JUSTICE 1 COMMITTEE

Tuesday 5 March 2002
(*Afternoon*)

Session 1

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JUSTICE 1 COMMITTEE
† 8th 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:

Robin Harper (Lothians) (Green)
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

The Hub

† 7th Meeting 2002, Session 1—joint meeting with Justice 2 Committee.

Scottish Parliament

Justice 1 Committee

Tuesday 5 March 2002

(*Afternoon*)

[THE CONVENER *opened the meeting at 13:45*]

The Convener (Christine Grahame): I convene this meeting of the Justice 1 Committee and ask members to switch off their mobile phones and pagers. No apologies have been received and all members are present.

Item in Private

The Convener: I ask members to agree to discuss the legal aid inquiry in private at our next meeting, prior to the debate on the committee's report that is to be held in the chamber on 13 March. At our next meeting, we will have an opportunity to hold a preliminary discussion on our position on the Executive's response to our report. Do members agree?

Members *indicated agreement*.

Subordinate Legislation

Police Act 1997 (Criminal Records) (Registration) (Scotland) Regulations 2002

Scottish Legal Services Ombudsman (Compensation) (Prescribed Amount) Order 2002

The Convener: We move on to item 2 on the agenda, which is consideration of two pieces of subordinate legislation. Both the Police Act 1997 (Criminal Records) (Registration) (Scotland) Regulations 2002 and the Scottish Legal Services Ombudsman (Compensation) (Prescribed Amount) Order 2002 are negative instruments. I refer members to the clerk's notes on the instruments.

Do members wish to comment on the instruments or are they content simply to note them? It may be helpful if I remind members that, during our inquiry into the regulation of the legal profession, we considered the issue of compensation by the Scottish legal services ombudsman.

Members appear to have no comments and wish simply to note the instruments.

Freedom of Information (Scotland) Bill: Stage 2

The Convener: We come to day 4 of our consideration of the Freedom of Information (Scotland) Bill at stage 2. I am a little sharp—is the minister here? [*Interruption.*] I am advised that he is downstairs. I will give him a little time.

I remind members that they should have a copy of the bill, the marshalled list of amendments and the suggested groupings. We have set no targets for today. If we do not finish stage 2 today, we will continue where we left off at our next meeting. I expect that to be the final day of our consideration of the bill at stage 2. I have organised a short break at 3.30 pm. Members should remind me about that because, if we do not take our break then, the tea and coffee will be whipped away.

I also remind members of the order of consideration of sections. Members will recall that we decided to take sections in numerical order, except that, following section 61, we will deal with sections 9, 12 and 13. Members should have received with their papers a copy of a letter from the Deputy First Minister on the fee arrangements under the bill. That letter has not been formally received yet, so it has not been allocated a number.

Section 45—Confidentiality of information obtained by or furnished to Commissioner

The Convener: I welcome the Minister for Justice. The first amendment for consideration today is amendment 81, which is grouped with amendments 82 and 83.

Donald Gorrie (Central Scotland) (LD): The three amendments deal with section 45, which relates to the rules governing the information that the commissioner may give out. There seems to be an undue restriction on the commissioner. An important part of the freedom of information scheme is that the commissioner should be independent. His or her independence should not be compromised.

Amendment 83 would scrub the whole section. Presumably, that would leave a gap in the bill but, with a bit of common sense on both sides, that problem could be dealt with.

Amendment 81 would amend section 45(2)(c), which states that disclosure is made with lawful authority only if

"the disclosure is made for the purpose of, and is necessary for, the discharge of—

(i) a function under this Act; or

(ii) a Community obligation".

I believe that the words "and is necessary for" are too prescriptive and would limit the commissioner too much. It may be reasonable and advantageous to the public for the commissioner to publicise certain items, even if it is not strictly necessary for him or her to do so. The words that I have cited are not helpful. The minister will no doubt be able to offer an explanation of why they are necessary. I will listen to that explanation with care.

Amendment 82 relates to a less serious issue, but would make the provisions of the bill more sensible. Section 45(2)(e) states that disclosure is made with lawful authority only to the extent that

"had the Commissioner received on the day of disclosure a request for the information, there would have been an obligation, by virtue of section 1(1), to give it."

Amendment 82 would insert the words

"or, in the case of information obtained from or furnished by a Scottish public authority, that authority".

The amendment would widen the provisions of paragraph (e) so that it applied to information received from a Scottish public authority in the same way as it applies to information received from the commissioner.

I await with interest the minister's response, but my starting point is that the commissioner should be as genuinely independent as possible. My amendments are intended to ensure that.

I move amendment 81.

The Deputy First Minister and Minister for Justice (Mr Jim Wallace): I share Donald Gorrie's view of the importance of the commissioner being independent. However, I do not for a moment believe that anything in section 45 undermines that independence.

As Donald Gorrie started by talking about amendment 83, I will do the same. I was intrigued to hear that the amendment would leave a gap that common sense might be able to fill. In debates on previous sections, it has been said that we cannot always rely on common sense and that it is better to put things in statutory form.

As Donald Gorrie indicated, amendment 83 would remove section 45 entirely. It is argued that, as a result of section 45, the commissioner will run the risk of committing a criminal offence if he or she discloses information in the course of his or her work. I assure the committee that, if that were the case, section 45 would not exist as drafted. Given the importance that Donald Gorrie attaches to the section and its relationship to the independence of the commission, I will explain why I believe the section to be necessary.

In supervising the freedom of information regime, the commissioner and staff will of

necessity acquire a great deal of information. Given that much of the work is likely to involve conducting appeals, it is reasonable to assume that much of the information will be highly sensitive and, in the public authorities' view, exempt from disclosure.

As part of the commissioner's independence and ability to do the job thoroughly, it is important that information that goes beyond that which would be considered for disclosure is available to the commissioner, so that he or she can gain a full picture. It has not always been recognised that, under section 50, the commissioner can in theory require any Scottish public authority to provide any information—without limit and regardless of sensitivity—that the authority holds, if that information would support the appeal that the commissioner is conducting. In other words, the commissioner has the power to request information that goes beyond the information that the applicant seeks.

It is appropriate that all information that falls within the freedom of information regime, regardless of sensitivity or of which Scottish public authority holds it, is within the reach of the commissioner. We structured the bill to allow for that because the commissioner must be able to conduct appeals properly and effectively. Equally, we had to ensure that such information is properly protected against inappropriate disclosure, which is the purpose of section 45. In that respect, the commissioner is no different from other ombudsmen and other public bodies that receive sensitive information. The Scottish Criminal Cases Review Commission regularly receives highly sensitive information, which is why section 194J of the Criminal Procedure (Scotland) Act 1995 establishes a statutory bar on the disclosure of such information, except in defined circumstances.

As I said, the commissioner will be able to access all information that falls within the freedom of information regime and is held by Scottish public authorities. He or she will be in regular receipt of highly sensitive information. It is important that the bill reflects that point, which is why section 45 is necessary.

Section 45 will not restrict the commissioner from fulfilling his or her functions. A major misconception about section 45 is that it precludes the commissioner from disclosing information. In fact, section 45 allows the commissioner considerable latitude in disclosing information. I will explain how the provision will work. Subsection (2) contains a list of the circumstances in which the commissioner will be deemed to have lawful authority to disclose the information in his or her possession. If the disclosure of information falls into any of those categories, it will be entirely legitimate. It is not necessary to satisfy all the categories; one is sufficient. I draw the committee's attention to paragraph (e) of subsection (2), which allows for the commissioner voluntarily to disclose information that he or she would be required to disclose if he or she received a request for it. In other words, the information would be disclosed under paragraph (e) unless an exemption applies.

To put the matter plainly, section 45 prevents the commissioner only from disclosing information that is potentially exempt. That is not the end of the story, as paragraphs (a) to (d) must also be considered. If the information falls into those categories, despite the fact that it is potentially exempt, the bill will allow the commissioner to disclose it, if he or she considers that to be appropriate.

From that perspective, section 45 is not restrictive. I do not accept that it will cause the commissioner difficulty. Given the sensitivity of much of the information that will come the commissioner's way, the provisions are consistent with the general presumption of openness that pervades the bill.

I turn to amendment 81. It has been suggested that the commissioner would commit an offence if he or she said whether his or her office was considering an appeal or if he or she named the public authority that was involved. It has been argued that, as a result, we should relax the conditions of paragraph (c). That is neither necessary nor appropriate because, as I explained, paragraph (e) allows the commissioner to disclose information that would not be exempt. Information about whether the commissioner is considering appeals and the identity of the authority that is involved is not potentially exempt information. Therefore, under paragraph (e), such information could be disclosed.

I strongly resist the suggestion that the phrase "and is necessary for" in paragraph (c) should be removed. That would mean that the commissioner could disclose information with lawful authority if the disclosure was made for the purpose of the discharge of a function under the bill. Any lawyer would explain that that would give the commissioner almost unlimited discretion to disclose information in his or her possession. In that respect, the arguments that I made for section 45 apply. As I explained, the commissioner can access all information held by Scottish public authorities regardless of its sensitivity. Section 45 is a necessary and essential balance to ensure that such information cannot be disclosed inappropriately.

14:00

Amendment 82 is somewhat technical and I

acknowledge the intention behind it. From detailed discussions that we have had with the Campaign for Freedom of Information, we are aware of a concern that when authorities pass information to the commissioner they will do so in confidence. The practical effect of that—and this is quite complex—is that information could then become exempt under section 36, which we debated last week. Consequently, the commissioner could not disclose that information. I certainly understand the concern.

For two reasons, I do not believe that information will be passed to the commissioner in confidence. First, with a section 50 notice, the commissioner can as a matter of law require the information to be provided. As a result, the commissioner would not be required to accept the information in confidence. Secondly, the existence of section 45 should reassure authorities that it is unnecessary to seek to pass information to the commissioner in confidence. Section 45 provides authorities with a reasonable expectation that the commissioner cannot disclose information without due regard to its content and to the terms of the section.

For those reasons I am not wholly persuaded of the need for amendment 82. However, the amendment would not disturb the general policy thrust and would prevent information from being unavailable solely because the authority passed the information to the commissioner in confidence. The Executive's draftsmen have advised that we should consider precisely how such a provision should be drafted. I ask Donald Gorrie not to move amendment 82 so that the Executive can lodge an equivalent amendment at stage 3 to achieve his objective.

There is a misconception about section 45. The commissioner in theory can access any information held by a Scottish public authority. As a result, section 45 provides essential protection and reassurance to authorities that the commissioner will treat highly sensitive information acquired in the course of his or her work in an appropriate manner. The section is not incompatible with openness and it does not act against the commissioner's wider role—I have indicated what powers are available to the commissioner under the section.

Accordingly, I ask Donald Gorrie not to press amendment 81. I am happy to commit to amending the bill to reflect the objective of amendment 82 once our draftsmen have had an opportunity to consider how it might best be expressed in the bill.

The Convener: It would be quite useful for us to have a little synopsis—if it is available—of your position on and resistance to certain amendments. With respect, if that could be done timeously, we might get through the bill faster. It would be handy for us to have that, rather than information on the purpose behind the amendment, which we usually have. Is that appropriate?

Mr Wallace: As we go along I will certainly try to provide that. When the committee has finished stage 2, that will certainly be my intention. As we go along I will try to flag up when we are going to take a particular line.

The Convener: I do not want to stop you in full flow, but it would be useful to have in advance a short synopsis of your objection to an amendment or of a view that you might take.

Mr Wallace: I do not think that I can prepare that in the short period that we have today. If we go on to a further day, I certainly could. I had hoped that we might finish stage 2 today.

The Convener: We could perhaps have that on another occasion.

Mr Wallace: I could certainly provide that if it would help the committee on another occasion.

Donald Gorrie: The minister has explained section 45, so I am clear about it in my own mind. It does not seem to be as sinister as I thought it might be. It is helpful that the minister has agreed that the Executive will lodge its own version of amendment 82. In the light of his explanation, which is on the record and presumably will be included in any interpretation of section 45, I seek to withdraw amendment 81.

Amendment 81, by agreement, withdrawn.

Amendments 82 and 83 not moved.

Section 45 agreed to.

Section 46 agreed to.

Section 47—Application for decision by Commissioner

Amendment 84 not moved.

The Convener: Amendment 85 is in a group on its own.

Michael Matheson (Central Scotland) (SNP): Amendment 85 deals with section 47, which is on applications for decisions by the commissioner. Under section 47(6), ministers will have the power to amend by regulation the period of time within which an application must be made to the information commissioner, which is currently six months. Amendment 85 tidies up that situation to ensure that ministers are not able to make the period less than six months. There is a danger that there will be confusion in the system if there are different time scales for different applications. I am pleased to note that the Minister for Justice supports amendment 85.

I move amendment 85.

The Convener: Minister, do you wish to say anything?

Mr Wallace: No, other than to say that I hope other committee members will support amendment 85.

Amendment 85 agreed to.

Section 47, as amended, agreed to.

Sections 48 to 50 agreed to.

Section 51—Enforcement notices

The Convener: Amendment 17 is grouped with amendments 87, 89, 129, 88 and 18. I point out that amendment 129 does not pre-empt amendment 88, so if amendment 129 is agreed to, amendment 88 can still be called.

Michael Matheson: Amendment 17 is a paving amendment for amendment 86. To confuse matters, I will begin with amendment 18, which is the final amendment in the group. Amendment 18 seeks to remove the provisions on the ministerial veto in section 52. In considering the legislation so far, the minister and committee members have highlighted the need to ensure that the information commissioner is able to act independently and to do so with confidence. The information commissioner will have an important role in changing the culture within public authorities to that of one of information disclosure. A good commissioner who is prepared to take on what could sometimes be controversial issues will assist in making the legislation successful.

The bill already has a number of safeguards and exemptions with regard to forms of information that are sensitive or inappropriate for disclosure. The Minister for Justice previously outlined before this committee and in the chamber the fact that the Executive has sought to achieve a balance between disclosure and non-disclosure. The provisions on the ministerial veto throw the balance against disclosure, which is detrimental to the bill.

The ministerial veto allows the First Minister to veto a notice from the information commissioner for information to be made available. As the bill stands, in exercising that ministerial veto the First Minister only has to consult other members of the Executive. He does not have to consult all members of the Cabinet or raise the issue at a Cabinet meeting. It could be done by a quick phone call at 11 o'clock in the evening to a couple of his colleagues. He does not even have to have a majority of his Cabinet in favour; he only has to consult them. I believe that, if ministers consider the matter to be important, the decision should be arrived at collectively.

During our stage 1 consultation, the National Union of Journalists said:

"If harm cannot be demonstrated to the commissioner or to the court, what harm can exist?"—[*Official Report*, *Justice 1 Committee*, 21 November 2001; c 2838.]

The representative of the NUJ said that the ministerial veto was not a belt-and-braces approach but

"a belt, braces and straitjacket approach"—[*Official Report*, *Justice 1 Committee*, 21 November 2001; c 2841.].

The Campaign for Freedom of Information said that there should be no veto and that, in the absence of that veto, ministers could have the right to challenge on a point of law or to review judicially a decision that was made by the information commissioner.

The matter that I am talking about is probably one of the defining issues in the piece of legislation. Although, at stage 1, the minister tried to explain why the ministerial veto was required, I was not persuaded. To ensure that the balance of the legislation is in favour of disclosure, where appropriate, given the safeguards that are already present in the legislation, we should not include this draconian power.

If the minister is intent on retaining the ministerial veto, there will have to be safeguards, which is what my other amendments in this group deal with. Amendment 88 deals with the period in which the certificate must be laid before the Parliament. The legislation sets no specific time scale for that, simply saying "as soon as practicable". If the First Minister were to use the ministerial veto, and given that there will have been a lengthy process including a review and an application to the commissioner by the First Minister, it would be reasonable to expect ministers to be given a time scale within which the certificate must be brought before the Parliament. That is the stage at which the Parliament will get an idea about exactly why the First Minister has sought to override the power of the information commissioner. Amendment 88 therefore says that the certificate should be laid before Parliament within seven days.

Amendment 89 would provide a safeguard by ensuring that, if the First Minister used the veto, it would be subject to a substantial prejudice test and a public interest test. That would mean that, before the ministerial veto could be exercised, the onus would be placed on ministers to prove that substantial prejudice would be caused.

I move amendment 17.

14:15

Donald Gorrie: Michael Matheson has set out the argument very fairly. I would prefer no

ministerial veto. However, I think I have been persuaded that having no ministerial veto might be a bridge too far for some of those civil service members who are less oriented towards freedom of information.

I hope that, in due course, we can achieve the goal of having no ministerial veto but, at the moment, some people who are concerned about the freedom of information issue need a baby's dummy to stick in their mouths and give them comfort. We therefore need to include section 52. However, it should be tightened as much as possible and amendment 87 tries to do that. Amendment 87 is similar to Michael Matheson's amendment 89 but adds the words

"and that complying with the notice would have exceptionally serious consequences."

The First Minister would have to demonstrate those circumstances in the certificate that he lays before Parliament.

In the light of the fact that several of us have concerns about a ministerial veto, I hope that the minister will consider the issue and see if he can tighten up the wording of section 52 while retaining the veto. We hope that the veto will never be used, but it is a comfort to some ministers and civil service departments that are about to embark on a voyage towards openness that is contrary to their current way of working. I will listen to the minister with interest and retain the concerns about the issue that Michael Matheson set out.

Gordon Jackson (Glasgow Govan) (Lab): I am only speaking because I agree with Michael Matheson that the issue is very important. I have been persuaded that the ministerial veto is not sinister. If Donald Gorrie can go with it, then I can go with it.

However, I worry about the issue in terms of the public's perception of the bill. Maybe the minister should address that. There is a danger that people who seek to undermine what the Parliament is doing will suggest that there is no freedom of information because of the ministerial veto; that we are giving with one hand and taking away with the other and the bill is not worth tuppence. That is a distortion of reality and I am not suggesting that Michael Matheson was saying that, but the veto could be used in that way. Whatever reservations there are about the veto, it would be wrong for anyone to present it as turning the bill into a meaningless piece of paper.

Perhaps Jim Wallace could tell us about the legal meaning of the term "other members". I heard Michael Matheson say that the First Minister only had to consult with one or two members. I understood the term to mean that the First Minister had to consult with all the members of the Executive. I took the term "the other members" to mean all members. I do not know how that could be done all the time, if it ever needs to be done. Will the minister tell me if I am correct? That is my reading of the term but I am not sure about it.

Paul Martin (Glasgow Springburn) (Lab): The issue about the term "as soon as practicable" was raised during the final meeting at stage 1 of the bill. I acknowledge that, in lodging amendment 129, the minister has proposed the 10th working day as the time limit for dealing with the certificate instead of as soon as practicable. I acknowledge that because, at stage 1, I raised the issue that the term "as soon as practicable" was unacceptable. The minister has recognised that.

I would also like to probe the point about laying the certificate before Parliament. Would the certificate be subject to committee scrutiny, for example, if it were laid before Parliament? I welcome the fact that there is a requirement in the bill to lay the certificate before Parliament, but what kind of scrutiny could the Parliament exert on the certificate? Could it be put before one of the justice committees?

The Convener: I reiterate the problems that I had with section 52 previously. First, consulting does not mean that it is a collective decision. Secondly, the Executive is appointed by the First Minister. The longer that the First Minister is in power—I am not speaking about this First Minister; I mean any First Minister—the more likely it is there are going to be people round about him or her who depend greatly on the First Minister for their job. I have concerns that the First Minister's veto could be used for party-political reasons and for personal reasons. I also have concerns about power being in the hands of the First Minister to veto a decision that was made after full scrutiny by the commissioner, when the First Minister is consulting members of an Executive that he or she has appointed.

Mr Wallace: It is right and proper that several members have contributed to the discussion on amendment 129. Section 52 is part of the scheme of the bill. That scheme includes a high harm test—one of substantial prejudice—which gives the commissioner, who is appointed independently of the Executive, the right to enforce decisions. In terms of checks and balances it was agreed in introducing this Executive bill that section 52 should be included. I recall when I gave evidence at stage 1 that that issue took up most time. I note that the stage 1 report of the committee concluded that:

"Some members believe that ministerial certificates are unnecessary and that section 52 should be removed from the Bill. Other members are of the view that ministerial certificates are a necessary backstop for ministers to use in exceptional circumstances, but that this provision should be used sparingly."

It is my expectation that the certificates would be used sparingly. I cannot accept that section 52 undermines the bill or, to pick up Gordon Jackson's point, that it could be used against us. The proof of the pudding will be in the eating. It is worth reminding the committee that in New Zealand, where they started with individual ministers being able to exercise an override—I do not want to split hairs, but it is probably an over-ride rather than a veto—the whole scheme was brought into question. That is why in New Zealand they moved from that to the collective override which, as I have indicated, has not been used in the 15 years that it has been on the New Zealand statute book.

I do not think that anyone suggests that the New Zealand official information act is fatally undermined by the override provision, nor does anyone suggest that about the Irish legislation—often held up as a good example of a robust freedom of information act—which includes a veto, in that a decision can be made to preclude the commissioner from considering an appeal. No one suggests that Ireland's freedom of information regime is fatally flawed as a result. I do not anticipate that in future when commentators consider the operation of the bill—or act, as I hope that it then will be—they will suggest that it is undermined by the existence of section 52.

In some respects the extent of the provision in section 52 is, as I have said, related to the general structure of the bill and the powers that it gives to the commissioner. The bill has properly been praised for creating a fully independent commissioner with strong powers, including the ordering of disclosure of information. I believe that the provisions in section 52 are part of the structure of checks and balances. It still leaves the bill very decisively weighted towards openness.

Under very limited circumstances, the First Minister would retain a right to have a final say on whether exempt information should be disclosed in the public interest. It is not a sweeping power. Intervention is only after the commissioner has reached a decision and only relates to a number of exemptions. The use would be high profile. The commissioner would have made his or her decision, and I am sure that MSPs and the media would take a keen interest in the way in which it was being done.

Section 52 provides for circumstances in which the First Minister, after consulting colleagues, forms a view that the public interest in withholding the exempt information outweighs that in disclosing the exempt information. Gordon Jackson picked up the point that Michael Matheson made about whether it was a matter of the First Minister doing a phone round to one or two colleagues from whom he thought he would get the right answer.

Our view is that section 52 is structured to mean that the consultation would involve the Cabinet's collective decision and the decisions of the Lord Advocate and the Solicitor General for Scotland. As I have explained previously, we could not use the phrase "Scottish Executive" in relation to the consultation in section 52(2), because of how that phrase is interpreted in the Scotland Act 1998, which could have meant that only individual ministers would be consulted rather than the Cabinet. We had to find a way of referring the consultation to a collective decision.

I draw members' attention to the wording of section 52(2), which says:

"the First Minister of the Scottish Executive, after consulting the other members of that Executive".

I point out that the wording is "the other members" and not just "other members". The Scotland Act 1998 defines the Scottish Executive as:

"(a) the First Minister,

(b) such Ministers as the First Minister may appoint under section 47"—

which is effectively the Cabinet—and

"(c) the Lord Advocate and the Solicitor General for Scotland."

Our view is that section 52 delivers what it is intended to deliver. I am more than willing, because Michael Matheson raised the matter, to double-check before stage 3 that section 52 delivers what I have indicated. However, I am confident that the phrasing of section 52, in conjunction with section 44(1) of the Scotland Act 1998, means that the consultation would involve a collective decision.

The bill will allow the First Minister to differ from the commissioner's decision only on the issue of whether withholding the exempt information would outweigh the benefit to the public interest of disclosing such information. A section 52 certificate can be issued if there are reasonable grounds for so doing. However, the First Minister's decision could be subject to a judicial review and his exemption certificate could be quashed if a court were satisfied that there were no reasonable grounds for his arriving at his decision. Alternatively, the court could decide that the First Minister and his colleagues had misdirected themselves.

The issuing of a section 52 certificate would be subject to parliamentary scrutiny. Paul Martin asked how that scrutiny would be done. I think that that would be a matter for Parliament. It would be wrong for the Executive to determine how Parliament should discharge that responsibility. Parliament might ask the Justice 1 Committee to take evidence on a section 52 certificate;

alternatively, there might be a plenary debate on the matter.

Critics ask why the section 52 certificate is in the bill if it is limited in scope and expected to be used only rarely. We came to the view, as did those who have issued comparable statutory FOI schemes, that it is necessary and appropriate to include such a limited provision as part of the checks and balances of the FOI scheme. I therefore urge members not to support amendment 18 and the consequential amendment 17.

Amendment 87, which was spoken to by Donald Gorrie, seeks to limit the use of section 52 certificates to those occasions on which complying with the commissioner's decision would have exceptionally serious consequences. I recognise the intention of amendment 87, but I hope that what I said about the operation of section 52 gives the reassurance that the section 52 certificate is limited in scope, can be exercised only when there are reasonable grounds for doing so and is subject to political and judicial checks and balances.

I am not convinced that Donald Gorrie drafted amendment 87 correctly. Its wording does not refer to the nature of the information. Given that we made it clear in the consultation document "An Open Scotland" that our expectation was that a section 52 certificate would be issued only in relation to information of exceptional sensitivity or seriousness, I am willing to recognise the intention of amendment 87 and consider lodging an equivalent amendment at stage 3 to reflect our position in "An Open Scotland." I hope, therefore, that Donald Gorrie does not press amendment 87.

Amendment 89, which Michael Matheson lodged, also seeks to limit the issuing of a section 52 certificate by adding a provision that would require Scottish ministers to demonstrate that disclosure of exempt information would satisfy the harm tests of substantial prejudice and public interest. Again, I appreciate the intention behind the amendment, but given the way in which section 52 would operate, I consider it unnecessary.

14:30

I also have specific concerns about the way in which the amendment is drafted. Any information that has the potential to be subject to a section 52 certificate will, by definition, have been considered by Scottish ministers on the basis that the public interest in maintaining exemption outweighs the public interest in disclosure. It is only because the commissioner is taking a different view on the public interest test that the information is potentially subject to a section 52 certificate at all. To add a provision requiring Scottish ministers to demonstrate that the public interest test is satisfied, when they have already taken that view, seems wholly unnecessary. Essentially, the amendment would add nothing and risks making unclear what, as I have said, is a tight and clearly drawn provision.

I emphasise that a section 52 certificate would be issued only on the basis that the First Minister has on reasonable grounds concluded that the public interest in maintaining the exemption outweighs the public interest in disclosure. There is already a test—one of reasonableness. The First Minister remains open to challenge by judicial review if it is considered that he has acted unreasonably in issuing a certificate. The power cannot simply be exercised on a political whim. I have already explained why we have used the term "First Minister" rather than "Scottish ministers". The other problem with the amendment is that it does not identify to whom Scottish ministers are to demonstrate that the tests have been met. In the light of those comments, I urge Michael Matheson not to press amendment 89.

Amendments 88 and 129 are somewhat less controversial. Both seek to amend the time scale within which the First Minister must lay a copy of the certificate and inform the person to whose application the certificate relates of reasons for the decision. Paul Martin raised the matter with me during the stage 1 scrutiny and during the stage 1 debate. He expressed concern that the phrase "as soon as practicable" may not be sufficiently stringent. It is also fair to note that the committee, in its report, recommended that the phrase be made more prescriptive. We are content therefore to tighten that up by specifying the number of working days; that is the substance of amendment 129.

My difficulty with amendment 88 is that it refers to seven days and takes no account of weekends or public holidays, so it could conceivably make the time scale as few as three working days if a weekend and two public holidays fell within the period. Amendment 129 proposes that the First Minister complete action

"by not later than the tenth working day".

Section 70 contains a definition of a working day. There is not much between the amendments, but "tenth working day" gives a degree of immediacy without being impractical. I therefore hope that amendment 129 will commend itself to the committee.

Lord James Douglas-Hamilton (Lothians) (Con): Can the minister envisage an example of a case in which the First Minister and ministers acting collectively might wish to use section 52 for a ministerial certificate?

Mr Wallace: Given that the power will be used very rarely indeed, no specific example comes to mind. However, I am conscious that, for example, in the aftermath of 11 September, ministers dealt with information that related to preparedness for possible terrorist attacks in Scotland if, heaven forbid, such an event should ever happen. It may be that those are circumstances in which we would take a different view from that of the commissioner. Section 52 was not designed with a specific category in mind, but that is the sort of territory in which it might be used.

Donald Gorrie: I welcome the minister's promise to introduce a better amendment than amendment 87. Therefore, when the time comes, I will not press amendment 87.

Michael Matheson: Some of the arguments that the minister has used today for maintaining the ministerial veto are those that were used at stage 1, when he was giving evidence to the committee, and in the stage 1 debate. The Law Society for Scotland, I think, asked why, if we cannot come up with concrete examples of when the ministerial veto will be used or if it is to be used infrequently, the power is there in the first place, given that ministers can go for a judicial review. The minister stated that, if the ministerial veto was used, it could be subject to judicial review. However, why should not the First Minister go for a judicial review of a decision by the information commissioner if he has concerns about the issuing of a notice for information to be made available? Notwithstanding the minister's example relating to the aftermath of September 11, I cannot help thinking that the provisions in respect of safeguards would cover such information. With all due respect, I believe that the minister is unable to come up with a good example of when section 52 would be required. The bill already provides safeguards, so I intend to press amendment 17.

The Convener: The question is, that amendment 17 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Grahame, Christine (South of Scotland) (SNP)
Matheson, Michael (Central Scotland) (SNP)

AGAINST

Douglas-Hamilton, Lord James (Lothians) (Con)
Gorrie, Donald (Central Scotland) (LD)
Jackson, Gordon (Glasgow Govan) (Lab)
Macmillan, Maureen (Highlands and Islands) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)

The Convener: The result of the division is: For 2, Against 5, Abstentions 0.

Amendment 17 disagreed to.

Section 51 agreed to.

After section 51

The Convener: Amendment 86, in the name of Michael Matheson, is in a group on its own.

Michael Matheson: The purpose of amendment 86 is to give the information commissioner the power to advertise the fact that an enforcement notice has been issued. It would give the commissioner the right to recoup the costs of that advertising from the public authority about which the information was published and it would provide a further sanction against public authorities that seek to be obstructive.

Members of the committee have highlighted concerns about how sanctions may be applied, in particular to public authorities that continually flout the legislation. In previous discussions with the committee, the minister stated that taking action is a matter for the information commissioner. However, it would also be worth while for information to be placed in the public domain; the commissioner should be given the authority to do that. The commissioner should also be able to recoup from the public authority that has flouted the legislation the money that was spent on putting the information in the public domain.

I move amendment 86.

Gordon Jackson: Is it fair that the commissioner can take such action in respect of an authority that may be about to obtemper an enforcement notice? I understand why we might want a sanction if an enforcement notice was issued and the local authority said that it would not comply. However, the authority may have had a legitimate query about something and would be willing to abide by an enforcement notice when it is made. If there was a public notice, the public perception would be of bad people in an authority who were trying to avoid doing something. However, the authority may have been working in the spirit of the act and may have been willing to comply, but just wanted a ruling.

The Convener: Donald, do you want to comment?

Donald Gorrie: I am interested in what Michael Matheson has to say. I will comment after he has spoken.

Michael Matheson: Amendment 86 states that public notice may be given

"in such a manner as the Commissioner considers appropriate".

It is obvious that, if an authority is in dialogue with the commissioner and states that it will publish information, the commissioner will not have to issue a notice. The amendment simply gives the commissioner the power to give notice of an enforcement notice. He does not have to exercise

that power. However, it is important that the information commissioner should have the option of placing in the public domain, by taking out an advertisement in a newspaper or other relevant publication, the fact that some public authorities continually or unreasonably decide not to disclose information.

The Convener: I find amendment 86 quite attractive as a sword of Damocles over some public authorities.

Donald Gorrie: If Michael Matheson's amendment is not agreed to, how will the bill deal with the commissioner naming and shaming or publicising a dispute with a council, for example? I would be grateful if the minister explained how he expects the system to work, if he is not minded to accept the amendment, which, in the absence of such an explanation, seems attractive.

Mr Wallace: In answering Donald Gorrie's question, I will say why I ask the committee not to agree to the amendment. The amendment is well intentioned, but we contend that that intention will be delivered under the powers that are already proposed for the commissioner.

The amendment would insert into the bill a new section to provide a power to issue a public notice to make it known that a section 51 enforcement notice had been issued, to name and shame the authority that is the subject of the notice and to give the reasons why the notice was issued. The bill already provides for that power as part of the commissioner's broad powers, which are set out in section 43, on the commissioner's general functions. Section 43(2) provides that the commissioner

"must determine what information it is expedient to give the public concerning the … operation of"

the act, "good practice" and

"other matters within the scope of that officer's functions".

The commissioner

"must secure the dissemination of that information in an appropriate form and manner"

and

"may give advice to any person as to any of those matters."

Section 43(4) provides that the commissioner

"may determine and charge sums for services provided under this section."

In addition, section 46 requires the commissioner to

"lay annually before the Parliament a general report on the exercise"

of his or her functions. It also says:

"The Commissioner may from time to time lay before the Parliament such other reports with respect to"

his or her functions, as he or she thinks fit.

The experience of similar commissioner and ombudsman offices allows one reasonably to expect such reports and other routine publications to provide a wealth of information to the public about the commissioner's activity. The existing powers in section 43 have a sufficiently wide scope to allow the commissioner to reflect the intention of amendment 86, but to use an element of discretion, if publicity would be inappropriate, as in the circumstances that Gordon Jackson described.

The power exists to do what Michael Matheson suggests. It is reasonable to expect the commissioner to make public a range of information about the operation of his or her office. As a sword of Damocles, that might be a good way of ensuring compliance with a request. In those circumstances and on the basis of that assurance, I hope that Michael Matheson feels reassured that the commissioner has an adequate range of powers.

Michael Matheson: A major challenge in the effective implementation of the bill will be changing the culture. A carrot-and-stick approach will be necessary. I believe that it will be appropriate at times for the information commissioner to take action to embarrass or name and shame public authorities that try to undermine or flout the bill. However, I am reassured by the minister that the bill contains powers that will allow the information commissioner to use the sanction that I suggest and to charge a public authority as appropriate for doing so.

Amendment 86, by agreement, withdrawn.

Section 52—Exception from duty to comply with certain notices

Amendment 87 not moved.

Amendment 89 moved—[Michael Matheson].

The Convener: The question is, that amendment 89 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Grahame, Christine (South of Scotland) (SNP)
Matheson, Michael (Central Scotland) (SNP)

AGAINST

Douglas-Hamilton, Lord James (Lothians) (Con)
Gorrie, Donald (Central Scotland) (LD)
Jackson, Gordon (Glasgow Govan) (Lab)
Macmillan, Maureen (Highlands and Islands) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)

The Convener: The result of the division is: For 2, Against 5, Abstentions 0.

Amendment 89 disagreed to.

Amendment 129 moved—[Mr Jim Wallace].

The Convener: The question is, that amendment 129 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Gorrie, Donald (Central Scotland) (LD)
Jackson, Gordon (Glasgow Govan) (Lab)
Macmillan, Maureen (Highlands and Islands) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)

AGAINST

Douglas-Hamilton, Lord James (Lothians) (Con)
Grahame, Christine (South of Scotland) (SNP)
Matheson, Michael (Central Scotland) (SNP)

The Convener: The result of the division is: For 4, Against 3, Abstentions 0.

Amendment 129 agreed to.

14:45

The Convener: As amendment 129 has been agreed to, amendment 88 would now leave out

"by not later than the tenth working day"

and insert

"within a period of seven days".

The phrase "seven days" includes public holidays and weekends.

Amendment 88 moved—[Michael Matheson].

The Convener: The question is, that amendment 88 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Douglas-Hamilton, Lord James (Lothians) (Con)
Grahame, Christine (South of Scotland) (SNP)
Matheson, Michael (Central Scotland) (SNP)

AGAINST

Gorrie, Donald (Central Scotland) (LD)
Jackson, Gordon (Glasgow Govan) (Lab)
Macmillan, Maureen (Highlands and Islands) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)

The Convener: The result of the division is: For 3, Against 4, Abstentions 0.

Amendment 88 disagreed to.

Amendment 18 moved—[Michael Matheson].

The Convener: The question is, that amendment 18 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Grahame, Christine (South of Scotland) (SNP)
Matheson, Michael (Central Scotland) (SNP)

AGAINST

Douglas-Hamilton, Lord James (Lothians) (Con)
Gorrie, Donald (Central Scotland) (LD)
Jackson, Gordon (Glasgow Govan) (Lab)
Macmillan, Maureen (Highlands and Islands) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)

The Convener: The result of the division is: For 2, Against 5, Abstentions 0.

Amendment 18 disagreed to.

Section 52, as amended, agreed to.

Sections 53 and 54 agreed to.

Schedule 3

POWERS OF ENTRY AND INSPECTION

The Convener: I invite the minister to move amendment 130, which is in a group on its own.

Mr Wallace: Amendment 130 is an Executive amendment to correct an accidental omission in schedule 3 to the bill. Paragraph 10 of schedule 3 makes it an offence for an individual to obstruct or to fail to assist the exercise of a warrant to enter and inspect an authority's records. Such warrants, issued by a sheriff, will be available to the commissioner where there are reasonable grounds for suspecting that an authority is in breach of its responsibilities under the bill and that evidence of that will be found on the authority's premises.

It is standard practice when creating offences to stipulate the penalty involved. Currently the bill does not stipulate a penalty, but the amendment would insert one. An individual obstructing or failing to assist in the exercise of a warrant would be liable in summary proceedings to a fine of up to £5,000. That is a summary offence, not an offence on indictment with a jury and so on. We have chosen to make it subject to a level 5 fine. The figure of £5,000 is an upper limit, but we think that it is appropriate in cases where there has been a blatant breach of the bill. I commend the amendment to the committee.

I move amendment 130.

Amendment 130 agreed to.

Schedule 3, as amended, agreed to.

Section 55—No civil right of action against Scottish public authority

The Convener: Amendment 19 is in a group on its own.

Michael Matheson: This matter has been brought to my attention by the Law Society of Scotland. It is inappropriate that there should be

no civil right of action against a Scottish public authority in respect of a failure to comply with the duties that are imposed by the bill. On that basis, it is inappropriate to include section 55 in the bill.

I move amendment 19.

Lord James Douglas-Hamilton: It seems extraordinary that public authorities should be exempted from civil action in connection with failures to comply with the duties that the bill will impose. I would be grateful to learn from the minister his reasoning in that regard.

Mr Wallace: I will happily try to oblige and give Lord James, Michael Matheson and the committee an explanation. The problem underlying amendment 19 is a failure to understand the structure of our proposed freedom of information regime and those in other countries. On the face of it, amendment 19 seems reasonable, but the removal of section 55 would be inappropriate. Indeed, it would completely upturn the way in which the freedom of information regime is intended to operate, in particular the considerable role that is proposed for a fully independent information commissioner.

As I have said on a number of occasions—and it has been widely accepted—central to the successful operation of the legislation is the fully independent Scottish information commissioner. The commissioner will have strong powers to ensure adherence to the legislation—powers to order disclosure, powers of entry and inspection and powers with regard to sanctions when necessary. Those strong powers will be sufficient and appropriate to promote and enforce the legislation swiftly, effectively and at no cost to the applicant. It is important not to undermine the commissioner's role, which an alternative and parallel machinery of access would almost certainly do.

Under the bill, the courts can ultimately become involved after the applicant has exhausted all his remedies through the commissioner—for example, a point of law could be the subject of an appeal to the Court of Session. That involvement would be by action of judicial review, which would very much be a remedy of last resort. I emphasise that that method of appeal is available. However, the current approach—of the applicant relying primarily on the commissioner—is by far the most friendly, economical and swift means of the applicant gaining access to the information to which he or she will be entitled. That is the essence of a freedom of information regime; it is the system that is commonly adopted under statutory FOI schemes.

As I have indicated, we will have a fully independent commissioner, who will be nominated by Parliament and will have strong powers. The commissioner's decisions will be judicially reviewable; like anyone else in a public position, the commissioner must follow the law. I do not believe that a further avenue of redress is necessary. Seeking to provide one could seriously undermine the operation of the legislation and reduce public confidence in the commissioner. That would weaken the commissioner's position; at a single stroke, the commissioner could be neutered. If applicants were dissatisfied with a decision by a public authority, they could bypass the commissioner and go straight to the civil courts. The courts would be required to get involved in the day-to-day operation of the legislation, yet it is the commissioner who would issue guidance.

The commissioner's valuable role in building up a consistent corpus of case law would be limited if the cases were spread around various courts. The committee has emphasised on many occasions the need for the efficient and effective operation of the courts; frankly, I am not sure that we want to flood the courts with FOI matters when there is proper recourse to the commissioner.

In addition, a two-tier system could be created. Everyone would have access to the commissioner, but a further avenue by way of civil action would be available to those who could afford it—it is well known that civil actions do not come on the cheap. A right to civil action would thus entitle an aggrieved applicant to damages. The purpose of the bill is to provide a right of access to information; it is not intended to be a vehicle for obtaining damages.

To sum up, I believe that the bill should preserve the role of the commissioner as the independent arbiter to determine whether information should be disclosed. It is important to maintain public confidence in the commissioner, to prevent the creation of a two-tier system and to ensure that the bill's purpose remains to provide access to information, not to obtain damages. On that basis, amendment 19 is ill conceived. I hope that the committee will accept that the appropriate course of action is to use the commissioner, who will have full powers and independence.

The Convener: Is there a similar provision in other FOI regimes—for example, in New Zealand or Ireland?

Mr Wallace: I understand that the other regimes are similar to what is proposed in the bill.

Michael Matheson: I am reassured by what the minister has said. The Law Society clearly did not have to hand the information that the minister has been able to provide this afternoon about the way in which freedom of information regimes operate in other countries. I am sure that the Law Society lodged the amendment with the best intentions. I

am reassured by the minister's comments and I seek permission to withdraw amendment 19.

Lord James Douglas-Hamilton: Am I correct in thinking that, if a constituent sustained a severe loss and substantial prejudice as a result of the withholding of information, he or she would not be barred from raising a civil action under the common law?

Mr Wallace: I do not believe that he or she could raise a common action for damages under the bill. However, I would not want to venture an opinion. There may be a separate avenue of redress to the ombudsman if there has been maladministration by a public body.

The Convener: I know that that is not what you are asking, James.

Lord James Douglas-Hamilton: Perhaps Gordon Jackson would like to comment first.

Gordon Jackson: I had not thought about that. Lord James raises an interesting point, which we should consider. I think that what he is saying—he will correct me if I am wrong—is that, in the attempt to ensure that people do not go to court to bypass the ombudsman, there is a risk that people will lose the right to go to court when they have sustained a very real loss because of a misdemeanour by a public authority. That approach throws the baby out with the bath water. I had not thought about that possibility, but it is a genuine issue.

Lord James Douglas-Hamilton: Is the minister aware that the ombudsman will not consider an inquiry if there is any possibility of that matter being taken before the courts? I am thinking about a case in which, for example, a lot of people lose their lives watching football, in the crush of a crowd. A person may be substantially disadvantaged and the information may not have been made available readily enough—someone could die of their injuries a year or so later having not been given the information. Surely, under the common law, individuals have a right to take action in such cases.

Mr Wallace: If it would help, I will try to clarify that right for Lord James. However, what he is thinking about would be maladministration under the Scottish Public Sector Ombudsman Bill. The Freedom of Information (Scotland) Bill does not intend to give a civil right to damages; it intends to give a right to obtain information. If a public authority has visibly demonstrated maladministration, that might be a ground for compensation, but not under this bill.

Gordon Jackson: Why not? If someone is told by the commissioner to reveal information, it is their legal duty to do so. If they choose not to do so, for whatever reason, enforcement notices can be served and they can be charged with contempt of court. If a person sustained a financial loss because that information was not revealed, would they not have a right of action—a normal action in court—because a legal duty had not been complied with? Lord James is worried about the issue and I am asking whether section 55 takes away that right. In trying to ensure that people do not have a right to bypass the ombudsman, the Executive is taking away another right.

15:00

Mr Wallace: Given that no such right exists at the moment, the section could not take it away.

Gordon Jackson: Yes, but what will happen once the bill is passed? You talk about a scheme but, when the bill is passed, there will be legal duties. On the one hand you are giving legal duties, but on the other hand you are taking away the ability to sue if those duties are not fulfilled. Is that right, Lord James?

Lord James Douglas-Hamilton: Yes, I think so.

Mr Wallace: Removing section 55 altogether would allow the twin-track approach to getting information, which is certainly not the intention.

Gordon Jackson: You have persuaded us of that.

Mr Wallace: Lord James Douglas-Hamilton and Gordon Jackson are asking what would happen under the single-track approach when there is a fault or maladministration. I am not giving an undertaking that there is an answer, but I am prepared to consider how redress to the applicant might be dealt with, as opposed to a penalty being imposed on the public authority. I do not think that amendment 19 achieves that, but I would want to consider the matter.

There are two issues. There is the issue of the twin-track approach, on which, as Gordon Jackson says, I hope that I have persuaded the committee. There is also the issue that Lord James raised about the single-track approach and redress for the applicant. I am willing to consider that.

Lord James Douglas-Hamilton: I am grateful to the minister for agreeing to consider the issue, because it needs further consideration.

The Convener: It would be useful if you could write to us about the matter prior to stage 3 so that we know your thinking on it, minister.

Mr Wallace: I would be mindful to write to the committee, if members would find that useful. I would also be happy to have an informal session with the committee. I am conscious of the fact that I have said that I am prepared to consider further a number of issues. Perhaps we could have an

informal session to discuss some of the ways in which we could address a number of the issues that have arisen during our debates.

The Convener: I will have to speak to the committee about that, as it is an unusual suggestion to make in the middle of consideration of a bill.

Mr Wallace: I will certainly write to the committee on the point that we are discussing, but it might be useful to cover a range of issues in other ways as well.

Amendment 19, by agreement, withdrawn.

Section 55 agreed to.

Sections 56 to 59 agreed to.

Section 60—Code of practice as to functions under this Act

The Convener: Amendment 140, in the name of the minister, is in a group on its own.

Mr Wallace: The committee will recall that on 12 February amendments 69 and 90 to—respectively—sections 23 and 60, in the name of Donald Gorrie, were considered. It was agreed that it would be helpful for the bill to include a reference to collection of statistics for monitoring the operation of the act. It was agreed that an amendment to section 60 would be more appropriate, so I undertook before Donald Gorrie and the committee to lodge an amendment to section 60 that referred to the collection of such statistics. I hope that amendment 140 meets that commitment and I invite members of the committee to support it.

I move amendment 140.

The Convener: Do you wish to speak to the amendment, Donald?

Donald Gorrie: No, we are obliged to the minister for honouring his promise to respond. His lodging of amendment 140 means that I will not move amendment 90.

Amendment 140 agreed to.

Amendment 90 not moved.

The Convener: Amendment 20 is grouped with amendment 21.

Michael Matheson: The purpose of amendment 20 is to extend the range of persons whom Scottish ministers must consult before issuing a code of practice in relation to the functions of the proposed legislation. The purpose of amendment 21 is to extend the range of persons whom Scottish ministers must consult on keeping, management and destruction of records under the proposed legislation. At present, the bill provides that ministers should consult the information commissioner and the Keeper of the Records of Scotland before issuing a code of practice under the proposed legislation. I would welcome the minister's views on whether that should be extended to other possible interested parties to engage other stakeholders in consideration of a code of practice before it is issued.

I move amendment 20.

Lord James Douglas-Hamilton: Broader consultation would be expected and would be widely welcomed if the minister felt able to agree to amendments 20 and 21.

Mr Wallace: It has been acknowledged that, under section 60 of the bill, ministers must already consult the information commissioner on codes of practice. Under section 61, ministers must consult the commissioner and the Keeper of the Records of Scotland.

It is clear that, if ministers consider it appropriate to consult more widely, they will do so. In doing so, they will not rely on whether the bill encourages them to do so. It would be perverse if, under the terms of amendments 20 and 21, ministers thought that it was appropriate to consult certain bodies but did not do so. If ministers are left to decide what is appropriate, they will do that.

I do not think that much would be added by amendments 20 and 21. Throughout consultation on the bill, we have shown willingness to consult widely; that is the spirit of the bill with specific regard to the code of practice under section 61. The Scottish Records Advisory Council is obviously a body that we would wish to consult. However, members should reflect for a moment. If ministers consider consultation to be appropriate, they will consult. I do not therefore believe that anything would be achieved through agreement to amendments 20 and 21.

Michael Matheson: I thank the minister for his comments. It is important to address the culture that surrounds the bill. The issue has been raised several times and it is important to engage as much as possible stakeholders and those who can contribute to the process. However, I am reassured by the minister's comments that ministers would consult appropriate interested bodies. However, although the Minister for Justice might be prepared to do that at present, it does not necessarily follow that his successors will do the same.

Amendment 20, by agreement, withdrawn.

Section 60, as amended, agreed to.

Section 61—Code of practice as to the keeping, management and destruction of records

The Convener: Amendment 141 is grouped with amendments 142 and 143.

Donald Gorrie: We are back at the question of record keeping, which figures earlier in the bill. Amendments 141 and 142 deal with the same issue in the appropriate places. Section 61 currently states:

"Scottish Ministers are to issue … a code of practice providing guidance to Scottish public authorities".

The guidance would deal with how records should be looked after. The amendments suggest that, instead of providing guidance, the code of practice should provide directions on the practice that Scottish local authorities should follow.

There is a view that a separate archives bill is needed—which is quite correct—and that we should avoid directing people on how to do things until the archives bill appears. Given the large number of bills that the Parliament and the Executive would like to pass, an archives bill would be quite far back in the queue. It would be helpful if the Freedom of Information (Scotland) Bill gave out a stronger message.

I have received representations from archivists about public authorities' lack of enthusiasm for archiving. It is understandable that if money can be spent either on school books or on looking after archives, it will tend to be spent on school books, but many of our archives are not as well kept as they should be. If the Executive were to produce directions, it might have to produce some money to enable public authorities to comply with the directions. Substituting "guidance" with "directions" would be a definite improvement.

Amendment 143 is on a slightly different issue. When the regional councils were broken up, many of the documents of regions such as Strathclyde Regional Council were inherited by a single local authority. For example, Glasgow City Council keeps documents on behalf of councils that were formerly part of Strathclyde region, such as North Lanarkshire Council, Renfrewshire Council and so on. That should be listed in section 61(2), which deals with the guidance.

The bill should be stronger about the need to look after records by requiring ministers to provide directions. We should also deal with the technical point to include authorities that hold records on behalf of other authorities.

I move amendment 141.

The Convener: If no one else wants to speak to this group of amendments, the minister may respond.

Mr Wallace: I will speak to amendments 141 and 142 and argue that they should not be accepted. I will then address amendment 143, which I am content to support.

Amendment 142 is consequential on amendment 141. Amendment 141 would change fundamentally the status of the section 61 code of practice on records management by providing that ministers should issue directions rather than guidance. That would establish a legally binding condition on authorities on the management of their records that would—as Donald Gorrie alluded to—be inappropriate in the context of the bill. Indeed, amendment 141 could undermine the commissioner's role in the code. Amendment 141 also overlooks Scottish ministers' requirement to consult the commissioner and the Keeper of the Records of Scotland before issuing or revising the section 61 code of practice.

In essence, amendment 141 seeks to provide Scottish ministers with powers to order Scottish public authorities on the practice that they must adopt for records management. During our discussion last week on amendment 123, we highlighted that it is simply not appropriate to seek to import into the bill matters that would be best considered as part of public records legislation. The two matters are quite different and should not be confused.

There is an interesting constitutional point. I am not readily persuaded that ministers should, in effect, be given powers to make legislation by way of a code of practice. Such directions would be mandatory and legally binding on public authorities. The code of practice would have to be laid before the Parliament, but no provision has been made for any parliamentary scrutiny. As has been said on many occasions, although we can rely on benign ministers to deal with the issue properly, one would not wish to give such sweeping powers to ministers.

The Convener: Is the minister saying that he is benign?

15:15

Mr Wallace: The committee has said so. It would not be appropriate to give ministers the power to make directions within the context of a code of practice. It might be helpful if I were to put on the record what we believe to be the precise legal status of the two codes of practice in the bill—the first is referred to at section 60 and the other is referred to at section 61. Neither code is prescriptive and authorities are not required to follow the codes to the letter. The important point is that authorities are legally obliged to have regard to the codes. If authorities follow the codes, they should find that fulfilling their legal obligations under the bill is straightforward.

For example, if an authority's record keeping conforms fully to the general principles that are set out in the section 61 code, complying with the 20-

day response time should not cause any difficulty. Authorities can depart from guidance, but they must have regard to the code before they do so. If an authority considers that, because of its particular circumstances, the practice that is set out in the code does not represent the most sensible way in which to do something, that authority is not legally obliged to follow the code. That inherent flexibility makes codes the most appropriate place in which to set down broad principles and to recommend administrative practice. If the codes became enforceable, as would be the case if amendments 141 and 142 were agreed to, that flexibility would be removed and the codes would become legally prescriptive.

I stress that authorities cannot simply disregard the codes. If they do so, they will be failing in their implicit legal duty to have regard to the codes. I will put it plainly: although codes are not legally prescriptive, they have legal status because of their statutory underpinning. The record-keeping arrangements in the bill go further than the arrangements in most comparable freedom of information schemes and they have been welcomed as such by the Keeper of the Records of Scotland and the Scottish Records Advisory Council. The arrangements provide strong encouragement to authorities to improve their record-management arrangements so that they are not found wanting in relation to their legal duties under the eventual act.

I make my comments in the context of codes of practice that will apply across a broad range of Scottish public authorities. The codes will have to be flexible in order to take account of both large and small authorities. The bill will do much to improve the position of record keeping in Scottish public authorities but, as I have argued previously, it would be wrong to view the bill as a substitute for archives legislation or to use it as a cure-all for the perceived ills in public records administration.

As I said, I am happy to support amendment 143. As Mr Gorrie explained, amendment 143 would include an additional subject for guidance in the section 61 code of practice. Although it is unnecessary to amend section 61 in the manner that is proposed in order for the code to provide the desired guidance, I am happy to support amendment 143 if the committee is minded to regard it as a helpful amendment.

Section 3 of the bill is relevant in this context, because it provides that records that are held by a Scottish public authority

"on behalf of another person"

are not, for the purposes of the bill, considered as being held by that authority. That is, the duties under the bill apply to the person—not a Scottish public authority—who has provided the records. I hope that Donald Gorrie will withdraw amendment 141 and not move amendment 142 for the reasons that I have given. However, if he decides to press amendment 143, I will be happy to support it.

The Convener: Are you convinced, Donald?

Donald Gorrie: One out of three is a better average than the Scottish rugby team tends to achieve.

Mr Wallace: I think that it is about the same.

Donald Gorrie: The minister produced an argument against amendments 141 and 142 that I had not thought of. The proposal in the amendments would have given ministers too much power. I am always keen not to do that and it was foolish of me not to have thought of the effect that the amendments would have. There is an issue about keeping records as well as possible but, for the reason that was given by the minister, the proposal in amendments 141 and 142 is not the way in which to resolve that—we will have to find another way. I am grateful to the minister for his support for amendment 143.

Amendment 141, by agreement, withdrawn.

Amendment 142 not moved.

Amendment 143 moved—[Donald Gorrie]—and agreed to.

Amendments 21 and 123 not moved.

Section 61, as amended, agreed to.

Section 9—Fees

The Convener: In view of the decision that was taken earlier about the order of consideration of sections, I return to section 9. I call amendment 91, which is grouped with amendments 93, 10 and 98 in the group of amendments that deal with fees and consultation. We have received from the minister a letter dated 4 March, which was not lodged formally, but which we may wish to refer to because it deals with the issues. I call Michael Matheson to move amendment 91 and to speak to the other amendments in the group.

Michael Matheson: I have seen the minister's letter only in the past few minutes, so I have not had an opportunity to consider it in detail. I understand that it was sent to the committee earlier in the day, but I did not have an opportunity to see the letter before the meeting. As a matter of courtesy to the minister, I will speak to amendments 91 and 10 and he may be able to comment on them in the light of the detail that is contained in his letter. It would be helpful to know about any implications.

Amendment 91 would impose a requirement on Scottish ministers to consult the information commissioner and other appropriate bodies on the

regulations within which public bodies set their fees. I believe that the Subordinate Legislation Committee recommended that the Executive should be subject to a statutory requirement to consult interested parties before it makes regulations under the powers in the bill. From what I have been able to pick up from the minister's letter, it is essential that any fees that are set should not act as a deterrent to people's being able to exercise their rights under the legislation.

Amendment 10 would impose an obligation on Scottish ministers to consult the information commissioner and other appropriate bodies regarding the fees that are to be charged for requests for information. Scottish public bodies should be able to charge for the information that they provide, but the fees should not be set at a level that would discourage people from applying for information. It is essential that we ensure that levels of fees do not defeat the policy objectives of the legislation.

I move amendment 91.

Donald Gorrie: Amendments 93 and 98 are straightforward. They seek to ensure that

"Before making the regulations, the Scottish Ministers … consult the Commissioner."

Representations were made about that earlier. The amendments are in line with the committee's views and are accepted by the Executive. I am happy to commend amendments 93 and 98 to the committee.

Gordon Jackson: Michael Matheson referred to the Subordinate Legislation Committee, which wanted to make the point that it considered the part of the bill that dealt with fees to be so important that it would be a good thing to include a statutory requirement for consultation. There is logic in the argument that there is no point in telling people to consult whomever they think appropriate, because they will normally consult those they think appropriate. I noticed that the same point arose in respect of another amendment. However, there is something to be said for making consultation a statutory requirement. One way or another, it is not the end of the world, but we should emphasise the seriousness of the fees issue. It is a matter of emphasis rather than substance.

The Convener: Ministers might not be benign—we are looking for benign ministers.

Lord James Douglas-Hamilton: If the test is of reasonableness, that echoes what the minister said earlier. A guide to the test of reasonableness is often given in consultation, at the time when the facts are given by the interested parties.

Mr Wallace: I am in the hands of the convener and of the committee. I could deal with the question of consultation, to which the group of amendments relates. On the amounts of fees, I will deal with the substance of my letter. Amounts of fees are covered by the next grouping of amendments. Alternatively, I am happy to explain to the committee, as a preliminary, what is being proposed in terms of fees. I will do whatever will be most helpful.

The Convener: My view, although I am in the hands of the committee, is that we should first deal with consultation and then move on.

Mr Wallace: As has been indicated, the amendments that are grouped with amendment 91 seek to place an obligation on Scottish ministers to consult prior to making regulations under sections 9 and 13. Michael Matheson's amendments 91 and 10 seek to require Scottish ministers to consult the Scottish information commissioner and, in relation to section 9,

"other such persons, bodies or office holders as they consider appropriate"—

and with regard to section 13—

"such persons as they consider appropriate".

With respect, it is almost a rerun of the debate that we had a short while ago about whom ministers consider it appropriate to consult. Any debate about a requirement to consult on the fee regulations will be similar to that previous debate. It is clear that if ministers consider it appropriate to consult more widely, it would be perverse not to do so. We have been willing to accept a specific requirement to consult the information commissioner. The Subordinate Legislation Committee considered the parliamentary process and recommended that, before regulations are made, Scottish ministers should be subject to a requirement to consult.

Amendments 93 and 98, in Donald Gorrie's name, would add a requirement specifically to consult the information commissioner and we are happy to accept those. We might have indicated our intention to reflect that recommendation at stage 1, but if we did not, I say that we intend to do so. It is right, especially given the commissioner's overall interest in the operation of the act and his or her obvious role in approving the publication scheme, that the commissioner should be consulted.

However, placing an obligation on ministers to further consult

"other such persons, bodies or office holders as they consider appropriate"

does not practically add anything. As long as ministers considered consulting such persons, they could decide that it was not appropriate and no further obligation would be put upon them. However, I would like to reassure the committee—

it is fair to say that we have a good record on consultation.

What I will say on the next grouping of amendments—on the amounts of fees—is in many respects a product of that widespread consultation. The committee has commended the Executive for engaging in full consultation on the provisions of the bill. We have made no decision yet about how we might consult on such regulations, but it is not necessary to take that decision now. We want to continue in the spirit of consultation; if we think it appropriate to consult people, that is the obvious course of action to follow.

I therefore invite the committee to support Donald Gorrie's amendments 93 and 98—which would add a particular requirement to consult the commissioner—but to accept that the other amendments do not practically add anything to what ministers would do.

Michael Matheson: I think that the minister is wrong about amendment 91, and I would like to correct him. The amendment would add consultation with the information commissioner, which is similar to the provisions in Donald Gorrie's amendments; however, it would also add other bodies.

However, in light of the minister's comments, I will support Donald Gorrie's amendments and seek to withdraw amendment 91.

Amendment 91, by agreement, withdrawn.

The Convener: We will, if the minister is content to do so—I certainly am—have a 10-minute break, after which we will return to the next group of amendments.

15:28

Meeting suspended.

15:42

On resuming—

The Convener: Amendment 92 is grouped with amendments 94 and 11. Does Michael Matheson wish to move amendment 92, or does he wish to speak to it and make up his mind afterwards?

Michael Matheson: I do not wish to move amendment 92.

The Convener: Do you wish to speak to it?

Michael Matheson: No.

Amendment 92 not moved.

The Convener: I invite Michael Matheson to speak to amendment 94 and Lord James Douglas-Hamilton to speak to amendment 11.

Michael Matheson: Amendment 94 refers to the issue of fees. As has been outlined, there is a concern that people might be disadvantaged by the proposed fee scheme, which could undermine some of the bill's provisions and its intent.

Amendment 94 would exempt people with low incomes from paying fees and would allow Scottish ministers under section 9(4) to determine by regulation the level of income at which exemption would apply. Everyone should have equal access to information, regardless of their personal financial circumstances. The cost of the process should not deter people from exercising their right to obtain information. Amendment 94 seeks to address that potential problem.

I move amendment 94.

Lord James Douglas-Hamilton: Amendment 11 would ensure that the fees that were charged provided adequate resources to the relevant Scottish public authorities. The organisations that are listed in schedule 1 have varying levels of resource. The effect of numerous and complex requests on the resources of some of those bodies should not be underestimated. If the legislation is to work properly, local authorities must be provided with adequate resources for staff and training.

15:45

Maureen Macmillan (Highlands and Islands) (Lab): I would like to comment on amendment 94, in the name of Michael Matheson. The letter that we have received from the minister indicates a change in the fees that people will be asked to pay when they request information. I am worried that, if the amendment were to be incorporated into the bill, the provision might be abused. People might be able to send someone else to request information for them, knowing that that person would get the information for nothing. There would need to be a way of policing the provision.

Mr Wallace: I thank the committee for arranging the discussion of the sections dealing with fees in a way that allowed us to give full further consideration to the question of fees. Members will recall that, when I appeared before the committee at stage 1, I indicated that, in the light of consultation on the draft bill, we wanted to reconsider the fees arrangements in the bill. I said that I would try to make known during the passage of the bill the conclusions that I had reached. As the convener has indicated, I wrote to her yesterday to make known our decision to revise the fees arrangements in the bill.

For the record, I will outline briefly the approach that we intend to take. Our proposals are the result of responses to the consultation on the document "An Open Scotland". They focus on the rare

occasions when a significant request for information could cost an applicant up to around £400, but might cost only up to around £50 under the United Kingdom Freedom of Information Act 2000. The UK act would allow authorities to raise fees of up to 10 per cent of prescribed costs, with an upper cost ceiling and no lower threshold.

The detail of the fees that we now propose under the Freedom of Information (Scotland) Bill will be set out in regulations. Our approach is based on that taken by the UK act—in other words, fees of up to 10 per cent of prescribed costs will be levied up to an upper cost ceiling—except that we intend to retain a threshold below which fees cannot be raised. That threshold, which previously I indicated would be set at around £100, is the threshold that operates today under the non-statutory code of practice. It is a feature of our proposals that has been widely welcomed. We consider it appropriate and helpful to retain the threshold under the statutory FOI scheme.

As previously indicated, the upper cost ceiling is likely to be set at around £500 to £550, which I understand to be similar to the ceiling that is likely to operate under the United Kingdom act.

Our revised approach would remove the main disparity between the fees that would operate under the UK FOI scheme and those that would operate under the Scottish FOI scheme. The proposals remain true to the principle that underpins consideration of the fees arrangements—that they should neither discourage applicants nor impose unreasonable or limitless burdens on Scottish public authorities.

I am confident that our revised approach will be welcomed widely. As Maureen Macmillan indicated, our approach is relevant when considering amendment 94, in the name of Michael Matheson.

Any fee that is charged under the bill would be discretionary. The bill does not require a fee to be charged; a public authority may decide not to levy a fee or to request a lower fee than that to which it is entitled. The provisions of sections 9 and 13 simply provide a framework. If a fee is to be charged, it must be calculated in accordance with those provisions.

Michael Matheson's amendment would exempt people on low incomes from paying fees and would require regulations that are made under section 9 to determine the exact definition of low income. I appreciate the sentiments that underlie the amendment, but, as the committee will understand, I am concerned that means testing under the bill would be unworkable in practice and, at the end of the day, unnecessary. As Maureen Macmillan pointed out, the provisions that are set out in amendment 94 might be subject to abuse, depending on who made a request for information.

The introduction of means testing for FOI requests would add significant bureaucracy and cost to the administration of the scheme. In relation to every request, an applicant would need to provide details on which means testing would be based, in case a charge might be involved. Those details would vary, depending on the way in which the applicant's means were to be measured. Regardless of that, such procedures would be complicated and would add significantly to the bureaucracy of a scheme that we have attempted to make very simple for the person who wants to get information. The committee acknowledged in its stage 1 report the problems of having a different charging regime for commercial organisations, and said that it had sympathy with the Executive's view that that would be unworkable because a commercial organisation could simply ask an individual—another variation on Maureen Macmillan's point—to apply on its behalf. The same would apply in relation to means testing.

Lord James's amendment 11 seeks to amend the fee regulation provisions in section 13. Such regulations would apply only to those requests that, either individually or collectively, fall above the upper threshold, and a public authority is under no obligation to supply information in such circumstances. I recognise that amendment 11 aims to address a resources issue by seeking to require that

"over time … the authority is provided with adequate resources to fulfil its obligations under section 1."

Regrettably, the wording of the amendment is vague. For example, I am not sure what is meant by "over time", nor what "sufficient" and "adequate" mean.

However, it is the reference to obligations under section 1 that renders amendment 11 unworkable from a legal point of view. The only obligation under section 1 is contained in subsection (1) and is disapplied under section 12, to which section 13(1)(a) refers. In other words, section 13 regulations apply only in circumstances in which a public authority has exercised its discretion to disclose information that, by virtue of section 12(1) or 12(2), it is not obliged to communicate or that it is not obliged by law to communicate. No obligations are placed on public authorities by section 1 for requests that would cost the public authority more than the upper threshold as prescribed in regulations under section 12.

Nonetheless, given the spirit in which Lord James spoke to his amendment, I offer him reassurance on the issue of authorities' income streams from publications not being undermined by the freedom of information scheme. Although it

is Executive policy that FOI fees are not intended to provide for full cost recovery, the bill makes specific provision to preserve a public authority's capacity to recover costs. Statutory charging schemes will continue unaffected and authorities will be able to set fees for information included in an approved publication scheme to cover a broad range of routine publications, including those for which fees may presently be raised, such as priced publications. I understand the motivation behind Lord James's amendment 11, but given that it would not have the intended effect, I hope that he will not move it.

Lord James Douglas-Hamilton: In view of what the minister has said, I will not press amendment 11.

Michael Matheson: On the surface, I welcome some of what the minister said about the provisions the Executive intends to make for the fee system. I presume that those will be contained in the regulations, which will be published later. Nevertheless, I will have to reflect on them. The provisions may be an improvement, but I am not aware of the full debate surrounding the fee system for the UK legislation and there may be some issues to consider.

What the minister said about means testing was not necessarily accurate. A gatekeeping mechanism could be used, as happens in other systems. If a person is on a certain type of benefit, that entitles them to something else. For example, income support is a gateway benefit that opens up options to other benefits. A benchmark could be drawn in regulation and someone could be checked at the time of their requesting information. If they could provide evidence that they were on a benefit, they would be classed as being on a low income. There would be no need for a public authority to go through the process of means-testing someone, as there would already be a mechanism that could be used.

Nonetheless, I am happy to seek to withdraw amendment 94 on the basis that the minister proposes changes in the regulations for fee setting.

Amendment 94, by agreement, withdrawn.

The Convener: Amendment 93, in the name of Donald Gorrie, has been debated with amendment 91. Although Donald Gorrie has a hospital appointment and cannot be here for this part of the debate, I believe that Michael Matheson will move amendment 93, which the minister has accepted.

Amendment 93 moved—[Michael Matheson]—and agreed to.

The Convener: Amendment 139 is in a group on its own.

Lord James Douglas-Hamilton: I will speak very briefly to amendment 139. The wording of the amendment is self-explanatory:

"In the case of a request for information made by an applicant who is not resident in the United Kingdom and who expresses a preference that the information be provided in a language other than English, the additional cost associated with translating the information requested need not be borne by the Scottish public authority."

The purpose of amendment 139 is to prevent the local authority from feeling that an extra burden is being imposed. For example, if a foreign company, institution or embassy makes a substantial number of requests involving language translation, the local authority should have discretion. As the minister said, reasonableness will be the test. I echo the minister's sentiment.

I move amendment 139.

Mr Wallace: My reply on amendment 139 harks back to a discussion that we had on the first day of the stage 2 proceedings. As I explained then, a public authority is obliged to respond only to a request that it understands. If an authority understands the language in which a request is made, the translation costs that are involved would be minimal. There would be no need to incur substantial costs by employing a translator, for example. An authority that does not understand a request because it is in a foreign language—perhaps Lord James envisages circumstances that involve an obscure foreign language—would be able to remit to the applicant for an explanation of the request. Section 1(3) states:

"If the authority—

(a) requires further information in order to identify and locate the requested information; and

(b) has told the applicant so (specifying what the requirement for further information is),

then, provided that the requirement is reasonable, the authority is not obliged to give the requested information until it has the further information."

Therefore, if the foreign body does not provide sufficient clarification, the authority would not be required to respond to the request.

In short, the concerns that lie behind amendment 139 are more imaginary than real and the amendment is unnecessary. If an authority understands a request, it will be required to respond. In that situation, it will surely be straightforward for the authority to give the requested information. We would not expect an authority to incur substantial expense in responding to a request. If an authority does not understand a request and does not receive the clarification that it seeks, it would not be required to respond. On that basis, I ask that amendment 139 be withdrawn.

Lord James Douglas-Hamilton: From what the minister said, it seems that the bill already covers the idea that is contained in amendment 139.

Amendment 139, by agreement, withdrawn.

Section 9, as amended, agreed to.

Section 12—Excessive cost of compliance

The Convener: Amendment 95 is grouped with amendments 9, 49, 96 and 97. If amendment 9 is agreed to, amendment 49 will be pre-empted.

Michael Matheson: The intended effect of amendment 95 is similar to that of amendment 91, which would have placed a requirement on ministers to consult the information commissioner and other appropriate bodies on the regulations. That requirement was proposed as a result of a recommendation from the Subordinate Legislation Committee. I will not proceed any further with that, because I am sure that the minister's argument against amendment 95 will be similar to the argument that he made against amendment 91.

Amendment 49 would remove the provision by which a public authority may deem several requests to be part of a concerted campaign and so refuse to answer them all if the cost of doing so comes to more than £500. The amendment would replace that with a requirement that an answer be given to the first applicant and that the information be made available in a manner that is acceptable to the commissioner and subsequent applicants. The current provision is open to abuse by public bodies, which could wrongly interpret several requests as originating from an organised campaign. Furthermore, in a democracy, someone's opinion does not count for less because they are part of a campaign. Indeed, at times it might be appropriate that information be provided to people who have formed a campaign.

16:00

For example, to encourage people to write to public authorities with requests for information, Friends of the Earth conducted a survey to check on responses to requests for information. If a large proportion of public authorities had discovered that Friends of the Earth had organised the campaign, the information might have been perceived as having been requested as part of a so-called concerted campaign. If a public authority received 300 requests, each of which cost £1.75 to reply to, including postage and stationery, it could simply refuse to answer all the requests, even if they were on differing subjects.

It should be noted that section 14 offers protection for public authorities from vexatious or repeated requests. Therefore, amendment 49 provides further protection to public authorities that already have protection. It is essential that those who request information on a genuine basis are able to do so and that public authorities are not able to hide behind a claim that the information is being requested as part of a concerted campaign.

The purpose and effect of Donald Gorrie's amendment 96 is to require Scottish ministers to consult the Scottish information commissioner before making regulations that relate to the setting of the upper threshold. The recommendation of the Subordinate Legislation Committee reflects the Justice 1 Committee report, which stated that the bill should contain a statutory provision to consult on fee levels in section 9 and on the setting of the upper threshold in section 12. It is important that we specify whom Scottish ministers are to consult rather than leaving it open-ended and that we state that the most important person who should be consulted is the information commissioner. I hope that members will support the amendment.

Amendment 97 would require the costs of providing information to a disabled person to be estimated as if the information was being provided to a person who was not disabled. I hope that the minister will clarify the matter as there is a danger that, because of the format, the cost of providing information to a disabled person could be greater than the cost of providing it to an able-bodied person. Without the amendment, there could be a financial penalty for a disabled person who requests information in a specific form. It is essential that the legislation does not discriminate against disabled people and makes provision to ensure that their rights are protected.

I move amendment 95.

Lord James Douglas-Hamilton: I will speak to amendment 9. The Law Society of Scotland had concerns about section 12(2). It thought that it was inappropriate for persons who were acting in concert to be disfranchised from applying for information under the section. The provision could be open to abuse by a public authority that did not wish to disclose information.

I note that the Consumers Association has sent committee members a message, which reads:

"Should excessive costs be incurred, we would support the publication of such information in an accessible form, after the initial request is made.

We therefore ask you to support amendment 9 in the name of Lord James Douglas-Hamilton, or amendment 49 in the name of Michael Matheson.

Consumers' Association feels that section 12(2) as it currently stands would prove a severe impediment to consumers' rights to properly access information."

Not only the Consumers Association takes that view. Mr Robin Harper MSP, the leader of the Scottish Green Party, expresses similar support in an e-mail that I believe he sent to all committee members. I look forward to hearing what the

minister says about amendment 9.

The Convener: I welcome Robin Harper to the meeting.

Maureen Macmillan: Michael Matheson and Lord James Douglas-Hamilton are right that considerable anxiety has been expressed about section 12. In the past few months, many bodies and individuals have contacted me about it. The problem is that we know what a campaign is. I think that a campaign probably aims to make a nuisance of itself, rather than simply obtain information. That has not been properly teased out in the bill.

I presume that the intention is to stop people making a nuisance of themselves by continually writing to request the same information, but there might be legitimate reasons for many people wanting the same information. Amendment 49 suggests a way in which information can be put into the public domain quickly and easily. We ought to consider how we can do that.

The definition of a campaign is subjective. Will the guidelines give local authorities a definition of a campaign? As Michael Matheson said, section 12 could be used to stop information being made public.

Robin Harper (Lothians) (Green): I support amendments 9 and 49. The bill is open to abuse by being used undemocratically and could deny individuals their rights. The amendments would address that weakness.

The Convener: I take issue with my colleague Maureen Macmillan's comment that a campaign's main aim is to make a nuisance of itself. Some people do not even know that they are part of a campaign.

Gordon Jackson: Some people do not know that they are a nuisance.

The Convener: The current campaign in the Borders involves a big area, and lots of people will apply for information without realising that other people are doing the same elsewhere. A campaign is not always a concerted effort, although it may eventually become that.

Maureen Macmillan: But some campaigns deliberately create a nuisance.

The Convener: I agree, but that is why we must be careful about saying what a campaign is. Whether a campaign is good or bad, it is just a campaign. In any event, the issues have been aired quite a bit. I would like to hear the minister's views.

Mr Wallace: The amendments in the group deal with three issues. Michael Matheson's amendment 97 concerns the provision of information to a disabled applicant in an alternative format. It says that, in considering the cost of providing information in an alternative format, any additional costs that exceed the upper cost threshold should not be considered. In other words, costs above the upper cost threshold should not be taken into account.

I have strong sympathy with the amendment and my officials discussed the issue last week with the Disability Rights Commission. As the committee is probably aware, under the Disability Discrimination Act 1995, the cost of any "reasonable adjustment"—in this case making information available in an alternative format—simply cannot be passed on to the individual who is receiving the service. Although the statutory obligation exists already, I acknowledge that it is important that the Freedom of Information (Scotland) Bill is clear in that respect.

During the meeting last week between my officials and the Disability Rights Commission, an amendment to section 11—not section 12, because that would apply only to the upper cost threshold—was discussed. Amending section 11 would ensure that the issues were taken into account whenever a disabled applicant requested information in an alternative format. We are in the process of discussing those complex issues with the commission. We recognise the need to provide clarity on the matter and, on the understanding that I will write to the committee ahead of stage 3 with details of the way forward that has been agreed with the Disability Rights Commission, I ask Michael Matheson not to press amendment 97.

Before I turn to what has been the focus of most of the discussion of section 12, I will deal with amendments 95 and 96. For reasons we have already gone over, I ask Michael Matheson not to press amendment 95. The Executive supports amendment 96, which would require Scottish ministers to consult the commissioner prior to issuing regulations under section 12. As I have explained, that does not fetter the ministers or prevent them from consulting others as well. In the spirit of our willingness to consult, I ask Michael Matheson not to press amendment 95.

Amendments 9 and 49 relate to the so-called campaign subsection. The subsection intends not to frustrate campaigns in any way but to secure a better form of delivery of information, where a substantial number of people seek that information, without exposing public authorities to what might otherwise be an open-ended financial commitment to continue supplying the information over and over again at considerable cost. Michael Matheson mentioned the Friends of the Earth Scotland campaign. I am advised that officials have already said at an FOES conference that the example of letters written to different organisations requesting information from different authorities

would not fall foul of section 12(2). The letters would be from different people to different authorities and so the cost of complying would not in any way breach the upper limit.

Much of the difficulty has centred on the word "campaign". The amendments address section 12(2). I make it clear that the bill does not—and neither should it—establish a right of access that is unfettered by the need to consider the impact on an authority's ability to deliver its day-to-day functions. In discussions about other sections, the committee has generally expressed contentment with that underlying approach. International experience has demonstrated clearly the need for such an approach. I have mentioned before the request in Canada that potentially involved the provision of 1.2 million pieces of paper. The authority had to devote 12 full-time staff to a task that could have taken up to a year to complete.

We introduced the upper cost threshold, which we have said will be in the region of £500 to £550, to protect public authorities. I think that James Douglas-Hamilton has mentioned on a number of occasions that resources should not be diverted to an extent that could cripple even a medium-sized public authority. Section 12(2) is an important element of that protection. Its removal could make life difficult. If it were removed and 10,000 people wrote to a public authority, the authority would be required to send 10,000 replies. That might be quite excessive and distract the public authority from its principal function.

We are trying to ensure that there are other means of disseminating information when such circumstances arise; one obvious way might be to publish the information on the internet. Depending on the nature of the information involved, the authority might have to consider other ways of ensuring access to the information, for example by making it available in public libraries.

Removing section 12(2), as amendment 9 seeks to do, would immediately remove that flexibility. The authority would need to respond individually to each request, copying and providing the information to each and every applicant. The fact that other cheaper and perhaps more effective ways of disseminating information might be possible would be irrelevant. If the public authority did not respond individually to every request, it would breach its obligations under the act.

Requiring an authority to respond individually could have a significant effect on its ability to conduct its day-to-day business. In that respect, section 12(2) is intended as a purely practical protection. The information would be readily available and the authorities would be given the flexibility to decide how best responses could be made.

16:15

The second consequence of removing section 12(2) would be to open a loophole that would allow applicants to avoid the upper cost threshold. A large request, which could exceed the threshold, could be broken down into a number of smaller requests, which one applicant might distribute round a group of applicants. Although we would not expect applicants to seek regularly to exploit the loophole, it is important that the bill is able to protect authorities.

It is important to note that an authority would need to have a good reason for citing section 12 in relation to requests for different information. That is why I do not believe that section 12 is open to abuse. An appeal against the citing of the section could be made to the commissioner. If the commissioner concluded that the authority had cited section 12 inappropriately and had failed to comply with its duty under the act, the commissioner could order the authority to comply with the request or requests. A refusal to comply with the direction of the commissioner could, ultimately, give rise to contempt of court proceedings against the authority.

Section 12 is not just a get-out-of-jail-free card for authorities. An appeal against the citing of the section could be made to the commissioner.

I refer committee members to paragraph 8 of the draft code of practice on the discharge of the functions of public authorities, which provides that appropriate assistance could include

"where a request would be refused on cost grounds an indication of what information could be provided within the cost ceiling."

It is important that that part of the draft code relates directly to the section 15 duty to provide advice and assistance and that that duty has legal force.

I do not believe that section 12 is a loophole or a get-out for public authorities. It provides necessary support with regard to the upper cost threshold. We can understand the anxieties about the provision, possibly because of the word "campaign". I ask the committee to acknowledge that the principle of not exposing public authorities to unlimited demand should be preserved. That is why I ask the committee not to support amendment 9.

Amendment 49 would remove the existing section 12(2) and make the provisions contained in paragraphs 13 and 14 of the code of practice explicit in the bill. I have explained why I think the underlying purpose of section 12(2) should be maintained. I could not agree with its entire removal, as proposed by Michael Matheson in amendment 49. The Executive considers the approach that Michael Matheson sets out in

amendment 49 to be more appropriate for guidance, because it details a particular administrative response. My concern about putting what Michael Matheson suggests in the bill is that there could be a reasonable, acceptable and more appropriate response other than publishing the information, which would not be available to the authority if the amendment were agreed to. Section 12 preserves a degree of flexibility that would not be there if amendment 49 were part of the bill.

Amendment 49 sets out, to a considerable extent, the underlying policy. Therefore, I am happy to consider what provision of the same sort might be placed in the bill, which would retain the flexibility and allow the detail of how an authority responds to be easily adjusted in the light of experience. A code can be more easily revised than can primary legislation.

I acknowledge the concerns that the committee has voiced about section 12(2). I remain committed to ensuring that there is protection for authorities. I hope that the committee will agree that that is important and will consider that allowing the aggregation of requests to take that into account is an essential and practical provision. Indeed, as a general principle, the committee has acknowledged that general dissemination of information is preferable to specific provision to thousands of individual applicants.

I acknowledge the committee's concerns about how the provision is expressed. As I have explained, it is not about undermining the right to campaign. I would be happy to consider further how we can set that out more clearly and to return to the matter at stage 3. I am reasonably confident that our draftsmen can find an alternative wording that does not refer to a "campaign" yet retains the policy, which is essential.

I ask the committee to support amendment 96 and, for the reasons that I have given, I ask Michael Matheson not to press amendment 97.

The Convener: Before I call Lord James Douglas-Hamilton and Michael Matheson to respond, I want to ask about section 14(1). If a campaign were to send in lots of requests for the same information just to clog up the system, would that be a vexatious request, from which there would be sufficient protection?

Mr Wallace: Section 14 is intended to deal with multiple requests from one individual.

The Convener: Section 14(1) deals with vexatious requests, but section 14(2) deals with repeated requests. Those are separate matters.

Mr Wallace: The mischief—if you want to call it that—that section 14(2) targets is, for example, the situation in which someone puts in a request and the commissioner says, "No," and the person returns the next day with the same request. Section 14(2) refers to requests from an individual, as opposed to similar requests from a multitude of people.

The Convener: I cannot read it like that. There is no "and" between sections 14(1) and 14(2).

Mr Wallace: There is an important distinction between section 14 and section 12. Section 12 relates to the upper threshold, whereas section 14's application is more general.

Paul Martin: I seek clarification on campaigns. If, for example, I encouraged the local community to probe for further information on the future of a hospital that it was proposed to close, and if they referred in their correspondence with the health board to the local campaign, would that prevent them from being provided with the information that they sought? I would be concerned about that. If someone said, "I request information in respect of the future of this hospital"—which is information that they would be entitled to and which I am sure the health board would be happy to provide—but they said in their final paragraph, "I advise you that I support the campaign by the local community and the local elected members to retain the hospital," would that provide a legal loophole to prevent the health board from providing the information?

Mr Wallace: The words, "This is part of the campaign to save the hospital," would not give the public authority the excuse to deny the information. The measures kick in only in relation to the upper threshold. If, for the sake of argument, 5,000 people asked for the same piece of information—even if they did not mention the word "campaign"—that would breach the threshold. In such a case, the health board would have the right not to respond to each of the 5,000 requests individually. Proposed section 12(b) in Michael Matheson's amendment 49 would oblige the authority to find a way to give the 5,000 people the information without necessarily sending a letter to each of them, which could take the cost over the £500 threshold. That is in the code of practice.

The issue highlights the problem that we have had with the use of the word "campaign" in section 12. Section 12 is not intended to frustrate legitimate campaigning; it is intended to ensure that the upper threshold is not exceeded and that an unlimited burden is not placed on public authorities. The code of practice seeks to find an appropriate way to respond to multitudinous requests. As I have indicated, I am prepared to take the issue away. I have a reasonable expectation that we can find words other than "campaign" which maintain the important principle of protecting public authorities from excessive

demands that they cannot legally deny and which promote the measures in the second half of Michael Matheson's amendment 49, without making the bill unduly inflexible.

It is important to remember that the provision also concerns regulations and that, if the committee passes a subsequent amendment, the regulations will be subject to affirmative resolution.

With those reassurances, I hope that members will not press the amendments.

Lord James Douglas-Hamilton: In view of the minister's helpful assurance, I will not press amendment 9, but I would like to ask him a question. He may not be aware that, some years ago, Cardinal Thomas Winning wrote to me to ask whether Roman Catholic education was under threat. When he made the query, no fewer than 7,000 almost identical letters arrived at the Scottish Office from his parishioners. If I remember correctly, every letter received a full reply. What guidance will the minister give to a local authority that receives thousands of letters on a particular matter? How will information be disseminated?

Mr Wallace: Each request will have to be acknowledged, but reference may be made to a statement made in the Parliament, for example. All such matters—including the upper cost limit—are discretionary. If there was a wish to reply to every request, that could be done. However, it might be possible, in acknowledging requests, to indicate that the information that is sought is provided in a readily accessible form—perhaps that is a reasonable example. As I said, it is important to emphasise that such requirements are not mandatory and that feeing is discretionary.

Michael Matheson: I welcome the minister's response to amendment 49. I hope that a form of words can be found and included in the bill, rather than dealing with the matter through guidance. On that basis, I will not move amendment 49. I am aware of the minister's meeting with the DRC at which amendment 49 and amendments that the committee has passed were discussed. I hope that proposals will be brought forward at stage 3.

The Convener: You moved amendment 95. Do you wish to press or withdraw it?

Michael Matheson: I wish to withdraw amendment 95.

The Convener: Does the committee agree to withdraw the amendment? Is there life in the committee? I do not know whether the committee is still there.

Amendment 95, by agreement, withdrawn.

Amendments 9 and 49 not moved.

Amendment 96 moved—[Michael Matheson]—and agreed to.

Amendment 97 not moved.

Section 12, as amended, agreed to.

Section 13—Fees for disclosure in certain circumstances

The Convener: We need to deal with the amendments to section 13. Members will see what lies before us after we have dealt with those amendments and Robin Harper is here. Michael Matheson is saying, "Let's get this done," which is all very well, but it is up to the members who are moving the amendments, in particular those that deal with the orders and regulations—I see that Michael Matheson is involved—to get things done and be terse in their remarks.

Amendments 10 and 11 not moved.

Amendment 98 moved—[Michael Matheson]—and agreed to.

Section 13, as amended, agreed to.

Section 62—Power to make provision relating to environmental information

The Convener: Amendment 124 is grouped with amendments 125 and 128.

16:30

Michael Matheson: I will be brief. The effect of amendment 124 would be to include in section 62 article 5 of the Aarhus convention, which requires the collection and dissemination of environmental information. The inclusion in the bill of article 5 of the Aarhus convention would enable Scottish ministers to make regulations for the implementation of that article. The benefit that would be gained from agreeing to the amendment would be that the section would—hopefully—provide greater protection. Also, given the way in which the matter is currently dealt with, it would redress some of the democratic deficit by safeguarding the rights of communities to know about their local environment.

I move amendment 124.

Robin Harper: First, I thank the clerks for their help in drafting amendments 125 and 128. Those amendments are lodged to fulfil the intention that the environmental regulations referred to in section 62 of the Freedom of Information (Scotland) Bill should come into force no later than one year after the bill is passed.

Amendment 125 amends section 62, on

"Power to make provision relating to environmental information",

such that Scottish ministers would be obliged to bring in the regulations on environmental information no later than one year after section 62 comes into force.

Amendment 128 would amend section 72, on commencement, such that section 62 would come into force on royal assent to the bill. Taken together, amendments 125 and 128 would ensure that regulations on environmental information would come into effect no later than one year after the bill is passed.

I hope that members will agree that that is a reasonable modification to the bill. It was suggested to me by Friends of the Earth Scotland. That organisation is as keen as I am to ensure that the freedom of environmental information that was agreed to by signing the Aarhus convention in 1998 is not left behind when access to other types of other information is given.

Mr Wallace: Article 5 of the Aarhus convention is about the proactive dissemination of information. Clearly, it is relevant to the bill. However, I ask the committee to accept that it is not necessary to include powers relating to article 5, for two reasons.

First, article 5 lists a wide range of activities for public authorities, all of which promote the proactive dissemination of information. A number of those activities are already carried out by authorities on an administrative basis. I understand that it might appear attractive to formalise that arrangement and introduce formal legal duties. However, given the nature of some of the activities listed in article 5, I strongly argue that those would be most effectively addressed administratively.

For example, article 5 provides that authorities should review and update the environmental information that they hold. That does not translate into a clear and specific legal duty. However, there is no doubt that the requirement can be delivered effectively through guidance. That is done currently in guidance on existing environmental information regulations that is issued to authorities.

Article 5 of the Aarhus convention similarly provides that environmental information should become progressively available on the internet. Again, we consider that that requirement would be most effective if delivered administratively. That also applies to the provision that authorities should make environmental information available to the public in a transparent manner. Those provisions are somewhat undefined and can be delivered effectively by administrative means.

Simply formalising those arrangements would not add value. Indeed, it could complicate matters by subjecting authorities to unclear and unenforceable legal duties.

The second reason that must be taken into account is the work that is proceeding in Brussels on revising the EC directive on public access to environmental information. That directive will translate the Aarhus convention into a specific legal framework that is designed for European member states. The directive is nearing the end of its development and will come into force by December 2002. The United Kingdom will be obliged to translate the directive into its domestic circumstances and to ensure that the relevant authorities fulfil the duties that are set out in the directive. I mentioned the vague nature of some of the duties in article 5; they will be clarified in the directive to which I referred. We should bear in mind the fact that the convention was drafted to apply to a wide range of diverse nations, including nations such as Kazakhstan and Albania. The forthcoming directive will adapt the provisions to a European context and, as a result, will place much clearer and more specific legal duties on member states.

I understand that at first sight it might seem attractive to use the bill to give some force to article 5 of the Aarhus convention, but the Executive considers it more appropriate to wait for the European directive to clarify the somewhat vague duties that are set out in article 5.

There are two arguments against amendment 124. First, some of the duties in the Aarhus convention are undefined and can be delivered effectively through administrative means. Secondly, the EC directive on public access to environmental information, which will be in place by the end of the year, will represent a much better vehicle to formalise the duties in article 5. On that basis, I ask the committee not to support amendment 124.

Amendments 125 and 128 would require the new Aarhus-compliant environmental information regulations to come into force within one year of royal assent being given to the bill. Robin Harper said that he did not want those regulations to be left behind. The fact that we have chosen the bill as the vehicle to refer to the Aarhus convention shows good will and good intent on the part of ministers. It is our intention that the EIRs will be in place by the end of the year, which is within a year of the expected date of royal assent.

We consider it inappropriate for the bill to require ministers to bring forward the EIRs within a year, regardless of what might happen. There could be any number of legitimate reasons why it is not possible to introduce the regulations within 12 months. For example, in relation to amendment 124, I mentioned the work that is being done to develop the EC directive on public access to environmental information. Issues that arise from

that work might require us to amend the detail of the regulations. Similarly, as some of the matters involved are complex, I cannot rule out the need to take legal advice.

I do not expect problems but, because nobody can be sure that problems will not arise, I ask the committee not to support amendments 125 and 128. I am happy to stand by the existing commitment to have the regulations in place as soon as practicable, which we hope will be within a year of royal assent. The committee will understand that it does not make sense to tie our hands in the way that is set out in amendments 125 and 128.

Robin Harper: I feel that the term "as soon as practicable" is pretty elastic—we have learned that during the past year or so. For that reason, I will move amendment 125. It has been brought to my attention that environmental information is often particularly difficult to get hold of. The quicker we have regulations that cover environmental information, the better.

The Convener: If an amendment is moved at stage 2, it is difficult to lodge a similar amendment at stage 3. Robin Harper could bring back a similar amendment at stage 3 and have the issue debated in a plenary session.

Robin Harper: Perhaps the amendment could be in a modified form. In that case, I will not move amendment 125.

Michael Matheson: I have nothing to add.

Amendment 124, by agreement, withdrawn.

Amendment 125 not moved.

Section 62 agreed to.

Section 63—Power to amend or repeal enactments prohibiting disclosure of information

Amendment 46 not moved.

Section 63 agreed to.

Sections 64 to 66 agreed to.

Section 67—Scottish Parliament and Scottish Administration

The Convener: Amendment 22 is in a group on its own.

Michael Matheson: Amendment 22 is a probing amendment, which would delete the exemption from prosecution for the parliamentary corporation and Scottish Administration that is provided in section 67. If those bodies are to be exempt from prosecution, the reasons for that exemption should be clearly stated in the bill. I would be grateful if the minister could clarify why those bodies have been included.

I move amendment 22.

Mr Wallace: I understand why Michael Matheson lodged this probing amendment, which, on the face of it, seems an attractive proposition. Section 67 makes provision concerning the application of the bill to the Scottish Parliament and Scottish Administration, just as section 81 of the United Kingdom Freedom of Information Act 2000 makes such provision for Government departments, the House of Commons, the House of Lords and the Northern Ireland Assembly.

Although the Crown may not be prosecuted under the terms of section 40(2)(a) of the Crown Proceedings Act 1947, section 64 and paragraph 10 of schedule 3 of the bill would apply to a person in the public service of the Crown who is a member of staff of the Scottish Administration. Section 40(2)(a) of the Crown Proceedings Act 1947 was amended by the Scotland Act 1998 to include the Scottish Administration. The Parliament is also open only to limited civil proceedings, according to the terms of section 40 of the Scotland Act 1998. I do not think that anyone here was around when the 1947 act was passed, but the arrangements in section 67 flow directly from the provisions of the Scotland Act 1998. That act gave the main new institutions in Scotland—the Scottish Administration and the Scottish Parliament—the same constitutional position as regards prosecutions as the Crown and the Crown in Parliament have in the United Kingdom. Amending those provisions in the bill is simply not an option, however attractive amendment 22 might appear. I urge Michael Matheson to withdraw his amendment.

Amendment 22, by agreement, withdrawn.

Section 67 agreed to.

Section 68 agreed to.

Section 69—Orders and regulations

The Convener: Amendment 126 is grouped with amendments 99, 100, 101, 127, 102, 104 and 103. If amendment 99 is agreed to, I cannot call amendment 100, as it will have been pre-empted.

Michael Matheson: Amendment 126 would require a positive procedure in Parliament to remove any body from schedule 1, although adding a body to schedule 1 would be subject to a negative procedure. Removing a body from the list of public authorities means that it is no longer subject to freedom of information legislation. That in itself is a serious undertaking and should be subject to positive procedure.

Amendments 99, 101, 102 and 103 are all in the name of Donald Gorrie, who has asked me to speak to them because I have been quiet all day. Those amendments would require fees regulations

made under section 9(4) and section 12 to be made by affirmative resolution. They would also require an order that concerns the application of the bill to specific information, and which is made under section 4(1), which limits new entries to schedule 1, to be made subject to affirmative resolution. Part of amendment 99 and all of amendment 102 are a response to recommendations from the Subordinate Legislation Committee and reflect the recommendation made in the Justice 1 Committee report on the bill that regulations made under sections 9 and 12 should be subject to affirmative resolution.

16:45

Amendments 101 and 103 are more technical. The Subordinate Legislation Committee highlighted an anomaly that arises from the drafting of sections 7(1) and 7(2). An order under section 4(1)(a) for a new entry to schedule 1 that, by reference to section 7(1), would limit the bill's application to

"information of a specific description",

would be subject to negative resolution.

Bear with me, as we are almost there. Donald Gorrie said that, as I do not understand amendments 101 and 103, members would not understand them either.

Section 7(2) will allow ministers, by an order, to amend schedule 1 entries to limit the bill's application to

"information of a specified description".

Such an order would be subject to affirmative resolution. The Subordinate Legislation Committee recommended that an order that limited the bill's application to

"information of a specified description"

should be made subject to affirmative resolution, as is provided for in section 7(1).

I wish I were a member of the Subordinate Legislation Committee, which looked at this matter in such detail.

Gordon Jackson: I am.

Michael Matheson: I rest my case.

I move amendment 126.

The Convener: I do not know whether Gordon Jackson, as a member of the Subordinate Legislation Committee, wants to explain that committee's points to us.

Gordon Jackson: At a quarter to 5? I think not.

The Convener: At any time.

Mr Wallace: Michael Matheson ably explained the recommendations that the Subordinate Legislation Committee made to us. I am pleased to support amendments 99, 101, 102 and 103. They will deliver the Subordinate Legislation Committee's recommendation that an order under section 4(1), which would limit the bill's coverage for a new entry to schedule 1, should be subject to affirmative resolution.

Michael Matheson's amendments—amendments 169, 100, 127 and 104—do not go as far as Donald Gorrie's, because they would not make subject to affirmative resolution the making of regulations for the general fee provisions in section 9(4), but would leave them subject to negative resolution. In addition, Michael Matheson wants the affirmative resolution procedure to be invoked every time an order is made under section 4(1) as part of the housekeeping action—I think that that was the Subordinate Legislation Committee's phrase—to remove an entry from schedule 1.

A section 4(1) order would apply to removing an authority that had been abolished; it would also apply to an authority that amended its name. The old name would have to be deleted and the new one added. It would be inappropriate and unnecessary to make subject to affirmative procedure section 4(1) orders that removed entries. However, if there were an attempt to abuse the powers of section 4(1)—the Subordinate Legislation Committee is always concerned about such potential abuse—I am sure that that would prompt a negative resolution to emerge.

The required safeguards are in place. We have reflected what the Subordinate Legislation Committee recommended. I urge, therefore, that amendment 126 be withdrawn, that amendments 100, 127 and 104 not be pressed and that amendments 99, 101, 102 and 103 be agreed to.

The Convener: I am sorry, minister. I was listening—honestly.

Mr Wallace: I know you were.

The Convener: I was just trying to work out which amendments you were accepting. I have now worked that out. Does Michael Matheson want to say anything further?

Michael Matheson: I have nothing to add.

The Convener: I am not surprised.

Amendment 126, by agreement, withdrawn.

Amendments 99 and 101 moved—[Michael Matheson]—and agreed to.

Amendment 127 not moved.

Amendment 102 moved—[Michael Matheson]—and agreed to.

Amendment 104 not moved.

Amendment 103 moved—[Michael Matheson]—and agreed to.

Section 69, as amended, agreed to.

Section 70—Interpretation

Amendment 27 moved—[Lord James Douglas-Hamilton]—and agreed to.

Amendments 51 and 23 not moved.

Section 70, as amended, agreed to.

Section 71—Giving of notice etc

Amendment 105 not moved.

Section 71 agreed to.

Section 72—Commencement

Amendment 128 not moved.

The Convener: Amendment 106, in the name of Donald Gorrie, is grouped with amendment 48. Amendment 106 does not pre-empt amendment 48, so if amendment 106 is agreed to, amendment 48 can still be called.

Maureen Macmillan: Donald Gorrie felt that five years was too long to wait for the implementation of the bill. After some discussions with the Executive, he lodged amendment 106, which would change the five years to four years. He believes that four years is a suitable length of time and I agree with him.

Michael Matheson's amendment 48 would change the five years to two years. I feel that that is too short. We must bear it in mind that local authorities will need time to prepare fully for the change to the new culture of openness.

I move amendment 106.

Michael Matheson: Amendment 48 would bring the commencement date forward from five years' time to two years' time. From evidence that we heard, it was obvious that the five-year wait was unacceptable and the committee made its recommendations to that effect:

"public authorities should already be getting themselves into a state of readiness for the freedom of information regime and that implementation should be possible within a maximum of two years of royal assent."

The evidence that we received from COSLA indicated that authorities would probably be prepared within a year to meet the demands that would be placed on them by the legislation. I therefore do not feel that there is any justification for the five-year delay in implementation—or four-year delay. Those time periods are exceptionally long.

We should consider the international precedents. Such delays were not considered necessary in New Zealand, where freedom of information legislation came into force seven months after it was passed. Australia's came in after nine months, and Canada's after 12 months.

The amendment that Maureen Macmillan moved would bring the implementation date of the bill in line with the implementation date of the UK act. However, during our consideration of the bill we did not receive any evidence that suggested that the implementation period for the bill should be either four or five years. As I stated earlier, the committee recommended that it be implemented within a maximum of two years. That is the reason for my amendment, which would reduce the commencement time for the bill from five to two years.

Gordon Jackson: I will accept a reduction in the commencement time for the bill to four years and leave Michael Matheson to do what he wants at stage 3. However, I cannot for the life of me see why it should take four years to do the things that are outlined in the bill. That is the length of the first world war. I do not understand why local authorities need four years to put in place the freedom of information regime. My experience of human nature—including mine—is that things take people as long as they get to do them. The idea that it will take four years to implement the provisions of the bill is absurd. For today, I will let that go, but I do not understand—especially from Jim Wallace, who is a passionate believer in freedom of information—why it should take people four years to get up to speed. That is nonsensical. I agree totally with Michael Matheson, but at the same time I do not—if he knows what I mean.

Mr Wallace: I realise that we are getting perilously close to the end of stage 2, so I will try not to take up too much time.

Gordon Jackson mentioned my enthusiasm for freedom of information. At stage 1, I indicated the many ways in which the Executive is already taking action to expedite the implementation of the Freedom of Information (Scotland) Bill, if and when Parliament passes it.

It is important to point out that section 72 of the bill and Donald Gorrie's amendment to it do not state that the bill would not take effect for four years—far from it. The bill states that the commencement of the bill must be completed no later than five years from royal assent. In other words, if for any reason there was foot dragging, the bill would kick in automatically after five years. The provision is included as a backstop, not as an implementation date. That is an important distinction. The commencement provision is intended to offer flexibility to ensure effective implementation, but not to stretch implementation

into the years ahead.

I support the proposal to bring forward the commencement date to four years from the date of royal assent. That reflects some of the concerns that were expressed by the committee. I would find it unacceptable if it took five years to implement the bill. Implementation should take place as soon as possible. I hope that it will be possible to implement the bill within a relatively short period. However, it is important to point out that in Ireland, which adopted a phased approach to implementation to allow for training, the bill was implemented first in Government departments and then in local authorities. A year later, it was implemented by voluntary hospitals and health bodies, and then by state industrial bodies and educational establishments. This year, 38 further bodies are due to come on stream, including the Irish Legal Aid Board, Bord Scannán na hÉireann—the Irish Film Board—and the fisheries boards.

The important point, to which sufficient weight has not been given, is that it will take time for the commissioner's office to be established from a standing start and to become fully operational; for the commissioner to prepare guidance on publication schemes; for the commissioner to prepare model publication schemes under section 24 of the bill—if he or she considers that helpful; and for public authorities to comply with those schemes. That is why we do not want to be boxed in by a two-year limit. It is also important to ensure that staff are made aware of their responsibilities and that there is time to ensure proper training. We have talked about the key role that the commissioner will play in promoting and enforcing the legislation, and in encouraging best practice. It is therefore important in the commencement provisions to allow sufficient time for the commissioner's office to become fully operational.

As I indicated at stage 1, we have done as much as we can, prior to the bill's being enacted, to get the commissioner's office up and running. As a result, changes will have to be made to the standing orders of the Parliament. The selection arrangements are now in train, but the commissioner cannot be appointed until the bill has received royal assent. The person appointed may then require time to give notice.

I want these provisions to be on the statute book as soon as possible. If a two-year commencement date were to be enforced, irrespective of whether the commissioner had published all that he or she wished to publish, the implementation of the bill could be messy. A four-year commencement date will allow some flexibility in the involvement of the commissioner. I hope that members will accept as a backstop Donald Gorrie's amendment, which was moved by Maureen Macmillan. It is not intended that we should wait four years before implementing the bill; we want to press on with this legislation. However, if, for some reason, there is slippage, there is that backstop to implement the bill fully after four years. My sincere hope is that we can do it in a much shorter time than that.

17:00

Maureen Macmillan: Are you thinking of publishing some sort of timetable for a roll-out of the bill and are there any guidelines? You talked about the Irish experience. Are you thinking about something similar here?

Mr Wallace: We obviously want to consult the commissioner—which we cannot do until he or she is appointed—on whether to go for the big-bang approach, whereby everyone comes on-stream on the same day, or whether to phase in the commissioner's office as it was phased in in Ireland, which means that people with expertise and training can be rolled on to the next group of organisations. That decision has still to be made and can best be made when we have the benefit of the commissioner being in post.

The committee should not forget that, under section 72(3), Scottish ministers are required to

"prepare, and lay before the Parliament, a report of their proposals for bringing fully into force the provisions of this Act."

That is an opportunity for Parliament to maintain scrutiny of what ministers are doing to bring the bill fully into effect.

Lord James Douglas-Hamilton: I would be grateful if we could return to the issue at a later stage of the bill. Four years seems an enormously long time. We have just passed emergency legislation that, to my knowledge, comes into effect at once. If the bill is to be enacted, it should be implemented within a realistic time scale.

Michael Matheson: I am not persuaded by the minister's arguments. He said that it would take four years to set up the information commissioner's office. However, the guardian's office for the Adults with Incapacity (Scotland) Act 2000 was up and running within months—people were appointed, the offices were allocated in Falkirk and staff were recruited. Within a year, that office was on the go. I am therefore not persuaded that it would take a long time for the information commissioner's office to get up and running. Four years may be the backstop, but it is likely that public authorities will be knocking at the Executive's door, wanting to push the bill's implementation to the full four years. That is the length of a term of the Scottish Parliament. If it takes the full four years to implement the bill, that will probably not be until the end of the next term of the Scottish Parliament.

I will not support Donald Gorrie's amendment 106, although four years is slightly better than five years. I will lodge an amendment at stage 3, because I do not believe that a four-year time scale is acceptable or necessary.

The Convener: I do not want to take the debate any further, as members have made their views on the matter clear. I ask Maureen Macmillan to press or withdraw amendment 106.

Maureen Macmillan: I press amendment 106.

The Convener: The question is, that amendment 106 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Jackson, Gordon (Glasgow Govan) (Lab)
Macmillan, Maureen (Highlands and Islands) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)

AGAINST

Douglas-Hamilton, Lord James (Lothians) (Con)
Grahame, Christine (South of Scotland) (SNP)
Matheson, Michael (Central Scotland) (SNP)

The Convener: The result of the division is: For 3, Against 3, Abstentions 0. I exercise my casting vote against the amendment, to maintain the status quo.

Amendment 106 disagreed to.

Amendment 48 not moved.

Section 72 agreed to.

Section 73 agreed to.

Long title agreed to.

The Convener: That ends our stage 2 consideration of the bill.

Advisers

The Convener: Although we have reached the end of our stage 2 consideration of the Freedom of Information (Scotland) Bill, we have not reached the end of our agenda—she says, waving her arms, lest the meeting become inquorate.

Item 4 concerns the appointment of an adviser to the committee on alternatives for custody. I ask members to have a quick look at the paper on that. I also remind members that one of the justice committees will scrutinise the criminal justice bill, which is expected to be introduced around Easter.

Pardon me if I am hurrying too much. We should first deal with the appointment of an adviser on alternatives to custody. We should also comment on the proposed role and specifications but, at this stage in the day, let us simply agree in principle to the appointment of an adviser. Perhaps the clerks can circulate the suggested role and specifications to members, who can then say whether what has been suggested is appropriate.

Item 5 also concerns the appointment of an adviser, but this time for the criminal justice bill, which has not yet been allocated to a committee. The Justice 2 Committee has perhaps jumped the gun by agreeing in principle to the appointment of an adviser. I believe that we should also agree in principle to that, as the bill will be substantial and wide-ranging. Does the committee agree in principle to the appointment of an adviser?

Members *indicated agreement*.

Paul Martin: What is the status of the bill?

The Convener: It will not be introduced until just before Easter. At that stage, the bill will be allocated to one of the justice committees.

Michael Matheson: I think that we declared an interest in the bill.

The Convener: Whether the bill is allocated to this committee is a matter for negotiation. It would be helpful if committee members could let me know their views on whether we want to deal with the criminal justice bill. The alternative is that we deal with the poindings bill and title conditions bill.

Lord James Douglas-Hamilton: This committee should deal with the criminal justice bill.

The Convener: I would be quite content for that to happen. Do other members wish to express a view? Does Maureen Macmillan have a view?

Maureen Macmillan: I am sorry, but I am trying to remember—

The Convener: Perhaps it is too late in the day.

Michael Matheson: I am sure that the committee previously expressed an interest in

dealing with the criminal justice bill.

The Convener: I would be interested in the committee's pursuing that bill. That makes three of us. Does Maureen Macmillan have a view?

Maureen Macmillan: I express an interest in the bill as well.

The Convener: That is four.

Lord James Douglas-Hamilton: The Justice 2 Committee is dealing with the huge Land Reform (Scotland) Bill.

The Convener: Do not worry. I shall argue about the timetabling but, if there is a conflict, the decision on which committee should deal with the criminal justice bill is for the Parliamentary Bureau and the business managers. My attitude is that we have space because we have finished dealing with the Freedom of Information (Scotland) Bill.

We now have only one or two things to finish off, such as our regulation of legal aid inquiry, which can be picked up. We have finished our report on legal aid. We are about to begin the early stages of our inquiry into alternatives to custody, but our timetable for dealing with legislation is clear. We could pick up the criminal justice bill and run with it, whereas consideration of the Land Reform (Scotland) Bill will be ongoing.

Is the committee content to take that view?

Members *indicated agreement*.

The Convener: There are a few more final points to be dealt with. Our away day has been cancelled, as it would be a waste of time to set it up on 18 and 19 March, when there will be railway strikes.

Our fact-finding visit to Peterhead prison has been arranged for 25 March. Michael Matheson and I have indicated that we want to go. Anyone else who wants to go to Peterhead should inform the clerks by this Friday. Having already been to Peterhead on an informal visit, I can say that the visit is well worth while. It will be extremely interesting to speak to the prison officers about the prison estates review and about the STOP 2000 programme.

When the Parliament goes to Aberdeen in May, we intend that an informal visit to Grampian police headquarters will be arranged. It will be quite useful for the committee to see how that operates.

The committee's debate on legal aid takes place on Wednesday 13 March, so I hope that all members will be in the chamber for that. Next Tuesday, we will meet at 1.45 in committee room 2 to consider the details of how to handle that debate. The committee might want to take a view on that. We will also have some other exciting items on the agenda. I know that you cannot wait.

That concludes this meeting of the Justice 1 Committee. I thank you all for your tolerance during such a long day.

Meeting closed at 17:08.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice at the Document Supply Centre.

No proofs of the *Official Report* can be supplied. Members who want to suggest corrections for the archive edition should mark them clearly in the daily edition, and send it to the Official Report, 375 High Street, Edinburgh EH99 1SP. Suggested corrections in any other form cannot be accepted.

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