JUSTICE 2 COMMITTEE

Tuesday 18 February 2003
(*Morning*)

Session 1

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JUSTICE 2 COMMITTEE
5th Meeting 2003, Session 1

CONVENER

*Pauline McNeill (Glasgow Kelvin) (Lab)

DEPUTY CONVENER

*Bill Aitken (Glasgow) (Con)

COMMITTEE MEMBERS

Scott Barrie (Dunfermline West) (Lab)
Mr Duncan Hamilton (Highlands and Islands) (SNP)
George Lyon (Argyll and Bute) (LD)
Mr Alasdair Morrison (Western Isles) (Lab)
*Stewart Stevenson (Banff and Buchan) (SNP)

COMMITTEE SUBSTITUTES

Roseanna Cunningham (Perth) (SNP)
Lord James Douglas-Hamilton (Lothians) (Con)
Donald Gorrie (Central Scotland) (LD)
Dr Sylvia Jackson (Stirling) (Lab)

*attended

THE FOLLOWING ALSO ATTENDED:

Hugh Henry (Deputy Minister for Justice)

CLERK TO THE COMMITTEE

Gillian Baxendine

SENIOR ASSISTANT CLERK

Irene Fleming

ASSISTANT CLERK

Richard Hough

LOCATION

Committee Room 4

Scottish Parliament

Justice 2 Committee

Tuesday 18 February 2003

(*Morning*)

[THE CONVENER *opened the meeting at 10:56*]

Item in Private

The Convener (Pauline McNeill): I welcome everyone to the fifth meeting in 2003 of the Justice 2 Committee. I ask for the committee's approval to take item 7 in private. Item 7 is consideration of the committee's legacy paper—the words of wisdom that we will pass on to future sessions of Parliament. Do members agree to take the item in private?

Members *indicated agreement*.

The Convener: I have received apologies from Scott Barrie and George Lyon.

Subordinate Legislation

The Convener: Item 2 is subordinate legislation. I welcome the Deputy Minister for Justice, Hugh Henry, and all his officials.

Members of the Parole Board (Removal Tribunal) Regulations 2003 (Draft)

The Convener: The Members of the Parole Board (Removal Tribunal) Regulations 2003 are to be considered under the affirmative procedure. Members will have in their papers note J2/03/5/1, which has been prepared for them by the clerks. Members should note that the Subordinate Legislation Committee asked the Executive to explain the legal basis of regulation 5(3), given that there does not appear to be any flexibility in the parent act. The Subordinate Legislation Committee states that, although the parent act states that the tribunal shall consist of three members, regulation 5(3) makes provision for the tribunal to operate with fewer than three members. I ask the Deputy Minister for Justice to speak to and move motion S1M-3904.

The Deputy Minister for Justice (Hugh Henry): The regulations set out the procedure under which the tribunal of the Parole Board for Scotland may investigate the conduct of a member of the board with a view to his or her possible removal as a member of the board.

The background to the regulations goes back to the temporary sheriffs case of Starrs and Chalmers in 1999. As the committee will be aware, the decision in that case prompted changes to the tenure of certain persons exercising judicial functions. As a result the Bail, Judicial Appointments etc (Scotland) Act 2000 created—among other things—a framework for the removal of part-time sheriffs and for the removal and restrictions of functions of justices of the peace.

In recognition of the court-like functions of the Parole Board when considering certain categories of prisoners for release, notably life prisoners, it was considered that a similar framework should be created for the removal of Parole Board members. That was done in the Convention Rights (Compliance) (Scotland) Act 2001. Section 5 of the 2001 act, which amends provisions of the Prisoners and Criminal Proceedings (Scotland) Act 1993, deals with the arrangements governing the removal from office of members of the Parole Board if they are found to be unfit for office by reason of inability, neglect of duty or misbehaviour.

Prior to the arrangements set out in the 2001 act, board members could in theory be removed at

will by the Scottish ministers and therefore did not have the security of tenure that the courts in Starrs and Chalmers considered appropriate for judicial members. The 2001 act makes provisions for the Scottish ministers to request the Lord President of the Court of Session to convene a tribunal to conduct an investigation of a member of the board.

We have no reason to suppose that the measure would require to be used other than very rarely. However, there may be occasions on which it is required. The board undertakes a vital role in our criminal justice system; it decides about the release of prisoners on licence. Membership of the board requires an individual to maintain high standards both in their professional and private lives. It is not possible to specify exactly what circumstances would result in the procedures being invoked. They are flexible and allow for a range of circumstances. The key aspect of the process is that an independent tribunal carries out any investigation into fitness for office.

The tribunal will consist of a High Court judge or sheriff principal in the chair, a second person who has been legally qualified for at least 10 years and a lay person. The 1993 act, as amended by the 2001 act, states:

"Regulations, made by the Scottish Ministers—

(a) may make provision enabling the tribunal, at any time during an investigation, to suspend a member from office and providing as to the effect and duration of such suspension; and

(b) shall make such further provision as respects the tribunal as the Scottish Ministers consider necessary or expedient, including provision for the procedure to be followed by and before it."

The regulations are in exercise of those powers. I should indicate, in passing, that they mirror those already in force as respects part-time sheriffs and justices of the peace.

The regulations provide that, before an investigation into the conduct of a Parole Board member commences, the Scottish ministers shall give the board member written notice of the investigation and of the reasons for requesting it. As I have mentioned, the tribunal shall consist of three members, but provision is made in the regulations for circumstances in which a member becomes incapacitated to act. As the convener indicated, the Subordinate Legislation Committee has commented on that part of the regulations, which I will return to in a minute.

The tribunal will be able to determine its own procedure, subject to the provisions of the regulations. However, the person being investigated has the opportunity to make written or oral representation, either personally or through a representative, on the matters that are subject to investigation. The tribunal will sit in private and the proceedings will be confidential.

The tribunal will have the power to suspend the board member from office, if it sees fit, and to end the suspension. It will also have the power to lift the suspension temporarily to allow the board member to complete a case in which he or she is involved. Once the investigation has been completed, the tribunal must send a draft of its findings to the board member, who will have the opportunity to comment. That will give the member the chance to challenge any aspect of the tribunal's findings with which he or she is dissatisfied. The report of the outcome of the investigation will be sent to the Scottish ministers. It will indicate whether the tribunal has decided to order the board member's removal from office.

11:00

I am aware that the Subordinate Legislation Committee has expressed some misgivings about regulation 5(3), which will provide that where the number of tribunal members is reduced for one of the reasons that are mentioned in regulation 5(1)—provided that the president of the tribunal is not the member concerned—a new tribunal member need not be appointed unless the board member under investigation so wishes. The Subordinate Legislation Committee has questioned whether we have the power to include such a provision in the regulations, given that paragraph 3B of schedule 2 to the 1993 act requires the tribunal to consist of three members.

As we said in our response to the Subordinate Legislation Committee on 6 February, we are satisfied that regulation 5(3) is intra vires, because of the provisions of paragraph 3D(b) of schedule 2, which enable the Scottish ministers to make such further provision as they consider necessary or expedient. In our view, the term "expedient" is sufficiently wide to support the approach that we have taken.

The key feature of the arrangements is that an independent tribunal—not the Scottish ministers—will take the decision on whether a Parole Board member is unfit and should be removed from office. We are happy to propose an important safeguard that will protect the Parole Board from political interference and maintain its independence.

I move,

That the Justice 2 Committee, in consideration of the draft Members of the Parole Board (Removal Tribunal) Regulations 2003, recommends that the Regulations be approved.

The Convener: Do members have any questions?

Bill Aitken (Glasgow) (Con): The regulations are another example of legislation that has been necessitated by an aspect of Starrs and Chalmers. They are a classic illustration of a sledgehammer being used to crack a nut. However, I accept that the minister has had no option and I have no objection to the regulations.

The Convener: I want to be clear about the effect of the regulations. Does the fact that they will give powers for the removal of members of the Parole Board mean that they will have a similar effect to provisions in the Bail, Judicial Appointments etc (Scotland) Act 2000? Why did we not tackle the issue sooner? Did we think that such powers would not be necessary?

Hugh Henry: I am not immediately familiar with the reason why the matter was not dealt with earlier. As Bill Aitken said, we have been obliged to act. We think it right to ensure that the proper statutory provision is in place to ensure the independence of the Parole Board when it comes to removing a member of the board. The regulation closes a potential loophole, which could have left us open to accusation had we not moved in this way.

Motion agreed to.

That the Justice 2 Committee, in consideration of the draft Members of the Parole Board (Removal Tribunal) Regulations 2003, recommends that the Order be approved.

Regulation of Investigatory Powers (Covert Human Intelligence Sources – Code of Practice) (Scotland) Order 2003 (Draft)

Regulation of Investigatory Powers (Covert Surveillance – Code of Practice) (Scotland) Order 2003 (Draft)

The Convener: We will now consider two further draft instruments under the affirmative procedure. Members have a note on the draft orders. I ask the minister to speak to the motions.

Hugh Henry: The two draft orders before the committee are the Regulation of Investigatory Powers (Covert Surveillance – Code of Practice) (Scotland) Order 2003 and the Regulation of Investigatory Powers (Covert Intelligence Sources – Code of Practice) (Scotland) Order 2003. Subject to approval by a resolution of the Parliament, the orders will bring into operation revised codes of practice on the use of covert surveillance and covert human intelligence sources by a number of public authorities in Scotland. The codes set out the various factors that are to be considered by the relevant public authorities in relation to directed surveillance, intrusive surveillance or covert human intelligence sources.

Section 6 of the Regulation of Investigatory Powers (Scotland) Act 2000 provides for the authorisation of directed surveillance by the public authorities that are listed in section 8 of the act. Those include the police, the Scottish Executive, local government, the national health service in Scotland and the Scottish Environment Protection Agency.

Section 7 of the act provides for the authorisation of the use or conduct of covert human intelligence sources by those authorities. Directed surveillance can be authorised only if it is necessary on one or more of the statutory grounds that are listed in section 6(3) of the act, proportionate to what is sought to be achieved by that conduct or use of a source and if arrangements exist for the security and welfare of the source.

Section 10 of the act provides for the chief constables of Scottish police forces to carry out intrusive surveillance. An authorisation for such surveillance can be issued only if that surveillance is necessary for the purpose of preventing or detecting serious crime. Serious crime is defined in the act as an offence for which a person who has attained the age of 21 and has no previous convictions could reasonably be expected to be sentenced to imprisonment for a term of three years or more. All authorisations for intrusive

surveillance must be proportionate to what is sought to be achieved by carrying it out and may be granted only if the information sought could not reasonably be obtained by other means.

These forms of surveillance are not new—public authorities have been able to use them for some time. The 2000 act regulated the use of powerful investigative tools where they assist in preventing or detecting crime, preventing disorder, ensuring the interests of public safety and protecting public health.

As a further safeguard to ensure their proper and appropriate use, section 24 of the act requires the Scottish ministers to issue one or more codes of practice that cover the powers and duties contained in the act. Any person or body undertaking the surveillance activities covered by the act will be required to have regard to those codes of practice, which will be admissible in civil and criminal proceedings in court and published and accessible to the public.

As required by section 24(3) of the act, we first published draft codes of practice for consultation between October and December 2000. At the same time, those draft codes were issued as interim codes of practice for use by relevant public authorities pending the outcome of the consultation. The draft codes were sent to more than 100 bodies and stakeholders, from which we received 14 responses. In general, respondents welcomed the codes. Where comments were submitted, they were mainly of a technical nature. All comments and representations were carefully considered in producing the final versions of the codes. A summary of the responses and changes that were made as a result is contained in annexe A to the Executive notes to the draft orders.

We have taken care in the preparation of the codes. The consultation exercise raised a number of complex issues. Moreover, we needed to ensure consistency and compatibility between our codes and those issued by the Home Office under the United Kingdom Regulation of Investigatory Powers Act 2000. That point is particularly important because of the surveillance commissioners' UK-wide function—they provide oversight for all UK surveillance legislation.

I stress that the codes are not a new imposition on public authorities. They build on our interim codes of practice, which were issued in winter 2000, and provide an important framework for relevant public authorities to exercise the powers and duties under the Regulation of Investigatory Powers (Scotland) Act 2000. In the intervening period, public authorities and others have not made us aware of any difficulties that arise from the operation of the interim codes.

The revised codes are intended to be self-explanatory. As required by the legislation, all 102 consultees have been sent copies and members of the public can access both codes on the Scottish Executive website. Do you want me to run through the content of the codes, convener?

The Convener: Yes, please.

Hugh Henry: Chapter 1 of the covert surveillance code is an introduction. It sets out the scope of the code, including its admissibility as evidence in criminal and civil proceedings. Chapter 2 explains the relationship between the Regulation of Investigatory Powers (Scotland) Act 2000 and the UK Regulation of Investigatory Powers Act 2000. Chapter 3 provides general rules on the authorisation of directed and intrusive surveillance under the act.

Chapter 4, coupled with annexe A, provides special rules on the authorisation of directed and intrusive surveillance under the Regulation of Investigatory Powers (Scotland) Act 2000, particularly in cases in which confidential information is involved. That includes matters that are subject to legal privilege, confidential personal information and confidential journalistic material. The code requires that, in cases in which confidential knowledge will be acquired, the authorisation of directed or intrusive surveillance is subject to a higher level of authorisation. Annexe A lists the authorising officers for each public authority.

Chapters 5 and 6 explain the statutory requirements and authorisation procedures for directed and intrusive surveillance. Chapter 7 details the authorisation procedures for entry on or interference with property or wireless telegraphy under part III of the Police Act 1997. As such, the code, and particularly chapter 7, supersedes the code of practice that was issued in 1999 pursuant to section 101(3) of the 1997 act. Chapters 8 and 9 detail the oversight and complaints arrangements provided for by the Office of Surveillance Commissioners and the Investigatory Powers Tribunal.

Chapters 1 and 2 of the covert human intelligence code deal with general points as well as the code's relationship with the UK act. Along with chapters 6 and 7, which deal with oversight and complaints, the chapters cover the same areas as the equivalent chapters in the covert surveillance code. Chapter 3 provides general rules on the authorisation of a covert human intelligence source.

Like the equivalent chapter for the covert surveillance code, chapter 4, coupled with annexe A, provides special rules on the authorisation of a covert human intelligence source, particularly in cases in which confidential information is involved. Chapter 5 explains the statutory requirements and authorisation procedures for covert human intelligence sources.

In conclusion, the codes are an important safeguard in ensuring that the covert surveillance provisions under the Regulation of Investigatory Powers (Scotland) Act 2000 are used fairly and proportionately.

The Convener: Thank you. Do members have any questions?

Stewart Stevenson (Banff and Buchan) (SNP): I note that the Association of Chief Police Officers in Scotland highlighted potential difficulties with restricting authorisation to superintendents and suggested that inspectors might be sufficient. The minister has rejected that, except in the case of urgency, which is fine as far as it goes. Paragraph 5.18 of the code provides that authorisations that are granted by

"a person who is entitled to act only in urgent cases will, unless renewed, cease to have effect after seventy-two hours".

That is fair enough. However, it appears from the wording in paragraph 5.22 that the authorising officer, who in an urgent case can be an inspector, can nonetheless continue the authorisation for the purpose for which it was given for a further 12 months. Does that mean that, under the code as worded, an inspector acting in a case of urgency may initially authorise for a period of 72 hours and on expiry of that renew the authorisation for 12 months?

11:15

Hugh Henry: On your first point, the superintendent rank was deemed the appropriate level to ensure the necessary seniority for granting authorisation, given the proportionality and necessity tests that the legislation imposes. Nevertheless, the Regulation of Investigatory Powers (Prescription of Offices, Ranks and Positions) (Scotland) Order 2000 allows for authorisation by an inspector in urgent cases, which goes some way towards meeting the concerns. On your second point, which code are we talking about?

Stewart Stevenson: I am in the first instance talking about the covert human intelligence code.

Hugh Henry: The urgency would apply for 72 hours. In such a case, the inspector could be involved. After the 72 hours, the urgency would have passed, in which case the power to authorise would revert to the superintendent.

Stewart Stevenson: With respect, minister, paragraph 5.22 of the code says that the authorising officer—who could be an inspector in an urgent case—may renew the authorisation. Furthermore, paragraph 5.23 says:

"Any person who would be entitled to grant a new authorisation can renew an authorisation."

The code does not qualify that statement by limiting the ability to renew an authorisation to superintendents; it says "Any person". An inspector is entitled to grant an authorisation, albeit only in urgent cases. However, according to the code as drafted, the power to renew does not appear to be restricted to superintendents.

I do not seek to make life difficult by opposing the order. I am perfectly content that inspectors should have that power, but clarity is necessary if the order is to be implemented appropriately. If my concerns about the drafting are well founded but you take a different view from mine, I give you the opportunity to lay an amended order that would give effect to your original intention rather than to my preference.

The Convener: I do not think that there was a question in there.

Hugh Henry: The arrangements for authorisation are set out in the Regulation of Investigatory Powers (Prescription of Offices, Ranks and Positions) (Scotland) Order 2000, which specifies that the rank required is superintendent but that, in cases of urgency, it can be an inspector. The schedule to that order states clearly that, in normal cases, the prescribed office is superintendent and, specifically, that an inspector will be involved only in urgent cases. Stewart Stevenson's point is about what happens when an authorisation is renewed and how long a renewal that an inspector makes can last. Is that correct?

Stewart Stevenson: That is the bottom line. I merely suggest—I do not insist—that the drafting of paragraphs 5.22 and 5.23 of the code of practice on the use of covert human intelligence sources appears to confer on inspectors the right to renew for the same periods as would be the case for superintendents because of the power that paragraph 5.18 creates for inspectors to provide the authorisation in urgent cases.

Hugh Henry: It is our belief that paragraph 5.22 of the code on the use of covert human intelligence sources allows renewals to be granted by an inspector but only in cases of urgency. Such renewals would last for a period of 72 hours.

Stewart Stevenson: I think that other committee members share my concern that the drafting does not give effect to what the minister has said. To avoid unduly prolonging our questioning, I simply ask the minister to note the issue and consider taking it away. I shall not oppose the order in its present form, notwithstanding the fact that I think that it is ineptly drafted. I merely seek to draw to the minister's attention the fact that the code appears to work in a way that is different from what is intended.

Hugh Henry: My contention is that the period of 12 months could be authorised only by the

superintendent. The most that an inspector could renew for is a period of 72 hours in cases of urgency. Paragraph 5.23 states:

"Authorisations may be renewed more than once, if necessary, provided they continue to meet the criteria for authorisation."

Those criteria for authorisation would be the same as those that applied before.

I am not sure that the defect that Stewart Stevenson claims to exist exists in fact. The code of practice is already in the public domain. If there is an anomaly, we will look to see how it might be dealt with. I am not necessarily sure that such an anomaly exists, but it is worth looking at.

Stewart Stevenson: I thank the minister. I am quite content with that.

The Convener: The committee has an opportunity to debate the motion. I ask the committee to consider the fact that, in 2000, we scrutinised the Regulation of Investigatory Powers (Scotland) Bill. At the time, we were keen to see the code as soon as possible after the bill was enacted, because the code contains a lot of detailed and important information that relates to the act. It strikes me that we should perhaps have been involved at an earlier point in the process. I realise that nothing untoward has happened and that the normal course of events has been followed, but the fact is that our committee scrutinised the original bill and was particularly keen to see the code.

I imagine that one reason why we missed out on the consultation was that the consultation period was around the time that the Justice and Home Affairs Committee split into two committees—perhaps that was why we could not reply to the consultation. I put it to the committee that, in future, we may want to be involved in the detail of such an important code at an earlier point, rather than just be presented with the code as part of the procedure for agreeing to the motion to recommend that the order be approved.

Hugh Henry: You make a reasonable point, convener. The code went out for wide consultation. In such cases, the committee might find it useful to be able to reflect on the consultation and on its implications. Committee members would then be able to influence the process before any final decision was taken. That point is well made.

Stewart Stevenson: I want to ask a further point of clarification. At paragraph 2.1, the code refers to the relationship between the code and the UK Regulation of Investigatory Powers Act 2000. What processes or procedures would be followed if, at the point that the authorisation was granted, paragraph a did not apply? In other words, if it was believed that the covert human intelligence would operate mainly within Scotland but, as the situation developed, it emerged that it would take place mainly outwith Scotland, would that change the authorisation that was required? Would the authorisation be invalidated? If there were an honest belief at the outset that the monitoring would take place mainly in Scotland but things transpired otherwise, would the authorisation be invalidated?

Hugh Henry: You referred to paragraph 2.1. However, paragraph 2.2 states that,

"Where the conduct authorised is likely to take place in Scotland, authorisation should be granted under the … Act, unless"

it has been

"obtained by certain public authorities".

The conduct would be covered within and outwith Scotland. I am not aware of any anomalies if the authorisation for the conduct started in Scotland and then moved beyond Scotland.

Stewart Stevenson: Does paragraph 2.3 cover those circumstances?

Hugh Henry: Paragraph 2.3 would apply, for example, to a source that started outwith Scotland and then moved to Scotland. It would allow the authorisation to continue for up to three weeks, not indefinitely. That may partially cover your point.

Stewart Stevenson: Okay. Finally, I have a point on the Regulation of Investigatory Powers (Covert Surveillance - Code of Practice) (Scotland) Order 2003.

The Convener: We will deal with that in a moment. Do you have any further questions on the CHIS code?

Stewart Stevenson: No.

The Convener: I have a question. In the consultation, the Law Society of Scotland remarked that the provisions relating to legal privilege seem to be tighter than the Home Office guidance. I do not have a clue what that means. I am just reading through the section entitled "Communications subject to Legal Privilege". Was that issue resolved? Can you comment on whether the Law Society of Scotland was right to be concerned?

Hugh Henry: Yes. We accepted some of what the Law Society of Scotland said. There is now absolute consistency in both areas.

The Convener: It strikes me that the issue of communications that are subject to legal privilege is straightforward, but we have not had the opportunity to examine it, because it did not come up when we were scrutinising the Regulation of Investigatory Powers (Scotland) Bill. Anyway, the point has already been made. Are there any further points?

Bill Aitken: No, the order seems okay.

The Convener: Do you wish to say anything in conclusion, minister?

Hugh Henry: No thank you, convener.

Motion moved,

That the Justice 2 Committee, in consideration of the draft Regulation of Investigatory Powers (Covert Human Intelligence Sources – Code of Practice) (Scotland) Order 2003, recommends that the Order be approved.—[*Hugh Henry.*]

Motion agreed to.

The Convener: Members also have a note prepared by the clerks on the draft Regulation of Investigatory Powers (Covert Surveillance – Code of Practice) (Scotland) Order 2003, which we will now consider.

11:30

Stewart Stevenson: Paragraph 3.6 of the covert surveillance code of practice is on collateral intrusion. Particularly when the surveillance is of electronic communications systems—I am thinking of electronic mail systems—what steps is it envisaged would be taken to prevent the loss of privacy of anyone who was not directly the subject of surveillance? How would their privacy be protected?

Hugh Henry: That is outwith the scope of the codes and is covered by the UK act. It is a reserved matter.

The Convener: That is because it deals with telecommunications.

Stewart Stevenson: That is a fair comment.

Motion moved,

That the Justice 2 Committee, in consideration of the draft Regulation of Investigatory Powers (Covert Surveillance – Code of Practice) (Scotland) Order 2003, recommends that the Order be approved.—[*Hugh Henry.*]

Motion agreed to.

The Convener: I thank the deputy minister and his officials for coming along this morning.

Regulation of Investigatory Powers (Prescription of Offices and Positions) (Scotland) Amendment (No 2) Order 2003 (SSI 2003/50)

The Convener: Item 5 is consideration of an instrument under the negative procedure. The committee has a note on the order. The Subordinate Legislation Committee considered the original instrument at its meetings on 21 and 28 January. It considered the replacement instrument at its meeting on 4 February. During the consideration of the original instrument, the Subordinate Legislation Committee raised concern that the effect of the order would be to lower the rank of the officer who could authorise directed surveillance or the conduct or use of covert intelligence sources, as detailed in sections 6 and 7 of the parent act. Members have a copy of the Executive's response. However, the Executive has since advised us that the supplementary response on page 8 of the note that is headed "Scottish Executive Justice Department" is inaccurate and should be ignored.

Bill Aitken: I do not want us to trawl through the details of the matter. However, documents that arrive here should be accurate.

The Convener: There is no explanation of how the response is inaccurate. As the instrument is subject to the negative procedure, all that we can do is express our deep concern that we do not have a note that is accurate.

Stewart Stevenson: I seek clarification. The instrument was laid on 30 January. When would be the last date on which we could move for it not to proceed?

Gillian Baxendine (Clerk): We are required to report to the Parliament by 3 March.

Stewart Stevenson: Could we invite the minister to lighten our darkness before our next meeting and put the matter on the agenda once again?

Gillian Baxendine: We will not have another meeting until 4 March, unless we arrange a special meeting.

Stewart Stevenson: The minister could write to us individually. We could act as individual members of Parliament, in any event.

The Convener: I suggest that I write to the Executive, asking it to provide us with the information that we need. When we get a response, it can be circulated to members. We are not meeting until 4 March, so we will have to incorporate our concerns in our report and clarify the information that Parliament might require in making a decision. Are there any other comments?

Bill Aitken: No, except that we should stress that this situation is not clever and should have been sorted out.

Annual Report

The Convener: Item 6 is consideration of the annual report. I refer the committee to the draft report, which covers the work of the Justice 2 Committee from 12 May 2002 to 26 March 2003—the report does not quite cover a full year. The report's format is based on the Conveners Group's recommendations. I invite members to make comments on or suggest amendments to the draft report. The publication date is 26 March. We will start with the introduction. Do members have comments on anything on the first page?

Stewart Stevenson: The report says:

"The Committee has again had a heavy workload".

I think that I am correct in saying that our work load has been the heaviest of any committee. If that is correct, it could be worth expressing in those terms.

Gillian Baxendine: In terms of the number of meetings, that is the case.

The Convener: So, in the introduction we should add to "heavy workload"—

Stewart Stevenson: Heaviest.

The Convener: I do not think that we can claim to have had the heaviest work load.

Stewart Stevenson: We can say that we have had the greatest number of meetings.

The Convener: We can say that the committee has had a heavy work load, including the greatest number of meetings of any parliamentary committee. Will that do?

Stewart Stevenson: Yes.

Bill Aitken: On the basis that if we do not blow our own trumpet, no one else will.

Stewart Stevenson: Absolutely correct, Bill.

The Convener: The first section of the report deals with our inquiry into the Crown Office and Procurator Fiscal Service.

Bill Aitken: That inquiry is now historical, so perhaps we should replace "has been conducting" with "carried out" or "conducted".

The Convener: Yes. I wonder whether it is possible to refer to the success of our inquiry report. The Lord Advocate has put on record the fact that the changes in the Crown Office are partly due to the Justice 2 Committee driving change by our decision to—

Stewart Stevenson: We could add after paragraph 5 that we believe that the inquiry was instrumental in changing policy and practice in the Crown Office and Procurator Fiscal Service.

The Convener: As has been acknowledged by the Lord Advocate.

Stewart Stevenson: The inquiry may prove a model for other committees, in that regard. We could say something along those lines.

The Convener: We will put that into an extra paragraph.

The next section in the report is on bills. Paragraph 6 is about the Land Reform (Scotland) Bill. I thought that we had met more than 11 times for stage 2. Does that figure arise because we doubled up meetings?

Gillian Baxendine: Yes. Some of them were all-day meetings.

The Convener: Can we say that?

Stewart Stevenson: It might be useful to say that we spent 34 hours on stage 2. That is my rough calculation, which someone will have to verify.

The Convener: Is that a lot?

Stewart Stevenson: It felt like it—and that was not just down to Bill Aitken.

The Convener: Can that figure be checked?

Gillian Baxendine: Yes.

Stewart Stevenson: The times are in the *Official Report*.

The Convener: During stage 2, I think that we all—including the clerks—felt that land reform issues dominated our lives.

Stewart Stevenson: When we are dealing with a subject of that size, the issue is not the time that is spent in committee meetings, but the time that is spent on work outwith meetings on preparation and research, for example, which take at least twice as long as the committee work does.

The Convener: How can we strengthen paragraph 6?

Bill Aitken: We should go along the lines that Stewart Stevenson suggested. Following the sentence that ends in the word "considered", we should add that the committee met for about 34 hours at stage 2.

The Convener: Was not it the case that more amendments were lodged for stage 2 of the Land Reform (Scotland) Bill than for any previous bill?

Gillian Baxendine: I am afraid that that record was quickly broken.

The Convener: Drat.

Gillian Baxendine: I think that the Mental Health (Scotland) Bill has broken all records.

Stewart Stevenson: I think that I am correct in saying that the Executive accepted amendments lodged by members from all political persuasions. We would need to verify that, but I am quite confident that it is true. That would be worth saying, because it is a committee point, not a partisan point, and it illustrates the value of the committee's impartiality.

The Convener: Yes, let us put that in.

Paragraph 7 is on the Criminal Justice (Scotland) Bill.

Bill Aitken: We should refer to the measure to extend the children's hearings system to include young people aged 16 and 17.

The Convener: The paper mentions victims' rights.

Gillian Baxendine: I have not specifically mentioned the youth crime pilots, partly because the provision was taken out of the bill.

Bill Aitken: All the more reason to mention it. The committee succeeded in its aim.

Stewart Stevenson: We ought perhaps to note as a matter of concern that major changes were made to the bill both at stage 2 and at stage 3. The committee found that that posed the risk of legislation being passed without adequate scrutiny. It was not only the Executive that was responsible for that; individual MSPs also lodged substantial amendments.

The Convener: While we are on the subject, I should mention that an amendment on interim anti-social behaviour orders will be considered at stage 3 of the Criminal Justice (Scotland) Bill. I have no difficulty in supporting the amendment, but I think that we should express some alarm at the fact that, when we pressed the panel of housing organisations on whether a change was necessary, we did not get any takers for change. Now that the bill is at stage 3 and the Executive is supporting an amendment, I am concerned about the parliamentary process. As yet, the committee has not been approached by any of the organisations that are promoting the change.

Stewart Stevenson: I have been approached individually, although I had the impression that the e-mail was a circular one.

Bill Aitken: Yes, it was.

The Convener: As a committee, however, we have not been approached. Okay.

Paragraph 8 is on subordinate legislation.

Gillian Baxendine: The figures will need to be updated after today.

The Convener: I do not know whether it is worth reporting—you can advise me—but I was not happy with what happened today in relation to scrutinising the lengthy codes.

Stewart Stevenson: Are we in private session?

Gillian Baxendine: No.

The Convener: There is a lot of detail in the papers on the codes, but we got sight of them only on Saturday. Many of the statutory instruments with which we deal are detailed and technical. I wonder whether it is worth thinking about how the scrutiny process can be better in future.

Bill Aitken: What happened this morning underlined the fact that there is a general problem with the parliamentary process. I do not feel that members get sufficient time to look into matters. They are confronted with massive piles of paper and I am not convinced that, no matter how committed and hard working they are, they have time to consider, to seek advice on and to research points that arise.

Far be it from me to hold up the way in which local authorities organise themselves as the epitome of everything that is right, but what happened to us today would not have happened in a local authority. The committee papers would have been given to the members something like five days before the meeting. If there was a difficulty with something, the matter would invariably have been continued so that further inquiries could be carried out.

In the Parliament, we are up against the eight-ball the whole time. Papers are coming to us at the last minute and then it is pointed out that a decision has to be made within a few days, or certainly within a time frame that does not allow the matter to be continued. I do not think that that is acceptable.

11:45

The Convener: It is probably best if we consider that in the legacy paper rather than in the report. You are talking about lessons that have to be learned.

Stewart Stevenson: It was certainly disappointing to find that, even after the relatively short time that I had to consider the orders, I had questions that the minister seemed to find difficult to answer. That seems to happen particularly with instruments that I am considering supporting. Instruments show signs of having been rushed, despite the fact that the Executive seems to have had a couple of years to prepare them. That is strange and not at all adequate.

The Convener: We should have been involved long before the papers appeared. There is no procedure for that. We followed the normal procedure.

Bill Aitken: That does not mean that the procedure is right or appropriate.

Stewart Stevenson: I have an example of what might be slightly better practice. In relation to the Land Reform (Scotland) Bill, we have had sight of the draft access code. Although we have not had the time to do anything about it, we have had the opportunity to take evidence or whatever steps we want. According to a parliamentary answer that I received, the access code will not now appear for something in the order of eight, nine or 10 months. It would be perfectly reasonable, and would be helpful to ministers, if committees were given the opportunity to consider instruments at an early stage of drafting. That would improve the secondary legislation.

The Convener: We can come back to that topic and make recommendations for the future.

The report shows that we have considered 19 negative and five affirmative instruments; it seems like more. Do members want to add anything to that section of the report?

Stewart Stevenson: We can say that on several occasions instruments have come to the committee that have left open important questions. Ministers have had to revert to the committee on X number of occasions—if we can find that out. If not, we could express it more generally than arithmetically.

The Convener: Is the purpose of the annual report to let the public see what the committee has been doing?

Gillian Baxendine: Standing orders require that committees report annually. The report is a summary for the public and anyone who is interested in what the committee has done.

The Convener: Would it be in order for us to include something about what we are discussing?

Gillian Baxendine: Yes.

Stewart Stevenson: The committee ought to be trying to help to improve the Parliament's processes and those of the Government. I am sure that such comments are entirely appropriate, if they are backed up by facts rather than being a party-political rant.

Bill Aitken: One is left with the inescapable feeling that, one of these days, something is going to go horribly wrong with a piece of legislation. There is not a lot that can be done about that in a unicameral system. Unnecessary pressure is put on committee members and members of the Executive if the Executive is not prepared to do things in a more measured manner.

The Convener: Okay. There are lessons to be learned.

On petitions, the paper says:

"The Committee has considered a number of petitions this year on such wide ranging topics as freemasonry in the judiciary, the wilful alienation of siblings, the display of obscene material".

I wonder whether it is worth expanding on that a little, if we have the space. On the wilful alienation of siblings, we could say that we recommend that a future committee should examine the Children (Scotland) Act 1995.

Gillian Baxendine: We may be running into space difficulties, but I can note that and come back to the committee if there are difficulties.

Stewart Stevenson: I was going to suggest—although it may not be possible—that there should be another paragraph, 11A, saying that the committee continues to believe that the petitions process serves a useful purpose in the Parliament in providing good access for the public to raise issues. I am happy for the clerks to express that as concisely as their number of words requires them to do.

The Convener: We could open the paragraph by saying that the committee believes that the petition process has been a good one.

Stewart Stevenson: That would be fine.

The Convener: Under "Other work", the report says that we have

"contributed to the scrutiny of European Union proposals".

I think that we are the first subject committee to enter into such scrutiny.

Gillian Baxendine: The Rural Development Committee has also done so.

The Convener: Would it be fair to say that we are one of the first, or one of the few?

Gillian Baxendine: Both.

Stewart Stevenson: Is it a coincidence that I am on both committees? Yes, it is.

The Convener: The report also says that we

"undertook two visits to the Procurator Fiscal Service in Hamilton."

We are still going to report on that visit, I think.

Gillian Baxendine: Yes.

Bill Aitken: A lot of other visits were carried out. Some members went to Aberdeen.

Stewart Stevenson: Pauline McNeill, Scott Barrie and I went there.

The Convener: We went to Aberdeen and to Tain.

Gillian Baxendine: Those visits were in the previous year.

Stewart Stevenson: Were they?

Gillian Baxendine: Yes. I know that it does not seem like it now, but they were.

The Convener: When was the Parliament in Aberdeen?

Stewart Stevenson: In May.

Gillian Baxendine: I am sorry. You are thinking about the youth justice visit, not the fiscal visit.

Stewart Stevenson: I am not sure whether we did that as individuals or as a committee.

Gillian Baxendine: You did not have any clerks with you and we did not organise the visit, so it probably counts as a visit by individuals.

The Convener: We shall just have to make do with what the report says about

"Reliance Monitoring's electronic tagging centre"

and

"Barnardo's ... Challenging Offending ... project for young offenders in Motherwell",

as well as our visit to Hamilton.

The rest of the report gives details of our meetings. We met 39 times.

Stewart Stevenson: I think that we have said in our legacy document, but it may also be worth saying in our annual report, that a year of relative stability in the committee's membership greatly aided our deliberations.

The Convener: Yes. If we can fit that in, that would be good.

Stewart Stevenson: In fact, although I said "relative stability", I do not think that we had any changes during the year.

Bill Aitken: No. I cannot think of any.

The Convener: We went from a virtually all-female committee to a nearly all-male committee in the first year. We had Margo MacDonald, Christine Grahame, Margaret Ewing and Mary Mulligan.

Stewart Stevenson: That is true.

Bill Aitken: And then I came to frighten them all away.

The Convener: A conspiracy!

Bill Aitken: I have just one point on paragraph 15. We went to Inverness. Was that not in the current year?

Stewart Stevenson: It was the previous year.

The Convener: We are doing our best to stretch things out.

We shall now move into private session, as previously agreed, to discuss our legacy paper.

11:53

Meeting continued in private until 11:55.

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