JUSTICE 2 COMMITTEE

AGENDA

5th Meeting, 2004 (Session 2)

Tuesday 3 February 2004

The Committee will meet at 2.00 pm in Committee Room 2.

1. **Item in private**: The Committee will consider whether to take item 5 in private.

2. **Energy Bill**: The Committee will take evidence on the Energy Bill currently before the UK Parliament from—

   Hugh Henry MSP, Deputy Minister for Justice.

3. **Asylum and Immigration (Treatment of Claimants, etc.) Bill**: The Committee will take evidence on the Asylum and Immigration (Treatment of Claimants, etc.) Bill currently before the UK Parliament from—

   Hugh Henry MSP, Deputy Minister for Justice.


5. **Youth Justice Inquiry**: The Committee will consider proposals for a seminar.

6. **Antisocial Behaviour etc (Scotland) Bill (in private)**: The Committee will consider a draft Stage 1 report.
The following papers are enclosed for this meeting:

Item 2 – Energy Bill

Note by the Clerk and Executive Memorandum J2/S2/04/5/1

Item 3 – Asylum and Immigration (Treatment of Claimants, etc.) Bill

Note by the Clerk and Executive Memorandum J2/S2/04/5/2

Item 4 – Budget Process

Note by the Clerk J2/S2/04/5/3

Item 5 – Youth Justice Inquiry

Note by the Clerk and Paper from the advisor (PRIVATE PAPER) J2/S2/04/5/4

Item 4 – Antisocial Behaviour etc (Scotland) Bill

Draft Report (PRIVATE PAPER) J2/S2/04/5/5
Late submission from the Scottish Human Rights Centre J2/S2/04/5/6

The following papers are enclosed for information only:

Scottish Executive consultation on hate crime (member only)

Forthcoming Meetings:

Tuesday 10 February – Justice 2 Committee meeting (PM)
Tuesday 24 February – Justice 2 Committee meeting (PM)
Tuesday 2 March – Justice 2 Committee meeting (PM)
Tuesday 9 March – Justice 2 Committee meeting (PM)
Tuesday 16 March – Justice 2 Committee meeting (PM)
Sewel motions

1. During the passage of the Scotland Bill it was established that it would be the convention of the UK Parliament that it would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament ("the Sewel convention"). Sewel motions are a result of this convention and are the means by which the Executive obtains the Scottish Parliament’s consent to Westminster legislation on devolved matters.

2. The motion seeks the Parliament’s consent for the UK Parliament to legislate in Scotland through the Energy Bill. Parliament is due to debate the following motion (S2M-787) in the name of Mr Jim Wallace MSP, Deputy First Minister and Minister for Enterprise and Lifelong Learning on Wednesday 4 February—

   “That the Parliament agrees that those provisions in the Energy Bill that relate to devolved matters and those that confer executive powers and functions on the Scottish Ministers should be considered by the UK Parliament.”

3. The Enterprise Committee took evidence on the Bill on Tuesday 27 January from Lewis MacDonald MSP, Deputy Minister for Enterprise and Lifelong Learning and Alan Wilson MSP, Deputy Minister for Environment and Rural Development. The Official Report of proceedings is available online at: [http://www.scottish.parliament.uk/enterprise](http://www.scottish.parliament.uk/enterprise).

4. This Bill also has elements which relate to the remit of the Environment and Rural Development Committee. The Environment and Rural Development Committee agreed at its meeting on 14 January 2004 to appoint Rob Gibson MSP as a reporter on the Enterprise Committee.

Energy Bill

5. The Bill was introduced in the House of Lords on 27 November 2003, had its second reading on 10 December and went to Grand Committee stage on 15 January. When the Grand Committee has completed its consideration of the Bill, it will have a third reading in the House of Lords. If the House of Lords passes the Bill it will then go to the House of Commons for consideration.
6. The Bill incorporates proposals affecting the nuclear industry, renewable energy and the regulation of the electricity and gas markets. The Bill deals with a range of issues related to the energy and nuclear industry, some of which are reserved and some of which are devolved.

7. Of primary concern to the Justice 2 Committee are the provisions in the Bill to create a body corporate to be known as the Civil Nuclear Police Authority, who will in turn establish the Civil Nuclear Constabulary (CNC). These bodies will be reconstituted from the existing UK Atomic Energy Authority and the UKAEA Constabulary.

8. Once established, the primary function of the CNC will be to protect licensed nuclear sites and nuclear material. Constables of the CNC will have the powers and privileges of a constable at every place comprised in a relevant nuclear site, everywhere within 5 km of such a place and at other places where it is considered expedient in order to safeguard nuclear material. This may include, for example, policing the transportation of nuclear waste.

9. In addition, chapter 1 of part 2 of the Bill provides for the extension of the powers of the police to investigate alleged offences in a Renewable Energy Zone (REZ), which may, for example be an offshore development beyond the territorial limit.

10. Members can access the Bill and its Explanatory Notes by clicking on the link to:

http://www.publications.parliament.uk/pa/ld200304/ldbills/002/2004002.htm

Procedure

11. Standing Orders do not set out a formal procedure for the Parliament’s consideration of Sewel motions. In some cases Sewel motions have been considered directly by the Chamber. In other cases they have been considered by the relevant subject committee before they are debated by the whole Parliament, as applies in this case.

12. Whatever mechanism is employed, conferring consent by resolution of the Parliament does require there to be some proceedings in the Chamber. The Parliament will therefore debate the motion on Wednesday 4 February.

13. The Deputy Minister for Justice will attend the meeting to outline the Executive’s intentions in relation to the legislation and the Committee will have the opportunity to question the Minister and officials on these points.

14. Following its consideration of the motion the Committee may decide to report to Parliament or to take no further action having debated the matter. In this case, since the motion is to be taken on the day after the
Committee Meeting, it is unlikely to be practical for the Committee to publish a report.

January 2004

Clerk to the Committee
MEMORANDUM

ENERGY BILL

Motion

1. The motion to be put to the Parliament is:

Energy Bill: "That the Parliament agrees that those provisions in the Energy Bill that relate to devolved matters and those that confer executive powers and functions on the Scottish Ministers should be considered by the UK Parliament."

Background

2. The Energy Bill, introduced in the House of Lords on 27 November incorporates proposals affecting the nuclear industry, renewable energy and the regulation of the electricity and gas markets. The provisions on the nuclear industry emerged from the consultation following the White Paper “Managing the Nuclear Legacy – A Strategy for Action” (Cm. 5552, July 2002) and the proposal to establish the Nuclear Decommissioning Authority were included in the draft Nuclear Sites and Radioactive Substances Bill, published for consultation in June 2003 and in the memorandum submitted to the Environment and Rural Affairs Committee at that time. The proposals on renewable energy emerged from the consultation which took place through the White Paper “Our energy future: creating a low carbon economy” (Cm. 5761, February 2003).

3. The purpose of this memorandum is to outline the terms of those provisions in the Bill that require the consent of the Scottish Parliament, by virtue of the Sewel Convention, because they apply to Scotland and are for devolved purposes, or alter the legislative competence of the Parliament or the executive competence of the Scottish Ministers.

Content of the Bill

4. The Bill deals with a range of issues related to the energy and nuclear industry, some of which are reserved and some of which are devolved. Primarily,

- The establishment of the Nuclear Decommissioning Authority (NDA), a UK-wide Non-Departmental Public Body with a specific remit to ensure the nuclear legacy is cleaned up safely, securely, cost effectively and in ways which protect the environment for the benefit of current and future generations.
- Amendments to the Radioactive Substance Act 1993, (RSA 93). The main amendment allows for "fast-track" transfers of authorisations, issued by SEPA to nuclear site operators, for the disposal of radioactive waste.
- Provisions to separate the UK Atomic Energy Authority (UKAEA) Constabulary from UKAEA and reconstitute it as the Civil Nuclear Constabulary (CNC) under a statutory Police Authority (the Civil Nuclear Police Authority).
- The creation of a Renewable Energy Zone (REZ), which will permit HM Government to extend regulation of offshore renewable energy activities beyond territorial waters. The regulatory proposals associated with the creation of the REZ mean that police powers, and the jurisdiction of criminal and civil law will be extended into the REZ.
The designation of safety zones around offshore wind farms. A safety zone would allow the Secretary of State to regulate shipping movements and activity in the immediate area. The Bill also provides for the Secretary of State and the Scottish Ministers to approve an application to extinguish the public right of navigation around a wind farm.

- Provision that all offshore renewable energy facilities should be subject to a requirement that ministerial approval will be required for decommissioning proposals.
- Provision to amend the Electricity Act 1989 so that the renewable energy obligations can be met from electricity generated in Northern Ireland.
- Allowing the Scottish Ministers to direct Ofgem to pay surplus Fossil Fuel monies into the Scottish consolidated fund. The Bill also provides that Scottish Ministers will make provision in budget proposals to the Scottish Parliament that these sums are used to promote renewable energy in Scotland.

Proposals

5. **Nuclear Decommissioning Authority (Part 1: Chapter1)**

Chapter 1 sets out the arrangements for the establishment of the Nuclear Decommissioning Authority (NDA) as a Non Departmental Public Body (NDPB) with responsibility for civil public sector nuclear liabilities. The primary functions of the NDA will be the decommissioning and clean up of sites, primarily those currently owned by BNFL and the UKAEA, across the UK. Schedules 1, 2 and 3 of the Bill provide further detail on the setting up of, and procedural arrangements for, the NDA.

(a) **Consultation**

The NDA provisions of the Energy Bill were published in draft for public consultation as the Nuclear Sites and Radioactive Substances Bill. That draft was the subject of the memorandum of 24 June 2003, by the Scottish Executive, to the Environment and Rural Affairs Committee but it did not reflect the roles of the Scottish Ministers and the Scottish Parliament in the NDA.

(b) **Background**

In November 2001, the UK Government announced its intention to reform the arrangements for cleaning up the UK’s civil public sector nuclear liabilities. The Scottish Executive was fully involved in the preparation of the White Paper, *Managing the Nuclear Legacy - a strategy for action* (Cm 5552), published in July 2002, which set out detailed proposals to improve the way that clean up is managed. Proposals related to both reserved and devolved matters. Management of civil nuclear sites is a reserved matter, whereas policy on radioactive waste, as administered under the Radioactive Substances Act 1993 (RSA93), the subject matter of which is an exception to the reservation under Schedule 5 of the Scotland Act 1998, is devolved. The White Paper proposed the establishment of a new body, the Liabilities Management Authority, now known as the NDA. The NDA will have strategic responsibility for the management of the legacy sites and wastes.
(c) Content

(i) Chapter 1, and Schedules 1, 2 and 3 of the Bill will give effect to the White Paper proposals with provisions to establish the NDA, its constitution, staffing, core functions, duties and powers, reporting requirements, financial and accounting arrangements. The NDA will have functions that relate to both reserved and devolved matters and so will be similar to cross-border authorities designated under section 88 of the Scotland Act 1998. The Bill provides for the Secretary of State to act jointly or in consultation with the Scottish Ministers subject to circumstances described. It also provides for reporting arrangements to the Scottish Parliament. It is proposed that the NDA will be obliged to have particular regard to relevant Government policy including that of the Scottish Executive and the other devolved administrations.

(ii) The Scottish Ministers will be involved in the approval processes for appointments to the NDA and for its strategy and annual plans. NDA reports and accounts and directions made jointly by the Secretary of State and the Scottish Ministers will be laid before the Scottish Parliament. The NDA will have the function of providing advice in or as regards Scotland to the Scottish Ministers either on request or on its own initiative.

(iii) The Secretary of State will act in consultation with the Scottish Ministers when making the appointment of the Chairperson and non-executive members or approving the appointment of the chief executive of the NDA and will also consult the Scottish Ministers before removing any appointees from office. The Secretary of State and the Scottish Ministers will jointly make directions which confer responsibilities on the NDA in relation to the disposal of hazardous materials (including radioactive waste) and the operation of disposal facilities on any nuclear site in Scotland. Directions will also be made jointly concerning the cleaning-up, decommissioning, treatment and storage of hazardous materials on certain principle nuclear sites in Scotland. The Secretary of State will consult the Scottish Ministers for directions which give the NDA responsibility for the operation of treatment and storage facilities on licensed, Crown or nuclear research sites before such a direction is made. Consultation will not apply where the facility to be operated is for the processing or reprocessing of spent (or irradiated) nuclear fuel.

(iv) Chapter 1 also provides that, before making an order to modify certain provisions the Secretary of State will consult the Scottish Ministers and seek their consent, should the order modify any of their functions in particular. Schedule 1 transposes sections 23(2)(b), 70(6) and 91(3)(d) of the Scotland Act 1998, to have effect as if the NDA were a cross-border public authority.

6. Civil Nuclear Constabulary (Part 1: Chapter 3)

Chapter 3 of Part 1 of the Bill seeks to modernise and strengthen the independence of the policing arrangements for civil licensed nuclear sites by the removal of the UK Atomic Energy Authority (UKAEA) Constabulary from UKAEA and for its reconstitution as the Civil Nuclear Constabulary (CNC), under a statutory Police Authority (the Civil Nuclear Police Authority). Once established, the CNC’s primary function will be to protect civil
licensed nuclear sites and nuclear material. This will replace the current system under which special constables are nominated by UKAEA for this purpose. The provisions seek largely to replicate the existing jurisdiction of the UKAEAC but they do not seek to change the way in which the present Constabulary works in co-operation with the Scottish Police Service. This is broadly in line with what has already been done in relation to other GB special police forces such as the British Transport Police (BTP) and the Ministry of Defence Police. While nuclear security is reserved, there are various devolved aspects to the proposals and on which the Executive is recommending agreement by means of this Sewel motion.

(a) Jurisdiction of the CNC

Members of the CNC will retain existing powers. Thus they will have all the powers and privileges of a constable at every place comprised in a relevant nuclear site (i.e. a licensed nuclear site other than a designated defence site); everywhere within 5 km of such a place; at every trans-shipment site at which a member of the Constabulary believes it expedient to be in order to safeguard nuclear material whilst it is at the site; and at every other place at which a member of the Constabulary believes it expedient to be in order to safeguard nuclear material which is in transit. This is very largely a re-enactment of UKAEAC jurisdiction. The 5km provision was specifically intended (and the distance chosen) for reasons of nuclear security to enable the Constabulary to patrol an appropriate area around the sites in order to protect them from attack. The principle purpose of the CNC is the policing of nuclear security: not to assist the Scottish police in the investigation and detection of crime in a general sense. However, this touches on a devolved area as only the Scottish Parliament can determine the powers and privileges of a constable in Scotland and could thus competently confer devolved functions on the CNC, but only in respect of its civilian policing activities. Protocols between the UKAEAC and the Scottish Police forces work well to ensure adherence to the respective jurisdictions. These would continue under the proposed new arrangements.

(b) Inspection of the CNC

Inspection of the UKAEAC is currently conducted on a voluntary basis every 3 years and follows the normal HM Inspectors of Constabulary (HMIC) format. The aim is to examine the efficiency and effectiveness of the whole force, particularly specialist aspects, such as firearms handling, across all, or most, of the nuclear sites that it protects. That would include Chapelcross and Dounreay in Scotland. The inspection is conducted by HMIC (E&W) and its inspection teams are accompanied by a Lead Staff Officer from HMIC (Scotland) for the Scottish sites, in order to ensure that these inspections properly reflect Scottish conditions. The inspection arrangements are placed on a statutory footing by the Bill but are otherwise intended to continue with little practical change through formal consultation on the scope and conduct of the Inspection, which would include agreement (as now) between the two Inspectorates on the level of direct Scottish involvement. The function of the CNC is generally a reserved matter, but may touch on devolved matters where an inspection relates to a civilian policing activity.

(c) Collaboration agreements between Scottish forces and the CNC

Scottish police forces can and do enter into collaboration agreements with each other in specified circumstances and Scottish Ministers can direct (after representation) police forces to enter into such agreements. The policy is to allow the CNC and the Scottish forces the
capability to engage in collaboration agreements and to put these arrangements on a statutory basis. Scottish Ministers will also, jointly with the Secretary of State (as in the case of the British Transport Police), be able to direct Scottish forces to enter into an agreement with the CNC. These issues touch on a devolved area as collaboration agreements may relate to efficiency or provision of equipment in relation to the civilian policing activity of the CNC.

As nuclear security is reserved, this chapter of the Bill has no new financial implications for the Scottish Executive.

7. **Authorisations relating to radioactive waste (Part1: Chapter 4)**

(a) **Purpose**

Chapter 4 sets out proposed amendments to the Radioactive Substances Act 1993 (RSA93), the subject matter of which is an exception to the reservation of nuclear energy and nuclear installations under Schedule 5 of the Scotland Act 1998, and, hence, devolved.

(b) **Consultation**

The proposed amendments were published in draft for public consultation as part of the Nuclear Sites and Radioactive Substances Bill. That draft was the subject of the memorandum of 24 June 2003, by the Scottish Executive, to the Environment and Rural Affairs Committee.

(c) **Content**

(i) The Bill proposes inserting a new section 16A into RSA93 to allow for "fast-track" transfers of authorisations, for the disposal of radioactive waste from nuclear sites, from one nuclear site operator to another. At present, RSA93 does not allow the transfer of authorisations. Rather, any new operator must apply for a new authorisation and the authorising authority, in Scotland the Scottish Environment Protection Agency (SEPA), will then go through its full determination process which, on nuclear sites, tends to be protracted and resource intensive. "Fast-track" transfer will be allowed when there is a new operator for a nuclear site, but there is otherwise no need for the existing limitations and conditions of authorisation to change. Such a transfer may be deemed necessary if the Nuclear Decommissioning Authority (as proposed in Chapter 1 of the Bill) is to be able to award management contracts to new site operators, for example, in the event of under performance by an existing site operator.

(ii) In addition, it is proposed that the process of variation of the conditions attached to any RSA93 authorisations be changed, with the insertion of new provisions within section 17 of the Act. At present, only SEPA can initiate the variation of an authorisation. Currently if an operator wants any change to its authorisation, it requires the full process of a new application, whereas, under the proposed new section, operators will be able to apply for a variation to their authorisations.

(iii) A new section 17A is to be inserted in RSA93 to provide for the periodic review of the limits and conditions of authorisations granted under sections 13 or 14 of RSA93, whether on nuclear sites or other premises. In addition, the authorising authorities
will have a discretionary power to carry out such additional reviews, as they consider necessary. This replaces the existing administrative procedure whereby the authorising authorities undertake periodic reviews of authorisations.

(iv) Schedule 15 details the consequential amendments required to RSA93.

8. **Renewable Energy Zone (Part 2:Chapter 1)**

(a) **Background**

(i) Although energy is a reserved matter, the Scottish Ministers have certain powers under Executive Devolution Orders to promote renewable energy in Scotland and to consider applications for consent under the Electricity Act 1989. The proposals to create the REZ, although mainly concerned with waters beyond the territorial sea, and therefore not in Scotland, also affect renewable energy developments in coastal and territorial waters. They also contain measures affecting public rights of navigation; the establishment of Safety Zones in and around offshore renewable energy installations; and the jurisdiction of the police. These proposals therefore affect devolved powers.

(ii) Sections 76 and 78 allow for Scottish ministers to be consulted prior to an Order in Council applying criminal and civil law in the REZ. Agreement has also been reached that the existing executively devolved powers for Scottish Ministers to consent to electricity generating stations in Scotland will be extended to the Scottish part of the REZ.

(b) **Proposals**

(i) Chapter 1 creates a legal framework for offshore renewable energy developments beyond territorial waters based on the rights available to the UK as a contracting party to the 1982 United Nations Convention on the Law of the Sea (UNCLOS). The UK Government published proposals to establish a Renewable Energy Zone under UNCLOS in its Energy White Paper and Chapter 1 implements these proposals. The limits of the REZ will be set out in an Order in Council and the Scottish Ministers will be consulted about how these limits will apply in waters adjacent to Scotland.

(ii) Chapter 1 also augments the existing framework of law, which applies to offshore renewable energy developments in territorial and internal waters. The effect is to create a common legal regime for all offshore renewable energy developments whether they are located in internal waters, territorial waters or a Renewable Energy Zone.

(c) **Policing of the Renewable Energy Zone (REZ)**

(i) Chapter 1 of part 2 of the Bill provides for the extension of the powers of the police to investigate alleged offences in the REZ. This touches on a devolved area, hence the need for a Sewel motion. An Order in Council power is to be allocated to the Scottish Ministers to provide that a constable is to have on, under or above a renewable energy installation situated in all Scottish waters to which this section applies (internal,
(i) Clauses 82-87 deal with the maritime safety aspects of offshore renewable installations. They provide for safety zones to be established and for public rights of navigation to be extinguished around these installations. The Executive supports the objective of ensuring the safe operation of vessels and crew working on or around these installations, and agrees that maritime activities around them should be properly regulated.

(ii) Under clauses 82-85 a safety zone may be established around an installation in waters out to the 12 mile territorial sea limits around Great Britain, and also beyond that in the Renewable Energy Zone (REZ), which may extend out to the 200 mile limit. The Scottish Executive has agreed with the Department of Trade and Industry (DTI) that, in relation to Scotland, approval of a safety zone should fall to the Secretary of State, but would be subject to consultation with Scottish Ministers as provided for in Clause 82(4) of the Bill. Scottish Ministers, therefore, will be consulted about cases arising within the 12 mile territorial sea limit adjacent to Scotland, and also for cases beyond that, in the “Scottish part” of the REZ as provided for in Clause 75(5) of the Bill.

(iii) Clauses 86-87 provide for the public right of navigation to be extinguished around an offshore installation. They apply only out to the territorial sea limit (12 miles). A public right of navigation exists in the sea within territorial waters, rivers, lochs and the foreshore. These provisions address the possibility of a development being either a public nuisance or a potential cause of damage. The provisions, therefore, also support the objective of ensuring maritime safety around an offshore renewable installation.

(iv) The procedure for implementing this provision will fall to Scottish Ministers. The public right of navigation falls within devolved competence, since it is a Crown property right but exempted from the Crown reservation in the Scotland Act 1998 (para 1 (a) Part 1 of Schedule 5 to the Scotland Act 1998). The procedure involved is built into the legislation for administering consents under section 36 of the Electricity Act 1989.
These provisions confirm the commitments made to the Parliament during the final stage debate on the Robin Rigg Offshore Wind Farm (Navigation and Fishing) (Scotland) Bill.

10. **Decommissioning of offshore renewable energy installations (Part 2: Chapter 2)**

(a) **Background**

UNCLOS places an obligation on contracting parties to ensure that renewable energy installations in a Renewable Energy Zone are decommissioned. Chapter 2 sets out a regime for the decommissioning of such installations.

(b) **Proposals**

(i) The Bill gives powers to the Secretary of State to give notice to developers that they are required to prepare, for the approval of the Secretary of State, a programme for the decommissioning of all offshore renewable energy installations.

(ii) The Bill also gives powers to the Secretary of State to require the developer to put in place financial security to cover the cost of these decommissioning programmes and to review this security as necessary.

(iii) The Bill contains provisions (Section 92) for Scottish Ministers to be consulted prior to the notice being served and in advance of the approval, or rejection, of proposals in respect of a development within territorial waters adjacent to Scotland and in the Renewable Energy Zone adjacent to Scotland. These consultation requirements are similar to those that apply under the Petroleum Act in respect of the decommissioning of offshore oil and gas installations.

11. **Renewable Sources in Northern Ireland (Part 2: Chapter 3)**

(a) **Background**

(i) Under the Electricity Act 1989 (c.29) and the Renewables Obligation (Scotland) Order 2002 (S.S.I. 2002/163) electricity suppliers in Scotland have a “renewables obligation” to produce to the Gas and Electricity Markets Authority (“GEMA”) certain evidence regarding the supply to customers in Great Britain of electricity generated by using renewable sources. The evidence required is Renewables Obligation Certificates (“ROCs”) issued by the industry regulator. Electricity suppliers in England & Wales have a similar renewables obligation under the Renewables Obligation Order 2002 (S.I. 2002/914). These are known as the Renewables Obligations.

(iv) The provision in the Electricity Act that provided for the creation of these Renewable Obligations did not extend to Northern Ireland. This means that renewable energy generated in Northern Ireland does not meet the requirements of the renewables Obligations and ***vice versa***. The establishment of the electricity interconnector between Scotland and Northern Ireland now makes it possible for renewable energy to
be traded between GB and Northern Ireland and the proposal is to empower secondary legislation so that the ROCs can similarly be traded.

(v) Northern Ireland has not yet made a renewables obligation Order, but it has recently enacted legislation which is analogous to the provisions of the Electricity Act that put in place the renewables obligation. That legislation requires Northern Ireland suppliers to produce, as evidence, Northern Ireland Renewables Obligation Certificates (“NIROCs”) issued by the Northern Ireland equivalent of GEMA, the Northern Ireland Authority for Energy Regulation (“Ofreg”).

(b) Proposals

(i) This Chapter provides for the recognition in Great Britain of Renewables Obligation Certificates issued in Northern Ireland. This will allow reciprocal arrangements to come into force from the outset of the renewables obligation for Northern Ireland. The Northern Ireland Order, which will allow reciprocal arrangements, is expected to come into force on 1 April 2005.

(ii) These provisions will require secondary legislation to amend the Renewables Obligation (Scotland) Order 2002 (S.S.I. 2002/163).

12. Payments of sums raised by fossil fuel levy (Part 3:Chapter 4)

(a) Background

(i) The price paid by electricity suppliers for electricity generated under Scottish Renewable Obligation (SRO) contracts was above the market price for electricity. Suppliers were compensated for their additional costs by payments made out of the Fossil Fuel Levy. Under subsequent arrangements introduced to encourage renewable energy generation, Renewable Obligation Certificates (ROCs) associated with electricity generated under the SRO arrangements can be sold, and the proceeds used to meet the additional costs incurred by suppliers under the SRO contracts. In practice, the proceeds realised have been sufficient to meet costs incurred and collection of the Fossil Fuel Levy has therefore ceased.

(ii) However, before Levy collection ceased, a surplus accumulated in the Levy fund. This was due to two factors; a slowing down in development and subsequent over collection of levy payments by the regulator, Ofgem, and secondly, the sale of ROCs generating more in revenue than it cost suppliers to generate the electricity. The Scottish Executive understands from Ofgem that the current total surplus in the Fund is likely to be of the order of £8-10 million.

(iii) Although existing legislation allows for collection of the levy by Ofgem, no powers exist to give that body any authority to do anything with the accumulated surplus.

(iv) The necessary powers to release the surplus need to be conferred under section 33 of the Electricity Act. Although the existing section 33 powers are executively devolved, the further amendment has to be made at Westminster since it amends the Act in a way that is not consistent with the Executive’s limited devolved power to amend section 33 of that Act.
(b) **Proposals**

(i) Section 135 of the Bill proposes giving Scottish Ministers the power to direct Ofgem to pay into the Scottish Consolidated Fund monies from funds paid to Ofgem under the Fossil Fuel Levy arrangements and arising from the auctioning of electricity generated under SRO contracts. It also proposes a corresponding duty on Scottish Ministers to include in budget proposals to the Scottish Parliament that monies thus raised shall be used to promote the use of energy from renewable sources. Renewable energy will be defined as sources of energy other than fossil fuel or nuclear fuel.

(ii) This provision will enable the Scottish Executive to provide the additional support necessary to meet its commitment to increasing the amount of renewable energy produced in Scotland. Similar powers were obtained by the DTI Secretary of State through a recent Private Members Bill at Westminster.

*The Scottish Executive*

*December 2003*
Sewel motions

1. During the passage of the Scotland Bill it was established that it would be the convention of the UK Parliament that it would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament (“the Sewel convention”). Sewel motions are a result of this convention and are the means by which the Executive obtains the Scottish Parliament’s consent to Westminster legislation on devolved matters.

Asylum and Immigration (Treatment of Claimants, etc.) Bill

2. The Bill was introduced in the House of Commons on 27 November 2003.

3. The following motion seeks the Parliament’s consent for the UK Parliament to legislate in Scotland through the Asylum and Immigration (Treatment of Claimants, etc.) Bill. Parliament is likely to debate the Motion (S2M-00838) in the name of Cathy Jamieson MSP, Minister for Justice, week beginning 10 February 2004.

   “That the Parliament endorses the principle of creating a new offence to combat trafficking in human beings for non-sexual exploitation as set out in the Asylum and Immigration (Treatment of Claimants, etc.) Bill and agrees that the provisions to achieve this end in Scotland which relate to devolved matters should be considered by the UK Parliament”.

4. According to the Executive Summary,

   “The Bill includes provisions which unify the immigration and asylum appeals system into a single tier of appeal with restricted access to the higher courts, deal with undocumented arrivals and those who fail to comply with steps to co-operate with the re-documentation process, create new offences and provide additional powers to the OISC.”

5. The Bill is arranged under 8 headings: Offences, Treatment of claimants, Enforcement powers, Appeals, Removal and detention, Immigration services, Fees and General. The matters dealt with in the Bill are almost entirely reserved (as they relate to immigration and nationality). The Bill contains provisions relating to trafficking people for non-sexual exploitation, which fall within devolved competence. The Bill also
proposes changes to the Proceeds of Crime Act 2002 in order to allow a
court to assume in certain circumstances that assets from the preceding
six years are the proceeds of crime and to calculate a confiscation order
accordingly.

6. Members can access the Bill and its Explanatory Notes by clicking on the
link to:

http://www.publications.parliament.uk/pa/cm200304/cmbills/005/2004005.htm

Procedure

7. Standing Orders do not set out a formal procedure for the Parliament’s
consideration of Sewel motions. In some cases Sewel motions have been
considered directly by the Chamber. In other cases they have been
considered by the relevant subject committee before they are debated by
the whole Parliament, as applies in this case.

8. Whatever mechanism is employed, conferring consent by resolution of the
Parliament does require there to be some proceedings in the Chamber. The Parliament is therefore likely to debate the Motion week beginning 10

9. The Minister for Justice will attend the meeting to outline the Executive’s
intentions in relation to the legislation and the Committee will have the
opportunity to question the Minister and officials on these points.

10. Following its consideration of the motion it will be for the Committee to
report to the Parliament accordingly. Such a report need only be a short
statement of the Committee’s conclusions.

January 2004

Clerk to the Committee
Asylum and Immigration (Treatment of Claimants, etc.) Bill: “That the Parliament endorses the principle of creating a new offence to combat trafficking in human beings for non-sexual exploitation as set out in the Asylum and Immigration (Treatment of Claimants, etc.) Bill and agrees that the provisions to achieve this end in Scotland which relate to devolved matters should be considered by the UK Parliament”
MEMORANDUM

ASYLUM AND IMMIGRATION (TREATMENT OF CLAIMANTS, ETC.) BILL

Motion

1. The motion to be put to the Parliament is:

Asylum and Immigration (Treatment of Claimants, etc.) Bill: “That the Parliament endorses the principle of creating a new offence to combat trafficking in human beings for non-sexual exploitation as set out in the Asylum and Immigration (Treatment of Claimants, etc.) Bill and agrees that the provisions to achieve this end in Scotland which relate to devolved matters should be considered by the UK Parliament”.

Background & Content of the Bill

2. The Asylum and Immigration (Treatment of Claimants, etc.) Bill was introduced in the House of Commons on 27 November 2003. The major proposals in the Bill are arranged under 8 headings: Offences, Treatment of claimants, Enforcement powers, Appeals, Removal and detention, Immigration services, Fees and General. The matters dealt with in the Bill are almost entirely reserved by Schedule 5 of the Scotland Act 1998 (as matters relating to immigration and nationality).

3. However, the Bill also includes provisions for the creation of a new criminal offence of trafficking people for non-sexual exploitation, which falls within devolved competence. The Scottish Executive proposes that those provisions should extend to Scotland. The purpose of this memorandum is to outline the terms of those provisions which, by virtue of the Sewel Convention, require the consent of the Scottish Parliament.

Proposal

4. Clause 4 of the Bill introduces a new criminal offence of trafficking people into, or out of, the UK for the purpose of exploitation. The offence is aimed at:

- those who traffic persons into the UK in order to obtain labour or services through force or coercion, for the removal of organs, or for offences of false imprisonment or kidnapping.
- those who recruit men, women or children into these situations of exploitation, whether or not for reward or gain.
• those who control in whole or in part the activities of persons trafficked for exploitation, whether or not for reward and gain.

5. A person therefore will commit the offence if he or she arranges for a person to enter or leave the UK in order to exploit them. The offence is also committed if a person arranges travel within the UK if he or she believes that the passenger has been brought into the UK to be exploited. Exploitation encompasses slavery or forced labour, organ removal, or the use of force or threats to induce the victim to provide services. The maximum penalty proposed for such offences is six months plus a fine on summary conviction and 14 years plus a fine on indictment.

6. It is also proposed that this Bill should add the new offences to Schedule 4 (Lifestyle Offences - Scotland) of the Proceeds of Crime Act 2002. Schedule 4 lists offences which are indicative of a criminal lifestyle. This allows a court to assume in certain circumstances that assets from the preceding six years are the proceeds of crime and to calculate a confiscation order accordingly.

7. The provisions of the Asylum and Immigration (Treatment of Claimants, etc.) Bill, set out above, will enable the UK to fulfil an obligation to meet the terms of the EU Framework Decision on Trafficking in Humans and the UN trafficking protocol. They will also bring the treatment of trafficking for non-sexual exploitation into line with the treatment of trafficking for the purposes of sexual exploitation, in that the latter activity is already an offence under the Criminal Justice (Scotland) Act 2003, which created an offence of trafficking for the purpose of prostitution etc. Schedule 4 of the Proceeds of Crime Act 2002 already includes, amongst other things, offences of people trafficking for the purposes of prostitution etc.

Financial Implications

8. Costs associated with the introduction of the legislation are mainly administrative and expected to be minor. Once the legislation has been introduced and is in force there will additional costs associated with enforcement for the police, the Crown Office and Procurator Fiscal Service, the Courts and prisons. Statistics on the incidence of the crimes to be targeted by the proposed new offences are not available centrally but the indications are that their incidence in Scotland is lower than that in England & Wales and the introduction of specific legislation to deal with these crimes should also have a deterrent effect.

SCOTTISH EXECUTIVE
January 2004
Background

1. The Scottish Executive’s budget proposals for 2005/6 are expected to be published on 31 March 2004. Subject committees will be required to report to the Finance Committee around mid-May.

2. In previous years, the two Justice Committees decided, with the agreement of the Bureau, to meet jointly to scrutinise the budget proposals. This arrangement took account of the fact that each committee gains a different range of information, evidence and expertise during the year.

3. Last year, the committees jointly appointed Professor Brian Main from the University of Edinburgh to assist their consideration of the Executive’s spending proposals, to identify areas on which it would be useful to take evidence, advise on lines of questioning and prepare the report to the Finance Committee. As in previous years, there will be some support available this year from the Finance Committee’s standing adviser, Professor Arthur Midwinter. However as he will be covering the whole of the budget, some subject committees are also proposing to appoint their own advisers.

2005/6 budget process

4. The Committee is invited to agree that permission should again be sought from the Bureau to meet jointly to consider the budget proposals this year.

5. The Committee is also invited to agree in principle that an adviser should be appointed to assist with the budget scrutiny, assuming that a suitable person can be identified.

6. Some Committees are seeking, or have secured, the appointment of a standing adviser to assist them with the budget scrutiny for more than one year or indeed the whole parliamentary session. There are potential benefits in having a standing adviser in terms of continuity and efficiency and ability to track funding and issues arising without unnecessary duplication each year. In addition, past experience suggests that there is only a relatively small pool of potential candidates with expertise in both finance and justice matters. Alternatively, the Committee might prefer to gain different perspectives through appointing a different adviser each year. It may also be that potential advisers find it difficult to make a commitment for more than one year.
7. The Committee is therefore invited to decide whether it wishes to seek the appointment of a standing adviser and if so, whether the appointment should be for the remainder of this session.

February 2004
Evidence to the Justice 2 Committee

Anti-Social Behaviour Bill

The Scottish Human Rights Centre (SHRC) is a NGO, which exists to promote human rights in Scotland through the provision of advice & information, research, scrutiny of parliament and monitoring of international human rights obligations

Introduction

The Anti-Social Behaviour Bill (ASB Bill) represents one of the worst pieces of legislation to come from the Scottish Parliament, not least because of its extensive discrimination against young people. Whilst the Scottish Executive will claim that the bill is based on consultation, they will need to consider the biased nature of consultation (discrimination against young people) and also that the consultation responses may not be representative of the population as a whole. This said in some instances it falls to the government to lead the people rather than follow their will – dealing with anti-social behaviour is one of those instances. It is a matter of regret that this Bill seems to be about excluding people, and especially children, from society rather than including them.

Whilst a very small minority of young people commit anti-social behaviour, adults commit the majority of anti-social behaviour yet the bill does not address this issue. It also misses the point that young people often commit anti-social behaviour through lack of other things to do, problems at home etc. – instead of tackling the cause of the problem the Scottish Executive are seeking to further criminalise and victimise the most vulnerable and excluded in our society. In addition to this they wish to remove the world acclaimed Children’s Hearing System from this process, further damaging young people’s chances in life.

It is stated in the consultation document “Putting Communities First”:

“The majority of young people are engaged in healthy, challenging, sociable lifestyles, showing respect for those around them. They are children and young people making the most of the opportunities available to them in education, music, sport and a whole range of other interests. For some, though, aggressive and disorderly behaviour can become the norm.”

However consultation with young people through the Scottish Youth Parliament, YouthLink and others has proven on a number of occasions that there are not enough opportunities for young people, in particular those from low-income families or who live
in deprived areas have less opportunities for education, music and sport. Until this lack of provision is addressed young people will have more opportunity to take part in anti-social behaviour therefore this problem must be addressed urgently. The Executive has funded initiatives to give young people something to do. Rather than pouring money into punishing young people and victimising them the Scottish Executive should put more money into helping them and providing more opportunities. The initiative by Glasgow City Council to allow young people free entry into all swimming pools is a good example of the proactive approach which needs to be taken. If early action is taken to give young people opportunities then intervention and diversionary orders should be unnecessary for most.

SHRC disagrees with the move to deal with more young people through the court system, even if it is through the youth courts. The Children's Hearing System is widely acclaimed for its holistic approach. SHRC believes that all young people i.e. those under 18 years of age, should be dealt with through the Childrens' Hearing System and be subjected to this holistic approach therefore treating the offending behaviour but also the circumstances which caused the behaviour. If properly resourced the Hearings system is a far better means of tackling anti-social behaviour. We know that the adult courts are a failure when dealing with those under 18. They end up in detention at great expense but without any significant impact on re-offending.

The ASB Bill however does not just pertain to young people it also has sections relating to housing, licensed premises, noise nuisance, the environment, parenting and sale of spray paint. This may be its second major flaw – once again the Scottish Executive are trying to do too much in one bill. The Criminal Justice (Scotland) Act 2003 suffered from the same problem and as a result had insufficient scrutiny, there is a real danger of this happening to ASB Bill and for some serious breaches of human rights to go unresolved, leaving the Scottish Executive and Parliament open to legal challenge. The Scottish Parliament should ensure maximum scrutiny of the bill at all stages to ensure that this doesn’t happen.

**Part 1 - Anti-Social Behaviour Strategy**
Each Local Authority must create and implement an ASB strategy in conjunction with the Chief Constable of that area; this is a positive move. They must also consult with a number of groups and bodies including those affected by ASB. The Scottish Human Rights Centre would suggest that a consultation with those committing ASB might prove beneficial if the Local Authority were then to tackle the root cause of the behaviour rather than criminalising it.

**Part 2 - ASBO’s**
The Bill provides for Anti-Social Behaviour Orders (ASBO’s) to be extended to children over the age of 12. This represents a serious challenge to young people’s rights. This proposal will only serve to criminalise young people without addressing the cause of their behaviour. The result of existing ASBO’s have been mixed with many Local Authority’s and police forces unsure of how to or unwilling to use them. It is pointless to extend a measure that is not proven to work.
ASBOs were originally created as a civil order to try to tackle the civil issue of anti-social behaviour. This bill proposes making breach of the order a criminal offence. Not only does this blur the line between civil and criminal matters in a dangerous way but it also removes judicial certainty, a factor which is protected by the European Convention on Human Rights (ECHR). The processing of ASBOs for young people through the courts instead of the Children’s Hearing System further criminalises young people and will not address their offending behaviour. The point of the Children’s Hearing System is to take a holistic approach to an issue, holding the young person’s rights and safety as paramount and treating them as children, but also tackling any offending. Dealing with ASBOs through the courts negates this and will potentially be detrimental to the young people. ASBOs should not be used against young persons under 18 but if they are the process should be then Children’s Hearing System not the courts.

SHRC only supports the extension of ASBO’s to under 16 year olds if they are implemented through the Children’s Hearing System. SHRC does not agree with their use with children / young people through the courts. The UNCRC recognises under 18 year olds as children/ young people and protects their rights, the Scottish Parliament should do the same.

Part 3 – Dispersal of Groups

Section 16 of the bill provides for dispersal of groups of 2 or more people by the police where they reasonably believe that members of the public have been alarmed or distressed or that anti social behaviour is a persistent problem in that locality. This provision is unnecessary as the issue of causing alarm to public is covered by offence of breach of the peace. Further the police believe that this power is unnecessary and that they have sufficient powers, except they are not properly / fully utilised.

“The police have sufficient powers at present, both at common law and in statute, to deal with disorderly groups. It would not be useful to extend police powers to tackle disorderly behaviour amongst groups of young people. This could lead to unnecessary conflict and alienate the police further from certain young people”

Lothian and Borders Police Force response to “Putting Our Communities First”.

The Scottish Human Rights Centre is concerned that if implemented this provision will be used disproportionately against young people, who often hang out in public places as they have nowhere else to go. SHRC is further concerned that this provision may breach art 11 ECHR which provides the right to freedom of assembly and association.

SHRC is further concerned that this provision could also be used disproportionately against protestors or other gatherings/assemblies/marches. Whilst provision is made to except marches notified under Civic Government Act what about peaceful protests under Human Rights Act which aren’t covered in Civic Government Act?
Part 4 – Closure of Premises
According to s 23 premises may be closed if there are reasonable grounds for believing that “at any time during the immediately preceding 3 months a person has engaged in anti-social behaviour on the premises” and the use of the premises is associated with persistent disorder or serious nuisance to the public. (S23(3)). This provision could potentially apply for example to a youth club where certain young people or indeed older teenagers i.e. 18/19 year olds persistently cause trouble. This is particularly a threat where adults consistently complain about the young people hanging about outside the club. This would be unfair to the youth club and its members but would be legitimate in terms of the legislation. This provision whilst sensible in its aim should be redrawn to be as tight as possible so that such situations cannot arise.

Under s28 a police officer “can do anything necessary to secure closed premises” and can use reasonable force to do so. SHRC would query why a police officer should require to use reasonable force and would suggest that the Scottish Parliament have reference to its positive obligations to protect life under art 2 ECHR before sanctioning such extensive powers.

Part 5 – Noise Nuisance
No relevant comments except general comment on fixed penalty notices see below.

Part 6 – The Environment
No relevant comments

Part 7 - Housing ASBNs
S53 provides that an anti-social behaviour notice can be served on a landlord and a fixed penalty imposed if anti-social behaviour occurs at their premises. This is unfair to the landlord who may have been unaware of the behaviour. There is a further issue in terms of the provision (s53(2)(b)) that includes visitors to the premises or anyone in the locality of the premises engaging in anti-social behaviour. This provision needs to be much more tightly drawn to alleviate the possibility that individuals seeking to cause trouble could do so by committing anti-social acts outside another’s house and cause them to be subject to an anti-social behaviour notice.

S56 further provides that a sheriff can order no rent to be paid until the anti-social behaviour notice has been acted upon. There is a fundamental flaw if the individual conducting anti-social behaviour is the tenant!

Part 8 – Housing Registration Areas
No relevant comments

Part 9 – Parenting Orders
Whilst SHRC believes that it is important that parents care for their children properly and in an adequate manner we do not believe that parenting orders will make this possible or encourage those parents who are failing to care for their children to remedy that situation.
Imposing a parenting order on a parent because of an action their child is taken is unfair and unreasonable. If the parent has been unable to care for the child until that point the parenting order is unlikely to make a difference, using emotional blackmail against children that if they don’t behave their parents may go to jail is potentially inhuman treatment and should not be considered in a civilised society.

Parents who are having problems with their children should be required to attend parenting classes to learn how to deal with those problems, not penalised for being unable to cope with their children.

Even if parenting orders are made law, they should not become part of the criminal law. There are already sufficient elements in the criminal law to deal with serious abuse of children e.g. neglect, sexual or emotional abuse etc. Inability to deal with a child’s behaviour is a matter for education and support not the criminal courts. Penalising and stigmatising the parent in this way is more likely to cause harm to the child than to remedy the problem.

Further the Scottish Parliament should decide at what age they wish to consider an individual a child and not change between age 12, 16 and 18 in different provisions in the Bill.

### Part 10 – Further criminal measures

**Anti-social behaviour orders**

Anti-social behaviour orders should not be used against children under 18. Any child in court will likely be there for a serious offence which cannot be remedied by an ASBO anyway. The court should not decide on balance of probabilities that an ASBO is necessary when this is being promoted as subject to criminal penalties – if this is the case then the criminal standard of evidence, beyond reasonable doubt, should apply. The Scottish Parliament must decide whether these measures are civil or criminal and then act accordingly rather than applying different standards as it suits.

**Community Reparation Orders**

Evidence in the Scottish Crime Survey showed that Community Service Orders (CSO’s) are not well understood by the public and whilst the public supports the idea of them the majority of the public were unaware of how little they are used or overestimated how much they are used. It should be noted that CSO’s are more effective when used in conjunction with other disposals e.g. Drug Testing and Treatment Orders therefore treating the cause of offending behaviour as well as punishing the individual.

SHRC welcomes that idea of Community Reparation Orders – with the focus on reparation to the community rather than punishment of individual and SHRC supports their use as the disposal of first instance. SHRC suggests that the Children’s Hearing System should also have CRO’s available to them as a disposal.
SHRC suggests that there should be no upper age limit on the use of CRO’s as this suggests that only young people commit anti-social behaviour which is not true. SHRC further suggests that CRO’s only be made against people under 18 years of age if made by the Children’s Hearing System.

Restriction of Liberty Orders
SHRC strongly disagrees with the use of Restriction of Liberty orders on children under 16 years old. Tagging children does not deal with the problems they face but may actually exacerbate them by confining them in a house where their problems stem from. This also put the onus on the family to deal with the child rather than the authorities e.g. social work taking their responsibilities. Tagging children may also quickly become a status symbol of gang as has occurred in USA without actually tackling the problems which the tag was provided for in the first place. A tag in itself is not a solution and should never be a solution for children. By placing a restriction of liberty order on a child you are effectively imprisoning them in their own home, this is unfair on the family and unfair on the child. If the child needs to be detained (in extreme circumstances) then they should be detained in appropriate facilities – the burden should not be placed on their family.

Spray Paint
Whilst SHRC understands that the Scottish Parliament wish to prevent graffiti – the provision to ban the sale of spray paint to under-16’s seems discriminatory and illogical. It implies that only spray paint is used for graffiti (illogical and untrue) and that only under 16’s carry this out. Whilst the restriction on the sale of other materials e.g. glue is restricted on a health and safety basis SHRC can see no reason that is not discriminatory for restricting the sale of paint to children and young people.

Part 11 – Fixed Penalties
Fixed penalty notices (general)
When providing for fixed penalty notices 2 important elements should be borne in mind in terms of article 6 ECHR the right to a fair hearing. Firstly the standard of evidence; fixed penalty notices should only be used where the evidence is incontrovertible e.g. traffic fines. If fixed penalty notices are used in situations where discretion is allowed this opens them up to the potential for abuse or allegations of it. Secondly fixed penalty notices should always be open to legal challenge as a matter of right. There should be a specified procedure for this (not judicial review).

SHRC is specifically concerned at the inclusion of breach of the peace in the offences which can be subject to a fixed penalty notice. It has already been challenged in law that this offence is insufficiently precise to be an offence, whilst this argument was refuted, SHRC believes that the offence is open to too much discretion and therefore lacks certainty to be subject to a fixed penalty.
Conclusion
The Bill makes reference to the obligation to promote equal opportunities – SHRC suggests that the Scottish Parliament reconsiders this bill in light of that obligation and rectifies the institutional discrimination in the bill.

For further information about this response please contact:
Rosemarie McIlwhan
Director
Scottish Human Rights Centre
146 Holland Street
Glasgow
G2 4NG
Tel: 0141 332 5960
Fax: 0141 332 5309
Email: info@scottishhumanrightscentre.org.uk
Web: www.scottishhumanrightscentre.org.uk