JUSTICE 1 COMMITTEE

Tuesday 30 October 2001
(*Afternoon*)

Session 1

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JUSTICE 1 COMMITTEE
† 29th Meeting 2001, Session 1

CONVENER

Christine Grahame (South of Scotland) (SNP)

DEPUTY CONVENER

*Gordon Jackson (Glasgow Govan) (Lab)

COMMITTEE MEMBERS

*Lord James Douglas-Hamilton (Lothians) (Con)
*Donald Gorrie (Central Scotland) (Liberal Democrats)
*Maureen Macmillan (Highlands and Islands) (Lab)
Paul Martin (Glasgow Springburn) (Lab)
*Michael Matheson (Central Scotland) (SNP)

*attended

THE FOLLOWING ALSO ATTENDED:

Alex Neil (Central Scotland) (SNP)

WITNESSES

Elaine Bailey (Premier Custodial Group Ltd)
Keith Connal (Scottish Executive Finance and Central Services Department)
Geoff Owenson (Scottish Executive Finance and Central Services Department)
John St Clair (Office to the Solicitor to the Scottish Executive)
Ron Tasker (Premier Custodial Group Ltd)

CLERK TO THE COMMITTEE

Lynn Tullis

SENIOR ASSISTANT CLERK

Alison Taylor

ASSISTANT CLERK

Jenny Goldsmith

LOCATION

The Chamber

† 28th Meeting 2001, Session 1—joint meeting with Justice 2 Committee.

Scottish Parliament

Justice 1 Committee

Tuesday 30 October 2001

(*Afternoon*)

[THE DEPUTY CONVENER *opened the meeting at 14:06*]

The Deputy Convener (Gordon Jackson): I call the 29th meeting this year of the Justice 1 Committee to order. I remind members to do what I am now doing, which is to turn off mobile phones and pagers. We have two apologies. One is from our convener, Christine Grahame, who has broken something, but we are not sure precisely what.

Michael Matheson (Central Scotland) (SNP): She has broken her leg.

The Deputy Convener: We wish her well. The other is from Paul Martin, who has to attend another committee meeting.

Item in Private

The Deputy Convener: Before I come to our visitors, I will briefly deal with item 1. Item 4 on the agenda is to consider a forward work programme. I anticipate that we will take that item in private. Do I have the committee's consent to that?

Members *indicated agreement*.

Prisons

The Deputy Convener: We are still considering the issue of prisons and item 2 is on Kilmarnock prison. We have two witnesses: Ron Tasker, who is a director of Premium Prison Services Ltd, and Elaine Bailey, who is the managing director of the organisation. We also have with us Alex Neil MSP, who has an interest in this agenda item and is here to exercise his right to ask questions. The witnesses have given us a written submission, but I understand that they would like to say something before we come to questions.

Elaine Bailey (Premier Custodial Group Ltd): I want to make a short opening statement.

The Deputy Convener: That is fine. I do not mean to sound the slightest bit rude by asking you to make a fairly brief statement, because we want to get on to questions. However, please say whatever you think is appropriate.

Elaine Bailey: Thank you. We are grateful for the invitation to meet the committee.

As you know, I am managing director of Premier Custodial Group Ltd. With me is Ron Tasker, who is one of my operational directors; he is also standing in for the director of HM Prison Kilmarnock, who is on secondment in South Africa.

We have both worked in the public sector prison service. For many years, Ron Tasker was a prison governor; before joining the company, he was governor of Full Sutton top security prison near York. I was a member of the prisons board, as director of security reporting to the director-general of HM Prison Service in England and Wales.

Your invitation has caused me to reflect on the information that has been made available to MSPs to date. It was clear from the reports of earlier meetings that some have felt frustrated at not getting information about Kilmarnock and the company. This meeting gives me the opportunity to provide you with that information. It was helpful that the Justice 2 Committee visited Kilmarnock on 14 September for a briefing from Ron Tasker and a tour of the facility. I am also aware of the information that Tony Cameron gave to the committee last week.

Premier Custodial Group Ltd is registered in the UK. It is a joint venture between the Wackenhut Corrections Corporation of America and the British company, Serco. The two shareholdings are equal, but in terms of market capitalisation the British company is more than six times larger than the American company.

Kilmarnock prison opened in 1999 and we are proud of what we have achieved since then. The

prison is within the Scottish prison estate and it is managed by Premier for the Scottish Prison Service. It is one of five prisons operated by Premier in Britain, all of which are managed by directors who were previously governors in the public sector. In addition, the company is responsible for two court escort contracts in England and for three electronic monitoring contracts, including the current trial in the Aberdeen area. We also operate a secure training centre for 12 to 15-year-olds in County Durham and have recently opened an immigration centre in Lanarkshire.

In making judgments about Kilmarnock, people should appreciate that we operate within a robust contractual framework. The SPS has been able to draw on its vast experience to specify clearly what it wants and to demand contract compliance. Where we have won contracts, we have done so on the basis of our ability to provide the level of service set out in the contract at a price that represents value to our customer—in this case, the SPS. The contract is designed to encourage flexibility in delivering the specified outcomes, now and in the future.

We understand that transparency and accountability are matters of prime concern to the committee. Everything that happens in the prison is monitored by an SPS controller supported by an assistant. They are permanently on site and have access to all records and every part of the prison. Their primary role is to monitor our performance against the contract. There are penalties, including financial ones, for shortcomings in performance, and there is an especially severe penalty for failing to notify the controller of any reportable incident.

The company's approach is to do our best to make a difference to people's lives. Our objectives at Kilmarnock continue to be adhering completely to the terms of the contract, continuing to run the prison for the betterment of the prisoners—and, ultimately, the communities from which they come—and supporting the excellent performance of the staff who work there. We regret ill-informed media comment that undermines the morale of a hard-working staff. I was therefore especially pleased to note Tony Cameron's comment when he gave evidence to the committee last week that, in his view, it was clear that Kilmarnock "is doing very well".

Thank you for the opportunity to address the committee. Ron Tasker and I will be pleased to respond to your questions.

The Deputy Convener: I ask members to keep their questions reasonably under control. I shall show courtesy to our visitor by allowing Alex Neil to have first shot.

Alex Neil (Central Scotland) (SNP): The last time I attended a meeting of this committee—it was on 11 September—Clive Fairweather, the chief inspector of prisons, was giving evidence about Kilmarnock. He said that the likelihood of a prisoner being seriously assaulted in Kilmarnock could be as much as four times higher than in other prisons such as Barlinnie. He said that after he suggested—I paraphrase him—that he could not confirm that Premier was not fiddling the figures on the classification of assaults. Why is the level of assaults in Kilmarnock four times higher than the level in other prisons? Are you trying to fiddle the figures? Why have you had to have the figures altered and reclassified after inspection?

Elaine Bailey: We do not fiddle the figures. As I said, we have a monitor on site, who is there primarily to monitor the contract. We have six performance measures relating to assaults. They are classified according to the type of assault. The SPS classifies the assaults, not us; the SPS decides whether they are key performance indicator assaults.

On Mr Fairweather's comment that prisoner assaults are four times more likely in Kilmarnock prison than in Barlinnie, I would say that the figures are not there to support that view. When Tony Cameron spoke to the committee last week he said that we would be placed in the mid-range of SPS establishments—we are neither the best nor the worst on assaults. In the year to date, we have had five prisoner-on-prisoner KPI assaults. Our comparators—we generally use Edinburgh and Perth—have had eight and two such assaults. I say strongly that we do not fiddle the figures.

14:15

Alex Neil: Are you saying that the chief inspector has got it wrong? The chief inspector's colleague said that

"the likelihood of a prisoner being seriously assaulted in Kilmarnock could be as much as four times higher than in other prisons, such as Barlinnie."

To back up that comment he said that

"there had been 26 reported assaults on Kilmarnock prisoners, in comparison with 31 reported assaults on Barlinnie prisoners."

He also said that four of the assaults in Kilmarnock were serious in comparison with only two in Barlinnie. The chief inspector said that he felt that

"at least another couple of assaults should have been classified as serious."—[*Official Report*, *Justice 1 Committee*, 11 September 2001; c 2633-34.]

The chief inspector carried out that survey at a time when Barlinnie had 1,085 prisoners and Kilmarnock prison had 548. In that time, nine assaults were made against staff in Kilmarnock prison and 12 in Barlinnie. Are you saying that the chief inspector is talking nonsense?

Elaine Bailey: I have the figures that were provided by the SPS, which show that Kilmarnock prison had 32 prisoner-on-prisoner assaults, of which five were KPI assaults. The level of assaults at Barlinnie—in absolute numbers—is higher than 32, according to the SPS figures.

Alex Neil: Are you saying that there is a conflict between the figures from the chief inspector and those from the SPS?

Elaine Bailey: I am saying that we know what assaults we have had and that I have to take the comparator information from the SPS—of which we are a part.

Alex Neil: Have you read the chief inspector's figures?

Elaine Bailey: Yes, I have.

Alex Neil: What is your comment on them? Where are they wrong?

Elaine Bailey: I do not think that they are wrong; they relate to different time periods. It can be confusing when we talk about years—calendar years or financial years.

Alex Neil: Are you not disturbed that the chief inspector has such grave concerns?

Elaine Bailey: As Tony Cameron said, we come somewhere in the mid-range in terms of assaults. That does not mean that we are complacent. We are always working to reduce the number of assaults and to make the prison a better place to be. It is interesting to note that the prisoner survey carried out by the SPS found that prisoners' perception of their safety was comparable to that within other SPS prisons. The prisoners in Kilmarnock prison did not feel more unsafe.

Alex Neil: What impact does the 32 per cent staff turnover have on your performance?

Elaine Bailey: In the first couple of years of operation, turnover was relatively high. However, it is coming down significantly this year. When we first opened the prison, although most of our staff had not worked in prisons before—I am sure that you would point that out—the managers and supervisors had. One of their primary roles is to mentor and coach new staff. We also created a support team when we first opened—that is something that we do in all our prisons. In this case, the support team was stipulated in the contract. The team is made up of experienced staff from prison custody officer—PCO—level upwards who are there to help the staff in their early days.

Alex Neil: What is the current rate of staff turnover?

Ron Tasker (Premier Custodial Group Ltd): At the end of September, it was 13 per cent. We expect the annualised figure to be 17.9 per cent but, at the rate at which turnover is slowing, it is likely to be less than that.

Alex Neil: Is that still significantly above the average for the public prison service?

Ron Tasker: It is, but it is consistent with what we expect when we open a new prison. In a new prison, everyone starts together. The job is not right for some people—it does not work for them or for us. From other prisons that we have opened, a graph could be drawn of the early days. For some reasons, people drift away fairly quickly, but then the position stabilises. There is clear evidence of stabilisation at Kilmarnock, which, in some ways, is better than we would have expected.

Alex Neil: Are not the staff turnover problems to do with the fact that, as Clive Fairweather said, Kilmarnock has the best-paid prisoners and the lowest-paid prison officers in Scotland? Derek Turner of the Scottish Prison Officers Association said that the SPOA was worried about

"working conditions for staff in Kilmarnock".

He felt that

"there are insufficient staff to do the job in a safe environment".—[*Official Report*, *Justice 1 Committee*, 23 October 2001; c 2671.]

Elaine Bailey: It is correct that we have fewer staff than might have been the case in a similar public sector prison. There are several reasons for that. One of them is the modern design of Kilmarnock prison—there are good sightlines and an efficient layout, that minimises distances between buildings. We make much use of information technology, have sophisticated camera coverage and all our staff have personal alarms. The staffing levels were agreed with the SPS during the contract negotiations; I am sure that the SPS would not have awarded us a contract had it not felt that the proposed staffing levels were workable within that prison setting.

Alex Neil: I need to let other members in, but I noticed that you did not mention pay.

Elaine Bailey: I am happy to mention pay. We aim to be a good employer in the local community. We pay a competitive package for that local community. Our pay rates for the PCOs are broadly in line with the public sector, although I emphasise that our comparator is not the public sector, but the local private market.

Ron Tasker: Our custody officers start—on completion of seven weeks' training—at the same rate as their public sector counterparts. Over the two years that we have run pay rounds, our custody officers have benefited from significantly higher increases—5.6 per cent and 4.5 per cent, respectively. What is most important is that we

work with the joint negotiating committees of our staff's union—all our staff are members of a union, or have the opportunity to be members of a union. Pay and conditions are central to the thinking of those committees and to our thinking. Our commitment is to pay our staff as well as we can afford to pay them for doing a good job. We are conscious that we have some good staff who deserve to be well rewarded for what they do.

Alex Neil: I do not intend to pursue that in detail. I have two quick final questions. We have mentioned what the staff get. What is your rate of profit for running the prison? Members of the Scottish Parliament repeatedly ask questions of the Scottish Prison Service. When it comes to Kilmarnock, nine times out of 10—on the social work costs per prisoner, the number of nursing posts and so on—we are told that we cannot get the information. Is not it right that, as you are funded through the public purse, we should have access to the same amount of information about Kilmarnock as we do about every other prison in Scotland? Will you undertake to provide all that information?

Elaine Bailey: Yes. When we are asked for information, we give it. I am sure that you understand that we hope that some information—to do with our ability to win more contracts—will always be in confidence for commercial reasons. However, we are happy to share with people the greater part of what we do at Kilmarnock. If you ask the questions, we can give you the answers. We collate a lot of information.

Alex Neil: You were going to give me the profit figure.

Elaine Bailey: Yes. Last year, our profit after tax was £300,000, which is about what we expect to make this year.

Lord James Douglas-Hamilton (Lothians) (Con): First, in paragraph 5 of his letter, Tony Cameron, the director of the Scottish Prison Service, wrote:

"Kilmarnock represents a major challenge to a number of expensive and outdated practices".

Can Ron Tasker give examples of those areas where Kilmarnock has improved the situation?

Secondly, what training is being offered at the prison and what is the associated cost? Thirdly, how do you feel about Kilmarnock prison not being included in the distribution of additional funding to address drug misuse? What action do you intend to take if, for instance, other prisons are able to implement new programmes?

Elaine Bailey: I will take the first question and ask Ron Tasker to deal with training and drugs.

We are able to provide good value to the SPS at Kilmarnock through our billed costs. We have a partnership with a contractor and we use the same one every time. The contractor is now quite experienced in building prisons. We design the prison around its operation; we decide what we want to do in the prison first, then we put the buildings around it. It is a modern design. As I said to Mr Neil, we make a lot of use of information technology, for example in camera coverage, where we use technology to identify visitors as they come in and out. We have good sightlines.

We are more flexible in our deployment of staff and can react quickly to changes. When he spoke to you last week, Tony Cameron mentioned the number of times we change our attendance patterns. We know from the contract what work we have to do and we deploy the staff to undertake that work. If we find that things are not working well or if the staff find it difficult, we reconsider the situation. We are able quite quickly to make changes to our processes and procedures. When we take on staff who are new to the prison environment we find that some of them are not suited, but the other side of that is that they come without any preconceived ideas and are open to learning how to do things the Premier way.

It is helpful to us to have the contract. It provides clarity and describes comprehensively what is required so that it is clear to us exactly what work we are required to do. All those elements together help us to provide good value for money.

Ron Tasker: On the differences, we employ all our own people, except in social work, which we contract out. The nurses and teachers work for us. In the main, the teachers are not contracted in from one college or another for the core curriculum. I have a public service background and when I moved to the private sector I found it possible to realise a lot of ambition quickly, even at 55 years old, as I was then. It is easy to have a vision and quite straightforward to put it in place. There is no baggage—sometimes that is not always to the good, because experience is worth a lot. On the other hand, when you start with a clean sheet and when you have senior members of staff and an enabling environment, the world is your oyster. You can pick your vision and go for it. That is the essential difference that I have found.

The staff are trained almost identically to those in the public service. They do a six-week course, followed by one week of shadowing when they get back to the prison. Most training is done in-house and all of it is verified. All members of staff must be certificated by the Scottish Prison Service. Experience is the only difference between staff at Kilmarnock prison and those at any of the other public service prisons.

Our training—including development training—is good: we have staff who are developing Scottish

vocational qualifications and management skills and who are following graduate and postgraduate courses. We have a training budget and a clear programme of how we want to train our staff. That is how we do it.

I turn now to the question about additional money. Tony Cameron has advised me that that money will be available to Kilmarnock prison. I cannot say on what terms. We are presently dealing with our submission, setting out what we could make good use of. I am grateful for Tony Cameron's assurance that some of the money will be made available.

14:30

Lord James Douglas-Hamilton: I ask Mr Tasker to clarify what he said in his last two or three sentences. Are you confirming that additional funding will be made available to Kilmarnock prison?

Ron Tasker: Yes.

Elaine Bailey: Yes.

Lord James Douglas-Hamilton: Has the Administration had a sudden change of heart?

Elaine Bailey: I do not think so. We were never formally notified that we would not receive any money, but we have now been formally notified that we will. As Ron Tasker said, it is now simply a question of working out what we would like to have.

Lord James Douglas-Hamilton: So that is a satisfactory outcome.

Elaine Bailey: Absolutely.

Lord James Douglas-Hamilton: At the moment, are there any particular matters on which you wish to seek the help of the Administration?

Elaine Bailey: On drugs in particular or in general?

Lord James Douglas-Hamilton: In general.

Elaine Bailey: I do not think so, although over the past couple of years, we have found it difficult to deal with a lot of the anecdotal stuff about Kilmarnock. Every time something appears in the newspapers, it upsets our staff and their families. On a number of occasions, we have had to call the staff together for a special staff meeting to put their minds at rest.

We are more than happy to have people come and visit the prison and see for themselves what we do at Kilmarnock. I suggest that the Justice 1 Committee invites as many people as possible to come and see what we do.

Lord James Douglas-Hamilton: Thank you.

Michael Matheson: First, I welcome your intimation to committee members that you are prepared to be open and answer questions. Members of the Parliament have taken the view that there has been a considerable amount of secrecy around the operation of Kilmarnock prison, particularly in relation to the contract.

I have been trying to get information on an issue for some time. It may be in the public domain, but I have not been able to get my hands on it. What is the annual income produced by the contract to run Kilmarnock?

Concern has been expressed about the staff-to-prisoner ratio. What is that ratio at Kilmarnock? How does that compare with the ratio at an SPS prison? I notice in your submission that prison officers appear to start on a similar rate of pay to SPS staff. After 10 years' service at Kilmarnock, would you expect the rates to be the same? In your submission, you make reference to what I would interpret as staff at Kilmarnock being principally turnkeys—responsible for nothing more than locking up prisoners. You state:

"Work with prisoners in respect of dealing with their offending behaviour and reducing the likelihood of further offences is the role of professional specialists".

The SPS also does that work, but prison officers play an important role in providing the services. Can you explain why there is such a difference between the role that your staff undertake and the role that SPS staff undertake in that regard? Who provides the specialists to provide the support that you say prisoners require?

Elaine Bailey: I will take the first three issues that Mr Matheson raised. Ron Tasker will reply to the last question.

Our income is about £12 million. That was the figure last year and we are on target for that this year. I can tell you about our staff ratios, but I cannot tell you how they compare with SPS prisons. We have 292 staff at Kilmarnock, which is more than we are contracted to provide. We provide the additional staff at our own expense. I do not know the staff ratios in other prisons, but they are not directly comparable, because of Kilmarnock prison's different layout, different function and the different types of prisoner. I will give a couple of examples. In our industrial workshops, we have 17 staff for a maximum of 275 prisoners. In a house block, we have a unit manager, two rovers and two PCOs while the prisoners are there.

I cannot say whether our PCO rates are the same as those in the public sector after several years, because I do not know the pay spines or rates in the SPS. All that I can go on is our experience at Kilmarnock. As Ron Tasker said, we start staff on £12,500, but after two years' service,

some PCOs are on just over £13,700. Our longest contract is at Doncaster. Staff there receive a pay rise each year. Many of our staff are promoted—our company is growing and recruits from within. At Kilmarnock, staff who were PCOs have been promoted to Dovegate near Burton upon Trent and to Dungavel. Ron Tasker will talk about PCOs as turnkeys.

Ron Tasker: There are alternative models. Some prisons—including some in which I worked—train prison staff to deliver programmes. That is good, because it enriches the job of prison staff. Our staff at Kilmarnock are well trained, but two and a half years into the prison's life, they are not experienced enough to do such work. That remains an ambition and I am sure that such work will start soon.

Other considerations must be taken into account when a prison is opened. It must settle, find its culture and find its feet. We have had to deal with some of the issues that the committee asked about, such as drugs, assault and people's relationships with each other. It is early days at Kilmarnock. We have successfully employed a senior psychologist, two other psychologists, a senior social worker and three other social workers. They are employed directly—they work for us; they are not contracted in, except for the social workers. Interestingly, we started with two social workers. Clive Fairweather, among other people, commented and made a case that led to discussion and we upped the figure by 50 per cent. The company pays for that, because we want to train prisoners.

We are not concerned with how much money is taken out; we are interested in the best match for resources and what needs to be done. Additionally, we have five counsellors. A couple of them started as prison custody officers and then obtained professional qualifications in counselling to deliver programmes to prisoners, such as anger management and drugs awareness. We have a full-time worker from the Rowan Alba Association, who is involved in homelessness and resettlement and helps people to find places. We will soon have a debt counsellor. She will advise prisoners on consolidating and smoothing out debt and making life simpler.

Mr Matheson is right to talk about prison officers playing an important role in providing services. That is not something that we have taken on in the custody function, but it remains an aspiration of mine, because I am confident that prison officers who diversify and deliver programmes, on the whole, do it well.

Michael Matheson: Is such work part of your contract?

Ron Tasker: It is part of the contract to deliver the programmes. Provided that the Scottish Prison Service is satisfied with the outputs—the number of programmes and their quality—how we arrange the business is for us.

Michael Matheson: So it is not specified in the contract. It is left to you to decide how you do that.

Elaine Bailey: Yes. Our contract is based almost exclusively on outputs. For example, the controller measures us on 70 performance measures each day and they are virtually all output-related. How we achieve those outputs is left to us.

Michael Matheson: Are those indicators in the public domain? It would be interesting to see the indicators and to find out how you perform against them.

Elaine Bailey: I think that Tony Cameron spoke last week about a CD-ROM that he had provided to the committee, perhaps in its earlier form. I know that the CD-ROM contained all the performance measures.

Michael Matheson: I understand that one of the private prisons that you run in England was recently refinanced. Do you intend to do that at Kilmarnock? If you do not intend to do that in the near future, do you expect to have to do it at a later date?

Elaine Bailey: We have refinanced all our private finance initiative prisons. That was done some time ago.

Michael Matheson: Including Kilmarnock?

Elaine Bailey: Yes. The first thing to say is that we did not make a killing out of it. We have brought together all our debt into a portfolio. That spreads the risk and means that the banks from which we borrow money for future contracts will at least consider more favourable interest rates than we pay at the moment. In turn, that will enable us to provide a better price for customers.

When we refinanced Kilmarnock and other prisons, we kept in close touch with the SPS all the way along the line and it approved everything that we did. The SPS's position now is no different from its position before the refinancing.

Michael Matheson: I understand that refinancing is in effect a form of remortgaging the establishment at a more favourable interest rate than the rate at which you borrowed when you built it. Is that correct?

Elaine Bailey: To build Kilmarnock and our other prisons, we borrowed some money from the banks and some money from our shareholders. We still owe as much money as we did before, but the proportion that we owe to our shareholders and to the banks is different. The overall lump of money that we owe is still the same.

Michael Matheson: So part of the refinancing was to pay back to your shareholders some of the money that you had on loan. Is that what happened to the money you raised from the refinancing?

Elaine Bailey: All that happened was that the shareholders sold some of their debt to the banks as part of the refinancing. So we owe our shareholders less money but we owe our banks more money. The net result is that we owe the same amount of money as we did before.

Michael Matheson: How much money did you make from refinancing?

Elaine Bailey: We did not make any money.

Michael Matheson: There was no profit at all?

Elaine Bailey: No.

Michael Matheson: Have the termination liabilities of the contract changed as a result of the refinancing?

Elaine Bailey: No. The SPS was clear that its position was not to alter one jot as a result of the refinancing and we were able to assure it that it had not. Our lawyers and the SPS's lawyers worked closely together to ensure that nothing changed.

Michael Matheson: Do you anticipate that having to be done again in the future?

Elaine Bailey: No. We have done the refinancing that we need to do. We now have a portfolio with each of our PFI prisons in it. That is the structure from which we can progress if there are opportunities for further prisons.

Maureen Macmillan (Highlands and Islands) (Lab): You mentioned training and the programmes that you run for prisoners. Will you give some more specific details about training and programmes?

Elaine Bailey: Do you mean the programmes that we run for prisoners?

Maureen Macmillan: Yes. You mentioned anger management and workshops. Would you give us details about those?

14:45

Elaine Bailey: I am sure that the committee is aware that we provide a full day for prisoners. We are contracted to provide eight hours' structured regime every day—an hour of exercise and then seven hours of a combination of offending behaviour programmes, education and work around the prison or in the industrial workshops.

On education, there is a focus on numeracy and literacy and there is vocational training. There is an anger management programme, which was accredited this summer, and the Maguire problem-solving skills course, which I think is the course that is used in the rest of the system. There are also basic and advanced drugs awareness programmes and programmes on anxiety management, living skills and parenting. There have been more than 325 completions to date.

Most programmes are most suited to long-termers. We are conscious that there are a significant number of remands in the prison—I think that there were around 60 this morning. Traditionally, there have been specific programmes for them, but we are putting together some sessions for them under the title of construct group through which we will offer sessions on offending behaviour, drug addiction and anger management. Ron Tasker has more details on the length and content of the programmes and the number of prisoners involved, if the committee would like them.

There are also workshops in which we employ prisoners on commercial contracts that we have won in the community. The contracts involve a range of skills to suit different types of prisoners. Packaging work is at one end of the spectrum and is fairly low skilled. At the other end of the spectrum there are fairly sophisticated metalwork contracts. For example, Kilmarnock College ran a welding course for prisoners so that they can make the big skips that are seen on building sites.

That is an overview. Does the committee need more specific details?

Maureen Macmillan: I am interested in what you said about Kilmarnock College. I thought you said that you do not take people in on such contracts.

Elaine Bailey: That is right. Part of our flexibility is that we employ our own teachers, vocational training instructors and instructors in the workshops. However, if we need to buy in specialised skills that we do not have, particularly for short periods, we will buy them in.

Maureen Macmillan: How many teachers do you employ?

Ron Tasker: I have the statistics.

Elaine Bailey: I think that we employ about 11 teachers.

Maureen Macmillan: Do you plan to pay them the McCrone rates?

Elaine Bailey: Sorry, we employ 12 teachers.

Maureen Macmillan: Are the salaries comparable to local authority salaries? Will you implement the McCrone rates?

Elaine Bailey: Yes. I said earlier that we pay the local market rate. The vast majority of teachers

work in public sector settings and the market rate is around the level that they are paid.

Ron Tasker: I would be happy to leave details of the drugs and anger management programmes if that would be helpful and if the committee is interested.

Maureen Macmillan: I would like statistics about the ratio of instructors and teachers to prisoners. Are the figures comparable to those in SPS prisons?

Elaine Bailey: We cannot answer that as we do not have comparative information about what goes on in the rest of the SPS. The focus of our contract is on outputs. We are contracted to provide a certain number of hours of education and a certain number of hours of offending behaviour programmes. It is for us to decide how we can best do that.

Maureen Macmillan: Are the number of hours on education and on offending behaviour programmes specified?

Elaine Bailey: Yes. That is one of the performance measures.

Donald Gorrie (Central Scotland) (LD): I apologise for being delayed—there was a crisis. Please tell me if my questions have been asked.

I am interested in what your report says about indiscipline. It does not quite say that a high number of indiscipline reports is a good sign, but it comes near to saying that. Will you elaborate on why you have more indiscipline reports than the other prisons?

Elaine Bailey: The simple reason is that we have a contract to which we must work. As I said, we provide eight hours' structured regime every day and convicted prisoners must take part in that. Prisoners must work. Work instils a work ethic into prisoners, a number of whom have not held down a regular job for some time, if ever. We find that many such prisoners would rather not work. However, they must work and, if they do not, they are put on an indiscipline report. Some reports therefore arise from our compliance with the contract and our desire to have prisoners carry out a full day of activity rather than simply sit in their cells. Ron Tasker might want to add to that.

Ron Tasker: I do not particularly want to add to that, except to say that there are significant differences in running the prison. For example, one performance measure involves no prisoner being allowed to enter another prisoner's cell. If a prisoner does so, he commits an automatic disciplinary offence and must be reported.

There are reports on work refusals and one or two make-weight reports that I do not want to overemphasise. A number of indiscipline reports have been generated by prisoners refusing to transfer, particularly to prisons that are a long way from their homes. Some reports have been generated by fairly minor matters, but they all contribute to the total. Prisoners are allowed to display material in their cells only within a finite area. Under the contract and our directors' rules, anything that is displayed outside that area generates a discipline report. The number is high primarily for those reasons and for the reason outlined by Elaine Bailey.

At this stage of the prison's evolution, staff know what they doing, are well trained and are developing their experience, but there is a little lack of sureness of touch here and there. Sometimes that leads to conflict and reports. I am working carefully with the controller on site and my staff. I want matters to be reasoned out and not to lead to indiscipline reports. When matters get to that stage, everybody fails—the prisoner fails because he gets punished and we fail because we do not get people to work. There are better ways of doing things, but at this stage of the prison's life, I am satisfied that we have at least analysed the matter well. We are on the right road and know where we are going.

Donald Gorrie: I also want to ask about training. When Mr Cameron spoke to us last week, he said that one of the problems with the Prison Service was that, compared with the police, for example, there was not a good career structure or visible promotion prospects. Your report says that you have a somewhat different model of average prison worker from the SPS. Do you think that you provide a good career structure?

Elaine Bailey: We think that we do. As I mentioned, we are a growing company and there are opportunities for people to move around in the system. One member of staff started as a court escort, worked up at the prison in Kilmarnock and is currently at our new prison in Dovegate. A number of staff from Kilmarnock have been promoted, and have moved on to the immigration centre at Dungavel and the new prison in Dovegate.

That movement of staff creates a backfill situation in the prison, so we have had quite a number of internal promotions. The culture that we have in the prison is one of openness between the staff and the managers. We go out of our way to ensure that the staff feel that the job that they are doing is valuable and that they are valued as individuals. We emphasise that the staff are doing good work.

Donald Gorrie: Any member of this Parliament would feel sympathy with another group of people who feel that they get harsh and unfair treatment from the press. Kilmarnock has come in for a good deal of criticism. What percentage of that criticism

do you think is justified?

Elaine Bailey: Very little of it. The vast majority of what appears in the press is just conjecture, anecdote and unsubstantiated allegation. A lot of it is from people who have never been in the prison. Some of it twists and manipulates the words of people who have been in the prison. The best way for anybody to find out the truth about the prison is to come and see it for themselves—I invite committee members to do so—and to form their own opinion based on the facts.

The Deputy Convener: I will let Michael Matheson ask another question, so long as he promises to be quick.

Michael Matheson: We are just about to move on to discuss the Freedom of Information (Scotland) Bill. Would you have any problems with Kilmarnock prison being classified as a public authority under section 5(1) of that bill? You may not be able to answer that question, because you may not have read the bill, but I would welcome your comments.

Would you have any problem with publishing the contract and placing it in the public domain with the commercially confidential sections removed? Would you be happy for members of the committee to view the contract in private with the commercially confidential information still included?

Elaine Bailey: I shall take the last two questions first, because I understand those. I thought that the contract had been published, or was at least in the throes of being published. I know that we had discussions with the SPS about precisely which parts of the contract would be treated as commercial and confidential; both the SPS and Premier wanted to reduce that to a bare minimum. As far as I know, if the contract has not already been published, it is very close to publication. I would have no problem with the committee seeing the commercially confidential information privately.

On the Freedom of Information (Scotland) Bill, you are right to say that I do not know about the section to which you referred. However, we do not have a problem with information. We collect an awful lot of information. We have to do so as part of our contract. It is all available to the SPS, so I do not see a problem with that.

Michael Matheson: Would you be happy for the prison to be classed as a public authority? That is what it would be classified as under the Freedom of Information (Scotland) Bill.

Elaine Bailey: I am afraid that I cannot answer that question, because I do not know the import of it.

Michael Matheson: Could you consider the question and respond to me?

Elaine Bailey: Yes, of course. That would be no problem at all.

Michael Matheson: I would be grateful.

The Deputy Convener: We are constantly being told that it is much cheaper per prisoner year to pay a private sector company than it is to pay a prison in the public sector. The difference in the figures that we are given is not trivial. When I try to discover the reasons for that difference—of course, it depends on who I ask—some people simply run down your establishment, saying that it is understaffed, that prisoners run about doing what they like and that conditions are bad. I do not expect you to agree with that, and clearly you do not.

However, two reasons for the difference emerge from your evidence and the evidence of other witnesses. One is staffing attendance patterns and the other is the physical layout of the prison. The layout is modern. The prison is not the old, galleried Victorian type that most of us have come to know and hate. Is it possible for you to divide up those reasons? Are staff patterns the main problem, or is it simply the case that old prisons cannot be run cheaply and that therefore we have got rolling stock, as it were—estates is the word, I think—that makes it impossible ever to do that on a decent value-for-money basis in the public sector? Am I perhaps missing a third factor?

15:00

Elaine Bailey: There is no overriding factor that allows us to provide that value for money. Several factors together are responsible. First is the physical layout of the prison—the way that the residential area is connected to the workshops or to the education areas. At Kilmarnock, the house blocks have clear sightlines that make it easy to see what is going on and we have made use of such things as information technology in the building. No matter how much an existing older prison is refurbished, the same degree of efficiency will never be achieved there as in a prison that has been designed around its operation.

The Deputy Convener: By efficiency, do you mean that the layout—sightlines and all that—simply allows you safely to employ far fewer people?

Elaine Bailey: Partly. I was trying to use efficiency in a rather more global sense. Efficiency is more than just staffing—

The Deputy Convener: I am sorry to keep interrupting you. Apart from staff costs, in what way does the layout make a prison cheaper?

Elaine Bailey: The layout does not necessarily make a prison cheaper. Personally, I would prefer

to talk about value for money. In a modern prison, the surroundings are more conducive to prisoners. The cell is more modern—it has its own toilet and washbasin and is warm, dry and pleasant. Prisoners feel better about themselves and we must not forget about that in the equation.

The Deputy Convener: I do not want to forget value for money. In a sense, what I have said is still relevant. I want to establish why a prison with a modern layout is cheaper. It might offer better value for money or worse value for money; it might or might not be nicer. Value for money is almost a separate issue, although it is not unimportant.

I want to identify—in pure pounds, shillings and pence—how such a prison is cheaper to run. You have told me about the shape of the building, which means employing fewer staff. How does the shape of the building make it cheaper other than by requiring fewer staff?

Elaine Bailey: That is probably the main element. The shape of the building also allows us to deploy staff in different ways. Staff move with prisoners—we have staff where the prisoners are. For example, when we unlock in the morning, most of our staff are on the landings. When the prisoners go off to work and education, the staff on those landings do not stay there, but move with the prisoners. Therefore, an officer will not work in one location all day long, but will move around the prison.

The Deputy Convener: Forgive my ignorance, but is that to do with what are called attendance patterns and work patterns?

Elaine Bailey: That is right. We create our attendance patterns from the work patterns, which are dictated by the service requirement that is stipulated in the contract. We examine the contract and pull out of it all the things that we must do. Some of those things will be time dependent—for example, unlocking the prisoners, serving them meals and organising their attendance at work or education. Some of those things are not time dependent and can be done at some point during the day. We call that flexible work.

Knowing what work we must do and the number of custody officers that we will need to do it, we start to put together our attendance pattern. Generally, we can be more flexible in the attendance pattern.

The Deputy Convener: Am I right in getting the impression that those things are connected, and that one cannot simply criticise members of the Scottish Prison Service for bad attendance patterns? Is the ability to have such attendance patterns directly connected to the physical layout of a modern building?

Elaine Bailey: It is directly related to the physical layout of the building and to the work that we have to do. I would say that we have an advantage over other prisons in the Scottish prison estate in having a contract that clearly sets out what we are required to do. That makes life easier for us, because we know what we are supposed to do at any point in time. That is important, as is the flexible deployment of staff. Staff move around with the prisoners. We do not have staff working in a fixed area. Staff can do a number of tasks during the day.

Ron Tasker: The best prisons, even in the old estate in Scotland or anywhere else, will never work efficiently because everything is stacked against them. That is part of what you are saying and I have no doubt that it is true. All prisons can make the best of what they have got, of course, and some prisons in the public service run efficiently and well and have committed staff who work very hard. Some prisons do not work like that, but that is the nature of a big enterprise.

In the private sector, we have the opportunity to start with a clear sheet, to build up from nowhere with an exacting contract, to be imaginative and visionary and to get the best of all that we know and have seen over the years. We do not have a monopoly on expertise. I am now in discussions with the Scottish Prison Service because I know that the SPS and I would both like there to be an exchange of staff between public and private prisons so that we can benefit from each other's experience and expertise. It is an evolving thing, but we are in a privileged and lucky position as a new contractor with a clear sheet.

The Deputy Convener: The witnesses from the Scottish Prison Service said that one of their problems was escort duty. They said that prison staff are constantly taken off other duties because the courts demand that prisoners be delivered. By definition, one cannot take prison officers off security duties, so they are taken off education duties and programmes are therefore affected. Do you have that problem?

Elaine Bailey: Not particularly. We have a number of people who are available to do escorting duties. That means that we can do those duties without shutting down the regime. The regime carries on. However, we have difficulties because the escort requirement is not constant, but comes in peaks and troughs. That is where we make use of the flexible work that we do under the contract—work that can be done at any time, either on that day or during that week. When we have a high requirement for escorts, we cross-deploy some of those officers from the work that they were doing to escorting. Similarly, when we have a low requirement for escorts, we can cross-deploy those custody officers who are there on that day to do escorting to other duties. That is

how we cope.

The Deputy Convener: Thank you. We have spent longer than we meant to on asking you questions, but I do not apologise for that because it has been very worth while.

Elaine Bailey: We would be delighted to come again if you would like us to.

Freedom of Information (Scotland) Bill: Stage 1

The Deputy Convener: Now for something completely different, as they say. We will now take evidence on the Freedom of Information (Scotland) Bill from members of the Scottish Executive unit dealing with the bill. I invite you to introduce yourselves and give a brief opening statement.

Keith Connal (Scottish Executive Finance and Central Services Department): We are grateful for the invitation to give evidence on the general principles of the Freedom of Information (Scotland) Bill at stage 1. I am Keith Connal, head of the FOI unit in the Executive. On my right is Geoff Owenson, also from that unit, and on my left is John St Clair from the office of the solicitor to the Scottish Executive, who has recently been assigned to the bill.

Because of diary clashes and the understandable delay in the committee's confirming today's meeting, my Crown Office colleagues who have appeared with us at previous meetings cannot be here today. They have asked me to say that they would be happy to attend on another occasion if that would be helpful.

The bill is the focus of considerable attention today—not only is the committee taking evidence, an all-day conference on the bill is taking place here in Edinburgh at which I and the Deputy Minister for Justice, Iain Gray, spoke this morning.

When we appeared before the committee on 16 May as officials, we discussed the draft bill that had been published in March. Since then, the Executive has completed the consultation exercise and refined and adjusted the bill, which was introduced to Parliament on 27 September. We have recently published a summary of the consultation responses. As has been the case since the Executive's proposals were first published, the bill received a general and broad welcome, although a number of issues and detailed points were raised in the consultation exercise. The adjustments to the draft bill have been summarised in a note provided to the committee clerk, and we are happy to discuss any of those points should the committee wish to do so.

In keeping with the key principles underpinning any FOI regime, the bill provides a legal right of access to information held by Scottish public authorities and balances that right by a limited range of exemptions, and decisions to withhold information are subject to a test of harm or, except in certain circumstances, a test of public interest in disclosure. The bill provides arrangements for

appeal to and enforcement by an independent Scottish information commissioner, who would have wide powers to promote and enforce the legislation.

I do not want to eat into the time available for questions, so I shall draw my opening remarks to a close. We would be happy to answer any questions, now or in writing, and perhaps to return to the committee later in stage 1 if that would be helpful.

Michael Matheson: What is the relationship between the Scottish bill and the UK legislation? How will they interface with each other?

Keith Connal: I shall start to answer that question. If further points emerge, I shall ask my colleagues to contribute. As the competence of the Scottish Parliament is clearly defined in an amendment made in 1999 to the Scotland Act 1998—

The Deputy Convener: I am sorry to interrupt you, but could you speak up a wee bit, please. I know that there is amplification, but some of our older members are having a little difficulty hearing you.

Keith Connal: My apologies—my voice is giving out as I have spent most of the day speaking. As an official of the Executive, I am more used to writing than to speaking.

In 1999, an amendment was made to schedule 5 to the Scotland Act 1998, which clarified the Scottish Parliament's competence to legislate in the area of access to information. In the sense that that amendment made the Parliament's competence to legislate on access to information clear, it is separate from the competence of the Westminster Parliament. The two pieces of legislation are distinct and will not overlap in their application to public bodies. In that sense, there is no interaction. The two pieces of legislation are separate and distinct. The Freedom of Information Act 2000 will apply to UK public bodies and the Scottish act will apply to Scottish bodies. You may want to ask about other aspects of interaction, in a practical sense, between Scottish bodies and UK bodies, which we would be happy to discuss.

Michael Matheson: You are saying that the Scottish legislation will apply only to areas that are within the legislative competence of the Scottish Parliament—its devolved functions. A UK-based organisation may have a quite distinct Scottish side to its operation. For example, the Disability Rights Commission has a Scottish commissioner. Will the UK legislation apply to the Scottish side of that UK body or will the Scottish legislation apply?

Keith Connal: The separation between the two pieces of legislation is based on what category a body belongs to. A UK public body, such as HM Customs and Excise, the Ministry of Defence or the Department for Work and Pensions—even if it operates in Scotland—will be subject to the Freedom of Information Act 2000. Legislative competence is not dependent on whether the information held relates to devolved or reserved matters; the separation is by the category of the public authority that holds the information.

15:15

Michael Matheson: There are non-statutory codes of practice for access to Scottish Executive information and to UK Government information. How will they be affected by the bill?

Geoff Owenson (Scottish Executive Finance and Central Services Department): The code of access to Scottish Executive information will cease to apply once the Freedom of Information (Scotland) Bill is enacted.

Michael Matheson: Will the codes cease to apply entirely?

Geoff Owenson: Yes.

Michael Matheson: I am often asked what new information will become available. Will the information that is unavailable under the current codes of practice automatically become available the day after the bill is enacted?

Keith Connal: We are often asked the same thing. The question is difficult to answer, because it implies that we have a list of information that cannot be disclosed which, on the bringing into force of the Freedom of Information (Scotland) Bill, it will be possible to disclose.

The key difference between the current code that the Executive operates and the proposed bill is that the enactment of the latter will give a legal right of access as opposed to access that is governed by a non-statutory, voluntary code. That legal right of access will be enforceable by a commissioner who will have more powers to order disclosure of information and generally to enforce the act than the parliamentary ombudsman has to enforce the current non-statutory code.

It is difficult to provide a list of information that we are holding back until the enforcement of an act. We do not have such a list. The key difference is the introduction of a right of access.

Michael Matheson: So the bill effectively just provides a legislative base for the codes of practice?

Geoff Owenson: When enacted, the bill will apply to a much wider range of public authorities in Scotland than the code applies to.

Michael Matheson: Of course. I am referring to Executive information.

Geoff Owenson: At the moment, the code is applied on a voluntary, discretionary basis. If enacted, the bill would provide a statutory right of access.

Michael Matheson: Does the bill go any further than the current codes of practice?

Geoff Owenson: It will provide a statutory right of access, whereas the codes are only discretionary. Because it will apply to a wider range of public authorities—

Michael Matheson: I am really talking about the types of information that are available under the current codes of practice. Will the types of information that are available change?

Geoff Owenson: That depends on the information, which will have to be considered on a case-by-case basis.

Keith Connal: I will try to answer your question directly. The non-statutory code that the Executive operates applies to all information held by the Executive. The code is not limited in that sense. If enacted, the bill would apply to that same range of information.

Lord James Douglas-Hamilton: Section 2 deals with the effect of exemptions. Section 2(1)(b) states:

"in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption."

What would you regard as an appropriate definition of the public interest? Should guidance be issued in this area, especially if the public interest is weighed against the various exemptions?

My second question has been raised by Friends of the Earth Scotland. As archives can charge an average of £25 an hour, it would be quite easy to pass the upper charging limit. Have there been many comments on the charging method and limits? Does the Executive have any plans to remedy the problem?

Geoff Owenson: As the public interest is a well-established legal concept, it is not common practice to define it in legislation. Consideration of the public interest is common to most FOI regimes around the world and we are not aware of any attempt to define the term in them. Any such attempt would necessarily restrict its potential application by setting in stone one of the factors that would for ever more define and bind what is meant by the public interest. After all, the public interest changes over time, and what was in the public interest 20 years ago might well be different now. As for guidance on the public interest, it would be more appropriate to leave that matter to the Scottish information commissioner.

Keith Connal: If I understand correctly, Lord James Douglas-Hamilton's second question relates to the charging regime and the prospect of reaching an upper threshold quickly. I should first point out that any FOI charging scheme introduced in regulations that will be made under the bill will not apply to existing charging regimes that are already set out in statute. Furthermore, the FOI charging scheme regulations would not apply to any charges for the provision of information set out in an approved publication scheme. The intention behind that is not to disturb existing arrangements for the provision of information to the public even where there might already be a charge.

The bill proposes that regulations made under it should set the value of an upper limit, which can be amended by changing the regulations. In the consultation paper that accompanied the draft bill, we suggested that the limit might be set at around £500. As charges apply only to the cost of searching and retrieving, it would take a significant request to breach an upper limit set at that level. I hope that that fully answers your question.

Donald Gorrie: Will the information commissioner's annual report to Parliament make public any failure by public authorities to disclose information?

Keith Connal: My answer is not intended to be circuitous, but the content of the commissioner's report will be very much a matter for the commissioner. The commissioner would be able to name and shame authorities if he or she so wished. We have sought not to prescribe in the bill too much of what the commissioner should or should not include in his or her report.

Donald Gorrie: The fact that certain decisions by the Lord Advocate and procurators fiscal do not seem to be open to appeal by the information commissioner has attracted adverse criticism. Why has that course of action been adopted?

Geoff Owenson: Under the terms of the Scotland Act 1998, any decision taken by the Lord Advocate in his capacity as head of the systems of criminal prosecution and investigations of death in Scotland is to be taken by him independently of any other person. It is not therefore appropriate to allow the commissioner to overrule such decisions of the Lord Advocate. I emphasise that the Lord Advocate is still subject to the legislation in all other respects, for example being required to respond within 20 days, to produce publication schemes and to consider public interest in disclosure.

Donald Gorrie: Forgive me if I am not on the ball—not being a lawyer—but as I understand it, the proscription of any comment on what the Lord Advocate or a procurator fiscal does applies to all the information held and not just to matters

relating to prosecution activities. It seems to go further than necessary.

Geoff Owenson: John St Clair might want to comment on this, but I would suggest that that depends on the extent to which the decision is taken by the Lord Advocate as head of the systems of criminal prosecution and investigations of death in Scotland.

Keith Connal: The detail of any question of the operation of the proposed bill by the Lord Advocate and the Crown Office might best be answered by Crown Office officials. They have been clear with us that they will come fully under the terms of the legislation. Any final decision in relation to the Lord Advocate's position as head of the systems of criminal prosecution in Scotland under the terms of the Scotland Act 1998 remains with the Lord Advocate. I would be happy to provide further details on that or to ask the Crown Office to do so.

Donald Gorrie: An issue that has aroused more adverse comment than any other is ministerial certificates. Why do we need them? Will there be some sort of guidance or limitation on their use? We have to look forward to a time when there is not a marvellous minister like Jim Wallace in charge, but a really evil minister of some nameless party who wishes to destroy the whole system. The system must be robust enough to defend itself against misuse. The power to issue ministerial certificates seems to be a serious weakness in the bill.

Geoff Owenson: The use of a ministerial veto is a feature of several regimes around the world. Ministers are aware of the concerns that the issue has raised. As a result, every effort has been made to emphasise unequivocally the seriousness with which the issuing of a ministerial certificate would be considered. I would also emphasise that it would be used only for limited exemptions in limited circumstances.

As we set out in the policy memorandum, our initial intention was that a certificate would be issued only on the collective decision of the Scottish ministers but, because the Scotland Act 1998 provides that the statutory functions of the Scottish ministers can be exercised by any one member of the Executive, that was not possible. That is why we have said that a certificate would be issued by the First Minister after consultation with the Scottish ministers.

The Deputy Convener: I am always fascinated by civil service phrases such as "used only in exceptional circumstances." Give us an example of an exceptional situation. Phrases such as "only in exceptional circumstances" and "once in a blue moon" are meant to be wonderfully reassuring, but no one gives us an example of the circumstances in which such measures might apply. I am always suspicious of provisions when no one can give me an example of when they might be used.

Geoff Owenson: It is a bit like saying what information would be disclosed—it is very difficult to say in what circumstances the provision would be used. The provision exists, should it be necessary. In New Zealand, ministers have a similar provision. It too is a collective power. It has not been exercised since 1987.

15:30

Michael Matheson: You say that it is difficult to give an example of when a ministerial certificate would be used and you have given an international example. When the bill was drafted, there must have been a reason for including the veto. What was that reason?

The Deputy Convener: It is a backstop.

Keith Connal: The reason for the Scottish bill having a very limited ministerial veto, and the reason for the UK Freedom of Information Act 2000, the Irish Freedom of Information Act 1997 and the New Zealand Official Information Act 1982 having a ministerial veto—all of which vary, and I would be happy to discuss that—is that they—

Michael Matheson: That does not necessarily make it right.

Keith Connal: I am not using those examples to justify the Scottish bill; I am not saying that it is necessarily correct to have a ministerial veto just because someone else has one. I mention the New Zealand and Irish acts because they are often cited as good examples of the drafting of FOI legislation. In those countries, it was felt that the strong powers of the commissioner and the way in which the bills were drafted meant that there was a need for a ministerial veto in limited and exceptional circumstances. The same view was taken here. In our case, the First Minister would consult colleagues to make the final decision in sensitive cases. Such a provision is not unusual in FOI regimes. The evidence from New Zealand supports the contention that vetoes would not be common. Here, the certificate would have to be laid before the Scottish Parliament and any ministerial decision in such a case could be the subject of a judicial review.

We understand that any FOI bill that contains a ministerial veto will attract criticism, but we need to provide, in limited circumstances, what I think I heard one committee member describe as a backstop. The limited nature of the veto in the Scottish bill is intended not to undermine the commissioner. The application of the veto in the Scottish bill would come only after consideration of an appeal by the commissioner. That contrasts

with Ireland—I am not criticising the Irish act—where ministers can veto the consideration of an appeal by the Irish commissioner so that the commissioner is not given the opportunity to consider the appeal and determine its outcome. I think it is fair to say that the circumstances for which the Scottish bill allows the application of the veto are limited.

I do not know whether that answer has been helpful. I am not sure that we can talk about hypothetical cases. The bill was not designed with a particular piece of information in mind that we anticipated would need the protection of a ministerial veto. We can consider other FOI regimes and we would be happy to provide the committee with information on the limited circumstances in which Ireland, New Zealand or wherever has invoked the ministerial veto.

The Deputy Convener: That would be helpful. I was the one who used the term "backstop". I understand what you said about Ireland and the fact that our backstop is even more limited than theirs. I also understand why Governments all over the world would want a backstop—I suspect that if I were in government I would want it as well. However, something worries me—although this question is perhaps not for you but for your political masters.

I take it that the veto will hardly be used. You have given us the New Zealand example. But the simple existence of the veto creates the perception that we are giving with one hand and taking with the other. The normal person—who is cynical about government—will say, "Well, they have given us freedom of information, but a ministerial certificate can overrule that—so they are not really giving us freedom of information." For the reasons that you have given, I feel that that perception would be wrong, because the veto would hardly ever be used, but if we find it impossible to say when we would use it, and if New Zealand has not used it since 19-canteen, a question arises: on balance, is it worth risking creating that wrong perception for something that has no real practical import? I appreciate that, with no disrespect to the civil servants, that may be more of a political question, but has it been considered?

Keith Connal: You give me the perfect opportunity to say that, when the minister appears before the committee later in the stage 1 scrutiny, you can put those points to him.

The Deputy Convener: We will.

Keith Connal: If you do not mind, convener, I will not attempt to give his personal view on whether including the veto gives an unfortunate tone to the act.

The Deputy Convener: That is fine.

Michael Matheson: Taking into account international experience, if the First Minister is given these powers, will guidance be issued so that when he can use them is clearly laid out—or will he be able to use them when he sees fit?

Keith Connal: No such guidance has been prepared in relation to this bill. We would be some way off doing that if it were to be produced. It is a question that I have not considered. I do not know whether in other jurisdictions such guidance is provided to ministers who are deciding whether to exercise a veto in their jurisdiction. That is a terribly unhelpful answer, I am afraid.

Donald Gorrie: Can the officials give us the history of this power in other countries? To take up your point, convener, can they give us examples of when the veto has been used? One could say, "That is a reasonable example. We should prevent that." I take the officials' point that they do not have to defend decisions made by politicians, but if I heard correctly, the argument that New Zealand has had the power since 1987 and has never used it is an argument against the power, not for it.

Keith Connal: For clarification, the significance of the 1987 date is that when New Zealand's Official Information Act 1982 was introduced, it allowed ministers individually to issue veto certificates, and a number were issued. The New Zealand Government felt that there was an inappropriate and too frequent use of individual ministerial certificates. The significance of 1987 is that the New Zealand Government amended the 1982 act to make the veto a collective ministerial veto. Since then, for whatever reason—I am not particularly au fait with New Zealand politics—that collective ministerial veto has not been exercised.

Mr Owenson has explained that the Freedom of Information (Scotland) Bill does not and cannot require a collective decision because of the terms of the Scotland Act 1998, but we have gone as far as we can in legislative terms to make the First Minister exercise the function, and require him to consult his colleagues.

The Deputy Convener: For the record, I raised the issue because of my experience, in another life, of public interest immunity certificates, which are not a million miles away from what we are talking about. Previous Administrations south of the border have been in serious trouble because of those certificates. You may not be able to do so now—you may have to do so later—but it might be useful to give us the information that Donald Gorrie requested. If such a veto is used worldwide, can you give us examples of when it has been used? As Donald Gorrie hinted, that would be helpful; being entirely reasonable people, we might say, "Yes, we can see why it is a good idea."

Keith Connal: I have made the offer, and we would be happy to assist in that way.

Lord James Douglas-Hamilton: Was not this issue a source of great controversy in the Scott inquiry on arms to Iraq? What do you have to say about that?

Keith Connal: Are you referring to the Matrix Churchill inquiry? That concerned public interest immunity, which is related to the veto but different. It does not relate to the Freedom of Information Act 2000, because the act was not in force then.

The Deputy Convener: But you might accept that the ministerial veto might give rise to the same problem.

Keith Connal: I accept that. Outside this forum, we have been asked about public interest immunity and whether there is a relationship between the Freedom of Information Act 2000 and PII certificates. I will shortly ask John St Clair to comment from a legal perspective.

In a sense, PII certificates carry with them a higher test because the withholding of documents from court is involved. They set a very high test, which must be satisfied before documents may be withheld. I am now straying into territory on which the deputy convener is more of an expert than I am, and now ask John St Clair to comment further.

John St Clair (Office of the Solicitor to the Scottish Executive): The way in which the bill is framed means that the decision to control the information gets out into the public domain. There are various controls on the making of the decision: the First Minister would have to consult his colleagues; judicial review; and, ultimately, parliamentary control. PII is rather different, because it is limited. Nevertheless, it is still subject to judicial review, and I remember that, in the Matrix Churchill case, the hare was let loose because the judge overturned the PII.

The Deputy Convener: I am not suggesting that a veto and a PII certificate are the same, but they often give rise to the same issue. In a funny sort of way, they present the same danger for politicians. Like other members, I was trying to ascertain that the game was worth the candle—that is why it would be useful to have examples of when a veto would be used—but I am not sure that we can take this much further.

Maureen Macmillan: This is a low-level point compared with what we have just discussed, but it perhaps relates to the same idea: that you seem to be giving with one hand and taking away with the other. There is to be a substantial prejudice test in Scotland—not in the whole of the UK. It is a matter of definitions: in the end, will the definition of "substantial prejudice" have to be tested in court? That provision makes the bill more powerful, but there are also ways of refusing requests. Some requests may be deemed to be vexatious—but who will determine what "vexatious" is? Will that have to be tested in court?

Why are there to be exempt classes of information? Could not that have been dealt with simply by having regard to the public interest or whatever? What about absolute exemptions? Many of the provisions relating to those questions seem hazy, and I do not know why they are included, nor how we will make the necessary definitions.

Keith Connal: I have noted four questions or subjects and I appreciate that there is a lot to be explored in each. I will ask Mr Owenson to touch on definitions, including the definitions of "public interest" and "vexatious". We will perhaps then discuss class exemptions, the operation of the public interest test and absolute exemptions.

Geoff Owenson: The problem with defining certain words or phrases such as "vexatious" or "public interest" in the bill is that it limits their application and does not allow an interpretation of the definitions to develop over time, whether through a change of view, experience or precedent. By not defining the terms, we give the information commissioner discretion about how best to apply them in given circumstances.

There is a general presumption that information covered by a class exemption will not be disclosed. There are only a limited number of class exemptions, which apply to information that is invariably sensitive, that it would not be appropriate to disclose, for example Cabinet minutes. That is not unique among freedom of information regimes around the world. Many of them have class exemptions or exclusions for such information. Class exemptions provide a clear signal that such information will not normally be disclosed, which is helpful to both the applicant and the public authority. However, it is important to remember that an authority would also need to take account of the public interest in considering most of the class-based exemptions.

Maureen Macmillan: Do you see that being tested in court once the bill becomes an act? I accept that you cannot put definitions in the bill, but if people who are anxious for information are told that they cannot have it because their request is vexatious, they will take the matter further and seek some sort of definition or justification.

John St Clair: We think it likely that the key expressions will be tested in court soon. Somebody is likely to take issue with the commissioner's interpretation and that will put a stamp on the jurisprudence. If the Parliament disagreed with the judiciary at that stage, it would

be up to the Parliament to intervene. We think that it does not make sense to over-define at this stage by using more concepts to describe what are difficult issues. They must be dealt with against a backdrop of jurisprudence. We think that that is adequate for now. Ultimately, it will be for the court and then for the Parliament to decide.

15:45

Keith Connal: I will add an illustration of how that might work in practice. Ireland has similar provisions to those in the Freedom of Information (Scotland) Bill. Because a number of Irish public bodies sought to refuse applications for information on the basis that they were vexatious, the Irish commissioner issued guidance to Irish public authorities on when he would consider it appropriate for them to judge an application as vexatious. That is the sort of guidance that would evolve here. Initially, the Scottish commissioner would be the first port of call for such guidance, because in the appeals structure he or she will be the person who will redress any dissatisfaction that an applicant might have.

I know that a great deal of paperwork descends on the committee, but on the subject of exemptions, I refer members to the policy memorandum that accompanies the bill. Starting on page 12, we try to set out in a few short paragraphs the principle of exemptions, what they do and do not mean, and what are absolute exemptions, which the member asked about.

Absolute exemptions are mainly technical provisions that deal with, for example, information that is already available to the public. There is an exemption for that. It might sound strange that we have had to put into a freedom of information bill an exemption that deals with information that is otherwise available, but that is a common technical route in such bills. The bill applies to all information that is held; it catches information and then one exempts what is already available to people. That is what an absolute exemption is. It would not make sense to apply the public interest test to information that is already available to the public.

Maureen Macmillan: The information is already in the public domain.

Keith Connal: Yes.

Maureen Macmillan: People do not have to find out about it, because they should know about it.

Keith Connal: That links to the proposal in the bill that all public authorities should issue a publications scheme that makes known what information and categories of information they make available routinely. The absolute exemption is meant to work together with that.

The other sort of absolute exemption deals with the fact that the bill needs to recognise and respect other statutes, for example the Data Protection Act 1998, which provides protection for personal information and subject access rights. Because the general right of access in the bill applies to all information, we have had to carve out or exempt absolutely personal data that are caught by and for which access is provided under the Data Protection Act 1998.

If one were simply to tot up the number of exemptions, one might conclude that there are too many, but a number of the exemptions are simply technical provisions. Given the way in which the bill is structured and its approach to the right of access to information that is held, one needs to carve out certain other provisions that deal with information that is already in the public domain or that is caught by the Data Protection Act 1998.

Michael Matheson: I am conscious that the key factors in the success of the legislation, once it reaches the statute book, will be how it is implemented and how the freedom of information regime is established.

Sections 60 and 61 give the Executive powers to issue codes of practice, with the intention of assisting public authorities with the implementation of a freedom of information regime. Does the Executive propose to consult on those codes?

Keith Connal: The first code, which is covered by section 60, is on the operation by Scottish public authorities of the general functions of the act. We have yet to finalise our views on how we will consult on a draft of that code. We have been focusing on preparing the legislation for introduction and have not developed the codes to the same extent that we have developed the bill. In preparing a draft of the second code, which deals with public records, we are receiving assistance from the National Archives of Scotland and we will consult relevant and interested parties in the wider archival community on its contents.

Examples of what the codes might look like are available in the equivalent codes that were produced under the Freedom of Information Act 2000—those codes can be found on the Lord Chancellor's website. I stress the word "might", because we are not bound to have the same codes, but it would not be unreasonable to assume that our codes will cover similar territory.

Michael Matheson: Would you expect to hold public consultation on the code that is to be produced under section 60?

Keith Connal: I have not committed the Executive to such a consultation. No decision has been taken on the precise mechanism that we will use to arrive at a final code. Members should bear it in mind that the code can be issued only after

consultation with the Scottish freedom of information commissioner, whose office has yet to be established. Therefore, it will be some time before the code is issued. I am not suggesting that we are putting the matter to one side—far from it—but we have not developed our thinking on the code to the same extent that we have developed the bill itself.

The Deputy Convener: The Executive has undertaken in relation to a number of pieces of legislation to produce draft codes before the end of stage 2 of the legislative process. For example, the Community Care and Health (Scotland) Bill will be implemented through regulations and the Executive has promised to produce the main regulations before the end of stage 2. Have you given any thought to producing draft regulations under the Freedom of Information (Scotland) Bill before we reach the end of stage 2? If you do not want to commit yourself today, could you give the convener an answer later?

Keith Connal: I am grateful for that question, as it covers an issue that I should have raised in response to Mr Matheson's question. As far as the parliamentary process is concerned, whether or not the Executive engages in a traditional 12-week public consultation exercise on the codes, our intention is to support stage 2 scrutiny of the bill by making drafts of the codes available. That is as far as I can commit the Executive today, but the minister may wish to go further. I hope that that commitment is reasonable and that making the drafts available will assist the stage 2 process.

The Deputy Convener: During the consultation on the draft bill, some consultees criticised some of the exemptions in part 2. Were changes made to part 2 following the consultation? Are there areas, which perhaps we have not covered, in which the consultation process had an effect, or did nothing much change? If I were in the industry, I could have researched the matter myself. I suppose I could work out the answer, but it would be easier if you just told me.

Keith Connal: Are you interested specifically in whether we amended any of the exemption provisions?

The Deputy Convener: Yes, but in more general terms, what did the consultation process achieve?

Keith Connal: The short answer to your first question is yes. The consultation led to changes to the draft bill. We have summarised those changes in the note that we provided for the clerk.

I shall give an example of the changes that we made to the exemption provisions. In direct response to a detailed submission from the Campaign for Freedom of Information in Scotland, we adjusted two subsections that gave exemption to investigations. We adjusted one subsection that dealt with information obtained from informants to bring the subsection into line with the approach adopted in the UK act, which the campaign had urged us to follow. We narrowed the exemption that was provided by a second subsection on investigations into the cause of death to tie the exemption to investigations initiated by the Procurator Fiscal Service.

Consultee comments were also taken on board through other, perhaps more minor, tweaks and adjustments. Although we initiated some technical adjustments to pick up areas of further work, adjustments were generally made in direct response to the consultation.

The Deputy Convener: I appreciate that you gave us a note of the changes, but I thought it appropriate to put on the record the fact that those changes had been made.

I want to ask two other things, one of which seems quite minor. The bill has various time limits for applications and appeals and gives the Scottish ministers power to alter those by regulation. Speaking with my subordinate legislation hat on, I am cynical about that sort of thing. Why is it thought necessary for the minister to be able to change by regulation the time limits that the Parliament has laid down?

Keith Connal: Interestingly, we included that provision in response to comments received in the consultation. We have not done exactly what people requested, but we have sought to address people's concerns by introducing the provision to allow time periods to be amended. What I mean by that is that we received contradictory representations. For example, some people thought that the period of 20 working days within which public authorities would have to respond was too long; others thought that it was too short.

We also received a number of representations on the provision that requires an applicant who is dissatisfied with the response to request an internal review by the public authority within 20 working days. Rather than make a series of complicated provisions to allow those time periods to be varied, we have left them as they were in the draft bill and added a provision that will allow them to be adjusted in the light of experience. I understand the concern that ministers may simply extend all the time periods—perhaps that will be examined in more detail by the Subordinate Legislation Committee—but our genuine intention was to try to address the concerns that were raised in the consultation.

The Deputy Convener: I have one final question before we finish. In the consultation process, mention was made of a "purpose clause". A number of the consultees were quite keen on

that. The inclusion of a purpose clause might not make much difference, but one union summed up the argument in favour of such a clause with the comment that, although the draft bill

"establishes the unambiguous principle ... the inclusion of a purpose clause was regarded as an opportunity to set down clearly the objectives of the legislation and to influence its interpretation."

I agree with John St Clair that it is the nature of the process that the courts will eventually consider the matter, but why was it not thought a good idea to have such a clause in the bill?

16:00

Geoff Owenson: Ministers considered the inclusion of a purpose clause very carefully, but concluded that it was neither appropriate nor necessary. They considered that the Executive's policy was clear and that the bill reflected that policy. The bill was designed to give precise effect to that policy.

The principal concern was that the inclusion of a purpose clause would set out broader—and necessarily less precisely defined—policy objectives that might upset the careful balance that is found throughout the bill and might result in the legislation having a more uncertain effect. At the end of the day, it is equally foreseeable that the purpose clause could also act to the detriment of the applicant. For example, it might have allowed a public authority to argue that the provision of requested information was outside the legislation's defined purpose. The purpose clause was not included to ensure clarity in the policy in the bill.

John St Clair: The policy was to make the bill as carefully drafted and calibrated as possible, so that its main purposes were clear. We think that that has been done. Also, one of the main purposes of the bill is expressed in the long title. It is thought that, together, those are more than adequate. To put one single purpose in the bill could easily, as Geoff Owenson said, have had the effect of limiting the bill and closing off purposes that could be construed from the bill, which we would not want to do.

The Deputy Convener: It might have done more harm than good.

John St Clair: Yes.

The Deputy Convener: I am finished. I hope that everyone else is finished, it being two minutes past four. I thank the witnesses.

The next item on the agenda is consideration of our forward work programme. I am afraid that we are moving into private session to do that.

16:02

Meeting continued in private until 16:16.

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