

JUSTICE COMMITTEE

Tuesday 19 January 2010

Session 3

£5.00

© Parliamentary copyright. Scottish Parliamentary Corporate Body 2010.

Applications for reproduction should be made in writing to the Information Policy Team, Office of the Queen's Printer for Scotland, Admail ADM4058, Edinburgh, EH1 1NG, or by email to:
licensing@oqps.gov.uk.

OQPS administers the copyright on behalf of the Scottish Parliamentary Corporate Body.

Printed and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by
RR Donnelley.

CONTENTS

Tuesday 19 January 2010

Col.

DECISION ON TAKING BUSINESS IN PRIVATE	2619
BRIBERY BILL.....	2620
CRIME AND SECURITY BILL	2627
SUBORDINATE LEGISLATION	2640
Scottish Criminal Cases Review Commission (Permitted Disclosure of Information) Order 2009 (SS1 2009/448)	2640

JUSTICE COMMITTEE 3rd Meeting 2010, 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)
*James Kelly (Glasgow Rutherglen) (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:

George Burgess (Scottish Government Criminal Justice Directorate)
Fergus Ewing (Minister for Community Safety)
Kevin Gibson (Scottish Government Legal Directorate)
Elizabeth Sadler (Scottish Government Police and Community Safety Directorate)

CLERK TO THE COMMITTEE

Andrew Mylne

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Andrew Proudfoot

LOCATION

Committee Room 1

Scottish Parliament

Justice Committee

Tuesday 19 January 2010

[THE CONVENER *opened the meeting at 10:00*]

Decision on Taking Business in Private

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I remind everyone to switch off mobile phones.

The first agenda item is a decision on whether to take in private agenda item 5 and the committee's consideration at future meetings of draft reports on the legislative consent memorandums on the Bribery Bill and the Crime and Security Bill. Do members agree to take those items in private?

Members *indicated agreement.*

Bribery Bill

10:01

The Convener: Agenda item 2 is an evidence session on the Bribery Bill, which is United Kingdom Parliament legislation, and the related legislative consent memorandum. I welcome Fergus Ewing, the Minister for Community Safety; George Burgess, deputy director of the Scottish Government's criminal law and licensing division; and Andrea Summers from the Scottish Government's legal directorate. I invite the minister to make an opening statement.

The Minister for Community Safety (Fergus Ewing): The Bribery Bill was introduced into the House of Lords on 19 November last year and the bill has just completed its committee stage. Bribery is very much in the spotlight today, with Jack Straw MP, the Lord Chancellor and Secretary of State for Justice, launching the United Kingdom's foreign bribery strategy. The Bribery Bill aims to provide a clearer and more effective legal framework to tackle bribery in the public and private sectors.

In the main, the Bribery Bill extends to the whole of the UK. It contains a range of provisions that are aimed at modernising the law of bribery and corruption in the UK while ensuring that the UK meets its international obligations. The consent of the Scottish Parliament is of course required to allow its clauses to extend to Scotland. There is a compelling case for using a legislative consent motion to ensure that Scotland does not fall behind the rest of the UK in reforming that area of the law. Its use will also avoid the situation in which the current deficiencies in the law remain in Scotland for longer than is necessary.

Although Scotland has low levels of corruption, the current law on bribery and corruption is fragmented, outdated and in need of reform. Under the bill, two new general offences will be created. In short, the first covers the offence of bribing another person. That would involve offering, promising or giving an advantage with a view to inducing the person to perform a function improperly or as a reward for having done so, or offering, promising or giving that advantage in the knowledge that accepting it would amount to improper performance of the function.

The second offence is, broadly speaking, the mirror image of the first. In short, it covers the offence of accepting a bribe. That would involve requesting, agreeing to receive or accepting an advantage with a view to a function being performed improperly or as a reward for having done so. It could also cover the situation in which accepting the advantage is in itself sufficient to

amount to improper performance of the function. The formulation of those two offences abandons the principal-agent relationship on which the current law is based in favour of a model that is based on an intention to induce improper conduct.

The bill creates new discrete offences—bribery of foreign public officials and a new corporate liability offence of negligently failing to prevent bribery. It creates defences when it is proved that the conduct was necessary for the prevention, detection or investigation, by or on behalf of a law enforcement agency, of serious crime; for the exercise of functions by the security services; or for the exercise of functions by the armed forces when engaged on active service.

Furthermore, the bill will increase the maximum penalty for bribery offences to up to 10 years' imprisonment. The other main provisions of the bill include extra-territorial jurisdiction to prosecute bribery committed abroad by persons ordinarily resident in the UK as well as UK nationals and UK corporate bodies. Those changes would not only assist in the international fight against bribery and corruption; they would further enhance Scotland's reputation as an excellent place to do business.

The best option to reform the law of bribery in Scotland is to promote an LCM and to include Scottish clauses in the UK Bribery Bill. Uniformity across the UK would provide a more effective and workable legislative framework than would be possible if separate bills were introduced in the two Parliaments. It avoids difficulties of cross-border bribery, which might arise should the law on one side of the border be perceived as weaker than the law on the other.

We do not consider that there are policy reasons for concluding that the law in Scotland should be different from the law elsewhere in the UK. Although this involves the UK Parliament considering legislation on a devolved matter, it is considered appropriate to take such a route in this instance, given the importance of ensuring that a consistent approach to bribery and corruption reform is taken throughout the United Kingdom. It is in the interests of good governance and an effective justice system that the provisions of the Bribery Bill, so far as they fall within the legislative competence of the Scottish Parliament, should be considered by the UK Parliament.

I am happy to take members' questions.

The Convener: Thank you, Mr Ewing. We do have a few questions. You said that the extent of bribery in Scotland is, fortunately, low. Could you quantify that further? How many instances have there been in recent times? How much easier will the proposed legislation make it to prosecute cases of that type?

Fergus Ewing: In answer to your first question, recent statistics from the court proceedings database show that the number of bribery or corruption offences that have been recorded in Scotland is consistently low. I have before me a table that shows three offences in 2006-07, three in 2007-08 and one in 2008-09. They are at a low, almost negligible, level.

Your second question was whether a change in the law would more readily facilitate prosecution. The answer is probably yes. The present law is unsatisfactory, and there has been some suggestion that that has led to difficulty in certain prosecutions, in which defences have been mounted on the basis of a lack of certainty in the definition of the crime. Smart lawyers will take advantage of any ambiguity of that nature.

Setting out the law on the basis of principle, which is what the bill does, is correct. It sweeps away the old laws, which date back to 1889, 1906 and 1916.

Nigel Don (North East Scotland) (SNP): Does the bill actually displace the common law—some recent statute has said as much—or does it provide a certain path through what might remain a bog on the sides?

Fergus Ewing: The current bribery law in Scotland rests very much on statute rather than on common law—it rests on the three acts of Parliament to which I have alluded. The Public Bodies Corrupt Practices Act 1889, I am told—I must confess to not having personally scrutinised it—is confined to the bribery of public officials; the Prevention of Corruption Act 1906 applies to the bribery of agents, regardless of the sector in which they are employed. The answer is that the present law is based on statute rather than on common law, and it will be replaced by a statutory regime—but by one that makes it clearer and more effective.

George Burgess (Scottish Government Criminal Justice Directorate): There is a small element of common law. There are common-law offences of bribery and accepting a bribe; in modern times those are never charged and the statutory offences are used—we think that they are restricted to cases that involve judicial officers. The common law exists in Scotland but is very narrow; the bill will abolish the remaining bits of common law in Scotland.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): I thank the minister for his opening remarks, which have covered many of the points on which members have questions.

The Joint Committee on the draft Bribery Bill referred in its report to an

“anomaly in relation to the draft Bill's jurisdictional reach.”

What discussions have taken place between the UK Government and the Scottish Government to resolve the apparent anomaly? I am happy to give an example of the anomaly.

Fergus Ewing: That would be helpful.

Cathie Craigie: The committee provided the following example:

“a Scottish company incorporated in Scotland but which does not do business in whole or in part in England and Wales or Northern Ireland, could not be guilty of an offence under clause 5, but could however be guilty of an offence under clauses 1, 2 or 4, regardless of whether or not there is any connection to England or Wales”.

George Burgess: I think that the answer to that is largely that the joint committee was at that time considering a draft bill that related only to England and Wales and Northern Ireland. The anomaly that the committee identified is in effect swept away by the creation of a single piece of UK-wide legislation. We thereby avoid issues of English legislation not dealing with Scottish partnerships and Scottish legislation not dealing with English bodies. That is an advantage of bringing the legislation together in the way that has happened in the bill.

Cathie Craigie: I think that the Subordinate Legislation Committee expressed concern that clause 39 does not properly take account of the position in Scotland—I apologise; I have gone on to the Crime and Security Bill. Now you know what is coming next. Be prepared!

The Convener: I am sure that the officials' sense of anticipation will have been honed.

James Kelly (Glasgow Rutherglen) (Lab): Clause 7 will create an obligation on commercial organisations to prevent bribery. I understand that the UK Government will produce guidance in that regard, although it is not under a statutory obligation to do so. Does the Scottish Government also plan to produce guidance?

Fergus Ewing: Clause 7 will create an offence of failure by a “relevant commercial organisation” to prevent bribery. We support clause 7 and will work with the UK Government to assess the best way to provide guidance on how that important provision will work.

James Kelly: Will you consider the guidance that the UK Government produces before assessing whether to produce guidance of your own?

George Burgess: I discussed the issue with Ministry of Justice colleagues last week. Our starting point will be a single piece of guidance. As you have seen, the bill does not need to do too much in the way of saying, “Here is the position in England and Wales; the position in Scotland is completely different”, so we hope that we can

weave guidance that covers the whole of the UK without too much separate provision for Scotland.

We would go down the route of producing separate, Scottish guidance only if, when we started writing the guidance, we discovered that we needed to say many very different things about Scotland and that separate guidance would be better. We will consider using all the opportunities that are afforded by UK and Scottish bodies to ensure that companies are well aware of the implications of the provision.

James Kelly: That is a sensible approach.

10:15

Nigel Don: On the defence in clause 12 that a person was engaged in the prevention of crime and other related activities, have we got the provision the right way around? Given that the Lord Advocate—or the Attorney General in England—could stop a prosecution and would not bring a prosecution unless it were in the public interest to do so, does the clause need to be written in such a way that there is a defence if someone can prove that they were involved in the prevention of crime?

Fergus Ewing: Clause 12 deals with the functions of law enforcement agencies, the intelligence services and the armed forces, which might require the use of a financial or other advantage to accomplish the relevant function. It provides statutory defences that mean that, in certain circumstances, it might be not only legal to pay somebody to obtain a certain advantage but necessary in the interests of national security. That is my understanding of one type of act that would be seen not as criminal but as necessary.

Nigel Don asks whether we should have those defences or leave matters to courts to determine. Plainly, the approach that has been taken by the drafters of legislation south of the border has been to set out the statutory defences. It is fair to say that that might not necessarily have been the approach that would have been taken in Scotland but, that said, it is not an approach that causes us any problems. The issue that Nigel Don raises about whether a particular set of facts should lead to a prosecution is entirely one for the Lord Advocate alone, not Government, as the member will appreciate. In cases in which it is clear that one of the statutory defences would not only apply but be successfully invoked, I imagine that the Lord Advocate would come to the conclusion that it is not appropriate to prosecute.

Nigel Don: I am slightly concerned that there might be situations in which the Lord Advocate considers a position and says, “Well, maybe the statutory defence does not apply,” and then feels that she ought to bring the prosecution because

Parliament has failed to bring the necessary defence. If we pass the legislation as it stands, you are asking for that discretion to be laid on top of a statutory defence, when, actually, the statutory defence would be irrelevant, unnecessary and redundant if the discretion would have dealt with it anyway. The Lord Advocate might feel that her discretion is fettered by the statute that provides for part of it.

Am I making myself clear? I am not sure that I am.

Fergus Ewing: I am not sure that you are, either.

I am happy that the charges that are set out in this bill are correct in principle. To offer or receive a bribe will be an offence, and defences will be open to those who are making such a payment in the pursuit of other legitimate aims to do with security or the prevention of crime. One can well imagine many other examples, such as paying an informer for receipt of invaluable information in order to prosecute crime.

I do not think that the discretion of the Lord Advocate will be fettered. The Lord Advocate will use his or her judgment to decide in any particular situation whether or not there is a prosecution. I very much doubt that the Lord Advocate would consider that the existence of the statutory defences would fetter her discretion. I am not aware that we have received from the Lord Advocate any objection to the proposals; on the contrary, I think that this is an example of a situation in which cross-border co-operation will produce a satisfactory result. We are, therefore, happy to promote this approach to the committee this morning.

Robert Brown (Glasgow) (LD): The proposed offence of negligent failure to prevent bribery is different from most mens rea provisions in the criminal law. One can readily understand why you want to make company officials responsible for deficiencies in their organisation, but is it fair to say that much of that relates to mechanisms such as companies' disciplinary arrangements and procedures with regard to contracts? I appreciate that the guidance will deal with some of the issues, but are there defences in the bill along the lines of "I did everything that I could reasonably do", to ensure that the offence will not be wider than it needs to be? One could envisage a substantial degree of strict liability on people in such situations, and there are questions about such an approach.

George Burgess: There is a defence in clause 7(2). The Parliament has considered such issues in the past, for example in relation to corporate homicide. We want to ensure that the people who are at the top of the organisation cannot simply

say, "Oh, the people at the bottom of the organisation did that; we did not know about it", or, "We had systems in place". The provision is partly about ensuring that people at the top of the organisation have not just written the guidance with a nod and a wink to the people who work for them to ignore it. As a defence, a person would have to demonstrate that adequate and effective procedures were in place.

Clause 7 has generated quite a bit of debate in the House of Lords, and I think that the UK Government might table amendments to give the guidance that will be prepared a little more statutory backing, to help companies to understand their obligations.

The Convener: I see that there are no more questions on the Bribery Bill. I think that on the basis of the minister's evidence we are reassured that Scotland is a nation of sea-green incorruptibles.

10:22

Meeting suspended.

10:23

On resuming—

Crime and Security Bill

The Convener: The Crime and Security Bill, like the Bribery Bill, is UK legislation. The minister is joined by his officials: Elizabeth Sadler is head of the organised crime unit in the police division; and Kevin Gibson is from the legal directorate. I invite the minister to make opening remarks.

Fergus Ewing: The legislative consent motion will seek approval for the UK Parliament to apply relevant clauses of the Crime and Security Bill that would otherwise fall within the devolved competence of Scotland. The clauses in question are clauses 39, 40 and 45. Clauses 39 and 40 will amend the Private Security Industry Act 2001 on matters within the Parliament's legislative competence; clause 45 will confer on the Scottish ministers a new power. I stress that those are the only provisions in the bill that fall within devolved competence. Other issues that are addressed in the bill are for the UK Parliament to consider.

The clauses in question make provision to build on the existing system of regulation, which is contained in the 2001 act. Under the 2001 act, individuals who work in the security industry must be properly trained, licensed and subject to periodic review, to ensure that they maintain high standards of service. The provisions will strengthen the existing regime by allowing regulation to be extended to cover companies as well as individual operatives.

I am sure that we all agree that the private security industry has improved significantly since the Security Industry Authority started to regulate individuals who work in designated sectors in 2005. The authority's work has received cross-party support in the past. The provisions are minor, but they will help to build on that work.

The 2001 act introduced a regulatory regime for licensing by the SIA of individuals who work in designated sectors of the private security industry. The UK Government has now identified an issue that relates to vehicle immobilisation in England. Regulation of those who undertake clamping and the like applies only to individual operatives and has not prevented abuses, which often result from a company's policy rather than an individual's conduct.

To tackle that, clause 39 introduces mandatory regulation of businesses that engage in vehicle immobilisation. Vehicle immobilisation on private land is illegal in Scotland, so the need to regulate individuals or businesses that immobilise vehicles does not extend to Scotland. Aimed squarely at company regulation, the provision allows for sole

traders and other individuals who operate independently as a business to require to be licensed as a business.

Clause 39 also introduces an order-making power that would allow mandatory licensing of businesses to be extended to other sectors of the private security industry. Such sectors would most likely have some presence in Scotland. The extension of mandatory regulation to any other sector is not currently planned, but it makes sense to introduce the enabling power in Scotland at the same time as in the rest of the UK. That will give the Scottish ministers the power to designate sectors that should be subject to business regulation, by making an order after consulting the Home Secretary.

The SIA operates a voluntary approved contractor scheme for the private security industry. The scheme reassures users of private security firms that such companies use licensed staff who meet rigorous standards that the SIA sets out. The scheme currently applies only to companies that provide private security operatives under contract. Clause 40 provides for the scheme to be extended to include in-house providers of security services. That will allow security companies to develop their businesses by providing services such as training to other companies and to apply for approved contractor status. It will also allow in-house private security operations, such as the door supervision and in-house security operations of a major pub chain, to seek approved contractor status to demonstrate their commitment to quality.

The approved contractor scheme is best extended in that fashion UK-wide, as several companies that might seek to improve their operations on the basis of this development have operations throughout the UK. The provision will promote the development of excellence in in-house private security operations and allow that excellence to be recognised.

Clause 45 is consequential on clauses 39 and 40 and provides for the Scottish ministers to bring the clauses that amend the 2001 act into force in so far as they apply to Scotland, after consulting the Home Secretary, who has overall responsibility for the Security Industry Authority.

The provisions will enhance further the regulation of the private security industry in Scotland and will allow us to take further steps to regulate businesses, in addition to individuals, when that is appropriate. I therefore ask the committee to support the draft legislative consent motion.

The Convener: You have anticipated some of our questions, but we will begin with Angela Constance.

Angela Constance (Livingston) (SNP): Good morning, minister. You might well have answered my question in part, but I will ask it anyway for clarity and for the record, so I ask you to bear with me.

The memorandum says that the Scottish ministers have

“no plans to extend mandatory regulation of businesses to any other sector”

of the private security industry. As the minister said, the memorandum also says:

“As vehicle immobilisation on private land is illegal in Scotland ... regulation of individual vehicle immobilisers does not extend to Scotland and there is consequentially no need for companies to be regulated.”

Given that, will the minister outline what the powers could be used for in Scotland?

10:30

Fergus Ewing: As Angela Constance says, there are currently no plans to extend mandatory regulation of businesses to any other sector of the industry, but we take the view that it is sensible to avail ourselves of the opportunity, if you like, to acquire powers to extend such regulation to other sectors of the industry should we in future decide so to do. The reason, in part, for the motion is to enable Scottish ministers to be in possession of such powers in case it is later adjudged that they need to be exercised.

The question invites me to speculate on what sectors we might, in due course, apply the powers to. I am not sure that it would be prudent for me to set hares running now, because it is inevitable that, if I begin to speculate, people will draw conclusions that, I suspect, would not be justified. I hope that members agree that it would be sensible for us to take the opportunity to acquire powers, because we are all concerned about some of the activities that have taken place in the security industry in general. That is why, as I alluded to, we united on a cross-party basis to provide for licensing and training in the sector. As far as I have been able to see, that approach appears to be working. For example, I recently observed late-night entertainment at an establishment in Hamilton and the stewards seemed to be doing their job very well. That is an anecdotal example, but I hope that it reflects a general view, which members may share.

Angela Constance: I appreciate the minister's concerns about the unintended consequences of speculation and setting hares running. However, given that he is, in his own words, seeking an enabling power that may be used at some point in the future, can he give a practical example of why he seeks that enabling power?

Fergus Ewing: We are seeking the power because we recognise that this is a very sensitive and important policy area. In future, we may well need powers to introduce regulation. Of course, were we to do so, there would be consultation with the Home Secretary and full consultation with the Parliament, so we would not seek to take anyone unawares—not that we ever do that, convener, even if we wish to.

I appreciate that the member wants me to give an example but I take the view that, if I were to give an example, that sector of the industry would immediately assume that we have secret plans to regulate it. In turn, that would lead to unsought turbulence and difficulty of the sort that we generally try to avoid.

The Convener: Yes, you have a very good track record on that, Mr Ewing.

Angela Constance: I will press the minister one last time. I am not trying to cast any aspersions about the Government not going through due process and all the rest of it—God forbid. I am just looking for an illustrative example.

Fergus Ewing: I admire the member's persistence and I hope that she will forgive me if I boringly repeat the answer that I have already given. Elizabeth Sadler might be able to be of some help.

Elizabeth Sadler (Scottish Government Police and Community Safety Directorate): It might be helpful to explain the rationale for the additional licensing requirement on vehicle immobilisation, where there is an issue. Licensing currently bites on the individual operative at all levels in the organisation, from directors down to individuals who work in the industry. A number of issues have been identified in relation to vehicle immobilisation south of the border, such as release fees and the criteria that are used to determine when to clamp a vehicle where the individual operative is acting under the orders of the company and is following company policy. It is therefore the company's policy and the way that it carries out its business that leads to abuses, rather than the actions of the individual operative. For that reason, the Home Office has identified that, in the case of vehicle immobilisation south of the border, there is a need to regulate businesses in addition to individual operatives.

At the moment, there are no examples of such company abuse being rife in other sectors of the industry and therefore requiring to be regulated. However, in taking the power to regulate an individual business area, it seemed sensible to have an enabling power that would make it easier to extend business regulation if such situations were found in other sectors of the industry in future. That does not answer your question, but I

have given an example of the type of behaviour that has led to the need for business regulation in that sector. I hope that that helps.

Angela Constance: Yes. It is illustrative. Thank you.

Cathie Craigie: I would like a wee bit more clarity. I will be careful about how I word my question.

Constituents have expressed concerns to me about whether we have got the regulation and licensing of the security industry right—I suspect that Angela Constance's constituents have expressed concerns to her about that, too. The issue of security firms that allegedly have contacts with criminal groups being able to tender for and win public contracts from the Government, local authorities and health boards, for example, has been raised with me. If we agree to the legislative consent motion, will the bill give the Scottish ministers, with the approval of the secretary of state—I think that it is worded in that way—the power to look at that matter and consider change if that is necessary?

Fergus Ewing: Cathie Craigie is correct to raise issues that will be understood by all members. The areas that the Security Industry Authority is responsible for regulating are clearly set out in schedule 2 to the 2001 act. Of course, the Scottish Government is taking rigorous action on organised crime more generally through the work of the serious organised crime task force, and I am sure that members remember the specific provisions that are included in the Criminal Justice and Licensing (Scotland) Bill, in which we propose that Parliament consents to new measures that will create new offences in order to tackle serious and organised crime. We debated those provisions just before Christmas, I think. We are concerned about matters cognate, but my understanding is that the powers that I alluded to earlier and to which Angela Constance referred would not be the most appropriate way to address some of the issues to which Cathie Craigie rightly referred. Those issues are being dealt with in other ways.

Does Elizabeth Sadler have anything to add?

Elizabeth Sadler: I missed the end of Cathie Craigie's question. Was it about private security firms that tender for public contracts?

Cathie Craigie: Yes. Things can move on. When we bring in licences and regulations, another loophole seems to be found.

Elizabeth Sadler: On manned guarding and securing of buildings that are being built, the Cabinet Secretary for Justice recently announced that, with all Scottish Government procurements that involve a private security requirement, the company will be required from now on to be a

member of an approved contractor scheme through the SIA. The approved contractor scheme puts in place safeguards relating to the probity of the company, its directors and the people it uses—licensed staff and so on. That will be a requirement for all Scottish Government contracts, whether it is a direct contract or a sub-contract.

Scottish Government procurement experts also recommend that other public bodies that are not within the direct control of the Scottish Government adopt a similar policy. The provision does not extend to other areas of public contracts; it affects only companies that fall within the definition of a private security industry company.

Cathie Craigie: Does the change require parliamentary approval or legislative change?

Elizabeth Sadler: No. It will simply become a condition of the contract between the company and the Scottish Government for the provision of private security services that the company is a member of the SIA's approved contractor scheme.

The Convener: That line of questioning leads me to think that the matter could be considered in conjunction with the Criminal Justice and Licensing (Scotland) Bill, which is before us at the moment.

Fergus Ewing: We are happy to hear from the committee if it wishes to make further representations in that regard. It is not too late to consider amendments, although I suspect that the clock is ticking towards midnight.

The Convener: There are still two stages of the bill to go.

Fergus Ewing: Yes.

Stewart Maxwell (West of Scotland) (SNP): The minister has covered this area to an extent, but I want to go over the three points that the Subordinate Legislation Committee raised in its report on the memorandum. First, on the power in clause 39, vehicle immobilisation on private land is illegal in Scotland, yet there is no express exclusion for Scotland. What is the Government's view on the Subordinate Legislation Committee's point that, given that vehicle immobilisation on private land is illegal in Scotland, there seems to be little purpose in having the power here?

Fergus Ewing: As I understand it, the power is required not in relation to vehicle immobilisation, but in case we need the general powers to apply the provisions of clause 39 in Scotland in relation to other sectors. As I sought to explain in my opening statement, clause 39 will extend the requirement to be licensed to individuals who operate as businesses. In other words, it identifies a general gap in the law. It is an offence under the 2001 act for an unlicensed individual to engage in an activity for which a licence is required, so it is

necessary to make it clear, as new clause 39 does, that businesses require to be licensed by the SIA. At the outset, therefore, businesses that carry out vehicle immobilisation activities will require licences.

Stewart Maxwell is right: the provision is required because of a problem that exists in England but not Scotland. However, because general powers are being created to deal with the matter, we felt that it would be useful to avail ourselves of the opportunity to acquire those general powers. I would appreciate Kevin Gibson giving further information about our approach.

Kevin Gibson (Scottish Government Legal Directorate): The general powers are taken in conjunction with specific powers about vehicle immobilisation that extend to Scotland but which do not apply to Scotland because they are disappplied elsewhere in the 2001 act. It is a technical point.

Stewart Maxwell: Do you not, however, accept the SLC's point, which is that it is confusing to take a specific power on vehicle immobilisation, which is illegal in Scotland? I accept your point about the general power.

Kevin Gibson: It is certainly an unusual approach, but it is consistent with the 2001 act. It was thought to be a more straightforward way of amending the legislation. I think that a different approach would have required much more extensive amendment of the 2001 act than is proposed.

Stewart Maxwell: Are you saying that you do not accept the SLC's point that it is confusing to have a specific power in Scotland to have a regulatory regime over something that is illegal?

Kevin Gibson: It is clear from the terms of the 2001 act that the power does not apply to Scotland.

Stewart Maxwell: Yes, I know, but we are talking about the Crime and Security Bill, the proposals in which, I think, seem at the very least to confuse the issue slightly in the minds of the general public.

Kevin Gibson: I do not accept that the matter is confusing; it is confusing only if one does not read the amendment in context.

10:45

Fergus Ewing: It might be regarded as opportunistic, rather than as unusual or confusing. We are taking advantage of an opportunity that should not be sniffed at, to acquire powers that members might agree could be useful in the future.

Stewart Maxwell: As the minister is probably aware, I have no argument about the general power that is being suggested. I am concerned about the specific power over something that is currently illegal in Scotland.

The clerks note states:

"The second issue raised by the SLC was that although Scottish Ministers can designate activities undertaken by businesses which are to be subject to the new regulatory regime, this will be subject to the overriding power of the Secretary of State to prescribe circumstances in which a business (which would otherwise be caught by the regulations) will not be guilty of an offence."

Can you comment on that, minister? It seems to be slightly odd that the secretary of state has, in effect, a veto over something that this Parliament would have agreed.

Fergus Ewing: Do you mean the secretary of state's power to grant exemptions from licensing arrangements?

Stewart Maxwell: Yes.

Fergus Ewing: That mirrors the existing approach to licensing of individuals under section 4 of the 2001 act. In other words, what is currently provided for individuals will now apply to businesses. It is a mirror provision that is designed to ensure consistency, and it will ensure that exemptions are granted on a UK-wide basis. In practice, the power to grant exemptions is used only where the organisation can demonstrate that its staff—or its business, in the case of business licensing—are subject to suitable alternative arrangements. It is further defined in the 2001 act as arrangements that are

"equivalent, for all practical purposes so far as the protection of the public is concerned, to those applying to persons applying for and granted licences."

There is currently only one exemption in place, which covers security staff at airports. Those staff are regulated by TRANSEC—the transport security and contingencies directorate—which deals with aviation and is overseen by the Department for Transport. It imposes on staff criminality and competence criteria that are equivalent to, or more stringent than, the SIA licence. To require an SIA licence as well would therefore be unnecessary.

Section 24(4)(a) of the 2001 act imposes a duty on the secretary of state to consult Scottish ministers ahead of making any such exemptions. I am satisfied that that ensures that our views on any exemption would be taken into account.

Stewart Maxwell: I am pleased to hear about the requirement to consult Scottish ministers. However, the third issue that the SLC raised is that there is no power for Scottish ministers that is equal to the secretary of state's power with regard to exemptions from the licensing requirement in

the new section 4B(1) of the 2001 act. It seems slightly odd that, as you have said, Scottish ministers would be taking new powers to regulate businesses at some point in the future—it may come about—but would not have a power that is equivalent to that of the secretary of state with regard to exemptions. Effectively, you would introduce regulation for certain businesses, but you would not be allowed to create exemptions without going to the secretary of state. Is not that a rather cumbersome way of doing things? Have you considered approaching the secretary of state or the UK Government about allowing Scottish ministers an equivalent power in relation to new regulations?

Fergus Ewing: I envisage that the powers would have limited—if any—applicability. Elizabeth Sadler has more information, which might cast some light on that hitherto unexplored area of law.

Elizabeth Sadler: The exemptions apply to particular sectors within a sector of licensable activity. The provision does not allow a secretary of state to exempt a whole category of licensable activity: it simply allows him or her to say that falling within that category is a particular group of people for whom the secretary of state is satisfied—on the advice of the Security Industry Authority—that the measures that are in place are equivalent to, or better than, the SIA licence with regard to competence and criminality. The exemption provision is used sparingly: it is currently used only for security officers at airports, because the standards that they are expected to meet are significantly higher than those that must be met for an SIA licence. In practice, exemptions are made on the advice of the SIA, which has to be satisfied that the exemption is well founded. As the minister says, it is highly unlikely that there would be a category in which there was an exemption only in Scotland and not in the rest of the UK.

Stewart Maxwell: It seems odd to take the power to regulate in areas that are as yet undecided, but not to have a power that is equivalent to the power of the secretary of state regarding exemptions for as-yet-unforeseen circumstances, although I accept what the Government has said. There may be only a slight chance that that would occur, but, when powers are being brought in, I would have thought it preferable to dot every i and cross every t.

Fergus Ewing: I can see that there is a theoretical point to be made. At the moment, any such areas are exempt, as no regulation is attached to them. If, in the future, we wish to have such regulation, the issue might arise. I tend to think, from the advice that we have had, that the procedure is designed for specific and limited circumstances. We are not overly concerned that

that particular aspect will pose a practical problem in the future.

It might be helpful if I were to mention that the activities that are subject to control under the 2001 act at the moment, and which are regulated, include manned guarding, which includes cash in transit; close protection; door supervision; public space surveillance; security guards; and keyholders. A wide range of activities are already subject to regulation, which the public understands and we can all appreciate. In the future, we might consider fine tuning and tweaking the arrangements by making minor amendments. We already have in place the corpus of law that was brought in to try to protect the public and to regulate activities in the areas that I have mentioned, which gave rise to many instances of concern.

Robert Brown: I want to address an issue that is not dealt with in the memorandum. Clause 2 and clause 8 will give powers to take DNA samples and fingerprints retrospectively in England and Wales and, separately, in Northern Ireland. The minister might be aware that we have had representations from GeneWatch UK, which expresses concerns that there are no meaningful restrictions on the provisions for retrospective DNA sampling and fingerprinting; that the provisions cover a wider group of people in England and Wales than they would do in Scotland; and that—because of the linkages with the Criminal Justice and Public Order Act 1994—powers will be created for people in Scotland to be arrested without warrant for offences under that legislation.

A number of issues arise from that. One relates to the fact that people can be arrested in Scotland under English, Welsh and Northern Irish warrants in situations that would not be covered by the legislation in Scotland, which is narrower. Does the minister have any comment to make on that? Linked to that is the issue that, apparently, samples can be collected regardless of whether the person is in police custody. The power appears to be so wide that things could be done to a person in Scotland arising from an offence committed elsewhere in the UK that could not be done to them with regard to an offence that had been committed in Scotland.

Fergus Ewing: Robert Brown has raised a wide range of topics. I begin by saying that, aside from the subject matter of the motion, the bill does not extend to Scotland. The other provisions in the bill, as Robert Brown has said, contain a wide range of policing, crime and security measures that would not apply in Scotland and on which we have made, or are making, various provisions.

On the GeneWatch submission, clause 2 of the bill provides powers to take samples and

fingerprints retrospectively without consent from persons aged 10 or over who have been convicted, cautioned or given a final warning for any recordable offence in England or Wales.

The GeneWatch submission asks how those provisions will operate for Scottish residents who receive one of the disposals that are listed for England and Wales. Home Office policy leads have confirmed that that is a drafting by-product of the fact that the criminal law applies individually to England and Wales, Northern Ireland and Scotland, whereas the law on nationality and residence applies UK-wide. We are told that there is no intention to take retrospective samples from Scottish residents in such circumstances. That means that there would be no requirement to attend a police station, no arrest for non-attendance and no issue of retention. The Home Office has offered to ensure that its minister puts that on the record during the passage of the bill. I am pleased to have the opportunity that has been afforded to me by Robert Brown to make it clear that the thrust of the issue that has been identified and raised will be dealt with by a minister in the Westminster Parliament, who will make it clear that the concerns need not concern us.

Robert Brown: I am grateful for that reply, which seems to take us some distance further on. However, I want to be clear about what the minister is saying. As I understand it, the issue is about the collection of data of various kinds in Scotland, from Scottish residents, under orders from English courts. I understand that there are circumstances in which that might need to be done and, in so far as the law in England and the law in Scotland are the same, I do not see an issue of principle. However, are you saying that the powers of the English courts to order the taking of such samples would not extend to the rest of the UK, not least to Scotland? That might be satisfactory, but it seems to take us a distance away from where I thought we began.

Fergus Ewing: If I have taken you away from the point, I can only apologise, as that was never my intention. Clause 44 makes it clear that the powers to which you refer do not apply to Scotland and extend only to England and Wales. Clause 44(1) states that clause 1, on police stop-and-search powers,

“extends to England and Wales only.”

Clause 44(2) makes it clear that the provisions on fingerprints and samples

“extend to England and Wales only, except that section 5(2) extends also to Northern Ireland.”

Clauses 44(3) to 44(6) make it clear that the provisions that relate to powers in respect of fingerprints, samples and other material—which, I presume, means DNA—extend to England and

Wales only. GeneWatch is concerned, but the information that I have is that the provisions will not extend to Scotland, but will operate as a matter of law only in the jurisdictions of England and Wales and Northern Ireland, as is stated explicitly in clause 44.

Robert Brown: For the avoidance of doubt, GeneWatch’s proposition appears to be that the application to Scotland comes from the Criminal Justice and Public Order Act 1994 and agreed protocols under it, which allow arrest without warrant by an officer from England or Wales of a suspect who is found in Scotland. The minister might want to write to us on that. I accept entirely that the issue is enormously complicated and I am pretty certain that I have not fully understood the implications. Will the minister give an undertaking to scrutinise GeneWatch’s representations with a fairly fine-toothed comb and ensure that the position that he has explained to the committee applies in all circumstances?

Another aspect relates to whether the powers in the bill are compatible with the European convention on human rights. I am in no sense casting doubt on the minister’s good faith, but if there remains any doubt about the issue it would be helpful if the minister would undertake to get back to us in detail, rather than give an absolute answer now.

11:00

Fergus Ewing: The advice that I have is that the provisions do not extend to Scotland. A number of scenarios have been put, and I am happy to provide further subsequent written assurances to the committee on all these issues. Plainly, I do not want inadvertently to misinform the committee in respect of any aspect of the questions that Robert Brown has put and the fairly technical issues that they raise.

We are here today because we believe that it is important that the motion be agreed to. However, I am quite happy to undertake to provide further reassurance to the committee and, in particular, to respond on the specific further technical aspects that Robert Brown has raised, if that would be of assistance.

The Convener: That would be the appropriate way forward, bearing in mind that this motion is not going anywhere until next week at the absolute minimum. Are you quite content with that, Robert?

Robert Brown: Yes. I am happy with the assurance that the minister has given on the principle of the matter. I appreciate that the detail can be sorted out later on. It is a complex matter, and I am not sure that I have fully understood the issues that are raised, which are important. It is

worth taking that little bit of extra time to be sure about the matter.

The Convener: Yes. I think that that is the case.

Bill Butler (Glasgow Anniesland) (Lab): In its submission, Children in Scotland expresses the view that clause 42 will effectively prohibit air-weapon use by people under 18, and that that represents a departure from the current position, which is that young people aged between 14 and 17 can use air rifles and can do so on private land without supervision. Will the minister detail his understanding of the effect of those provisions and advise us whether any consideration has been given to the issues that have been raised by Children in Scotland in that regard?

Fergus Ewing: Certainly. As I understand it, all those matters are reserved. However, clause 42—the offence of allowing minors access to air weapons—will amend the Firearms Act 1968 and, like that act, extends to Scotland as well as to England and Wales. Children in Scotland takes the view in its submission that the provisions in that clause will effectively prohibit air-weapon use by people under 18. However, the actual effect of the provisions is to make it an offence for a person who is in possession of an air weapon to fail to take reasonable precautions to prevent its coming into the hands of a person under 18. The offence does not apply where the person under 18 is permitted by the act to have the weapon with him or her. Those circumstances are set out in section 23 of the 1968 act. Therefore, the provision does not restrict legitimate use by persons under the age of 18. I support the provision and we welcome the creation of that new offence in this area of law.

Bill Butler: That is very clear. I welcome the minister's assurances on that.

The Convener: Thank you. There are no further questions, so I thank the minister and his officials. Although there is no tremendous urgency, we would appreciate the minister letting us have more specific answers to the GeneWatch questions by the start of next week at the latest.

Fergus Ewing: There will be no problem with that. The committee will have the assurances and information by then.

11:03

Meeting suspended.

11:05

On resuming—

Subordinate Legislation

Scottish Criminal Cases Review Commission (Permitted Disclosure of Information) Order 2009 (SSI 2009/448)

The Convener: Item 4 is subordinate legislation. There is one negative instrument for our consideration today. I draw to members' attention the cover note, which is paper 3. The Subordinate Legislation Committee has drawn no matters to the attention of the Parliament in relation to the order. Do members have any comments?

Robert Brown: The order relates to the Megrahi situation, if I am not much mistaken.

The Convener: I do not think that we require a crystal ball to appreciate that.

Robert Brown: Article 2(b) talks about a person who provided the information to the Scottish Criminal Cases Review Commission consenting to its disclosure. Is there any issue there if that person has subsequently died? There may be an easy answer to that.

The Convener: I suggest that we note the order, which is perfectly inoffensive, and write to the Government to ask about the rationale for the order and to put the question that Robert Brown has asked. Is that agreed?

Members indicated agreement.

11:06

Meeting continued in private until 13:25.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice at the Document Supply Centre.

Members who wish to suggest corrections for the archive edition should mark them clearly in the report and send it to the Official Report, Scottish Parliament, Edinburgh EH99 1SP.

The deadline for corrections to this edition is:

Tuesday 26 January 2010

PRICES AND SUBSCRIPTION RATES

OFFICIAL REPORT daily editions

Single copies: £5.00

Meetings of the Parliament annual subscriptions: £350.00

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

Single copies: £3.75

Annual subscriptions: £150.00

Published in Edinburgh by RR Donnelley and available from:

Blackwell's Bookshop

**53 South Bridge
Edinburgh EH1 1YS
0131 622 8222**

Blackwell's Bookshops:

243-244 High Holborn
London WC1 7DZ
Tel 020 7831 9501

All trade orders for Scottish Parliament documents should be placed through Blackwell's Edinburgh.

And through other good booksellers

Blackwell's Scottish Parliament Documentation

Helpline may be able to assist with additional information on publications of or about the Scottish Parliament, their availability and cost:

Telephone orders and inquiries

**0131 622 8283 or
0131 622 8258**

Fax orders

0131 557 8149

E-mail orders, Subscriptions and standing orders

business.edinburgh@blackwell.co.uk

Scottish Parliament

**All documents are available on the
Scottish Parliament website at:**

www.scottish.parliament.co.uk

For more information on the Parliament, or if you have an inquiry about information in languages other than English or in alternative formats (for example, Braille; large print or audio), please contact:

Public Information Service

The Scottish Parliament
Edinburgh EH99 1SP

Telephone: 0131 348 5000

Fòn: 0131 348 5395 (Gàidhlig)

Textphone users may contact us on
0800 092 7100

We also welcome calls using the RNID
Typetalk service.

Fax: 0131 348 5601

E-mail: sp.info@scottish.parliament.uk

We welcome written correspondence in any language.