JUSTICE 1 COMMITTEE

Tuesday 26 February 2002
(*Afternoon*)

Session 1

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JUSTICE 1 COMMITTEE
6th Meeting 2002, 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) (LD)
*Maureen Macmillan (Highlands and Islands) (Lab)
*Paul Martin (Glasgow Springburn) (Lab)
*Michael Matheson (Central Scotland) (SNP)

*attended

THE FOLLOWING ALSO ATTENDED:

Dr Richard Simpson (Deputy Minister for Justice)
Mr Jim Wallace (Deputy First Minister and Minister for Justice)

ACTING CLERK TO THE COMMITTEE

Alison Taylor

SENIOR ASSISTANT CLERK

Claire Menzies

ASSISTANT CLERK

Jenny Goldsmith

LOCATION

Committee Room 2

Scottish Parliament

Justice 1 Committee

Tuesday 26 February 2002

(*Afternoon*)

[THE CONVENER *opened the meeting at 13:50*]

The Convener (Christine Grahame): I open the sixth meeting in 2002 of the Justice 1 Committee and remind members to turn off mobile phones and pagers.

Item in Private

The Convener: The first agenda item is to consider whether to discuss item 4, on witness expenses, in private.

Members *indicated agreement*.

The Convener: Item 4 will be discussed in private because it concerns expenses relating to individual witnesses and it would not be appropriate to discuss such matters in public.

Subordinate Legislation

Advice and Assistance (Financial Conditions) (Scotland) Regulations 2002 (Draft)

Civil Legal Aid (Financial Conditions) (Scotland) Regulations 2002 (Draft)

The Convener: I welcome Dr Richard Simpson, the Deputy Minister for Justice, to speak to and move motions S1M-2732 and S1M-2734, which members will have with their papers. The papers also include two background papers, J1/02/6/1 and J1/02/6/2.

The Deputy Minister for Justice (Dr Richard Simpson): The regulations are the annual uprating of the financial limits for both civil legal aid and advice and assistance. In essence, this is a technical exercise to uprate the levels in the light of inflation and it happens each April. It is not intended, at this point, to change eligibility substantially. The wider issues of eligibility will no doubt be debated soon in the context of the Justice 1 Committee's report on its legal aid inquiry. However, we see no case for holding up this annual exercise for that reason.

The draft Advice and Assistance (Financial Conditions) (Scotland) Regulations 2002 provide for the uprating of financial eligibility limits in relation to advice and assistance. Limits are increased annually in line with the contributory benefits. The Secretary of State for Social Security announced on 28 November that those benefits would rise by the retail prices index, which this year stood at 1.7 per cent. We therefore propose to increase the income limits and the contribution bands accordingly for advice and assistance.

The draft Civil Legal Aid (Financial Conditions) (Scotland) Regulations 2002 deal with uprating the financial eligibility limits for civil legal aid. The annual uprating of those limits is also directly linked to increases in the level of income-related social security benefits. As announced by the Secretary of State for Social Security on 28 November 2001, those benefits have been uprated by the Rossi index, which is based on the retail prices index but does not include housing costs. In recent years, those measures have always been used for uprating such benefits. Members of the committee may recall the discussion last year about the difference between the two indices. By coincidence, this year the Rossi index and the RPI both stand at 1.7 per cent. We therefore propose to increase the income limits in civil legal aid accordingly.

The changes that we propose today are technical and inevitably complex, but they are necessary and inevitable to ensure that eligibility

keeps pace with increases in the benefits to which it is linked, until we have a chance to debate more fully legal aid as a whole.

I move,

That the Justice 1 Committee recommends that the Advice and Assistance (Financial Conditions) (Scotland) Regulations 2002 (Draft) be approved.

The Convener: Thank you, minister. Does anyone else wish to speak on this matter?

Lord James Douglas-Hamilton (Lothians) (Con): I hope that the minister will accept that I support both measures strongly. However, the measures constitute annual upratings. Are most legal aid provisions uprated annually or are some uprated triennially? There may be a case for everything being uprated annually.

Dr Simpson: Some provisions are not uprated automatically at all. We realise that the capital issue is somewhat out of date—we need to address the capital limitations.

Lord James Douglas-Hamilton: There may be a case for an annual uprating of not only these limits, but limits across the board.

Dr Simpson: I accept that there are some grounds for that suggestion. The committee may wish to consider the possibility of finding a way of uprating automatically, rather than the Executive having to lay regulations on uprating by small amounts every year. There could be a triennial review for considering uprating in greater detail. That would save the time of the justice committees and of the Scottish Executive's justice team. I expect that annual rating was introduced when inflation was a far greater factor than it is now.

The Convener: That makes sense. The weekly disposable income is increased by only £1, which I cannot understand, although the minister explained that the increase was attached to an increase in benefits. I am sure that the annual cost of living goes up by more than £1 a week. Given all the paperwork that is involved, we must find another way of looking at and dealing properly with financial limits, in addition to the minister's suggestion of a triennial review. That will form part of our inquiry.

No members wish to say anything further. Does the minister wish to make any final comments?

Dr Simpson: I have nothing to add.

The Convener: The question is, that motion S1M-2732, in the name of Mr Jim Wallace, be agreed to.

Motion agreed to.

That the Justice 1 Committee recommends that the Advice and Assistance (Financial Conditions) (Scotland) Regulations 2002 (Draft) be approved.

Motion moved,

That the Justice 1 Committee recommends that the Civil Legal Aid (Financial Conditions) (Scotland) Regulations 2002 (Draft) be approved.—[*Dr Richard Simpson*.]

Motion agreed to.

The Convener: The committee is required to report to Parliament on the instruments. We will submit our usual, short, formulaic report. Are members content for that report to be e-mailed to them? Thereafter, they may register their dissent, if any.

Members *indicated agreement*.

The Convener: I thank the deputy minister for attending.

Freedom of Information (Scotland) Bill: Stage 2

The Convener: Good grief—I see that the minister is accompanied by an army of officials. He must be expecting hostilities.

I welcome the Minister for Justice, who is here to continue the delights of stage 2 of the Freedom of Information (Scotland) Bill. We will start at section 29, but first I want to check that members have with them their copy of the bill, the marshalled list of amendments and the suggested groupings.

The business bulletin stated that the committee did not intend to proceed beyond section 61 today. If we reach section 61, we will stop, although I suspect that we might not get that far; so far we have not been good at guesstimating progress. If the committee so wishes, and if the meeting becomes too exciting for us, we can take a short break. I remind members—including Paul Martin, who has just arrived—that we will take item 4, on witness expenses, in private.

Section 29—Formulation of Scottish Administration policy etc.

The Convener: I call amendment 71, in the name of Donald Gorrie, which is grouped with amendments 72, 40, 41, 50, 42 and 73.

14:00

Donald Gorrie (Central Scotland) (LD): The intention behind amendments 71, 72 and 73 is to work out better wording for section 29. We want the factual information on which the Government, councils and so on make their decisions to be as freely available as possible, but we accept that the private advice that is given to ministers based on that information should remain private, because on that basis one gets more honest advice. I accept that distinction. That issue is not properly covered in the bill as drafted. The bill allows people who feel the need to conceal something too many excuses for not publishing information.

Section 29(1), which amendment 71 seeks to amend, says that information

"is exempt information if it relates to"

something. That is a remarkably vague phrase; almost anything, including a tea break during the discussion, could relate to the areas that are mentioned. The definition is far too wide and should be narrowed down. That is why I suggest the removal of "relates to" and the inclusion of a provision that information should be exempt if it would "prejudice substantially" formulation of Government policy and so on.

I altered amendment 72 in the light of advice that I received about section 29(1)(c), which relates to

"the provision of advice by any of the Law Officers or any request for the provision of such advice".

There seem to be separate rules governing the law officers. I do not see why, but I accept that separate rules exist—we live in an imperfect world. I am not allowed to ask for advice of the law officers to be included, so paragraph (c) would not be amended. Amendment 72 relates to the formulation or development of Government policy, to ministerial communications and to the operation of any ministerial private office. It says:

"Factual information and information relating to its analysis is not exempt information".

That is an attempt to distinguish factual information from advice given thereon. Amendment 73, which relates to a later section, makes the same point. The issue is important and I hope that the minister is aware of the concerns. It might be that he has a cleverer form of words or another way of approaching the issue. I will listen with interest to his response.

I move amendment 71.

Michael Matheson (Central Scotland) (SNP): Amendments 40, 41, 50 and 42 would improve access to information. One of the key principles of the bill is to allow members of the public to be better informed about how policy decisions are arrived at and to allow them access to the information that might have been used in reaching those decisions.

Amendments 40 and 50 are worded slightly differently, but have the same intention. Under section 29 there is no good reason for the Scottish Administration to hold back simple statistical information until a decision is made. Information that may be placed in the public domain or requested cannot be made available until a decision has been made. The problem is that people often have to take a step back to find out how decisions were made in the first place. Amendment 40 would allow such information to be placed in the public domain so that people could be better informed when ministers reach decisions.

Let me move on to amendments 41 and 42. As the bill stands, an applicant would be unable to gain access to information that was being used for a policy decision until a decision had been made. It is likely that many applicants will not be aware of when the Administration's decision has been made, so they will need to keep making new applications to obtain the information.

The words that amendment 42 would insert before subsection 3 of section 29 would place an onus on public authorities to keep applicants

informed. That would mean that an authority would need to keep a record of those who requested information that was being used for policy formulation, and would need to advise them whether that information could be provided once a decision had been made. At the moment, the onus is on applicants.

Amendment 41 concerns such matters as gathering statistical information. As the bill stands, any information that is used to inform policy decisions is subject to a class exemption and would not be released unless there were an overriding public interest. Amendment 41 would remove that exemption so that the applicant could also gain access to information that is the background to policy.

The Convener: If no other members wish to speak to the amendments in the group, I invite the minister to respond.

The Deputy First Minister and Minister for Justice (Mr Jim Wallace): The amendments in the group concern an important aspect of the bill. I will speak to the amendments that relate to section 29 and then to amendment 73, which would amend section 30. It is worth spending some time considering such important amendments. In doing so, I hope that I can justify the bill's current shape and structure. I also want to allay some of the concerns that have been expressed, although I understand where those concerns are coming from.

In his opening remarks, Donald Gorrie helpfully said that he accepted that private advice should be a matter for ministers and that his amendments relate to factual advice and are not intended to upset the current structure. Amendments 71 and 72 would change section 29 from a class exemption to a harm-test exemption. The amendments would remove entirely from exemption factual information that might be used for Government policy formulation and information relating to policy analysis. I will explain why that would be inappropriate.

There are concerns about the class exemptions for which section 29 would provide, but the section has been carefully considered on many occasions. I believe that section 29 is appropriate. We should not lose sight of the fact that the public interest test must be considered for each exemption, other than the exemptions that are technical provisions. In each case, the commissioner will have powers to determine whether information should be disclosed. Those powerful and important arrangements are sometimes overlooked or taken for granted by some observers who have commented on the bill.

There is a public interest test even for class exemptions, which must be taken into account by the public authority—the Scottish Administration in this case. Even if that does not produce the result that the applicant wants, the public interest test is also taken into account by the commissioner. It is fair to say that the kind of class exemption that is provided for in section 29 is a common feature of other freedom of information regimes, such as those in Australia, Ireland, New Zealand, the Netherlands, the United States, Canada and, indeed, the United Kingdom.

Section 29 provides the necessary and appropriate framework for protecting the confidentiality of internal decision making, as Donald Gorrie acknowledged fairly. The process by which the Government reaches a collective view and takes account of the confidential advice of officials is covered. It is important that internal opinion, advice, recommendation and deliberation should be confidential, to ensure that such matters can be candidly and frankly discussed in Government and that a full record can be kept without at every turn taking account of the possibility of publication. Much of that goes back to the 1993 white paper, "Open Government". I am sure that, as he was a minister at that time, Lord James Douglas-Hamilton remembers that well. The white paper emphasised the importance of candour and the risk of its loss from discussions if such protection were not provided.

Agreement to amendment 71 would undermine effective formulation and development of Government policy. I do not think that that is Donald Gorrie's intention, but that would be the amendment's impact. I remind members that, when it gave evidence to the committee, Friends of the Earth Scotland acknowledged that

"advice to ministers should not be inhibited from being frank and open".—[*Official Report*, *Justice 1 Committee*, 27 November 2001; c 2884.]

Countries that have comparable regimes have reached the same conclusion.

I remind the committee that the exemption is not absolute. The bill requires the Executive to consider the public interest in disclosure. I think that Michael Matheson made a point about that on the first day on which we discussed the bill at stage 2—the presumption is in favour of disclosure. Information can be withheld only if the public interest in maintaining an exemption outweighs the public interest in disclosure. The commissioner can rule on disclosure in response to an appeal from a dissatisfied applicant.

Amendment 72 would remove facts and analysis from the exemption. The amendment does not acknowledge that there might be legitimate and reasonable circumstances during Government policy formulation and development in which it would be appropriate not to disclose facts and analysis. I understand what Donald Gorrie said

but, if we reflect, we will see that that provision would be inappropriate in some circumstances.

The Executive is not precluded from disclosing factual information at any stage in the policy development process. Section 29 requires the Executive to have regard to the public interest in disclosing factual information that has been used, or is intended to be used, to inform a policy decision. It is not necessary always to await the announcement of a decision. Information can be withheld only if the public interest test is satisfied.

As I said, there might be good reason to hold back from wide public disclosure of factual information, in order to allow local sensitivities to be taken into account, or to allow individuals who are affected by a decision to be informed first, as they should be. Committee members might recall that information was disclosed last December about the investigation into concerns about cancer among workers at the Greenock plant of National Semiconductor (UK) Ltd. We all recognised that that was a sensitive matter about which there was much statistical and factual information that related to the number, age and sex of workers, their mortality rates, cancer registrations and other matters.

In recognition of the concerns of the National Semiconductor work force in Inverclyde, the results of the two-year study were published only after arrangements had been put in place to provide present and past workers with information and counselling and after local general practitioners had been briefed. That was appropriate. I believe that committee members will, on reflection, agree that that course of action was appropriate. It was welcomed.

If amendment 72 were agreed to, that approach to the disclosure of information could not be guaranteed, because factual information would not be exempt and would have to be disclosed whenever it was requested. It would be inappropriate to disclose to the wider public such factual information without first giving that information to those who are most affected by it.

I am sure that the committee acknowledges that the absence of a framework in which to consider disclosure of factual information could adversely affect the formulation of inward investment policies. No one would wish to risk job creation by a requirement automatically to disclose to the public, when requested, all factual information relating to a developing inward investment strategy for a deprived area, for example.

Amendment 72 presumes that factual background information on any matter can be disclosed at any time and in any circumstances. That is not provided for in comparable freedom of information regimes. It is not the arrangement under the current non-statutory code of practice and there are circumstances in which such disclosure could be damaging to the public interest.

14:15

Amendments 40, 41, 50 and 42 are intended to modify the approach under section 29 to the disclosure of statistical information that is used to provide an informed background to policy decisions. I find the amendments a little contradictory. They do not add value, they are unnecessary and they complicate an otherwise straightforward provision.

Once a policy decision has been made, no statistical information that has been used to provide an informed background is exempt. Section 29 does not preclude the Executive from disclosing statistical information at any stage in the policy development process. However, it is important that the section allows that there might be legitimate and reasonable circumstances in which it would be inappropriate to disclose statistical information until a policy decision had been made. Perhaps the incidence of cancer in Inverclyde—where there was much statistical information—is an example in which it was right not to disclose information until a policy decision on what would follow had been made.

In the event of a policy decision not to proceed as recommended, it is important to regard that as a decision. A decision not to do something is as much a decision as a decision to do something. In each case, the underpinning statistical information would cease to be exempt on a decision's being made. I therefore urge members not to support amendments 40, 41, 50 and 42.

Amendment 73 would amend section 30 by removing factual information and its analysis from the exemption for prejudice to

"the effective conduct of public affairs."

Amendment 73 is unnecessary. Section 30 provides that factual information—indeed, any information—relating to the conduct of public affairs can be withheld only if its disclosure would prejudice or inhibit substantially certain specified matters such as

"the free and frank provision of advice",

or

"the free and frank exchange of views for the purposes of deliberation".

The public interest test in section 2 also applies and the commissioner can determine disclosure.

Gordon Jackson spoke at stage 1 about the significance of the substantial prejudice test. The test is a high hurdle. It could be relatively

straightforward to argue simple prejudice or damage, but substantial prejudice is different and raises the hurdle.

Amendment 73 is also inappropriate because it does not acknowledge that there might be circumstances in which disclosure of factual information could prejudice or inhibit substantially matters that are specified in section 30. To remove factual information from the exemption would be to risk assuming that the disclosure of all facts at all times in all circumstances relating to any matter cannot ever prejudice substantially

"the effective conduct of public affairs."

As I said, I am interested in a structure that will be as open as possible, but which will be consistent with effective government. A range of issues and people who might be affected by decisions, information and the factual basis that underpins those decisions must be taken into account. We are not dealing with circumstances in which, for example, 30-year rules apply. A person can apply for information and the Scottish Administration must apply the public interest test. If there is public interest in disclosure—even if the issue is 50:50—there will be an obligation to disclose information. If the applicant is not satisfied with the outcome, he or she can appeal to the commissioner. Such rights progress matters considerably and I urge members to reject the amendments.

Michael Matheson: I want to turn to an issue on which the minister did not comment. If a person requests statistical information that is being used for policy purposes, the applicant will not be provided with the information. After a decision—whether to do something or not—has been made, the applicant will have to reapply for that information. Why should not public authorities be responsible for keeping a list and providing applicants with information when a decision has been made?

Mr Wallace: Perhaps I could draw Michael Matheson's attention to section 23(3), on publication schemes, which says that in

"reviewing its publication scheme the authority must have regard to the public interest in"

a number of things, including

"the publication of reasons for decisions made by it."

The public authority must have regard to the publication of those reasons when it draws up the publication scheme.

It is now on the record that my view is that a decision not to do something is as much a decision as a decision to do something. Therefore, under the publication scheme, the local authority should as a matter of course publish decisions and the reasons for them—one cannot publish reasons without giving decisions. That would be a clear indication that a decision on a particular issue had been made.

If it is thought necessary, we could consider providing further guidance on that matter in the code of practice that is outlined in section 60, to underline what is already in the bill. I remind Michael Matheson and the committee of section 15, which deals with the overriding duty to provide advice and assistance.

In many respects, the matter is administrative. When a decision is made to do something, there is usually quite a fanfare about it. I accept that it is sometimes not so obvious when a decision is made not to do something. If the committee's view is that it would be better to supplement guidance on the publication scheme by including something in the code, I am prepared to consider that.

Michael Matheson: If a decision is unpopular, there might not be much of a fanfare. That is probably the issue about which I am more concerned. I note section 23, on the publication scheme, which is heavily dependent on the codes of practice and the role that the information commissioner would have. I accept the minister's point that the issue could perhaps be addressed through guidance and the codes of practice. In that way, when the information commissioner considers the publication schemes that public authorities submit to him, he could check whether authorities provide that, if the requested information is not to be published at that time, they will keep it on record and notify applicants when the information is available, rather than wait for another application to come in. That seems to be quite straightforward and would be easier administratively. It would also put the balance of the bill in favour of the publication of information and make things easier for applicants. Perhaps that could be done through the codes of practice.

Mr Wallace: Section 15 is quite widely drawn. It states:

"A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it."

The section continues:

"A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed".

That links neatly back to the statutory obligation to provide advice and assistance that is described in section 60(2). I think that we can in that way achieve what Michael Matheson perfectly fairly desires.

The Convener: I ask Donald Gorrie to wind up

on amendments 72 and 73 and to indicate whether he wishes to press or to withdraw amendment 71. I got that wrong. Donald Gorrie will wind up on amendments 71, 72 and 73.

Donald Gorrie: I accept the minister's points. He obviously has experience of the machinations of Government that I do not share. Therefore, I must take his advice to a degree. I know that Mr Wallace is enthusiastic about freedom of information. He has produced a bill that is much better than Westminster's Freedom of Information Act 2000. I am sure that under Mr Wallace's regime things will be done as openly as possible.

Those of us in the Parliament who are critical of the bill look forward with apprehension to a time when a less open Government might be in place—a Government that might use the wording of the bill to weasel out of supplying information that it should be required to supply. In practical terms, if ministers decide not to give out information, what can the commissioner do about that?

Mr Wallace: That is a fair question. The point that I was going to make to Donald Gorrie was that Governments might come and go, but the public interest test remains. The commissioner, who will be appointed by the Parliament and not by the Executive, will remain. We will come later to the sections that deal with the commissioner's powers. Those powers are extensive. They include the power to compel a public authority to make information available. The commissioner can then examine the situation and decide whether the Scottish Administration is pulling a fast one or whether there are good grounds for withholding that information.

I do not want to labour the example that I gave about information that was sought about cancer statistics. If the Executive had said that it was not in the public interest for that information to be disclosed, and if an appeal was made on that decision, the commissioner might decide that we were right to take that approach.

I turn again to the example that was given by Donald Gorrie. If the commissioner asked us when a tea break took place, who had coffee and who had tea, and we decided that to disclose that information was not in the public interest, I hope that any commissioner worth his or her salt would give the administration pretty short shrift for doing so.

When members—quite properly—examine the detail of individual sections of the bill they tend to overlook the bill's overall structure. The commissioner is in place; he or she has powers and is independent. Section 49 sets out the position as regards the commissioner's decisions, section 51 relates to enforcement notices and section 53 sets out that

"If a Scottish public authority has failed to comply with"

an information or enforcement notice from the commissioner,

"the Commissioner may certify in writing to the court that the authority has failed to comply with the notice."

Where a failure to comply is certified to the court, the court

"may inquire into the matter and … may deal with the authority as if it had committed a contempt of court."

That is a substantial penalty or finding.

Schedule 3 makes provision for the commissioner's power of entry and inspection, which allows him or her to enter premises and remove documents. Last night in my office, when I was in discussions with my officials, the point was made forcefully to me that the commissioner could enter my office and inspect anything that sits in it, if that inspection related to a particular request for information. In saying that, I have probably disclosed public information.

The Convener: Mr Matheson is smiling—his imagination is engaged by what you have said.

Michael Matheson: I hope that the minister has a tidy office.

Mr Wallace: I assure the committee that we did not break for tea or coffee during that particular meeting.

Donald Gorrie: I might apply for the job of commissioner.

I am reasonably persuaded, although I have doubts whether—in the famous real world that we are supposed to be concerned about—the commissioner would take on the Government. I hope that he or she would. I hope also that the commissioner would not suffer the fate of Ms Filkin.

Mr Wallace: That is why the commissioner must be independent. We could have followed the UK line and had the Government of the day appoint the commissioner, but we chose not to do so. We chose to make the same manner of appointment as is the practice for the Auditor General for Scotland. I think that everyone agrees about the method of that appointment, which is made by the Scottish Parliament on a cross-party basis. That is because people recognise the importance of that position and the importance of the independence of the person who is to occupy it. I envisage the commissioner's having the same status and reputation for independence—which will, one hopes, grow—as the Auditor General has and which we take for granted.

14:30

Donald Gorrie: I might live to regret this, but, in

the light of the minister's comments, I seek to withdraw amendment 71.

Amendment 71, by agreement, withdrawn.

Amendments 72, 40, 41, 50 and 42 not moved.

Section 29 agreed to.

Section 30—Prejudice to effective conduct of public affairs

Amendment 73 not moved.

Section 30 agreed to.

Sections 31 and 32 agreed to.

Section 33—Commercial interests and the economy

The Convener: Amendment 58 is grouped with amendments 75 and 121.

Maureen Macmillan (Highlands and Islands) (Lab): The purpose of amendment 58 is to allow us to discuss the definitions of a trade secret and a commercial interest. As the minister will know, the majority of committee members were not opposed to class exemptions, but in paragraphs 79 to 83 of our stage 1 report we raised concerns about the different definitions.

Commercial interests have a content exemption and rely on the substantial prejudice test, but we wonder why a trade secret has a class exemption. The committee thought that there might be a legal definition of a trade secret, but I have since been informed that there is no such definition. I am concerned that organisations that do not want to rely on the commercial interest substantial prejudice test to keep things secret might just say that they have trade secrets that cannot be divulged.

I would like the minister to define a trade secret and justify its being a class exemption, and explain why a trade secret cannot be covered by a content exemption, to which the substantial prejudice test would have to be applied.

I move amendment 58.

Michael Matheson: Amendment 75 is an attempt to provide a definition of the phrase "prejudice substantially" in relation to a commercial interest exemption. There is something odd about the idea of public authorities talking about commercial confidentiality. However, I think that most people would recognise that there is an increasing tendency for local authorities to be asked to tender for specific services, particularly by central Government.

A recent example was Glasgow City Council's tender to the national asylum support service, which had to be submitted on the basis of commercial confidentiality. When the council was asked how much money it had received per asylum seeker from the NASS, it was unable to provide the information because it was classed as commercially confidential.

Another recent example that highlights the issue of commercial confidentiality is the Scottish Prison Service's invitation to local authorities to tender for the provision of social work and education services. The local authorities are unable to provide information relating to the contracts or tenders on the basis that that information is commercially confidential.

I do not believe that it is acceptable for two public authorities to go through a tendering process that is cloaked in commercial confidentiality. Given the increasing use of such commercial confidentiality provisions, there is a danger that an increasing amount of public information—or what I believe to be public information—will be exempt. That is why I lodged amendment 75, which tries to outline where the provisions will apply, to provide protection to those who have a legitimate reason for claiming information to be commercially confidential. The amendment aims to ensure that the public are able to obtain information readily, in particular where public authorities are concerned.

Donald Gorrie: Amendments 58 and 75 are sensible and I am interested to hear what the minister has to say about them. They address what I think are defects in the bill.

My amendment 121 returns us to the matter of factual information about various people's performance in providing services to the public. It is not about giving away advice or secrets or anything of that sort; it is about what is to be achieved. The amendment covers information in relation to "a Scottish public authority", which means the Government, local authorities, health boards, quangos and so on, and

"a company established by such an authority to provide services to the public".

That is particularly important, because many councils have given provision of their recreation services to arm's-length, non-profit-making trusts or other organisations. I know from my experience as a councillor that it is quite impossible to get any information about the performance of the outfit in question, because the information is claimed to be commercially confidential. Previously, a councillor could ask how many people used a swimming pool or what its income was; now that the provision of that service has been passed to an arm's-length company, we may ask for such information, but we will not get an answer. That is totally unsatisfactory.

The third category of organisations covered by amendment 121 is:

"a company or voluntary organisation with which such an authority has a contract to provide such services."

That includes contractors building council houses or large voluntary organisations that provide residential accommodation for elderly people, handicapped people or whomever. All those organisations should be accountable.

We heard evidence—I think that it was from Glasgow City Council—that the price paid for getting involved in a public contract is openness. That is not a quotation, but it is the gist of what the council's representatives said. It is important that things are open.

The matter is retrospective, in that it concerns factual information about what organisations have or have not done. Some bodies could well take advantage of the bill to conceal information from the public, which they should not be able to do.

I would very much like amendment 121 to be accepted and I am interested to hear what the minister has to say about it.

Paul Martin (Glasgow Springburn) (Lab): The experience in Glasgow has largely involved economic development companies, which receive public funding from local councils as well as Scottish Executive funding in the form of social inclusion partnership funding. In the past, there have been difficulties in accessing information. People might want to ask an economic development company how it has made a difference in tackling local unemployment figures, for example. There should not be any difficulties in obtaining that kind of information.

I have some sympathy for amendment 121, which would secure a right to such information. Currently, I see no aspect of the bill that would ensure that we have access to information about where economic development companies are making a difference.

Gordon Jackson (Glasgow Govan) (Lab): Maureen Macmillan points out that a trade secret is a class exemption, not a content exemption. I would like the minister to tell us how we know that. I am not saying that that is wrong; I have just lost track.

Mr Wallace: I will answer Gordon Jackson's question at the end. He is right to say that a trade secret is a class exemption, while commercial interests are content exemptions.

Amendment 58 would subject trade secrets to the harm test rather than the class exemption test. Although trade secrets are often considered to be commercial interests, I invite the committee to accept that they are materially different from the normal interest that a business has in the confidentiality of its affairs. A trade secret can be regarded as an asset—perhaps the most valuable asset—of a business. The recipes for Drambuie and Irn Bru are examples of trade secrets that people would readily recognise as being of a different quality from commercial interests. Sometimes trade secrets attract legal protection, such as a patent or copyright, but often the only protection is in maintaining their secrecy.

Our approach is in keeping with the approach under the present, non-statutory code of practice for the UK Freedom of Information Act 2000 and the Irish Freedom of Information Act 1997, whereby trade secrets are recognised as a distinct category, justifying separate protection by way of a class exemption. I draw the committee's attention to the code of practice on access to Scottish Executive information, which deals with trade secrets. Trade secrets are described as

"information (including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism) which:

(i) is or may be used in a trade or business;

(ii) is not generally known in that trade or business;

(iii) has economic value from not being generally known; and

(iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

I believe that trade secrets are different in quality from run-of-the mill commercial interests.

The Convener: Sorry, I lost you there. What were you quoting from?

Mr Wallace: I was quoting from the guidance on interpretation of the code of practice on access to Scottish Executive information. That guidance accompanies the current non-statutory code and is available in the Scottish Parliament information centre. I hope that the definition gives the committee a flavour of what the code covers.

The Convener: I am happy to allow the minister to deal with all the points and to let members who have lodged amendments make comments.

Maureen Macmillan: Who will make the decision about whether something is a trade secret? Will that decision be made by the commissioner or by the individual firm?

Mr Wallace: The test is not absolute—it is not an absolute exemption. The public interest must be considered before a decision is made to withhold information. That recognises that there may conceivably be circumstances in which commercial sensitivity is not sufficient justification for non-disclosure. For example, there could be circumstances in which disclosure is necessary or

conducive to the protection of public health, public safety or the environment and that would outweigh any financial loss or substantial prejudice to the competitive position of a third party.

Under the exemption as drafted, information must be disclosed, unless the holding authority—the public authority that holds the information—can justify that the disclosure of a trade secret would be contrary to the public interest. That is the proper balance to strike. It recognises the importance of trade secrets as assets of companies that are in the hands of a public authority and also puts an obligation on the public authority to ensure that if the public interest is such that it outweighs the wish to maintain the secret, it should be disclosed. Of course, a disappointed applicant would have recourse to appeal to the commissioner.

On the general point about commercial interests, Donald Gorrie used the phrase "commercially confidential", which is not a phrase that is used in the section. To be reasonable, we must begin from the premise that it is appropriate to withhold some commercial information because disclosure could be damaging. The bill does that but no more. Unless the disclosure of the information would cause substantial prejudice, it cannot be withheld. Even if it would cause substantial prejudice, the public authority is still required to apply the public interest test.

Michael Matheson's amendment 75 is, if I may respectfully say so, illogical.

14:45

The Convener: There is no way that you can say that respectfully.

Mr Wallace: The text of amendment 75 is drawn from the exemption in the Irish act for "commercially sensitive information", but the transposition does not sit easily with the way that our legislation is drafted. Amendment 75 would further specify—and in so doing limit—what is meant in section 33 by

"prejudice substantially the commercial interests of any person".

Aside from there being widespread agreement that it would not be helpful to define substantial prejudice in the bill—that should be a matter for the commissioner—the proposed paragraph (a) in amendment 75 would have the effect of limiting the meaning of substantial prejudice to mean harm that could

"reasonably be expected to result in a material financial loss"

I suspect that the amendment would do the opposite of what Michael Matheson hopes it would achieve.

Paragraphs (b) and (c) of the new subsection proposed by amendment 75 simply reiterate the existing harm test of substantial prejudice. They do not clarify further what is meant by the use of that phrase in section 33(1)(b) so they are unnecessary. Proposed paragraph (a) could make it easier to withhold information. I remind the committee that substantial prejudice is a pretty robust test. It is far better to leave the interpretation of that phrase to the commissioner, but the hurdle is high and is intended as such. Section 33, which deals with commercial interests, should take that into account.

Donald Gorrie advanced arguments that I find not only attractive but, in many respects, compelling. He underlined the need for freedom of information legislation. I have always—I think properly—avoided saying that a particular public authority was wrong if it did not disclose information. When the bill, I hope, becomes an act, public authorities that have sought over the years to withhold information—Paul Martin gave an example—will be able to be challenged. It would be wrong of me to say what the result of such a challenge would be, but I remind the committee that the authority would have to show that disclosing unemployment figures would cause substantial prejudice. Even if it showed that doing so could cause substantial prejudice—I will leave committee members to let their minds do overtime as to how it might do that—it would also have to show that it was in the public interest not to disclose the information.

The points that Donald Gorrie and Paul Martin made simply underline the importance of having a freedom of information regime because, if the public authority says no, there is the possibility of an appeal to the commissioner who, as I indicated in relation to section 29, has robust powers.

The sentiments behind Donald Gorrie's amendment also motivate much of the bill. Bringing such information into the public domain should be a spur to improving the performance of our public authorities. However, I resist amendment 121 because it is flawed. The bill would allow the public to obtain the type of information that Donald Gorrie has in mind, unless disclosure would be contrary to the public interest. Earlier, I explained that the disclosure of trade secrets will be subject to the public interest test. Other commercial information could be withheld only if its disclosure would cause substantial prejudice and, even then, the public interest test would have to be applied. That is a stiff test and would be policed by a commissioner with powers.

We are being invited to accept that at no time and in no circumstances would the disclosure of factual information about the performance of an authority prejudice substantially the commercial

interests of an authority or any other person. That is a difficult point on which to be satisfied. I do not think that anyone in this room would wish information about the performance of a Scottish public authority to be disclosed at all times and in any circumstance, because we are all aware that such disclosure might substantially prejudice the commercial interests of an authority and be against the public interest.

For example, I am sure that Caledonian MacBrayne holds factual information of a commercial nature that, if disclosed, might well prejudice it in any tendering that might take place. We know that local authorities negotiate large supply contracts. CalMac might have negotiated a discounted rate for fuel with a supplier. That is, undoubtedly, a fact. Under Donald Gorrie's amendment, because that fact could be construed as relating to the company's performance in the areas of value for money and service provision, it would not be exempt, irrespective of the fact that disclosure of that fact might substantially prejudice the position of the supplier in negotiating other contracts—the supplier might be asked to supply the fuel at the same rate, even though the contract was for a smaller amount. The same situation might apply in relation to the supply contracts that hospitals, local authorities and other authorities enter into. The bandying about of information about discounted rates could be against the public interest because it might mean that discounted rates were not available or that discounts were not as advantageous to the local authority.

Scottish Enterprise might hold a third party's commercial information, such as its accounts or its business plan. Information relating to loans or grants to such companies could be considered as performance indicators for Scottish Enterprise. Much of that information is factual and would have to be disclosed come what may if amendment 121 were included in the bill. There is a question about whether inward investors would be willing to provide Scottish Enterprise or Highlands and Islands Enterprise with sensitive financial details or employment statistics. That could quite quickly have a serious impact on our economy.

I do not think that people believe that all such information should be disclosed in any circumstance. No one could say with their hand on their heart that disclosure of such information would not cause damage.

As I have indicated, the sentiments behind Donald Gorrie's amendment—that more information ought to be in the public domain—motivate the bill. However, simply saying that all factual information should be disclosed without any kind of check on whether disclosure could substantially prejudice commercial interests is too open-ended.

Although I share the spirit of what Donald Gorrie wants to see, I believe profoundly that the structure of the bill provides for that while ensuring that certain commercial interests would not have to be disclosed if there were substantial prejudice and if it were not in the public interest to disclose them.

Gordon Jackson made a point about a trade secret being a class exemption. We know that principally because it is not covered by an absolute exemption nor is there a reference to substantial prejudice. Section 33(1)(b) refers to substantial prejudice whereas section 33(1)(a) states only that a trade secret is exempt information. That is the difference.

Gordon Jackson: So the expression substantial prejudice is always used when referring to content exemptions and class exemptions are stated simpliciter. That is how we know the difference.

Mr Wallace: Also, section 2 concerns the effect of exemptions and absolute exemptions.

Gordon Jackson: I could not remember from glancing at the bill how we knew the difference between the two classes of exemption.

The Convener: In the interests of moving the meeting along, I would be obliged if members who want to respond to the minister's comments on their amendments would be brief and to the point. I ask Donald Gorrie to respond to what the minister said about amendment 121.

Donald Gorrie: If amendment 121 were agreed to, is it not the case that an authority could appeal to the commissioner and not have to give out the information?

Mr Wallace: No, that is not how it would work. There would be no grounds for appeal, because the exemption would have gone and the authority would be obliged to hand over the information without recourse. The bill is structured to allow the applicant to appeal if dissatisfied, not to help the public authority if it does not like what it is being asked to do in circumstances in which there is no exemption.

Michael Matheson: I have nothing to add on amendment 75.

The Convener: You did not have to take what I said about being brief and to the point so literally.

Amendment 58, by agreement, withdrawn.

The Convener: Amendment 119, in the name of Lord James Douglas-Hamilton, is grouped with amendment 120.

Lord James Douglas-Hamilton: In section 33, page 17, line 23, amendment 119 would insert:

"or it relates to research being carried out by a professional researcher or higher education institution, but

not yet complete."

I understand that the minister has been sent a copy of the letter from Universities Scotland on that issue, which was signed by Mr David Caldwell.

Mr Wallace: Yes. I think that there is also a letter from Lord Sutherland.

Lord James Douglas-Hamilton: Yes. It might be the same letter, but signed by Lord Sutherland. I will just run through the three sets of arguments presented by Universities Scotland.

The first relates to commercial interests. Universities Scotland was obviously concerned about that in relation to academics being compelled to disclose what they had studied before bringing their research to a conclusion. The first bullet point of the letter states:

"The exemption for release of information which would 'substantially prejudice' commercial interests would not protect much academic research where commercial benefit would not be felt in the short term. This would affect an institution's intellectual property rights or make it significantly more difficult to attract commercial research contracts from industry. This latter problem is exacerbated by the fact that universities in England and Wales would not face the same requirements, putting Scotland at a clear competitive disadvantage."

The absence of commercial confidentiality would be harmful to Scottish universities, especially those that are engaged in research with industry—for example Heriot-Watt University. That absence could reveal research that was entirely on the wrong tack.

I will give a light-hearted example of incomplete research. In the second world war, Winston Churchill got to hear about research plans for an aircraft-carrier made of ice. His civil servants tried to prevent him from seeing those plans because they knew that, if he saw them, he would order an enormous amount of work to be done on the incomplete research. That is precisely what he did, which took the scientists off much more important matters. The conclusion was that an aircraft-carrier made of ice was not a feasible proposition within reasonable costs.

15:00

The Convener: Did the research consist of lighting a fire under the aircraft-carrier to find out whether it would work?

Lord James Douglas-Hamilton: The lack of commercial confidentiality would be of serious concern to academics who are engaged in research with industry in which commercial confidentiality is needed.

The second bullet point in the letter relates to academic interests and states:

"The forced disclosure of incomplete research could result in interpretations of incomplete data from third parties, such as the media, which would significantly harm the value of the research. This could damage Scotland's reputation for excellence in research."

It is well known that more than 20 per cent—somewhere in the region of 25 per cent—of British scientific discoveries and inventions come from Scotland, which is well above our 10 per cent per capita ratio. We have a distinguished record in scientific innovations, from Watt and the steam engine onwards. Forced disclosure of incomplete research could lead to many misunderstandings.

David Caldwell's third bullet point is about staff interests. It says:

"Recruiting international-quality researchers to Scotland would be significantly more difficult if they knew they might be required to disclose incomplete research. This would damage the quality of research in Scotland and might lead to a 'brain drain'."

The important point is that forced disclosure could put our best researchers—or even those who are not our best researchers—at a competitive disadvantage on projects and could mean that the necessary researchers will not come to Scotland. That would be contrary to the public interest.

I also submit to the minister that universities need support from the private sector as well as from the public sector if they are to reach their full potential. I hope that the minister will not necessarily feel impelled to give a final answer today but will take the matter away and consider it. Commercial confidentiality is important for the morale of Scotland's universities. It is wrong to upset them and to lower their confidence, morale and esteem. The disadvantages of forced disclosure of incomplete research outweigh the advantages.

I move amendment 119.

Donald Gorrie: Amendment 120 covers the same ground as amendment 119. Naturally, I think that my amendment 120 is better, but I am happy to support Lord James's amendment 119, as it has come up first in the marshalled list.

The issue is important. It is a question of the best wording. Amendment 119 mentions

"a professional researcher or higher education institution".

I am not quite sure about "professional researcher". Are the enthusiastic people who work for us in the Parliament professional researchers? They may well be. If I do some research, I am definitely an amateur, even though the research might be quite good.

Amendment 119 refers to research that is not yet complete, but I feel that the issue is the publication of the research rather than its completeness, which is why my amendment 120

refers to research that is not yet in the public domain.

Like Lord James, I feel that the issue is important; I know from our discussions that the minister is also concerned about it. I will listen with interest to whether the minister will accept amendment 119 or my amendment 120, or whether he has a better idea.

Mr Wallace: As Donald Gorrie suggests, I am aware of the concerns over this issue. As James Douglas-Hamilton says, I have received representations from Lord Sutherland, the convener of Universities Scotland. I would be among the first to acknowledge the importance of research to Scotland's higher education establishments. The £10 million for research that Wendy Alexander is announcing today reflects the Scottish Executive's awareness of what is going on in our universities.

I thought that Lord James was going to tell us that Churchill had waited so long for research that the aircraft-carrier had melted. However, it is important to acknowledge the excellent record of cutting-edge research in a number of areas. That must not be undermined by our freedom of information regime. However, I have concerns about amendments 119 and 120. Amendment 119 assumes that all research is undertaken by higher education institutions, ignoring the fact that a range of research work is undertaken elsewhere—for example, by public authorities such as the Scottish Executive through its central research unit, and by the Fisheries Research Services marine laboratory. Furthermore, as Donald Gorrie suggests, not all researchers do such work professionally. It is likely that some university research is done by postgraduate students; I am not sure that such people would be caught by the phrase "professional researcher". Consultant physicians, for example, often have research interests but would not be considered professional researchers.

Both amendments refer simply to research. Given the extent of the protection that is being offered, it is vital that we are clear about what is meant by research. Donald Gorrie was perhaps touching on that when he suggested that some of the work that is done by enthusiastic people in the Scottish Parliament could be described as research. We must ensure that any provision that we introduce is measured and appropriate. Under both amendments, if information is considered to fall within the meaning of research, it will be exempt and could therefore be withheld by an authority. I do not think that the amendments' proposers intend to introduce yet another category that could be misused by authorities that some people may not trust.

Opinions can differ on what is or is not research. However, I have been corresponding with Universities Scotland and with ministerial colleagues and we take this issue seriously. I want to make it clear again that we do not wish our freedom of information regime to undermine the ability of Scotland's universities and other authorities to compete for research contracts worldwide. As drafted, the bill already offers safeguards against inappropriate and premature disclosure of information where an authority's commercial interests would be affected. In replying to Lord Sutherland last week, I said that I had asked my officials to investigate whether the bill could be amended to afford sufficient protection to such information. He suggests that the bill should extend protection to incomplete research where premature disclosure would result in substantial prejudice to the interests of the institution, the research or the subject matter. As members may be aware, a similar provision to that is included in the Irish Freedom of Information Act 1997. We will consider that approach.

I do not want to give undertakings until we have completed our examination of the possibilities. With the committee, we have spent a fair amount of time examining the bill's exemptions. From those discussions, it is clear that any move to extend the coverage of exemptions must be carefully considered; such a move should be made only if absolutely necessary. We would not want inadvertently to introduce a loophole whereby we give protection to the kind of research to which we want to give protection but inadvertently give protection to information that we think ought to be freely available in the public domain.

We have specific concerns about the drafting of amendments 119 and 120, but I acknowledge that this issue will require further careful consideration. Indeed, the bill may have to be amended. I ask James Douglas-Hamilton and Donald Gorrie not to press their amendments. Prior to stage 3, I will be happy to write to the committee to explain how we intend to address members' concerns. We acknowledge the problem and I have informed Universities Scotland that we have asked officials to investigate whether the bill can be amended to provide sufficient protection. I therefore ask that the amendments not be pressed at the moment.

The Convener: In the light of that, James, do you want to press or withdraw amendment 119?

Lord James Douglas-Hamilton: Convener, may I press the minister on this point? The pursuit of educational excellence must not be disadvantaged. If the minister is prepared to accept the principle contained in amendment 119 and come back with his own amendment, I will be content and will seriously consider withdrawing the amendment. However, if he is not prepared to accept the principle, I will be extremely uneasy

and will press amendment 119 to a vote.

Mr Wallace: My point was that Scotland has an excellent record of innovative, cutting-edge research. I am clear—James Douglas-Hamilton and I share this view—that that must not be undermined by the legislation. We want to ensure that we achieve that.

Lord James Douglas-Hamilton: In order to clarify the matter, will the minister endeavour to lodge amendments if at all possible?

Mr Wallace: If at all possible, yes. As I indicated to the committee, we want to give the matter measured consideration; if we produce amendments, they should be appropriate and measured. I have indicated to Lord Sutherland that we are considering whether the bill can be amended and we are examining the Irish provisions to see if we can use them. However, I do not want to give an absolute commitment, because we have spent a lot of time trying to narrow exemptions and there is a danger that, if we add an exemption, it may go further than providing the proper protection that we want. However, I assure Lord James and the committee that we want to ensure that Scotland maintains its place at the forefront of research.

Lord James Douglas-Hamilton: I hope that the minister will feel able to produce amendments. However, in the event that he does not, I will seek to use the right to return to this subject at stage 3. For that reason, I do not wish to press amendment 119 to a vote now.

The Convener: So you are seeking to withdraw amendment 119.

Lord James Douglas-Hamilton: Yes, but I am putting down a marker that this matter should be dealt with later.

The Convener: You may lodge an amendment at stage 3.

Amendment 119, by agreement, withdrawn.

Amendments 120, 75 and 121 not moved.

Section 33 agreed to.

Section 34—Investigations by Scottish public authorities and proceedings arising out of such investigations

The Convener: A substantial number of amendments to section 34 have been lodged. Do committee members wish to have a short break after we have dealt with the section or do they wish to press on? I am in your hands. Will we see how members feel at the end of section 34?

Maureen Macmillan: Is there coffee?

The Convener: There is coffee outside. The minister looks excited by that. Gordon Jackson is away to eat the shortbread as we speak.

Amendment 133 is grouped with amendments 43, 44 and 134.

Michael Matheson: The aim of amendment 133 is similar to that of amendment 134, although it would achieve that aim in a slightly different fashion. Amendment 133 seeks to amend the provisions on investigations by statutory bodies such as the Health and Safety Executive into matters that may require prosecution. The purpose of amendment 133 is to ensure that information that is gathered by a public authority, such as the Health and Safety Executive, for a report to the procurator fiscal with the intention of bringing a prosecution will be made available if the public authority decides not to pursue the matter with the procurator fiscal or the procurator fiscal decides not to prosecute. The amendment would ensure that the information that a public authority has gathered for a report can be made available. That information may be valuable and could lead to a form of civil action being taken. However, the parties concerned will not be able to obtain that information under the bill at present. Notwithstanding the fact that a procurator fiscal might have decided not to undertake criminal proceedings, that information could be important for a civil case.

15:15

On amendment 43, in response to a point that I put to him, the Lord Advocate said that the purpose of section 34(2)(b) was to protect the

"right of the family … to maintain privacy in relation to information of a personal and medical nature of deceased persons".

However, the class exemption could cover information on and investigations into deaths that were not referred to the procurator fiscal or into which further investigations were made after the procurator fiscal's inquiries were completed. It could also reach into matters such as research into the causes of death.

The bill could catch a matter of considerable public interest, such as research into medical errors, industrial disease or food poisoning. The privacy of the family would still be sufficiently protected by the substantial prejudice test. Some information could be classified under the present exemptions inappropriately.

In effect, amendment 44 would introduce a test of substantial prejudice for confidential sources. The class exemption for information from confidential sources is fairly widely drawn and could cover regulatory investigations. If disclosure of information were unlikely to reveal the source of the information, I see no reason why that information should not be made available to an

applicant.

I move amendment 133.

Mr Wallace: We are introducing a statutory freedom of information regime to ensure that the criminal justice system in Scotland remains effective. Section 34 is intended to achieve a balance, and that is why I do not accept Michael Matheson's amendments.

Amendment 133 would alter fundamentally the basis on which the exemption in section 34 is intended to operate. Section 34 is directed at case-specific information and is intended to include all investigations that are made with the purpose of submitting a report to the procurator fiscal and investigations that are carried out or instructed on behalf of the fiscal. Mr Matheson talked about information remaining in the hands of the Health and Safety Executive. That is a reserved organisation, so it will not be covered by the bill, but information that the Health and Safety Executive passed to a Scottish public authority would be covered by it.

Amendment 133 would remove the exemption from information if and as soon as an authority decided not to make a report to the procurator fiscal or the fiscal decided not to institute proceedings. That would mean that information that was provided by witnesses and informants could be released into the public domain.

That highlights several difficulties. It is important that the committee should be aware of the significant implications for the criminal justice system if the amendment were agreed to. The main point is that amendment 133 would risk prejudicing live or future investigations and proceedings. There are also considerations relating to the presumption of innocence, the privacy and reputation of witnesses and informants, the effective conduct of prosecution and investigations, and the role of criminal proceedings as the forum for bringing information into the public domain.

I will elaborate. We are concerned that witnesses and persons under investigation should not be subject to the risk of trial by media without any protection, as could happen if information became freely available. We should not disturb arrangements that ensure the confidentiality, privacy and reputation of witnesses and the presumption of innocence of accused persons. To provide certainty for witnesses and victims, the exemption must be available in perpetuity. That does not mean that information will never be disclosed; it means that the exemption remains available as a framework within which disclosure decisions are made, including considerations of the public interest. We should not undermine the role of criminal proceedings as the key forum for bringing information into the public domain and the sole forum for determining people's guilt or innocence. The integrity of the informant system could also be undermined if there were a possibility of subsequent disclosure.

It is important that we maintain uniformity in cross-border co-operation in relation to the investigation and prosecution of crime. Many law enforcement agencies—such as HM Customs, the Health and Safety Executive, which was mentioned, and the Benefits Agency—that report to the procurator fiscal are subject to the Freedom of Information Act 2000. The UK act provides a general class exemption to exist in perpetuity. The exemption for the investigation and prosecution of crime in the Scottish bill requires compatibility between the two jurisdictions to avoid operational difficulties for such agencies and to provide certainty and consistency between the two jurisdictions. It would be unfortunate if we found a blockage in the flow of information as a result of concerns about one of the reserved bodies passing on information. We should ensure that witnesses, victims and informants are subject to the same protection, regardless of the authority in which the power to prosecute is vested.

I hope that the committee will accept that those considerations are weighty and that it would not be appropriate to amend section 34 as amendment 133 proposes.

Amendment 43 would change section 34(2), which applies to information gathered during an investigation into the cause of death of a person, from a class exemption to a content exemption. Such information is currently exempt under section 34, but is still subject to the public interest test. Following discussions about the draft bill with the Campaign for Freedom of Information, we revised and narrowed the exemption. Specifically, we narrowed it, as a result of representations, to refer only to an investigation being carried out by virtue of a duty to ascertain the cause of death of a person or for the purpose of making a report to the procurator fiscal in respect of the cause of death of a person. We would strongly resist an attempt to narrow the exemption further, as it has been considered, discussed and already narrowed.

I should point out what seems to be an inadvertent error in the drafting of amendment 43. It provides that information would be exempt where disclosure

"would not prejudice substantially the privacy of surviving members of that person's immediate family or other close relatives."

As a result, information would not be exempt where disclosure would prejudice substantially the privacy of the victim's family or close relatives. I do not think that Michael Matheson intended the amendment to say that, but that would be the effect.

There are more substantive policy reasons for resisting the amendment. Information collected during investigations into the cause of death of a person is invariably sensitive. If the information is not exempt, it must be made accessible to all. There would be no need for an applicant to demonstrate a need to know. However, much of the information collected during an investigation into a cause of death is inappropriate for general public disclosure, given the distress that might be caused to the victim's family, for example.

The amendment attempts to address that, but would require authorities to make difficult judgments about the effect of disclosure on an individual's privacy. Relatives of a victim will often have a legitimate interest in information and it may be entirely appropriate to make that information available in private to the victim's family. That practice will be unaffected by the legislation. The bill provides a general right of access, open to all. Only where it is in the public interest should that information be made generally available.

I recommend that amendment 43 be rejected. It appears that there is a drafting error and, in any case, the amendment would be wholly inappropriate. To make the information subject to a content exemption could lead to insensitive situations.

Amendment 44 would subject section 34(3) to a harm test. Coincidentally, that subsection, too, was revised and narrowed in response to the representations made about the draft bill. The bill's approach now matches that found in the UK Freedom of Information Act 2000. Subsection (3) is now very specific in its coverage. It states:

"Information held by a Scottish public authority is exempt information if … it relates to the obtaining of information from confidential sources."

The bill does not apply to the information gathered from such sources. The subsection could not be cited by an authority that was seeking to withhold information gathered from an informant or other confidential source; it applies only to information concerning how the information was gathered, which might include information that could reveal the identity of informants.

We consider it appropriate that that specific category of information is covered by a class exemption. Confidential sources are essential for the effective operation of intelligence operations intended to combat serious crime. It is vital that the means by which such information is obtained are not compromised. It is essential that confidential sources are not deterred from providing information by the possibility that information about how the information was obtained from them—which could lead to their identification—could be made known in cases where such a disclosure would prejudice only the confidentiality of the source. There has to be recognition that, subject to the public interest test, information relating to the obtaining of information from confidential sources should not routinely be disclosed.

Amendment 134 seeks to insert in section 34 specific criteria to which public authorities are to have regard when determining the public interest test under section 2(1)(b). I ask members not to support the amendment on the basis that it is neither appropriate nor necessary to insert in section 34—or any other section—such a qualification for the operation of the public interest test.

The committee has already considered, in its discussion of section 2, the way in which the public interest test will operate and it has discussed the balance towards disclosure in cases where the public interest in information being disclosed is not outweighed by the public interest in maintaining the exemption. It has been accepted that it would not be appropriate or helpful if the bill were to define or interpret, and possibly thereby limit, the scope of the term "public interest". Amendment 134 seeks to provide a qualification to the exercise of the public interest test, but to do so would be inappropriate.

Section 34 is an important section, and we should ensure that, in promoting freedom of information, we do not compromise the criminal justice system, particularly the vital and valuable work that is undertaken by the prosecution service. We have met the Campaign for Freedom of Information and we amended the draft bill. I believe that we have struck the right balance and I urge members not to support amendments 133, 43, 44 or 134.

Michael Matheson: The minister has suggested that amendment 133 could compromise a situation in which a prosecution was taking place or was being considered. In fact, the amendment deals with situations where it has been decided not to take matters forward. I am referring to the stages involving the regulatory body or the procurator fiscal and the amendment was drafted so as to prevent matters from being compromised in such a situation.

The amendments are in essence a series of probing amendments. I wonder whether the minister could address the issue that I raised when speaking to amendment 43 in relation to medical errors and research that may be carried out into deaths. Could the provision inadvertently cover industrial disease investigations and food poisoning matters? I understand what the minister said about cases into which a procurator fiscal carries out an inquiry—for example, the case of a road traffic accident following which, sadly, someone has been killed. I am sure that the

minister does not intend that cases where good research has been undertaken into deaths resulting from, for example, industrial disease or food poisoning should also be covered by exemptions, as they would be under the bill as drafted.

15:30

Mr Wallace: We discussed that point with the Campaign for Freedom of Information after the draft bill was published. It was on that basis that we narrowed the scope of section 34. Michael Matheson makes a fair point and we have tried to address it. We have limited the section's scope to try to take account of such circumstances.

Michael Matheson said that amendment 133 is intended to cover only circumstances in which it is decided not to make a report or institute proceedings. I recognise that, but the amendment could still be a bar to future proceedings being taken through the Moorov doctrine, which Gordon Jackson might recognise. For example, there could be a case, such as a sexual abuse case, in which there is insufficient evidence to proceed with a prosecution. However, a subsequent allegation might be made and it might be found that the Moorov doctrine could be applied to use both cases to uphold the allegation. Amendment 133 could prejudice such a future prosecution.

Furthermore, following the investigation of a criminal allegation against Mr X, it might be decided that there is insufficient evidence to make a case. However, the investigation might discover information about Mr Y, which might be insufficient to bring a case against him, but which could trigger another line of inquiry. I accept Michael Matheson's point that amendment 133 is intended to apply to cases in which there is a decision not to prosecute. Nevertheless, the amendment could prejudice a future criminal prosecution.

Michael Matheson: I am still unclear about the position of research that has been undertaken into issues such as medical errors and industrial disease. As the minister will be aware, there are on-going campaigns on such issues. I wonder whether they will continue to be covered by class exemption as opposed to content exemption.

Mr Wallace: I hope that we have addressed that issue in section 34(2)(b), which states that information is exempt if it is

"held at any time by a Scottish public authority for the purposes of any other investigation being carried out—

(i) by virtue of a duty to ascertain".

Wider research would not be caught by that exemption. We honed the exemption to take that consideration into account.

Amendment 133, by agreement, withdrawn.

Amendments 43, 44 and 134 not moved.

Section 34 agreed to.

Section 35 agreed to.

The Convener: Members will be delighted to know that we will have a break until just before 3.45 pm—there will be a 10-minute suspension for coffee and tea.

15:33

Meeting suspended.

15:47

On resuming—

Section 36—Confidentiality

The Convener: Amendment 13 is grouped with amendments 45, 76, 78, 77 and 33.

Michael Matheson: Amendment 13 tries to probe the type of information that will fall within the category of exempt information for the purposes of the bill. The bill as drafted is unclear about whether legal privilege material will come within the ambit of section 36. Section 36 refers to confidentiality, but no definition of the term is given.

Within the legal profession, the privilege of confidentiality applies widely. Legal professional privilege applies in Scots law. I understand that section 31 of the Data Protection Act 1984, sections 19 and 39 of the Terrorism Act 2000 and section 33 of the Criminal Law (Consolidation) (Scotland) Act 1995—I am sure that members have copies of those acts with them—all provide a definition of legal professional privilege in Scots law.

The Convener: Do you have copies of those acts with you, Mr Matheson?

Michael Matheson: Of course. There is a need for clarification of the definition of confidentiality within the bill and I hope that the minister will be able to provide that.

Amendment 45 would have the effect of preventing a person who provides a public authority with information from specifying that the information is provided in confidence, if the reason for doing so is to frustrate freedom of information provisions and to prevent actions for breach of confidence arising from disclosure of that information. Section 36(2) provides for an absolute exemption that is founded on the common-law obligation of confidentiality. Therefore, the Scottish public authority and the provider of the information could quite simply agree that the information that was provided should be confidential. Amendment 45 would invalidate any such an agreement.

I move amendment 13.

Donald Gorrie: Amendment 76 relates to one public authority providing information to another public authority. Section 36(2) currently states:

"Information is exempt information if … it was obtained by a Scottish public authority from another person (including another such authority); and … its disclosure by the authority so obtaining it … would constitute a breach of confidence".

Amendment 76 would replace "including" with "other than", which would mean that a public authority that passed on information to another public authority would not thereby help to make the information exempt. We are back to this business of having to guard against some public authorities that might not share the minister's enthusiasm for freedom of information. Two public authorities in collusion could use section 36(2) so that they would not have to make the information available. Having passed the information from one to the other, they could claim that, as the information was given in confidence, it would be a breach of confidence to give out the information.

Amendment 78 tries to deal with the situation whereby someone could simply claim that a piece of information was confidential. The amendment provides for the situation in which something that may have been confidential when it was originally received is no longer confidential with the passing of time. The amendment would mean that the Scottish public authority would have to contact the provider of the information who said that it needed to be confidential and discover whether the information could now be published. The information would remain confidential only if the authority had contacted the original provider since receiving a request for the information and the provider's consent was not given or if the original provider had refused such consent during the previous year. It is reasonable to try to be as open as possible. A public authority could hide behind the fact that, years ago, somebody had said that the information was confidential, when there is now no reason to keep the information confidential. That is the purport of amendment 78.

Amendment 77 addresses something that appears in the draft code of conduct that accompanies the bill but which would be better to appear in the bill. The amendment would provide that information would not be exempt where

"(a) the Commissioner has issued guidance as to the circumstances in which it would be inappropriate for a Scottish public authority to accept information the disclosure of which would constitute a breach of confidence actionable by that person or any other person; and

(b) the authority has subsequently accepted the information under the circumstances mentioned in paragraph (a)."

For example, the code allows the commissioner to say that, if a council enters into a contract with a company that will repair the roads, the council or the contractor cannot write into the contract a clause that will make everything confidential.

Although that issue is already dealt with by the code, it is important that we have the wording on the face of the bill. We need to make it clear that the public authority cannot sneak round the freedom of information regime and make lots of information confidential by having the appropriate clause in a contract.

All three amendments would improve the bill. As always, I shall be interested in what the minister says.

The Convener: I apologise to James Douglas-Hamilton, whom I should perhaps have called to speak to amendment 13, which he is supporting as well as Michael Matheson. The next time a similar situation occurs, I shall call the member supporting the amendment.

Lord James Douglas-Hamilton: Michael Matheson has said it all. The Law Society was concerned by this matter, and we would be grateful for any enlightenment from the minister. Amendment 23 is merely a consequential amendment if amendment 13 is accepted.

Mr Wallace: Perhaps I should start by dispelling a myth that could easily arise, particularly around exemptions on the grounds of confidentiality. I want to make it clear that it will not be open to public authorities to decide that it would be inconvenient to disclose certain information and therefore simply to label it confidential. Indeed, that concern probably lies behind amendment 45, which seeks to provide that information cannot be labelled confidential solely for the purpose of establishing the exemption. I categorically assure members that an authority cannot take a "one bound and we are free" approach; it cannot simply stamp information as confidential and remove it from the reach of the freedom of information regime.

Section 36 sets out two conditions on the use of this exemption. First, information must be passed to the authority by another person; secondly, information must be passed with a legally enforceable duty of confidence attached. It is important to remember that citing the exemption does not remove the commissioner from the equation. The commissioner can review whether the exemption has been properly applied, and where the information involved does not fall within the exemption, the commissioner may intervene. Equally important, the commissioner will have a broader supervisory role in ensuring that authorities do not accept unnecessary obligations of confidence. For example, the option to name and shame will be an important aspect of this work, particularly as far as changing the culture is concerned.

Amendment 13 attempts to clarify the bill's coverage of legal professional privilege at section 36(1). Michael Matheson and Lord James Douglas-Hamilton have mentioned the need for clarity. The phrase "confidentiality of communications", which is used in section 36(1), is intended to go wider than just "legal professional privilege", although it certainly includes that aspect. The wording extends to other categories of information such as certain communications between spouses and between doctors and their patients which the courts deem, in certain circumstances, to attract a duty of confidentiality.

Moreover, in cases that fall within section 10 of the Contempt of Court Act 1981, the phrase would apply to communications between journalists and their sources. Although I do not know how it might apply to public authorities, it may even extend to priests and penitents. We want to protect such communications in the same way that the courts do.

I should also point out to the committee that the equivalent section—section 42(1)—of the UK Freedom of Information Act 2000, under the heading of "Legal professional privilege", exempts

"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings".

The phrase "confidentiality of communications" therefore appears in the UK act under "Legal professional privilege" as the wording that applies to Scotland in this respect. Our use of the phrase ensures consistency and I make it clear that it includes the legal professional privilege element that Michael Matheson and Lord James Douglas-Hamilton are concerned about.

Amendments 76, 77 and 78 attempt in different ways to affect how authorities enter into obligations of confidence and would allow such obligations, once entered into, to be set aside. That is a major policy step beyond what is set out in the bill, and before I respond in detail to each amendment, I will explain the approach that we have taken in the bill.

Section 36(2) is an absolute exemption, although I have indicated that the commissioner will have a role in determining whether the exemption has been claimed properly. The bill deliberately leaves the law of confidentiality untouched. In Scotland, the law of confidence is a broad and complex area simply because it covers almost all categories of information. Such categories range from information as we commonly understand it to information such as know-how, which is akin to intellectual property and can be subject to formal licensing agreements, just like patents and copyrights.

The law of confidence applies across that broad range, and we were aware that any encroachment in the bill on the law of confidence—we have tried to replicate the law of confidence by importing it—could have far-reaching and possibly unforeseen consequences. After careful consideration of the issues, we made the deliberate decision to leave the law of confidence untouched. I shall mention some of those considerations in a moment.

16:00

I shall deal with amendment 76 briefly, before addressing the weighty matters in amendments 78 and 77. I have significant concerns about amendment 76. It would remove from the confidentiality provisions information obtained by one Scottish public authority from another, automatically and in all circumstances. The amendment seems to assume that the only reason for one authority passing information to another authority in confidence would be to take it out of the reach of the freedom of information regime and that it would not have any test applied to it—it would not be an appeal by the authority to the commissioner. I do not think that is a reasonable premise from which to begin.

There could well be situations in which it would be entirely appropriate for information to be passed in confidence from one authority to another. For example, multi-agency working is common—it is positively encouraged—and sensitive information will often be passed between authorities, for instance, in social work cases. Similarly, education authorities often pass information in confidence to Her Majesty's Inspectorate of Education.

I have here a questionnaire that was given to pupils by school inspectors. It states:

"What you tell us is private. We will not tell anyone what you have written unless it makes us worried about your safety."

Clearly, it is vital that such information remains confidential and can be passed to other authorities on that basis, otherwise the purpose of getting that information about schools could be undermined. It would be inappropriate to prevent authorities from passing on that kind of information, as it could be very useful. If amendment 76 were passed, there would be no protection for such information given by school pupils in private to HMIE.

Amendment 78 seeks to compel authorities to consult a third party and to ask whether the duty of confidentiality might be lifted, in which case the information could be disclosed. On the face of it, the amendment appears to be sensible and I recognise the intentions behind it. However, my fear is that there is a key flaw in the approach that it takes. As the amendment is drafted, the

exemption would not attach if the authority did not take reasonable steps to consult. Third parties would lose all their rights to protection of their confidential information if the authority failed to request consent to the disclosure of the information. In other words, information would cease to be recognised as confidential and all could be done without the knowledge of the third party involved.

Freedom of information discussions naturally focus on ensuring that information is disclosed wherever possible, and it can be easy to lose sight of the rights of third parties that are affected. However, we must develop a regime that is workable from all angles. It would not be fair or proper if we were to run the risk of the kind of perverse outcome—no doubt unintentional—that could occur. I refer members to the code of practice, although I shall not go into it in detail. The code indicates that authorities should, where reasonable, approach third parties and ask whether any duty of confidentiality may no longer be necessary. That is a much more appropriate approach than setting agreements aside if consultation does not take place. On that basis, I advise the committee not to accept amendment 78.

Amendment 77 would make any guidance that was issued by the commissioner binding. Whenever an authority entered into a confidentiality agreement that was considered inappropriate by the commissioner, the commissioner could set aside that agreement and require that the information be disclosed. That would be inappropriate and could give rise to serious practical problems.

First and foremost, the commissioner's setting aside contractual terms that had been agreed by an authority could have serious legal repercussions for that authority. It could trigger default clauses in contracts with any number of serious consequences. The third party could simply walk away from the contract. It is also conceivable that the contract that was set aside could include a cross-default clause that stipulated that an event of default in one contract would automatically trigger events of default in all the contracts between the authority and the third party, entitling the third party to terminate all its contracts and walk away from them. It may even trigger events of default in other contracts between the third party and the public sector.

Furthermore, if we put in that type of statutory override of confidentiality, an authority might not be sued for damages in Scotland—it could plead that there had been statutory intervention—but that might not be enough to protect the authority from actions for damages for breach of contract in other jurisdictions such as the United States.

I also consider that amendment 77 could be unfair. Third parties might not be aware of the commissioner's powers in that respect and could find that agreements that were entered into in good faith were set aside. The committee will understand our concerns about the statutory force that it would give to the commissioner's guidance. Some matters are dealt with most appropriately in guidance for good reasons. I believe that claims of confidentiality are one such matter. It will be for the commissioner to consider whether a public authority's claim of confidentiality is appropriate. That in itself is a safeguard and reassurance in the context of section 36.

In developing the bill we deliberately set out not to affect the law of confidence. To do so could have serious and unforeseen consequences and I ask the committee to acknowledge that. At the same time, it is certainly our intention that section 36 should not provide authorities with an easy device with which to remove information from the scope of freedom of information. Authorities cannot simply label information as confidential and consider it protected. The law of confidence does not work like that and the commissioner has the power to intervene where the exemption has been inappropriately cited.

In those circumstances and against that background, I ask Michael Matheson and Donald Gorrie not to proceed with their amendments.

The Convener: I have a question on the draft code of practice and consultation with third parties to which the minister referred. The draft code of practice states:

"Where the consent of the third party would enable a disclosure to be made, an authority should consult that party prior to reaching a decision."

I am trying to work out, from the word "should", whether that is mandatory. Is it mandatory?

Mr Wallace: No, it is a code; it is not statutory.

The Convener: I am referring to the "should" part.

Mr Wallace: It is guidance and it would be good practice, but it would not carry the force of law. It is what would be expected of public authorities. As part of the code it is mandatory, but it is not statutory.

The Convener: That is what I am getting at. It is mandatory, but the code is not. From listening to the debate with Donald Gorrie, I am trying to work out what would happen if someone could not get in touch with the third party. I wonder what the Executive's view is on that.

Mr Wallace: It is mandatory, but not statutory.

The Convener: I do not know whether I understand that, but I will leave it for another day.

Gordon Jackson: I do not think that that makes sense, minister.

Mr Wallace: It is intended to accommodate those circumstances in which it might not be possible to contact the third party.

The Convener: So people should consult. The "should" is mandatory, but the code of practice is not.

Mr Wallace: The code puts a heavy obligation on people to contact the third party, but acknowledges that there are circumstances in which that cannot be done.

Gordon Jackson: We cannot have a mandatory provision in a non-mandatory document. It does not make sense.

The Convener: We could not rely on the code of practice to enforce practice.

Mr Wallace: I am not claiming that it has legal force. It is there as guidance, but places a heavy obligation to which authorities must "have regard" and that would be statutory.

The Convener: We have come back to Donald Gorrie's point about reasonable steps to obtain consent. When does that stop? If someone has requested information that a third party, which cannot be contacted, has given in confidence, can the information be disclosed at that stage? That is what I am trying to follow up.

Mr Wallace: The duty of confidence would continue to attach until the third party waived it. That is the law of confidence and we are not attempting to amend the law of confidence.

The Convener: So if the third party cannot be traced, there is a block on the information.

Mr Wallace: That is the block.

Maureen Macmillan: If someone cannot trace the third party, they are stuck.

The Convener: The information is taboo. That is Donald Gorrie's point.

Mr Wallace: It has been suggested to me that there may be cases in which the person is dead and there would be no one to sue the public authority.

The Convener: Your code of practice, which is only guidance and not mandatory—no, sorry, it is section 36 of the bill that refers to a third party. The section refers to

"a breach of confidence actionable by that person or any other person",

such as a relative.

Mr Wallace: Which paragraph is that?

The Convener: Section 36(2)(b).

Mr Wallace: I am sorry, I thought that you were still talking about the code.

The Convener: No, I have moved back to the bill. The person who brings the action does not have to be the person who provided the information.

Mr Wallace: The confidentiality agreement could confer rights on third parties. The fundamental point that I am trying to state is that we have attempted to import the Scots law on confidentiality. The bill is not an attempt to rewrite the Scots law on confidentiality, which is a detailed branch of law. In importing that law, it is also not meant to provide a get-out for public authorities. That could not happen. What is in the bill is basically Scots law on confidentiality.

It is also fair to say that it is difficult to think of circumstances in which one would owe a duty of confidentiality to someone whose whereabouts one did not know. It is hypothetically possible, but difficult to think of a circumstance in which that could readily happen.

Donald Gorrie: I found the minister's explanation reasonably satisfactory. Perhaps the requirement to consult should be in the code. If the authority discovers that its informant is dead, is it assumed that it is okay to give the information out, or would the Scottish information commissioner make a decision on that?

Mr Wallace: That is in many respects a matter for the law of confidence.

Gordon Jackson: Generally speaking, when somebody is dead, that law flies off.

Mr Wallace: I am not sufficiently au fait with the law of confidence to say that there would not be circumstances in which an obligation might continue, although I cannot readily think of such a situation. That is why I do not want to give a categorical answer.

The Convener: I am cloudier about that than I was when I started. Never mind. I will read the *Official Report* later, when I cannot get to sleep. Whether it will put me to sleep or keep me awake is another matter.

Donald Gorrie: Despite subsequent cloudiness, I found the minister's arguments on amendments on 78 and 77 reasonably convincing. I realise that my efforts, having closed the can of worms that they were aiming to close, opened up another can of worms.

I am not enthusiastic about the minister's answer on amendment 76. To take his example of a confidential inquiry of schools, the issue is surely the confidentiality of the piece of paper. Whether the council gives it to another council, the Executive or anyone else is neither here nor there.

I do not understand why passing it on should be covered by confidentiality. The information in a social work report or a confidential survey of schools, for example, should be exempt whether it stays in one council or goes to another. The minister's argument is that, if a confidential questionnaire about schools stays in the council that ran it, it may become open, but if they send it to HMIE, it is exempt. That seems illogical to me. I need a bit of persuasion on that.

Mr Wallace: In that example, the pupil gives the information to the inspectorate in confidence. As I understand the effect of amendment 76, if the information were to be passed on to another public authority, that confidence could fly off because the amendment is absolute almost in the opposite way to section 36 as drafted.

Take another example when information may be passed in confidence. Two public authorities may be involved in a multi-agency approach and information may be passed from one to the other in confidence—it might be very sensitive information in relation to social work. When one went to the public authority that had received the information in confidence, that confidentiality would not attach. There would be no defence because there is no harm test in the way in which Donald Gorrie has drafted his amendment. The authority would not even be able to say that disclosure would cause harm.

16:15

Donald Gorrie: I am still not enthusiastic, but I have ended my spiel.

Michael Matheson: I will be brief, because amendments 13 and 45 were essentially probing amendments and the minister has clarified the situation.

Amendment 13, by agreement, withdrawn.

Amendments 45, 76, 78 and 77 not moved.

Section 36 agreed to.

Section 37—Court records, etc

The Convener: Amendment 14 is grouped with amendments 15, 135, 136 and 137.

Michael Matheson: Amendment 14 seeks to ensure that only documents that are formally lodged in court may be considered a court record for the purposes of section 37. As the bill stands, the term "or otherwise" in section 37(1)(a)(i) is unclear, so it might be difficult to ascertain precisely when custody begins and ends. The amendment seeks to resolve any potential difficulties in interpreting section 37 and the term "or otherwise". The amendment was suggested by the Law Society of Scotland, which expressed concerns in that regard. Amendment 15 is consequential to amendment 14.

Amendment 135 is a tidying amendment, in that it does not change the provision in section 37(1)(b)(ii) but merely tidies it up.

Amendment 136 is intended to ensure that the provision on the exemption of court records no longer applies when the proceedings inquiry or arbitration process, whichever may be undertaken, is concluded.

In amendment 137, I am seeking clarification from the minister about the types of inquiries that section 37 might be applied to. Could the minister give us examples?

I move amendment 14.

Lord James Douglas-Hamilton: I support amendments 14 and 15, which are drafting amendments. It is hard to understand exactly what the current wording means, as it lacks sufficient clarity. Amendment 15 is a consequential amendment.

Paul Martin: Section 37(1)(a)(iii) refers to documents that are

"created by a court or a member of its administrative staff for the purposes of such proceedings".

Would that include transcripts of court proceedings?

Gordon Jackson: Section 37(1)(a)(i) refers to a document that is lodged

"or otherwise placed in the custody of, a court".

What does that phrase mean? When I read that, I just assumed that there was another way of placing a document in the custody of a court apart from lodging it, but now I am beginning to wonder whether it means anything at all.

Mr Wallace: I hope that I can reveal all.

In our proposed freedom of information regime, similar to other freedom of information regimes, judges, courts and tribunals would not be subject to the legislation. Section 37 echoes a similar section in the UK Freedom of Information Act 2000. Despite the fact that judges, courts and tribunals would not be subject to the legislation, public authorities may well hold information regarding any proceedings in which they are, have been, or may become involved. It is important that such documents are afforded the appropriate protection.

The policy memorandum says that the purpose of section 37 is to exempt information that is contained in court records or other relevant legal documents

"where a Scottish public authority holds the information solely because it is contained in such a document."

That is quite a narrow application.

With regard to amendments 14 and 15, I am aware of the concern that has been expressed by Michael Matheson, Gordon Jackson and James Douglas-Hamilton that the phrase

"or otherwise placed in the custody of, a court"

is unclear and that it might be difficult to ascertain when custody begins and ends. However, I think that the concern is unfounded. Those words are necessary to cover documents that are placed in the custody of a court or arbitration but not necessarily lodged. The word "lodged" is not wide enough to cover all situations in which the court might have custody of documents. For example, pending an appeal, all productions must be held in the custody of the court, whether they have been lodged or not. Section 106 of the Criminal Procedure (Scotland) Act 1995 provides a useful example of that; subsection (4) refers to

"Any document … lodged in connection with the proceedings … kept in the custody of the court"

whereas subsection (5) refers to documents that have been "produced" and kept in the custody of the court.

James Douglas-Hamilton was the minister who took the Criminal Procedure (Scotland) Act 1995 through the House of Commons, so he will be able to tell us why that distinction was made. The distinction is there to cover situations that would not otherwise be covered because "lodged" does not refer to documents that may be in the possession of the court, for example documents that are produced and held pending an appeal.

Amendments 135 and 137 would remove inquiries from the scope of the exemption. I am not certain that that was Michael Matheson's intention. If courts and arbitrations are referenced in the exemption, it makes sense to include inquiries, as they are judicial or quasi-judicial proceedings and are really a species of court. The type of considerations that normally apply to confidentiality of documents for courts and arbitrations should apply equally to inquiries. Michael Matheson asked what kind of inquiries were meant. A planning inquiry is one example. The inquiry that Lord Clyde held in 1991 into the removal of children from their parents in Orkney was also an inquiry in those terms. It would be inconsistent to disapply inquiries.

Amendment 136 is an alternative to amendments 135 and 137—although perhaps they are meant to be read cumulatively—as it retains inquiries, but seeks to remove documents from the exemption once the proceedings are finished. Clearly, reports that are commissioned by, or lodged with, a court may contain sensitive commercial or personal information that, rightly, should remain protected even after the proceedings are concluded. Information does not cease to be sensitive or no longer need protection just because the court proceedings have ended. In those circumstances, I ask members not to press the amendments.

The Convener: Michael Matheson can respond first, followed by other members.

Michael Matheson: Perhaps Lord James Douglas-Hamilton should give us an explanation first.

The Convener: I defer to both our QCs on the panel.

Lord James Douglas-Hamilton: I am absolutely content with the minister's response. I was once offered the job of parliamentary draftsman, but I never rose to those dizzy heights.

Gordon Jackson: At the risk of being mischievous, I have to say that I still do not understand, but nor do I really care. I do not find anything sinister in the proposal. I do not think that the inclusion of the phrase

"or otherwise placed in the custody"

will create a loophole. The words may be in the bill because Lord James, in a previous life, included them in another act of Parliament, but I still do not know what they mean.

The minister gave the example of documents that are in the custody of the court pending an appeal, but not lodged. What document would be in the custody of the court pending an appeal, but not lodged? The advisers may well be right that the provision has been in statute since time immemorial, but that does not make it have any meaning. I have no idea what documents could be in the custody of the court, yet not have been lodged.

Mr Wallace: This is a classic example of the meticulous care with which parliamentary draftsmen consider such things. A distinction that was made in the Criminal Procedure (Scotland) Act 1995 has been identified, and it has been included in case it has meaning.

Gordon Jackson: I see. It is an extra pair of belt and braces.

Michael Matheson: I am not really convinced that that explanation takes us any further. It seems to be a drafting matter, so I will happily bow to the expertise of the Executive's draftsmen on such issues—I am sure that the Law Society will do so as well.

Amendment 14, by agreement, withdrawn.

Amendments 15, 135, 136 and 137 not moved.

Section 37 agreed to.

The Convener: We were supposed to finish at 4.30, but proceeding with section 38 will take us

beyond that time. Section 38 is quite long, but sections 39 to 42 have no amendments; if we considered section 38 now, we could get all the way to section 42. What are members' views?

Mr Wallace: I am quite willing to carry on if it would help the committee to make progress.

The Convener: It would help us psychologically, because we would begin again at our next meeting at section 43.

Lord James Douglas-Hamilton: Would that take us beyond 5 pm?

The Convener: No, I do not anticipate that. I am in the hands of those members who have lodged amendments.

Michael Matheson: I have to be away before 5 o'clock.

The Convener: We will see how far we get. I hope to finish in quarter of an hour. We have a short item in private to consider after that, but that should take only a few minutes.

Section 38—Personal information

The Convener: Amendment 79 is grouped with amendments 80 and 122.

Donald Gorrie: Amendment 80 is merely consequential, because amendment 79 mentions the word "official" and amendment 80 explains who an official would be.

The Data Protection Act 1998 is very severe. Recently, a London borough put on a website details of all its councillors, including their political persuasion. That was challenged because, under the Data Protection Act 1998, a person's political persuasion is a secret thing. Clearly that is a nonsense, because a councillor's political affiliation is a public thing.

It has been explained to me that we should not try to model ourselves on the Data Protection Act 1998. The bill would enable somebody not to be identified who possibly should be identified. In the light of the previous discussion, if information is exempt anyway because it is advice, that is fair enough. However, if we do not have an amendment like amendment 79, people who could and should be named—if the information is not exempt otherwise—could conceal their identity or other people could conceal their identity for them. In the interests of openness and preventing people from seeking protection behind the Data Protection Act 1998, amendment 79 tries to deal with that possible anomaly.

I move amendment 79.

16:30

The Convener: I call Michael Matheson to speak to amendment 122 and, if he wishes, the other amendments.

Michael Matheson: I do not intend to move amendment 122.

The Convener: If no other members wish to speak to the amendments, I call the minister.

Mr Wallace: I understand that Michael Matheson is not moving amendment 122, so I will truncate this discussion.

Amendments 79 and 80 attempt to clarify the definition of personal data as contained in the Data Protection Act 1998. To seek to provide an interpretation of when the data protection principles would or would not be contravened by disclosure of personal data relating to officials is something—given the example that Donald Gorrie gave—with which I have considerable sympathy. Unfortunately, the matter cannot be dealt with in the Freedom of Information (Scotland) Bill. The Data Protection Act 1998 is reserved legislation, therefore it is outwith the competence of this Parliament to interpret its meaning in this bill.

I acknowledge the points that Donald Gorrie made. I hope that I will not fall foul of the data protection commissioner if I say that I cannot understand why something that one is allowed to put on the ballot paper cannot be put on a website. There is a measure of ambiguity about the definition of personal data in the Data Protection Act 1998, but that must be a matter for the United Kingdom Parliament and the UK information commissioner, who has responsibilities in this area and who, ultimately, can be challenged in the courts.

We anticipate that the Scottish information commissioner will, in due course, liaise closely with the UK information commissioner on the boundaries between the Scottish freedom of information act and the Data Protection Act 1998. My officials have a complicated flow chart, which I do not recommend to anyone unless they have insomnia. If anyone wants a copy, in the interests of freedom of information I will supply it. The serious point is that our Scottish information commissioner will be able to liaise closely with his or her UK counterpart to deal with matters such as the monitoring of any developments under the Data Protection Act 1998 on what constitutes personal data. The problem is not that I do not sympathise with Donald Gorrie's point; it is just that it would not be competent to interpret data protection in this bill.

Donald Gorrie: In the light of what the minister said, I am content to withdraw my amendment.

Amendment 79, by agreement, withdrawn.

Amendments 80 and 122 not moved.

Section 38 agreed to.

Sections 39 to 42 agreed to.

Schedule 2 agreed to.

Section 43—General functions of Commissioner

The Convener: Amendment 16 is grouped with amendment 123. I understand that you accept amendment 16, minister. Is that correct?

Mr Wallace: Could you allow me a moment, convener?

Gordon Jackson: It may be my fault. I thought that you were accepting amendment 16, but maybe you are not.

Mr Wallace: I support amendment 16.

The Convener: Michael, could you move amendment 16?

Michael Matheson: I have quite a lot to say on amendment 16.

The Convener: That is accepted, but—

Michael Matheson: I move amendment 16.

Mr Wallace: I do not support amendment 123, which I notice is in the same grouping.

The Convener: Amendment 123 will be moved later in the meeting. To conclude debate on the amendments in this group, I call Donald Gorrie to speak to amendment 123.

Donald Gorrie: The minister and I have discussed the issue of certain public authorities destroying records that they should not destroy. I know that he is concerned about the issue. I also know that amendment 123 may not be the right way of addressing the matter. However, a number of archivists have told me that councils and other public authorities destroy records that they should not destroy. The bill should clearly address that fact.

There is a code on record keeping, which includes a lot of good stuff, but it would be helpful if the bill made it clear that it is a serious offence to destroy records indiscriminately. People should not do that and amendment 123 would include that offence in the bill. If the minister can find a better way of addressing the issue, I will be interested in his proposals. The bill should send a strong message on the issue.

Mr Wallace: As I indicated, I am willing to accept amendment 16. Amendment 123 would allow the commissioner to intervene to prevent the destruction of records if the commissioner became aware that a public authority was not following the code of practice on records management. Donald Gorrie rightly said that record keeping has been discussed—indeed, I believe that it was discussed on day one.

I accept that it is important for public authorities to keep records appropriately. The bill has helped to bring the issue to the fore. However, I fear that amendment 123 misunderstands fundamentally the commissioner's powers to enforce the legal obligations that are imposed by the bill as compared to the commissioner's role in relation to non-statutory codes of practice.

We have gone as far as it is possible to go in a freedom of information bill to provide the commissioner with statutory powers to encourage good practice in relation to the codes of practice—indeed, we have gone further than most. Notwithstanding the fact that a practice recommendation issued by the commissioner will need to be taken seriously by the receiving authority, we must recognise the distinction that has to be drawn between the encouragement of good practice and the enforcement of legal obligations. That returns us to the argument about statutory and non-statutory. The codes of practice are non-statutory. Unlike Donald Gorrie, we are not seeking to enforce a legal obligation.

To provide the commissioner with powers to decide what each authority should, and should not, retain would be to stray far into the territory of what might be more appropriately dealt with by archives legislation. To do so would not be appropriate for a freedom of information bill.

The bill will do much to encourage Scottish public authorities to improve record keeping. The bill has been welcomed by the Keeper of the Records of Scotland and the Scottish Records Advisory Council. The bill has never purported to be a substitute for archives legislation and we have not sought to use the bill to correct all the perceived ills in public records administration. The bill is not archives legislation and it is wrong to confuse it with that.

Amendment 123 is not practical and does not make sense in the absence of a clear legal framework for records management. The arrangements that amendment 123 proposes could not be satisfactorily enforced other than by first setting out in detail—either by class or by some other means—which records should be retained.

The bill does not provide the commissioner with a legal framework that is capable of supporting the public records role that amendment 123 envisages for the commissioner. However, that is not to say that the commissioner could not have such a role if those duties were set out clearly in separate

archives legislation.

When we discussed the matter on day one, I undertook to consider how the issue might be addressed. The way in which amendment 123 seeks to address it is not satisfactory. As I said, the code of practice sets out general good practice on the management of records, but it is not intended to be a substitute for archives legislation.

Requirements differ significantly from public authority to public authority. The code of practice is general in nature and, because record keeping varies properly from public authority to public authority, amendment 123 would not provide the certainty of a legal framework if the commissioner were given a statutory function in that respect.

Lord James Douglas-Hamilton: As the minister is aware, over an 18-year period, a large number of records of Scottish Office ministers were destroyed systematically. When the BSE inquiry took place, it was found that the relevant records of junior ministers had ceased to exist. In my own case, I had very little evidence of any consequence to give, but the principle remains that, if an inquiry is likely to take place into something that has gone wrong and there is a public desire to ensure that that unfortunate happening does not occur again, it is reasonable to expect that the commissioner can tell a local authority not to destroy records.

Mr Wallace: A code of practice, which will be laid before Parliament, will be promulgated under section 61. A working draft of the code was circulated to the committee. The code is to be prepared in consultation with the information commissioner, when he or she is appointed, and in consultation with the Keeper of the Records of Scotland. The code sets out arrangements for the disposal of records, records closure and selection.

Although I emphasise that the bill will take us a considerable way, I do not pretend that it is a substitute for proper archives legislation. However, by introducing the Freedom of Information (Scotland) Bill, we have underlined the need for archives legislation. To graft archives legislation on to the Freedom of Information (Scotland) Bill would be difficult indeed.

As I said, the codes of practice that will ultimately come before the Parliament will have to be prepared in consultation with the information commissioner when appointed. I think that I am right to say that the Keeper of the Records of Scotland has been involved in the preparation of the draft code.

I also draw section 44 to the committee's attention.

The Convener: Is that a section of the code of practice?

Mr Wallace: No, it is section 44 of the bill. The section states:

"If it appears to the Commissioner that the practice of a Scottish public authority in relation to the exercise of its functions under this Act does not conform with the code of practice issued under section 60 or 61, the Commissioner may give the authority a … practice recommendation",

which must

"(a) be in writing and specify the code and the provisions of that code with which, in the Commissioner's opinion, the authority's practice does not conform; and

(b) specify the steps which that officer considers the authority ought to take in order to conform."

Section 44 also states:

"The Commissioner must consult the Keeper of the Records of Scotland before giving a practice recommendation to a Scottish public authority … in relation to conformity with the code of practice issued under section 61."

I will refresh the committee's memory of paragraph 11.1 of the draft code of practice on records management, which is provided for under section 61. It says:

"It is particularly important under Freedom of Information that the disposal, or final disposition, of records … is undertaken in accordance with clearly established policies, which:

- have been drawn up with advice from the authority's own professional archives/records management staff or following advice from the Keeper of the Records of Scotland;
- have been formally adopted by the authority; and
- are enforced by properly authorised staff."

That paragraph sets out practice recommendations that would be sent to public authorities in writing. The recommendations involve consultation with the keeper. From the perspective of freedom of information, we have come a long way with the provisions of the codes of practice.

Donald Gorrie: What the minister says is helpful. I presume that he is not in a position to say whether, when the code is publicised, money will be found to enable public authorities to deliver.

Mr Wallace: I would dearly love to be in such a position but, as Donald Gorrie rightly surmises, I am not.

Donald Gorrie: Do we get a chance to debate the code?

The Convener: I understand from a footnote to the code of practice on records management that it will come before the Parliament.

Mr Wallace: Yes, I am certain that the code will be laid before the Parliament.

Donald Gorrie: That means that we will have to

ask for a debate.

Mr Wallace: The code is not a statutory instrument, but that does not preclude a debate. I am not making a commitment to holding a debate, but I am sure that—

The Convener: It is open to the committee to decide whether it wants to examine the code of practice.

Mr Wallace: It is important to say that what we have at the moment is a working draft and that the commissioner has to be appointed before the code can move on to the next stage. It is open to the committee—

The Convener: At that stage, it might be open to the committee to examine the codes of practice and to take a view on them, as they are so central to the matter.

Amendment 16 agreed to.

Section 43, as amended, agreed to.

Section 44 agreed to.

The Convener: I thank the minister.

That concludes our stage 2 deliberations for today. I ask committee members to remain for a brief moment. Before we move into private session, I will allow a few moments for the room to be cleared of the public, who have been stalwart in staying with us through what have been intricate matters.

16:46

Meeting continued in private until 16:48.

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