JUSTICE 1 COMMITTEE

Wednesday 16 May 2001
(*Morning*)

Session 1

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JUSTICE 1 COMMITTEE
† 15th Meeting 2001, Session 1

CONVENER

*Alasdair Morgan (Galloway and Upper Nithsdale) (SNP)

DEPUTY CONVENER

Gordon Jackson (Glasgow Govan) (Lab)

COMMITTEE MEMBERS

*Phil Gallie (South of Scotland) (Con)
*Maureen Macmillan (Highlands and Islands) (Lab)
*Paul Martin (Glasgow Springburn) (Lab)
*Michael Matheson (Central Scotland) (SNP)
*Nora Radcliffe (Gordon) (LD)

*attended

WITNESSES

Dr Alastair Brown (Crown Office and Procurator Fiscal Service)
Keith Connal (Scottish Executive Freedom of Information Unit)
Stuart Foubister (Office of the Solicitor to the Scottish Executive)
Maurice Frankel (Campaign for Freedom of Information)
Michael Lugton (Scottish Executive Constitutional Policy and Parliamentary Liaison Division)

CLERK TO THE COMMITTEE

Lynn Tullis

SENIOR ASSISTANT CLERK

Alison Taylor

ASSISTANT CLERK

Jenny Goldsmith

LOCATION

The Chamber

† 14th Meeting 2001, Session 1—joint meeting with Justice 2 Committee.

Scottish Parliament

Justice 1 Committee

Wednesday 16 May 2001

(*Morning*)

[THE CONVENER *opened the meeting at 09:02*]

The Convener (Alasdair Morgan): I remind members to turn off their mobile phones and pagers. I also remind members that stage 3 of the Convention Rights (Compliance) (Scotland) Bill is now set for 30 May and that amendments can be lodged until 4 pm on 23 May.

I welcome those who are attending the meeting as part of the Parliament's staff open week. Members of departments in the Parliament have been invited to go round and see the work of the committees. I hope that they enjoy the meeting. I am sorry that the committee members appear to be anonymous at the moment, but we shall try to ensure that nameplates are put in place as soon as possible.

Draft Freedom of Information Bill

The Convener: We shall take evidence today from Executive officials on the draft freedom of information bill. Those officials are are: Michael Lugton, head of constitutional policy and parliamentary liaison; Keith Connal, head of the freedom of information unit; Stuart Foubister, head of the Executive secretariat solicitor's division; and Dr Alastair Brown, from the policy group at the Crown Office and Procurator Fiscal Service. I understand that Mr Lugton wants to make a brief opening statement.

Michael Lugton (Scottish Executive Constitutional Policy and Parliamentary Liaison Division): We are grateful for the invitation to give evidence on the Executive's draft freedom of information bill. I shall not introduce my colleagues, as the convener has kindly introduced them already. I shall keep my opening remarks brief, as I do not want to eat into the time that will be available for questions and because, as the convener intimated, the committee intends to hear evidence from the Campaign for Freedom of Information in Scotland later this morning.

On 1 March, as the committee will know, the Deputy First Minister and Minister for Justice published a draft freedom of information bill for consultation and pre-legislative scrutiny. That followed an earlier consultation on proposals for freedom of information, which were set out in our consultation document "An Open Scotland". The draft bill reflects the document's main proposals and includes the harm test of substantial prejudice, the requirement in most circumstances that the public interest in disclosure should be considered and the appointment of an independent information commissioner. The draft bill also has a limited number of exemptions.

The consultation period on the draft bill ends on 25 May, and we are beginning to receive responses. As part of the consultation we have met, or have arranged to meet, a number of organisations that have a particular interest in the topic. The organisations include the Campaign for Freedom of Information, Friends of the Earth Scotland, the Scottish Consumer Council, the three statutory equality bodies and officials of the Scottish Parliament.

We have taken part in a seminar that was co-hosted by the Scottish Consumer Council and the Campaign for Freedom of Information and in another seminar that was hosted by the Convention of Scottish Local Authorities and the National Archives of Scotland. Those meetings have helped us to firm up our thinking on the subject. We recognise that consideration of the details of the bill will need to await the formal

scrutiny stages following the bill's introduction. However, my colleagues and I will be happy to try to answer any questions that the committee might have at this stage, or to provide responses in writing.

The Convener: Thank you. What time scale do you envisage for the bill's introduction?

Michael Lugton: The First Minister intimated his intention to introduce the bill during this calendar year, and that is still our plan. The consultation exercise might throw up points that will take longer to consider than was planned, but all being well, we hope to introduce the bill in the autumn. Subject to its progress through Parliament, it should be presented for royal assent by spring 2002.

The Convener: Has the drafting process been assisted by the fact that the Freedom of Information Act 2000 is on the statute book of the UK? Have some of the wrinkles been ironed out of the process as a result?

Michael Lugton: My legal colleague might want to comment on that. We have tried to develop a bill that is appropriate to Scottish needs and circumstances. Equally, we have tried not to reinvent the wheel. That means that, where the UK act seems to us to be fit for a purpose, we have looked to it in the preparation of our bill.

Stuart Foubister (Office of the Solicitor to the Scottish Executive): Michael Lugton has rightly said that what we are doing is different to the UK act in a number of respects. The fact that an act has been passed at Westminster in the very recent past means that many of the issues have been considered. It would be incorrect to say that the UK act has not been of considerable help to us.

The Convener: I understand that the Westminster act will be phased in. Does that affect what we do with our bill, assuming that it becomes an act? Will it also be phased in and must the two phasings be synchronised to any extent? Would they stand independent of each other?

Michael Lugton: There is no statutory constraint on us in the UK act, nor will our act put any statutory constraint on the UK authorities. However, everybody acknowledges that it makes sense for us to try to march in step as far as possible. We will develop our implementation programme, bearing in mind the planned programme for implementation in the south. We will not synchronise the two exercises absolutely, but it makes sense to try to co-ordinate them as much as we can.

The Convener: Does Michael Lugton envisage problems with the working of the two acts when they are implemented in full? Authorities in Scotland might well hold information that has been passed to them by the UK authorities. The UK authorities will assume that that information is covered by the UK act with its different provisions.

Michael Lugton: Statutory provisions are in place to provide for the extent to which the Freedom of Information Act 2000 covers information that is passed to Scottish public authorities. I ask Keith Connal to elaborate slightly on those provisions.

Keith Connal (Scottish Executive Freedom of Information Unit): Schedule 5 to the Scotland Act 1998 was amended in summer 1999 to give the Scottish Parliament competence to legislate on access to information. As part of that amendment, a provision was included to remove from the ambit of the Scottish legislation any information that was passed by a minister of the Crown or by a UK department to be held in Scotland in confidence. It is in the UK Government's gift to decide whether to retain under its legislation the decisions on disclosure of information that it might pass to us in confidence. In all other respects, the Scottish Parliament's competence applies to all information that Scottish bodies hold.

The Convener: Are structures in place in the civil service and in other bodies to determine which information falls under which category? What would happen if, some years down the line, the origin of information was not clear?

Keith Connal: That is a good question. As the Freedom of Information Act 2000 is implemented UK-wide, and as the bill on freedom of information is implemented in Scotland, procedures will be developed to make it clear which information must be protected, such as that which is supplied in Scotland under the UK act. We will have to address that administrative issue.

The Convener: Are the functions of the Scotland Office covered by the UK act or will they be covered by the Scottish act?

Keith Connal: As a department of the UK Government, the Scotland Office is covered by the Freedom of Information Act 2000.

Nora Radcliffe (Gordon) (LD): I would like to clarify one aspect of what you said. When you say that information is passed to be held in confidence, does that mean that it will have formally to be identified as information that the UK Government wishes to be held in confidence? If no such marker were on the information, would it be presumed that it did not need to be held in confidence, or would the presumption go the other way?

Keith Connal: The presumption will rely on a clear indication that information is to be treated in that manner.

Nora Radcliffe: So the UK Government will have to flag up the information. If it hands over information that it wishes to be kept confidential, it will have to say so.

Keith Connal: That is correct.

Maureen Macmillan (Highlands and Islands) (Lab): The consultation paper "An Open Scotland" proposed three charging schemes, but you seem to have opted for just one. The consultation paper said that authorities might have discretion to charge applicants up to 10 per cent marginal cost of locating and disclosing information and that they might charge for postage and other matters. It was suggested that the maximum charge would be about £50, which seems fairly reasonable. However, you seem to have opted for letting the first £100 charge be waived. After that, the full cost would be charged, which could add up to a considerable amount of money for some people. You also rejected the option of a flat rate of £10. Why did you choose the option that seems to cost people most?

Keith Connal: I will try to answer that question, but I should say that ministers went on record during the Parliament's debate on 15 March to say that the Executive has received several responses and comments on that matter and that ministers will revisit the proposals. The responses to "An Open Scotland" that we received on that issue were varied, but there was a consensus for the second option.

The experience under the present non-statutory code of practice on access to Scottish Executive information, which operates a charging regime broadly along the lines that will be proposed in the draft bill, shows that the vast majority of requests fall under that lower threshold of £100. In setting out the draft bill, ministers were keen to retain the principle that there should be a lower threshold below which there would be no charge.

The other result of the first consultation was that it became obvious that any charging proposals that relate to freedom of information cannot satisfy the interests of both the applicant and the public authority. The proposal on option 2, which is what we currently operate, seeks to balance the provision of information at no cost under the lower threshold of £100 with the need to allow local authorities to recover some costs for requests that would involve significant effort.

09:15

Maureen Macmillan: It seems, however, that should one breach the fairly arbitrary £100 limit, the costs that would be incurred could be expensive. I appreciate what you say about the vast majority of requests costing less than £100. We all want to ensure that, when the system is put in place, people are not disadvantaged any more than necessary.

Will the proposed charging scheme make provision for exceptional cases? For example, will information formats be provided for those who have sensory impairments? Such provision would cost more money, but that cost should be waived rather than being included in the price.

Keith Connal: The details of the charging regime will be set out in regulations, so some of the points that Maureen Macmillan makes have not been fully thought through in relation to the draft bill, but we will take note of the points that she makes. In any event, it is proposed that the charging be discretionary and that a public authority would not be obliged to raise charges. We received representations from equality bodies on existing statutory obligations other than those that relate to freedom of information matters, which might levy on local authorities a duty to make information available in certain formats. However, that will not be a matter for freedom of information legislation, but for existing equality legislation.

Maureen Macmillan: Factors such as the Disability Discrimination Act 1995 and the European convention on human rights will have to be taken into account, I presume. Is that correct?

Keith Connal: Yes.

Maureen Macmillan: Under the current proposal, will there be a difference in the charging regime if a request is made to a devolved public body, rather than to one that deals with reserved matters?

Keith Connal: The proposed charging scheme in the draft bill would be applied by Scottish public authorities operating under the Scottish act. However, the UK Government has said that it will introduce a differing charging scheme for UK public authorities; that is the scheme that will apply when requests are made to those bodies.

Maureen Macmillan: Will not that be a bit confusing?

Keith Connal: It would not confuse the applicant, who would simply request information. Each sort of public authority would operate only one act.

Maureen Macmillan: Might a member of the public not realise that information that he or she requested from the Scottish Executive would cost a different amount from information that was requested from the Scotland Office?

Keith Connal: That might be the result of different charging proposals. Although the United Kingdom Government has not set out such matters under regulation, it has said that it will

adopt a 10 per cent approach. That would mean that applicants could be charged from the outset.

Maureen Macmillan: It strikes me that the 10 per cent charge would probably cost people a lot less than what is proposed.

Keith Connal: I agree that that would be the case for requests that incur significant effort in searching and retrieving information.

The Convener: Let us consider some definitions in the bill.

Nora Radcliffe: We have talked glibly about a public authority, but it is important to define what we mean by that. For example, would Kilmarnock prison, which exercises a public function, be considered as a public authority under the bill? How would you define "public authority"?

Michael Lugton: I will ask my colleague, Mr Foubister, who has been involved in the drafting of the bill, to deal with that point.

Stuart Foubister: Section 3 of the draft bill sets out three categories of Scottish public authority, the most sizeable of which will be named under schedule 1 of the bill. There is a substantial list under the draft bill, although we are examining the details of that list to see whether there are omissions.

The simplest category is a publicly owned company, which is any company that is wholly owned by a public authority that is listed under schedule 1 of the bill. A company that is wholly owned by Scottish ministers, for example, would be a Scottish public authority.

The third and perhaps trickiest category concerns those bodies that can be designed by order under section 5(1). They could be mixed public-private companies. A private body that carries out public functions under contract will be listed in an order. We must develop our thinking about exactly which bodies should be listed by order. However, there is a power under the bill to list any private body that carries out public functions, so that the information that it holds in connection with those functions is subject to the freedom of information regime.

Nora Radcliffe: Why does the bill not contain a list of all those bodies that are not covered by the bill—with all those not listed therefore within the scheme by default—rather than a list of bodies that are covered by the bill?

Stuart Foubister: That is an attempt to clarify matters. We could have adopted the generic phrase "Scottish public authority" and it is possible that the majority of bodies that would fall into that category would be clear. However, the closer to the edges one gets, there less clarity there is. The list under schedule 1 will not be fixed for all time. The bill will include powers to vary it, by deleting bodies as they cease to exist and by adding bodies that come on stream or were omitted in the first instance, but which after consideration were thought worthy of inclusion.

Michael Matheson (Central Scotland) (SNP): Will the Scottish Prison Service be classed as a public authority?

Stuart Foubister: The Scottish Prison Service does not have a legal identity of its own. The phrase "Scottish ministers" will cover the service. It is an agency.

Michael Matheson: In short, the Scottish Prison Service will not be classed as a public authority.

Stuart Foubister: It will not be listed, but it will be a public authority because it is functions are controlled by Scottish ministers.

Michael Matheson: Does that mean a company that contracts to service Kilmarnock prison, for example, will be classed as a public authority?

Stuart Foubister: The body that runs Kilmarnock prison, which is essentially a private entity, would be capable of designation under section 5(1).

Michael Matheson: Is Kilmarnock prison designated in the bill as a public authority? I am not asking whether it is capable of being designated.

Stuart Foubister: It is not designated under schedule 1.

Michael Matheson: Kilmarnock prison is not listed as a public authority, but all other Scottish prisons will be under the designation of the minister.

Stuart Foubister: A prison is not an authority, as such. However, in so far as prisons are operated directly by the Scottish Prison Service, they are covered.

Michael Matheson: Are you saying that other prisons will be covered by the bill, but that Kilmarnock will not?

Stuart Foubister: It will not be covered in the initial listing of the bill. The approach under schedule 1 is to list public authorities. If a private authority is exercising public functions, the bill will deal with it by a designation order.

Michael Matheson: As the bill stands at the moment, however, Kilmarnock prison is not designated.

Stuart Foubister: That is correct.

Phil Gallie (South of Scotland) (Con): I would like to press for clarification on that point. Surely Kilmarnock prison runs under contract to the

Scottish Prison Service and operates with responsibilities to the Scottish Prison Service. As such, apart from commercial interests in the prison, all affairs that affect prisoners and the sentences that they serve would, as matters of public concern, be covered by the bill.

Stuart Foubister: The approach is to list the bodies or legal persons. I imagine that an awful lot of the information that relates to Kilmarnock prison will be in the hands of Scottish ministers. If that is the case, it is absolutely part of the FOI regime. If there is information that is held only by the private body and not by Scottish ministers, the accessibility of that regime will depend on whether the private body is designated by order in due course.

The Convener: If the firm that runs Kilmarnock prison had passed information to ministers saying, "This is commercially sensitive information, which we are giving you in confidence", I presume that that would not be covered by the act, but would be exempt. Is that the case?

Stuart Foubister: There are exemptions for commercially confidential information and for confidential information. However, it would be a misconception to suggest that all that a body such as the one that runs Kilmarnock prison has to do is to say that it thinks that information is confidential, and pass the information across on that basis. That is not a sufficiently objective test.

The Convener: Are you saying that the commissioner could override that?

Stuart Foubister: I am saying that, in those circumstances, that information would not be exempt in the first place. However, if Scottish ministers took the view that the information was exempt, that decision would be subject to review by the commissioner.

Michael Lugton: I would like to add to what Mr Foubister has said. The designation of private companies that carry out public functions must obviously be considered case by case. As Stuart Foubister explained, they are not listed in schedule 1, but there is a power to designate them by order. From the point of view of FOI policy, it is still early in the process, and we have not yet given detailed consideration to specific private finance initiative projects. It is clear that companies that are involved in major PFI projects that are delivering important public services—Kilmarnock Prison Services Limited comes into that category—are the kind of projects that we would expect to be included in the scope of the legislation.

Members might want to pursue that issue with the Deputy First Minister and Minister for Justice when he appears before the committee on 30 May. However, the general message that I want to give is that we take the point that the committee is interested in the issue.

The Convener: We shall take up your invitation to quiz the minister on that matter.

Phil Gallie: What additional information could the bill draw out of any of the prisons, including Kilmarnock prison, that would not come through the inspector of prisons' report?

Michael Lugton: The legislation creates a right of access for the first time. At the moment, we operate under a non-statutory code of practice. The ministers attach particular importance to creating a statutory right of access to information, and that access will be constrained only by express exemptions in the act.

As for the difference that it will make, I hope that we are operating an accessible system of provision of information under the present code. It is an arguable case that introducing legislation will not make a significant difference to the amount of information that can be released. However, members of the public have the assurance that they will have a statutory right of access and will have recourse to the information commissioner if they are not happy with the response of the public authority concerned. The distinction to draw is between a non-statutory code that is operated informally and internally, and a statutory code that has an independent and powerful commissioner and a limited ministerial veto.

Phil Gallie: At the present time, the reports of HM chief inspector of prisons are usually thorough. No attempt has been made to cover up any issue or to keep information from the public.

09:30

Michael Lugton: I am not sure that we are well qualified to speak for HM chief inspector of prisons. People may consider that the reports do not cover issues on which they would like information. At present, people can ask for information under the terms of the code, but when the bill is enacted, they will have recourse to the law.

Nora Radcliffe: What criteria have been used to define which bodies should be covered by the bill?

Stuart Foubister: At present, schedule 1 should be viewed as a list for consultation. We hope that we have covered the majority of genuine public authorities within the competence of the Parliament. I hope that all the main non-departmental public bodies are covered. I am not aware of a conscious decision to leave out bodies of any note. There might be issues of de minimis with small advisory bodies, but the list is fairly extensive.

Michael Lugton: I endorse what Stuart Foubister said. We are not trying to exclude any part of the Scottish public sector about which the Parliament has the competence to legislate. If members of the committee think that we have, we shall be glad to be made aware of the gaps because we shall want to consider filling them. We have no agenda to leave out authorities. The regime should not be selective in any way.

The Convener: Why did you not list the bodies that would be excluded? That would have been easier than thinking of all the possible bodies from which you might want information and risking accidentally missing one out. It is like the Scotland Act 1998 as opposed to the Scotland bill of 1997, and the approach to devolved matters—the way in which they were listed and how they were changed.

Michael Lugton: The act will give the Executive the power to extend the list by order. A fair degree of flexibility will be built into the system

Michael Matheson: Schedule 1 lists the various Scottish public authorities that will be covered. It is impressive and goes from the Strathclyde Passenger Transport Authority to the Scottish Agricultural Wages Board. Why is the Scottish Prison Service not included?

Stuart Foubister: It is. You are correct that the name is not listed, but that is a matter of legal identity. The Scottish Prison Service has no legal identity. It carries out the functions of Scottish ministers. The same applies to the Scottish Executive rural affairs department.

Michael Matheson: Is that the same for the national health service?

Stuart Foubister: We have looked at the legal personalities involved in every instance. I appreciate that the list could seem misleading because it does not include bodies such as the Scottish Prison Service. The appropriate analysis is that the legal body and the service are covered under the name of the Scottish ministers.

Michael Matheson: I understand that the Scottish Prison Service is covered by the Scottish ministers. However, various authorities listed in the schedule are covered by the Scottish ministers, too.

Stuart Foubister: We do not agree.

Michael Matheson: What about the national health service? Would not that be covered by Scottish ministers?

Stuart Foubister: No, it has a separate legal identity. National health service boards and trusts are legal persons. The Scottish Prison Service is not a legal person.

Michael Matheson: So a quango such as the Scottish Prison Service will not be included.

Stuart Foubister: The Scottish Prison Service is not a quango.

Michael Matheson: Given its non-Executive role, it will not be included.

Stuart Foubister: The Scottish Prison Service has no legal identity, aside from the Scottish ministers.

Phil Gallie: Michael Matheson mentioned quangos. Recently, there has been a massive escalation of Government bodies that are not necessarily responsible to ministers, but stand in their own right. Can Mr Foubister assure me that all the quangos in Scotland are contained in the list? If not, will he explain why?

Stuart Foubister: I shall reiterate what I said earlier. The list is for consultation. Having been involved in the drafting of the bill, I am not aware of a conscious decision to leave out a quango. However, I would not like to say, hand on heart, that each quango is covered because I am not sure that there is an exhaustive list.

Phil Gallie: Given that answer, is there a danger in presenting a list if one is not sure that it contains all the appropriate bodies?

Stuart Foubister: There is much to be said for the clarity of listing bodies. If an omission is made, the list can be rectified at a later date. The words "Scottish public authority" would leave a lot of doubt about what bodies are covered.

Paul Martin (Glasgow Springburn) (Lab): Will Stuart Foubister clarify that quangos are funded by the devolved Parliament?

Stuart Foubister: Yes, devolved quangos are funded by the Executive.

Paul Martin: Surely we have a comprehensive list of those quangos if they are funded by the Scottish Parliament?

Stuart Foubister: That depends on what you mean by "quango".

Paul Martin: Am I correct in assuming that all non-departmental public bodies are funded by the Scottish Parliament?

Stuart Foubister: Some advisory committees may still be regarded as quangos. I am not sure that the funding will necessarily come direct in such circumstances.

Paul Martin: I am trying to clarify whether there is a list of non-departmental public bodies. There must be.

Phil Gallie: They are set up too quickly to keep count.

The Convener: It is probably a classified list.

From what I have heard, I am convinced that it would be far better to have a list of bodies that are exempt, instead of a list of bodies to be included. The inertia factor suggests that, when the bill is enacted, the inclination to change schedule 1 would not happen often. If the boot were on the other foot and a body that was not exempt had to argue for exemption, it would have to put forward a fairly strong case and the balance would be in favour of freedom of information.

Stuart Foubister: The phrase "public authority" is not clear. It is used in the Human Rights Act 1998. Legal journals are full of analyses of what is and what is not a public authority, hence "any Scottish public authority" lacks clarity.

Keith Connal: I would like to assist and say why we have taken such an approach. Schedule 1 of the United Kingdom Freedom of Information Act 2000 has 16 pages of bodies that are covered by the act. We may have to have that list in the Scottish bill if we adopt the method of listing those bodies that are not covered. There would be the same difficulties of determining whether the list of bodies not to be covered was as complete as a list of those bodies that are to be covered. We are attempting to clarify those bodies to be covered by the bill.

We take on board the fact that we may, in notes accompanying the bill, have to point out what is covered by Scottish ministers and explain that bodies that do not have a legal identity would be caught because they are part of the legal entity that is the Scottish ministers. We can certainly provide such an explanation to assist a layman's understanding of the bill.

Nora Radcliffe: It would be important for people to have additional guidance when using the act. The requirement to be a legal entity does not immediately leap to mind. We would expect to see the name of a body if it exists. We do not regard it as not existing in a legal sense.

Michael Lugton: One of the points that we are picking up through you, convener, is that some umbrella terms, such as "the Scottish ministers", understandably raise uncertainty in people's minds. Stuart Foubister has explained the legal justification for taking such action and I entirely support what he said. However, we have a responsibility to accompany the bill with a clear list of precisely which bodies will be covered, and an explanation of the way in which to add to the list, so that Parliament can consider the coverage of the legislation.

Nora Radcliffe: It would be helpful to know how quickly bodies could be added to the list. Will such a procedure be straightforward? How long will it take?

Michael Lugton: I understand that the process would be based on subordinate legislation passed by Parliament, which would need to agree to the addition of a body. The legislation may be subject to the negative procedure. There should not be a particular delay. If it were obvious to all concerned that a body should be added to the list, there is no reason why an order could not be brought forward quickly and, assuming that Parliament agrees, that body could be included without delay.

Stuart Foubister: The negative procedure is the quicker of the two subordinate legislation procedures.

Maureen Macmillan: I am still worried about the confusion in public minds between quangos and Executive agencies. If people do not see the Scottish Prison Service on the list, they will assume that they are not allowed to ask it for information. There should be a list of Executive agencies with the instruction that if people wish to access information from them, they apply to Scottish ministers.

Michael Lugton: It would be helpful if I drew a distinction between the act and the guidance on it. We do not expect that members of the public who want access to a specific body will need to refer to the act. There is a substantial task ahead of us in preparing public bodies for the new regime, which will include the delivery of information to the public. The information commissioner will have an important role to play, too. There is no intention to make matters unclear to people who want information from a certain body. They need to know which bodies are covered by the act and we need, proactively, to ensure that that information is in their hands.

Michael Matheson: As for those organisations that have no legal definition, can you provide a list of them for the committee? I am conscious that we want to ensure that it is available to members of the public when the bill is enacted, but we have a responsibility to consider such organisations while the bill is being scrutinised.

Michael Lugton: Yes.

Nora Radcliffe: Definitions are always tricky. The consultation paper defines information as recorded information, which is not the same as information held. How will unrecorded information be treated?

Keith Connal: The bill will cover information held in permanent recorded form, either electronically or on paper, to distinguish between that and, for example, recollections in the mind of a public official which are not recorded.

Nora Radcliffe: So anything that is written, stored electronically or in tangible form is information by definition.

Keith Connal: That is correct. For further

clarification, I inform the committee that we have not defined all the formats in which information could be recorded. We did not think that that would be helpful. If we describe particular electronic formats and so on, something may be excluded. The definition of "in recorded form" is broad.

09:45

Nora Radcliffe: It is important to clarify that.

How is the public interest to be defined? Is the Executive considering defining it in the bill?

Keith Connal: I may ask Stuart Foubister to ensure that I do not commit a heinous crime by committing the legal service to defining such a term. It is not common practice to define in legislation terms such as "the public interest". It is deliberately left to the discretion and consideration of judges—or, in our case, the Scottish information commissioner—to determine the public interest, given the circumstances of the case, the nature of the information being requested and various other factors, rather than set in stone one set of factors that would, for ever more, define and bound what is meant by the public interest.

Stuart Foubister: I do not have much to add. The term "public interest" does not crop up many times in statute. I have not heard of an attempt to define it. I do not know how one would begin to define it in statutory terms. It has an element of subjectivity. What matters is who is testing the term and I think that that is the role of the courts.

The Convener: We shall not have enough time to cover as many areas as we wish. Does Phil Gallie want to ask about the costs?

Phil Gallie: Has the Executive assessed the cost implications of the proposals?

Michael Lugton: Only in broad terms. The United Kingdom Government has estimated the cost as £6 million per annum. From that figure, we can roughly estimate what the scheme may cost in Scotland. We are working on the figures at the moment, but much will depend on the rate of take up and the office that the commissioner decides he needs. We have started to give detailed consideration to that. The commissioner will be a creature of the statute, which has not yet been passed, so it is a little early to make detailed estimates of the costs. However, given the costs in the United Kingdom and Ireland, we know what may be involved.

Phil Gallie: I am still not clear about the cost. What was the figure for the United Kingdom as a whole?

Michael Lugton: It was £6 million.

Phil Gallie: Did you say £50 million?

Michael Lugton: No, £6 million for the office of commissioner.

Phil Gallie: Will the figure for Scotland be about £1 million?

Michael Lugton: If we operate along the lines of a comparable office here, costing 10 per cent of that figure, and take into account the fact that the Irish commissioner had a budget of £300,000, we are talking about a figure between £300,000 and £1 million.

Phil Gallie: What reasons would be acceptable, where there is failure to provide specific information to the public on the grounds that gathering that information would prove too costly?

Keith Connal: I think that Mr Gallie is referring to the upper cost limit that is proposed in the draft bill. It is intended that public authorities could charge for search and retrieval of information and for reasonable dispersement costs, but not for the time that is taken to consider whether information is disclosable. It is fair to say that it would take a significant request to breach that upper threshold; a public authority would have to expend significant resources on search and retrieval for the request to incur costs of more than £500, if that is to be the upper limit. As with the present situation, we expect that the vast majority of requests would not come anywhere near that upper threshold.

Phil Gallie: What about the stockpile of information? For example, the Scottish Executive has a large amount of information on criminal statistics. Sometimes, some of us would like to go a bit further to get that information in more detail, but, quite rightly, the Executive stands back and says, "To gather in all that information would require too much time and too much effort. It is just not feasible." The figure of £500 that you referred to will often be exceeded, just on gathering information.

Keith Connal: I note your point. It is difficult to anticipate how many cases would breach the limit, if it were set at £500.

Phil Gallie: Will any special arrangements be made for covering the costs of meeting special needs in the operation of the freedom of information regime? For example, will translation facilities be provided and will information be provided in different formats, so that a request that has a special-needs element is not declined on the ground that meeting it would exceed cost limits?

Keith Connal: My answer is similar to my earlier answer. From our discussions with the three statutory equality bodies, we are aware that there are concerns about those areas and we agreed with those bodies that we would consider them further. We also agreed that, in the first instance, public authorities must consider their existing

statutory obligations under, for example, the Race Relations (Amendment) Act 2000 and the Disability Discrimination Act 1995, in relation to whether alternative formats and so on should be provided. We will consider further the relationship between freedom of information—providing a right of access to information held—and the obligations of public authorities to comply with other equality statutes.

Phil Gallie: Okay—that is fine.

Michael Matheson: On that point, my understanding is that requests for information must be submitted in writing or by e-mail. However, individuals with certain disabilities are unable to comply with that requirement. Is consideration also being given to how such individuals can be enabled to make requests for information?

Keith Connal: Your point is well made. I do not have a straightforward or simple answer, other than to say, "Yes, we are looking at those issues."

We considered carefully whether to require requests to be made in writing, which is a common feature of FOI regimes worldwide. That provision not only serves the public authority but favours the applicant, because it provides a record in the event of a subsequent appeal. We will consider the measures that might be necessary for those who may be unable to submit a request in writing. However, that provision is not unique to FOI, because similar situations arise in relation to other legislation and, for example, when people apply for benefits. The Government already interfaces with people who may not be able to complete forms or submit requests in writing. We are not trying to use FOI to reinvent existing arrangements.

Michael Matheson: I am conscious that there may be similar problems with other legislation, but the draft freedom of information bill is new and creates an opportunity to right some of the problems that have been encountered with previous legislation. We should consider overcoming those problems positively, as opposed to simply considering them in the context of other legislation, which is rather negative. We have an opportunity to get it right and to set a standard.

Keith Connal: I note your point.

The Convener: We will have to draw our discussion to a close soon, because, unfortunately, we must also scrutinise the budget in our meeting with the Justice 2 Committee. We will take up other points with the minister.

I have a final question about the broader picture. How do we change the culture? Dr David Clark, who was the minister responsible for the first draft bill in the United Kingdom Parliament, said at one stage in a debate:

> "there is obsessive secrecy in Britain. Secrecy is almost endemic in senior levels of the civil service".—[*Official Report, House of Commons*, 7 December 1999; Vol 340, c 739.]

That may or may not be an exaggeration. Obviously, putting in place the legislation does not change the culture in public authorities. How do we do that? Do you have in mind any specific mechanisms or training courses to change the mindset of the people who will operate the legislation? Who will be responsible for that?

Michael Lugton: In the first consultation paper, we recognised the need for a change in approach and said that we would need to deal with that proactively. At that stage, we proposed that we should set up a group of senior officials to work through the implementation of a freedom of information act. We have done that, in the sense that we have set up an implementation working group, which met for the first time in February and will meet again in June. That group brings together people from throughout the Scottish public sector, not merely from the Executive. We see our role as educating our colleagues on the coming statutory regime and helping them to develop schemes for preparing their own organisations for the FOI regime.

That is one part of the exercise. The other is that we hope to have in place an information commissioner, who will play an important role in changing the culture, fairly soon after the bill is passed. The commissioner will be required to issue models for the publication schemes that every public authority will have to develop to release information proactively.

We fully accept that there is a job of work to be done in parallel with passing the bill. We have tried to make a good start on that. I believe that we have done that.

Maureen Macmillan: I hear what you say, but section 14(1) of the draft freedom of information bill says:

> "Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious."

That could be used to promote the culture of secrecy. Who will decide what is "vexatious"? Will officials be able to say that a request is vexatious and refuse it because they do not think that the applicant should have the information that they are requesting?

Michael Lugton: Initially, such judgments will have to be taken by the authority concerned, but the authority will do so against the background of an implementation programme that has tried to discourage officials from taking an unreasonable view of what might be vexatious. However, if an

applicant feels that an unreasonable view is being taken in a particular case, the commissioner can review the case. If the commissioner takes the view that the request is not vexatious, it is open to the applicant to pursue the matter further with the authority. The bill will build in mechanisms for dealing with unreasonable attitudes, if such attitudes are displayed.

Maureen Macmillan: Presumably, the official concerned would have to say why they thought that the request was vexatious.

Michael Lugton: Reasons for refusal would normally have to be given.

Paul Martin: Are there any other proposals for members of the Scottish Parliament to be able to access information on non-departmental public bodies—for example, a property services committee in a health board? Will there be any arrangements for MSPs to access such information privately?

10:00

Keith Connal: I am not sure whether I follow the question. MSPs would be able to exercise the right of access that the bill would provide for information from the public authorities that it covers. We do not envisage separate and different arrangements for MSPs, although they have their own arrangements in that they can ask parliamentary questions. That aside, MSPs will be able to exercise the right of access that will be available to any member of the public.

The Convener: Would the bill apply to parliamentary questions? I could probably clarify that for myself. It often strikes me that the answers to parliamentary questions try to give the minimum amount of information while still answering the question, rather than giving the maximum amount of information.

Keith Connal: The short answer is yes. The bill would apply to parliamentary questions, in the sense that the act would have to be operated by the public authority that was in receipt of the question—in the case of parliamentary questions, that is the Executive.

The Executive answers parliamentary questions in accordance with the non-statutory code of practice. Members will be familiar with occasional reference, in answers that are given, to exemptions in the code of practice. In the same way, if the bill were passed, questions that were put to the Executive would need to be considered in terms of whether the information could be disclosed under the legislation.

The Convener: Thank you very much for your attendance this morning, which has been helpful.

Our next and final witness is Maurice Frankel from the Campaign for Freedom of Information. Unfortunately, we will need to finish at about 10.25, so I ask members to weigh in with whatever questions they feel are important.

I will start off. We have your submission in front of us, but which bits of the draft bill do not go as far as you would like—or go too far, perhaps, although I suspect that that is hardly likely?

Maurice Frankel (Campaign for Freedom of Information): Our main concern is with the class exemptions—the broad exemptions—some of which are absolute and not subject to a public interest test or any other kind of test and some of which allow access, but purely on public interest grounds. Our fear is that those exemptions will favour non-disclosure too often.

There is an interesting dichotomy in the draft bill. For many of the exemptions, there would be a test of substantial prejudice, on top of which there would be a public interest test. The case for access to information in those areas would be strongly entrenched in the bill. Alongside that, there would be class exemptions with no access at all, or access only after a public interest test with the possibility of a veto. In the one piece of legislation, there are two separate cultures—a strongly pro-disclosure culture, represented by some of the exemptions, and a cautious culture, represented by the class exemptions.

The Convener: Which of the class exemptions are most detrimental?

Maurice Frankel: The most significant will be the one for information subject to an obligation of confidentiality. That was picked up in committee members' questions on Kilmarnock prison. An obligation of confidentiality is easily created. In effect, the person who is supplying information to the authority asks the authority whether it is okay for the information to be treated as confidential. As long as the information has not been made public previously, or is not trivial, it is then legally confidential, except in cases where the relatively strict public interest test under the common law of confidence would allow disclosure. That is a limited area. That exemption opens the door to the parties' agreeing between themselves—often because they prefer to avoid the embarrassment of scrutiny—to create an obligation of confidentially and then to reject, lawfully, requests under the exemption.

The Convener: Clearly, in some cases, commercial confidentiality would come into play. An increasing number of cases involve commercial relationships between public service providers and the Government or the public authorities. If we do not approach those relationships in the way that the Executive

suggests, how should we approach them?

Maurice Frankel: A separate exemption exists for information, the disclosure of which would substantially prejudice someone's commercial interests, and a further exemption exists for personal information about individuals. Information in confidence is an additional category that does not depend on an objective demonstration of harm to anybody's commercial or privacy interests. One could try to limit that exemption to put additional hurdles in the way of the authorities before they accepted information in confidence or before they could invoke the exemption.

The Convener: Is the provision of a First Minister's veto reasonable? In the first consultation document, the reference was to Scottish ministers, but I notice that that has been changed.

Maurice Frankel: The veto is more limited than the one that UK ministers will have. Under the UK act, the veto applies wherever there is a public interest test. In Scotland, the veto will be limited to five exemptions, but we would prefer it not to be there at all and for ministers, if they did not like the decisions of the information commissioner, to have to appeal against those decisions on proper grounds. If the veto is retained, ministers should be required to demonstrate a proper reason for invoking it. One such reason might be that disclosure would cause significant harm.

In the original consultation paper, the Executive indicated that the veto was needed for cases in which the information was of exceptional sensitivity. If that were written into the bill, there would be a test to which ministers could be held. At the moment, there is no such test. Ministers need say only that, in their reasonable opinion, the commissioner got the decision wrong, and that, in their reasonable opinion, the public interest favoured—if only marginally—withholding the information.

The Convener: Would that decision by a minister be subject to judicial review?

Maurice Frankel: Yes, I believe that it would. However, the courts will say that ministers have a wide range of discretion and they will step in only if a decision is so unreasonable that the insanity test could almost be applied, because no reasonable person could have reached that decision. The courts use terms such as absurd or irrational. I am, therefore, not optimistic that judicial review is an effective control against the veto.

Maureen Macmillan: The consultation paper set out three possible charging schemes. In the first option—I think that is the option that will apply at UK level—authorities would have the discretion to charge applicants up to 10 per cent of the costs, with a maximum charge of around £50.

In the draft bill, the Executive seems to have settled on the second option, whereby information that would cost less than £100 to provide would be provided free. There would then be a full-price charge for the rest, with a ceiling of about £500. The third option is the £10 flat rate fee to cover everything.

What do you think about the charges? Will they prevent people from accessing information?

Maurice Frankel: The option chosen by the Executive was the best of the three that it proposed in the consultation paper. However, the UK approach is better.

That people cannot be charged for all requests is a valid point. There cannot be a system in which people pay an up-front application fee, particularly under this type of legislation, where any written request is a freedom of information request. People would be charged for writing to the Benefits Agency, for example, and asking why their pension is being calculated one way rather than another. They would be asked for £5 for an answer to the question. People will not have to say that they are invoking their rights under the act. If a request is made in writing, the authority will have to treat it under the act. The charging regime must acknowledge and not get in the way of the normal flow of correspondence.

Maureen Macmillan: Would no charge on the first £100 therefore be the best option?

Maurice Frankel: I am very happy with having the first £100 free, but I am worried about the rapid speed at which the costs build up after the £100. It is one thing to say that the next hour's work will be £20, but people will quickly find that they are up to £100. Costs would then probably be out of most people's range.

The Convener: I have a supplementary question. It had not occurred to me that all requests are now freedom of information requests. When public authorities try to assess the cost of administering the act, can they heap on costs that they incur in any event, which are covered by the act, too?

Maurice Frankel: Yes. They would be entitled to do that. A similar problem arose when the codes of practice came into force in 1994. I think that in the first year, the Scottish Office calculated that it had 11 code requests. The Welsh Office calculated that it had 3,500, which was 70 per cent of the national total. The Welsh Office had treated all requests for leaflets and requests to the press office from journalists as code requests, too. One has to be very careful about the calculations.

A significant difference between the Scottish and UK legislation and other freedom of information acts is that someone does not have to say that

they are making a freedom of information request in correspondence. That has many implications and is very positive. The applicant is not expected to know about his rights in order to benefit from them, but authorities must go out of their way to train their staff to appreciate that every written request must be dealt with in accordance with the act. Requests cannot be refused, unless the exemption is cited. The public interest test must be gone through and people told of their rights of appeal. That is a big training exercise for any authority.

The Convener: I presume that that would also cover not just answering a letter but the tardy answering of letters, as there is a time scale. Will local authorities have to respond to every piece of correspondence within a certain time scale?

Maurice Frankel: They will need to respond within 20 working days, which is not too demanding a time scale. I understand what you are saying. Most authorities already set themselves targets of responding to correspondence within shorter time limits.

Maureen Macmillan: On the charging scheme, will it be difficult for people with special needs, for example, to access information? We talked about perhaps providing information for them in a non-written form.

Maurice Frankel: In section 15 of the draft bill, there is a duty on authorities to provide advice and assistance to people in exercising their rights. The draft code of practice that the Government proposes to issue, under the UK act, makes reference to the fact that, if someone is physically unable to make a written request, the officials can invite them to make the request by telephone, write it out and then send it to them to confirm that it properly describes what they are after. That would offer a solution.

Maureen Macmillan: However, if the person could not read or see, the information would have to be given to them in another way—perhaps on a tape or in Braille. I presume that you would want the additional costs of that to be borne not by the recipient, but by the body.

10:15

Maurice Frankel: The £500 limit that we have been talking about is the cost of locating and retrieving the information. The way in which the bill is drafted—and the introduction explains this—means that the cost of transcribing the information or putting it on tape would not be included in that £500 limit.

Phil Gallie: In your submission, you observe that the commissioner cannot investigate complaints relating to a procurator fiscal or the Lord Advocate. That makes their compliance effectively voluntary. However, a procurator fiscal is named in the list in schedule 1. Is there any conflict in that?

Maurice Frankel: Those individuals are required to comply with the bill as it is drafted; however no action could be taken against them if they did not. The commissioner would have no such power. Nevertheless, the court could be approached if a procurator fiscal had not disclosed information that he was required to disclose under the bill.

Phil Gallie: Another complaint about information that is withheld by procurator fiscal offices concerns charges in court proceedings that are marked for no further action. Do you think that the bill will open up access to that information—to the reasons why no further action has been taken?

Maurice Frankel: No, it will not. The purpose of including a provision that states that the commissioner cannot investigate such matters is to leave that area of discretion untouched. People might have different views on whether that is a positive thing to do. For example, three or four years ago, there were reports that the Crown Prosecution Service was consistently failing to disclose evidence to defendants, as required by the rules. An internal study was undertaken, which supported that view. I should be concerned if the commissioner could not investigate a complaint that a procurator fiscal or the Lord Advocate had failed to disclose a report of that kind, which has nothing to do with the exercise of their discretion in bringing charges. It would be a real shame if that type of information was protected from access by this provision.

Phil Gallie: Let me press you on your organisation's wishes. Would you want the procurator fiscal to release information on charges that have been marked for no further proceedings to those who are directly involved?

Maurice Frankel: The way to do that would be to apply exemptions to them. A test should be applied to determine whether disclosing the information would undermine the ability of the procurator fiscal to operate effectively in future. If offences below a certain threshold were not the subject of action, it could be argued that the system would encourage criminals to limit their offences. For example, if someone knew that, if they drove so many miles per hour above the speed limit, they would not be prosecuted, motorists would be encouraged to exceed the speed limit by that amount. A test could be applied to reveal any specific evidence of harm resulting from the disclosure of information.

Phil Gallie: I am a bit surprised at your response. I thought that your aim was to ensure that the general public were made fully aware of

such criteria. It seems that you are going back on your basic aim.

Maurice Frankel: I am proposing a test of harm. I am trying not to answer the point directly because it is a complex area of criminal law, which I am not competent to comment on without thinking about it properly first.

Phil Gallie: Okay, thank you.

Michael Matheson: You heard the figures in the earlier evidence that were suggested for the cost of implementing the bill when it is enacted and how much money should be allocated to the commissioner. Given your knowledge of freedom of information regimes that have been implemented in other countries, do you have a view on that?

Maurice Frankel: The problems are twofold. The main problem is whether authorities will be able to absorb the costs into their own costs, because there is no extra budget for freedom of information. We are worried that authorities might use every excuse that they can to stall, because they do not have any money for freedom of information and they do not want to put extra work into doing something for which they do not get extra money. That is one problem.

I do not know what the realistic running costs for a Scottish commissioner would be. The critical point is to ensure that the commissioner is on top of the case load. We do not want to end up waiting nine months for a decision from the commissioner because the commissioner cannot cope with the work load. The Executive must be prepared to provide funding to a degree that will prevent that from happening.

Michael Matheson: I will make a point about the effectiveness of the bill when it is enacted. When the Canadian information commissioner made a speech last year in Scotland, he said that one of the biggest challenges that he faced when he became commissioner was to change the culture of secrecy. Legislation is only one part of the process of improving freedom of information. What action should be taken alongside the bill to address the long-standing secrecy that exists in many public authorities?

Maurice Frankel: First, ministers must understand what it is that they are doing when they introduce a freedom of information act and commit themselves to living with it. If such an act is any good at all, it will embarrass ministers from time to time—perhaps more often than that. Ministers must be prepared to put up with that and not say, when something embarrassing comes up, "Which idiot released this?" and then launch a witch hunt in the department to find out who released the information without consulting the minister or invoking an exemption that would have given them grounds to withhold it. Ministers must live with it. If they do so, there will be benefits, as there will be greater public confidence in what ministers do and greater willingness to believe them when they have complex stories to tell about the real position. It must start at the top.

Much training is required. I am worried that the legislation will come into force, but officials will not know about it. It often happens under the code of practice. People write to officials and receive letters back that ignore the requirements of the code. The ombudsman comes in and says, "You have had seven years to learn how to operate the code; you are still not doing it." In the UK, that is more often the case with the Home Office, which is responsible for the code, than with any other Government department. Work is required to bring everybody up to speed on the matter. The legislation should be operated on the basis that it is a positive thing for people to deal with those requests. Part of their function is to meet those requests from the public and MSPs.

The Convener: Finally, I will raise the issue of the contents of schedule 1; you probably heard the earlier discussion on that.

First, are there any bodies that should be in the schedule which are not? Secondly, do you think that the Executive was right to take that approach, rather than the alternative that was suggested, of having a list of bodies that were excluded from the bill?

Maurice Frankel: I have some sympathy with the view that it is difficult to define. We have had experience with the Environmental Information Regulations 1992, which have a formula that defines who is supposed to be covered. All kinds of fringe bodies say, "We do not think that the formula applies to us. If you do not like it, judicially review us." Of course, most people cannot do that.

It is helpful to specify which bodies are covered wherever that can be done, but clear and unambiguous formulas could be added. One could say that any body to which ministers, local authorities or other authorities make appointments is a public authority, because it is effectively under the control of ministers or another public authority. One could say that bodies that receive more than X per cent of their funds in the following ways will be brought in as a class and that bodies that have their accounts audited in the following ways will be included as a class. Such catch-all formulas have precise meanings and would help to prevent people from slipping off the list by accident.

The Convener: I thank Mr Frankel for his evidence. I suspect that we will be in touch again.

Meeting closed at 10:24.

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