ECONOMY, ENERGY AND TOURISM COMMITTEE

AGENDA

26th Meeting, 2010 (Session 3)

Wednesday 29 September 2010

The Committee will meet at 9.30 am in Committee Room 4.

1. Protection of Workers (Scotland) Bill: The Committee will take evidence on the Bill at Stage 1 from—

   Sam Jennings, Health and Safety Manager, Capability Scotland;
   Colin Borland, Public Affairs Manager, Federation of Small Businesses;
   Julie McComasky, Head of Human Resources, First ScotRail Limited;

   and then from—

   Alan McCreadie, Deputy Director of Law Reform, and Bill McVicar, Convenor of the Criminal Law Committee, The Law Society of Scotland.

   Not before 11.45 am

2. A fundamental review of the purpose of an enterprise agency and the success of the recent reforms: The Committee will take evidence from—

   Bill Jamieson, Executive Editor, The Scotsman;
   Alasdair Northrop, Editor in Chief, Business7, Scottish Business Insider.

3. A fundamental review of the purpose of an enterprise agency and the success of the recent reforms (in private): The Committee will consider the evidence heard during today’s meeting and its approach to the inquiry.
The papers for this meeting are as follows—

**Agenda Item 1**
Note by the clerk  EET/S3/10/26/1

**Agenda Item 2**
PRIVATE PAPER  EET/S3/10/26/2 (P)
Protection of Workers (Scotland) Bill

Background

1. The Committee received the following 2 written submissions from today’s first panel of witnesses in response to the Committee’s call for evidence in September 2010:
   - Capability Scotland
   - Federation of Small Businesses

2. The Committee also received a written submission from the Law Society of Scotland in response to the Committee’s call for evidence.

3. The submissions are attached in the annexe to this paper and Members are invited to take them into account in their deliberations when questioning today’s witnesses.

Diane Barr
Assistant Clerk to the Committee
September 2010
SUBMISSION FROM CAPABILITY SCOTLAND

1. BACKGROUND

1.1. Capability Scotland is one of Scotland’s leading providers of employment, education and support services to disabled people, their families and carers.

1.2. The organisation’s direct service provision is combined with campaigning, consultancy and advice to ensure that the organisation functions as an ally of disabled people as they strive to gain full equality, choice and control in their lives.

1.3. Capability employs approximately 1,000 staff across a broad range of occupational disciplines from social care and nursing through to shop work, marketing and campaigning.

1.4. Capability Scotland is committed to taking all reasonable precautions necessary to secure the health and safety of all employees carrying out work activities, including helping to combat violence and aggression.

1.5. Capability recognises that the likelihood of experiencing challenging behaviour, which may lead to injury and/or verbal abuse in the workplace, is a genuine concern for many of our staff.

1.6. It is also recognised that the nature of the services Capability provides may sometimes place particular groups of staff at risk.

1.7. Capability supports staff with effective use of personal planning and risk assessment to seek to remove, minimise or manage the risks and effects of challenging behaviour.

1.8. Our staff have the right to involve the police if they have been assaulted or feel that their personal safety is in jeopardy as a result of a service user’s challenging behaviour or the behaviour of a member of the public.

1.9. We are aware that the Economy, Energy and Tourism Committee are considering evidence on the general principles of the Protection of Workers (Scotland) Bill.

1.10. This Bill seeks to create a specific statutory offence dealing with assaults on people whose work brings them into contact with members of the public.

1.11. Capability Scotland is pleased to provide written evidence in relation to this draft Bill.

1.12. We are broadly supportive of the general principles of the bill and are very pleased to see unpaid workers included within the scope of the legislation.

2. SPECIFIC COMMENTS
2.1. We are aware that there has been significant debate in the Scottish Parliament around the necessity for additional legislation in this area given the protections already offered to public-facing workers under the common law of assault and the common law of breach of the peace.

2.2. As an organisation Capability Scotland is pleased that successive Scottish Governments have recognised the nature and the scale of the problem in relation to violence against workers in the public services.

2.3. We believe extending protections provided by the EWA to all public-facing workers will send a clear public policy message that violence against workers who are serving the public should not be tolerated.

2.4. Our specific comments relate however to the need for the following in any extension of EWA protections to public-facing workers:

- clarification as to who would constitute a member of the public
- assurances that provisions within the draft Bill would apply suitably to the care settings that many of our workers operate in
- clarification as to whether non-physical assault would be covered by this legislation if it led to obstruction of a service (verbal assaults/threatening behaviour that can be physically damaging to a worker for example)
- clarification as to whether hindrance and/or obstruction of workers will be proposed in the same way in this Bill as it is in the EWA.

**BILL SECTIONS**

1.1. Section 1(1) of the draft Bill makes it an offence for a person, defined as a member of the public, to assault a worker during (a) the course of that worker’s employment or (b) by reason of that worker’s employment. At present the Bill does not elaborate on who this might exclude from the scope of the offence. We would welcome clarification about who would be covered by the definition of member of the public – would this new offence cover disabled people who use our services and their families and supporters if they assaulted a member of our staff?

1.2. Section 1(2) of the draft Bill states that no offence is committed unless the person who assaults knows or ought to know that the worker is acting in the course of the workers employment. If our service users are covered in the definition of member of the public, it may be difficult to establish prior knowledge or malice towards a worker’s employment in this context particularly when there are doubts over a person’s capacity.

1.3. Non-physical assault, principally threatening or violent verbal abuse towards staff that leads to staff absence and sick leave can be as
obstructive to service delivery as a physical assault in some cases. Are there any plans to apply tougher penalties to breaches of the peace directed at public facing workers?

1.4. In relation to hindrance and/or obstruction of workers, will this be proposed in the same way in this Bill as it is in the EWA? We are unclear that hindrance and obstruction would apply as readily to the delivery of services that we provide as to the provision of an emergency service.

Capability Scotland,

September 2010
SUBMISSION FROM THE FEDERATION OF SMALL BUSINESSES

Introduction

1. The Federation of Small Businesses is Scotland’s largest direct-member business organisation, representing around 20,000 members in every sector of the economy and every area of the country. The FSB campaigns for an economic and social environment which allows small businesses to grow and prosper.

2. Given that our members play an integral role in their communities by delivering important services, we welcome the opportunity to submit our comments to the consultation on the Protection of Workers (Scotland) Bill.

Background

3. The Emergency Workers (Scotland) Act 2005 introduced tougher criminal penalties for those who assault, hinder or obstruct specified emergency service workers in the course of their work. Others who also provide a service to the public, such as shop workers and bus and taxi drivers, were not covered and so this Bill aims to extend a similar protection to them.

4. This, we believe, is a most laudable objective. A range of workers provide essential services – from transport to retail – without which communities would not remain viable. Thus, we welcome moves to send a strong message that violence against people delivering those services is completely unacceptable and to extend to them the same protection enjoyed by emergency workers.

5. The FSB responded to the consultation on the Workers (Aggravated Offences) (Scotland) Bill in September 2009. In that response, we raised a question about whether the self-employed / owner-managers would be covered by the legislation. It is on this issue that we would again seek clarification.

FSB Research

6. A recent FSB/ICM survey of FSB members found that 28 per cent of respondents in Scotland had experienced threatening behaviour, intimidation or aggression in the course of the last year. We feel that these findings are relevant to this response. (Details of full survey results are available on request.)
Q4 In the course of your business activities have you suffered from any of the following crimes in the past year?

### Base: All respondents

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<th>Crime</th>
<th>Total</th>
<th>England</th>
<th>Scotland</th>
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Prepared for The Federation of Small Businesses by Guided Insight & ICM Research
Definition of ‘worker’ and ‘employment’

7. Section 1(3) defines the individuals to whom the provisions of the Bill will apply. Essentially, “worker” is defined as a, “person whose employment involves dealing with members of the public”. “Employment” is then defined as, “any paid or unpaid work whether under a contract, apprenticeship, or otherwise.”

8. Thus, the section will cover employees, contractors, agency workers, volunteers and apprentices. However, we are unclear whether the term “or otherwise” will include the self-employed or business owners.

9. Looking to the policy memorandum for evidence of intention, examples of the sort of occupations which are key to communities include taxi drivers, who in many cases will be self-employed.

10. The FSB, therefore, would like to see the self-employed and business owners explicitly included on the face of the Bill. This would give our members, such as shop owner/managers, an assurance that they enjoyed the same protection as other individuals within the business who happen to be employees.

Conclusion

11. Small businesses provide vital services (and, of course, the consequent jobs) in communities across Scotland. Indeed, the local pub, shop or Post Office can often be the glue which binds vulnerable rural and urban communities together. The FSB therefore backs any move to recognise the importance of these businesses and their staff and to protect them from violence and intimidation at work.

12. To be equitable and truly effective, however, this Bill must apply to those who are delivering services while self-employed. The FSB therefore calls for the inclusion, on the face of the bill, of confirmation that the protection will extend to the self-employed and other business owners.

Federation of Small Businesses
September 2010
SUBMISSION FROM THE LAW SOCIETY OF SCOTLAND

INTRODUCTION
1. The Criminal Law Committee of the Law Society of Scotland (“the Committee”) welcomes the opportunity to comment upon the general principles of the Protection of Workers (Scotland) Bill which was introduced into Parliament by Hugh Henry MSP on 1 June 2010. The Committee should like to respond to the Scottish Parliament’s Economy, Energy and Tourism Committee’s call for written evidence upon the general principles of the Bill in the following terms.

GENERAL COMMENTS
2. The Committee previously responded to the Scottish Executive consultation entitled “Protection of Emergency Workers” in February 2004 and also responded to the public consultation by Hugh Henry MSP entitled “Workers (Aggravated Offences) (Scotland) Bill” in August 2009. The Committee remains of the view that, with regard to assaults upon workers employed in professions involving face to face contact with the public, educational programmes and awareness raising events are essential in reinforcing the message that any assault on a public facing worker, especially those in the emergency services, is clearly unacceptable and should be dealt with by the Court severely. The Committee maintains the view that the position with regard to common law at present providing protection from assault for everyone and allowing aggravating circumstances such as whether or not it was an assault of a worker in the course of that worker’s employment can be taken into account, both in determining the forum for prosecution and the level of sentence upon conviction.

3. In its response to the public consultation by Hugh Henry MSP in August 2009, the Committee then stated that it was unclear whether an assault on a worker providing a service to the public and in doing so coming into face to face contact with the public would be libelled as an aggravation of common law assault, or indeed would be libelled as a separate new offence. The Committee now notes that, in terms of the Bill, it is the intention to libel such an assault as a separate new offence.

4. The Committee again refers to paragraph 3 of the Scottish Executive consultation paper entitled “Protection of Emergency Workers” published in 2004, at which consideration was given to public service workers in non emergency situations.

5. In particular, paragraph 3.5 of the consultation paper stated:-

“While for the reasons outlined in this consultation paper we do not consider that the proposed legislation should extend beyond emergency workers, nor introduce a statutory aggravation, the Executive will be taking forward, in partnership with the STUC, other Unions and representative bodies, and relevant agencies, a wider package of measures to educate the public and to reinforce the message that attacks on public service and other workers are totally unacceptable. This is likely to include increased use of CCTV, evidence sharing and partnership working, and wide awareness and educational campaigns”.
6. The Committee believes that such non legislative measures would be more effective in reinforcing the message that it is unacceptable to assault a public service worker, especially those in emergency services as referred to above.

SPECIFIC COMMENTS

Section 1 – Assault of Workers

7. The Committee notes the definition of worker at Section 1(3) meaning a person whose employment involves dealing with members of the public, to any extent, but only if that employment involves –

(a) being physically present in the same place and at the same time as one or more members of the public, and
(b) (either or both) –

(i) interacting with those members of the public for the purposes of employment or
(ii) providing a service to either particular members of the public or the public generally.

“employment” means any paid or unpaid work whether under a contract, apprenticeship or otherwise.

8. With regard to the defence as outlined at Section 1(2)(a) of the Bill, while proof of knowledge on the part of the accused may not be problematic in cases where there is a recognisable uniform worn by an emergency worker, this may be more problematic with regard to other workers whose employment involves dealing with members of the public.

9. Accordingly, the evidential burden of proof under a statutory offence such as the one proposed here may therefore be greater and, conversely it may be more difficult to secure a conviction.

10. The Committee also notes an offence of assault on a worker by reason of that worker’s employment and that no offence is committed unless the assault is motivated, in whole or in part, by malice towards the worker by reason of the worker’s employment.

11. Again, there is an evidential burden of proof for the Crown to establish that the assault was by reason of that worker’s employment and also motivated, in whole or in part, by malice towards the worker by reason of the worker’s employment.

12. The Committee in its response to the Workers (Aggravated Offences) (Scotland) Bill public consultation last year referred to the then Lord Advocate’s comments made to the Scottish Parliament on 15 January 2004, at which the proposal for an Emergency Workers (Scotland) Bill was debated.

13. The Committee should like to reiterate those comments which were as follows:-
“The Lord Advocate referred to a 19th century Scots lawyer who recognised that “assault may be aggravated by it being committed on an official performing a public duty”.

The Lord Advocate further stated that “In the 21st century the principle has developed to recognise the special position of all workers who provide a public service, embracing a vast variety of services on which we as a society now rely. The flexibility to which I have referred has allowed our Criminal Justice system to keep pace with the times, offering effective means of dealing with new or emerging blights on society. Our courts have been able to get on with the business of bringing to justice those who fail to respect people who deliver valuable services to society without getting caught up in the technical arguments about who does or does not fall to be protected in such a way. I suggest that that would inevitably be the result of prescribing in statute the particular category of workers who are entitled to special protection”.

14. The Lord Advocate offered MSPs the following practical example:-

“A bus driver stops a bus at a bus stop and a youth gets on. There is an altercation and a dispute about the youth paying. As a result the youth is asked to leave the bus. Before he does so, he spits at the bus driver – a nasty, disgusting offence that deserves to be punished. As the youth gets off the bus, an old lady in the street remonstrates with him about what he has done. He spits at her and then leaves. Those who argue for a statutory aggravation in those circumstances would have the court impose a greater sentence for the spitting at the bus driver than for the spitting at the old lady in the queue. To some people, that might be appropriate because the first victim was a bus driver. However, I think that most people would suggest that the punishment in both cases should be equivalent. That is the problem of having an aggravation.

15. The Committee endorses these comments.

Section 2 Penalties

16. The Committee notes that the statutory penalty proposed for the new offence of assaulting a worker is, on summary conviction, to imprisonment for a period not exceeding twelve months or to a fine not exceeding the prescribed sum within the meaning of Section 225(8) of the Criminal Procedure (Scotland) Act 1995 or to both.

17. The Committee notes that this penalty is identical to the penalty for any common law offence in terms of Section 5 of the Criminal Procedure (Scotland) Act 1995 as amended by section 43 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007.

18. The Committee further notes that Section 225(8) of the Criminal Procedure (Scotland) Act 1995 which prescribes the standard scale of fines for offences triable only summarily (“the standard scale”) is now, in terms of Section 28 of the 2007 Act, £10,000.
19. The Committee notes that the creation of this new statutory offence with identical penalties to assault at common law tried summarily detracts from flexibility and imposes evidential burdens upon the Crown which would not of course apply at common law.

**Section 3 Savings for certain offences**

20. The Committee notes that Section 41 of the Police (Scotland) Act 1967 and the Emergency Workers (Scotland) Act 2005 remain unaffected by this proposed legislation.

The Law Society of Scotland
September 2010