The Committee will meet at 2.00 pm in Committee Room 4.

1. **Items in private:** The Committee will consider whether to take items 5 and 6 in private.

2. **Subordinate legislation:** The Committee will consider the following negative instruments—
   - The European Communities (Services of Lawyers) Amendment (Scotland) Order 2004 (SSI 2004/186); and

3. **Petitions:** The Committee will consider the following petition—
   - **PE578** Petition by Mr Donald MacKinnon calling for the Scottish Parliament to take the necessary steps to extend the right of absolute privilege available to those who complain about the conduct of a range of public bodies, to young and vulnerable people who report abuse to an appropriate authority.

4. **Constitutional Reform Bill:** The Committee will take evidence on the Constitutional Reform Bill currently before the UK Parliament from—
   - Colin Boyd QC, the Lord Advocate, Paul Cackette, Head of Civil Justice Division, and Glynis McKeand, Head of Civil Jurisdiction and Court Procedure Branch, Civil Justice Division, the Scottish Executive.

5. **Youth Justice Inquiry:** The Committee will consider a report on its recent youth justice seminar.

6. **Tenements (Scotland) Bill:** The Committee will consider a draft Stage 1 Report.
The following papers are enclosed for this meeting:

Agenda item 2 – Subordinate legislation

Note by the Clerk (SSI 2004/186 attached)  J2/S2/04/19/1
Note by the Clerk (SSI 2004/194 attached)  J2/S2/04/19/2

Agenda item 3 – Petitions

Note by the Clerk (PE578 and correspondence attached)  J2/S2/04/19/3

Agenda item 4 – Constitutional Reform Bill

Proposed areas for questioning  J2/S2/04/19/4
(PRIVATE PAPER – MEMBERS ONLY)
Correspondence from the Lord Advocate  J2/S2/04/19/5
(Justice 2 Committee Members’ only - previously circulated as J2/S2/04/15/3)
Minutes of Evidence taken before the Select Committee on the Constitutional Reform Bill  J2/S2/04/19/6
(Justice 2 Committee Members’ only – available online at: http://www.publications.parliament.uk/pa/ld/lduncorr.htm)
Correspondence from the Lord Chancellor  J2/S2/04/19/7

Agenda item 5 – Youth Justice Inquiry

Remit and Approach paper  J2/S2/04/19/8
(PRIVATE PAPER – MEMBERS ONLY)

Agenda item 6 – Tenements (Scotland) Bill

Draft Stage 1 Report (PRIVATE PAPER – MEMBERS ONLY)  J2/S2/04/19/9

Forthcoming Meetings:

- Tuesday 25 May Justice 2 Committee Meeting (PM)
- Tuesday 1 June Justice 2 Committee Meeting (PM)
- Tuesday 8 June Justice 2 Committee Meeting (PM)
- Tuesday 15 June Justice 2 Committee Meeting (PM)
I attach the following papers:

**Agenda item 6**

Correspondence from the Deputy Minister for Communities  
J2/S2/04/19/10

11 May 2004  
Tony Reilly
The European Communities (Services of Lawyers) Amendment (Scotland) Order 2004 (SSI 2004/186)

Note by the Clerk

The Instrument

1. This Order is being made in accordance with the powers conferred on Her Majesty the Queen by section 2(2) of the European Communities Act 1972.

2. The purpose of the Order is to amend the European Communities (Services of Lawyers) Order 1978 which facilitated the effective exercise by lawyers of the freedom to provide services. The Order allows lawyers in all those states that have entered the European Community since 1985 the freedom to provide services.

3. The Executive note explains that the 1978 Order should have been amended at the time of each accession to the European Community since 1985. However, the Scottish Executive is not aware that any European lawyer has been prevented from pursuing professional activities in Scotland as a result of this administrative oversight.

Procedure

6. The Justice 2 Committee has been designated lead Committee and is required to report to Parliament by 31 May 2004.

7. The Subordinate Legislation Committee considered this instrument on 4 May 2004 and raised two points of a technical nature with the Executive. The Subordinate Legislation Committee will consider the Executive’s response at its next meeting. The instrument was laid on 26 April and comes into force on 17 May 2004.

8. Under Rule 10.4, the instrument is subject to negative resolution procedure - which means that the Order remains in force unless the Parliament passes a resolution, not later than 40 days after the instrument is laid, calling for its annulment. Any MSP may lodge a motion seeking to annul such an instrument and, if such a motion is lodged, there must be a debate on the instrument at a meeting of the Committee.

6 May 2004

Clerk to the Committee
JUSTICE 2 COMMITTEE

19th Meeting 2004 (Session 2)

Wednesday 12 May 2004

The Supervised Attendance Order (Prescribed Courts) (Scotland) Order 2004
(SSI 2004/194)

Note by the Clerk

The Instrument

1. The Order is being made in accordance with the powers conferred on the Scottish Ministers by section 235(4)(a) of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”).

2. The effect of the Order is to remove from Ayr Sheriff Court and Glasgow District Court the option of imprisonment in cases of fine default at or below level 2 of the standard scale (currently £500). In such cases, this Order prescribes the imposition of a supervised attendance order. A supervised attendance order requires an offender to attend a place of supervision for a specified period and, during that period, to carry out instructions given by the supervising officer. The two courts will be subject to a two year pilot before any further roll outs.

Procedure

6. The Justice 2 Committee has been designated lead Committee and is required to report to Parliament by 24 May 2004.

7. The Subordinate Legislation Committee considered this instrument on 4 May 2004 and had no comment to make. The instrument was laid on 23 April and comes into force in Ayr Sheriff Court on 17 May 2004 and in Glasgow District Court on 21 June 2004.

8. Under Rule 10.4, the instrument is subject to negative resolution procedure - which means that the Order remains in force unless the Parliament passes a resolution, not later than 40 days after the instrument is laid, calling for its annulment. Any MSP may lodge a motion seeking to annul such an instrument and, if such a motion is lodged, there must be a debate on the instrument at a meeting of the Committee.

6 May 2004 Clerk to the Committee
Background

1. Petition PE578 was lodged in November 2002 by Mr Donald MacKinnon. It calls for the Scottish Parliament to take the necessary steps to extend the right of absolute privilege to young and vulnerable people who report abuse to an appropriate authority.

2. The Petitioner wants the Scottish Parliament to consider providing statutory immunity from civil action to children and other vulnerable people who report abuse. Although the petitioner has personal experience of this situation, the purpose of his petition is to address the more general issues raised.

3. The Scottish Executive position was originally set out in a letter from its Education Department in 19 March 2003:

   “In effect an allegation by a child of abuse is protected by qualified privilege unless the person is proved to be acting out of malice. A false statement made in good faith would be protected whereas knowingly making a false accusation could be considered to be malicious.”

   Providing children and other vulnerable people with absolute privilege would mean extending their statutory immunity from civil suit, even in the case of a complaint being made maliciously. The Executive expressed concern that extending absolute privilege in such a way would risk being non-compliant with ECHR. ¹

Committee consideration

4. At its meeting on 30 September 2003, the Committee agreed to take further advice on whether extending the right of absolute privilege to children and other vulnerable people would risk being non-compliant with ECHR. The Committee is still awaiting opinions on the ECHR issue.

5. The Committee also agreed to seek information from the Executive on the number of defamation actions which had been raised against young and vulnerable persons who had reported abuse. As an Appeal to the Inner House of the Court of Session had been pending (the Appeal Court Opinion

¹ Letter from Scottish Executive Education Department, 19 March 2003
was delivered in February 2004) a response has only recently been received from the Scottish Executive (attached). The response indicates that the Executive is not aware of any cases similar in nature to the McKellar v. MacKinnon case. The Deputy Minister also advises that the Executive is in the process of deciding how best to address the possibility that children and young people may be deterred from making genuine complaints because of the prospect of a subsequent defamation against them.

6. It is our understanding that, although no final decision has been made, the Scottish Executive does not feel that legislation is the most appropriate mechanism to address this issue. Instead it is developing an awareness raising policy.

7. Further correspondence has also been received from the petitioner in which he restates his position that there is “an urgent need for legislative clarification” (letter dated 15 February 2004, attached). The petitioner has also provided the Committee with a copy of the relevant Court of Session Appeal Print which is available from the Clerks on request.

Options

8. Members are invited to agree whether a change in the law appears necessary. If so, this could be raised with the Executive. If Members agree with the Executive’s view that a change in the law is not necessary, and that a programme of guidance and information is sufficient, the Committee may wish to close consideration of this petition and advise the petitioner accordingly.

6 May 2004

Clerk to the Committee
Petition PE578

You wrote to me on 10 February following a decision by the Inner House of the Court of Session in relation to the McKellar v. MacKinnon case. I am sorry that I did not reply sooner.

I am not aware of any cases similar in nature to McKellar v. MacKinnon. This case was a highly unusual one.

The Scottish Executive is aware of the need to minimise any risk of the existence of the case acting as a barrier to other children making similar complaints. We are in the process of deciding how best to address the possibility that children and young people may be deterred from making genuine complaints because of the prospect of a subsequent defamation action against them.

I hope that this is helpful to you.
Thank you for your letter of 31 March 2004, inviting me to attend the Justice 2 Committee of the Scottish Parliament to discuss the Constitutional Reform Bill.

I welcome the Committee’s interest in what I consider to be a Bill of fundamental importance and look forward as both lead Minister and member of the House of Lords Select Committee on the Constitutional Reform Bill to reading the Justice 2 Committee’s report.

I do not think it would be appropriate for me to accept your invitation on this occasion. I believe you readily appreciate that my accountability is to the Westminster Parliament and that it is rightly a matter for Scottish Ministers to account to the Scottish Parliament for the devolved matters within the Bill.

The main evidence to the Justice 2 Committee will of course be the Scottish Executive’s Sewel memorandum. If it would be helpful, however, my Department would be happy to prepare for the Justice 2 Committee an additional written memorandum once the Lords select Committee has reported and the Scottish Executive have submitted their own memorandum to you. In the meantime, the Committee may find it helpful to refer to the written evidence I have provided to the House of Lords Select Committee. This can be obtained from the DCA website (www.dca.gov.uk).

I am sending copies of this letter to Alistair Darling, Jack McConnell, Patricia Ferguson, Colin Boyd, Cathy Jamieson and Lord Richard (in his capacity as Chair of the House of Lords Select Committee).

Lord Falconer
Secretary of State and Lord Chancellor
29 April 2004
TENEMENTS (SCOTLAND) BILL

I undertook to write to the Committee to further explain the Executive’s views on a number of issues which arose during the session on 27 April when I gave evidence on the Tenements (Scotland) Bill.

Tenement Management Scheme

I sense that there is still some confusion about how the Tenement Management Scheme is to be applied.

We think that it is only in very old tenements, where there is little or no title provision, that the Tenement Management Scheme will apply more or less in its entirety. In other cases, though mostly in older flats, only parts of the Scheme will apply. In the case of modern developments, most of these have fairly comprehensive and sophisticated regimes set out their titles for management and maintenance and it is likely that the subject matter of most of the rules of the Scheme will be covered.

The Tenement Management Scheme is set out in the form of a number of rules. An individual rule of the Scheme will only apply to existing or future tenements if the title deeds of the tenements do not cover the subject of that individual rule. This means that the Tenement Management Scheme is unlikely to apply in its entirety to very many tenements, because nearly all tenements will have titles which cover at least some of the rules.
Perhaps this is best explained by an example. It is very common for title deeds to specify how much is payable by the owners of particular flats towards the cost of common repairs and maintenance. It is, however, also quite common that the title deeds may at the same time contain no decision making mechanism, such as majority voting, which will allow owners to take decisions to have work carried out.

Under the provisions of the Bill, the title provisions on allocation of costs will prevail, but because the titles do not provide any decision making procedure, Rule 3.1 of the Tenement Management Scheme (on scheme decisions) will apply to enable the owners to make a decision and rule 2 will apply to set out the procedure. The owners of a majority of the flats will then be able to take decisions to have repairs carried out.

Probably the most common reason for title deeds to be considered to be unworkable or inadequate is that the allocation of liability for costs does not cover the full cost of works. Very often this is because the allocation does not amount to 100% of the costs, in most cases because the various flats were sold off over a long period of time and different conveyancers have imposed different liabilities on different flats. But in such cases, Rule 4 of the Tenement Management Scheme will apply to apportion the costs.

In general, the Tenement Management Scheme will operate to fill in gaps in title deeds, rather than replacing them entirely. This will ensure that all tenements will at the very least have arrangements which provide the basic necessities for the efficient management and maintenance of the building, whether these appear in the title deeds or in the Scheme or by a combination of both. Of course many title deeds will provide much more comprehensive and detailed arrangements which have been tailored to the needs of particular buildings.

**Definition of a tenement**

The Committee has expressed concern about the definition of a tenement and whether there might be some doubt as to whether a sub-divided villa would actually be considered to be a tenement under the provisions of the Bill. Particular concerns were expressed where the division is L-shaped. In this case whether the premises forming the part of the ‘L’ which is itself not divided horizontally from another part of the building is part of the tenement would be determined by considering the terms of the title – ie the division of ownership within the building and the nature of the burdens imposed on the building. The Executive is confident that the definition is robust enough to avoid confusion.

**Liability of incoming owners**

As I indicated during the Committee meeting, the Executive is still considering the possibility of providing for a registered notice procedure which would warn buyers of the existence of outstanding repair bills.

**Chimney stacks**

The Committee may welcome further clarification of the position of chimney stacks and flues under the Tenement Management Scheme. The effect of Rules 1.2 and 1.3 is that if a chimney stack and flue is owned by only one owner then they will not be considered to be scheme property and that one owner will be liable to maintain the stack and flue. If the chimney stack is stated to be common property in the title deeds, or if it is the common property of the owners of the flats it serves under section 3 of the Bill (because the titles are silent), then it will be considered to be scheme property under the Tenement Management Scheme. If the title deeds do not make arrangements for maintenance of the chimney stack and flues then the provisions of the scheme will apply.
Majority in a tenement of three

On re-reading my evidence I believe that I may have suggested to the Committee that the Bill as it stands contains a provision to allow a majority in a small tenement to apply to the Sheriff Court to carry out necessary repairs. In fact the Bill does not contain a provision on these lines. We do, however, recognise the strength of the arguments about majorities in small tenements and we are considering the best way forward on this.

Demolished and abandoned tenement buildings

In relation to the sale of abandoned tenement buildings, the Executive is preparing an amendment which will be brought forward at Stage 2 and which will provide safeguards in the process of selling an abandoned tenement.

I hope this is helpful.

MARY MULLIGAN