



**OFFICIAL REPORT**  
AITHISG OIFIGEIL

# Justice Committee

**Tuesday 18 April 2017**

**Session 5**



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**JUSTICE COMMITTEE**  
**14<sup>th</sup> Meeting 2017, Session 5**

**CONVENER**

\*Margaret Mitchell (Central Scotland) (Con)

**DEPUTY CONVENER**

\*Rona Mackay (Strathkelvin and Bearsden) (SNP)

**COMMITTEE MEMBERS**

\*Mairi Evans (Angus North and Mearns) (SNP)

\*Mary Fee (West Scotland) (Lab)

\*John Finnie (Highlands and Islands) (Green)

\*Fulton MacGregor (Coatbridge and Chryston) (SNP)

\*Ben Macpherson (Edinburgh Northern and Leith) (SNP)

\*Liam McArthur (Orkney Islands) (LD)

Oliver Mundell (Dumfriesshire) (Con)

\*Douglas Ross (Highlands and Islands) (Con)

\*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Annabelle Ewing (Minister for Community Safety and Legal Affairs)

Alexander Stewart (Mid Scotland and Fife) (Con) (Committee Substitute)

**CLERK TO THE COMMITTEE**

Peter McGrath

**LOCATION**

The Mary Fairfax Somerville Room (CR2)



# Scottish Parliament

## Justice Committee

*Tuesday 18 April 2017*

*[The Convener opened the meeting at 10:00]*

### Subordinate Legislation

#### International Organisations (Immunities and Privileges) (Scotland) Amendment Order 2017 [Draft]

**The Convener (Margaret Mitchell):** Good morning and welcome to the Justice Committee's 14th meeting in 2017. We have apologies from Oliver Mundell. I welcome to the committee Alexander Stewart, who is substituting for Oliver today.

Agenda item 1 is consideration of an affirmative instrument: the draft International Organisations (Immunities and Privileges) (Scotland) Amendment Order 2017. I welcome Annabelle Ewing, Minister for Community Safety and Legal Affairs, and her officials: Hamish Goodall, who is a policy officer in the civil law and legal system division; and Greig Walker, who is a solicitor in the solicitors constitutional and civil law division.

I refer members to paper 1, which is a note from the clerk, and I invite the minister to make a short opening statement.

**The Minister for Community Safety and Legal Affairs (Annabelle Ewing):** Good morning. The draft order amends certain legal immunities and privileges in connection with the European Organisation for Astronomical Research in the Southern Hemisphere, which is otherwise known as the European southern observatory, or ESO for short.

The ESO is an intergovernmental organisation that is supported by 16 member states, including the United Kingdom and the host state of Chile. The ESO was established by an international convention that was signed in 1962 in Paris. It is developing a giant telescope, which is at an advanced stage of design, with astronomers and industry across Europe.

The UK astronomy technology centre at the Royal Observatory, Edinburgh is leading the partners in the UK that are part of the international project. There are 20 full-time equivalent posts in the project, with the work split between 40 to 50 individual staff members.

To enable the organisation to fulfil its purposes and carry out its functions, privileges and

immunities apply by virtue of a practical protocol to the convention that was signed in 1974. The conferral of immunities and privileges on officers of the organisation is effectively a condition of membership.

The UK Government joined the ESO in 2002, but the protocol on the privileges and immunities of the organisation came into force for the UK only in September 2012. As part of the UK's membership of the ESO, the agreement has to be effective throughout the UK. That includes privileges and immunities, some of which relate to devolved matters in Scotland.

Equivalent provision in respect of reserved matters and devolved matters in the rest of the UK has been conferred by legislation at Westminster. To the extent that the privileges and immunities relate to devolved matters in Scotland, however, conferral rightly falls to the Scottish Parliament.

The order's purpose is to correct an error that was inadvertently made to the principal order—the International Organisations (Immunities and Privileges) (Scotland) Order 2009—by an amending order in 2010. This area of law is complex and the policy note therefore sets out a comprehensive explanation of the position. Articles 7 to 19 of the protocol require member states to grant a number of privileges and immunities to the organisation and its officers and staff. The majority of those relate to reserved matters and are dealt with in the parallel United Kingdom order.

An error in the UK order—failure to confer certain immunities and privileges on officers of the organisation who are British nationals—came to light because the ESO pointed out that some of its staff were not receiving the reserved tax exemptions to which they were entitled. When the Foreign and Commonwealth Office alerted Scottish Government officials to the discrepancy in the UK order relating to reserved tax, officials reviewed the Scottish order last autumn and discovered a different mistake that was unrelated to taxation.

In fact, the Scottish order had conferred too many immunities and privileges in one instance only—that is, on high officers of the organisation, and specifically the director general of the ESO or a person acting in their stead, in the event of their being a British national.

It is unclear how that discrepancy arose in the Scottish order. Although it is of course regrettable, officials acted to remedy the situation as soon as they realised in the autumn of last year that an amendment was required. The work had to be done in tandem with the FCO to ensure that the two orders could be considered at the same Privy Council meeting. We understand that the

discrepancies in the Scottish order have given rise to no practical issues; indeed, it should be noted that since 2007 the director general of the ESO has been a Dutch person.

As a result, the purpose of the order is to correct and limit the provision of immunities and privileges of high officers of the ESO who might in the future be British nationals in the course of any activities in Scotland, in order to reflect the equivalent Westminster order and the terms of the founding agreement. High officers who are British nationals will be entitled only to more limited immunities and privileges, namely exemption from income tax and immunity from legal process in respect of acts performed by them in the exercise of their functions and within the limits of their authority, except in the case of motor traffic offences committed by them or of damage caused by motor vehicles belonging to or driven by them. The order will therefore help the UK fulfil its international obligations in respect of Scotland.

I hope that that slightly more comprehensive overview of what is a technical and complex area of the law has been helpful to members, and I am, of course, happy to answer any questions that the committee might have.

**The Convener:** I now seek questions from members.

**Stewart Stevenson (Banffshire and Buchan Coast) (SNP):** First of all, I should make it clear that any answers to my questions will not influence my support of the order, which I will support regardless.

In her remarks, the minister referred to “motor traffic offences” being outwith immunity. What does the term “motor traffic offences”, as stated in paragraph 7 of the policy note, mean in this context? I am thinking specifically of parking offences—in particular, certain parking offences are subject to the criminal law, whereas others are subject to the civil law and have therefore been decriminalised. One urban myth is that diplomats can park anywhere, and it might be useful to put on record the limitations in that respect and perhaps shoot down that urban myth for ever.

**Annabelle Ewing:** I thank the member for what is a pertinent question. I, too, think that a myth has arisen with regard to the extent of immunities and privileges in these circumstances. The relevant officials are of course required to obey the laws of the host country, including the parking laws, and I do not really think that any immunity would apply in circumstances in which parking had not been decriminalised, or vice versa. The requirement to obey the laws of the host country applies across the board, and any immunities and privileges are limited to circumstances in which someone acts in the exercise of their functions—with the motor

vehicle exception—and within the limits of their authority. That is the extent of the immunities and privileges, and parking fines are still payable in all circumstances.

**John Finnie (Highlands and Islands) (Green):** Good morning, minister. Are you able to tell us the current status of the UK legislation?

**Annabelle Ewing:** I understand that there is to be a debate on the UK order in Westminster next week—on 25 April—and the plan is for both orders, if approved, to go to the Privy Council on 24 May. That is the timing for the two pieces of secondary legislation.

**John Finnie:** I am reassured by your comment that the area can be confusing and complex, because I certainly found it to be so. Nevertheless, the policy note says:

“States party are, however, required to extend article 16 immunity to all persons in the service of the Organisation, regardless of their nationality or permanent residence.”

Can you clarify what that means?

**Annabelle Ewing:** Yes. It refers to the tax exemption entitlement. The error in the equivalent UK order and in the original Scottish order came to light because the ESO—presumably further to issues being raised by officials themselves—pointed out that some officials were not receiving the tax exemption to which they were entitled under the immunities and privileges provisions.

The situation was looked into and it was noted that the protocol required that those entitlements be applied equally erga omnes to a country’s own citizens and those of other contracting parties. However, that was where the error in the UK order had occurred such that the provision was disapplied to the benefit of British nationals. The UK order is intended to correct that mistake. It was not carried over into the Scottish order.

**John Finnie:** You mentioned income tax. What other taxes will the order relate to?

**Annabelle Ewing:** Various exemptions are set down in the protocol. I would be happy to write to the member on that. The protocol is detailed and refers to other pieces of statute but the focus on the part of the officials concerned would normally be on the exemption from local income tax.

**John Finnie:** I would be grateful to receive that information. With regard to the ESO, are you able to say how many individuals the order would apply to?

**Annabelle Ewing:** I do not have a figure to hand for the number of British nationals working for the ESO outwith Scotland but we can find it out.

**John Finnie:** I am asking about individuals within Scotland.

**Annabelle Ewing:** The officials concerned within Scotland are those who may have a link to the telescope project that is taking place at the Royal Observatory. As I said, there are 20 full-time equivalent posts in that project at the Royal Observatory, Edinburgh. In terms of individuals rather than full-time equivalent posts, that encompasses 40 to 50 people. I would need to have my officials check on the exact status of each of those individuals to see whether they were full-time officials.

**John Finnie:** However, that is potentially 50 people in Scotland working for the organisation and not paying tax.

**Annabelle Ewing:** Well, yes—they would be exempt from UK income tax. That would be the normal position with respect to international organisations founded by international treaty that have an immunities and privileges protocol as part of their conditions of membership. That would be the case for British nationals working in other relevant member states—contracting parties of the organisation—so the benefit would not be applicable uniquely to British nationals or others working in the UK but would be applicable *erga omnes* to nationals of the contracting parties working to further the ESO's functions and within the limits of their authority.

**John Finnie:** Will you confirm that the exemption from the law relates to the civil and the criminal law?

**Annabelle Ewing:** Yes, it is both. Immunities and privileges under international law and international convention are deemed to be a functional necessity but they are not to go wider than is necessary to secure the objective of functional necessity.

In the instant case, immunity would apply in principle to the civil and the criminal law but it is limited by the important caveat that the immunities and privileges kick in only in the circumstances where the individual is exercising the functions of the international organisation concerned—in this case, the ESO—and acting within the limits of their authority. Therefore, in practice, I guess that we would be looking at white-collar crime, if that. As I said to Mr Stevenson, officials of international organisations are required to obey the laws of the host country, and it is therefore easy to see what offences under the criminal law could never be further to the privileges and immunities laid down in the protocol—for example, assault and other crimes of that type. However, white-collar crime might fall within the scope of the immunities and privileges.

**John Finnie:** Who would determine that?

10:15

**Annabelle Ewing:** As far as I understand, where the issue of immunities and privileges arises, there is a process that would be followed, and that is how matters would proceed as part of how the privileges and immunities work across all the contracting parties. However, the actual scope of the protection is limited to where someone is carrying out their job and the limits of their authority, and they are still required to obey the law of the host country.

**John Finnie:** Who would determine that, though?

**Annabelle Ewing:** It depends on what scenario you are talking about. If the person were charged with a serious assault, it would be quite clear that the charges would proceed in the normal way. However, I imagine that there would nonetheless be some process of notification, further to a privileges and immunities scenario, and that would be the case for all organisations that have a privileges and immunities protocol underpinning their membership. That is how international organisations, including the United Nations, have developed over many decades thus far, and that is the accepted position.

There have been high-profile cases, for example in the United States, where diplomatic immunity—and what we are talking about is at a lesser level than diplomatic immunity under the Vienna convention—has come up against the law of the relevant country where the official has been working. The immunity that we are discussing in this case, which is what the order is intended to correct, does not confer diplomatic immunity per the Vienna convention. Rather, it confers a particular protection where someone is carrying out the functions of their job within the limits of their authority.

**John Finnie:** So it places no restriction on access to premises, as applies in other orders.

**Annabelle Ewing:** I am not quite sure what you mean by access to premises.

**John Finnie:** In other orders, there has been a phrase about inviolability.

**Annabelle Ewing:** You mean the inviolability of residence. That is equivalent to the protection of comparable ranks under the Vienna convention, where the protection that was bestowed was deemed to be in excess of what was required under the protocol, in the event that it concerned a British national. That has not been the case because, for this one post, the director general of the ESO or the person authorised to act in his or her stead has been a Dutch national. That person was appointed in 2007 and the protocol came into effect in the UK in 2012, so there has not been

any practical issue as a result of the way in which the initial order was drafted. However, that is not the level of privileges that will now be applicable where the person concerned is a British national, which is what the order is intended to correct.

**John Finnie:** So it is just a civil law exemption, a criminal law exemption and an exemption from taxation, but it is not a question of the inaccessibility of premises.

**Annabelle Ewing:** The order is intended to correct the position only in those circumstances where the person is a British national. The way in which the previous order was drafted extended the level of privileges further than the protocol determined, and that is what this order is trying to correct. If a future director general were to be a British national, immunity would apply in those circumstances, and there would be no inviolability of premises.

**John Finnie:** There has been no consultation on the order, and no impact assessment.

**Annabelle Ewing:** I am advised by my officials that it was viewed as a technical amendment. The initial order was in place and this order is designed to correct the provision that I have referred to.

**John Finnie:** You said that 40 to 50 people in the ESO will be affected. What will be the cumulative effect in Scotland of all those who have that level of immunity granted to them?

**Annabelle Ewing:** Do you mean in relation to the ESO or to all such organisations?

**John Finnie:** I mean in relation to all such organisations in Scotland.

**Annabelle Ewing:** I do not have information about how many individuals work for treaty-based international organisations that have protocols of immunities and privileges. It would require a particular job of work to ascertain, first, which international organisations that meet that description have operations in Scotland; secondly, how many people work for them in Scotland; and thirdly, how many of those people are Scottish and UK nationals. I do not have that information.

**John Finnie:** Finally, no business and regulatory impact assessment has been done on the order, notwithstanding that it was, in the first place, financial matters that brought to light the need for the order.

**Annabelle Ewing:** I am advised by officials that the UK order that dovetails with the Scottish order that is before the committee is correcting the previous erroneous UK order that suggested that the tax exemption entitlement could not be extended to British nationals in the ESO. The UK order has jurisdiction because it deals with reserved tax matters, whereas the Scottish order

deals with circumstances in which, at some future date, the director general of the ESO—or a person who is authorised to act in his or her stead—might be a British national. That is the extent of the legislative reach of the order that is before the committee today.

**The Convener:** I appreciate that you are talking specifically to the order, but can you clarify whether, if additional taxation was accrued on taxable income that was earned outwith the exercise of the functions of the ESO, it would be payable?

**Annabelle Ewing:** Yes. In normal circumstances such tax would be payable. You have to look at what the privileges and immunities are focused on, which is people who are exercising their function in work for that organisation, where they are acting within their authority. That is why I said that the exemption would, in normal circumstances, apply primarily to income tax. We will write to the committee and respond to Mr Finnie's supplementary question.

**The Convener:** Okay. Thank you. Do you want to make further comments, minister?

**Annabelle Ewing:** No.

**The Convener:** Agenda item 2 is formal consideration of motion S5M-04479. The Delegated Powers and Law Reform Committee has considered and reported on the instrument and has made no comment on it. The motion will be moved, then there will be an opportunity for formal debate, if necessary.

*Motion moved,*

That the Justice Committee recommends that the International Organisations (Immunities and Privileges) (Scotland) Amendment Order 2017 [draft] be approved.—  
[Annabelle Ewing]

**The Convener:** Do members want to speak?

**John Finnie:** I think that it is just you and I, convener, who will recall that in the previous session we were in a similar position with an order on the Asian Infrastructure Investment Bank. At that time, I expressed some surprise. I absolutely understand the long-standing international convention, but it seems to me to be a bizarre situation when Government ministers who represent legal departments come here to exhort us to exempt people from civil and criminal liability and, indeed, from taxation. There is no way that I will lend my support to the order.

**The Convener:** Are there any other comments?

**Annabelle Ewing:** I want to respond briefly to Mr Finnie's point. First, the order will merely correct a previous order in Scotland. Its reach, as I said, covers the specific instance of the director general of the ESO being a British national.



However, there has been a long-standing debate on the extent of privileges and immunities that international organisations rely on in order to be—in their view—as effective as possible, and on the reach of the national law of the host country. It is always a balancing act. I have tried to explain that the balance is such that, in general circumstances, people in such organisations are required to obey the law of the host country, but will, nonetheless, have some privileges and immunities. That is a balancing act that international contracting parties have worked on over many decades. The feeling that underpins the debate is that such privileges and immunities are necessary in order to protect the integrity of the international organisation in question, as far as its workings in a particular country are concerned and, in particular, in circumstances in which political developments in a country could, for various reasons, put at risk individuals' reasonable expectation that they have the right to carry on their peaceable residence and employment. That is the thinking behind the existence of privileges and immunities in international law, although I accept that there must always be a balancing of interests.

**The Convener:** No one else wishes to contribute to the debate, so we will move straight to the vote.

The question is, that motion S5M-04479, in the name of Annabelle Ewing, be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

#### For

Evans, Mairi (Angus North and Mearns) (SNP)  
 Fee, Mary (West Scotland) (Lab)  
 MacGregor, Fulton (Coatbridge and Chryston) (SNP)  
 Mackay, Rona (Strathkelvin and Bearsden) (SNP)  
 Macpherson, Ben (Edinburgh Northern and Leith) (SNP)  
 McArthur, Liam (Orkney Islands) (LD)  
 Mitchell, Margaret (Central Scotland) (Con)  
 Ross, Douglas (Highlands and Islands) (Con)  
 Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)  
 Stewart, Alexander (Mid Scotland and Fife) (Con)

#### Against

Finnie, John (Highlands and Islands) (Green)

**The Convener:** The result of the division is: For 10, Against 1, Abstentions 0.

*Motion agreed to,*

That the Justice Committee recommends that the International Organisations (Immunities and Privileges) (Scotland) Amendment Order 2017 [draft] be approved.

**The Convener:** That concludes our consideration of the order. The committee's report will note and confirm the outcome of the debate, and the fact that the minister is to supply further information to the committee. Are members

content to delegate to me, as convener, the authority to clear the final draft of the report?

**Members indicated agreement.**

**The Convener:** I thank the minister and her officials for attending, and I suspend the meeting briefly to allow them to leave.

10:26

*Meeting suspended.*

10:27

*On resuming—*

### **Act of Sederunt (Fees of Solicitors in the Court of Session and Sheriff Court Amendment) (Pursuers' Offers) 2017 (SSI 2017/53)**

### **First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Amendment Regulations 2017 (SSI 2017/68)**

### **First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017 (SSI 2017/69)**

**The Convener:** Agenda item 3 is consideration of three instruments that are subject to negative procedure. I refer members to paper 2, which is a note by the clerk.

The Delegated Powers and Law Reform Committee has considered and reported on all three instruments and has made no comment on them. Members have no comments. Does the committee agree that it does not wish to make any recommendations on the instruments?

**Members indicated agreement.**

**The Convener:** Excellent. Thank you.

## Justice Sub-Committee on Policing (Report Back)

10:28

**The Convener:** Agenda item 4 is the consideration of feedback from the Justice Sub-Committee on Policing on its meeting on 30 March. I refer members to paper 3, which is a note by the clerk. I invite Mary Fee to provide feedback from the sub-committee.

**Mary Fee (West Scotland) (Lab):** On 30 March, the Justice Sub-Committee on Policing took evidence from the Auditor General for Scotland on the review of the i6 programme. It heard that it is critical that the Scottish Police Authority and Police Scotland now put in place a plan that sets out how the benefits that i6 was supposed to deliver will be secured. That is particularly important, given the emphasis on use of technology in the recent "Policing 2026" draft strategy.

The next meeting of the sub-committee is scheduled for Thursday 20 April, when it will take evidence from the Scottish Police Federation, from the Association of Scottish Police Superintendents and from Unison on the financial planning of Police Scotland and the SPA. As ever, members are welcome to attend.

I will be happy to answer questions.

**The Convener:** As members have no questions, we will move into private session. The next committee meeting will be on 25 April, when we will consider our draft stage 1 report on the Railway Policing (Scotland) Bill. I ask that the gallery be cleared.

10:29

*Meeting continued in private until 12:28.*

This is the final edition of the *Official Report* of this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

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