JUSTICE 1 COMMITTEE

Wednesday 21 November 2001
(*Morning*)

Session 1

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JUSTICE 1 COMMITTEE
31st 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

WITNESSES

Martyn Evans (Scottish Consumer Council)
Paul Holleran (National Union of Journalists)
Frank Johnstone (Law Society of Scotland)
Anne Keenan (Law Society of Scotland)
Rosemarie McIlwhan (Scottish Human Rights Centre)
David Mallon (Law Society of Scotland)
Graeme Millar (Scottish Consumer Council)
Sarah O'Neill (Scottish Consumer Council)
David Shayler (National Union of Journalists)
Francis Shennan (National Union of Journalists)

CLERK TO THE COMMITTEE

Lynn Tullis

SENIOR ASSISTANT CLERK

Alison Taylor

ASSISTANT CLERK

Jenny Goldsmith

LOCATION

Committee Room 1

Scottish Parliament

Justice 1 Committee

Wednesday 21 November 2001

(*Morning*)

[THE CONVENER *opened the meeting at 09:32*]

The Convener (Christine Grahame): Good morning and welcome to this meeting of the Justice 1 Committee. Lord James Douglas-Hamilton is attending a meeting of the Standards Committee and will arrive later. I have apologies from Maureen Macmillan, who is attending a Transport and the Environment Committee meeting.

Prisons

The Convener: Before we move on to the main business of the morning, we will deal with a matter that ought to have been on the agenda as a convener's report. I feel that I must bring the issue to the committee's attention.

A matter was raised by Alex Salmond MP with regard to evidence that was given to the committee on 23 October by Tony Cameron, the chief executive of the Scottish Prison Service. Members should have a copy of that letter and a copy of the *Official Report* to which the letter refers. The letter deals with a serious issue regarding evidence to the committee and I seek members' guidance on what should be done about it.

The letter is dated 12 November and is written to me as the convener of the Justice 1 Committee. Referring to the *Official Report* of the 23 October meeting, it says:

"I write to you on a most serious matter after examining the minutes of the Justice 1 Committee hearing of 23 October 2001.

I have to tell you that Mr. Cameron, Chief Executive of the Scottish Prison Service seriously misled your Committee at its hearing.

In column 2706 Mr. Cameron, in response to a question from Stewart Stevenson, claimed to have been present at a meeting between myself, the First Minister and the Justice Minister on the 26 January. He then went on to inform the Committee of his view of the commitments given or not given at that meeting and claimed to 'remember the assurance well'.

In fact Mr. Cameron was NOT in attendance at the meeting and any comments he made about it seem more to do with his prejudices against Peterhead Prison than genuine information to be given to your committee. Nor could Mr. Cameron be confusing this with any other meeting since I have NEVER held a meeting about Peterhead with the First Minister at which Mr. Cameron was present.

I took notes of the key points of the meeting which I am sure would be confirmed by the official Executive minute. Mr. McLeish twice assured me that the quality of service would be a key factor in the consultation exercise and he readily agreed to me putting that fact in my press release following the meeting, a copy of which I also enclose with the hard copy of this letter.

A further key commitment at the same meeting which may be of interest to your Committee was from the Justice Minister who said that HMCIP (Mr. Fairweather) would have a key role in determining on the question of 'total prison culture' which has been so important in the success of the Peterhead programmes.

I am sorry I have had to write to you with such a serious charge against a public official. Of course I stand ready to assist your Committee in any way I can, including giving further information or evidence if required.

In the meantime I leave the matter in your hands."

This matter is serious and I am seeking guidance from members of the committee. I will refer to the *Official Report* of the meeting. In column 2706, Stewart Stevenson asks:

"Does the assurance stand that the First Minister and the Minister for Justice gave to Alex Salmond when he met them on 26 January that the quality of service at Peterhead would be the determining factor in making a decision on the future of the prison service in that location, if not in that building?"

Tony Cameron replies:

"I was at the meeting, so I remember the assurance well. It was also stated that the future of provision at Peterhead would be decided in the context of the estates review and that costs and alternatives would be considered."

Stewart Stevenson asks:

"Will consideration of them be secondary to quality?"

Tony Cameron replies:

"No undertaking was given that one feature would prevail over others. Ministers did not concede that."—[*Official Report*, *Justice 1 Committee*, 23 October 2001; c 2706.]

The Executive minutes of that meeting on 26 January show that Mr Cameron was not at that meeting. They show that only Alex Salmond, the First Minister, the Deputy First Minister and W George Burgess, the civil servant who minuted the meeting, were present.

I raise this as a matter of concern because Peterhead prison was a contentious issue. I do not know whether members of the committee take the same view. I put two suggestions to the committee. We could write to Mr Cameron and ask him to respond in detail to this allegation or we could ask him to come before us and respond to the allegation. However, I am open to members' comments.

Gordon Jackson (Glasgow Govan) (Lab): I have not heard about this issue before, so my view is in some ways off the cuff.

I do not know whether Westminster makes people pompous or what the problem is, but Alex Salmond's letter is full of upper case "NOT"s and "NEVER"s and serious charges. Tony Cameron might have said that he was at a meeting that he did not attend. That is quite possible. We might want to write to Tony Cameron to say that it has come to our attention that he has made a mistake and has claimed to be at a meeting that he did not attend. However, to turn this into a large affair involving serious charges against a public official would be a mistake. I do not know what Tony Cameron might tell us, but he might simply apologise for getting two meetings mixed up when he was answering questions. Initially, at least, the reaction seems to be over the top. If it turns out that Tony Cameron has deliberately misled the committee, that would be a serious matter, but I think that we are not yet at that stage, despite the tone of Mr Salmond's letter.

Paul Martin (Glasgow Springburn) (Lab): I subscribe to Gordon Jackson's view. You have said that this is a serious matter, convener, but we do not know that it is.

The Convener: The allegation is serious. I make no prejudgments.

Paul Martin: You have said that it is a matter of great concern and that it is a serious matter. Now you are saying that the allegation is serious. However, we have not received a response from Tony Cameron.

The Convener: That is right.

Paul Martin: If Mr Cameron said that he had attended a meeting when he had not, and we receive a response to that effect, that will be of great concern. However, we may receive a satisfactory reply. We should give Mr Cameron the same opportunity as anyone else to clarify his position.

The Convener: Yes. I make it plain that I would not have raised this matter had I not also had the minutes of the Executive meeting. Because I have that information, I raise the matter as an allegation that has been made, which I do not prejudge. That is why I ask for the committee's guidance on how we should handle the matter. As Gordon Jackson suggested, no committee has been in this position before. I will take the committee's guidance.

Donald Gorrie (Central Scotland) (LD): I, too, support writing to Mr Cameron in the first instance to ask him to explain. We can take it from there.

The Convener: I suggest that, with the clerk, I draft a letter and circulate it to the members who are present and those who are not—they will be able to read the *Official Report* of this discussion. If the committee is content with the letter, it will be sent. Is that agreed?

Members *indicated agreement*.

The Convener: I add that the reason that this matter was unfortunately not circulated to members in advance was to prevent any leaks or problems prior to the meeting. We have had problems previously and I felt that committee members had to handle this matter themselves.

Item in Private

The Convener: We move on to item 2. Should we take this item—which is to agree in private lines of questioning for the witnesses—or should we just proceed to item 3, which is the questioning?

Donald Gorrie: We should just proceed to the questioning.

The Convener: Does anyone disagree?

Members: No.

Freedom of Information (Scotland) Bill: Stage 1

The Convener: We are taking evidence on the general principles of the Freedom of Information (Scotland) Bill. Our witnesses are: Frank Johnstone, who is the convener of the Law Society of Scotland privacy law committee; David Mallon, who is also a member of that committee; and Anne Keenan, who is deputy director of law reform at the Law Society of Scotland. I welcome them to the committee.

I am pleased to say that we are launching straight into questions—which is a pleasant change. I ask members to indicate which question they want to start off with. Members should have, among their vast supply of papers, the written submission from the Law Society of Scotland. It is paper 43.

Frank Johnstone (Law Society of Scotland): I am conscious of how much work is before the committee this morning. However, I want to make a brief comment, if I may.

The Convener: I am sorry. I understood that you did not want to. However, while members gather their thoughts, that will not be a problem.

Frank Johnstone: I am a solicitor in private practice. On my right is David Mallon, who is also a solicitor in private practice, and on my left is Anne Keenan. The society genuinely welcomes the Freedom of Information (Scotland) Bill and regards it as a positive step towards promoting a more open and accountable system of government. Our written submission is before committee members and we are happy to supplement its comments.

Donald Gorrie: I have a point about aspects of the proposed commissioner. Your written evidence suggests that the provisions in section 45

"may prevent the Scottish Information Commissioner from making public the name of any Scottish public authority which fails to meet its responsibilities under the legislation."

Can you elaborate on how that might happen? It would be bad if it did.

Frank Johnstone: It is one of our concerns. We think that the information commissioner will have strong powers and we welcome that aspect of the bill. Where appropriate, he or she will have quite incursive powers, if they are necessary.

We are concerned about section 45, although we have not come to a positive conclusion about it. We feel that, particularly in the report, there should be nothing to inhibit the commissioner from naming authorities that have not complied on the issues.

Our concern revolves around section 45(2)(c). The commissioner is entitled to make disclosures about information that comes into his or her possession. However, that disclosure has to be necessary for the discharge of a function of the act. It is not impossible to see that, if an issue has been amicably resolved between the person requesting the information and an authority, it might be helpful for the broader issue to be extracted from the problem so that the authority can be named in the public report. If that facility were available, it would demand attention from other authorities. We are concerned that section 45 might prohibit such a disclosure.

09:45

Donald Gorrie: I want to explore the general system of punishment, if that is the right word. If a bolshie public authority consistently fails to do its duty on this issue, nothing seems to happen to it. Why should it do its duty? There is no punishment. In most areas of life, if someone does something wrong, there is some kind of punishment. Under the bill, there is no punishment at all, other than the possibility of naming and shaming. Is that why you are concerned—because you are not even allowed to name and shame?

Frank Johnstone: Yes. That is an interesting question, as it deals with the issue of sanctions under the bill. The answer depends on how one perceives that a freedom of information regime will develop in Scotland. The issue is whether people will do what they should do or whether they will do it because they will be punished if they do not.

There is a mechanism—albeit a lengthy one—that will enable a sanction to be imposed against a delinquent authority. An applicant who has not had a satisfactory response to a request for information might be required to ask the authority to carry out a review. If the individual is still unhappy, he must then appeal to the information commissioner. If the authority still refuses to comply with an order made by the commissioner, the commissioner can make an application to the court to deal with the matter as contempt of court. That is a relatively severe mechanism or penalty.

Another approach is to create a freedom of information regime that, at every turn, imposes penalties for non-compliance. That approach would not be helpful to the promotion of a positive attitude to freedom of information on the part of the authorities. If authorities were conscious that, if they delayed or were dilatory in performing their obligations, a penalty could be imposed, we might find that those authorities would allocate freedom of information responsibilities to their legal departments. That would not be helpful. The issue must be considered.

Donald Gorrie: It seems that you share the concerns of various people that a future and less enlightened Government than the current one might misuse ministerial certificates. Would you elaborate on that?

Frank Johnstone: There is a concern that that might happen. When the issue arises, it is frequently said that the procedure will seldom be used in practice and will never be relied on. In that case, why is it there? We think that it should be ring-fenced. We think that it is important that care is taken about the provision, to ensure that it does not undermine the integrity of the freedom of information regime that we are hoping to create in Scotland.

Paul Martin: You will be aware that, in response to the draft bill, the Executive has confirmed that it will give further consideration to how the fees would be structured. What are your views on how the fees could be structured?

Frank Johnstone: Our submission expresses our concern that parties in Scotland should not be disfranchised from the rights created by the bill. If the financial limits are unduly high, a right with no remedy is no right at all. It is important that the rights created under the bill can be translated into effective remedies. The rights are only one step. If people cannot afford to translate the rights under the bill into an effective remedy, the bill is meaningless, so the costing is important. Our submission does not make detailed proposals, but we have flagged up the issue as the kernel of the whole system's integrity.

The Convener: This is a question that has just crossed my mind and I should probably not ask it, but would legal aid be available for such inquiries under advice and assistance? I think that the test would be a matter of Scots law and public interest.

David Mallon (Law Society of Scotland): It is a while since I have done advice and assistance, but my first reaction is that legal aid probably would be available. The inquiry would be a matter of Scots law and something for which people may require the assistance of a solicitor. I expect that the Scottish Legal Aid Board will have a view on that, which might be contrary to my suggestion.

The Convener: It might be useful to write to SLAB.

David Mallon: It might well be.

The Convener: That might deal to some extent with Paul Martin's question about fees.

Frank Johnstone: It would be interesting to see how the issue interfaces with section 15, which places an obligation on authorities to assist applicants and prospective applicants in exercising their rights.

The Convener: Could you develop that point?

Frank Johnstone: I think that it is section 15 that places an obligation on authorities to assist applicants and prospective applicants in relation to making requests.

The Convener: Do you think that that would be an obligation on the board?

Frank Johnstone: No, I mean that it would be an obligation on public authorities. It is not ideal that legal aid would not be available. However, if legal aid were not available, there should be a party to help applicants.

The Convener: I did not quite follow that. It may be too early in the morning. I am trying to see how that develops the point about whether advice and assistance would be available.

Frank Johnstone: What I am saying is that section 15 imposes an obligation on an authority to provide advice and assistance. I accept the fact that that is separate from the issue of legal advice and assistance.

The Convener: Right. I understood that distinction. I thought that the section you referred to might strengthen the argument that advice and assistance should be funded by the board.

I am concerned about class exemptions. They involve a public interest test. Do you believe that it is right that the bill does not contain any definition of public interest? Surely that is a minefield.

David Mallon: The question of public interest arises in many areas and the definition can depend on which area one is dealing with. However, it is a question that is regularly addressed by courts, so there is a lot of jurisprudence on it. If one wanted to apply public interest tests on a daily basis, the lack of a clear definition in the bill might give rise to difficulties. I suggest that it should be dealt with in the code of practice. Guidance for public authorities would certainly be helpful. I can see that there might be difficulties in applying a public interest test where public interest is not defined.

The Convener: Previous evidence seems to suggest that the code of practice is central to the bill's implementation. At stage 2, we ought to look at the bill with at least some draft code of practice before us. What are your views on that?

Frank Johnstone: The privacy law committee is of the view that the codes of practice will be essential in assisting authorities to identify the extent of their obligations and the obligations themselves. If those codes of practice are made available sooner rather than later, that would be helpful. However, having the codes of practice available is only one aspect of assisting authorities to comply with the obligations. It is essential that funding is available to them to provide training and facilitate compliance.

The Convener: Yes. I think that one of the papers that we received in evidence from some police authority—I forget which—says that £100,000 a year is the guesstimate for training and facilitation. We are not aware of the figures and no one really knows what the cost to local authorities will be. Are you concerned that those obligations may not be properly financed?

David Mallon: The concern is that, if the meeting of authorities' obligations is not adequately financed, the principles and goals of the bill will not be fulfilled. At this stage, asking what the figures should be is like asking how long a piece of string is. The Law Society is concerned that, in the absence of adequate funding, there will be a problem in meeting the goals of the bill.

The Convener: I asked a question at our previous meeting about charging. I gave the example of property inquiry certificates, which used to be free. As we all know, those certificates are required to be produced when one is purchasing a house. Now they are—perhaps this is unfair—a bit of a money-making exercise for some local authorities. Are you concerned that further charging may again turn into a method of generating income for local authorities?

Frank Johnstone: We would be concerned if the bill was hijacked and turned into a money-making machine. We must accept that expenses will be incurred by authorities in dealing with responses under the bill and it is important that authorities are adequately resourced to deal with those expenses. If they are not, they may try to raise funds by attaching costs in other areas.

The Convener: If no other members want to ask questions, I shall push on. I want to ask about vexatious applications. We know all about vexatious litigants. Concerns have been raised that the bill provides no definition of vexatious. Would you want that definition in the codes of practice, or would you leave it to case law?

Frank Johnstone: That is a difficult issue. I understand why the bill provides for vexatious requesters to be disfranchised. However, there would be some difficulty if an authority sought to draw an unreasonable conclusion to that effect, although its decision would be subject to internal review and review by the information commissioner. Guidance on that issue could be given in the codes of practice; I have no doubt that the commissioner will issue such guidance.

Paul Martin: The bill sets out exemptions in relation to confidential material. Can you give us an example of what would be considered a confidential matter in respect of your own dealings?

Anne Keenan (Law Society of Scotland): We are concerned about the lack of a definition of confidentiality in the bill, especially in relation to section 36. The explanatory notes in the policy memorandum say that the section deals with legal professional privilege. However, we are concerned that the drafting of the section has not been considered carefully enough. It seems to deal with wider issues of confidentiality and is not restricted to the narrow aspect of legal professional privilege.

Definitions of legal professional privilege already exist in Scots law. For example, section 31 of the Data Protection Act 1984, sections 19 and 39 of the Terrorism Act 2000 and section 31 of the Criminal Law (Consolidation) (Scotland) Act 1995 all, I think, provide a definition of legal professional privilege for Scots law. We are concerned that the bill does not include such a definition. It would be helpful to include distinctions between classes of material, so that people could know what was confidential or privileged and could understand the import of section 36 of the bill. Perhaps further consideration should be given to the drafting of that section.

Paul Martin: If information was exchanged between the Law Society and an individual solicitor, in respect of a complaint that had been made by a user of the solicitor's firm, would that information be termed confidential?

Frank Johnstone: It is an interesting question. Can you expand on it a little?

Paul Martin: If a complaint against a firm of solicitors was raised with the Law Society and the firm responded to that complaint, would the information be deemed confidential if someone asked for access to it?

Anne Keenan: That would not fall within professional privilege, as I understand the reference in the bill. Legal professional privilege is a particular type of confidentiality that is generally used in forthcoming legal proceedings. If a person instructs a solicitor and gives them information about their defence or a civil action, that would usually be regarded as privileged material. Confidentiality is wider than that. In the example that you gave, the information would not be regarded as privileged according to my understanding of the Executive's intention in the bill.

10:00

Donald Gorrie: Some people have spoken about their concern that the bill treats what one might call a campaign with some suspicion—almost as vexatious. Would you like to comment on that? There seems to be an idea that if, for example, one person writes in with a complaint about the carpet, that is okay, but if 10 people do so it becomes a campaign and so you would ignore all complaints about carpets. That seems odd.

Frank Johnstone: There is genuine concern that, because a number of people feel strongly about a matter, people might be disfranchised from exercising their rights under the bill. I agree that that should cause concern.

The Convener: You have not commented on section 33, which deals with commercial interests and the economy. The section deals with class exemptions and states:

"Information is exempt information if—

(a) it constitutes a trade secret; or

(b) its disclosure under this Act would, or would be likely to, prejudice substantially … commercial interests".

We have had difficulty obtaining information from private prisons because of commercial interest. It was thought that such information was commercially sensitive. The provision seems very wide and might well be a barrier to obtaining information that should rightfully be disclosed in the public domain. Would you like to comment on trade secrets or commercial interests? The committee would welcome a steer on those issues.

David Mallon: The difference between a trade secret and something that is commercially sensitive could perhaps be clarified in guidance or in the code. Sometimes there might be confusion about which is which, although a recipe or some piece of know-how akin to a patent would clearly be a trade secret.

The Convener: We said that a Borders firm's recipe for black bun might be a trade secret.

David Mallon: I have never tried black bun. Arguably that would be a trade secret. Guidance would be helpful on that point.

The Convener: It would also be commercially sensitive.

David Mallon: A trade secret is definitely commercially sensitive, but something that is commercially sensitive might not be a trade secret.

The Convener: I follow you. Are there any other comments? The bill has been presented to us as being robust and our duty is to test whether that robustness is simply on the surface.

Frank Johnstone: The issue is worth focusing on to a certain extent. In other freedom of information regimes, a significant number of requests are from commercial entities seeking information that would be of economic advantage to them. Beyond that, I do not wish to comment at this stage.

The Convener: The local authorities gave us their view, which was that if a contract was put out to an agency and, in the interests of openness and transparency, there was an inquiry to find out the cost of the contract, in the interests of commercial confidentiality and in the face of genuine public, democratic interest, that information might not be forthcoming. Is that right? As so much local authority business is contracted out to private companies, that might be a problem.

David Mallon: That is a difficult question. At a general level, there are commercial interests that should be protected from an application for disclosure. It is a balancing act. That is the difficulty in drafting the bill. Commercial interests are not necessarily something that should be disregarded.

The Convener: I have a final question about that. One of the pieces of evidence that we took last week suggested that other authorities should be included in the list in schedule 1 of authorities that are classified as Scottish public authorities. You may have had the opportunity to read the *Official Report* of last week's meeting. What is your view of that suggestion? What other public authorities might be included? Should the list be left more open, because designating all the authorities could be a huge problem? An agency might be contracted to a local authority only temporarily, and so should not be on the list after the contract has ended. What is your solution to that?

Frank Johnstone: An agency that is doing work of a public nature for a public authority will be caught by the provisions of the bill. The agency will be designated as a public authority in so far as the services that it provides are of a public nature. The designation system creates for authorities a degree of certainty about whether they are caught by the provisions of the bill. The list will be extended or shortened in due course.

The Convener: Is that a matter for the code rather than for the bill?

Frank Johnstone: The commissioner may be helpful in identifying persons who should have been designated and who have not been. I do not think that we can expect the list to be absolutely comprehensive at the moment; it will develop.

Michael Matheson (Central Scotland) (SNP): It has been indicated that, in other countries that have introduced freedom of information legislation, one of the greatest barriers to the effectiveness of the legislation was changing the culture and the regime of secrecy that pervades many public bodies. I welcome your views on how that could be tackled as part of the process of making the legislation effective.

I see from your submission that you are of the view that it will be important to monitor the effectiveness of the freedom of information legislation and, in particular, the commissioner's role. That seems to be close to the idea that we should ensure that we change the culture. We have to ensure that the commissioner does their job properly and monitors the effectiveness of the legislation. How do we do that? If the legislation is not working, how should we address the issue?

Frank Johnstone: That is an interesting question. Changing the culture will be absolutely critical to making the bill work for the citizens of Scotland. If we are honest, there is not huge openness in certain matters, particularly in Scotland. Perhaps I speak only from my own experience, but we are brought up to believe that a problem shared is a problem doubled. That uniquely Scottish approach needs to be changed. At the heart of that will be adequate funding for training for authorities that are caught by the bill, useful and clear guidance in the codes and a proactive commissioner who is under an obligation to disseminate information about the final legislation.

That should be achieved in the same way as we ensure that the Information Commissioner complies with her obligation in relation to data protection matters. She and members of her office are regularly available to speak at conferences and lectures to promote information about the Data Protection Act 1998. I would welcome the Scottish information commissioner adopting such an approach.

Changing the culture will be difficult and if the legislation has penalties built into it, authorities will withdraw from it rather than embrace it. We want to make authorities genuinely concerned about complying with their obligations under the legislation. We want them to promote their publication schemes so that they are proactive in relation to freedom of information rather than defensive about it.

Michael Matheson: Is training the responsibility of individual authorities or would the Scottish Executive have to provide a lead and additional funding?

Frank Johnstone: The committee has not considered that matter other than to identify the importance of training. The committee has not considered the funding of that training.

The Convener: Before we conclude, I have a final question. You stated that it is important to monitor

"the effectiveness of the Scottish Information Commissioner in ensuring that the aims of the legislation … are achieved."

How should that monitoring be carried out? It seems easy to say, but harder to do.

Frank Johnstone: That is right. No doubt members of the Scottish Parliament will monitor the role as problems arise—we must expect that they will. The strong points of the legislation will be recognised in practice and, where weaknesses are identified, I hope that the Parliament will react.

The Convener: So you are leaving it to us?

Frank Johnstone: It would be presumptuous of me to take on that responsibility for the Law Society.

The Convener: As there are no further questions, I thank the witnesses for attending. Your evidence was very helpful.

Good morning and welcome to the representatives from the Scottish Consumer Council. We are joined by Martyn Evans, the council's director, Graeme Millar, its chairman, and Sarah O'Neill, its legal officer. Committee members have before them a copy of the Scottish Consumer Council's paper, FOI 18. I understand that the witnesses will make a short opening statement, although it is not mandatory to do so.

Graeme Millar (Scottish Consumer Council): Thank you. I will make a short opening statement to set out the context.

Our belief is that the proposals for freedom of information in Scotland go further and are better—even at this stage and without further amendment—than those that apply in the rest of the United Kingdom. We lobbied for freedom of information before the Scottish Parliament was set up. We are pleased to find ourselves where we are now.

We are happy to accept questions.

Michael Matheson: Considerable concern has been expressed about the charging regime that is proposed in the draft bill. I understand that, on the basis of the consultation exercise, the Scottish Executive is to reconsider the regime. Will you detail your concerns about the proposed charging regime?

Graeme Millar: I will make some general comments and then ask Sarah O'Neill to come in on the specifics.

We recognise that the original proposals for charging were given as an indication. Their aim was to illicit a response and we have given ours to the Executive. On the one hand, we have said that we are pleased with the advances that are proposed in the bill compared with those for the rest of the UK. However, consumers in Scotland could be hugely disadvantaged if the suggested scale of charges was to come into effect. We are delighted to hear Michael Matheson say that, following submissions from ourselves and others, the Scottish Executive is reviewing the regime.

Sarah O'Neill (Scottish Consumer Council): At the moment, one of our problems is that we do not know what the Executive's plans are. All we can go on is what was proposed in the draft bill. We were concerned about the proposed charging regime, as it could lead to someone paying a lot more money in Scotland than they would elsewhere in the UK.

We appreciate that it is likely that compliance with most requests will cost less than £100, but when it does not, that could cause problems for people who cannot afford to pay the required fees. People on low incomes should be exempt from paying any fees. We are also concerned about the maximum limit, which the draft proposals said should be £500. An authority could refuse to provide information that cost more than that to provide, regardless of the applicant's ability to pay. That is a potential barrier to access to information and we would like the provision to be reviewed.

Michael Matheson: As you may have heard in other evidence, I am worried that financial barriers to exercising rights under the bill may undermine the bill's effectiveness. You talked about the possibility of exempting people on low incomes from paying fees. How would such a system operate? For example, would gateway benefits be identified, so that people on income support were automatically exempted from paying costs?

10:15

Sarah O'Neill: That is one system of exemption. We have not gone into the detail of how a system might be implemented, but I imagine that the basis could be the same as for eligibility for legal aid advice and assistance, for which some benefits automatically passport people, and for which people who do not claim benefits but who are on low incomes may still be eligible.

The Convener: If I have understood, you are talking about an eligibility test for being charged a fee, not an eligibility test for applying for advice and assistance, which would mean that the Scottish Legal Aid Board paid the fee. Is that correct?

Sarah O'Neill: Yes. I just used legal aid as an example.

The Convener: The example was interesting.

Donald Gorrie: The Scottish Consumer Council is one of the organisations that have expressed enthusiasm for a purpose clause. As I understand it, the Executive uses two arguments against that. The first is that such a clause would be vague, which is bad in a bill, as bills should be precise. The second is that such a clause might unintentionally restrict the bill, because if the bill does not have a purpose clause, the world is your

oyster, so to speak. What do you think of those arguments in response to your understandable desire for a purpose clause?

Graeme Millar: I ask Martyn Evans to answer that question, as he has covered that matter a fair bit before.

Martyn Evans (Scottish Consumer Council): We heard and read the Executive's evidence to the committee to the effect that a purpose clause would do more harm than good. The argument of which we hope to convince the committee is that purpose clauses show which of two or more competing values should be uppermost when a decision is made.

That probably relates to the question on culture that was asked of the Law Society. We have the right to know, the right to privacy and a need for a duty of confidentiality. We argue for a clear purpose clause, as exists in a significant number of other freedom of information acts around the world. The purpose clause that is used in New Zealand is probably the most elegant. It balances competing interests—a task that is at the heart of the bill. Such a clause makes decisions about the amount of information to provide more straightforward.

The House of Commons Public Administration Select Committee heard evidence on that point. The Home Office said the same to that committee as the Executive has said to this committee—that the clause would do more harm than good. The select committee was not persuaded. We could point this committee to UK legislation that contains purpose clauses that have been effective at balancing competing demands.

On balance, we think that the culture change that the committee has talked to other witnesses about is at the heart of the change that will take place. A purpose clause would help that culture change. It is consistent with other freedom of information acts and such clauses exist in a limited amount of UK legislation. There is no purpose clause yet in Scottish Parliament legislation, but we hope that we can persuade the committee that such a clause would be valuable. In considering the UK Freedom of Information Bill, the Public Administration Select Committee recommended a purpose clause. We have a form of words that we would like the committee to consider, which is in our submission.

Sarah O'Neill: Unlike the Executive, we consider a purpose clause to be more than just a legal instrument. We think that the purpose clause sets the tone and spirit of the legislation and encourages the people who administer the legislation to view it positively instead of as a chore that they have to carry out. Furthermore, if a case should go to court, the clause would encourage the commissioner and judges to lean towards disclosure. Perhaps more important, it might have the same effect on those in public authorities who will administer the legislation.

Donald Gorrie: Your organisation understands campaigning. As I understand it, the bill does not; indeed, it seems to suggest that if a number of people write in for the same information, it is all a wicked plot and so they should not get it. How can we protect public authorities from unreasonable requests and lots of expense and still ensure that information is given to people who genuinely share an enthusiasm for a particular issue?

Graeme Millar: Having been in different roles in other environments and public authorities, I think that campaigns are often regarded negatively by organisations. Often they identify a single problem that is recognised by many different people for whom those organisations provide services. Campaigns are useful in that they help to define problems that are clearly vexatious, although we appreciate the Law Society of Scotland's comments about the difficulty of such a definition. Authorities must be persuaded that such campaigns might be emphasising much larger problems of which they are not fully aware. In many cases, we can turn a campaign round to give it a positive aspect instead of a negative one.

Sarah O'Neill: It should not mean any more work for public authorities if people who are mounting a campaign all ask for the same information. They could publish the information on their websites or send the same letter to anyone who asks. The task would not be particularly onerous. Indeed, a representative from a public authority made that point at a conference I recently attended. He did not see it as a particular problem.

The Convener: You said that a purpose clause would set a tone in the bill that would tip the balance towards the presumption of disclosure. If a case came before the commissioner in which access to information was denied on the basis of public interest, what test of evidence would he or she apply? In civil law, the test is the balance of probability, whereas in criminal law the test centres on proof beyond reasonable doubt. Which of those tests should the commissioner apply?

Sarah O'Neill: I have not really thought about that question, but my initial reaction is that the commissioner should apply the civil test of the balance of probability instead of the more demanding criminal law test. We feel that there should be a presumption of disclosure, unless it is more in the public interest not to disclose.

The Convener: But that test is not so robust. The commissioner could simply say that, given the balance of probability, they would not be inclined

to disclose. The other test would be stronger. I am quite surprised by that response, although you are quite entitled to make it.

Sarah O'Neill: If you will pardon me, I think that I was getting a bit confused there. I think I should have said that we would prefer the criminal law evidence test.

The Convener: Sorry?

Sarah O'Neill: I said that I think that we would prefer the beyond reasonable doubt test.

The Convener: I was wondering about that. I do not want to be leading evidence for the Scottish Consumer Council. For the sake of clarity, do you want the commissioner to have a fairly robust role right across the spectrum?

Graeme Millar: Absolutely.

Paul Martin: Will you elaborate on your concerns about the procedures set out in the bill that specify that information that is sought should be confirmed in writing?

Graeme Millar: That issue does not arise only in this bill but in other aspects of provision of information. Insisting on a written format for information will rule out certain people. We represent people who are disadvantaged in the widest sense, including those with poor literacy skills, special needs or difficulties with the English language.

We know that, in many authorities, there are mechanisms for providing such information and examples of good practice that overcome those constraints—that is one aspect. Simple things would help, such as taking requests by telephone and the authority writing them down and sending letters to request confirmation that what has been written is exactly what is being sought. People should be more flexible, or there might be a perception that they do not really welcome requests for information. There are other issues.

Martyn Evans: We strongly support the evidence that the Disability Rights Commission gave to the committee about people who may be significantly disadvantaged. Those who have difficulty in reading and writing are a more difficult group for us. I regret to say that the issue of functional illiteracy is significant in Scotland and in the UK as a whole—it affects between 16 and 30 per cent of people. We recognise the difficulties in that area and understand the Executive's arguments that the matter could be dealt with under regulation and that assistance could be given. However, there should be more consideration of the issue and there could be greater clarity on the duty to assist an applicant who may not be able to put their request in writing.

Our chairman said that those who receive poor public services and find it difficult to express their views and put their requests in writing are of most concern to us. We strongly support the DRC and we want that issue to be focused on.

Paul Martin: There could be concerns about telephone requests involving sensitive information—if an application was made to a health board for sensitive medical information, for example. Are you concerned that such information could be given over the telephone? Regulations would have to be in place to prevent that.

Graeme Millar: To wear my health service hat, as chairman of the Common Services Agency, I hold a lot of information. You are absolutely right. We suggest that there could be requests by telephone, but that there should not be responses by telephone. A request may be made by telephone and may simply be formatted by the person who receives the request, which is what currently happens. A response would then be sent to the individual by some means simply to confirm the information that they want. The request could then be processed in the normal written form or by another form of communication to protect sensitive information.

On time limits relating to applications, there is a suggestion in the bill that, with all the facilities that are available, an individual should be able to request information and an authority in theory should be able to supply that information within 20 days because that is part of the authority's function. We link the request for information and how we request information with the time scales that have been proposed for responses. We need greater flexibility in the response time from organisations and from individuals who request information.

Paul Martin: You mentioned that applications could be made in person. Will you elaborate on the procedures that would be followed? Are you talking about setting aside areas within authorities where people could apply in person with a proforma letter, perhaps?

Graeme Millar: In some respects, we are reflecting what is already good practice in some authorities, where people are able to walk through the front door of council chambers or offices and request information or something else at the reception area. Someone will help them to write down the request and then will process it as they would have done through channels such as the telephone. That is good practice.

There are authorities throughout Scotland with the same positive culture that is enshrined in the bill. It is not the case that all public authorities will have to wake up to a completely different culture. The 32 authorities can look to their own clusters for good practice. A culture change is not far off,

although some authorities are more enlightened than others. We want to encourage those who are enlightened to share good practice.

The Convener: It is important that consumers know their rights. Even now, many do not know about the simplest things.

Graeme Millar: I do not know whether I know all my rights.

The Convener: Likewise. People do not know what to do about shoddy goods, for example. How will people become aware of their rights under the bill? The proposals are hardly going to be the talk of the steamie. If they are not, how will they be made the talk of somewhere else so that the public out there can access their rights? I mean ordinary people—we do not want only commercial interests or interest groups to know their rights.

Graeme Millar: I will ask Martyn Evans to make some comment. Other generalities apply in other sectors.

Martyn Evans: I agree that a key issue is whether those rights will be used. The three pieces of legislation—the Freedom of Information Act 2000, the Freedom of Information (Scotland) Bill and the Data Protection Act 1998—add to the complexity of the matter. We envisage that the commissioner will have a key role in promoting rights and that there should be a duty on the public authorities to promote them. That goes beyond what is in the bill. It goes back to the questions about culture and how to promote rights.

Sarah O'Neill has done more work with a wider group of agencies to consider how, when the bill becomes an act, we can assist in the promotion of rights.

10:30

Sarah O'Neill: As Martyn Evans just mentioned, the commissioner will have a duty to promote awareness of the act. We hope that he or she will have sufficient resources to do that properly. That might involve providing information booklets to people, sending leaflets to every household and television and newspaper advertising campaigns.

We have considered producing a guide for consumers, perhaps in partnership with another organisation. We have just produced a similar booklet about rights under the data protection legislation. We consider that to be important. There is no point in people having those rights if they are not aware that they have them. That will be key to the effectiveness of the bill.

The Convener: You mention a freedom of information officer. Who he? Who she?

Sarah O'Neill: Every public authority should be required to designate someone a freedom of information officer. That does not necessarily mean that the authorities would need to employ a new person for that role. An existing employee could take it on. If someone senior needs to make a judgment about what information is given to people, the freedom of information officer needs to be reasonably senior to ensure that people are given the information that they require and are entitled to.

The freedom of information officer should be required to help people frame requests for information. Section 15 of the bill imposes a duty on public authorities to do that, but it does not specify that someone should be designated to deal with framing requests. We think that someone should be.

The Convener: Should freedom of information officers also be part of the publicity engine?

Martyn Evans: They should. That too is a matter of culture change. A related culture change—public involvement in the health service—has been pushed by requiring primary care trusts to designate directors responsible for public involvement. They do not deliver the public involvement, but they have responsibility for it within the governance of the trusts.

We envisage the freedom of information officers as being focal points for issues that are complex or require a decision and for policies and procedures, particularly in larger agencies. Freedom of information officers may not deliver everything, but they would be the responsible focus for policy development and pushing the culture change that the bill requires.

Michael Matheson: We have already discussed the format for requests for information. The flip side of that is the accessibility of the format of the information that the applicant receives. That can equally apply to those who have difficulty in applying for information in the first place. Section 11 of the bill makes provision for the information to be provided in a form acceptable to the applicant. The potential exists for discrimination against groups such as those who are disabled. Should that section go further to ensure that there is no discrimination against people who have difficulty obtaining information and have to have it in a special format?

Sarah O'Neill: We are concerned about the wording of that part of the bill. It says that people can have information in their preferred format, but only where it is "reasonably practicable". Cost is explicitly mentioned as one of the factors for deciding what is reasonably practicable. We absolutely support what the Disability Rights Commission said to the committee last week about that. It should be made clear that the bill must not conflict with what the Disability

Discrimination Act 1995 says on that point.

Lord James Douglas-Hamilton (Lothians) (Con): I was in the Standards Committee, which is why I arrived a little later than I would have wished.

The Convener: I explained that.

Lord James Douglas-Hamilton: I will ask two questions. I hope that they have not been asked. I have one on the ministerial veto and one on the Scottish information commissioner. The convener can rule me out of order if the questions have been touched on.

First, I understand that you have concerns about the ministerial veto and suggest that, should it be used, the decision should be made public. Are the current restrictions on the use of the veto enough to prevent it from being abused?

Secondly, while the commissioner will have the power to make a recommendation on good practice in the function of the veto, they will only be recommendations and it will not be possible to enforce them. I understand that you feel that the bill does not sufficiently deal with public authorities that constantly evade their duties. What would you suggest?

Martyn Evans: We understand the reasons for the ministerial veto. We welcome the fact that the restrictions in the Freedom of Information (Scotland) Bill are less wide-ranging than those in the UK Freedom of Information Act 2000, but we do not know whether they are sufficiently well-drafted for the veto not to be abused. That judgment is for the future. However, as we set out in our submission, there must be public scrutiny of the veto process. It is important that the fact that a veto has been exercised is made public. The certificate should be lodged with the information commissioner, and certificates should be held in a public register, so that there is a continuing record of what is done.

We are uncertain about the validity of the veto, but we understand why it exists. The mechanisms that we propose would better regulate the ministerial veto. We are concerned that the veto exists at all, but we have read the evidence about how little it is used in other regimes and the collective responsibility that is exercised through the First Minister. The bill should provide for better regulation and public scrutiny of the vetoes.

Sarah O'Neill: We are concerned that the sanctions in the bill are insufficient, particularly when a public authority persistently fails to comply with its duties under the bill. While the commissioner will have powers to take individual authorities to court, they can be exercised only in respect of a failure to comply with an information or enforcement notice. It is fairly straightforward when a request for information has been refused, but there is nothing in the bill that is strong enough to deal with an authority that, for example, consistently evades time limits. We hope that most authorities will comply with their duties under the bill, but there may be some that do not, and there are not enough measures in the bill to deal with that situation.

We are also concerned about codes of practice. We appreciate that codes of practice generally do not have legal force, but we are concerned that in this case the code will not, because while most authorities will comply, those that do not will not be required to do so. That could mean authorities failing persistently to observe the code of practice. There is no specific power in the bill for the commissioner to do something about that.

Graeme Millar: I add the rider that if codes of practice are not adhered to, within reason, throughout Scotland, we will end up with disparities between authorities. If we end up with a rogue authority that turns its back on requests for information and the information process, I suspect that Parliament will be concerned, because it is unlikely that that would happen in just one area of the authority's activity. It would reflect the culture in that organisation, so there would be problems in many areas. Overall, we must seek uniformity, where possible. I hope that the gap between what is regarded as the best practice and the worst practice will be narrowed substantially. I have faith that we can get there.

The Convener: I follow on from ministerial certificates with class exemptions, which concern me. Some bits of the Freedom of Information (Scotland) Bill are quite robust, but other bits are quite flaccid and would deny access to information. In your submission you say:

"There is no place for class-based exemptions in a truly open freedom of information regime. All class exemptions should be replaced by a presumption that every application will be considered on its merits"

Could you expand on that?

I have serious reservations about ministerial certificates. Section 52(3) of the bill requires the First Minister to lay before Parliament a copy of the certificate of exemption and

"in relation to a decision notice, to inform the person to whose application the notice relates of the reasons for the opinion formed".

That is somewhat trammelled,

"except that the First Minister is not obliged to provide information … if, or to the extent that, compliance … would necessitate the disclosure of exempt information."

It is a limited disclosure of the reasons. Could you comment on that? There seems to be an intertwining of class exemptions and ministerial certificates. This is where we get down to the nitty-

gritty: when people want information that they may not get.

Sarah O'Neill: We are concerned that, if there is a class exemption for information falling under a particular category, harmless information could be withheld without any need for the authority to give reasons. We are of the view that there should not be class exemptions in the bill.

A point that relates to all exemptions is that there are no time limits in the bill. Other freedom of information acts have what are known as sunset clauses, which specify that the information will be exempt only for a certain period of time. There is no such provision in the bill, and we feel that there should be.

The Convener: Can you give an example of when a class exemption would catch something that was, even to the keenest eye, innocuous?

Can you tell us more about other freedom of information regimes that have a sunset clause?

Graeme Millar: I will ask Sarah O'Neill to answer again, as she has worked so much in that area.

Sarah O'Neill: On the first question, I cannot think of an example off the top of my head.

On whether the commissioner can review decisions made by the Lord Advocate—

The Convener: Is that an absolute exemption? I am trying to recall whether it is an absolute or class exemption.

Sarah O'Neill: I believe that it is a class exemption but I am not sure.

The Lord Advocate's office could refuse to say how many people work in the office or how much they are paid, although that has nothing to do with the investigation of crime, which is what the exemption is there to address.

I have forgotten the second part of the convener's question.

The Convener: So have I.

Graeme Millar: There was a point about ministerial certificates in section 52.

The Convener: It was about ministerial certificates and the limited disclosure of reasons.

Martyn Evans: We have not played this very strongly in our submission to the committee. We believe that the provisions in the bill are better than those in the UK act.

The Convener: My question was about comparative freedom of information regimes.

Martyn Evans: Yes. It must be compared to other regimes.

In terms of the consumer interest, we understand the arguments that are being put forward as to why those certificates should be there. We feel that the process of openness should be laid before Parliament. That is the limit to what we are saying about the matter. Other issues in the bill are more important.

Graeme Millar: On some aspects of the bill, rather than taking a stand on an issue of principle we want to ensure that they are workable. Our emphasis varies. We want the bill to be workable.

The Convener: The clerk has told me that it is an absolute exemption on court records. I thought that it was one of the absolute exemptions.

On not disclosing information, would I be right in saying that the Scottish Consumer Council might be interested in the section on commercial interests? It states:

"disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person".

Is that an example of where you think that a sunset provision might be considered? The commissioner might consider that it would be commercially sensitive for a period of time, but not thereafter. Historically, it might be of interest to have the information, even if it is recent history.

Graeme Millar: That sounds like the type of scenario when a time limit would be appropriate. Eventually, disclosure would not matter.

Sarah O'Neill: Commercial confidentiality is the obvious situation where sunset clauses might be appropriate. We have suggested that a particular event might trigger disclosure in a specific case. If no such event can be identified, there should be a two-year time limit for any exemption.

On commercial confidentiality more generally, we are concerned about the breadth of the exemption. In particular, we think that a trade secret should be defined in the bill because, as we heard earlier, it is not easy to say what a trade secret is. We also think that the bill should make it clear what kind of information will never constitute a trade secret—for example, information on pricing, sales volumes and tenders.

The Convener: Who will decide on the mechanism for dealing with commercial interests? If the climate changes because of events, who will decide what information should be released or whether the time limit should be changed? Will the commissioner monitor that and how will it operate? I presume that a mechanism will exist by which people can reapply for information a year or two later, but should it be in the bill or in the codes of practice?

10:45

Sarah O'Neill: There should be a mechanism to inform applicants that they can reapply after one or two years or however long the period is. Ultimately, the decision on the time scale would be for the commissioner, but the obvious place to put the period would be in the codes of practice. However, as I said, we are concerned that the codes of practice will not be enforceable, which might mean that the reapplication period will be difficult to enforce in practice.

The Convener: I wanted to find out whether the bill prohibits reapplying in a certain period of time because vexatious applicants who keep reapplying week after week might cause problems. I have not found a time limit for reapplication in the bill.

Sarah O'Neill: Section 14(2) states that repeated requests that are "identical or substantially similar" may be refused unless there is

"a reasonable period of time"

between them. We are concerned that what constitutes a reasonable period is not defined. We would like to know what it means and who will make the decision.

The Convener: Would it be up to the applicant to know when to reapply? Do you think there should be an obligation on local authorities and public bodies to intimate to the commissioner that circumstances have changed, or should it be up to the searcher for information?

Sarah O'Neill: The obligation should be put on the authority, although I am not sure how that would work in practice. It might be difficult, but I am sure that the difficulties are not insurmountable.

The Convener: When people who receive legal aid have a change in financial circumstances, they are obliged to notify SLAB. Should the bill put an obligation on public bodies to notify the commissioner if the original circumstances of a case change?

Graeme Millar: That scenario is highly desirable. We must recognise that, at the moment—without the bill—authorities have different ideas on what is confidential. For instance, all national health service organisations are in theory the same, but they have different views on what should be discussed in public meetings and on what is commercial and confidential. Many have a broad view and require justification for discussing matters in private session, but others adopt the attitude that anything with a price tag should be discussed in private.

There is a need for guidance from the commissioner. Authorities should be obliged to inform people, either at the time of application or at the time of refusal, of the time scale in which the information will become available and cease to come under the banner of being commercial and confidential. The National Consumer Council has done a lot of work on commercial confidentiality. That work was enlightening, as it showed the huge differences in practices in the same types of authorities. The decision is often based on the personal opinion of a senior officer. The commissioner should give advice to different types of authorities and examine the best practice that exists, which I mentioned, in which information is put in the public arena unless there is a good reason that can be defended by the authority.

The Convener: I think that the committee would like a synopsis of the divergence in practices in Scotland. We should consider the difficulties with practices. The information would be useful when we come to consider the codes of practice, if not before then.

Graeme Millar: We would be happy to do that.

The Convener: As there are no further questions, I thank the witnesses for attending.

Before I introduce the next witness, I advise members that we will have an adjournment—with coffee—before we take evidence from the witnesses from the National Union of Journalists. I hope that that puts members' minds at ease.

I welcome Rosemarie McIlwhan. Have I pronounced your surname correctly, Rosemarie?

Rosemarie McIlwhan (Scottish Human Rights Centre): The stress should be on the second syllable.

The Convener: I beg your pardon.

Rosemarie McIlwhan is the director of the Scottish Human Rights Centre. I refer members to the paper headed "Freedom of Information—FOI 60", which was distributed yesterday. I am advised that Rosemarie does not wish to make an opening statement.

Rosemarie McIlwhan: That is correct.

The Convener: I must have said something to our witnesses.

I ask members to launch in with questions from the paper that is before them.

Donald Gorrie: Like a number of other groups that have written to the committee, you raise in your submission the issue of the ministerial power to veto decisions. Would you elaborate on that point? Is there a balance to be struck? Does the Government deserve a degree of protection, or should all information be open? Should ministers have no veto?

Rosemarie McIlwhan: In our opinion, ministers should have no veto. The bill makes it look as if the executive branch of government is interfering with the judicial process, which is unacceptable in any democracy. If the First Minister or the Cabinet felt that it was necessary to take issue with any disclosure ordered by the information commissioner, they should do so through the court system, because that is what would apply to anyone else.

Donald Gorrie: My next question is along the same lines. What are your views on class-based exemptions, as opposed to the other type of exemptions?

Rosemarie McIlwhan: We are concerned that class-based exemptions have been proposed for what is supposed to be an open freedom of information regime. There is no place for class-based exemptions in such a regime. Any information should be subjected to the substantial-harm test, which is provided for in the bill. If it is sufficiently in the public interest not to disclose information, the substantial-harm test will be passed and the information will not be disclosed. There is no need for a class-based exemption.

Donald Gorrie: Is there a bureaucratic argument that some things are so secret that they should not be open to challenge? Is it not the Government's thinking that, in order to demonstrate the public harm that could be done, it would have to give away secrets?

Rosemarie McIlwhan: In that situation, people would consider whether to disclose information behind closed doors and whoever was involved in that exercise would be subject to confidentiality anyway. Therefore, that information would not be disclosed, so the alleged prejudice that disclosure would cause would not arise. On the other hand, if releasing that information would not cause prejudice, it should be in the public domain. That is what should happen under a proper freedom of information regime.

Michael Matheson: The cost of requesting information has been raised by a number of organisations in both written and oral evidence. I understand from your written evidence that you, too, have concerns about that. It has been proposed that people should be means-tested, which might mean that people would be exempt from charges if they were in receipt of certain benefits that act as gatekeepers. What changes would you like to make to the proposed charging system? Could that system act as a barrier to people who want to request information? Should certain categories of people be exempt from charges? How would that work?

Rosemarie McIlwhan: We believe that putting a price on access to information could cause a barrier for individuals and organisations. If someone is on a low income and is trying to get information, even £50 is a lot to be asked to spend and whether they can afford £500—the top end of what is proposed as a possible cut-off—is another issue entirely. Even for an organisation that is seeking information, £500 is a lot of money. So yes, a way of allowing people or organisations on a low income to access information is needed. The Scottish Consumer Council's proposal for means testing would be one way of addressing that. I would be interested to hear more about its proposals.

Having a gateway of benefits is one way of allowing people on low incomes to access information, but it should not be the only way. As was highlighted earlier, some people on a low income do not get benefits. It might be worth considering what is a low income. The Scottish Low Pay Unit may have a different view about what constitutes low income. If the mean-testing approach is taken, that issue may need to be considered.

We are concerned that if there is an upper limit to charges the authority will not have to provide the information if it considers that the cost of complying would exceed that limit. People who have the money should be allowed to spend it on accessing information, if that is what they want to do. However, we are concerned at how the charges are arrived at. There does not seem to be any guidance on how to decide that it costs £500 to produce this bit of information and £50 to produce that bit. Are decisions based on the time that it takes to get the information or on the number of staff who are needed? In this day and age much information is computerised—you press a button and it comes up. Someone would have to be paid an awful lot of money and it would have to take them an awful lot of time for the cost of accessing a bit of information to reach £500. Although our records are quite extensive and an absolute disaster, we would have to wade through them for at least a month to get to £500. How does that figure come about? No information on that is available and that needs to be considered. However, that barrier should not be there anyway.

Michael Matheson: On how the £500 is arrived at, the concern is that there will be variance between local authorities. Some local authorities will have good archive systems and will be able to retrieve information relatively quickly and at a limited cost, but it will cost much more to retrieve information from authorities that have poor archive systems. There is potential for variance throughout the country. If we do not have some sort of standard for setting costs throughout local authorities, we could have postcode provision of information. From what you have just said, I envisage that being a potential problem.

You mention the Scottish Consumer Council's evidence on means testing. The concern is that we should not have a system that grinds to a halt. Carrying out a financial assessment of someone can be lengthy and bureaucratic. We have to find a mechanism that will allow us to identify people or organisations that are on a low income but that will allow us to move things along so that the process is not very bureaucratic.

Rosemarie McIlwhan: The problem with excluding means testing is that doing so would exclude a large section of the population. For example, asylum seekers are on a level with people on benefits but they would not make it through the benefits gateway. That would be an issue, because they have as much right to information as anyone else. There are other people in society in similar situations. Many members of one of the groups we work with, Gypsy/Travellers, are on very low incomes but will not take benefits. They, too, would not make it through the gateway. There is the potential for such discrimination to occur.

I take on board the fact that different authorities have different means of archiving, some of which are better than others, but that is where the information commissioner comes in. The commissioner will promote good practice and will encourage authorities to sort their archives out and ensure that they maintain proper records, so information will become more accessible as we go along. That is the culture change that is needed. The codes of practice will ensure that authorities try to keep their records updated. Financial investment is needed to achieve that.

11:00

Lord James Douglas-Hamilton: I have one question—

The Convener: I think that you have already asked questions in this session. Have you?

Lord James Douglas-Hamilton: No.

The Convener: I am sorry.

Lord James Douglas-Hamilton: It is only an exceedingly brief question. The bill refers to public interest, but includes no definition of it. Do you think that there should be such a definition?

Rosemarie McIlwhan: We would like public interest to be defined in the bill, as several different public interests are defined elsewhere in legislation. It would be helpful to have the phrase defined, along with other phrases that are used, such as breach of confidence. That is a difficult charge to prove in court, and it is difficult to test. It would help if other provisions were better explained in the bill.

The Convener: Would guidance for the interpretation of public interest be more properly placed in the codes of practice?

Rosemarie McIlwhan: Not as it stands, as the codes of practice are not legally binding. Like the representatives of the Scottish Consumer Council and other witnesses, we believe that the codes should be legally binding. If the codes were legally binding, we would be happy for the definitions to be included in them; otherwise, the definitions must be in the legislation.

Paul Martin: Do you believe that the bill is compatible with European convention on human rights requirements?

Rosemarie McIlwhan: Yes. It is novel for us to say that we find the bill compatible. The exception to that relates to accessibility issues—which have been quite well covered by other people—but even those would not constitute breaches of the ECHR, as they are just not good practice. The bill complies with the ECHR requirements, which is pleasing to see. It is quite a good bill.

The Convener: Thank you very much.

We have only two more evidence-taking sessions left. Regrettably, the programme for reviewing the bill at stage 1 is very constrained—a difficulty that we have encountered before. At the first of those sessions, we will hear from Friends of the Earth Scotland, the Convention of Scottish Local Authorities, the Campaign for Freedom of Information and the Association of Chief Police Officers in Scotland. The following week, we will hear from the Crown Office, the Lord Advocate and the minister. I would like to consider the role of the courts and hear the judiciary's point of view. I am not quite clear whether decisions are open to judicial review.

If members want to take evidence from organisations other than those that I have listed, we can perhaps invite one more. We have received a lot of written evidence, which has been circulated with members' papers. I ask members to read that. We might be able to slip in another party, and if we choose to do so I shall contact members by e-mail. If members have other suggestions, we can consider them, but I suggest that we ask for evidence from somebody from the judiciary concerning the role of the courts in the implementation of the bill. Is that agreed?

Members *indicated agreement*.

The Convener: We will have a short adjournment until a quarter past 11, when we will take evidence from the National Union of Journalists.

11:04

Meeting adjourned.

11:22

On resuming—

The Convener: I introduce to the committee Paul Holleran, who is the Scotland organiser for the National Union of Journalists; Francis Shennan, who is chair of the Scottish council of the NUJ, and David Shayler, who is a member of the NUJ. I declare an interest: I am also a member of the NUJ, but very much at arm's length.

I also welcome to the committee Lord Russell-Johnston, who is President of the Parliamentary Assembly of the Council of Europe and who will address some members of the Scottish Parliament this afternoon. Unfortunately, many of us will be entrammelled in stage 1 of the Sexual Offences (Procedure and Evidence) (Scotland) Bill, so I make my excuses now for missing that address.

I invite the witnesses to make a brief opening statement before we move to questions.

Francis Shennan (National Union of Journalists): From the beginning, the National Union of Journalists has congratulated the Scottish Executive on its serious and honest attempt to open up Government to scrutiny. However, the Scottish council of the NUJ has become increasingly concerned about the restrictive effects of certain provisions in the Freedom of Information (Scotland) Bill—to the extent that we worry that it might be worse than no bill at all. The bill would cloak the Executive in an aura of openness while not increasing press—and therefore public—access to information that is of real relevance and importance.

We have a number of concerns, but four especial ones: class exemptions, charges, restrictions on so-called vexatious and multiple requests for information, and—of increasing concern in the light of recent information that has been given to us—the role of the First Minister of Scotland.

The introduction of class exemptions will contradict the principles of openness. If the harm test is satisfactory, there is no need for exemptions. If harm cannot be demonstrated to the Scottish information commissioner, then either the harm test is wrong, the commissioner is wrong or there is no harm.

One exemption especially—the one that will cover the police, courts, tribunals and statutory investigatory bodies, including those on health and safety—will go beyond what is needed to protect police investigations and judicial processes. In fact, the Contempt of Court Act 1981 already provides that protection. In effect, the class exemption will remove from the remit of the bill any investigation by any public body at any stage. The bill would therefore not increase the information that is available to the public on the public scandals such as those of recent years, for example the BSE crisis, food safety, rail safety and similar pressing public concerns.

The proposed charging structure remains a mystery—it will be governed by still-to-be-drafted regulations. The most recent indications of Executive thinking on that structure threatened to deter legitimate applications, even by newspapers and broadcasters. Local newspapers in particular would be inhibited in covering local stories, and freelance journalists would be largely prevented from making use of the proposed act. If there is a genuine problem of cost, a central fund should be made available to fund applications that are in the public interest.

When a request for information is made, who will determine what is vexatious and at what point? So-called vexatious requests could apply to almost any journalist who is pursuing a legitimate inquiry. Would a local reporter who was pursuing inquiries about a minister be regarded as vexatious? Repeated requests are almost inevitable in many serious lines of inquiry, and the pursuance of a campaign is part of what journalists rightly do.

Our fourth concern is about the role of the First Minister. The proposed use of first ministerial exemption certificates unnecessarily perpetuates what was one of the worst practices of Westminster and Whitehall. The Scottish information commissioner should have sufficient clearance to see and to decide on relevant documents, with appeal to the Court of Session if necessary. If harm cannot be demonstrated to the commissioner or to the court, what harm can exist—other than perhaps political discomfort? Therefore, what justification can there be for political interference?

Section 52(2) of the bill requires only that the First Minister consult the other members of the Executive. There appears to be a cosy culture in certain parts of our public life, which embraces behind-the-scenes solutions to perceived problems and appears not to balk at trying to interfere with the press. Paul Holleran and David Shayler can give examples of the culture of secrecy, whether it is conducted at cosy level in local areas or at national level. May they speak now, convener?

The Convener: Before we get into examples, I must caution you. As I am sure you are aware, under the Scotland Act 1998, any statements that are made during proceedings of the Parliament—such as this meeting—are absolutely privileged. You are protected. I have no idea what is coming next, but it would be unfortunate, to say the least,

if we allowed things to be said that might be challengeable as defamatory but that would be privileged because these are parliamentary proceedings. I also caution you that what you say has the status of being said under oath.

Paul Holleran (National Union of Journalists): We have major concerns about the role of the First Minister. The NUJ was heavily involved in the development of the Freedom of Information Act 1997 in the Republic of Ireland. We argued successfully that no Taoiseach should have a veto and that the commissioner for freedom of information should act as an ombudsman.

The issue of political interference has been causing more concern because of a recent event. The concern is about the suppression of information and news being brought into the public arena. On 17 October, a local paper carried a story relating to the then Minister for Education, Europe and External Affairs, Jack McConnell. It was a bland story about MSPs' allowances. The next day, Mr McConnell summoned the deputy editor of the local paper to the constituency office, which is situated across the road from the newspaper's office. The paper also received a demand for a written apology and a retraction of the story.

The Convener: I hear what you are saying, but at the moment that story is hearsay. I presume that we would need to ask the editor of the paper whether what you have said is correct.

Paul Holleran: Not necessarily. The issue is that the journalist who wrote the story was faced with a problem. I was involved in representing her.

The Convener: Let me consider the matter for a moment.

I have had my moment's thought and consulted my Queen's counsel. You will understand my caution. Please proceed.

11:30

Paul Holleran: As a journalist, I would not present this information if I had not corroborated my story. Because I am a trade union official, I was contacted by the journalist who wrote the story. She had been told that all her copy would in future be run past the local MSP: her copy would possibly be vetted by Mr McConnell. She came to me and said that that would be totally unacceptable and asked what the union's position was. We invoked the grievance procedure and said that we wanted the issue to be taken to the top of the company. We said that we wanted the situation stopped and turned around.

The Convener: I hear what you are saying, but we need to tie in your evidence with the Freedom of Information (Scotland) Bill. Will you make a direct connection between the incident that you have mentioned and the bill? How does the incident tie in with ministerial certificates?

Paul Holleran: It ties in with political interference. People who try to get information into the public arena are being stopped or told that their copy must be vetted. The incident reflects our concern about political interference and the suppression of information from journalists who seek information to publish stories. We are concerned that that level of secrecy and interference exists even for the blandest of stories in which somebody is trying to inform the public. What I have said ties in clearly with journalists' right to access information through the Freedom of Information (Scotland) Bill. It is totally unacceptable that the Executive or the First Minister should have the right to interfere at that stage.

The Convener: Are you saying that removal of the ministerial veto and making the commissioner's role robust would protect people from what you allege happened?

Paul Holleran: I am not so naive that I think that would stop political interference or prevent people from raising questions with the press. However, where that goes on, a more independent approach to the situation would be better than politicians of whatever hue having the final veto. The answer to your question is yes.

The Convener: Before we move on, do the other witnesses want to make a statement? Will Mr Shayler make a statement on this issue as well as Mr Holleran?

Francis Shennan: We invited Mr Shayler to the committee to show the other extreme, which is the nightmare scenario in which an atmosphere in which no one is accountable leads to greater harm than the threat of openness. David Shayler can either make a brief statement or he can respond to questions.

The Convener: We will come to that when we have dealt with this issue; we are talking about how the bill might not penetrate the climate of secrecy, which was mentioned in previous evidence.

Michael Matheson: I want to be clear about the example that you gave about the ministerial veto. At the moment, the bill gives the First Minister the right to veto the provision of information and provides no right of appeal against that. Is it your view that, unless the ministerial veto is removed or some type of appeals process is put in place by which the veto can be challenged, the bill will leave journalists open to political interference on issues that are politically sensitive for the First Minister or his ministerial colleagues?

Francis Shennan: Yes. We feel that the ultimate court of appeal should be the courts. The Court of Session would be ideal for appeals. We feel not only that section 52(2) creates a potential for interference, but that it institutionalises acceptance that the final court of appeal is politicians and not the courts.

Michael Matheson: Ultimately, if there is going to be any mechanism, there should still be a ministerial right to veto the publication of information. It is then for the party who wants the information to appeal against the veto, but that appeal should be through a court of law.

Francis Shennan: We propose that, if ministers do not trust the Scottish information commissioner, they should have the same rights as other people to appeal to the Court of Session against information being released. Cases should be heard and tested in court. Harm test and class exemptions already exist and now we will have section 52 of the bill. That is not a belt-and-braces approach—it is a belt, braces and straitjacket approach.

Michael Matheson: Do you describe section 52(2) as a straitjacket?

Francis Shennan: It could be, in certain circumstances. The explanatory document and the policy memorandum emphasise that the legislation can be used only in limited circumstances, but that is not expressed in the bill. Even if section 52 were not used often, its existence creates an atmosphere of threat.

Michael Matheson: How would you feel if a clear code of practice was set up around how and when the ministerial veto could be used?

Francis Shennan: We are generally sceptical about codes of practice. If legislation is being enacted, why not include the code in the legislation? Why not give the ultimate test to the court, as we do in almost every other area of life?

Paul Martin: We could create a balanced approach because—as you are aware—following the submission of the certificate, there is a legal requirement for a copy of that certificate to be brought before the Parliament. That is in section 52(3), which says that the First Minister must,

"after such a certificate … is given in relation to a decision notice … inform the person to whose application the notice relates of the reasons for the opinion formed".

You talk about secrecy, but it is clear in the bill that the certificate would be laid before the Parliament.

Francis Shennan: It is significant that other parts of the bill lay down the time scale in which public bodies must respond. However, section 52(3) says "as soon as practicable". There is no deadline.

From the explanatory notes and policy memorandum, I understand that the original idea was to put that power in the collective hands of Scottish ministers. The fear was that that would mean that the power could be exercised by one minister acting alone. However, there is no provision in the bill for what form of consultation should take place; for example, whether it should be a Cabinet meeting or equivalent.

Paul Martin: To be fair, I want to confirm that we are talking about a veil of secrecy. However, it is clear that a copy of the certificate would be laid before the Parliament and that the person to whom the certificate related would be told why the application was made in the first place.

Francis Shennan: Would the certificate be laid before Parliament after the event?

Paul Martin: Yes, but the point I am making is that although you are talking about secrecy, the certificate would be brought before the Parliament. I take it that the Parliament would have the opportunity to debate the issue. There would also be an opportunity for the person to whom the certificate related to be advised of the reason why the application was sought in the first place. I do not see that as a veil of secrecy.

Francis Shennan: You must realise that from a journalist's point of view, time is important; many stories are time sensitive. It is established practice to delay a story to reduce its impact.

Paul Holleran: We are looking to remove obstacles. We see the ministerial certificate as being an obstacle and a process that will take a long time to go through. We think that there should be fewer obstacles, in particular for investigative reporters and journalists who must meet deadlines. We see such ministerial certificates as interference. There needs to be a smoother process. The matter is not merely about holding on to information, but about releasing it within a certain time scale.

The Convener: Section 52 says that a copy of the certificate is to be laid before Parliament and that the party who applied for information is to be given notice and reasons for the opinion that has been formed. However, the notice and reasons need not be given if that would disclose the information. I make no comment other than to say that that would be a constrained declaration.

I should remind members before they question Mr Shayler or he makes his statement that Mr Shayler is facing trial at the Old Bailey, and that he is accused of breaching the Official Secrets Act 1989 by leaking documents to a Sunday newspaper three years ago. I remind members of rule 7.5.1 of standing orders, which states:

"A member may not in the proceedings of the Parliament

refer to any matter in relation to which legal proceedings are active except to the extent permitted by the Presiding Officer."

We want general information and questions rather than the specific details of the current case.

Lord James Douglas-Hamilton: Much has been made of the public interest test, but public interest is not defined in the bill. Is that acceptable or should public interest be properly defined?

Francis Shennan: There should be more detail on what would automatically be covered by the public interest. The public interest test is to be applied by the body that holds the information. We would prefer some sort of independent review.

Lord James Douglas-Hamilton: If I understood you correctly, you are against ministerial certificates in principle. Section 35(1)(a) says that information would be exempt if it is likely substantially to prejudice

"the prevention or detection of crime".

If a ministerial certificate had any bearing on that, would you still be opposed to it in principle?

Francis Shennan: Yes. We think that the Scottish information commissioner would be able to see whether that was the case—if the right person is appointed. The right person would be somebody who has had the requisite training and who understands the issues that are involved. The writing in of a role for ministerial action at this point would demean ministers. The idea behind the bill is that there should be a freedom of information regime and an independent Scottish information commissioner who will oversee that regime. Such a provision demeans ministers' confidence in appointing somebody to that post.

Paul Holleran: We also argue that the commissioner needs sufficient resources and legal support.

Lord James Douglas-Hamilton: Am I right to say that you would still take that position, even if the Lord Advocate knew a great deal more about the alleged crimes that he was investigating than the commissioner could possibly know?

Francis Shennan: The Lord Advocate has separate powers, which are independent of the First Minister in this case. The Lord Advocate, because of his special role, has the last word—the First Minister's certificate should not affect him at all.

Lord James Douglas-Hamilton: If the commissioner gave a view that was contrary to the view of the Lord Advocate, would not that information become public before the Lord Advocate could—

Francis Shennan: If there were a dispute, why should the appeal not go to the Court of Session? If there were confidential information that would cause irreversible harm, it could be heard in camera.

Lord James Douglas-Hamilton: If that information could be prejudicial to a criminal investigation and an appeal were made to the Court of Session, would not that information inevitably become public and thereby prejudice the Lord Advocate's investigation?

Francis Shennan: If an appeal were made, the information would become public when it was heard in court. However, there already exists the protection that is provided by the Contempt of Court Act 1981 and the legislation that covers miscarriages of justice. Furthermore, the courts have the power to order that information that could prejudice a trial must not be published.

Lord James Douglas-Hamilton: Have you any views about monitoring the effectiveness of the legislation and the commissioner?

Francis Shennan: It would be important to monitor how effectively the act was used. The press might not initially be the main users of the act, partly because of cost and partly because of procedure. We would want to ensure that the monitoring process was not used to reveal the interests of a journalist in a particular line of inquiry, which could then be pre-empted by press releases or press conferences.

11:45

Donald Gorrie: Mr Shayler, bearing in mind the warning that the convener issued, what lessons would you draw from your experience that might help us to improve the Freedom of Information (Scotland) Bill?

David Shayler (National Union of Journalists): People are talking about all the criminal charges against me, but I must point out that I am charged only with offences relating to information that appeared in *The Mail on Sunday* and the taking of documents. I have been charged with nothing in relation to subsequent allegations that I made about the Gaddafi plot, the Israeli embassy bombing, the Bishopsgate bombing and so on. Therefore, information about them is not sub judice.

The Convener: I apologise. If you have not been charged with anything—

David Shayler: I have been charged with a small set of offences relating to information that appeared in *The Mail on Sunday* on 24 August 1997. I will gladly not talk about those.

Although I come here with criminal charges hanging over my head, all I have done is say things. I remind anybody here who might think that

I have a strange attitude to Britain that, during the five years in which I served my country, I helped put Irish Republican Army terrorists behind bars and stopped attacks which, although they might not have been on the scale of the attacks of September 11, had the same motivation and nature.

I have been a journalist, an intelligence officer, a whistleblower and a journalist again, so I have a unique perspective on freedom of information. Since the early 20th century, state secrecy has been ingrained in the culture of central Government in Westminster. The Official Secrets Act 1911 made it illegal to disclose virtually any official information unless it was justifiably in the public interest to do so. That put everyone in a difficult position. Alongside that, there is routine over-classification of material. The various levels of security classifications—ranging from restricted through confidential to secret and top secret—are designed to protect national security and to shield the state from embarrassment. If we had a proper bill of rights or written constitution in this country, it would have been possible to argue that the Government's restricting information on the ground of embarrassment would be like its behaving as a totalitarian, rather than a democratic, Government. Governments must understand that the fact that certain information is embarrassing is no reason for people not to see it.

There is a problem in this country in relation to recognising the nature of national security and damage to it. Many people will, on the ground that I used to be an MI5 officer, criticise my speaking to the committee today. That does not mean that everything that I say will damage national security. In fact, the ability to damage national security relates to very small areas of the work of the security services. It relates, for example, to the identities of agents and officers—although there is an argument that officers should not be anonymous—to continuing operations, and to the sensitive techniques that are used by the services. By sensitive I mean the techniques that are not known to terrorist organisations. In my case, we have had Crown prosecutors trying to say—

The Convener: Many of us are aware of your situation. However, are you aware of the Freedom of Information (Scotland) Bill, which is supposed to be more robust than the UK Freedom of Information Act 2000? Could you address Donald Gorrie's comments in the light of that? How would the bill assist the cultural framework that you believe exists? Would the bill be of assistance, or would it be insufficient? It would be useful if you could deal with those questions.

David Shayler: The test is one of harm. Under article 10 of the European convention on human rights, which has been incorporated into British law, the right to receive information, as well as the right to express information, can be restrained on the grounds of national security, in the interests of preventing crime and so on. However, what cannot be done is to restrain information in the national interest. The national interest is not the same thing as national security.

I tend to use that in my court cases as part of the pre-trial legal arguments. When we go to the law lords in February, we will argue that free speech—

The Convener: I am sorry, but I thought that no litigation was pending. Do you have an appeal pending?

David Shayler: No. We have gone to a pre-trial hearing. In the pre-trial hearing we do not talk about evidence, we only ever talk about legal arguments.

The Convener: I know what a pre-trial hearing is.

David Shayler: But we do not normally have pre-trial hearings in criminal trials. Normally, there is a criminal trial and somebody is convicted, then they appeal. In my case, I have to go through the legal process of pre-trial hearings before a criminal case in front of a jury.

The Convener: But charges are pending, and an appeal to the House of Lords is pending.

David Shayler: Yes, on what is admissible evidence in the case.

The Convener: We will be cautious, because we are unclear whether litigation is in train.

David Shayler: This has been reported in the press. The judge—

The Convener: Yes, but I am thinking of the standing orders of the Parliament. I am not trying to be difficult, Mr Shayler. I am trying to remain within the strictures of the standing orders, which, as convener, I am compelled to do. The committee is quite content with the lines that you have taken on the generalities of your experience. Could you extend your specifics into general comments and apply them to the Freedom of Information (Scotland) Bill? We seek a robust bill. We are operating in a Scottish context, which I hope is slightly different from Westminster. I would be more content if you could keep tying in to the generalities.

David Shayler: This is part of the problem. This is what happens, ironically, when there is no freedom of information. I do not know what specifics I can go into about various matters, but I will discuss the general arguments about national security versus the national interest.

The Convener: Yes. That was an interesting line.

David Shayler: National security is damaged only when information gets into the hands of the people who are the targets, for example. Even if the IRA were being investigated, and a terrorist group that did not like the IRA came into possession of that information, that would not necessarily damage national security, because the IRA still would not know about it. The Government argued that, if I spoke to journalists, that would damage national security. However, unless those journalists spoke to members of the IRA or the Libyan intelligence services, national security would not be damaged.

The national interest is different from national security, because it appears at times to cover, for example, embarrassment. Before "Spycatcher", the Government could ban information from the public domain so that British citizens could not see it, even if it was in the public domain in, say, America. The European Court of Human Rights ruled that that was an unreasonable restraint on free speech, because national security is damaged only once. When the information is disclosed to a newspaper or on the internet, the chances are that the IRA will see it or the Libyan intelligence services will see it and national security will be damaged. If disclosure is repeated, there is no further damage to national security. If the information is embarrassing to the Government, there will be continued embarrassment. The Government can continue to talk about harm to the national interest, but cannot talk about damage to national security.

The Convener: The three witnesses might not be aware of the contents of the Freedom of Information (Scotland) Bill, but I want them to consider a concern that I have about section 31 on "National security and defence".

We have talked about ministerial certificates, but two lots of ministerial certificates are involved in section 31—there is a double whammy. Section 31 refers to exempting information, although there is the public interest test

"for the purpose of safeguarding national security."

Two issues arise that I would like you to consider. A matter of national security might mean information about a nuclear power station's transport of nuclear waste, or some such matter. One might argue that knowing about that is very much in the public interest—or the national interest, as you said. However, it might also be argued that it is a national security matter. I wonder whether that makes it harder for organisations that are opposed to nuclear processing to access the information.

My second point is that we have perhaps been considering a culture of extreme secrecy, as you said, which shields Government embarrassment or mismanagement. Currently, there is a climate of threats from terrorism and legislation is being prepared to deal with that terrorism. We are happily pursuing a bill on freedom of information, which—I suspect—might hit buffers that derive from the bill on terrorism. How those might those two interact to prevent the Freedom of Information (Scotland) Bill from being enacted? Might the bill on freedom of information be overwhelmed?

My third point concerns the ministerial certificate that is referred to in section 31, which states:

"A certificate signed by a member of the Scottish Executive certifying that such exemption"—

that is, an exemption to do with national security and defence—

"is, or at any time was,"—

note the past tense—

"required for the purpose of safeguarding national security is conclusive of that fact."

A minister could tell the commissioner that he was not giving out specific information because that information affected national security and defence. The commissioner could overrule that, but the minister could sign another certificate.

How would those three issues operate in determining what national security and defence is? Perhaps the witnesses, or members of the committee, will explore those issues, which might change the climate for the Freedom of Information (Scotland) Bill.

Francis Shennan: One of our arguments against class exemptions is that we have an adequate harm test. I do not believe that a properly appointed Scottish information commissioner would not recognise that particular information is harmful or potentially harmful. If the commissioner has the proper resources, he should be able to call on expert advice from, for example, members or former members of the armed forces.

The problem with a class exemption is that it covers anything that could relate to national security. A current example is the running scandal about the lack of modern secure radios for Britain's armed forces. The press has covered that issue. If troops were deployed in Afghanistan with the existing radio system, would it prejudice national security for that to be known? We argue that, if information about the radio system had emerged sooner, the armed forces would not face the present situation. In Kosovo, there were stories of troops using mobile phones because they were faster and more secure than their radios.

In a journalistic context that might seem far-

fetched—the Crimean war—the War Office regarded as harmful to national security the work of Florence Nightingale and Templeton, the reporter from *The Times*, who reported on the condition of the troops. That work, however, led to the proper care and protection of our armed forces.

The danger of the class exemption is that it is just that: a class exemption. Anything that relates to national security cannot be disclosed, no matter how scandalous or how much the restriction of information might prevent a situation from being improved.

We argue that it would improve national security to have access to information that does not harm national security but is connected with it. It would mean, for example, that the lives of our armed forces would not be put at risk because they had been issued with substandard equipment.

12:00

David Shayler: The problem with national security is that it can become an ever-lengthening piece of string. If the Executive wants to withhold information, it can use national security to suit its own ends. Recently—within the past month or so—MI5 disclosed the first personal file that it had ever made. That was file PF1, on someone called Éamon de Valera. However, MI5 still claims that files PF2 and PF3, on Lenin and Trotsky, cannot be released to the general public.

The intelligence services make the mistake of thinking that their methods are unique. The intelligence services trying to recruit an agent is much the same as a journalist trying to get a source to speak to them, or as someone negotiating a contract. In essence, agents are recruited with a carrot and a stick. From the beginning of human civilisation, the method has been the same. It has not changed. The same techniques are still being used, and they are not sensitive techniques. Given the amount of technological development that took place in the 20th century, it is hard to imagine that revealing files from 1909 will give an insight into the current technical methods of MI5 and others.

The Government does not understand national security in terms of what the intelligence services do. I have recently been threatened with being charged with another offence under the Official Secrets Act 1989, even though I used a Government injunction to submit the story concerned before the *Sunday People* published it and the offending piece was taken out. I cannot go into the detail of the case, but the story did not damage national security, as the hostile intelligence service concerned already knew about the person to whom reference was made in the story. The service knew that the person was going to the British Government to negotiate on its behalf. Any mention of his role could not damage national security, but the Government claimed that that was happening.

The Convener: Are you making the point that, in your view, there is paranoia in Government establishments about national security? We have received evidence on what someone has termed a sunset clause. There may be times when an application for information is mistimed. It is rather like a bank arrestment, which has to be served at the right time if the money is to be caught. The timing of an application may have national security implications. You have given evidence that dangers to national security could be pre-empted by obtaining information, such as that relating to armed forces radios that you mentioned.

If an application is made and rejected on the grounds that the information sought is sensitive from the point of view of defence and national security, should there be a serious obligation on the establishment concerned to notify the information commissioner if circumstances change? I may be going down a lane that leads nowhere. However, a genuine decision may be made that information cannot be released at a particular time, for reasons that neither you nor I know.

Francis Shennan: The procedure is that applications are made to the public body that holds the information that is sought. If defence information were sought, the application would be made to the Ministry of Defence or to units within it. If the ministry felt that releasing the information would threaten national security, the application would be refused. If an appeal were made to the Scottish information commissioner, he or she could investigate. The first step would surely be to approach for an explanation the department that had turned down the application. If that department were unable to justify its decision to a properly appointed, independent Scottish information commissioner, that would mean that the wrong person had been appointed to the job, that the department was unable to communicate effectively with him or her, or that there was really no harm.

The Convener: I envisage a situation in which the commissioner is convinced that information relates to national security or defence and that the information is too sensitive, for reasons that are not in the public domain and that even skilled journalists may not have sniffed out, to release at that point. Should the bill or the codes of practice, to which we have not yet referred, include a provision for the commissioner to be notified if the situation changes? I believe in scrutiny, but there has to be an element of trust in Government.

Should authorities be obliged at some point to inform the commissioner if the situation changes and a certificate can be withdrawn?

I may be suggesting something incredible, but I wonder whether there is a role for that. We could build in the provision that the failure of an authority to inform the commissioner of changed circumstances, either at the time or retrospectively, would be penalised because they would be deemed to be deliberately withholding information. Circumstances change. At the moment, it is up to the applicant to reapply, but they might not know when to reapply. I wonder whether we should be doing something about that.

David Shayler: Secrets degrade with time. We have an enormous problem in this country with information that was gathered before the security services put it on a legal footing. Until then, there was no framework of law to govern what the security services were doing in terms of invading people's privacy.

We are talking about national security. The Government claims that it can keep files on subversives even now. Twelve years after the Berlin wall came down, the Government is keeping files on individuals who no longer pose a threat. The reason for which the information on those individuals was gathered in the first place has also disappeared. The files that the Government holds on so-called subversives were gathered illegally, because there was no legal framework for the security service prior to 1989. Once the eastern bloc fell down, the reasons for gathering the information on those people and for considering them as a threat to national security had disappeared.

If we are serious about freedom of information and about making rational decisions on national security, we need to look long and hard at such issues.

The Convener: I think that you are saying that there should be something in the bill that would compel authorities who withhold information under a sensitive section to disclose that information once it is plain as a pikestaff that it would no longer be against the public interest to do so. That is not the same as proscribing information; the information would be disclosed at the appropriate time. We could require that disclosure be made within a specified period.

David Shayler: Any refusal to give information on the grounds of national security should be kept under proper review, because the circumstances of national security change. Circumstances are not the same now as they were 15 years ago.

The Convener: The provisions of the Westminster Anti-Terrorism, Crime and Security Bill might suddenly be lifted. I have a feeling that that bill will impact on freedom of information.

David Shayler: When we are under threat, it is more important that we know more about our intelligence services. We can know more without damaging national security.

Gordon Jackson: I have been listening to you and the impression that I get is that you are confusing your targets. You obviously have strong feelings about secrecy and the excuse of national security as a way of covering up embarrassment or ineptitude. I do not have any quarrel with you on that.

You then focus on the ministerial veto as part of that, and I wonder what your evidence is for that. I say that because we are told that every freedom of information regime, including Ireland, has that ultimate backstop position. Historically, the veto has hardly ever been used and is hardly ever used worldwide. Ireland has had problems trying to use it and New Zealand, we are told, has not used it since nineteen-canteen. The reality is that the veto is difficult for a Government to use, because of the political fallout.

I wonder whether, in your legitimate attack on Government secrecy, you are worrying too much about that backstop.

David Shayler: We have a history in this culture—much more so than in other western democracies—of restraining free speech and denying people access to information. Other western democracies will not use vetoes on information, in the same way that they will not restrain the freedom of the press.

Under the Blair Government, we have seen arrests of journalists and intimidation of the press to stop it investigating allegations of crime. Given the context of the way in which the Westminster Government works, and until the culture that exists in other western democracies comes to this country, we should be wary of the ministerial veto. Governments in the west do not often ban the free press, but in this country it is almost a reflex reaction. I do not think that using the procedure causes embarrassment in this country.

I would like to talk about the Gaddafi plot, on the grounds that information about it is in the public domain and I am not charged with it, so it cannot be subject to contempt of court.

The Convener: I have no problem with that, except that I wonder how it links with the bill. If you can link it to the bill, I am content.

David Shayler: I shall give an example of the way in which, in the absence of any freedom of information regime, Government ministers can lie and paint as a troublemaker the person who is saying things and trying to gain information. I first became aware of an MI6-funded plot to

assassinate Colonel Gaddafi of Libya in 1995. I was briefed officially on the plot and I raised the matter with my bosses in MI5. I had been told that the MI6 officers had permission from the Government to carry out the assassination, but I did not know whether they had, and I thought that we should check in case it was an illegal act. My bosses in MI5 did not really seem to give a damn about it. By that time, I was about to leave the service anyway, so I did not push the matter any further.

In July 1998, when I reported the matter through a legal route, I gave the information to the Government, asking permission to publish it with due respect for national security. The Government banned the story and made a request for my extradition, although I had committed no new offences, and I was put in prison. Robin Cook then said on national television that there was no basis in fact for the allegations and that they were pure fantasy. At that point, he denied the plot. Most people would believe the minister, not the whistle-blower. After that, we tried to seek information on the matter and we tried to get the police to investigate it. The police did not take my statement about an allegation of conspiracy to murder on the part of two MI6 officers until December 2000.

If there had been a freedom of information act, perhaps we would have been able to look for documents that may not have damaged national security but would have confirmed the nature of that plot. Throughout the case, the Government said that revealing any of the information would be damaging to national security, yet the operation was non-sanctioned—the Government said that it did not sanction an operation of that nature. Finally, we got a police investigation. The police concluded that although there was relevant material, there was not enough evidence to bring about a conviction of the two officers who were involved. However, we all know that an assessment of available evidence is not the same as an assessment of fact.

Throughout the process, I have written to the Government and tried to obtain documents, but that has been impossible because the Government has used the blanket excuse of national security to protect the illegal activities of MI6 officers.

Gordon Jackson: I am still puzzled that you think that the Government backstop would affect that. You would have to get any application past the exemptions and through the commissioner long before you got to the Government backstop. The fear is that, when everybody—including the commissioner—says that you can have the information, the Government will routinely block it. However, even allowing for differences in culture, there is no evidence that that happens under any freedom of information act. Once the commissioner has said that it is okay, the matter goes to judicial review, although that is not a route that has been much used. I am afraid that you are confusing your legitimate attack on oversecrecy with the provision of the backstop that exists in every freedom of information act, but which is hardly ever used.

Francis Shennan: The function of the Freedom of Information Act 2000 is not only to legislate, but to begin to change the culture of our society—to open it up. The act has to have the confidence of the community. Writing in the ministerial backstop is symptomatic of the culture that has pervaded the UK for so long, which believes that nobody—not High Court judges, Court of Session judges or a specially appointed information commissioner—is to be trusted above a minister. When ministers gain office, there will always be a temptation for them to use that backstop.

In New Zealand, the ministerial veto was used until it was made a collective decision, then it became harder to use. That was the idea behind making it a first ministerial certificate procedure. The procedure for consultation is hardly mentioned—all that the minister has to do is consult.

If a good enough bill has been drafted, why is a ministerial backstop necessary? If the bill is not good enough, go back and redraft it—get a better bill. Our country is supposed to be governed by laws, not by men. Writing in the ministerial backstop is not quite the same as going back to check that you have turned off the gas. There is a little corner in the back of politicians' minds that makes them say, "Well, it doesn't matter how good the judge or the information commissioner is. I want my finger on it."

Gordon Jackson: I rather like your analogy of going back to check whether the gas has been turned off. Is it so unreasonable for politicians worldwide to keep a backstop provision just in case? Leaving aside perception, on which you made a fair point, is that so bad? Can you demonstrate, historically or anecdotally, a fear that that gives rise to, other than David Shayler's general fear about Governments being secretive organisations?

12:15

Francis Shennan: Our fear is that, in addition to the UK culture of secrecy, there is a worrying culture of cosiness, for want of a better word, in Scotland. We are concerned that influence or pressure will be brought to bear on the coverage of stories or how they are steered. We hear stories of ministers phoning different newspapers at times just to ensure that the editor understands the full implications of—

Gordon Jackson: You are now making a totally different small "p" political point.

Francis Shennan: It is not party political.

Gordon Jackson: The Freedom of Information (Scotland) Bill will not affect that culture, if it exists. If ministers phone editors and editors phone ministers, you could have freedom of information bills coming out of your ears and nothing would change. I do not really see the relevance of your point.

Francis Shennan: If you have a properly drafted bill and a properly appointed and resourced information commissioner, why would you need the backstop? I think that not having the backstop would enhance ministers. I do not think that it is needed at all.

Gordon Jackson: It is a comfort blanket.

Paul Holleran: In the argument that journalists always advance when they are seeking information, the final line is always, "Trust me. I'm a journalist." What you are saying is, "Trust me. I'm a politician."

The Convener: Neither of those goes down very well.

Paul Holleran: Exactly. That is why we need the commissioner to deal with such things.

Gordon Jackson: A normal, sensible human being would say, "A plague on both your houses."

The Convener: Of course, the final veto would belong to the First Minister. It would be the First Minister, whoever that may be and from whatever regime, who, after consulting the other members of the Executive, would exercise the final veto. There is consultation, but there is no collective responsibility. I have concerns about that in principle. I also have concerns about the form that the veto would take. It comes down to one man or one woman consulting his or her colleagues. That seems to be a belt-and-braces approach, as you put it. That is just a comment; it is just the way I am thinking.

Michael Matheson: One thing that has become clear in the evidence that we have heard and in the responses to the consultation process is that, if the legislation is to be successful, we must also address the culture of secrecy and the regimes under which many public authorities operate. David Shayler has given examples of the ways in which the authorities can be secretive. If we continue with the backstop measure or ministerial veto, will that undermine the possibility of truly changing the culture of secrecy that currently exists in public authorities, because they will know that that final backstop could be used if need be? Last year, the Information Commissioner of Canada was here. The Canadians have had legislation on freedom of information for 10 or 15 years. One of the biggest barriers that they came up against was changing the culture of secrecy. Are you saying that the measures in the bill will undermine the process of changing that culture?

Francis Shennan: Yes.

Michael Matheson: Are you also saying that, if the ministerial veto continues, there should be a right of appeal through the courts system?

Francis Shennan: No. I think that, instead of the veto, ministers should have the right of appeal. They should go to the courts like anybody else.

Michael Matheson: I would like to be clear about this point, as our discussion has gone in a variety of directions. If the information commissioner considers that information can be made public, is it then for the minister to go to court to appeal against the commissioner's decision?

Francis Shennan: Yes.

Michael Matheson: Christine Grahame talked about a national security issue. When the commissioner is given information, he or she may receive additional information that makes it insensitive to publicise the information at that time, although later, the information may not be as sensitive. How could that process be reviewed? Who would decide when the information was no longer classified and could be placed in the public domain?

Francis Shennan: We have argued from the start that the commissioner should have high enough clearance to allow him to see any documents that he needs. I do not see why the commissioner should not have the right to say that information should not be released now, but could be reviewed in six months. The commissioner could order that it be released after six months or flag up to the applicant the fact that they could approach him again in six months, when he might reach a different conclusion.

Michael Matheson: A number of systems could be used. The onus could be placed back on the person who requested the information, or the information could be subject to a time barrier that would make it public in a year.

Francis Shennan: Yes.

The Convener: I want the next two questions to be fairly short, as we still have other business to conclude.

Donald Gorrie: I was interested in the comments in the NUJ's written submission about the relationship between this bill and the British Freedom of Information Act 2000. You seem to suggest that some bodies that could be subject to the bill will remain under the British act. You

mention twice the Forestry Commission, which is a worthy organisation. Even if it operated entirely in Scotland and all our trees had an awful disease, questions about it would come under the Westminster act, which is worse than our bill.

Francis Shennan: Yes.

Donald Gorrie: I will reveal my ignorance. Can we do anything about that? Can we strengthen our bill and tell Westminster to get stuffed, or does it have a grip on us?

Francis Shennan: That is a good question and I do not know the answer. The bill could say that cross-border bodies should not automatically fall under the remit of the Westminster act, especially when their activities are entirely in Scotland. The committee has the right to say that such bodies should fall under the Scots bill.

What would happen if Westminster did not accord with that? That would be an opportunity for the courts. In that sense, we are on the verge of finding out what devolution means. We have examples of federal systems in the States and it is on such matters that the law tends to move. We should trust the courts in such cases.

Lord James Douglas-Hamilton: If all ministerial certificates were ruled out on principle and a major crime was being committed or was about to be committed, would not that rule out immediate action?

Francis Shennan: I would be very worried if a ministerial certificate were needed in such a case. A major crime that is about to be committed falls under the existing class exemption on investigation of crime. Contempt of court legislation and interference with the course of justice legislation would provide protection in such cases.

Members should not forget that every case involves information that is held by a public body of some sort. If it felt that releasing the information would be harmful, it would refuse. If that decision were appealed against, the information commissioner would see the evidence for that refusal. If the case were serious, I am sure that the information commissioner would refuse the request.

The Convener: I will make a final point on section 52, which is on the exception from the duty to comply with certain notices—the First Minister's certificates. If we were persuaded to remove section 52, would it cure matters to insert in the bill a right of appeal to the Court of Session for either the applicant or the public body?

Francis Shennan: I think that that is already included in the bill on a point of law.

The Convener: I am talking about a right of appeal beyond that, with a review of the facts and circumstances of the case and a final review of the determination. With a point of law, you cannot reintroduce the facts.

Francis Shennan: It would certainly be more acceptable to have a right of appeal through the courts. However, if the grounds of appeal were extended beyond a point of law, we would want those grounds to be defined.

The Convener: Would giving each party the right of appeal provide an acceptable balance? I believe that, at the moment, you feel that only one party has such a right.

Francis Shennan: Yes. We do not want the right of appeal to be removed. People involved in such cases should have the same rights of appeal as other people.

The Convener: That was quite an exhaustive session and I thank all the witnesses for coming, especially those who have travelled a long distance. Your evidence was very interesting.

Petitions

Summary Warrants (Alleged Debtors) (PE373)

The Convener: The fourth item on the agenda is consideration of petitions. I refer members to petition PE373 from Raymond Dorricott, which concerns amending current legislation with regard to summary warrants to local authorities in so far as it relates to the rights of alleged debtors to reply or make comment before a warrant is issued. As members will see from the background briefing note, there does not have to be a hearing; in certain instances, a local authority can simply move to enforcement proceedings.

How does the committee wish to proceed on the petition? The deadline for responses to the report from the working group on a replacement for poindings and warrant sale, entitled "Striking the Balance—a new approach to debt management", was 17 October. The Scottish Executive justice department is currently analysing those responses and will shortly present its findings to the Minister for Justice. I understand that summary warrants form part of the consultation.

Against that background, I am open to suggestions about how we should proceed with the petition. Do members want to defer detailed consideration of the petition until the Minister for Justice makes a statement on the working group's report, or do they wish simply to note the petition and take no further action?

Gordon Jackson: Perhaps it could become part of our inquiry.

The Convener: So you are suggesting that we defer consideration of the petition until we have received the Minister for Justice's response.

Michael Matheson: Will the issue come to the committee?

The Convener: That I cannot say. There was a promise that it might come to the committee, but I have been told that it was not written on tablets of stone. I certainly hope that it comes to us, as we heard the evidence. Gordon Jackson knows more people than I do, and he says that it is coming to us.

Michael Matheson: Even so, if we are going to defer it, we should do so for both justice committees.

The Convener: Obviously, if we were to defer the petition and the matter did not come to this committee, we would refer the petition to the Justice 2 Committee. I certainly hope that poindings and warrant sales come to us, as we dealt with Tommy Sheridan's Abolition of Poindings and Warrant Sales Bill in the first place. I would like to think that we are informed on the issue.

Are members agreed to defer the petition until we receive the Minister for Justice's response?

Members *indicated agreement*.

Complaints against Solicitors (PE405)

The Convener: The second petition is PE405 from Mr James Duff, which relates to—[*Interruption.*] Excuse me, I have misplaced my briefing paper. It is easily done.

Gordon Jackson: The petition relates to the regulation of solicitors. [*Interruption.*]

The Convener: Order. I want to say this for the *Official Report*. The petition calls for the Scottish Parliament to change the law in order that complaints against solicitors are taken out of the hands of the Law Society of Scotland and placed with an independent body. As members know, we are launching a wide-ranging inquiry into complaints against many operatives in the legal profession. Does the committee wish the petition to become part of that inquiry?

Members *indicated agreement*.

The Convener: That would make sense. Furthermore, it would be appropriate for members who might, in some people's eyes, be tainted by being members, past members or half-past members of the Law Society of Scotland to declare their membership again.

12:30

Lord James Douglas-Hamilton: I am a non-practising Queen's counsel.

Gordon Jackson: How often do we have to declare this?

The Convener: I do not know, Gordon, but we must take a belt-and-braces approach. I am afraid we have to declare it every time it comes up.

Gordon Jackson: Every time we discuss an issue to do with law?

The Convener: No—every time we discuss lawyers. The complaints are against lawyers.

Gordon Jackson: Lawyers. I am one. Right.

The Convener: I no longer practise, although I am registered as a solicitor.

Marriage (Scotland) Bill

The Convener: The fifth item on the agenda is to consider whether to report to the Local Government Committee on the general principles of the Marriage (Scotland) Bill at stage 1. It is worth noting that the Local Government Committee hopes to report on the bill by Christmas. As we will be considering the Freedom of Information (Scotland) Bill during November and December and starting our inquiry into the regulation of the legal profession, including taking evidence, our timetable looks pretty crowded. Do members wish to report on the Marriage (Scotland) Bill?

Gordon Jackson: No, thank you.

The Convener: Is that the general consensus?

Donald Gorrie: I would argue that, as the bill focuses on what constitutes a suitable atmosphere for weddings, it is more relevant to the Local Government Committee. I think that it deals with issues such as people getting married on top of Ben Nevis.

The Convener: Not at this time of year, I hope.

Donald Gorrie: It is not a legal issue; it is a decent procedure sort of issue. As a result, we should leave it to the Local Government Committee.

The Convener: Is that the consensus?

Members *indicated agreement*.

The Convener: Finally, I remind members that the next meeting is on Tuesday 27 November. [*Interruption.*] I see that some people are not taking the information in, so I hope that they will attend. The meeting will take place at 1.30 pm in the chamber. I have already mentioned that we will take evidence from COSLA, Friends of the Earth Scotland, the Campaign for Freedom of Information and ACPOS. We have one remaining slot for another group of witnesses to give evidence. If we do not hear from members by this afternoon, we will assume that they have no further suggestions.

Michael Matheson: When is the meeting again?

The Convener: It will take place on Tuesday 27 November at 1.30 pm in the chamber.

Meeting closed at 12:32.

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