that more detail would have been helpful. Are members content to note the instrument?

**Members** *indicated agreement.*

**The Convener:** The committee will now move into private session.

10:53

*Meeting continued in private until 10:58.*

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