JUSTICE 2 COMMITTEE

Tuesday 21 February 2006

Session 2

£5.00

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by Astron.

CONTENTS

Tuesday 21 February 2006

JUSTICE 2 COMMITTEE
4th Meeting 2006, 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)
*Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD)

COMMITTEE SUBSTITUTES

Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
Carolyn Leckie (Central Scotland) (SSP)
Mr Kenny MacAskill (Lothians) (SNP)
Margaret Mitchell (Central Scotland) (Con)
Mike Pringle (Edinburgh South) (LD)

*attended

THE FOLLOWING GAVE EVIDENCE:

Bill Barron (Scottish Executive Justice Department)
Ian Ferguson (Scottish Executive Justice Department)
Ian Fleming (Scottish Executive Justice Department)
Alastair Merrill (Scottish Executive Justice Department)
Colin Miller (Scottish Executive Justice Department)
Eamon Murphy (Scottish Executive Environment and Rural Affairs Department)

CLERKS TO THE COMMITTEE

Gillian Baxendine
Tracey Hawe

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Steven Tallach

LOCATION

Committee Room 6

Scottish Parliament

Justice 2 Committee

Tuesday 21 February 2006

[THE CONVENER *opened the meeting at 14:06*]

Police, Public Order and Criminal Justice (Scotland) Bill

The Convener (Miss Annabel Goldie): Good afternoon, everyone, and welcome to the fourth meeting of the Justice 2 Committee in 2006. The agenda and papers have been circulated to members, and the first item on our agenda is the Police, Public Order and Criminal Justice (Scotland) Bill. Before I get to that, however, I should mention that I have had intimation of one apology, from Colin Fox.

I also mention that this is likely to be my last meeting as convener of the committee. The matter is being dealt with through the Parliamentary Bureau and related parliamentary procedures. If it is not premature to say so, I thank committee colleagues and the clerks for all their support during my time as convener. It has been a pleasure to have been convener of this committee.

I welcome to the meeting officials from the Police, Public Order and Criminal Justice (Scotland) Bill team. You are a cast of thousands by the look of it. I will not name you all; you are identified by your name-plates. I am very grateful to you all for coming. We are also joined by Eamon Murphy from the Scottish Executive Environment and Rural Affairs Department.

The bill team has kindly agreed to brief the committee on likely Scottish Executive amendments at stage 2, and members have received briefing papers. According to my clerks, one of the papers, the paper on sex offenders, is to be updated in the course of the next week, by way of a briefing. The most helpful way to proceed is to ask the officials to speak to the various papers; then members will be warmly invited to ask questions. Without further ado, I ask Mr Barron to proceed. I take it that you are in charge of the cohort. Is that right?

Bill Barron (Scottish Executive Justice Department): Yes—everyone else here has been press-ganged by me. To start with, we wish to express our appreciation of your work, as convener of the committee, on this bill and others in which we have been involved.

Thank you for inviting us to brief you on the amendments that the Executive plans to make to the Police, Public Order and Criminal Justice (Scotland) Bill. This is, of course, work in progress. No doubt, other amendments will be decided upon in the course of stage 2, or indeed stage 3. I hope that members have before them the list of planned amendments that we e-mailed yesterday. I suggest that we go through them topic by topic, beginning with the two new policy areas, in which I imagine that interest is greatest.

My colleagues and I will introduce the key themes in each topic. If you wish, we will keep those introductions quite brief to allow more time for questions. Each of us is taking the lead on one or two policy areas. I will introduce my colleagues. Ian Fleming will go first, on sex offenders. Eamon Murphy, as you mentioned, is from the Environment and Rural Affairs Department, and will speak about the enforcement of regulating orders. Colin Miller is the authority on the Scottish crime and drug enforcement agency. Alastair Merrill will deal with complaints and public processions. I get mandatory drug testing, and Ian Ferguson gets virtually everything else.

Fergus McNeil, our expert on incentives for providing evidence, is unwell and unable to join us. In his absence, Ian Ferguson and I will do our best to help the committee with that issue.

First up is Ian Fleming, who will talk about sex offenders.

Ian Fleming (Scottish Executive Justice Department): I am responsible for what is commonly known as the sex offenders registration scheme and the supporting legislation. I know that the Minister for Justice wrote to the conveners of the justice committees, enclosing a copy of Professor Irving's report, "Registering the Risk: Review of Notification Requirements, Risk Assessment and Risk Management of Sex Offenders". I also know—because I attended the meeting—that on 17 January Professor Irving gave members his own perspective on the report and then answered questions.

I will outline amendments that we are likely to lodge at stage 2 in order to pick up some of Professor Irving's recommendations. The first amendment will seek to broaden the details that sex offenders will be required to provide to the police as part of the notification scheme. At the moment, they have to provide only their name or names, their address and their national insurance number. Professor Irving felt that such details were basic and, indeed, inadequate, and identified various types of information that it would be useful to include in the register. For example, he recommended that passport details should be supplied, and we hope to widen current requirements to ensure that when a sex offender notifies the police, they furnish them with their passport and supply passport numbers, the issuing authority, date of issue, expiry date and so on.

Professor Irving identified other types of useful information. Given the very detailed nature of such information, we feel that it would be prudent and appropriate to set out in subordinate legislation any additional information that might help the police. For example, Professor Irving highlighted bank account and credit card details, which have proved useful to the police in identifying and tracking sex offenders who have accessed or purchased pornography off the internet. We hope that the bill will allow for regulations to be made and for the Parliament to scrutinise them.

Professor Irving also felt that DNA sampling would be useful, if such samples had not already been taken when the person in question was charged or convicted. Again, we feel that an amendment in that respect would be helpful. At the moment, the police are allowed to take DNA from suspects and sex offenders; however, the data have sometimes been lost or destroyed. Moreover, sex offenders who have come to this country from a foreign land might not have had their DNA taken. Given such potential loopholes, we certainly hope to lodge a mop-up amendment to the Criminal Procedure (Scotland) Act 1995, which contains the current provisions on taking DNA. That approach should not confuse the police too much.

A more significant proposed amendment is to give the police the power to enter and search a sex offender's house to verify that the information that the offender has provided is accurate. In his report, Professor Irving said that the power of entry was sufficient, but we felt that the power perhaps needed to go beyond that, to include active searching for verification that details that had been provided were real. We hope to have a power of entry and search, into which checks and balances will be built. The police will have to approach a sheriff to seek a court order. They will have to satisfy the sheriff that although they have made every endeavour to gain entry to a sex offender's premises, that has proved unsuccessful, which is why they seek an order that will allow them to search and make inquiries on the sex offender's premises. The rate of compliance with legislation is held to be fairly high, as 97 per cent of sex offenders comply with the obligations that are placed on them. However, we believe that a small group know what powers they have and seek to make life as difficult as possible for the police. The proposed measure will get round that.

14:15

Lastly, we hope to amend section 96 of the Sexual Offences Act 2003. We conducted a consultation exercise, which closed on 15 February, on requiring the Scottish Prison Service and hospital managers to disclose information about the release or transfer of prisoners or patients. One issue that was identified is that the legislation that empowers ministers to make regulations on that matter does not specify the types of information that the regulations can require governors and hospital managers to disclose, including the address at which the sex offender will or is likely to reside. That needs to be expressed more clearly in the primary legislation, so we hope to amend it to rectify that perceived flaw.

That was a quick—or rather, quite long—résumé of where we are at with sex offenders legislation. The Scottish Parliament information centre briefing paper was fairly comprehensive and fairly accurate, except in relation to placing an obligation on sex offenders to comply with the risk assessment process. We have remitted Professor Irving's recommendation on that to the Risk Management Authority and asked for its views on whether that is a valid measure to introduce in legislation. Methodological difficulties could arise from requiring or forcing a sex offender to comply with a risk assessment, which would remove the obligation on agencies that undertake risk assessment to get a handle on where the sex offender is coming from.

The Convener: It is probably sensible to take each contribution separately and deal with questions while everything is fresh in our minds.

Bill Butler (Glasgow Anniesland) (Lab): Mr Fleming, the last issue that you talked about was risk assessment, which is being discussed further. After being remitted, if it is felt that that measure should proceed, will we be able to deal with it at stage 2?

Ian Fleming: That is unlikely. The Risk Management Authority has been given a deadline for responding of May 2006, but the provision is unlikely to be part of the bill.

Bill Butler: If the timetable does not fit in with that for the bill, has another legislative vehicle been thought of?

Ian Fleming: I am not aware of that. We recognise that primary legislation will be needed, but it does not feature in my plans.

Maureen Macmillan (Highlands and Islands) (Lab): You talked about providing

"a regulation making power to extend the provision of information sex offenders are required to provide".

That information will not be specified in the bill—we will not have a list of all the different pieces of information that they will have to provide—but I presume that you have in your mind what the information will be and that it is not a blank sheet. How long will we have to wait for those regulations?

Ian Fleming: I do not think that it will take too long. Professor Irving has a view on what should be included and we have our own view on that. I have instanced bank account or credit card details; that is one thing that we are thinking about.

Maureen Macmillan: Are you thinking about anything else?

Ian Fleming: Not at the moment. The difficulty is that some of the information that Professor Irving has instanced, such as leisure activities or main associates—

Maureen Macmillan: Or place of employment.

Ian Fleming: That is one of them. Some of that information is quite difficult to get a handle on if one is mindful of the fact that the sex offender has to register those details with the police within three days and that failure to do so could potentially mean five years' imprisonment. Many of the areas that Professor Irving identified are transitory or dynamic; we are mindful that the register needs to be a tool that is as useful as possible to the police and we would be chary of their being deluged with the daily comings and goings of sex offenders and their main associates. A careful balance needs to be struck, not least to ensure that the register complies with the European convention on human rights. The question is whether such information would take us to a tipping point at which the sex offenders register becomes a real burden or a real intrusion into individuals' lives. We have certain things in mind.

Maureen Macmillan: Do you hope to lay the regulations before the Parliament sooner rather than later and to keep the committee informed?

Ian Fleming: Yes, very much so. We will endeavour to do that.

Mr Stewart Maxwell (West of Scotland) (SNP): I will push you on the extension of the notification requirements. Professor Irving mentioned main associates and leisure activities in his briefing to us, and they appear in subsequent briefings. Are you saying that those will definitely not be included, or are you still thinking about that?

Ian Fleming: We are still thinking about it, but my personal view is that there might be difficulties with legislating to require that level of detail. The Association of Chief Police Officers in Scotland's sex offenders working group felt that to require that level of detail in legislation might be unhelpful in relation to certain issues. The police already have details of places of employment, main associates and vehicles. Those form a wide, complete picture that the police build up through their own intelligence gathering. There is also a high compliance rate with the current legislation; sex offenders are fairly understanding of where the police are coming from and tend to furnish as much information as possible.

Mr Maxwell: I am sure that many people have concerns about a number of the issues on the extended list and it seems to me that it would be difficult to keep updated information on some of them. Main associates and leisure activities are the two that spring to attention. How do you define those? If an offender were to take up the guitar for a fortnight, would they have to inform the police? If the guy next door who I talk to over the hedge was—unbeknown to me—a sex offender in the past and we go for a pint, should he name me as an associate? I had hoped that we would get more clarity on that. My problem with the extension is not with the details that you mentioned—I have no problem with those—but with the ones about which you are still thinking. There are clearly difficulties with those, and people would begin to feel uncomfortable with information being gathered not about sex offenders but about other people who happen to know sex offenders, even if they do not know that they are sex offenders. It would be helpful if information on the regulations was provided as soon as possible so that we can discuss those matters.

I have another question, which concerns the retention of DNA samples. You explained clearly where the loopholes and gaps might be in relation to retained DNA samples. The e-mail that you sent contains the phrase

"if not obtained at the time of charge or conviction".

Do you intend to retain DNA samples that are taken at the time of charging if there is no subsequent conviction? Is there any intention to change the procedure and retain DNA samples beyond acquittal?

Ian Fleming: As I understand it, there will be no change to the current system for DNA retention for sex offenders, or for any other offender. We are keen to keep the system the same as far as possible.

Mr Maxwell: So there will be no difference.

Ian Fleming: Yes.

Mr Maxwell: That is fine.

The Convener: Just to clarify, can someone get on to the sex offenders register without having a conviction?

Ian Fleming: Yes.

The Convener: So where does that leave DNA?

Ian Fleming: I will have to take that under advisement.

Mr Maxwell: Surely the point is that, at the moment, samples from someone who is not convicted cannot be retained.

Ian Fleming: That is right. Professor Irving was clear that the provision is for samples not already obtained at the time of charge or conviction, so I imagine that the provision applies only to those who have been charged or convicted and it would not bring in anyone—

Mr Maxwell: They are two separate things. Being charged does not necessarily mean being convicted.

Bill Barron: We are not talking about two separate things. The provision is about samples taken "at the time of" charge or conviction. You are asking whether the samples can be retained if the person has not been convicted. We need to go back and find out the answer to that.

Ian Fleming: I will get clarification on that.

Mr Maxwell: There is also the convener's point about those who are on the register but have not been convicted.

Bill Barron: That is what I am talking about. Can the police keep the DNA of those on the sex offenders register who have not been convicted of anything? We will find that out.

Jackie Baillie (Dumbarton) (Lab): It is not important whether there has been a charge or a conviction; it is the fact that the person is a registered sex offender. My interpretation is therefore that DNA samples will be retained on the basis that the person is a registered sex offender. However, I would welcome clarity on that.

The Convener: Mr Barron, you have encapsulated the points on which we need clarification. Such clarification would be extremely helpful.

Bill Barron: I think that I agree with Jackie Baillie. The phrase

"if not obtained at the time of charge or conviction"

is a bit of a red herring. The issue is whether the police are allowed to get a complete list of DNA for all sex offenders.

The Convener: Jeremy Purvis is next.

Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD): Thank you convener. We are sorry that you are leaving us—I wanted to get my sycophancy on the record.

I would have thought that a person who is defined as an offender will have committed and been found guilty of an offence. The key point will be the non-offenders who are on the register or who have been categorised as a risk.

Ian Fleming's briefing was helpful, but, on the police power of entry and search, I would like a little more information about why the proposed amendment is not entirely consistent with Professor Irving's recommendation 19. He recommended that there should be a power of entry but did not state explicitly that there should be a power of search.

Ian Fleming: We felt that we could live with the power of entry, but if that was all that a policeman had when he went into a sex offender's house, the only information that he would be able to gather would come through his conversations with the sex offender and through general observation. Logically, that would not go as far as we felt would be necessary. A power of search needs to be included so that the police can look through the house to find out whether the bank accounts or other details that the sex offender has at his place of residence square up with what he claims are his details. He might have assumed a different identity and the detail of that might be contained in the house, among his belongings.

Jeremy Purvis: How would that operate on a practical basis? You said that the police would have to apply to the court if they wanted to do a search. Presumably, they would not have to give any reason to the court other than that they needed the power of entry to confirm that the requirements of the register were being upheld by the offender.

Ian Fleming: They would have to go to a sheriff and show that they had made several attempts at reasonable times to gain entry but had not, for whatever reason, been able to do so. A search would be done only for the purposes of verification.

14:30

Jeremy Purvis: I do not know whether you have talked to Professor Irving about this issue, or whether you have simply interpreted his recommendations and added to them. There may well have been a policy decision. Professor Irving considered how to determine whether an offender was carrying out the requirements that were placed on him. The professor's report was thorough, but did not recommend an unfettered power for the police to search premises. Premises may well be shared premises, or they may be the place of residence of the offender but be in the name of someone else. The person who owns the property may be unaware that the person who lives there is an offender—although there are recommendations on notification. The power of entry is one thing, but the power of search is another. A search of an offender's property and possessions could in fact be a search of other people's property and possessions. That is cause for concern.

Ian Fleming: I do not disagree; those issues are sensitive and the scenario that you describe is likely to occur.

I cannot speak for the police or say how they would react, but they are mindful of their duty of care to offenders and others. We would hope to introduce checks and balances. For example, a court order would be required and a search would be done only for the purposes of verification. I have spoken to Professor Irving on where we intend to go with the recommendations and he is comfortable with the approach that we have adopted.

Jeremy Purvis: He is comfortable?

Ian Fleming: Yes.

The Convener: On application for a warrant for entry and search, would the court normally require specific information on what was being searched for?

Ian Fleming: The purpose of seeking a court order would be verification. As when a warrant is applied for, I do not think that specifics would be given on what was to be looked for.

The Convener: I would have thought that a court might be reluctant to grant a warrant if it meant that the court was, in effect, acquiescing to a fishing expedition.

Ian Fleming: A warrant has, if you like, an association with criminality. However, the situation that we are discussing is not a fishing expedition or an attempt to catch anyone out. The police would simply be seeking to ensure that the information that the sex offender had provided on the register was the same as the information that was to be found in his household.

A warrant is different from the court order that we are seeking to introduce—I have tried to separate them. The police already have powers of entry and search under existing legislation. The new court order would not take anything away from that; its purpose is simply to enable the police to check that what an offender says is true.

Jeremy Purvis: In your correspondence with Professor Irving, do you have a record of his saying that he is satisfied with that?

Ian Fleming: My dealings with Professor Irving have been friendly and cordial and have been mostly over the telephone. I am reluctant to put words in his mouth. I have said that he is comfortable, but if you would like me to get his assurances on this point, I—

Jeremy Purvis: You are on the record as saying that he has told you that he is satisfied. If the committee needs to go back to Professor Irving, we may well do so.

Bill Barron: We will make a further point, convener, if we may.

The Convener: Surely.

Alastair Merrill (Scottish Executive Justice Department): I wanted to clarify the point about conviction, charge and DNA samples. A person who is on the sex offenders register is there as a consequence of their having been convicted of a sex offence. From discussions with Professor Irving, my understanding is that there is an anomaly in that individuals who were convicted before the sex offenders register came into being may not have had DNA samples taken when they were charged or when they were convicted. The recommendation in his report was intended to close off that anomaly so that there would be a comprehensive DNA database of all individuals who were on the sex offenders register.

The Convener: Thank you for that. I think that Mr Murphy is next on the list.

Eamon Murphy (Scottish Executive Environment and Rural Affairs Department): I am grateful for the opportunity to explain to the committee what we propose to do on regulating orders in the Police, Public Order and Criminal Justice (Scotland) Bill, and for the fact that the bill has given us the chance to take urgently needed measures. Although the bill represents the first opportunity that we have had to do that, we have not simply jumped on the first legislative vehicle that has come along. The proposed measures are highly pertinent to the bill because they are about enforcement.

Our proposals have been consulted on; technically, the consultation is still open because we have allowed the consultees an extra two weeks. We have circulated a paper that explains the background and contains a summary of the consultation responses that we have received so far. I would be happy to discuss any element of that paper or to explain any points of detail.

I make it clear that we are dealing with a technical anomaly in the Sea Fisheries (Shellfish) Act 1967, which is a mechanism for making regulating orders. We seek to improve the enforcement of those regulating orders. As I said, the bill is the first opportunity we have had to create urgently needed powers. The bottom line is that, subject to the parliamentary processes, the bill will enable us to have the new provisions in place by the time the Solway cockle fishery—which members may have heard about in the news recently—reopens for its first full season in the autumn this year. It is worth pointing out that the timetable for the bill will enable us comfortably to meet a partnership agreement commitment to make technical legislative amendments that will sort out the problem of our being unable properly to enforce regulating orders.

I turn to a point of detail. We seek to clarify section 3(1)(a) of the 1967 act. It states that the grantee of a regulating order can enforce that

regulating order, but it does not confer express powers to enable that enforcement and does not say how, where or when the grantee can carry it out. That is the crux of our difficulty.

In the consultation, we proposed that the Scottish Fisheries Protection Agency or the grantee or a combination of both should be able to enforce regulating orders. As we have not finished the consultation exercise, we have not reached a definitive position; ministers still have to examine the responses and make up their minds. We have offered the best of both worlds in the consultation because regulating orders can be difficult to enforce and, in theory, the means by which that is done could vary, depending on the type of order that was being enforced, where it applied and what sort of fishery it related to.

I mentioned the Solway cockle fishery. The reason for the urgency is that there is a particular problem with that fishery, which has for conservation reasons been closed for a number of years. It is now brimming with cockles and is asking to be exploited, but that must happen in a managed and regulated way. When it was open previously and the fishery was unregulated, it was nearly fished out of existence. A large quantity of cockles is waiting to be exploited and because they are extremely valuable on the market at the moment, people are champing at the bit.

We have had reports—many of which have made the press recently—that some people have been unable to wait and have been fishing illegally. It seems that they are so desperate that they are taking to the foreshore to fish illegally at night, in bad weather, in bad conditions, on dangerous sands and even, in some cases, in the face of flood tides. We believe that if proper enforcement measures are put in place, we can help to stop people putting at risk their own lives and those of the people who try to rescue them when they get into difficulty. That is why we are keen to put the proposed measures in place as soon as possible.

The Convener: That was helpful. I am pondering the delightful spectacle that is conjured up by the metaphor of people champing at the bit to get at their cockles; I suppose that that can be done. We will have questions from Bill Butler and then Maureen Macmillan.

Bill Butler: I will try to be literal rather than metaphorical. The excellent Scottish Parliament information centre note refers to the experience in Shetland, which has shown that

"the grantee is likely to have limited resources for enforcement"

and is unlikely to have the necessary enforcement skills and the ability to produce evidence that is of the required standard.

You said that the consultation process is still under way and that no decision has been made on whether regulating orders will be enforced by the SFPA, grantees or a mixture of both. Would it be wiser simply to make the SFPA responsible for enforcement, given what SPICe has told us about grantees not having sufficiently sophisticated skills to take on that role? What is the present thinking on that?

Eamon Murphy: The fisheries that have been mentioned illustrate the different types of fishery to which regulating orders could apply. It is right to say that that is the view in Shetland and we understand that. Given how the Shetland fishery is set up, I agree that grantees probably do not obtain sufficient income from fisheries or have the necessary expertise to enforce regulating orders. In such a situation, it would be incumbent on the SFPA to carry out enforcement.

The situation on the Solway firth is completely different and in describing it, I will try not to mix my metaphors again. Because there are so many cockles waiting to be exploited and they are so valuable—they can fetch anything between £1,000 and £2,000 per tonne—and because the licence holders under the regulating order arrangement will pay significant amounts for a licence, which income will go back into the fishery, the grantee on the Solway will have the resources to enforce properly. Furthermore, the grantee will have two ex-SFPA employees as staff, who have the experience, the background and the wherewithal to enforce—they will even be able to manage the technical arrangements that must be used when reports need to be made to the procurator fiscal. That is why we propose different possibilities in the consultation exercise.

Ultimately, how we conduct enforcement will be for ministers to consider once the consultation exercise has been completed, but at the moment there is a strong argument for offering both options.

Bill Butler: I am grateful for that clarification.

Maureen Macmillan: I was also going to ask that question. In some cases, grantees will employ enforcers, but I have concerns about how that will work and about how the grantees will be regulated to ensure that they employ the right kind of enforcers. We do not want to have punch-ups between fishermen and enforcers.

I appreciate your argument that on the Solway the grantee will have enough income to employ enforcers, but what will happen in other areas, such as Shetland and the fisheries in the seas off the west Highlands? In how many of the areas where the regulating orders might apply will grantees be able to employ enforcers and in how many of them will enforcement be left to the SFPA?

14:45

Eamon Murphy: It is hard to put a number on that. In theory, it depends on the type of fishery; for example, scope may exist for a cockle fishery on Barra, which would generate income. I guess that, in the main, the most common practice will be for grantees to seek to have the SFPA do the enforcement for them, but that might not be the case in other instances, which is why we are considering proposals to cover the broad spectrum. Through its strategic planning process, the SFPA is involved in discussions with us and we are in the process of ensuring that the matter becomes for the SFPA a priority that fits in with its wider roles and responsibilities.

I understand and take on board fully the point about who might be recruited to be an enforcement person for a grantee. I guess that punch-ups happen from time to time in the world of fisheries, but we want to avoid them if we can. One possibility is that the SFPA would employ and train anyone who was appointed or seconded to a grantee, to ensure as far as possible that they were the right sort of person and not someone who might be a bit overzealous in performing their duties.

Maureen Macmillan: Does the SFPA have the capacity to do the extra work?

Eamon Murphy: We are ensuring that it will. The SFPA has already received additional resources for inshore functions; such enforcement is an inshore rather than an offshore issue, because a regulating order can apply only inshore. We are ensuring that proper resources are in place. The answer depends partly on the number of new regulating order proposals that are made. We must gauge that as we go along.

Maureen Macmillan: Have you any idea of what the number will be?

Eamon Murphy: It is hard to say. We have the Shetland order, and the Solway regulating order was laid before Parliament just before the recess, so it is going through the parliamentary process. There is also the Highland regulating order, which is about to go to a local inquiry, which is part of the process that the 1967 act allows for.

Beyond that, as a separate policy initiative, we are putting in place a series of up to 12 inshore fisheries groups around the country. The plan is to devolve management responsibilities for inshore fisheries to those groups, which may see regulating orders as a mechanism that will help them to manage their fisheries. If so, those groups could make more proposals.

The Convener: Given that the consultation period has been extended, could we have a revised list of responses when the period ends?

Eamon Murphy: By all means. We have given consultees an extra fortnight. It is regrettable that the consultation period was short; that was partly because of the importance of, and the exceptional circumstances that apply to, putting the provisions on the statute book. However, we can provide that list before the minister appears before the committee on 14 March.

The Convener: That would help. Thank you.

Mr Miller will now strut his stuff.

Colin Miller (Scottish Executive Justice Department): The amendments on the Scottish police services authority and the Scottish crime and drug enforcement agency are largely minor and consequential amendments to existing provisions. Most of them will clarify and tidy up what is in chapter 1 of the bill.

However, one or two provisions are slightly more substantial, so I will say more about them, if it will help. We propose amendments to the provisions on the appointment and tenure of SPSA board members and we also propose to redesignate the authority's senior strategic officer as chief executive.

Apart from that, quite a number of amendments will add references in existing police legislation to the authority and the agency, and to the director and the deputy director. Those amendments are by way of wiring into existing police legislation. If it would be helpful, I would be happy to say more about the amendments relating to the appointment of board members.

The Convener: Please feel free.

Colin Miller: We will lodge amendments on three separate issues. As the committee will know, the board of the Scottish police services authority is to comprise between six and nine members plus a lay convener. The members will include at least two senior police officers, at least two police authority conveners and at least two lay members. However, at least two of the services that will report to the board will be led by deputy chief constables. The bill currently provides for the appointment of chief constables, deputy chief constables or assistant chief constables to the board of the SPSA. On reflection, we felt that it would not be appropriate to have on the board either deputy or assistant chief constables when services that will report to the board are led by deputy chief constables. We therefore propose to amend the bill so that the police force members on the board will have to be chief constables.

There are only eight chief constables and only eight police authority conveners in Scotland. In those circumstances, it seems appropriate that appointments be made on the basis of statutory nomination by the representative bodies, rather

than on the basis of open competition. As committee members will know, statutory nomination is provided for in the new code of practice on public appointments.

The final change relates to tenure, and again it reflects the forthcoming code of practice on ministerial appointments to public bodies. At the moment, the bill provides for board members to be appointed for up to four years, with the possibility of reappointment for another four years, but with an overall maximum of six years. As I understand it, the code of practice—which has already been debated by Parliament and will be published in March—proposes that the limits on tenure be removed altogether. We therefore propose to amend the bill to bring it into line with the code of practice—in other words, members of the board will be appointed for a period to be determined by ministers. At the end of that period, they could be reappointed for one further period—but only one—without open competition.

Those are probably the most significant proposals to amend the bill. If committee members have questions on them, or on any other points, I will be happy to answer them.

Jackie Baillie: What I am about to say may reflect my hopes rather than the actuality, but I am sure that you will clarify things for me. One of the bullet points in the list of amendments says:

"To clarify the status of the Director and Deputy Director and who can apply for these posts – schedule 2."

Does that touch in any way on the committee's recommendation that the director should be of a rank equivalent to chief constable? Do we need to follow up our recommendation?

Colin Miller: It is not directly related to that recommendation. Ministers have considered the committee's comments but do not propose to lodge an amendment to change the rank of the director of the SCDEA. We have a number of proposals to tidy up the bill. For example, it is not clear in the bill whether a person has to be a deputy chief constable to be eligible to apply for the post of director. The intention is not that a person should have to be a DCC; the intention is that a person who is a DCC or who is eligible to apply for promotion to become a DCC should be eligible to apply for the post of director. The amendment that we propose will make that clear.

I believe that the committee recommended that the director's status should be equivalent to that of a chief constable, rather than that the director ought to have the rank of a chief constable.

Jackie Baillie: Did I not use the word "equivalent"? I think I did.

Colin Miller: Yes, but it is equivalent status.

Committee members will know that the bill is providing, for the first time, statutory recognition for the Scottish crime and drug enforcement agency and for the post of director, and is conferring specific statutory powers on the director. So, to some extent at least, the bill provides a special status for the director, but—

Jackie Baillie: You do not need to argue the point with me; I just wanted you to clarify whether you would seek to confer that status or whether we would have to do it. I think I have that clarification. Thank you.

Mr Maxwell: I have a query about the bullet point that reads:

"To make SCDEA exempt from the Freedom of Information (Scotland) Act – schedule 5."

Will you expand on the reasons for that exemption?

Colin Miller: That is to do with the nature of the SCDEA's work and the information that it will hold. The aim is also to bring it into line with the serious organised crime agency, which will attract a similar exemption. However, the exemption will be limited to the SCDEA and will not apply to other aspects of the authority's work.

Mr Maxwell: I am curious about that. I accept your explanation about bringing the agency into line with SOCA, but is the SDEA not more similar to a police force? I am not convinced that complete exemption is suitable. Would not it be reasonable to allow the SCDEA to be subject to the Freedom of Information (Scotland) Act 2002 but to withhold information that clearly should not be in the public domain? I am sure that the Scottish information commissioner would uphold such a decision if it were appealed, because withholding such information would be entirely reasonable. However, other matters should be open to freedom of information requests; the purpose of the 2002 act is to make as many public bodies as possible open to requests.

Colin Miller: It is a question of balance. As you say, it would be perfectly possible not to exempt the SCDEA in its entirety but to deal with individual applications and apply individual exemptions, which is how police forces operate. On balance, our view was that such an approach was right for all the services that the authority provides but that because all the agency's work deals with the top end of the criminal spectrum, it is difficult to see circumstances in which releasing information under the 2002 act would be appropriate. That is very much a matter of judgment.

Mr Maxwell: I accept that there is a balance to strike. However, with many other pieces of legislation, especially regulations, ministers tell committees that they need flexibility because they

cannot envisage all circumstances. The proposed exemption would remove such flexibility. On the face of it—perhaps I need to think more about it—it seems that to leave the flexibility in place would be better because, in some circumstances, which you have not envisaged, information could and should be released. The blanket exemption will prevent that.

Colin Miller: It is open to the agency to release information about its activities. For example, it will provide an annual report and, obviously, it takes great care about the information and the detail that is set out in that. In the last analysis, that is a matter of judgment. As you say, even if the SCDEA were to be subject to the 2002 act, it might seek to apply an exemption to most, if not all, requests that were made to it.

The Convener: One bullet point says:

"To provide that SCDEA is subject to the direction of the Lord Advocate in relation to the investigation and prosecution of crime in Scotland."

I am sure that there is nothing sinister in that, but what does it mean?

Colin Miller: That simply reflects the Lord Advocate's duties as set out in the Scotland Act 1998—his responsibility for the prosecutorial system in Scotland. The bill will create a new statutory office, so it clarifies that the office will be subordinate to the Lord Advocate's exercise of his functions for prosecution and investigation of crime.

Jeremy Purvis: Another bullet point concerns amending

"section 14(3) to introduce a line of accountability between the Director of SCDEA and the SPSA".

Will you say a little more about how that will work? Will the annual plan be connected with the funding element?

Colin Miller: The bill provides for the director of the SCDEA to prepare and publish an annual plan; the authority will be under a similar duty. Just as the bill provides that the authority cannot publish its plan without the Scottish ministers' agreement, we took the view, on reflection, that it was appropriate that the agency, which will be accountable to the authority, should not publish its plan without the authority's agreement, and that the authority should be able to propose modifications of the agency's plan.

However, as in all other aspects of the bill, we have to safeguard the agency's operational independence. The amendments that we propose will provide that the director should submit a draft plan to the authority three months before the beginning of the financial year, and that the authority may then propose modifications, subject to the proviso that they do not relate to operational matters. In essence, we are trying to clarify the point that the agency is ultimately accountable to the authority but is operationally independent.

15:00

Jeremy Purvis: What if there is continuing dispute?

Colin Miller: The authority has the last word, because the agency is accountable to the authority. A similar thing applies with regard to Scottish ministers and the authority's plan.

Jeremy Purvis: Is it not correct that the agency will have direct funding?

Colin Miller: Yes.

Jeremy Purvis: So it could receive direct funding but not be able to spend it because there was no agreed plan.

Colin Miller: There will be no possibility of an impasse. The bill will provide that the director should submit a draft plan that the authority can then agree, either as it stands or after modification. If the authority makes modifications, the plan as modified will be the version published.

As you know, the bill provides for 100 per cent funding of the authority by Scottish ministers. However, the bill also says that ministers may stipulate how much of the total pie is to go to the agency. The authority does not have the discretion to reduce or increase the amount that ministers direct should go to the agency.

Jeremy Purvis: But there could be a difficulty. If the agency's plan has funding requirements, the authority could impose its will on the agency, but the Executive can state the funding that it expects to go to the agency. There could be differing requirements.

Colin Miller: But in the last analysis, the authority requires the agreement of ministers for its own plan. Ministers could make it clear—

Jeremy Purvis: That they agree with the agency.

Colin Miller: It would be very surprising indeed if ministers were to override the authority in that way. Ministers have the power, first, to allocate the budget for the authority as a whole, secondly, to say how much should go to the agency, and finally, to approve the authority's plan. The agency is an integral part of the authority and answers to it; it is therefore right that the authority and not ministers should approve the agency's plan. It is quite a complex weave of relationships.

Jeremy Purvis: Indeed.

Colin Miller: It also reflects the difference between the SCDEA, which will be maintained by

the authority, and the various other services that the authority provides. The agency will be part of the authority but will have separate status and, crucially, operational independence.

The Convener: As there seem to be no other questions for Mr Miller, I thank him very much indeed for that explanation.

The sun is indiscriminately striking individual people in the room; if we make a noise, something can be done about that. We will pause while the blinds are closed. [*Interruption.*]

I do not know that we have ever done that during a committee meeting. It was all very diverting—and sounded a bit like washing a car without water.

Mr Merrill will discuss the amendments to do with complaints.

Alastair Merrill: Thank you Convener.

The amendments under the heading "Complaints Commissioner" are a mixture of technical amendments and clarifications, picking up points that were made at stage 1.

I draw your attention to three amendments that we may not be in a position to lodge at stage 2, although it is still our intention to do so. The first amendment, which is the seventh on the list, proposes to give the police complaints commissioner for Scotland—the PCCS—power to enter into agreements with other complaint handling bodies on how to handle jointly complaints spanning several jurisdictions. This relates to another matter of interest to the committee—ensuring that all law enforcement agencies are within the scope of the commissioner's remit.

Unfortunately where this relates to United Kingdom law enforcement bodies, the policy has to be pursued jointly and in parallel with Westminster. We therefore need to identify an available legislative slot at Westminster to allow that to happen. We are hoping to make progress on this issue in line with our work in respect of UK-wide law enforcement bodies. The Scottish ministers are committed to ensuring that the PCCS has the necessary powers to work effectively with all other relevant organisations involved in police complaints. Further work must be done at the Scottish Parliament and also at Westminster to ensure that that can happen.

The other two amendments relate to the proposed commissioner's relationship to the Scottish public services ombudsman. They seek to clarify the respective responsibilities and give the PCCS power to share information on complaints with other relevant complaint handling bodies. Ministers are still considering the relationship between the PCCS and the Scottish public services ombudsman which will inform both amendments. Due to timing considerations, unfortunately, we may not be in a position to lodge the amendments at stage 2.

Of the other amendments in the list, I draw the committee's attention to two in particular. The first in the list concerns a proposal to enable ministers to exercise judgment about appointing to the post of commissioner a person who has a criminal conviction. The amendment proposes to allow ministers more discretion than is provided for in the bill. We do not need, for example, an automatic bar on anyone who has had a custodial sentence of three months or more, but ministers would be able to take into consideration any offence committed by the applicant, even if the crime did not entail a custodial sentence. One example could be the downloading of illegal material from the internet that might carry a community service penalty rather than imprisonment. The amendment aims to give ministers more discretion about who might or might not be appointed commissioner.

The second amendment—the third on the list—proposes to give the commissioner powers to examine how a complaint about the off-duty conduct of a police officer or other relevant person has been handled, rather than limiting it to his or her on-duty behaviour. That will give the commissioner wider discretion in how he or she applies these powers. An example of where that could be relevant could be where a member of the public complained about inappropriate behaviour by police staff at a training event. The complainant should expect the complaint to be dealt with properly and by the appropriate authority. If that did not happen, under this amendment, he or she would be entitled to ask the complaints commissioner to investigate the handling of the complaint. In that regard, you may recall some media stories about the activities of police officers engaged in training and outside the normal course of duty.

The other amendments are technical. I am happy to take any questions on those or the other points.

Bill Butler: Although ministers are still considering the relationship between the PCCS and the Scottish public services ombudsman, it is hoped that an amendment will be ready for stage 2. What will happen if it is not? Will an amendment be lodged at stage 3? That would be unsatisfactory.

Alastair Merrill: I agree that that would be unsatisfactory. We hope to lodge an amendment at stage 2. However, the time that is available may mean that the necessary legal drafting cannot be done, which would be regrettable. If that is impossible, we certainly intend to lodge an amendment at stage 3.

Bill Butler: If the only problem is that ministers are still considering the relationship, what you have said would not be the case. Therefore, I take it that there is a danger of something else delaying the lodging of an amendment. What is holding things up?

Alastair Merrill: It is simply a case of reaching a final clarification of the exact terms of the relationship between the police complaints commissioner and the ombudsman and then translating that relationship into an amendment to the bill. As I said, I hope that we will be in a position to lodge an amendment at stage 2, but I am simply trailing the idea that if we are not in a position to do so for practical drafting reasons, that does not mean that we do not recognise the importance of making the clarification in question.

Bill Butler: What mechanism are you employing to reach clarity? It seems to me that ministers are considering the relationship, taking soundings and so on. Why is it feared that there may be a delay?

Alastair Merrill: It must be decided which aspects of the relationship can be sorted out through a memorandum of understanding between the police complaints commissioner and the ombudsman, for example, and which aspects would have to be clarified by statute. The points that were made during stage 1 about the commissioner's and ombudsman's responsibilities in relation to police boards, the ombudsman's responsibilities in relation to authorities and the commissioner's responsibilities in relation to civilian staff must be picked up. We should be clear that statutory amendments that we lodge are necessary from a legal point of view and do not relate to areas that can be handled by a protocol or memorandum of understanding between the two bodies.

Bill Butler: So the aim is to disentangle things, or rather, not to get tangled up, which would mean disentangling in the future.

Alastair Merrill: Exactly.

Bill Butler: I think that I am now clear about matters.

The Convener: I want to clarify something, Mr Merrill. You said that handling complaints that could span several jurisdictions was subject to finding a legislative slot at Westminster. Could the Police and Justice Bill represent such a legislative slot?

Alastair Merrill: We had hoped that that bill, which is being considered at Westminster, would do so, but that has not proved to be the case. We must therefore try to find an alternative.

The Convener: Do you have any questions to ask, Maureen?

Maureen Macmillan: Thank you, but I wanted to ask the same questions that Bill Butler asked.

The Convener: So you have nothing to add to what has been said.

Maureen Macmillan: No. We have received full answers. I simply hope that the committee will be kept informed of progress as decisions are made.

Jackie Baillie: I would like to ask a slightly hypothetical question, which may be mischievous. If amendments were lodged to give the commissioner's responsibilities to the ombudsman, would understandings still require to be reached with the various bodies that you have mentioned, Mr Merrill?

Alastair Merrill: I believe that they would, certainly with respect to bodies that span more than one jurisdiction. Ministry of Defence police, who come under the responsibility of the United Kingdom, and local police might be involved with a complaint relating to a protest at Rosyth, for example. We need to be clear about how such complaints would be handled and about the relationship between the two bodies. That would apply whether the ombudsman or the police complaints commissioner was responsible.

Jackie Baillie: I was thinking more of the local bodies to which the penultimate bullet point under the section on the complaints commissioner in your paper refers, rather than of UK agencies.

15:15

Alastair Merrill: I see. My understanding is that there would still need to be clarification of that. It would depend on the eventual decision on the legal relationship between the SPSO and the police complaints commissioner.

Mr Maxwell: I seek clarification, in case I have misunderstood this. I understand the problem with the legislative slot at Westminster. That is clear as far as UK bodies are concerned. Given that difficultly, might you intend to draft an amendment dealing with all the Scottish bodies? That could get them covered by the bill and would avoid entangling the provisions for the Scottish bodies with the UK stuff.

Alastair Merrill: That would certainly appear to be a sensible way to proceed.

The Convener: Thank you very much for that, Mr Merrill. We now move on to football banning orders. Mr Ferguson's moment has come.

Ian Ferguson (Scottish Executive Justice Department): There are nine bullet points on the list under the heading, "Football Banning Orders". Like my colleagues, I will not go through all of them, although I can answer any questions that members may have. Some of these intended

amendments respond to issues that were raised at stage 1; some are intended to make the policy work better; and a few of them are simply tidying-up amendments. Members will probably be most interested in the first four on the list.

The first two proposals relate to issues that were raised at stage 1:

"To remove the requirement that an offence must be committed within 24 hours either side of a football match"

and

"To provide for reasonable excuse"

for the offence of breaching a football banning order, as set out at stage 1.

The two proposals after that are probably the most significant on the list. The first of them is:

"To enable the police to apply for variations of criminal FBOs".

For civil banning orders, both the person who is subject to the order and the police can apply to have the order varied, for example to impose or remove a requirement not to attend a certain bar or a given town centre on match days. For criminal orders, according to the bill as drafted, only the person who is subject to the order can apply to have it varied. We said in the policy memorandum that we would consider that further and return to it at stage 2.

We considered the matter for a while, and we decided that it would be best for the police to make applications to vary football banning orders to the court. That would not mean the police appearing in the criminal courts at their own instance, however. The procurator fiscal would make all the necessary court appearances, facilitate the application, take evidence from witnesses and so on. We think that that would be a sensible way to proceed.

The next bullet point is:

"To enable courts to make a declaration that an offence is related to football (a declaration of relevance)."

That applies only to criminal orders. To explain why such a declaration is needed, we need to take a step back and consider how the banning orders would be imposed. The proposed legislation says that courts can impose banning orders only when they are satisfied that they will help prevent future violence or disorder related to football. That raises the question how the court could be satisfied of that. In practice, the court would probably need to see a track record of a person's football-related offending. We would not expect the orders to be imposed for first football-related offences unless they were especially serious. The court can look at a schedule of previous convictions, but that might just detail breaches of the peace or assaults, without necessarily specifying whether or not the offences were related to football.

The proposed amendment will enable courts to declare that an offence is related to football. That will then appear on the schedule of previous convictions. If the person comes before the court again for a football-related offence, the court can look at the schedule of convictions and see that they have a track record of that sort of offending. The measure provides the technical means to enable courts to make well-informed decisions on whether to impose banning orders in particular cases.

There are a few other amendments, but they are largely technical and tidy up the provisions already in the bill. I can answer questions on any of the proposals if that would be helpful.

The Convener: Thanks very much for that, Mr Ferguson. I am sure that the committee will wish to express its appreciation for the Executive's recognition of the observations that we made at stage 1. That is very positive. I invite questions for Mr Ferguson.

Mr Maxwell: I have a question about the point that you ended on, Mr Ferguson. A court will be able to define an offence as football related, rather than simply being breach of the peace. That would mean that a history would be built up. Does that effectively mean that it will be some time in the future before football banning orders are imposed, given that the courts will not yet have anything to look back on? Will there be any retrospective provision?

Ian Ferguson: I am sorry—I meant to mention that. It is true that the legislation will take a little while to bed in. As we have said all along, we expect that at first most football banning orders will be imposed by summary application. As time goes on, it is more likely that banning orders will be imposed on conviction. It is also the case that a person could be liable to a series of football-related offences at one case and a banning order could then be imposed.

Mr Maxwell: Effectively it would be a first offence, but it could be a number of offences.

Ian Ferguson: A number of similar offences.

Jeremy Purvis: Just for clarification, if the police are retaining information now of people who have been arrested, charged or even convicted of offences and they are holding that information on the day that the act comes into force, they will be able to apply for orders.

Ian Ferguson: Yes—civil orders.

Jeremy Purvis: So, if the police are holding all that information now and they want to use the act, there could effectively be a big tranche of applications on day 1.

Ian Ferguson: Yes.

The Convener: Thank you, Mr Ferguson. That was extremely helpful. Now, by a process of elimination, but here entirely on merit, Mr Barron.

Bill Barron: I am afraid that it is not me—I am saving myself for even later in the process. Alastair Merrill and Ian Ferguson get another go each.

Alastair Merrill: Under the heading, "Marches and Parades", the only amendment on the list is to remove an anomaly that has the unintended effect of imposing a duty on local authorities to advise funeral directors and any other bodies made exempt from the notification process that no order of conditions will be imposed. We consider that the vast majority of funerals and other non-notifiable events will be held without any order being required, so it seems pointless to require a local authority to notify an organiser that no order will be made. The amendment is intended simply to avoid the inadvertent creation of a bit of unnecessary bureaucracy.

Community consultation is not the subject of an amendment, but concerns were raised in the stage 1 report and in the debate. We are considering how best to ensure that community consultation happens, but in a genuine way and without the creation of extra process or bureaucracy. We may consider lodging an amendment on that, or building something into the guidance to local authorities, a draft of which I provided to the clerk last week.

Bill Butler: Are we likely to know soon whether there will be an amendment on community consultation or guidance to local authorities?

Alastair Merrill: Yes, I would hope so.

Bill Butler: What is your best approximation?

Alastair Merrill: I would hope that it would be before any amendments have to be lodged for stage 2 of the bill.

The Convener: Mr Barron, I am in your hands. Where do we go now?

Bill Barron: Ian Ferguson has another amendment.

Ian Ferguson: Under the heading, "Date and place of birth", I draw the committee's attention to one amendment on the list that is definite and another that is a possible amendment. I will start with the one on the list. The powers of the constable, as originally drafted, could have been interpreted as being a bit wider than was necessary. For example, the bill says:

"information about the person's place of birth".

Does that mean the population or the major industries? A person should not be arrested for not having that sort of information to hand. We will lodge an amendment to the effect that the constable can ask a person only for their date and place of birth and nationality.

The possible amendment is about a policy that has been agreed. It may be included in this bill; it may be included in the proposed criminal proceedings bill. We will advise you of that as soon as we can. The intention is to extend to witnesses the existing provisions for suspects. There are two reasons for that, one of which is consistency. The Criminal Procedures (Scotland) Act 1995 says that witnesses and suspects have to provide their name and address when asked for that information by a constable. More important, however, is that the amendment is needed to enable the Crown Office to fulfil its obligations under the Privy Council rulings on the Holland and Sinclair cases, which require the Crown to disclose to the defence certain information related to on-going prosecutions, such as witness statements, whether the witnesses have any previous convictions and so on.

If two witnesses have the same name, it can be difficult to distinguish between them and that can cause the Crown problems in working out which information it needs to give to the defence. We want to ensure that the Crown gets the information about date and place of birth so that it can identify witnesses effectively. We will confirm which bill that provision will go into as soon as we possibly can.

Mr Maxwell: I ask for a small point of clarification about the amendment in the list. You suggested—and it sounded like quite a reasonable suggestion—that we do not necessarily want to know the population density of an area. The proposal is that the person should

"state their place of birth in such detail as the constable considers necessary".

What does that mean?

Ian Ferguson: For example, is the town enough; is the country enough; is the region enough? To give a slightly frivolous example, there is a place called Hollywood in Dumfriesshire. So if someone gives their place of birth as Hollywood, is that Hollywood in Scotland or America? A town or a country might not always be enough information for the police officer to know exactly where it is.

Mr Maxwell: It just seems that one could define that relatively simply, whereas you have left it open-ended, which puts you back where you started in trying to remove the option to ask for any information that was wanted.

Ian Ferguson: When stating your place of birth in such detail, that detail has to be about where the place of birth was, rather than information about the place of birth; it is narrower than—

Mr Maxwell: The number of the hospital ward?

The Convener: Mr Maxwell's point is that the subject is becoming a test for the constable to apply. Would it not be better to state the objective need, which is quite simply to gain sufficient information to locate the address or place of birth?

Ian Ferguson: If the bill were to require sufficient information, it would be for the constable to decide what is sufficient. There has to be a little flexibility to allow the constable to be able to get the information that they need.

Mr Maxwell: It seems that it should be possible to define the requirement in the bill.

Maureen Macmillan: Could the amendment say something such as, "considers necessary to identify" the place of birth?

Ian Ferguson: I have not seen the exact drafting of the provision, but I am sure that it can be looked at.

Mr Maxwell: I am sure that we will look at it when it comes up.

The Convener: Thank you, Mr Ferguson. Mr Barron.

Bill Barron: There are five amendments under the heading, "Mandatory drug testing". Of those, the most important are the third and fourth amendments. Each of them amends section 75. "Section 27" is a misprint; it should read "section 75".

The bill currently says that any sample must be

"destroyed as soon as possible following its analysis for the purpose for which it was taken."

We are amending that to clarify that the sample will need to be retained until the individual has attended their assessment and, if necessary, for the longer term. That is because if they fail to attend, the physical sample might well be required for evidential purposes when a court considers the offence of failing to attend the assessment.

In order to prosecute a person for such an offence, the Crown will need to prove that a person tested positive for a class A drug, which meant that he or she was required to attend the assessment. We need both the third and fourth amendments in the list to allow that to happen. The policy is that the sample will be destroyed as soon as possible after the assessment has been attended. If there is a failure to attend, the sample may be retained for the long term, to be available for evidential purposes.

The only other amendment that might need some explanation is the second on the list. Section 80 provides that a person will not have to attend a mandatory assessment if a further analysis of the initial sample is carried out before they attend and reveals that the drug was not present in their system. That provision deals with a case where a sample is initially analysed, but it could be that the sample that a person provides for testing is destroyed or is unsuitable for analysis and a further sample needs to be taken. We are looking at section 80 to consider how we need to broaden it to make it clear that it deals both with the follow-up to cases where a sample has been re-analysed, but also the parallel situation of where a new sample has been taken. There is no change to the policy of when a new sample can be taken because that is already dealt with in the new section that is referred to in this amendment.

Maureen Macmillan: The first amendment under the heading "Mandatory drug testing" says:

"if a drugs assessor decides to change an appointment"—

for a drugs assessment, attendance at which will be mandatory—

"a written notice must be given to the person required to attend."

This might be picky, but does that mean that the notice must be put into the person's hand and not posted?

15:30

Bill Barron: I need to take advice on that.

Maureen Macmillan: The point is important, because a person might have a chaotic lifestyle and not look at their post. Given that attendance will be mandatory, it will be important to ensure that the person receives the notice.

Bill Barron: Yes. There is no question about that. The notice must be delivered to the person in a way that ensures that they receive it.

Maureen Macmillan: Who would deliver the notice?

Bill Barron: I am sorry, but I do not know that level of detail.

Maureen Macmillan: I seek a wee bit of clarification on the matter.

Bill Barron: Certainly. We will come back to you.

The Convener: Thank you for helping us, Mr Barron. We move on to the amendments listed under the heading, "Incentives for providing evidence".

Ian Ferguson: As Bill Barron said, our expert on the matter, Fergus McNeil, is off sick, but we will do our best to talk the committee through the amendments. The Law Society of Scotland expressed concerns during stage 1 and we have had two meetings with its representatives to

discuss those concerns, which, as I understand it, focus on two areas: the question whether the proposals on reduction in sentence offer a good enough incentive to offenders to co-operate with the prosecution; and how the immunity provisions work with common law on matters such as pleas in bar of trial.

The minister will write to the Law Society of Scotland to explain how the immunity provisions will work in practice. The first two amendments on the list respond to the society's suggestions about the proposals on reduction in sentence, by requiring, rather than just enabling, the court to take into account the co-operation that has been given when it imposes sentence and by requiring the court to give reasons if it does not pass a reduced sentence. The amendments would make offenders more likely to co-operate and provide evidence. The other three amendments on the list are fairly technical and I am happy to answer the committee's questions on them.

Mr Maxwell: How do the first two amendments on the list interrelate? The bill says:

"the court may take into account the extent and nature of the assistance given or offered by the offender."

You propose to change "may" to "must", but there remains the possibility that the court might not pass a discounted sentence. How will that work? Surely the purpose of the wording, "may take into account" is to allow the court to consider the co-operation that has been given but to decide that there are reasons why it should not pass a discounted sentence. If the court "must take into account" the assistance that has been given, surely it must pass a discounted sentence.

Ian Ferguson: My reading of the provision is that if a court "may take into account" the co-operation that has been given, it may also not take the co-operation into account and ignore it completely. If the court "must" take co-operation into account, it can still decide to impose the sentence that it would have imposed anyway, if that is reasonable.

Mr Maxwell: By "must" you mean that the court must consider the co-operation that has been given, which will not necessarily mean that the court passes a lesser sentence.

Ian Ferguson: Yes.

Mr Maxwell: Okay.

The Convener: If there are no further questions, I thank the witnesses for their help. We have witnessed an interesting demonstration of co-operation between the Executive's bill team and the committee in its scrutiny role, which has worked well. On behalf of the committee, I thank the witnesses not just for giving us extensive preliminary documentation but for answering our questions so fully today. That will be helpful as we approach stage 2.

We will have a five-minute comfort break.

15:33

Meeting suspended.

15:40

On resuming—

Police and Justice Bill: Legislative Consent Memorandum

The Convener: Item 2 is consideration of the legislative consent memorandum to the Police and Justice Bill, which is a Westminster bill and will be the subject of a Sewel motion in the Scottish Parliament.

Members have received a briefing note from the Executive and a clerk's note that set out the pertinent points. Interestingly, the bill has a certain significance, given that its passage is almost parallel to that of the legislation that we have been actively considering.

We need to think about and decide on a number of issues. First, does the committee wish to seek oral evidence from the minister? Indeed, do we wish to seek any additional oral evidence? Moreover, should we seek written evidence from organisations such as ACPOS, the Scottish Police Information Strategy, Her Majesty's inspectorate of constabulary for Scotland, the Law Society of Scotland and so on? I am simply placing all this before the committee so that we can reach some decisions.

Bill Butler: I think that we should take oral evidence from the Minister for Justice. However, I am not so sure that we should take oral evidence from anyone else, given that the time for taking such evidence is limited, as the clerks have pointed out. It seems sensible to seek written evidence from ACPOS, the Law Society of Scotland and various other groups, but I know of no other groups from which we should seek evidence that are not contained in the clerk's helpful list.

Jackie Baillie: I agree with those comments.

Maureen Macmillan: I agree too.

Mr Maxwell: I am not against inviting the Minister for Justice to give oral evidence. However, having read the papers, I feel that this legislative consent memorandum seems—strangely enough—to be fairly straightforward. It is clear that the legislation itself is a knock-on effect of the abolition of the police information technology centre. We might need to seek written evidence from certain organisations if any difference of opinion exists, but I am not entirely sure what information, other than what we have already received, we would garner from an evidence-taking session with the minister. Perhaps someone could explain that further to me.

Bill Butler: I am not sure about that, either, but we should have the chance to take evidence formally and on the record. As Stewart Maxwell has suggested, we might gather little or no additional information, but it would be much safer to find out whether that is the case.

The Convener: I point out that the committee is obliged to prepare a brief report or set of recommendations, and it would look a bit strange if we did not have any specific comments from the minister on the matter.

Mr Maxwell: As I say, the matter is fairly straightforward.

The Convener: Do I gather that the committee agrees to proceed as outlined in the clerk's note and that we should arrange to take oral evidence from the minister?

Members *indicated agreement*.

The Convener: The clerk's note contains a list of various bodies from which we could seek written evidence. Do members wish to seek evidence from all of them?

Members *indicated agreement*.

The Convener: Finally, do members agree to work to the clerk's proposed timetable?

Members *indicated agreement*.

Proposed Legal Profession and Legal Aid (Scotland) Bill

15:44

The Convener: The final item on our agenda concerns the forthcoming legal profession and legal aid (Scotland) bill. It had always been my view that it would be inappropriate for me to convene the committee when its obligation to scrutinise the bill arose. I discussed the matter with Bill Butler, who kindly agreed that he would be prepared to convene the committee when the bill came along. However, events overtook me and it was recognised that my continuance as convener would be of a fairly short-term nature. That is why, as I said, I have intimated to the Parliament that I am stepping down from the committee. In those circumstances, it would be inappropriate for me to play any role at all on the committee in relation to the bill. Therefore, I ask the committee to agree that I demit the convenership and invite Bill Butler, as deputy convener, to chair the committee. At this point, I say my farewells and bid members adieu.

The Deputy Convener (Bill Butler): Is that agreed?

Members *indicated agreement*.

The Deputy Convener: Before you go, I put on record my appreciation for your commitment, your hard work and your assistance to me, as deputy convener, and to all members of the committee. Your convenership has always been inclusive and you have adopted a consensual approach when that has been possible. You have always—without exception—been objective and impartial and the committee wishes to put on record its thanks to you for that. Let me say, too, that your convenership has been fun. Your metaphorical flights of fancy sit well on the record and have gladdened the hearts of committee members during some fairly dry, albeit necessary, evidence-taking sessions. Does anyone else wish to say anything at this juncture?

Jackie Baillie: I will certainly miss Annabel's guidance of our deliberations and those of us who do not have a legal background will remember fondly the individual tutorials that she gave us on Latin terms. I am sure that each of us wish her very well. Her successor will undoubtedly have a hard act to follow and we will probably make mincemeat of him, but there you go.

Miss Annabel Goldie (West of Scotland) (Con): Thank you both very much indeed. When I said at the beginning of the meeting that it had been a pleasure to be the committee's convener, those were not empty words. I have always felt that the Justice 2 Committee is a very good committee and that is attributable in no small measure to the skills and commitment that individual members have brought to it. It has been a pleasure to convene the committee and I think that, collectively, its members have served the Parliament very well. I thank Bill and Jackie for their kind remarks. I am sorry to be leaving and I wish all members every success as you go forward with the committee. I shall look on with interest at the challenges you throw up as you pursue your scrutinising responsibilities.

The Deputy Convener: I will take over just for item 3, which is about the forthcoming legal profession and legal aid (Scotland) bill. The clerk has prepared a note that provides an overview of the expected bill. As the bill will be highly technical, it is suggested that we may wish to appoint an adviser to assist us in our scrutiny. Would that be agreeable?

Members *indicated agreement*.

The Deputy Convener: Let us consider the adviser's remit, which is dealt with in annex A of paper J2/S2/06/4/5, entitled "Specification for Appointment". Do members have any questions or comments on the specification? I have a few.

Jackie Baillie: I want to clarify one point. Could the adviser be a lawyer or are we excluding lawyers because the bill is about the regulation of the legal profession?

Tracey Hawe (Clerk): Information will be obtained from candidates, who would have to declare any interest. It would then be for the committee to decide whether any such interest would prevent someone from taking up the appointment.

Jackie Baillie: Thank you.

Mr Maxwell: My question is on the same important point. I do not know how the clerks will go about obtaining an adviser. Many of the people who come to us are from the Law Society of Scotland or the Faculty of Advocates. They are the bodies to which we would usually go for advice on legal matters. Will you cast your net more widely on this occasion? Will you consider people who work in other areas, such as academics or other non-lawyers?

Tracey Hawe: We are investigating academic options, as well as the possibility of appointing someone who has previous experience of complaint handling or other jurisdictions.

The Deputy Convener: Members have no more questions, but I have a few fiddly points. The second paragraph, which is on the adviser's duties, states:

"The adviser will be expected to attend evidence-taking sessions where possible".

I would prefer us to leave out "where possible". If, for whatever reason, it is impossible for the adviser to attend a particular meeting, that will become apparent on the day.

Six lines down in the first paragraph under the heading "Person specification", there is a sentence that says:

"A thorough knowledge of the current legal aid system in Scotland would also be desirable."

I think that such knowledge is necessary rather than desirable. Do members agree?

Members *indicated agreement.*

The Deputy Convener: Do members agree to the specific remit that has been proposed for the adviser?

Members *indicated agreement*.

The Deputy Convener: The next meeting will be on Tuesday 28 February at 2 o'clock.

Meeting closed at 15:51.

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

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

The deadline for corrections to this edition is:

Friday 3 March 2006

PRICES AND SUBSCRIPTION RATES

OFFICIAL REPORT daily editions

Single copies: £5.00
Meetings of the Parliament annual subscriptions: £350.00

The archive edition of the *Official Report* of meetings of the Parliament, written answers and public meetings of committees will be published on CD-ROM.

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

Single copies: £3.75
Annual subscriptions: £150.00

Standing orders will be accepted at Document Supply.

Published in Edinburgh by Astron and available from:

Blackwell's Bookshop
53 South Bridge
Edinburgh EH1 1YS
0131 622 8222

Blackwell's Bookshops:
243-244 High Holborn
London WC1 7DZ
Tel 020 7831 9501

All trade orders for Scottish Parliament documents should be placed through Blackwell's Edinburgh

Blackwell's Scottish Parliament Documentation Helpline may be able to assist with additional information on publications of or about the Scottish Parliament, their availability and cost:

Telephone orders and inquiries
0131 622 8283 or
0131 622 8258

Fax orders
0131 557 8149

E-mail orders
business.edinburgh@blackwell.co.uk

Subscriptions & Standing Orders
business.edinburgh@blackwell.co.uk

RNID Typetalk calls welcome on
18001 0131 348 5412
Textphone 0845 270 0152

sp.info@scottish.parliament.uk

All documents are available on the Scottish Parliament website at:

www.scottish.parliament.uk

Accredited Agents
(see Yellow Pages)

and through good booksellers

Printed in Scotland by Astron