JUSTICE 2 COMMITTEE

Tuesday 25 January 2005

Session 2

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JUSTICE 2 COMMITTEE
3rd Meeting 2005, Session 2

CONVENER

*Miss Annabel Goldie (West of Scotland) (Con)

DEPUTY CONVENER

*Bill Butler (Glasgow Anniesland) (Lab)

COMMITTEE MEMBERS

*Jackie Baillie (Dumbarton) (Lab)
*Colin Fox (Lothians) (SSP)
*Maureen Macmillan (Highlands and Islands) (Lab)
*Mr Stewart Maxwell (West of Scotland) (SNP)
*Mike Pringle (Edinburgh South) (LD)

COMMITTEE SUBSTITUTES

Ms Rosemary Byrne (South of Scotland) (SSP)
Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
Mr Kenny MacAskill (Lothians) (SNP)
Margaret Mitchell (Central Scotland) (Con)
Margaret Smith (Edinburgh West) (LD)

*attended

THE FOLLOWING ALSO ATTENDED:

Dennis Canavan (Falkirk West) (Ind)
Hugh Henry (Deputy Minister for Justice)

CLERK TO THE COMMITTEE

Gillian Baxendine
Tracey Hawe

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Richard Hough

LOCATION

Committee Room 6

Scottish Parliament

Justice 2 Committee

Tuesday 25 January 2005

[THE CONVENER *opened the meeting at 14:04*]

Subordinate Legislation

Title Conditions (Scotland) Act 2003 (Notice of Potential Liability for Costs) Amendment Order 2004 (SSI 2004/552)

The Convener (Miss Annabel Goldie): I welcome members to the third meeting in 2005 of the Justice 2 Committee. I have received no apologies, but Mike Pringle will be joining us, I think. I remind committee members and members of the public to switch off their mobile phones and pagers.

Agenda item 1 is subordinate legislation. The Title Conditions (Scotland) Act 2003 (Notice of Potential Liability for Costs) Amendment Order 2004 (SSI 2004/552) is subject to the negative procedure. Members should have received a briefing on it with their committee papers. No points of substance were raised by the Subordinate Legislation Committee.

As members have no questions about the order, are they content with it?

Members *indicated agreement*.

Inquiries Bill

14:06

The Convener: Agenda item 2 is the Inquiries Bill, which is currently before the Westminster Parliament. I welcome to the meeting the Deputy Minister for Justice, Hugh Henry, who is a familiar face, and Mr Hamish Goodall and Barbara Brown, who are colleagues from his department. We are pleased to have the minister with us.

Members should have seen in their papers a letter from the Executive that includes a policy paper that outlines potential rules on evidence and procedure for inquiries that will be set up under the bill. The bill will be the subject of a Sewel motion, the terms of which have been published and are available to members.

Minister, do you want to say anything by way of initial comment?

The Deputy Minister for Justice (Hugh Henry): Yes. I thank the committee for giving me the opportunity to give evidence. I feel that I am almost a seconded member of the committee at the moment, because I am seeing so much of its members—I saw you last week and am seeing you again today.

The purpose of the Inquiries Bill is to establish a new framework for ministers to set up formal inquiries into matters of public concern. The bill proposes a new statutory basis for inquiries, with the aim of enabling them to work more effectively, more flexibly, more quickly and at lower cost than has sometimes been the case. The Executive has maintained close contact with the Department for Constitutional Affairs as the proposals have been developed, and it was closely involved in drawing up clauses that will cover Scottish circumstances.

A variety of events that cannot easily be categorised as reserved or devolved matters may cause public concern and result in calls for an inquiry. We and the United Kingdom Government have a shared interest in creating a modern statutory framework that recognises that reality and provides for inquiries to be set up jointly by ministers in the Scottish and UK Administrations. The Sewel process will allow the bill to make provision for joint inquiries, which I believe would benefit Scotland and which we could not obtain by way of a Scottish bill alone. Of course, we could create a new framework for inquiries into wholly devolved matters in Scotland by means of a Scottish Parliament bill but, unfortunately, there is currently no space for such a bill in our legislative programme.

The UK bill offers us an opportunity to create a new statutory framework for inquiries on devolved

matters in Scotland at an early date by working in partnership with our colleagues in the UK Government. It gives us the chance to put in place a structure for ensuring a consistent approach and flexibility to respond to differing circumstances for all types of inquiry into matters of public concern in Scotland.

The Convener: Thank you. Members may now ask questions.

Bill Butler (Glasgow Anniesland) (Lab): A question strikes me: if the bill is passed, will it give inquiries powers of compulsion such as could have been used, for example, by the Fraser inquiry to make the BBC hand over tapes?

Hugh Henry: As members know, the ad hoc nature of Lord Fraser's inquiry meant that it had no powers either to require witnesses to appear or to make people produce evidence. As a result, he could not compel the BBC or others to submit the interviews that he requested. However, we believe that the BBC and IWC Media would, if the bill had been in force at that time, have been obliged to release the tapes. Any future inquiry would have a power of compulsion that was not available to Lord Fraser.

Bill Butler: I am grateful for that clarification. Do you find it as interesting as I do, convener?

The Convener: It has come too late. [*Laughter.*] However, that point highlights an interesting dimension. If the bill were passed, would inquiries in Scotland lose some of their current flexibility?

Hugh Henry: I do not believe that any flexibility would be lost. Instead, as I explained, the bill would give an inquiry added powers. It would allow inquiries to address only Scottish matters, if we so wished, and it would retain the ability to allow UK-wide inquiries. Moreover, with the bill's added powers, we will be able to have inquiries that cross jurisdictions. Some aspects of the tragic circumstances at Dunblane—for example, firearms—had a very clear impact on UK legislation, but if the incident had occurred after the creation of the Scottish Parliament, it would also have impacted on some clearly devolved matters, such as safety and protection of children. I believe that the bill will provide scope for flexibility and co-operation and that it will enable us to give consistency where it is needed.

The Convener: The purpose of having the item on the agenda is to allow members to comment on the Sewel motion, either through a formal report or—if we are so minded—through a briefer minute. Are members content that the matter be dealt with through a Sewel motion?

Mr Stewart Maxwell (West of Scotland) (SNP): No.

The Convener: Do you want to explain your position further?

Mr Maxwell: We have had so many Sewel motions that I think the point has been well made and understood. Parliament was set up to find—as Executive members often say—Scottish solutions to Scottish problems. The idea that we should sit here week in, week out debating and passing motions that allow Westminster to rule on Scottish matters that come within the Parliament's devolved competence seems to be rather bizarre and is, to be frank, at odds with the purpose of the Scottish Parliament.

As a result, I think that using the Sewel procedure for the Inquiries Bill is incorrect; we could and should deal with the matter here. Indeed, the excuse that there are timetabling problems does not explain sufficiently why we should not do so. I have heard that reason used a number of times, but simply to say, "We have a timetabling issue with this particular bill", does not address the fundamental question of why the Scottish Parliament is not fully debating matters that, at the end of the day, become part of Scots law. I am opposed to the use of a Sewel motion.

The Convener: As I said, there is not a great deal of substance to discuss in connection with the bill, unlike with some of the other Sewel motions that the committee has had to consider. If the committee is agreed, the matter might be dealt with by a simple minute based on a vote, which would enable Stewart Maxwell to record his dissent.

14:15

Hugh Henry: Convener, with your permission I will clarify the specific point that Stewart Maxwell raised, concerning what he understood from my comments. He suggested that one of my arguments for agreeing to the Sewel motion was the fact that there is not sufficient time for a purely Scottish bill. What I said was in the context of a bill that would deal only with powers and issues for which we are responsible. My comments pertained only to that. The beauty of the current bill is that it does not deal purely with Scottish matters. If we went down the route that is suggested by Stewart Maxwell and legislated only for Scotland, that would not enable us to co-operate across the UK in inquiries that need to consider devolved and reserved matters. The bill is necessary to reflect the complexity of the UK Administration and UK working on a range of subjects.

I understand that Stewart Maxwell believes that there should be no common cause between Scotland and England as far as legislation is concerned. He does not believe in the United Kingdom: that is an acceptable political view for him. However, while we operate within a UK framework, the bill will give us a significant advantage in enabling us to bring a Scottish

dimension and to offer Scottish input to and have Scottish control of a wide range of issues. I do not want my comment about Scottish legislation to be taken out of context.

The Convener: Thank you for that explanation. The question is, that the committee agrees to recommend to Parliament that the provisions of the Inquiries Bill be considered by the UK Parliament. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Jackie Baillie (Dumbarton) (Lab)
Bill Butler (Glasgow Anniesland) (Lab)
Miss Annabel Goldie (West of Scotland) (Con)
Maureen Macmillan (Highlands and Islands) (Lab)
Mike Pringle (Edinburgh South) (LD)

AGAINST

Colin Fox (Lothians) (SSP)
Mr Stewart Maxwell (West of Scotland) (SNP)

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

The committee's recommendation will take the form of a brief minute that will be made available to Parliament.

Fire (Scotland) Bill: Stage 2

14:17

The Convener: Item 3 on the agenda is our continued stage 2 consideration of the Fire (Scotland) Bill. We will not allow the minister to feel bereft and assailed by a panic attack. We will wait to ask questions until he is supported by his advisers.

Hugh Henry: No, it is okay. I am quite happy to fly solo, convener.

The Convener: I welcome the minister's advisers on the Fire (Scotland) Bill. They are Rosemary Whaley, Alison Coull—there does not seem to be a name-plate for her, but I see that someone is nodding in appreciation—Jill Clark, Brian McKenzie and Johann MacDougall.

Once again, members should have the marshalled list of amendments and the groupings. We have quite a number of amendments to consider. Although some are essentially technical and drafting amendments, I am nonetheless conscious that we have a big agenda before us this afternoon; item 4 is also quite substantive. Therefore, I suggest that we have only brief debates on amendments that are moved by members and that members take no more than three minutes when they speak to amendments before moving them. I will then allow members who are so minded to speak briefly to amendments before I allow the minister to comment briefly, again for no more than three minutes. In that way, I hope that we can make solid progress through the amendments.

Section 49—Duties of employers to employees

The Convener: Amendment 34 is grouped with amendments 48, 35, 36, 85, 86, 37 and 87 to 90.

Colin Fox (Lothians) (SSP): I notice that members' amendments are very rare in the marshalled list, so I will take delight in moving one of the three amendments to which I will speak today.

On first sight, it might seem remarkable that amendment 34 seeks to delete the word "reasonably" from section 49, when the law places so much emphasis on reasonableness. However, I understand that recent health and safety legislation from the European Parliament prefers to apply a much stiffer test on such matters than the "reasonably practicable" test that would apply under the bill.

The approach of European regulations and directives requires a risk assessment and calculation of perceived danger in that risk. In other words, although employers might say that

such and such an approach to health and safety precautions would be too costly when measured against the low risk involved, European directives in effect overrule that approach in favour of a much higher standard of safety. Under the European approach, any practice that is unsafe or that involves personnel or property being unable to be protected against danger ought not to continue, irrespective of the cost. The emphasis should be not on an economic test but on putting people's safety first.

In my view, the term "reasonably practicable"—which is notably not used often in the bill—does not reflect the change in opinion that has occurred in our approach to health and safety matters, and is insufficient to meet current European legislation. By deleting the word "reasonably" while leaving "practicable", amendment 34 would let the much higher standard of safety cover of the European directives apply.

I have delight in moving amendment 34.

Bill Butler: Colin Fox has made it clear that the intention behind amendment 34 is to ensure that there is no doubt about the matter, but I am not sure that the phrase is not perhaps tautological. Does "practicable" not imply "reasonable"? I know where Colin Fox is coming from—we all want to ensure that the i's are dotted and the t's crossed, but I am not certain that the phrase is anything more than tautological.

Hugh Henry: Earlier, for one exhilarating moment, I thought that I had slipped my minders for the afternoon, but they have encased me again.

To some extent, Bill Butler is right to say that a degree of tautology is involved. However, the words that we are discussing also have significant legal implications. The use of the phrase "reasonably practicable" was raised in evidence by the Fire Brigades Union; it was suggested that the Executive and Parliament were acting ultra vires. Following that union's oral evidence on 14 September, my officials wrote to the committee to advise that the Executive is content that the approach that has been adopted in the bill will correctly implement the framework directive and is within Parliament's legislative competence. I know that the matter has been the subject of discussions between law officers in Scotland and in England.

The sections in part 3 reflect the duty that is placed on employers in relation to other aspects of health and safety at work by the Health and Safety at Work etc Act 1974, which the United Kingdom regards as being the legislation that currently implements the appropriate 1989 European Council directive. If amendments 34 and 37 were agreed to, the employer's duty would be to ensure the safety of his or her employees as far as is practicable rather than as far as is "reasonably practicable", as the bill currently provides. That would mean that employers' duties in respect of fire safety in the workplace differed from their duties in relation to other health and safety at work issues. Employers' duties in Scotland would also differ from the duties of employers in England, which could cause confusion. I do not believe that the issue caused concern or was identified as being a major problem by the FBU when the law was considered at Westminster. We could find ourselves acting out of concert with other parts of the United Kingdom on the definition of what is required at work.

It is our aim to simplify the fire safety regime, not to complicate matters unnecessarily. It is worth while to point out that the United Kingdom's record on health and safety at work is among the best in Europe. An unfair burden could be imposed, in that employers could be required to take measures where practicable but without any assessment's being made of whether the measures were reasonable in the circumstances. In other words, an employer could be required to carry out disproportionate work at disproportionate cost on a minor issue, regardless of whether that work was needed, simply because of the deletion of the word "reasonably". I do not believe that that is the proper way to proceed.

We work within a very strict health and safety at work regime, which is right. I understand the sentiments behind amendment 34, but it would leave us out of line with other aspects of health and safety at work regulations and out of step with what is happening in the rest of the United Kingdom in relation to fire safety. I do not believe that the amendment is necessary.

Do you wish me to discuss the other amendments in the group?

The Convener: I would be happy if you would speak to amendment 48 and the other amendments in the group. You have another three minutes in which to do so.

Hugh Henry: Do you want me to speak to amendments 35 and 36?

The Convener: Yes—if you have something to say about them.

Hugh Henry: Amendments 35 and 36 appear to have been lodged in an attempt to address concerns that were expressed during stage 1 that the bill would make industrial action by firefighters unlawful. I addressed that issue when I gave evidence to the committee—

Colin Fox: I am sorry to interrupt the minister, but I want to raise an issue of procedure. Amendments 35 and 36 are separate

amendments. Amendment 35 is in my name. I wish to be courteous to the minister, but surely I am entitled to speak to the amendment before the minister replies. I seek guidance on this point from the convener.

The Convener: Amendment 34 is in your name, Mr Fox, and you have been asked to move it and to speak to the other amendments in the group. I assume that you have done so.

Colin Fox: I spoke to amendments 34 and 37 because they are on the same issue. I did not take the opportunity to speak to amendments 35 and 36 because they are on separate issues.

The Convener: I am advised by the clerk that the amendments are in the same group and have to be dealt with at the same time. We will let the minister deal with the amendments and return to you to wind up. At that point you can cover the points.

Colin Fox: I apologise for the interruption.

Hugh Henry: I suggest that, for the flow of argument, I do not refer to amendments 35 and 36. I can address the others and come back to them. I am entirely in your hands, convener.

The Convener: There might be logic in that, if you are happy to do that, minister.

14:30

Hugh Henry: Okay—I shall do that.

Amendment 48 will remove an unnecessary enabling power. It was the intention to include—under the fire safety regulations in section 54—provisions on electrical luminous tube signs. In order to replicate the existing provisions in the Electrical Luminous Tube Signs (Scotland) Regulations 1990, an offence provision was necessary. It has been agreed that building regulations are a more appropriate vehicle for those provisions so the offence provision, which was included only for that particular purpose, is no longer required.

Amendments 85 and 86 will extend disapplication of the due diligence defence that is set out in section 67(9) to any other duties that are specified in the fire safety regulations. For example, the power might be used in relation to the duty to eliminate or reduce risk from dangerous substances. Failure to fulfil that duty could have serious consequences.

Amendments 87 and 88 will enable Scottish ministers to apply the reverse burden of proof, that is set out in section 67(10), to proceedings for offences that are set out in regulations. As with amendments 85 and 86, that power may be used in relation to the duty to eliminate or to reduce risk from dangerous substances. In the event of non-compliance, we might want to apply the reverse burden of proof in relation to the offence.

Amendment 89 aims to address the situation in which a person with duties under part 3 has committed an offence, but where its commission by that person was due to action or inaction by a third party. The amendment provides for prosecution of that third party, regardless of whether the person with the duties under part 3 is prosecuted or not. The provision is equivalent to section 24 of the Fire Precautions Act 1971.

Amendment 90 will extend the provision at section 69 to other persons who will be specified in regulations. Section 69 will ensure that the fact that an offence was caused by the acts or omissions of employees will not afford an employer a defence in proceedings for an offence. Amendment 90 will also apply the provision to those persons who are specified in regulations. For example, if an employer assigns fire safety assistance duties to a competent person under draft regulation 18 of the fire safety regulations, the regulations will specify that the employer cannot rely on a breach of the fire safety duties by that person as a defence.

The Convener: Thank you minister. Colin Fox may now speak to the other amendments in the group and wind up on amendment 34. I ask him thereafter to confirm whether he wants to press or withdraw the amendment.

Colin Fox: I am grateful, convener. To maintain the logic of the argument, perhaps I should reply to the section that we have discussed rather than open up another front with the minister.

The minister and Bill Butler made the point that there are significant legal implications in the matter of health and safety. Deletion of the word "reasonably" will make clear the practicable standard. We are talking about a higher practicable standard, in my view.

The minister suggests that if amendment 34 were agreed to, it would take us out of line with UK legislation. I contend that to leave the word in will take us out of line with best practice in Europe. If the minister is saying that we have some of the best health and safety standards in Europe, we should welcome and protect that, not reduce it by accepting a lower standard than the health and safety directives that are coming out of Europe suggest. I will therefore press amendment 34. Do you want me to speak to amendment 35?

The Convener: Yes.

Colin Fox: Amendment 35 is a response to questions that I put to the deputy minister in committee and in the stage 1 debate. Although I welcome the assurances that the minister gave on both occasions, the Executive has failed, in my

view, to provide a cast-iron assurance that it has no intention of outlawing strike action in pursuit of a legal industrial dispute.

I had hoped that the minister would have lodged his own amendment to stipulate that the provisions of section 67 would not apply, and would not be seen to apply under any circumstances, to individuals who are involved in lawful industrial action. The minister may say that the Executive has no intention of outlawing strike action but, as the bill stands, the question is left open to legal challenge and the decision will ultimately not be for ministers, but the courts. My amendments seek to close the door firmly on any prohibition or outlawing of strike action and to ensure that the right to lawful industrial action is protected.

The Convener: The question is, that amendment 34 be agreed to. Are we all agreed?

Members: No.

The Convener: There will be a division.

FOR

Fox, Colin (Lothians) (SSP)

AGAINST

Baillie, Jackie (Dumbarton) (Lab)
Butler, Bill (Glasgow Anniesland) (Lab)
Goldie, Miss Annabel (West of Scotland) (Con)
Macmillan, Maureen (Highlands and Islands) (Lab)
Maxwell, Mr Stewart (West of Scotland) (SNP)
Pringle, Mike (Edinburgh South) (LD)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 34 disagreed to.

The Convener: Amendment 38 is in the name of the Minister for Justice and is grouped with amendments 39 to 44, 52, 58, 71 and 76.

Hugh Henry: Ten of the amendments in the group will insert an improved form of words in a number of places and will clarify what "safety" means—namely, "safety in respect of harm caused by fire"—so that there is no doubt that that incorporates fire precautions and fire prevention.

Amendment 42 is simply a tidying-up amendment that will remove unnecessary wording and bring the reference at section 50(4) into line with similar references elsewhere in the bill.

I move amendment 38.

Amendment 38 agreed to.

Amendment 39 moved—[Hugh Henry]—and agreed to.

Section 49, as amended, agreed to.

Schedule 2 agreed to.

Section 50—Duties in relation to relevant premises

Amendments 40 to 44 moved—[Hugh Henry]—and agreed to.

Section 50, as amended, agreed to.

Section 51 agreed to.

Section 52—Duties of employees

The Convener: Amendment 45, in the name of the minister, is grouped with amendments 46, 95 and 96.

Hugh Henry: I would like to link amendments 45 and 46 to Colin Fox's comments on amendments 35 and 36, to which I could not respond. Can I do that?

The Convener: That is acceptable.

Hugh Henry: Thank you. Amendments 35 and 36 relate to the allegation that what we are doing would make industrial action by firefighters unlawful. When I gave evidence to the committee, I categorically denied that. I refuted the allegation again during the stage 1 debate and I am happy to repeat today that what is suggested is not the case.

I am disappointed that some people have made public comment not only to Fire Brigades Union members, but to the public, to raise fear, concern and alarm that we were trying to make strikes illegal. That is categorically untrue. The people who say that have misunderstood the situation or are trying for their own malign reasons to portray such a situation.

We have never intended to make strikes illegal. We have said specifically and categorically that that is not our intention. I have said that more than once. Nothing in the bill can be construed in that manner. However, as I promised the committee—I do not remember whether Maureen Macmillan or someone else raised the issue before—we have reflected on whether we could do more to enhance that assurance. That is why we have lodged amendments 45 and 46. The amendments clarify the extent of employees' duties to take reasonable care for their own and other people's safety in the event of a fire. The duty will apply when employees are at work, wherever they are at work.

We hope that the amendments will also clarify that the offence provisions in section 67(2) are linked to the employee's duties when at work. As someone who is engaged in lawful industrial action is not at work, there is no way that section 67 offences would unintentionally catch someone who was on strike. As I said categorically in winding up the stage 1 debate,

"the Executive has no intention of making industrial action unlawful".

It is incorrect to interpret sections 67 and 52 in that way. I also said:

"Nothing that we are doing will provide any opportunity for powers to be used in the suggested way. That is not our intention and would not have our support."—[*Official Report*, 18 November 2004; c 12033.]

As I said, I am disappointed that some have, for their own reasons, sought to interpret the bill in a completely different way. Some comments that have been made in the local and national press are completely untrue. I have written to the convener—I do not know whether the letter has been issued—to clarify the situation. If the letter has not been issued, I will ensure that that happens immediately after the committee meeting. I will also take the step of trying to assure board employees that the allegations are completely untrue. In the light of the further amendments, I hope that Colin Fox will accept the assurances that I have given.

Amendments 95 and 96 will tidy the definitions in section 73. Amendment 45 will introduce the term "at work" and a definition will be added to cover that. The definition of a workplace will be adjusted to make it clear that it also applies to the employer's employees.

I move amendment 45.

Colin Fox: I take the opportunity to welcome the minister's public statement here today. I know that he is not talking about me, with regard to any public statements that have been made outside the committee on the matter.

Hugh Henry: I am happy to confirm that.

Colin Fox: I welcome the minister's remarks, as it seems to me that he is saying categorically that the Executive has no intention whatsoever to make strikes illegal. I welcome amendments 45 and 46. I said earlier that I hoped that the Executive would come forward and clarify the situation and I believe that the amendments do that. I will be happy not to press my amendments 35 and 36.

14:45

Maureen Macmillan (Highlands and Islands) (Lab): I thank the minister for lodging amendments 45 and 46; they clarify the situation and I am grateful for that. Although I do not believe that the Executive ever had any intention of making strikes illegal, I thought that it was important for it to clarify the intention of the bill and put the matter beyond doubt.

Amendment 45 agreed to.

Amendment 46 moved—[Hugh Henry]—and agreed to.

Section 52, as amended, agreed to.

Section 53—Risk assessments: power to make regulations

The Convener: Amendment 47, in the name of the minister, is in a group on its own.

Hugh Henry: Amendment 47 is merely a tidying amendment that removes an unnecessary enabling power. The general enabling power at section 53(1) is sufficient for the purposes and it will be relied upon instead, if required.

I move amendment 47.

Amendment 47 agreed to.

Section 53, as amended, agreed to.

Section 54—Scottish Ministers' power to make regulations about fire safety

Amendment 48 moved—[Hugh Henry]—and agreed to.

Section 54, as amended, agreed to.

After section 54

The Convener: Amendment 49, in the name of the minister, is in a group on its own.

Hugh Henry: Amendment 49 will enable Scottish ministers to apply a provision for the safeguarding of firefighters to areas that are used in common by the occupants of private dwellings. The amendment will ensure that measures that are provided to protect firefighters are properly maintained; it addresses the safety and protection of firefighters when they attend fires and other operational incidents.

Examples of the equipment or facilities that may be covered by the power are rising mains, smoke outlets, ventilators and firefighting lifts. In recognition of the fact that many blocks of flats, for example, have such equipment in their common areas, subsection (2) of the new section allows the maintenance provision in regulations to be applied to such common areas.

I move amendment 49.

Amendment 49 agreed to.

Section 55—Special case: temporary suspension of Chapter 1 duties

The Convener: Amendment 50, in the name of the minister, is grouped with amendments 51 and 53.

Hugh Henry: Amendments 50 and 53 are intended to clarify that the circumstances in which fire safety duties are to be temporarily suspended are when the persons who are mentioned in the section, such as constables, are at work in that capacity and are actively undertaking duties that are connected with their work.

Amendment 51 is intended to clarify that a temporary suspension of duties will operate only when a constable, rather than a

"member of a police force",

is undertaking their duties. The amendment also confers a power to apply the section to other persons, which will enable the effect of the section to be extended to situations where other services are operating.

I move amendment 50.

Amendment 50 agreed to.

Amendments 51 to 53 moved—[Hugh Henry]—and agreed to.

Section 55, as amended, agreed to.

Section 56—Enforcing authorities

The Convener: Amendment 54 is grouped with amendments 56, 57 and 59 to 61.

Hugh Henry: Currently, Her Majesty's chief inspector of fire services, who has responsibility for inspections on Crown premises, may enter into an agreement with a fire and rescue authority that will enable the authority to carry out inspections on that person's behalf. Amendment 54 simply ensures that the chief inspector has continuing power to enter into those arrangements.

Amendments 56 and 57 are minor tidying amendments, the first of which ensures clarity, as well as consistency in language, and the second of which clarifies and improves understanding of the section. Amendments 59 and 60 will place an obligation on enforcement officers who exercise their powers to carry out inspections and to measure and test premises or articles to do so in the presence of the person who has the chapter 1 duties, if that person so requests. The amendments bring the section in line with powers to dismantle an article and ensure a consistent approach across the powers in the bill.

Amendment 61 addresses an anomaly in the bill whereby an enforcement officer exercising powers to take samples of an article for testing is obliged to leave a notice, whereas an enforcement officer exercising powers to remove an article in its entirety is not obliged to leave a notice.

I move amendment 54.

Amendment 54 agreed to.

The Convener: Amendment 55 is grouped with amendments 63, 91 to 94, 97 and 108.

Hugh Henry: Amendment 55 will allow for the making of regulations to modify the identities of enforcing authorities. Amendment 97 makes that new regulation-making power, and the regulation-making power at section 72(6), subject to the affirmative procedure.

Amendment 63 is a minor tidying amendment, which links the reference to licensed houses in multiple occupation to the definition of relevant premises, rather than duplicating the definition in the body of the section.

Amendments 91 to 94 and 108 set out more clearly the "relevant premises" that are caught by part 3 of the bill. By using the definition of "domestic premises" used in the Health and Safety at Work etc Act 1974, we effectively made shared or common areas of private dwellings subject to the fire safety regime. That would have meant, for example, that if two homes shared a common driveway, that driveway would have been caught by the part 3 provisions. That was clearly not our intention and would, in any case, be unenforceable. We have therefore recast the definition of "relevant premises" to exclude private dwellings and their shared areas and to make clear the premises that are to be covered by the part 3 provisions.

I move amendment 55.

Amendment 55 agreed to.

Section 56, as amended, agreed to.

Section 57—Powers of enforcement officers

Amendments 56 to 61 moved—[Hugh Henry]—and agreed to.

Section 57, as amended, agreed to.

Section 58—Prohibition notices

The Convener: Amendment 62 is grouped with amendments 64 to 70, 72 to 75, 77 to 81 and 84.

Hugh Henry: Amendment 62 clarifies the point at which an enforcing authority's power to issue a prohibition notice will be triggered. The intention is that a notice will be issued only if, in the opinion of the enforcing authority, the use of those premises involves a risk of death or injury so serious that the use needs to be prohibited or restricted. The bill as it stands does not specify how prohibition, enforcement or alterations notices may be withdrawn and may therefore be subject to confusion and misinterpretation. Amendments 64, 68 to 70 and 78 clarify that such notices may be withdrawn in writing, which reflects current practice.

Amendment 65 is intended to tidy up the language in relation to the contents of an enforcement notice and to improve readability. Amendments 66 and 67 have been lodged to reflect in the consultation duty the terminology that is used in the Building (Scotland) Act 2003, the provisions of which will come into force in advance of those of part 3 of the bill.

Amendments 72 to 75 and 77 are intended to clarify the alterations notice procedure, which, as the bill stands, may be difficult to follow. The amendments clarify that the trigger of the duty to notify under an alterations notice is where the change is one that is listed in section 60(5) and that, if made, would constitute a serious risk to relevant persons. Because the alterations notice process is about notifying an enforcing authority in advance of a proposed change, the amendments make it clearer that the notification should be sent to the enforcing authority before the change is made.

Amendments 79 and 80 are tidying amendments that address anomalies in the appeals process. Amendment 79 will enable anyone who has a legitimate interest in the premises through having either section 49 or 50 duties—for example, the owner of the premises—to appeal against the service of a prohibition notice. Amendment 80 clarifies the circumstances in which a suspension order will cease to have effect if it has not been recalled by the sheriff.

Amendment 81 sets out how the determination process will interact with potential enforcement action, which will make both the benefits and impact of a determination clear. Amendment 84 provides consistency between the language that is used about prohibition notices in section 58 and that used in the linked offence provision in section 67(4)(d).

I move amendment 62.

The Convener: Amendment 64 reads:

"In section 58, page 30, page 13".

For the record, I clarify that it should state "line 13" instead of "page 13".

Hugh Henry: That is correct.

Amendment 62 agreed to.

Amendments 63 and 64 moved—[Hugh Henry]—and agreed to.

Section 58, as amended, agreed to.

Section 59—Enforcement notices

Amendments 65 to 70 moved—[Hugh Henry]—and agreed to.

Section 59, as amended, agreed to.

Section 60—Alterations notices

Amendments 71 to 78 moved—[Hugh Henry]—and agreed to.

Section 60, as amended, agreed to.

Section 61—Appeals

Amendments 79 and 80 moved—[Hugh Henry]—and agreed to.

Section 61, as amended, agreed to.

Section 62—Determination of disputes

Amendment 81 moved—[Hugh Henry]—and agreed to.

Section 62, as amended, agreed to.

Sections 63 and 64 agreed to.

Section 65—Consequential restriction of application of Part I of Health and Safety at Work etc Act 1974

15:00

The Convener: Amendment 82, in the name of the minister, is grouped with amendment 83.

Hugh Henry: Amendments 82 and 83 are technical and are related to the interaction between the reserved and devolved elements of fire safety legislation. As the committee is aware, that issue is complex and has been the subject of on-going consideration and discussion.

At present, section 65 of the bill provides that part I of the Health and Safety at Work etc Act 1974 has effect in relation to fire safety only in so far as it applies to reserved matters. That was intended to clarify that part 3 of the bill and related subordinate legislation would, once in force, provide for all aspects of general fire safety as devolved to the Scottish Parliament. I hope that those few remarks satisfy the committee.

I move amendment 82.

Amendment 82 agreed to.

Section 65, as amended, agreed to.

After section 65

The Convener: Amendment 109, in the name of the minister, is in a group on its own.

Hugh Henry: Amendment 109 ensures that fire safety matters are dealt with under part 3 of the bill and related regulations, not in licensing, certification or registration provisions.

I move amendment 109.

Amendment 109 agreed to.

Section 66—Consequential restriction of application of certain other enactments

Amendment 83 moved—[Hugh Henry]—and agreed to.

Section 67—Offences

Amendment 35 not moved.

Amendment 84 moved—[Hugh Henry]—and agreed to.

Amendment 36 not moved.

Amendments 85 and 86 moved—[Hugh Henry]—and agreed to.

Amendment 37 not moved.

Amendments 87 and 88 moved—[Hugh Henry]—and agreed to.

Section 67, as amended, agreed to.

Section 68 agreed to.

After section 68

Amendment 89 moved—[Hugh Henry]—and agreed to.

Section 69—Employee's act or omission not to afford employer defence

Amendment 90 moved—[Hugh Henry]—and agreed to.

Section 69, as amended, agreed to.

Sections 70 and 71 agreed to.

Section 72—Meaning of "relevant premises"

Amendments 91 to 94 moved—[Hugh Henry]—and agreed to.

Section 72, as amended, agreed to.

Section 73—Interpretation of Part 3

The Convener: Amendment 110, in the name of Bill Butler, is grouped with amendment 111.

Bill Butler: I am delighted to speak to both amendments in the group.

The purpose of amendment 110 is to insert a definition of "operational task" into the interpretation section for part 3 of the bill. It aims to define an "operational task" for an employee of a relevant authority in relation to carrying out designated functions as set out in section 8, which is on firefighting, in section 9, which is on road traffic accidents, and in an order under section 10, which is on additional functions. The associated amendment 111 aims to limit the exclusion of employees of relevant authorities from the definition of relevant persons. If we agree to the amendment, the exclusion would be restricted to those undertaking operational tasks as defined in amendment 110. The effect would be to ensure that the fire safety duties that are owed to relevant persons will also be owed to employees of relevant authorities who are not undertaking operational tasks as defined.

The amendments were lodged to ensure that firefighters who are legitimately on premises in pursuit of fire authority duties that are not connected with firefighting—such as operational intelligence collecting, giving advice and conducting fire safety inspections—will not be excluded from protection. The effect of the two amendments would be to restrict the categories of persons who are excluded from the definition of a "relevant person" to those actively undertaking operational tasks. I wanted to clear up the point that was made by the FBU down south and by the Chief Fire Officers Association.

I move amendment 110.

Hugh Henry: Bill Butler is right to say that the issue was first raised by the Fire Brigades Union and by the Chief Fire Officers Association. Amendments 110 and 111 are sensible and they extend necessary protection to employees of relevant authorities who had been unintentionally—I stress, unintentionally—excluded from the definition of a "relevant person".

The Convener: So they were missed out and they are now being included.

Bill Butler: The sense of the amendments is compelling and I hope that members agree. I press my amendment.

Amendment 110 agreed to.

Amendment 111 moved—[Bill Butler]—and agreed to.

Amendments 95 and 96 moved—[Hugh Henry]—and agreed to.

Section 73, as amended, agreed to.

Sections 74 to 77 agreed to.

Section 78—Abolition of Scottish Central Fire Brigades Advisory Council

The Convener: Amendment 112, in the name of Colin Fox, is in a group on its own.

Colin Fox: I notice that the minister has finally accepted amendments from a member of a committee so I hope that we are on a roll.

Amendment 112 seeks to ensure that the replacement for the current Scottish Central Fire Brigades Advisory Council, which the minister has assured the committee and the Parliament will be a more dynamic body, has teeth by having statutory weight and recognition and by retaining the direct involvement of the minister.

This area of the committee's scrutiny has been a curious one. We heard evidence that the SCFBAC was set up 50 years ago and that all the players in the fire service are represented. We found that few people were able to point to one piece of good

work that the SCFBAC has produced. I am sure that the committee recognises that the public probably takes a dim view of the picture painted, of a body that involves many professionals in a one-day meeting, three times a year and which has a relatively poor output.

Nonetheless, as things stand, the minister is under a statutory obligation to consult the relevant fire authorities and fire employees and, in turn, to advise Parliament. The bill proposes many additional powers for the minister in areas such as fire safety, yet it reduces the obligation on the minister to ensure that the necessary expertise is available to advise him on operational requirements. In the light of the promise of a more dynamic replacement for the current advisory council, which, it seems, will have less involvement from the minister, who will have fewer powers, amendment 112 seeks to ensure that the replacement body has greater teeth, can fully advise the minister and involves him in its functions. The promise of a more dynamic replacement suggests more teeth; let us hope that it is not a hollow promise.

I move amendment 112.

Mr Maxwell: I accept what the minister has said, in particular in the stage 1 debate, but the bill as it stands leaves what appears to be a bit of a vacuum. It proposes the abolition of the advisory council but gives no real idea of what, if anything, will replace it.

Amendment 112 is not unreasonable in that it would provide for the setting up of a replacement body by regulations. I expressed my views on the matter in the stage 1 debate. I will shed no tears at the loss of the SCFBAC, but if we are to have a more modern, dynamic, flexible body along the lines that the minister described, it would be reasonable for that body to be placed on a statutory footing. Amendment 112 would allow that to happen. If the minister intends to oppose the amendment, I will be interested to hear his reasons.

15:15

Hugh Henry: When Colin Fox described the advisory council, I thought that he was making the case for complete abolition rather than for the retention in statute of such a council. As Stewart Maxwell indicated, I have made it clear that we acknowledge the continuing need for an advisory council. However, we want a council that is appropriate to modern circumstances. We are consulting on the most appropriate structure for the future and the consultation period will not conclude until early March. We are talking to the relevant stakeholders and to anyone who has an interest in the fire service, to ascertain their views on how an advisory body should operate. As I have explained, I am not convinced that the establishment in statute of such a body is the right way forward. That approach would be too restrictive and would not allow for change to happen quickly or easily, if change were to be required as circumstances alter. Stewart Maxwell said that he would shed no tears at the disappearance of the SCFBAC, but he hankers for a body to be set up in statute. That is a bit of a contradiction.

Setting up an advisory body to consider improvements to a service and advise the minister should not include making in statute provisions in relation to the minister or to the minister chairing the body. The advisory body should draw on the range of experience, expertise and interest that is available throughout the country, so that it can come to informed, educated opinions and put those opinions to the minister for careful consideration. It would not be right or necessary for the legislation to specify the membership, the remit or the frequency of meetings of the body. A more flexible way of operating would enable the widest range of opinion to be involved. The advisory body should not be used as a substitute for other negotiating mechanisms, as can happen. There are appropriate ways of negotiating.

It is appropriate that there should be a body that can reflect on the changes that are being made and on future needs. The best approach would be to set up a body that can adapt and evolve, and I worry that to place such a body on a statutory footing would introduce rigidity to the system that would be unhelpful in future. I have heard nothing that changes my opinion on the matter. I disagree with Colin Fox. I look forward to hearing the conclusions of the current consultation and I am sure that we will be able to move forward with a proposal that is more reasonable and more relevant to the period that we are entering.

Colin Fox: The minister accepted that we are committed to setting up a dynamic replacement for the SCFBAC. The abolition of the SCFBAC is a given; we must consider its replacement. The minister referred to the consultation that is going on, but the consultation might conclude that the most appropriate and modern approach would be to ensure that professional expertise can be brought to and can demand the minister's attention and can make suggestions. I am sure that the minister does not want to pre-empt the consultation's conclusions, but if that suggestion comes out of the consultation, some of his points might be negated.

The minister will notice that the amendment contains nothing about the membership, the frequency of meetings, agendas and so on. It pertains to the principles and the purpose of the

body. I will press the amendment, the remarks of the minister notwithstanding.

The Convener: The question is, that amendment 112 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Fox, Colin (Lothians) (SSP)
Maxwell, Mr Stewart (West of Scotland) (SNP)

AGAINST

Baillie, Jackie (Dumbarton) (Lab)
Butler, Bill (Glasgow Anniesland) (Lab)
Goldie, Miss Annabel (West of Scotland) (Con)
Macmillan, Maureen (Highlands and Islands) (Lab)
Pringle, Mike (Edinburgh South) (LD)

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

Amendment 112 disagreed to.

Sections 78 and 79 agreed to.

After section 79

Amendment 19 moved—[Hugh Henry]—and agreed to.

Section 80 agreed to.

Section 81—Orders and regulations

Amendments 20 and 97 moved—[Hugh Henry]—and agreed to.

Section 81, as amended, agreed to.

Section 82 agreed to.

Schedule 3

MINOR AND CONSEQUENTIAL AMENDMENTS

The Convener: Amendment 98, in the name of the minister, is grouped with amendments 99 to 107.

Hugh Henry: These amendments add entries to schedule 3 to the bill, which makes minor and consequential amendments to legislation. The amendments will replace references in statutes to "fire authorities", "fire brigades" and to joint fire boards and other terms that are used in the Fire Services Act 1947. It will no longer be appropriate to use those references once the Fire Services Act 1947 is repealed and the bill comes into force. Therefore, it is necessary to replace those terms with reference to the updated terminology that is used in the bill.

Amendment 101 will make an amendment to section 22(9) of the Local Government in Scotland Act 2003, to make that provision subject to section 15(3) of the bill. Section 22(9) of the 2003 act provides that a local authority cannot impose reasonable charges for fighting fire as part of its remit to advance well-being—I stress that point. The amendment is necessary to ensure that the limitation on a local authority will be subject to the power of a relevant authority to charge for extinguishing fire and protecting life and property when action is taken at sea, which we discussed last week.

Amendment 102 makes a technical adjustment to the text of paragraph 4 of schedule 3 to the bill, which amends section 61 of the Local Government in Scotland Act 2003. The amendment is consequential to amendment 101, which will make further provisions in respect of the Local Government in Scotland Act 2003.

Schedule 4 to the bill will repeal the Fire Services Act 1947. Amendments 103 to 107 make consequential amendments to legislation to tidy up the statute book by removing references to or amendments that have been made to the Fire Services Act 1947.

I move amendment 98.

Amendment 98 agreed to.

Amendments 99 to 102 and 21 moved—[Hugh Henry]—and agreed to.

Schedule 3, as amended, agreed to.

Schedule 4

REPEALS

Amendments 103 to 107 moved—[Hugh Henry]—and agreed to.

Schedule 4, as amended, agreed to.

Sections 83 and 84 agreed to.

Long title

Amendment 108 moved—[Hugh Henry]—and agreed to.

Long title, as amended, agreed to.

The Convener: That ends a long session. It also ends stage 2 consideration of the bill. I thank members, the minister and the minister's team for their co-operation in the process.

I propose that we have a comfort break of five minutes.

15:26

Meeting suspended.

15:40

On resuming—

Serious Organised Crime and Police Bill

The Convener: I reconvene the meeting and welcome the minister back, in the third of his many guises, with his new team of advisers: Fiona McClean, Bill Barron and Catherine Brown. We are pleased to have the minister with us to give evidence on the Serious Organised Crime and Police Bill, which is currently before the Westminster Parliament. I am happy to allow the minister to make some introductory remarks.

Hugh Henry: There has been some speculation during the past week about the bill and its necessity. The proposal that is before this Parliament will introduce a number of measures that I think will be important in our fight against serious organised crime. I hope that members recognise the significance of some of the proposed measures, such as compulsory investigative powers, financial reporting orders and witness protection. It is significant that we are putting into legislation international obligations that otherwise would not be brought forward and that we are looking at something that is long overdue and for which many people have been calling: the regulation of the private security industry. We believe that it is necessary to move forward on those fundamental areas in order to enhance our ability to tackle serious organised crime. We believe that many of the measures will give added protection to our communities, so we think that they are worth supporting.

I will comment on the speculation that there has been about certain aspects of the bill. In the past week, the police staff associations have expressed concern about some aspects of the serious organised crime agency that is proposed in the bill. I know that the committee has received comments from the Association of Chief Police Officers in Scotland. I want to take the opportunity to set out some facts, which I hope will help to clear up any potential misunderstandings before we consider the Sewel memorandum in more detail.

We need to be clear about what is being proposed in the bill. The committee and the Parliament would agree that crime recognises no borders. Therefore, our view is that it is essential that law enforcement agencies throughout the United Kingdom have a sound statutory basis on which to work closely together to ensure that criminals cannot slip through the net. The serious organised crime agency will comprise the National Crime Squad for England and Wales, which carries out broadly the same functions as the Scottish Drug Enforcement Agency, and three organisations that already operate on a UK-wide basis—in other words, they already operate in Scotland. Those are the National Criminal Intelligence Service—NCIS—the immigration service, in respect of its responsibility for organised crime, and HM Customs and Excise, in respect of its responsibilities for serious drug trafficking. All those agencies already work closely with the SDEA and the Scottish police service. We want to build on that successful track record. The bill provides the statutory basis to ensure that any SOCA activity in Scotland is carried out in full accordance with our criminal justice system. I think that that is right; no one, including the police staff associations, would disagree with that. Let us also be clear that nothing in the bill will change the responsibilities of Scottish forces or the SDEA, nor will it affect the existing tripartite policing arrangements in Scotland.

The bill makes it clear that SOCA agents can operate in Scotland only with the agreement of Scottish ministers and the director of the SDEA or a Scottish chief officer nominated by him. As with any police or law enforcement agent who is exercising powers in Scotland, a SOCA agent must do so under the direction of the Lord Advocate and procurators fiscal. Home Office ministers have given a commitment that they will ensure that SOCA agents will be allowed to operate in Scotland only when they are fully trained and accredited; the training will include specific training on the Scottish criminal justice system.

15:45

It has been suggested that the bill will lead to political interference in the police service and that it will, in some way, diminish the operational independence of Scottish chief constables. That is simply not true. The bill makes it clear that no UK minister can direct Scottish police forces; it sets out that only Scottish ministers will be able to exercise such a power and only in rare and extremely specific circumstances. For example, if police forces and SOCA were unable to agree on providing each other with support on a particular operation, Scottish ministers would act as an impartial arbiter to ensure that forces and SOCA were able to continue working together effectively. That would be done in full consultation with the relevant bodies.

The letter from ACPOS to the committee raises a number of other more detailed issues that have been taken up directly with the chairman and director general designate of SOCA. I know that a constructive meeting was held last week and that the relevant parties agreed to begin the preparation of a memorandum of understanding

that will address the ACPOS concerns about operational arrangements. I believe that that is the right approach to take. The people involved have the professional knowledge and experience and they know what will work best in practice.

I am also aware that, over the past couple of days, the issue of trespass has been raised in the context of whether we are importing English law into Scotland. I confirm that we are not doing so; indeed, there is neither the intention nor the opportunity to do so. The power will be given to Scottish ministers to identify sites of the Crown and, in respect of three particular premises, Scottish ministers could probably introduce a power to restrict entry. We are not importing English trespass law. Some have argued that that power exists in Scots law already: that is as may be. However, we believe that, if we are doing a belt-and-braces job, it is right to ensure that those designated Crown premises are not left vulnerable. We believe that it is right for Scottish ministers to have that power. If we believe that it is necessary to use the power, Scottish ministers will use it, not the Home Secretary or English ministers.

As I said, there is no intention to introduce English law on trespass into Scotland. English law would not apply in Scotland, but UK ministers would have the right, as they have under reserved legislation in the case of a state of emergency, to make certain designations.

I hope that some of those assurances will clarify some of the points that have been made. The bill is long overdue. The public in Scotland will welcome the proposed measures to tackle serious organised crime, not least of which is the opportunity to regulate the private security industry. There is possibly a misunderstanding over the issue of trespass. However, in terms of the wider context of the bill, that is a minor issue. The bigger picture is what we can do to make our communities more safe and secure and to take effective action against major criminals.

The Convener: Thank you, minister. I have a couple of points to raise by way of preliminary clarification. Of course, nobody objects to the idea of trying to build safer and more secure communities. However, is it not the case that, in post-devolution Scotland, such proposals, however well-intended, sit ill at ease with the structures that have now evolved in the Scottish criminal justice system? Indeed, this Parliament and the Executive have influenced the extension of the framework of criminal justice in Scotland. For that very reason, has the particular form of the proposals not come too late? Is it not infinitely better to let the Parliament legislate on these areas?

Hugh Henry: No, I do not think so. For example, when we went out to consultation on the regulation of the private security industry a few years ago, one of the responses that we received highlighted the need to regulate the industry to ensure consistency across the UK. Such an approach would also provide financial benefits. The proposal might be late in the sense that we have simply been waiting patiently for this opportunity; however, I do not believe that the Parliament should legislate on the matter. We have decided that that is best done on a UK basis.

We are also introducing some very particular safeguards and giving various powers to Scottish ministers to ensure that people who operate in Scotland are properly accountable to the SDEA and Scottish police forces. After all, many major matters, such as tackling human trafficking, are reserved. We must have a statutory framework that ensures effective co-operation by and the direct engagement of Scottish ministers, the director of the SDEA and local police forces in operations involving human trafficking and other reserved matters that impact on local policing or Scottish concerns. We also need an overarching UK regulatory framework for cases in which the work of HM Customs and Excise overlaps with areas of devolved responsibility. Moreover, although some issues involving international obligations centre partly on Scotland's international obligations, many of them interrelate with and impact on UK interests.

As a result, although one could isolate some matters that could be dealt with under Scottish legislation, many areas of activity against serious organised crime affect and impact on UK agencies. We are introducing a statutory requirement for those agencies to be accountable in an appropriate way through Scottish ministers to the Parliament.

The Convener: I know that colleagues have questions on individual aspects of the legislation.

You used the word co-operation. Is that not the key to controlling serious organised crime successfully? Have you considered using the SDEA, which has an expanded area of operation and a very good performance record, as a Scottish organisation to tackle serious crime?

Hugh Henry: But that agency would not be able to carry out HM Customs and Excise work or to deal with immigration matters. Sometimes, such operations are cross-UK and, indeed, international. If we took the course of action that you have suggested, we would effectively prevent immigration and customs services from being able to operate in this country in partnership and co-operation with our local agencies. Indeed, we would be designating them as arm's-length organisations instead of making them accountable to ministers for any operations that impact on devolved matters.

We have struck the right balance. I am not convinced that it would be right to set up the SDEA as a stand-alone agency; given that matters such as immigration and customs are reserved, we would not be able to do so. It is right that we have ensured that the Home Secretary's writ does not run in Scotland, that the SDEA's director will be directly involved when any SOCA agents are active in Scotland and that the Scottish ministers will have an input into the process. The proposals are entirely appropriate and consistent.

The Convener: I do not want to hold back other members who are anxious to pursue their lines of questioning.

Jackie Baillie (Dumbarton) (Lab): The proposals might be entirely consistent, but, in the interest of clarity, will the minister tell me which single organisation will take the primary role in tackling serious organised crime? Will it be the proposed new serious organised crime agency, the SDEA or a chief constable?

Hugh Henry: It would depend on what exactly the operation was. Some operations will be carried out within a single police authority area and others will cut across authorities, which is when the SDEA becomes involved. If a major operation were to cut across the United Kingdom, the serious organised crime agency would be in the lead. However, if any SOCA agent was operating in Scotland, there would have to be agreement between the Scottish ministers and the Home Secretary about the broader terms of reference; there would also have to be agreement with the SDEA's director or a designated or appointed chief officer about the agent working in Scotland. In major operations, the serious organised crime agency would be responsible for operations that cut across jurisdictions, but for anything that was specifically Scottish and did not involve immigration or customs issues, the SDEA, the police authorities or the chief constables would be responsible.

Jackie Baillie: Will that be clarified through the memorandum of understanding?

Hugh Henry: I believe that it will be. Some amendments that attempted to reflect the interests of Scots law and the Scottish ministers in the process have already been made to the bill, and I hope that anything other than that would be picked up in the memorandum of understanding.

To return to a remark that I made in my introductory speech, the primacy of the Lord Advocate holds for SOCA's operation within the Scottish legal framework. SOCA agents cannot operate outside those terms of reference, irrespective of who they are. Clause 45 attempts to clear up some of those powers.

Jackie Baillie: I return to a point that you made about the operational independence of chief constables, which, as I am sure you appreciate, is a much valued right. You mentioned that there would be rare or specific circumstances in which a Scottish minister could exercise a degree of direction and you gave the example of the different agencies failing to agree on resources or staffing. What criteria would determine whether ministers became involved? Will there be a process that would lead up to ministerial direction or involvement and, if so, what will it be? People want reassurance that, in the rare circumstances in which you would use the power, it will be used appropriately.

16:00

Hugh Henry: To some extent, the proposal in the bill reflects the situation in which we find ourselves. People say that the proposal amounts to the politicisation of the police service and that it gives ministers, for the first time, the power to intervene. However, section 11 of the Police (Scotland) Act 1967 allows Scottish ministers to intervene if they feel that that is appropriate and if

"it appears to the appropriate Minister or Ministers to be expedient in the interests of public safety or order that any police force should be reinforced or should receive other assistance for the purpose of enabling it to meet any special demand on its resources".

That power has not been used because negotiations and dialogue are able to resolve most of the tensions that may or may not exist, but the fallback power is there.

The proposed fallback power that we are discussing is very similar. If Scottish ministers felt that there was an impasse between SOCA and the SDEA—or between SOCA and any individual police authorities—that was not being properly resolved and if it became apparent that there was a stand-off and that the two agencies were in dispute as to whose responsibility it was to act, we would have the power to intervene and would act. As with the power in the 1967 act, we would expect the proposed power to be used very infrequently, if at all. We believe that it is right that, if public safety were being endangered because two agencies were not able to reach agreement, we should have the right to become involved. However, we hope that any such problem would be resolved.

Jackie Baillie: I was not questioning your right to do that; I was questioning the process that may underpin the decision making that you would then go through. Rather than that process being based on what you feel, is there a set of criteria and a formal process?

Hugh Henry: I do not know whether the committee has seen the new clause that was inserted. Clause 26, which is entitled "Directed arrangements: Scotland", states:

"(1) This section applies where it appears to the Scottish Ministers—

(a) that a body within subsection (2) has a special need for assistance from SOCA or SOCA has a special need for assistance from a body within that subsection,

(b) that it is expedient for such assistance to be provided by SOCA or (as the case may be) the body, and

(c) that satisfactory arrangements cannot be made, or cannot be made in time, under section 24.

(2) The bodies within this subsection are—

(a) any police force in Scotland, and

(b) the Scottish Drug Enforcement Agency."

Subsection (3) goes on to give further detail. I hope that that is the type of clarification that Jackie Baillie is, quite rightly, looking for.

Colin Fox: I want to ask what I imagine will be a very straightforward question about the National Criminal Intelligence Service. Do you envisage that, in future, when it is part of SOCA, it will continue to provide the same service in Scotland as it does just now?

Hugh Henry: I would imagine so. I do not anticipate that anything significant will change.

Colin Fox: I thought that you would give a short and straightforward answer.

My other question concerns the submissions from the Scottish Police Federation and ACPOS. You will know that they are concerned about the principle that SOCA agents will operate as constables, with the same powers and privileges as police constables have just now. You will also know that the Scottish Police Federation is very concerned about extending those powers to SOCA agents. ACPOS has argued that if those powers are to be extended, the principle should be the subject of scrutiny by the Scottish Parliament. Do you think that ACPOS has a point?

Hugh Henry: I think that there has been a misunderstanding about that. There are issues to do with the designation of some of the agents from English agencies who are being subsumed into SOCA, but we are quite clear that there will be no change to the definition of a constable in Scotland. Indeed, further safeguards have been built in for anyone who transfers or is seconded into SOCA, so that they would have certain rights. That is an added assurance. There is no change to the definition of a constable or the powers of a constable, or to the definition of a chief constable or the powers of a chief constable.

Although there may be concerns in England and Wales about the designation of some agents, no one in agencies in Scotland will be affected. The problem arises partly because there has been a misunderstanding and partly because concerns have been generated south of the border. Those concerns are not particularly relevant to Scotland.

Colin Fox: You made a point about transferring and seconding. From where will SOCA agents be transferred or seconded?

Hugh Henry: As Colin Fox knows, the new SOCA will involve some of the agencies to which I referred in my introductory remarks. However, from time to time there may be opportunities for SOCA to ask for people with certain experience from agencies in Scotland to be seconded for particular pieces of work. We have attempted to ensure that safeguards are built into that process.

Colin Fox: Will they be known henceforth as SOCA casuals?

The Convener: Moving swiftly on—

Mike Pringle (Edinburgh South) (LD): I have a question about the proposed new compulsory investigative powers that will be conferred on the Lord Advocate. Have the Scottish police organisations been consulted about those new powers? In its submission, the Scottish Police Federation indicated that it is worried about the powers and that it believes that more money will inevitably be needed to fund their use. It also thinks that the changes will make prosecutions far more complex. Do you have any comments on that issue?

Hugh Henry: I am not sure about the suggestion that more money will be needed. Can Mike Pringle clarify that point?

Mike Pringle: In its submission to us, the Scottish Police Federation said that it was worried that there would inevitably be additional costs. Has anyone given thought to that issue?

Hugh Henry: I recognise that the changes may have resource implications, depending on the frequency with which the new powers are used. We do not expect them to be used very often—possibly about 20 times a year. At the moment, we estimate that the additional costs may be in the region of £50,000 per year, which is not a huge amount.

Mike Pringle asked a more general question about the circumstances in which the powers would be used. In our view, it is most likely that they would be used against those on the fringes of an organised crime group. In Scotland, the offences to which the powers will apply are the lifestyle offences listed in schedule 4 to the Proceeds of Crime Act 2002, offences of fund raising, money laundering and so on under the Terrorism Act 2000 and certain customs and excise offences. Under the new powers, the Lord Advocate or a procurator fiscal could authorise a police officer to issue a disclosure notice requiring an individual to attend an interview, to answer questions, to provide information or to produce documents. However, the provisions contain

certain safeguards. A person may not be required by a disclosure notice to disclose information or documents that are subject to legal privilege or confidential banking information.

It is right that these new powers should be introduced for the investigation of very serious offences. However, there are also safeguards, as is right and proper. I do not believe that the changes will have the huge resource implications that some have suggested.

The Convener: On that aspect, why will a subject who is investigated under the powers not be able to have a solicitor present?

Hugh Henry: That issue has a number of aspects. To put it in the context of Mike Pringle's question, compulsory investigative powers without judicial oversight have been used in Scotland for almost two decades—as the convener is probably well aware, they were introduced in the Criminal Justice (Scotland) Act 1987 for investigations into serious and complex fraud.

We do not believe that a solicitor is necessary in such situations, given that important safeguards will be introduced. In general, statements that are made by the person will not be able to be used in criminal proceedings against them. The person may not be required to answer any question, provide any information or produce any document that they would be entitled not to answer, provide or produce on the ground of legal privilege. The proposals are modelled on the Lord Advocate's existing powers in relation to the investigation of serious and complex fraud, under which persons who are subject to the compulsory investigation powers have no right to have a solicitor present.

The new powers merely reflect current practice. In addition, in order to provide safeguards in respect of article 6 of the European convention on human rights and the privilege against self-incrimination, as I said, a statement that is made by the person in response to a requirement under the new powers may not be used in criminal proceedings against them. Given that the safeguards are sufficient and the new powers reflect existing practice, those powers are entirely appropriate.

The Convener: You referred to criminal procedures legislation, but I think that the relevant statute is probably the law reform (miscellaneous provisions) (Scotland) act 1995. However, I do not understand why new provisions are necessary when we have existing ones.

Hugh Henry: The new powers are an enhancement. When I mentioned the Criminal Justice (Scotland) Act 1987, I was developing the point that Mike Pringle made. Certain powers already exist, but in relation to certain specific crimes it is right to build in additional powers. The new powers will enable the SDEA and other police officers, working closely with prosecutors, to compel individuals to co-operate with investigations by producing documents and answering questions, which will be done by giving disclosure notices. The new powers will enhance the existing ones; they build on the current situation and add value.

The Convener: Sorry, I gave the wrong title of the act; I should have said the Criminal Law (Consolidation) Scotland Act 1995.

Mr Maxwell: I turn to the issue of witness protection in relation to the bill and the Sewel motion. Will you confirm that witness protection throughout the UK currently relies heavily on co-operation between jurisdictions and joint working across borders? If we did not agree to the Sewel motion, would the current situation continue or do you envisage that a new problem would arise?

Hugh Henry: Certain aspects of the present situation would continue, but the Scottish police and the director of the SDEA would be unable to take advantage of the UK provisions in the bill and would therefore be operating at a disadvantage. If a person is to begin a new life in a new area with a new name, support is needed from other public authorities, particularly housing, education and health authorities and the Benefits Agency. The bill puts a statutory obligation on those authorities to assist.

Stewart Maxwell has touched on one of the important aspects of the bill that is sometimes shrouded in secrecy because of issues of confidentiality. Because of the serious nature of some of the crimes that we are discussing, it is inevitable that many of the people who seek witness protection would have to be moved outwith Scotland, because this is quite a small country. Without the Sewel motion, police forces could still offer witness protection, as I indicated, but the quality and effectiveness of the service would be affected. My worry is that, ultimately, that could deter people from entering the witness protection programme and testifying.

16:15

Mr Maxwell: I understand what you have said, but I am not absolutely sure why it leads you to the conclusion that people might fail to enter a witness protection programme. I assume that, even if we did not agree to the Sewel motion, there would still be cross-border co-operation, as there is at the moment. I understand what you are saying about the statutory provision that might allow housing agencies and other organisations to be forced—although I do not think that it would take much force—to be part of that co-operative work. Could you explain why you think that people whose lives

were at risk and who would be willing to enter a witness protection programme if the UK bill that we are discussing were to apply would be unwilling to do so if cross-border co-operation continues as at present? I do not see how that view holds together.

Hugh Henry: The bill introduces new powers that will enable witness protection providers to make arrangements for witness protection. It would be ironic if witness protection providers south of the border had those powers but ones in Scotland did not. Does Stewart Maxwell envisage some form of one-way traffic whereby witness protection providers in England and Wales would be able to offer protection to people from Scotland who needed protection but we would be unable to offer protection to people from south of the border?

I think that not having a UK provision could be problematic. Our arrangements would be out of step and there would be reduced scope for reciprocity or joint working. I think that it would impact on our ability to deliver effective witness protection in Scotland. If the quality of the service is affected in whatever way, the faith of individuals in the system could be shaken. I am not sure that we want to send out a message that, by refusing to sign up to the new measures, we are willing to have what would effectively be a second-best system.

Mr Maxwell: I hear what you are saying, but I cannot understand how you come to the conclusion that we would end up with a second-class system. I take it that you are not saying that the current system—which is what we would continue to have—is a second-class system. There would still be cross-border co-operation. I am not saying that there would be one-way traffic if we decided not to agree to the Sewel motion and England and Wales went forward with the bill. With regard to the problems that you envisage, is it the case that there is no cross-border co-operation between, for instance, the Republic of Ireland and the UK? I remember cases in which people entered into witness protection programmes in the Republic of Ireland and were relocated in the UK. Surely such programmes work across international borders. I am still at a loss—

The Convener: Can we let the minister respond to that point?

Hugh Henry: I do not intend to deviate into a discussion of reciprocal arrangements that might exist between the UK and other countries. I am talking purely about the arrangements that exist in the UK.

We are introducing new requirements and new powers. As I have said twice, if the Sewel motion is not agreed to, the existing arrangements will continue. Why would having the existing arrangements be second best? It would be second best because other jurisdictions would move on with new and enhanced powers, but we would not. By standing still, we would be disadvantaged compared with others.

New powers will be introduced to exempt from civil and criminal liability some people who give false information about a protectee's new identity for the purpose of ensuring that protection arrangements continue. The bill will place a duty on public bodies, such as health, education and housing authorities, to provide reasonable co-operation to protection providers.

If the Sewel motion were not agreed to, we would not have that. We would have to hope that bodies in Scotland responded in that way, but if they did not, what power would we have to do anything? What power would an individual, the Parliament or ministers have if the local authorities in the member's area decided for whatever reason not to contribute or participate? No powers would be available.

It is right to have consistency throughout the United Kingdom and reasonable co-operation with protection providers. Other provisions will be introduced. That is the right thing to do.

Mr Maxwell: I have a question on one tiny point.

The Convener: You must be quick, as other members have questions.

Mr Maxwell: I appreciate that. The minister asked me what would happen if a local authority did not contribute. I suggest that we should legislate for that. We should bring the powers to this Parliament and legislate so that authorities throughout Scotland operate in the same way. We are talking not about standing still, but about moving forward. I am not convinced by the explanation of why it is necessary to use a Sewel motion.

Hugh Henry: That is exactly what we are doing—we are legislating through the Sewel convention. We are back to the old argument about whether everything that affects Scotland should have stand-alone legislation. At some point, it might be useful for the committee and the Parliament to identify the amount of parliamentary time that would be required for all the stand-alone bills that would be needed if we took the advice of Stewart Maxwell and his colleagues. The Sewel motion is an appropriate mechanism for protecting vulnerable people quickly, rather than waiting for the Parliament to free up sufficient time to legislate at some point in the future.

Bill Butler: I move on to the suggested changes to the Proceeds of Crime Act 2002, which I believe are mostly minor and technical and relate to civil

recovery provisions. Who in Scotland was consulted about those changes? Were any concerns expressed?

Hugh Henry: To the best of my recollection, the UK Government undertook the consultation. We do not have to hand the information about who was consulted. I can write to the committee with that information.

Bill Butler: I am sure that committee members would be obliged.

Hugh Henry: The civil recovery unit in Scotland is fully aware of the proposals. I will obtain the information for Bill Butler.

The Convener: That would be helpful.

Bill Butler: Do any distinctively Scottish issues arise in relation to the bill? I am thinking about clause 93, which concerns civil recovery freezing orders.

Hugh Henry: Do you want a list of specifically Scottish issues?

Bill Butler: I think that clause 93 has Scotland not following a provision on freezing orders.

Hugh Henry: Scotland has a range of separate provisions. From about page 52 onwards, the bill sets out several measures that relate specifically to Scotland. The provisions for a Scottish freezing order, which is called a prohibitory property order, are in proposed new section 255A of the Proceeds of Crime Act 2002.

Maureen Macmillan: My question is on automatic number plate recognition, about which ACPOS seems to have some concerns. I am not sure that I totally understand what those concerns are, but it seems to me that although money is hypothecated for the system—in that the money that is raised from automatic number plate recognition will provide the equipment to run it—ACPOS is concerned that the number of hits that the police will get will mean that they will need more resources, which might have an impact on funding for other aspects of police work. Has ACPOS raised that matter with you?

Hugh Henry: We are aware that there are concerns about the bureaucracy of accounting, but I can give Maureen Macmillan an assurance that that will be kept under control. I am not sure what the broader issue is. Perhaps she could explain a bit further.

Maureen Macmillan: I am referring to what ACPOS told us in its written evidence. It says:

"There are issues in relation to how forces will deploy resources to respond to hits on ANPR".

It may be that ACPOS thinks that there will be hidden costs that have not been properly addressed.

Hugh Henry: Again, I give the assurance that we will seek to keep the bureaucracy under control. On the hypothecation issue, the experience in England suggests that we are talking about perhaps £70,000 per annum, so we need to keep the matter in perspective.

The Convener: Will the system lead to a rash of cameras throughout Scotland?

Hugh Henry: I would not have thought so. I do not know whether the committee has had the opportunity to see the system in operation, but it is a sophisticated system that is used at specific locations. It can be extremely useful in serious crime investigations, and indeed terrorist investigations, in keeping track of vehicles. It has already had some success in relation to drug dealing and trafficking; the system has made a significant contribution to tackling those.

The debate is entirely different from the one that has been generated by speed cameras. We are talking about something that is much more significant. I admit that the system will also be able to identify those who are breaking the law in relation to vehicle excise duty or even car insurance. Some cameras will be mobile in police cars and a few will be fixed at various parts of the road network. However, we are talking about something that is significantly different from speed cameras.

Maureen Macmillan: I draw your attention to the amendments to the Police Act 1997, which are mainly in response to the Bichard inquiry. As we are all aware, there have been concerns in the recent past about Disclosure Scotland's workload and performance in relation to the time that it has taken to deal with paperwork concerning people who seek to work with children or vulnerable people. Do you think that the amendments will have any impact on Disclosure Scotland's ability to deal with such inquiries?

16:30

Hugh Henry: I would not have thought so. Maureen Macmillan is probably aware of the significant improvements that have been made at Disclosure Scotland in recent months. As a result, I do not think that there would be any significant impact. Of course, there will be some impact—it would be wrong to suggest that there would be no impact—but I suggest that it will be entirely manageable. In light of its recent improved performance, I am confident that Disclosure Scotland will be able to cope.

If the Sewel motion is not agreed to, I worry not so much from a logistical or operational perspective, but from a legal perspective that, although we would be able to legislate on some of the devolved functions in part 5, Scottish ministers

might not have powers to require bodies outwith Scotland to provide information. In that event, some Bichard recommendations—specifically recommendations 23 and 31—could not be implemented in Scotland, which would be a concern.

Maureen Macmillan: So do you think that Disclosure Scotland's procedures are now robust enough, or do you intend to put in any more resources?

Hugh Henry: We are keeping a close eye on what is happening at Disclosure Scotland. There has been significant investment and I give credit to all those who have worked hard to bring about the improvements that have been made. I think that the organisation is robust enough to cope. We think that its performance has significantly improved, but we will continue to monitor that closely, as it would be in nobody's interest for us to go back to where we were a year or two ago.

Jackie Baillie: I very much welcome the extension of regulation to the private security industry and I make the passing comment that we are discussing the positive use of a Sewel motion, as the sooner we do what has been proposed, the better.

The minister will not be surprised to hear that a number of us have had serious misgivings about the activities of some security companies and, indeed, about the possibility that some of them have been acting as a front for criminal activity. Therefore, I sympathise with the point that was made by the Association of Scottish Police Superintendents, which emphasised

"the Licensing Authority's need to take into account legitimate intelligence information/non-conviction data in assessing an individual's fitness to hold a licence."

I wonder whether the extension of regulation deals with that point or whether we will consider that matter elsewhere.

Hugh Henry: I am not entirely sure about the detail of that, but I repeat what I said earlier. We think that it is good to have a UK regulatory framework for a number of reasons. To consider matters from a positive perspective, good companies that are based in Scotland should be able to access the market elsewhere in the United Kingdom. Equally, if good, law-abiding and reputable companies are operating elsewhere in the United Kingdom, I am sure that they will be welcomed with open arms in some communities. We want to ensure that disreputable companies are effectively dealt with north and south of the border.

On licensing, concerns have been expressed that the costs of setting up our own regime would be disproportionately great on small companies that operate in Scotland and would place them at a significant commercial disadvantage. On the broader front of licensing and intelligence information, information becomes available to the Security Industry Authority and it must decide whether it is appropriate to discuss that with other agencies. However, it is in all our interests for more effective action to be taken against the companies that have been highlighted in the media. I am not entirely familiar with what is happening elsewhere in the country, but I know from my own experience in the west of Scotland that disreputable security companies are a serious concern.

Mr Maxwell: A supplementary Sewel memorandum was issued in relation to new clauses after clause 123, which is entitled "Offence of trespassing on designated site". Paragraph 6 of the memorandum says:

"Scots law is generally sufficient as regards the operational power of the police to deal appropriately with intruders on sensitive sites."

Given that sentence and the view of other organisations, can you explain to us exactly what the difference will be between the proposed new powers in relation to the law of trespass, or whatever you want to call it, and the current situation in Scotland?

Hugh Henry: It might be useful if I start with a specific comment about the law of trespass, then come back to your question about the difference. There has been speculation that we are importing English trespass law into Scotland. As I said in my introductory remarks, that is not the case. However, given that people have been talking about concepts that are alien to Scots law, I want to put some of the issues into a broader context.

People would be right to suggest that Scots criminal common law does not recognise the legal concept of trespass in the same way as English law does. However, a number of statutory trespass offences apply in Scotland. For example, section 3 of the Trespass (Scotland) Act 1865 refers to occupying or encamping on land without permission and section 68 of the Criminal Justice and Public Order Act 1994 refers to aggravated trespass. There are also offences of criminal trespass in relation to specific matters. For example, section 16 of the Railway Regulation Act 1840 refers to the offence of wilful trespassing on a railway line and refusing to leave on request and section 23 of the Regulation of Railways Act 1868 refers to the offence of trespassing on a railway following a warning not to pass.

We have sought to act within the context in which a general law is regarded as sufficient. However, there are additional safeguards in relation to specific incidents. We are clear that English legislation is not being introduced into Scotland; we are introducing our own, additional

legislation. I have copies of the relevant clause that we are introducing in relation to Scotland; I am not sure whether the text has been made available to the committee. Members will see that the word "trespass" is not mentioned in the clause. We have been very careful to ensure that that word is not included. Clause 124 refers only to "Corresponding Scottish offence".

Clause 124(1) refers to an offence occurring when someone

"enters, or is on, any designated Scottish site without lawful authority."

Clause 124(2) states:

"A 'designated Scottish site' means a site in Scotland … specified or described (in any way) in an order made by the Secretary of State or by the Scottish Ministers".

The secretary of state would make such an order only

"in the interests of national security."

That is a reserved power, so Scottish ministers would not be involved in that in any case. Scottish ministers could designate a site for the purposes of the section only if

"it is comprised in Crown land"

or

"it is comprised in land belonging to Her Majesty in Her private capacity or to the immediate heir to the Throne in his private capacity".

We do not think that the provision should apply in a general sense and Scottish ministers would not use it in a general sense. However, there have been recent incidents at a number of properties that give rise to concern that people might intrude on premises such as the Palace of Holyroodhouse or the Balmoral estate. Although we agree that in general the current law is sufficient, we want to ensure that there is no loophole that someone might use to avoid being prosecuted. We want to make it clear that such unlawful entry would be an offence.

That is a belt-and-braces exercise; it is not a huge issue compared with other elements in the bill and I suppose that to some extent it is a matter only of legal semantics. The provision would apply only in two or three sites. Notwithstanding that, we have ensured that there would be no unintended introduction of English law or powers of UK ministers into a matter that is appropriately the responsibility of Scottish ministers.

Mr Maxwell: I return to the question that I asked some time ago. What would the proposed law add to the situation? What would change? You mentioned loopholes and a belt-and-braces exercise. Will you identify a specific loophole that the proposal would deal with?

Hugh Henry: Perhaps I can describe a situation. Simply entering land without the owner's permission is not a criminal offence; it is a civil wrong and the landowner would have to raise interdict proceedings to prevent the person from re-entering the property or raise an action for damages if the property had been damaged. Under the current criminal law, the ability of the police to arrest a person who unlawfully enters a sensitive site and the scope for prosecuting such a person depend on the person's being suspected of having committed other offences, such as a breach of the peace or malicious mischief. The extension to Scotland of the power that we are discussing would, first, ensure that the police have a specific power to detain and, if necessary, arrest a person who intrudes on a designated site, notwithstanding the fact that the person might not be suspected of an offence such as malicious mischief. That would be a new power; that is what would be different. Secondly, the new offence would mean that a person could be prosecuted for intrusion on a designated site, whereas currently any prosecution that involved unauthorised intrusion would depend on the person's having committed an offence in the course of the intrusion. The situation would be very different.

Mr Maxwell: That is the point that I wanted to get to. From your answer, it sounds as though we should be using the word "trespass". Someone could be arrested just because they happened to be on Crown land, for example. I thought that in Scotland the principle of the freedom to roam was a much-prized ethos. In many ways, that is what the Land Reform (Scotland) Act 2003 was about. During the debates on the Land Reform (Scotland) Bill, a number of points were made about the introduction to Scotland of the unwanted, unnecessary and alien—you used the word yourself—idea of trespass law. Indeed, the Balmoral estate was one example that was used.

You said that the power would be used in specific circumstances, but you did not say that the power could not be applied more generally or widely, for example to the entire Balmoral estate or to Crown land such as the Glenlivet estate or the shoreline. Would the power be restricted so that Scottish ministers could not apply it in that way, or is it merely the case that you would not do so? You clearly stated that someone could be arrested just for being in a certain location—in other words, they could be arrested for trespassing.

16:45

Hugh Henry: Stewart Maxwell is valiantly attempting to ensure that this debate is about what he might describe as alien legislation, but we are clear that the bill is not about introducing the

English law of trespass to Scotland. Mr Maxwell has outlined his suspicions that it will do that very thing; that it will take away a person's right to roam; and that it will mean that they will be prosecuted simply for being in a certain place. However, as I explained, limits and restrictions have already been placed on the inalienable right to roam in Scotland by the Trespass (Scotland) Act 1865, the Criminal Justice and Public Order Act 1994, the Railway Regulation Act 1840 and the Regulation of Railways Act 1868. If Stewart Maxwell or other committee members want me to enter into a broader discussion about the implications for land reform, I am happy to do so. I will take your guidance on the matter, convener.

The Convener: Mr Maxwell's concerns centre on the apparent creation of an offence in Scotland for something that has hitherto not been an offence.

Hugh Henry: Well, I hope that I have answered the specific question about the circumstances in which such an offence would be committed.

Stewart Maxwell also asked about how widely any such area would be identified or designated. We are quite clear that, in cases in which action needed to be taken for security reasons, any designation would be commensurate with the intelligence advice that was given. There would not be a catch-all to stop people using their existing right of access to large areas of open countryside. However, if security advice suggested that we needed to take additional powers and designate specific premises, we would do so. Whether such a designation would extend from the particular premises to the end of a certain hedge, a certain fence or the bottom of a certain path would largely depend on the security services' advice; it would not automatically apply to a whole estate and stretch for miles and miles. Scottish ministers would take advice on a very limited number of premises where we think that action needs to be taken.

The Convener: Would the notice of such a designation be given to the public through the physical presence of big signs saying, "Trespassers will be prosecuted"?

Hugh Henry: It is reasonable to suggest that people would expect some signage to alert them to the fact that entry beyond a certain point could render them liable to prosecution. The convener is right to raise the concern that members of the public might accidentally wander into an area and find themselves unwittingly or unknowingly committing a criminal offence. Indeed, subsection 3 of section 127, which covers designated Scottish sites, says:

"The Scottish Ministers may take such steps as they consider appropriate to inform the public of the effect of any designation order made by them."

The Convener: I am conscious of time, but Maureen Macmillan has wanted to ask a question for some time.

Maureen Macmillan: I am concerned about the bill's potential impact on land reform legislation. I understand that the curtilage of a dwelling-house was always excluded from the right to roam, but I would be rather worried if the bill's provisions were used to prevent that right. I realise that that might have to happen if there are national security considerations, but I seek an assurance that any such step would last only for a limited period.

I would like to know how the designations will be sought and how long they will last. I assume that sometimes designation orders will have to be made in a hurry and, perhaps, even secretly, because of national security issues. Is that the case? Could you take us through the process?

Hugh Henry: Designation orders must be approved by the Parliament. They will not necessarily specify a period, but we can apply for an order to be revoked once we think that a concern no longer exists.

On Maureen Macmillan's general concerns, I give an assurance that the power will not cut across the general provisions of the Land Reform (Scotland) Act 2003. I repeat the point that I made earlier: ministers would seek a designation order from Parliament only when advised to do so. The dwelling or area that we sought to designate would be the minimum area consistent with advice on security requirements. I am struggling to think of a situation in which a designation order would extend beyond the curtilage of an area. There have been major demonstrations in a number of areas on which people have descended from a wide area. If people wanted to make a point about an event or incident, security advice might be that the designation order should extend beyond the curtilage of an area or the immediate surrounds of a dwelling-house.

The general intention is not that Crown lands or royal estates should be excluded from the provisions of the Land Reform (Scotland) Act 2003. That is not an unintended consequence of the bill and will not happen. Ministers will seek the Parliament's approval of designation orders. If Parliament identified ministers attempting to act in the way that has been suggested, it would rightly have something to say about that.

Maureen Macmillan: Rather than having designation orders that are open ended, would it not be better for them to come before the Parliament with a time limit and for ministers to seek to have that extended?

Hugh Henry: I am not sure that it is necessary for us to proceed in that way. It is right for us to have orders that grant the powers that are

necessary, but there might be certain locations where we want powers to apply indefinitely. Experience suggests that we would not want to keep coming back to the Parliament to have an order extended. If we believed that the threat to a specific location had been removed, we would seek to revoke the order. However, we need to bear in mind the fact that Crown lands or residences are in a small number of specific locations. Ministers would have to have a specific reason to seek the designation of an area.

Colin Fox: I realise that it is nearly 5 o'clock and that we would all like to get away, but I am anxious to press the minister on one point. My question is based on the memorandum that he sent the committee. Does he envisage the bill being used to curtail protest rights at the G8 summit in Gleneagles in July? Much of what he said related to Crown land, but the memorandum refers to national security. Will he assure the committee that the bill will not be used in the way that I have described? As the minister said, the police and authorities have other powers to control demonstrations.

Hugh Henry: Even if the motion on the bill were rejected by the Scottish Parliament, the UK bill would go through and any powers that the secretary of state will have in relation to national security would apply anyway, so that argument is neither here nor there.

I am not familiar with the geography of the Gleneagles area and do not know who owns the land around the hotel. I am not aware of there being any Crown land or royal sites immediately adjacent to the area, but I genuinely do not know. Colin Fox asked whether we would use the power in relation to the G8 summit, and I have to tell him that I do not know. If the advice was that, as an overspill from the G8 summit, security services identified a specific threat to Holyrood palace or Balmoral, we might designate one of those sites if it were appropriate to do so, on the basis of information. However, I am not sure of the value of such speculation.

Colin Fox: Could I just—

The Convener: No. The minister has dealt with your point. You were allowed one question.

Colin Fox: The minister has told me that he does not know the answer to my question. I would like to pursue that with him later.

Bill Butler: If any new devolved matters or significant changes are introduced, will they also be subject to the Sewel procedure?

Hugh Henry: Do you mean if that happens as the bill progresses?

Bill Butler: Yes.

Hugh Henry: We give the same assurances as I gave earlier. If there is anything significant that impacts on the devolved powers of this Parliament, we would bring that to the Parliament. However, if there are changes that do not affect this Parliament, that would be a matter for the UK and would have nothing to do with us.

The Convener: As no one has any further questions—apart from Mr Fox, who wants to gnaw at the bone—I thank the minister for his attendance at this mammoth session. We are grateful for his contribution to the committee's proceedings this afternoon. We thank the members of his team for their assistance as well.

The committee must now decide what it wants to do in relation to the Sewel motion. The terms of the motion are before the committee and we have had a briefing from officials and have taken evidence from the minister. The options that are available to the committee are straightforward. There could be a report from the committee, stating whether it supports or opposes the motion, without any additional comment, or the committee, if it were so minded, could produce a slightly fuller report, which would deal with the fundamental question of whether the Sewel procedure is supported. That would enable members who are supportive of the motion to identify areas about which they are still concerned and in respect of which they would welcome clarification or further information.

I am happy to be guided by the committee and I ask members to express their views.

Mr Maxwell: This Sewel motion is different from the one that we discussed earlier, in relation to which we decided simply to make a recommendation. I think that we have to produce a report on this one as the introduction of the new agency constitutes quite a change. The motion covers a lot of ground and it would be remiss of us if we did not produce a fuller report on the issue.

I support some of the suggested policy changes—particularly the one about the regulation of the private security industry, which is long overdue—but I do not support the use of the Sewel procedure to make the changes. The Scottish Parliament should have taken the action that is outlined years ago; there is no reason why it should have been delayed as long as it has been and there is no reason why we should have to use a Sewel motion to take the action.

I want to ensure that the report includes some of the discussion about the introduction of a new offence of trespass. I know that the minister said that there was no intention to bring the English law of trespass into Scots law, but he confirmed in one of his answers that a new criminal offence will be created that means that one could be arrested just

for being on a particular piece of land in a particular area. That is a new offence. The minister does not want to call it trespass, but I think that a law of trespass is being introduced, irrespective of where it comes from. That is alien to the tradition in this country of having the freedom to roam, and I am very concerned about that.

Although the minister said that the offence would be limited to certain areas, when Maureen Macmillan asked whether it would be time barred, he said that it would probably be open ended. That also concerns me. A motion would come to this Parliament to be passed and then we would have to wait for a revocation order on some dim and distant future date, if at all. The offence is new and unlimited by time, it is the law of trespass and it cuts across the thrust of the Land Reform (Scotland) Act 2003 and the issues that the Parliament has debated over the past few years. It would impinge on the freedom to roam and I do not think that we should introduce a criminal law of trespass into Scots law. I cannot support it.

17:00

The Convener: So your desire is for a full report, or as full as we can manage in the time available, in which you would tease out those issues, also note your opposition to the Sewel procedure and your concern about certain matters.

Bill Butler: I agree with Stewart Maxwell's preference for a full report, which the convener has just articulated. Given our timetable, I know that that will mean making the report by correspondence, but that is just the way it is.

I also agree with Stewart Maxwell that the regulation of the private security industry is to be welcomed, although I am baffled by his comment that it should and could have been done years ago by the Scottish Parliament and that he will not support regulation through a Sewel motion—unless I am misquoting him. To me, that seems to be an extraordinary position, but it has just been stated clearly, so I accept that it is Stewart Maxwell's and his party's position.

Having heard what the minister said, I do not accept in any shape or form the suggestion that he proposes to introduce a law of trespass. That does not match up with what will be in the *Official Report* of this meeting. It is obvious that we have a difference of opinion. As the convener said, we can use the question-and-answer session that we have just had with the minister to draw out the salient points and significant differences of opinion. I believe that using such a Sewel motion is pertinent and appropriate.

The Convener: Bill Butler does not support a very basic for-and-against approach. Do you want to adopt the same detailed approach that Stewart Maxwell advocates or do you want something in between the bare bones approach and—

Bill Butler: Let us have as much detail as possible in the time available. I know that that is not easy, but we have to do it that way. We need to bring out the points of agreement and disagreement.

Jackie Baillie: Bill Butler's approach is absolutely right. The minister went out of his way to offer assurances about whether a law of trespass will be created. I would like us to reflect on two areas. To use the Balmoral example, it would be the committee's view that we should include not the whole estate, but the curtilage of the building.

Maureen Macmillan: Where there is no right to roam anyway.

Jackie Baillie: Absolutely. We are looking to make a proportionate response. Equally, we need to reiterate Maureen Macmillan's point about timing—are the designations temporary or permanent and how will people know?

The Convener: Do you share the views of your colleagues on the issue, Maureen?

Maureen Macmillan: I do. That is the one point on which I am concerned. I wonder whether there is some way of putting a time limit on the powers, even if for only for a year. I would not like the powers to be in place indefinitely. The proposal reflects the kind of provisions that are in place on railways, for example; there are places where people are not allowed to wander at will. As there are not all that many Crown lands—I think that there are only Glenlivet, Balmoral and Holyrood—the proposal is quite specific.

The Convener: Perhaps the issue is one that we could expand on in our report.

Mike Pringle: I agree. Indeed, Maureen Macmillan answered when I indicated that I wanted to ask a question. The issues of how long a designation would last, the area to which it would apply and so on are huge and we have to get to the bottom of them. I am concerned.

I am also concerned that the minister has said on a number of occasions that the powers apply to Crown land, so only two or possibly three sites are involved. Clearly, there is a huge amount more Crown land in Scotland than just two or three sites. I want to know whether only two or three specific sites can be designated or whether all Crown land can be designated.

The other area that I want to explore—I support the suggestion that we explore it further in a fuller report—is what discussions have gone on between Westminster and Scotland and what

assurances have been given by Westminster. On the power to designate sites, the document says:

"Nevertheless, the Home Secretary has undertaken in correspondence with the First Minister to consult Scottish Ministers before making any designation in Scotland under this power."

The committee has not seen any correspondence. I would like to know what that correspondence says and what the assurances are. We must tease out that information. The issues require fuller debate, perhaps in the chamber.

Colin Fox: We are unanimous on the extent of the problem that needs to be resolved. However, given that we have only a week, how much can we do? That said, I have a couple of points to raise. As other committee members have said, although there are some good things in the bill, we also have to reflect the fact that it contains a few highly controversial measures.

I will not try to draw a distinction between the law on trespass and the proposal. However, under the cover of national security, the bill will introduce potentially important new powers. It is not Fathers 4 Justice that the Government is worried about: that is a red herring in terms of Crown land. Its anxiety concerns the anti-capitalist protest that will be held at Gleneagles when the G8 summit is held there in July. The more the minister talked about the non-designation of large areas of land, the more he divulged that anxiety.

In answer to a question from the committee about the use of the powers at the G8 summit, the minister said that he did not know whether the powers would be used there or not. I am anxious about that, but I am willing to be persuaded that the Government is not planning to use the powers in that way. Many people are anxious about that major event. If the police plan to use the power in July, we should examine the issue further.

Maureen Macmillan: Does it not apply just to Crown land and—

Mike Pringle: That is one of my concerns—[*Interruption.*]

Colin Fox: The minister talked about Crown land, but the memorandum says that the third category of designation is "national security"—

The Convener: I ask members to direct their remarks through the chair. Members should remember that we are in public session.

Colin Fox: I was trying to do that, but I was being heckled.

The Convener: Colin Fox was making the point that he wants to express concern about how the proposed new law will act in practice. What about the general principle of whether the bill should be the subject of a Sewel motion?

Colin Fox: Of the three options—which are to produce a note, a report or a fuller report—I am happy to support the call for a fuller report. In turn, that raises the question of the appropriateness of a Sewel motion.

The Convener: Yes, but within the context of a fuller report, the committee must say whether it is happy with that.

Colin Fox: I would like to do that next Tuesday.

The Convener: Okay—fair enough. The clerk is advising me on timescales. I understand that the current timescale is tight. We have to get our report together quickly; the likely date for the debate on the Sewel motion is 3 February. If the committee agrees, it would be possible to ask whether a little more time could be afforded the committee to allow it to adjust its report. Obviously, for such matters we would be in the hands of the Parliamentary Bureau. I am happy to be guided by members.

Bill Butler: I am seeking guidance rather than offering it. Do we have time for an agenda item next week to allow us a brief discussion—it would be brief, because the positions are clear—on whether or not to support the Sewel motion? We can guess how the vote would go, but do we have time for such a discussion? If possible, we should have the discussion.

Gillian Baxendine (Clerk): The committee might wish to do it that way but, at this stage, we should ensure that the business managers are aware that we have concerns and are aware of our view that there should be a full debate on the issue. We could be publishing the day before the debate.

Jackie Baillie: I am not sure that we have arrived at that view.

Gillian Baxendine: I do not know whether we have, but I am suggesting that, if we publish the report after next Tuesday, it will be the day before the debate, so the report could inform the debate but not influence the form of the debate.

The Convener: The practical dilemma is that, at the moment, the debate in Parliament is scheduled for a week on Thursday. From what members have said, it is clear that issues of substance arise. We can try to accommodate members' views in our report, which we might well manage to adjust—we would have to adjust it—not later than next Tuesday.

The clerk is saying that, although that could be done, the report will do little to inform the debate. It will arrive out of the blue and there will be very little time for members to consider it. The clerk is saying that, if the committee wishes, it could be explored with the bureau whether the debate could be deferred beyond a week on Thursday.

Dennis Canavan (Falkirk West) (Ind): Convener—

The Convener: I am sorry, Mr Canavan, but I have to listen to members of my committee.

Dennis Canavan: Yes, of course.

Mike Pringle: I think that the issue requires a fuller debate and that we should say so to the bureau. I do not know how long the debate has been scheduled for, but a substantial number of issues have arisen and I know that people in my party group are concerned about them. We should at least give members the opportunity to have a fuller debate.

Bill Butler: I think that we are talking at cross-purposes. I do not think that we are talking about having a fuller debate; we are talking about the timing of the debate being very—

The Convener: Hard on the heels.

Bill Butler: Yes—hard on the heels of our report. It will be up to the bureau to set the times, but we should have an assurance—I think that we had one from the clerk, through you, convener—that we can have a brief agenda item that will allow us to consider the report and to decide our position on whether to Sewel or not to Sewel. I think that such discussion should be possible.

I take the point that you made on the advice of the clerk, convener—that that would give Parliament little time—but Parliament would have little time anyway, whether or not we include such an agenda item next Tuesday. We should look at the report and come to a decision. My guess is that the debate will still take place on 3 February and that it will last the same length of time. The issue is not the length of the debate, but whether we should have an agenda item next Tuesday.

Mr Maxwell: I agree that there seems to some confusion about whether we are talking about the length of time between our report and the debate or the length of time for the actual debate. The length of the debate is up to the bureau.

The Convener: The issue is the timing of the debate.

Mr Maxwell: Yes. The point that was made about putting off the debate—from a week on Thursday to perhaps the following Thursday—is a good one. We should approach the bureau to ask whether it could timetable the debate not for a week on Thursday but for a fortnight on Thursday. That would allow us to meet next Tuesday, agree our report—and agree whether the issue should be Seweled or not Seweled—and have our report published. Parliament would then have the report for a week before the debate, rather than one day, which would be sensible.

17:15

Bill Butler: Perhaps through the convener's good offices we could approach the bureau informally with that suggestion. However, although I do not disagree with the suggestion in principle, it has been heavily hinted at that the debate will take place on 3 February anyway. The main issue to concentrate on is our having the report available next Tuesday—if possible, given the time constraints—so that the committee can have a quick look at it and decide whether to Sewel or not to Sewel. The convener might wish to make an informal suggestion that the debate on the motion be moved, but that is as far as we should go with that suggestion.

The Convener: I am happy to do that, but not without the committee's agreement.

Members *indicated agreement*.

The Convener: I see that I have that agreement. Accordingly, my clerks will ask the bureau immediately whether there is any possibility of deferring the debate. Bill Butler is correct that there is still an imperative on the committee to come to a helpful conclusion on what we have learned and heard as quickly as we can. That is a tall order for the clerks because we are asking them to cobble something together and to then adjust it through a process of correspondence, with a view to getting it on the agenda for next Tuesday's meeting at which—if we have no stay of execution—we will give it a final adjustment.

Bill Butler: I am willing to use the limited compositing skills that I have acquired in the past to help with that process.

Jackie Baillie: It will be a long report, in that case.

The Convener: Before we move on, Mr Canavan has arrived as a mere attender or observer and has indicated that he would like to say something.

Dennis Canavan: Thank you. I do not want to intrude or delay the committee unduly, but I take it that you are discussing the possibility of a Sewel motion on the Serious Organised Crime and Police Bill.

The Convener: That is correct.

Dennis Canavan: The committee ought to give the matter further consideration because the repercussions could be serious. If a Sewel motion is agreed to, that will give the Westminster Parliament the opportunity to torpedo an important amendment that I successfully persuaded the Parliament and the Scottish Executive to accept during the passage of the Land Reform (Scotland) Act 2003, which is one of the most progressive

acts that Parliament has passed. My amendment extended the right of public access to land that is owned by the Queen in a personal capacity, such as Balmoral estate. My understanding is that the Queen approved of that amendment, but it now seems that the powers that be at Westminster are trying to undermine the will of the Scottish Parliament and the Scottish Executive. I could go on and on, but I do not want to delay the committee; all I will say is that the committee should give the matter serious further consideration. I would appreciate the opportunity to attend any future meeting at which the issue is discussed so that I can elaborate on my views.

The Convener: Your comments have been noted by members.

I have a real concern about the measures that are being Seweled, not because I disapprove of the objectives, but because I feel that the proposed solutions in the bill will give rise to many difficulties that would not arise if matters were addressed differently, particularly if some of the necessary legislation were contemplated in the Scottish Parliament. I merely put that view on the record. The paradox is that, although the proposals would have worked before devolution, I am concerned about the attempt to sit them on top of the structures in our criminal justice system, which have evolved in a perfectly healthy way. As the foot has adopted its own shape, the shoe will not fit, which will give rise to tensions and confusion, about which I am deeply concerned.

Gillian Baxendine: To clarify, apart from SOCA and the trespass element, are there other issues that members want to be written up?

The Convener: Views have been expressed about regulation of the private security industry. Stewart Maxwell thought that that could be dealt with by this Parliament.

Mr Maxwell: Yes. That matter could have been dealt with before now. I do not see why this Parliament could not have dealt with it. The fact that the Executive failed to raise the matter during the past five or six years does not seem to be a reason why we should Sewel it now.

The Convener: The other issue that emerged as being of concern to you during questioning of the minister is witness protection.

Mr Maxwell: Yes—I was going to mention that.

Jackie Baillie: To clarify—I am trying to be of assistance—I assume that we are writing a balanced report that will welcome some things but raise concerns about others. However, I am picking up that the clerks need a shorthand version in which we home in only on issues with which we have a problem.

Gillian Baxendine: That is up to members. We can either welcome each element individually or simply say that we welcome all the other aspects.

The Convener: Unlike other inquiries that we have done on Sewel motions, our report will be based on a briefing by officials and a limited evidence-taking session with the minister this afternoon. To be frank, those are the parameters of the information resource that is available to us and on which we can base comments and decisions. All the clerks are trying to do is to pick up, from members' questions and views, where points of concern arise. The concern is twofold. Some members have a fundamental difficulty with the Seweling of the legislation. Other members do not have a problem with that but have genuine concerns about how specific aspects will operate in Scotland.

Jackie Baillie: I understand all that, and the substance of it. I was seeking clarification of the clerk's question, which was about what approach we are taking.

The Convener: The only approach that can be taken is a chronology of the bill and the position of the committee that has been detected in response.

Jackie Baillie: I am comfortable with that.

The Convener: I do not see how else the matter can be addressed.

Bill Butler: So the report will basically mirror the conversation that we had with the minister—that is fine. We thought that some things were good and we had concerns about others.

The Convener: I do not see what other form the report could take.

Bill Butler: That is perfectly agreeable to me, convener.

Colin Fox: The only caveat that I would make is this: there has been correspondence on the matter and I hope that the committee will accept further correspondence from Mr Canavan as evidence. That could be sent to the clerk for the committee to consider. We have not had a great deal of correspondence—I think we have had just two letters—but we referred to it often in our submissions and questions to the minister.

The Convener: If Mr Canavan wants to write to the committee, we cannot stop him from doing so. That might help members to come to a view, although I cannot say expressly that his letter would necessarily be referred to in the report. However, if he cares to write to the committee I am sure that members will be interested in his views.

Dennis Canavan: Thank you.

The Convener: I ask for members' co-operation, because we are obviously asking quite a lot of the clerks. We hope that they will try to put something together and into members' hands before next Tuesday.

I thank everyone for their patience. This has been a long meeting, but we have achieved a lot.

Meeting closed at 17:23.

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