JUSTICE AND HOME AFFAIRS COMMITTEE

Wednesday 16 February 2000
(*Morning*)

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JUSTICE AND HOME AFFAIRS COMMITTEE
6th Meeting 2000, Session 1

CONVENER

*Roseanna Cunningham (Perth) (SNP)

DEPUTY CONVENER

Gordon Jackson (Glasgow Govan) (Lab)

COMMITTEE MEMBERS

*Scott Barrie (Dunfermline West) (Lab)
*Phil Gallie (South of Scotland) (Con)
*Christine Grahame (South of Scotland) (SNP)
*Mrs Lyndsay McIntosh (Central Scotland) (Con)
Kate MacLean (Dundee West) (Lab)
*Maureen Macmillan (Highlands and Islands) (Lab)
*Pauline McNeill (Glasgow Kelvin) (Lab)
*Michael Matheson (Central Scotland) (SNP)
*Euan Robson (Roxburgh and Berwickshire) (LD)

*attended

WITNESSES

Dr Alastair Brown (Crown Office)
Keith Connal (Scottish Executive Freedom of Information Unit)
Stuart Foubister (Scottish Executive Office of the Solicitor)
David Goldberg (Campaign for Freedom of Information Scotland)
Michael Lugton (Scottish Executive Constitutional Policy and Parliamentary Liaison Division)

CLERK TEAM LEADER

Andrew Mylne

SENIOR ASSISTANT CLERK

Shelagh McKinlay

ASSISTANT CLERK

Fiona Groves

LOCATION

The Chamber

Scottish Parliament

Justice and Home Affairs Committee

Wednesday 16 February 2000

(*Morning*)

[THE CONVENER *opened the meeting at 10:02*]

The Convener (Roseanna Cunningham): Good morning, everyone. We will begin the meeting. I have received apologies from Gordon Jackson and notification that Pauline McNeill will be late. I understand that there have been problems with the trains from Glasgow this morning.

Item 1 on the agenda is to decide whether to take item 2, on stage 1 of the Abolition of Poindings and Warrant Sales Bill, in private, and I ask members to agree that we should do so. It has already been agreed that draft reports should be considered in private, and it would constrain discussion on this item if it were not treated similarly. I also ask members to agree that, at our next meeting, we should discuss our draft stage 1 report on the bill in private. Are we agreed?

Members: Yes.

Phil Gallie (South of Scotland) (Con): I wish to suggest that, rather than having that discussion now, we move it to the end of the meeting.

The Convener: We cannot do that, because we have scheduled times for the witnesses who will give evidence to the committee on the Executive's freedom of information proposals—one of the witnesses cannot be with us before 11:45. Those arrangements have been made to allow us to discuss item 2 in private at this stage of the meeting.

Phil Gallie: Okay.

10:04

Meeting continued in private.

10:46

Meeting resumed in public.

Carbeth Hutters

The Convener: Item 3 on the agenda is the consideration of the evidence taken on petition PE14 from the Carbeth Hutters Association. The paper sets out the main issues arising from the evidence. We should consider it, and then agree our conclusion. If members recall, we agreed at our first meeting this year on 11 January that our committee report should not attempt to draw conclusions about the substance of the dispute, but should aim to draw the Executive's attention to the issues raised, and make more widely available the evidence that the committee has received. However, we can invite ministers to consider ways in which the hutters might be given greater security of tenure and/or some protection from arbitrary rent increases.

A bill relating to land reform is going through this Parliament—the Abolition of Feudal Tenure etc (Scotland) Bill—and there is to be another land reform bill, which I understand will include a crofting right to buy, as well as a community right to buy. So there are legislative opportunities in this Parliament to do something.

We will now look at the note from the clerk, and discuss it, keeping in mind that we have already agreed that we will not attempt to draw conclusions about the substance of the dispute. I think that we were all agreed that we had heard such totally contradictory evidence that it was difficult for us to come to the kind of conclusion that might otherwise have been possible. Are there any comments? Michael Matheson is in a difficult position, because he was not on the committee when we heard the evidence.

Phil Gallie: When I was looking through the evidence, it struck me that we never considered a comparison of the situation with respect to residential caravan owners and sites or holiday caravan sites. I wonder whether somewhere along the line it might be worth making that comparison.

Scott Barrie (Dunfermline West) (Lab): I have some sympathy with that, but is it not the case that the issue boils down to the fact that the huts were not portable? If they were portable, the comparison that Phil Gallie has suggested could be made. From the early evidence that we took, I remember that the huts were a semi-permanent arrangement and that one could not move them except by destroying them. They are also in a slightly anomalous position, as this is by far the biggest such site. That is what gave us such difficulty when we were considering the evidence.

Maureen Macmillan (Highlands and Islands) (Lab): The huts are unique and cannot be compared to caravans any more than they can be compared to crofts. They are not people's principal place of residence. Something unique and specific is needed to deal with this situation, in the same way as something unique and specific was needed for crofts.

Phil Gallie: Anyone who sees the caravans on a holiday static caravan site is sometimes left wondering whether they are caravans. A great deal of money is often invested in building the caravan into the site. From my time as a councillor, I remember occasions when it seemed that the owner of a site was trying, after a minor tiff, to move on from the site someone who had bought a caravan and built it into the site with the owner's blessing. The holiday static caravan regulations might be useful to people such as the Carbeth hutters.

The Convener: That would involve reopening the issue and taking further evidence. I am not saying that that is impossible, but those are the implications of what Phil Gallie is suggesting.

Phil Gallie: Perhaps the clerk could investigate the issue and build a comment into the report, if he finds something useful.

The Convener: The clerk is indicating that that is possible.

Christine Grahame (South of Scotland) (SNP): I see the connections with holiday static caravans and crofts, but the historic background to and social evolution of the huts makes it clear that they are something separate. I would like them to have their own niche in legislation, just as we have specific legislation dealing with crofting and other kinds of tenancy or ownership. The huts are a historical phenomenon. I do not think that any new huts or hutters estates are evolving, although there are some in England.

Phil Gallie: Planning law prevents that.

Christine Grahame: We are talking about residences that, like crofts, have a specific historical evolution and require a particular legislative framework.

The Convener: Basically, you are suggesting a Carbeth hutters (legal protection) (Scotland) act.

Christine Grahame: I am suggesting legislation for hutters in general, as the Carbeth hutters are not the only ones.

Pauline McNeill (Glasgow Kelvin) (Lab): We do not want to get into taking further evidence. The background to this case is important. The point is that land was trusted to working people; in that sense, the huts cannot be compared to holiday homes. The intention was to make provision for holiday homes, but the land was set aside for people who could not otherwise afford to go on holiday. The Carbeth estate is a beautiful piece of scenic land, so there is a link with the land issue. If the huts did not exist, people who live in the city would not be able to enjoy that land.

It is a pity that the trust that was intended to protect the Carbeth hutters has not done so. I sympathise with the hutters and would like to find a way of protecting them. The evidence indicates that, rightly or wrongly, there is now a commercial development on the estate. The huts that we are talking about do not have running water or electricity and are very small and basic. There are new huts on the estate that seem to be developing along more commercial lines, which is a matter for the landowner.

This case boils down to two issues. The first is that the rent can be set arbitrarily, so that although the hutters have entered into the lease voluntarily, the landlords can do what they like. Secondly, the 40-day period for eviction seems unbalanced. Those are the things that we must try to legislate for, if we can. The answer probably lies in some kind of arbitration and rent controls. One way or another, I would like us to proceed with protective legislation. I take on board the fact that in its evidence the Executive indicated that that would be difficult, but it did not say that it was impossible.

The Convener: That is right. Are there any further comments? We need to make progress on this item. We cannot leave it in limbo.

Maureen Macmillan: This is a classic case of what the land reform bill is supposed to address in the Highlands—people who live on the land being at the mercy of a landlord. If the landlord is good, everything is fine, but if the landlord is replaced by a Marumba or a Schellenberg, everything falls apart. The same sort of thing has been happening in the case of the hutters. However, the situation is not the same because people do not live permanently in their huts. We need to come up with a new piece of legislation to deal with that.

The Convener: We are agreed that we would like the Executive to consider specific legislation that would provide protection for hutters and avoid their being put in the position in which the Carbeth hutters appear at the moment to find themselves. However, we recognise that there are some real difficulties in achieving that and invite the Executive to respond by indicating how it might go about setting up the kind of regulatory body that it claims is the only thing that can work in this area.

We need to move the issue on. We agree that the hutters need some kind of protection, although we accept that they are an anomaly and that none of the obvious existing protections can be applied to them easily. There may be an analogy with

crofting, because although historically crofts were principal residences, arguably that is no longer the case. Phil Gallie has also suggested a comparison with caravans, which are not always as mobile as the word caravan suggests. Although we have not taken evidence in that area, the clerk might like to investigate it. Do we agree that there ought to be some protection?

Pauline McNeill: I agree that we want the Executive to proceed with this, despite all the difficulties. We should ask it to consider three issues. The first is the annual lease and the principle of tacit relocation. The second is rent controls. The Executive says that there is no specialist information available in Scotland that would enable it to compare the hutters' rents with those of others, but there must be other mechanisms for deciding whether a rent is reasonable. The third issue is the 40-day notice of eviction. Those are the three areas in which we will have to legislate, if we are going to legislate at all. Without that, there is no security of tenure.

The Convener: That is helpful. Phil, you are looking slightly puzzled.

Phil Gallie: I am just slightly puzzled, because I do not like the idea of setting up separate bits of legislation to deal with a whole range of specific issues. I can think of one example that could be compared to this. Back in my old Galloway Hydros days, we had a number of lochs for which people had fishing rights that dated back very many years. Those people had invested money, put in boathouses and used the facilities there, but we could probably have terminated any rights that they had to fish at the drop of a hat. That is just one example; but I am a bit concerned that there is a whole range of other examples out there that I have not thought about. I am wondering about the difference between those people and the Carbeth hutters.

If any changes could be built into existing legislation—and I come back to the static caravan legislation—I would be quite happy. I hear Pauline McNeill's comments, and I understand what she says, but I feel that what she wants could be incorporated in existing laws rather than a new law having to be drawn up to deal with just one case.

11:00

Christine Grahame: There is the possibility of incorporating it in the land reform bill.

The Convener: Yes, that is what I have said: the Abolition of Feudal Tenure etc (Scotland) Bill and the land reform bill offer the opportunity of incorporating this issue in legislation that is already going through.

Christine Grahame: But in my view, it belongs more with static caravan legislation.

The Convener: I appreciate what Phil is saying.

Christine Grahame: So do I.

The Convener: But ultimately, Phil, I think that you will just have to accept that sometimes we will come up against complete anomalies. Whether we like it or not, this may be one of them.

Phil Gallie: I do accept that, convener, but I am worried about how many anomalies lie along the way.

The Convener: Yes, but fishing rights are a different matter.

Phil Gallie: But there are boathouses.

Christine Grahame: Oh, do not start on boathouses, please.

The Convener: All right. I think that we have covered enough for the clerk to get on with. Clearly, we will come back to this issue. If we are thinking of recommending that this be incorporated in one of the bigger pieces of legislation, we will have to watch the timing carefully.

Freedom of Information

The Convener: The next agenda item is the consideration of the consultation on freedom of information. One witness cannot come before 11.45, so we will hear from the witnesses from the Executive first. I see that they are all here in their usual vast numbers. An official from the Crown Office is also here, who will deal directly with the questions that we expect to arise on the way that freedom of information relates to the Crown Office and to the Lord Advocate.

I am reluctant to mention this, because I know what the committee members are like, but, if we run out of questions before 11.45, tea and coffee will be available. I do not want that to be a green light for everybody not to ask any questions because they are desperate to get a coffee. If we do adjourn for coffee, witnesses are welcome to come and join us. Executive witnesses may wish to stay on to hear what David Goldberg has to say. Depending on how long that takes, it might be useful for them to come back afterwards, even for five minutes, to respond.

A note from the clerk has been circulated with the other papers. The consultation that was announced by the Minister for Justice is due to be completed by 15 March. The committee wants to have a brief look at the consultation document and some of the issues around it. A number of questions will obviously arise out of some of the proposals that have already been made. We will not necessarily produce a detailed formal report, but we will probably write a letter from the committee, so that we have an input to the consultation. Following the consultation, there will be a draft bill, but we have nothing of that sort to consider at present.

I would like to ask for a brief statement from the Executive team that is steering this. For my own interest, I would ask the team members to include in that statement, if you have not already done so, an indication of how the proposals differ from the bill that is proposed at Westminster. We are all aware that the proposals here are apparently better, and that we will have a stronger freedom of information bill in Scotland. However, I expect that a number of people are not entirely clear as to what the differences are.

Michael Lugton (Scottish Executive Constitutional Policy and Parliamentary Liaison Division): Convener, and members of the committee, we are grateful for your invitation to give evidence to the committee on the Executive's proposals on freedom of information. As you mentioned, in his statement to Parliament on 25 November, Mr Wallace, the Deputy First Minister, indicated that he expected that the committee would want to take a close interest in this complex area of public policy. We expect that this will be the first of a series of discussions between the Parliament and the Executive as we move towards a statutory regime.

Let me introduce the Executive team. I am Michael Lugton, and I am head of constitutional policy and parliamentary liaison in the Executive secretariat.

On my right is Keith Connal, who is the head of the freedom of information unit within my command. He has been working, and will continue to work, full time on the development of the Executive's policy in this area. His unit also has the responsibility for the existing non-statutory code of practice on access to Scottish Executive information and for the policy on data protection.

On my left is Stuart Foubister, who is the divisional solicitor in the office of the solicitor to the Scottish Executive. He will be leading on the legislation within the solicitor's office. Next to him is Alistair Brown, who is the senior depute in the policy group of the Crown Office. He is prepared to answer your questions on the Crown Office and prosecution.

If it would be helpful, I would be happy to say a little to set our appearance before you in context. As I have said, we announced on 25 November, through the Deputy First Minister, the publication of the consultation document "An Open Scotland", and, as the convener said, the consultation period extends to 15 March. We have distributed just over 1,300 copies of the consultation document; but, not surprisingly, we have received only six responses so far.

We have tried to take a proactive approach to consultation. We have arranged to meet, or have met, eight organisations with a close interest in the subject, including the Campaign for Freedom of Information and its Scottish counterpart, of which David Goldberg is a leading member. Arrangements are also in hand to discuss with the clerk and the chief executive of the Parliament later this month the issue of whether—and, if so, how—the Parliament and the Scottish Parliamentary Corporate Body might come under the scope of the legislation.

The proposals set out in "An Open Scotland" can be characterised in three ways. They are intended to be distinctive, in the sense that they should fit Scottish needs and circumstances and not be merely derivative of other schemes. They are intended to be open, in the sense that they should give due weight to the public's right of access to official information, which will be enshrined in the legislation. They are intended to be effective, in the sense that they should allow easy access to information while ensuring that the

business of government can be carried out effectively.

To achieve those objectives, the key components of the scheme, which are set out in the document, include several provisions. First, there should be a statutory right of access to information. Secondly, the power to refuse disclosure should be exercisable only where substantial prejudice would arise, or would be likely to arise, from the release of information. There should also be a requirement to consider the public interest in disclosure.

Thirdly, we believe that there should be wide and strong powers for an independent Scottish information commissioner to promote and enforce the regime, including the power to order—rather than merely to recommend—release of information in the public interest. Fourthly, the statutory regime should embrace not only central Government, but the wider public sector. The document proposes that it should include local government, the national health service, the police and the education service. Finally, a simple system should be available to members of the public to apply for information, with costs not being met in full by the applicant.

The consultation document also draws attention to the Executive's commitment to fostering a culture of greater openness in the Scottish public sector, for which it has responsibility, in parallel with the development of the legislation.

The scheme in the consultation document is intended to be distinctive, open and effective, but ministers recognise that those objectives might be achievable in other ways. They have indicated that they will consider carefully how the scheme might be modified in the light of views received, including those of the committee. Thereafter, their intention is to introduce a draft bill for further consultation before the introduction of the bill itself.

I hope that that is helpful as a general introduction. You asked, convener, about the differences between our proposals and those in the south. There are three key differences. The first is in the test for retaining information. In our case, we have identified the test of substantial prejudice, whereas in the UK legislation the test is only prejudice. Our scheme is stronger in that respect.

The second difference is that our scheme proposes that the commissioner should have power to order the release of information, whereas in the south the intention is that the commissioner should have power only to recommend release of information. The third difference is that a duty will be placed on the Executive to release factual and background information leading up to policy decisions, whereas in the south the intention is simply that there should be discretion to release factual and background information.

Those are the three key differences at the moment. As members will be aware, however, the UK bill is still passing through Parliament and we have yet to finalise our proposals in the light of the responses to consultation.

We will be happy to respond to any questions that the committee may have. Where we cannot give an answer, we will certainly let you have a response in writing as soon as possible after this meeting.

The Convener: You said that it was planned that the proposals should be distinctive and not derivative. You will undoubtedly have looked at other systems of freedom of information. We are all aware of the American system of freedom of information, which is extensive. Do you think that what is proposed here will end the situation whereby it is easier to find out about decisions made in Britain by going through the American system than it is to find out the same information in the United Kingdom? You will know how wide open the American system is. You will also know of examples of information having been released from American sources about practices in Britain. Will that stop?

Michael Lugton: I shall ask Keith Connal to say a little bit about that. In saying that our intention was that the scheme should be distinctive and not derivative, we meant that, in developing our proposals, we had looked at other schemes and had drawn on what we thought were good ideas. For example, we have modelled our proposals for the exercise of ministerial discretion on the arrangements in Australia, New Zealand, Canada and Ireland, where there is a power for ministers to exercise discretion and effectively to override the commissioner's views in a limited range of cases. It is not our intention that the scheme that we have devised should provide a back door, as it were, for information about the United Kingdom Government. Perhaps Keith Connal would like to elaborate on that.

The Convener: I do not want us to get hung up on the UK Government because, until now, we have not had a Scottish Parliament with which to deal. The kind of examples that I am talking about are widely known. We are now beginning to introduce a system that will give us our own sources for finding out information, so that we do not have to resort to American sources.

Keith Connal (Scottish Executive Freedom of Information Unit): If the Scottish proposals were truly open and effective, it is expected that the necessity of running to America to bypass the regime here would be lessened. I do not know whether that will be universal. The American

system is very different; there is no commissioner, for instance, and legal recourse to the courts happens only in the event of an unsuccessful application. We expect that the new regime here, as provided for in the legislative framework, should be sufficient to provide people who seek it the required information from Scottish public authorities.

11:15

Michael Matheson (Central Scotland) (SNP): The American system of freedom of information has been mentioned, and I am sure that we can learn a considerable amount from countries that already have freedom of information legislation or regimes. To draw another international comparison, I was interested to read a paper by the Canadian commissioner, who said that the biggest problem in implementing the regime was the culture surrounding access to information, particularly in the public sector. Cases were often brought to him because access to information had been refused despite the legislation entitling the applicant to that access; there had not been a change of culture in the public sector.

I note from the consultation document that a working group of senior officials from the Executive and from across the public sector will be considering the issue of culture. However, Canada has had a freedom of information regime for some 10 to 15 years, but it is still having problems breaking down the culture in the public sector, which concerns me.

How do you see the working group proceeding and what will the time scale be? Will the recommendations from the working group be published six months before the legislation comes into force, or several years before it comes into force? I am concerned that the working group's recommendations may be published such a short time before the legislation comes into force that the commissioner could be bogged down for several years dealing with cases that he should not really have to deal with because the legislation already allowed for the provision of information.

Keith Connal: The Canadian commissioner's 1998 report gave a depressing view of the success of the regime in Canada over the past 16 years. It spoke about the lack of advance in breaking down organisational culture in the Canadian public service. We recognise that changing to a culture of openness will not be easy. It will be a long-term programme, but our consultation document sets out our view that that is an essential component of the legislation. We have not finalised the membership of the working group, but the idea is that we will set it up in parallel with our preparation of the legislation.

We will draw on the recent report of the Home Office advisory group on openness in the public sector, which met during 1999 and spent about 10 months considering this question. We will also draw on the Irish experience. The Irish are about two years ahead of us; they are creating a culture of openness in what was a fairly secret civil service environment and they are bringing in freedom of information.

The introduction of the legislation will begin to create a culture of openness; as people know that freedom of information is going to be put on to the statute book, we will be working on organisational and mindset change to alter the culture.

Phil Gallie: I am glad that somebody from the Crown Office has come along, Dr Brown. From Jim Wallace's comments, it seemed that the Crown Office was going to be absolved from freedom of information. That is the greatest area of concern for the public, who want to know why some prosecutions are dropped, why certain judgments are reached in court and why judges pass sentences that are out of line with the perceived seriousness of crimes. Is there any evidence of a relaxation on freedom of information in relation to that? Will freedom of information present a better view of our justice system to the public?

Dr Alastair Brown (Crown Office) I will exclude two of the matters to which Mr Gallie referred—judgments reached by judges in court and sentences that the public might perceive as out of touch with what the crime deserved—because the Crown Office does not have real input on them. The fiscal, or advocate depute, will have made his or her argument at an earlier stage. The reasons for judgments and sentences are a matter for the courts; they are not matters over which the Lord Advocate has any control.

Mr Gallie asked about the giving of reasons for dropping cases. I would want to widen that, because we do not simply drop cases—we take up more cases than we drop, so we must consider the whole issue of the giving of reasons. At present, we are at consultation stage on freedom of information. Members will have seen that law enforcement in general is addressed in the consultation paper "An Open Scotland". Paragraph 2.5 points out that there is a UK exclusion in relation to a large part of the law enforcement process. Paragraph 4.15 sets out the fundamental principles and difficulties with which we have to grapple every time we consider the question of the giving of reasons.

The bottom line is that, in any case with which we deal, there will be multiple interests. There is the obvious interest of the victim, the obvious interest of the accused and the broader public interest in the effective prosecution of crime. There

may be competition between those interests. There may also be competition between the interests of victims. It is difficult to produce an approach that discriminates between those various interests that is not focused very particularly on an individual case. As members will know, the general principle is that the Crown does not give reasons for specific decisions, although we have, on a considerable number of occasions, stated the kinds of reasons that informed decisions.

We are watching the consultation process closely and will be interested to see the responses, particularly any constructive suggestions about reconciling the need to protect several interests with the desirability of openness. We will consider the position once we see the results of the consultation. It is difficult to see a way forward other than what we are doing at the moment.

I do not know whether that answers Phil Gallie's question. I suspect that it does not, except that it explains the difficulties that we face in meeting public concern, and the public's need to know why we take decisions, without compromising interests in individual cases.

Phil Gallie: That answers the point in so far as it explains that this matter will be excluded—the public will not be made to feel comfortable about many of the decisions. Every effort must be made to ensure greater openness, because the justice system belongs to everyone. At times, perhaps, the interests of victims take second place to the interests of those on charge. I hope that that will be considered.

I recognise that judges are not the responsibility of the Crown Office, as they are independent from politicians—the European Court of Human Rights would certainly want to enforce that. I believe that there would be some advantage in a bit more openness about the way in which decisions are reached. I would like to ask Mr Lugton whether there is any way in which we could consider that, given that the Crown Office cannot.

Dr Brown: Before Mr Lugton answers, I will comment on Mr Gallie's remark that the interests of victims sometimes seem to take second place to the interests of those in charge, by which I take it Mr Gallie means ministers and officials in the Procurator Fiscal Service. I have never seen any case in which the interests of victims, or anyone else, have been put second to those of the people operating the system.

Phil Gallie: You picked me up wrongly, or I expressed myself wrongly. I am suggesting the interests of those who are charged with the crime, not those who operate the system.

Dr Brown: In that case, my comment was unnecessary and I apologise.

Michael Lugton: I am not sure that I can provide a great deal of comfort to Mr Gallie. As I said in my introductory remarks, the intention was that the scheme would cover a wider range of public sector authorities than the present non-statutory code does. It is intended that the police and the Crown Office will be covered, but the legislation will not have any effect on questions about judicial decisions. I am not sure if that is what Mr Gallie was asking about, but concern about lack of transparency in the judicial process is not a matter on which this legislation will have any impact.

Phil Gallie: That was my fear.

Has any estimate been put on the overall cost of information gathering in relation to the bill?

Michael Lugton: There are broad ballpark figures in the consultation document, but much depends on how the scheme pans out and how much take-up there is—how many people seek to obtain information from the Executive and other public authorities that the bill will cover. In the consultation document, we say that—based on 10 per cent of the UK Government's estimates—the cost to Scottish public funds arising from Scottish freedom of information legislation would be in the region of £9 million to £12.5 million.

The Convener: I will ask Dr Brown to consider this point, which has been made time and again: the matter that causes the greatest concern is the failure to disclose reasons why a case has been marked no proceedings. The most that I have ever seen by way of explanation is "insufficient evidence". When people come to MSPs surgeries, they say that they are bewildered by the fact that, even when there are four or five witnesses saying x, they are told that there is insufficient evidence. They do not understand why that should be. I do not expect an answer at this stage, but it is an issue that will come back. The Crown Office must take it on board.

Dr Brown: I take that point on board. My job is to examine the letters of complaint that we receive, so I am fully aware of the issue. In a limited range of cases, we are able to give a little more information than that. We are aware of the difficulties. We publish the categories for no-proceedings cases, but I recognise that that does not tell the individual why a case was marked no proceedings. However, your comment has been noted.

11:30

Mrs Lyndsay McIntosh (Central Scotland) (Con): I want to pursue that point. We come into contact with people who want to see justice; all we

can offer them is the law. Sometimes the two do not marry up. What the convener says is true: MSPs have to see people who have difficulties. They do not seek revenge; they seek justice. There is quite a disparity.

Unfortunately Phil Gallie has asked at least two of the questions that I had wanted to ask. Can you tell me, therefore, what requests for information you have received? What will be in the public domain that was not previously? What has been the experience in Ireland, which is two years ahead of us?

Keith Connal: I can give some figures for the code of practice, which was introduced last July. I should perhaps explain that, on 1 July, the minister introduced the Scottish code of practice, which rolled forward the equivalent UK code of practice on access to Government information. That code had been in place in major UK Government departments and agencies since 1994.

From 1 July to 31 December 1999, we received only 28 formal requests for information. At the moment, because we rolled forward the UK code, we are using the UK definition of what constitutes a formal request. A formal request is where someone cites the code in a request, if a request is refused or if charges are levied.

That figure of 28 formal requests is set against approximately 200,000 items of correspondence, which the Executive and its related bodies receive in any given year. Many requests for information are dealt with routinely. All requests are handled under the code, but in our experience it is rare for people to cite the code formally.

Mrs McIntosh: Is that due to lack of experience of the appropriate citation to make?

Keith Connal: It may be, but that does not affect the handling of the request. People do not lose out by not referring to the code. The response time is the same regardless of whether the code is cited. In any case, the general level of formal requests is low. Does that begin to answer the question?

Mrs McIntosh: It leads me to wonder how many people outwith specific interest groups are interested in getting more information. Do the majority of people think that there is an information overload?

Keith Connal: I am not sure that I can answer whether people feel that there is an information overload.

Mrs McIntosh: Trust me, I do.

Keith Connal: I am sure that within the Executive we do. Our experience of operating the code is that the majority of people ask for innocuous, easily available information—leaflets, reports on school statistics and so on—which are available off the shelf.

Campaign groups or individuals with a particular interest in a subject tend to be the ones who are more aware of the code, who put in repeat requests for information and who will challenge a refusal by putting in a slightly different request. At the moment however, those are relatively rare events.

In our experience, take-up of statutory regimes tends to be relatively slow. We do not expect a flood of applications for information the day after an act is passed. That is perhaps to do with awareness of legislation. We may learn from the responses to the consultation whether people are genuinely disfranchised in terms of information or whether they feel that they are not particularly affected at the moment. Does that answer the question?

Mrs McIntosh: Yes. I was also curious about Ireland's experience and about whether there had been a flood of requests once legislation required that information be made available.

Keith Connal: The Irish experience is slightly different from what we will have here. The legislation introduced freedom of information measures and the equivalent of UK data protection legislation at the same time. The initial flood of requests was from staff in Government departments who wanted access to their personnel records. Hitherto, they had not had the same access to records as we have. It was an interesting outcome. They had a deluge of people asking for access to their career folders.

The Convener: Therefore, the situation is not strictly comparable.

Keith Connal: It is not comparable to the situation that we will be in.

Maureen Macmillan: You partly answered the question of how you will deal with the culture of secrecy when you spoke to Michael Matheson. I wondered who would define substantial prejudice as a test for retention of information, as the definition appears fairly subjective. Will it be the commissioner or will there be a series of test cases about whether something will cause substantial prejudice or not?

Paragraph 1.8 talks about cross-border public bodies. Why will they be subject to UK freedom of information legislation? Is it not possible to deal with the Scottish side of it under our own freedom of information legislation? How many cross-border public bodies are there? Finally, what does the Forestry Commission have to hide?

The Convener: That is a serious question.

Michael Lugton: I will deal first with Ms Macmillan's question about substantial prejudice. We agree that that is not easy to define objectively. The consultation document talks about prejudice that is

"real, actual and of significant substance."

It took a long time to put together that wording. We intend to examine the definition of substantial prejudice even more critically when we draft the bill, which will, essentially, be a matter for our legal colleagues.

Ministers are absolutely clear that the test will be stronger than it would have been if we had merely used the word prejudice. Getting there, however, will take a bit of time and deftness. We are not there yet, but the policy's intention is that substantial prejudice should mean substantial prejudice.

You asked about cross-border public bodies. The cleanest and simplest way to draw the boundary between our scheme and the United Kingdom scheme was to ensure that every public body need apply only one statutory regime, otherwise it might not be clear under which scheme particular cases should operate. Against that background, it seemed that we would not succeed in persuading the UK Government that cross-border public bodies should be subject to the Scottish regime when, by definition, such bodies have responsibilities in other parts of the United Kingdom. I dare say that it might be possible to review that decision, but it is not clear to us what significant benefit there would be in that.

Maureen Macmillan asked whether the Forestry Commission has something to hide. That question implies that the United Kingdom regime would be a good deal more restrictive than ours would. We intend our regime to be open, but the United Kingdom bill has not yet been passed. Once it is, and once it comes into operation, it might be that it does not operate significantly differently, in practice, from the Scottish legislation.

The Convener: We are holding our breath.

Maureen Macmillan: My question about the Forestry Commission was not entirely serious. I would like to know, however, approximately how many cross-border bodies there are.

Keith Connal: I do not have the figure to hand, but I can comment on the cross-border bodies in relation to the competence of the Scottish Parliament, under the definition of Scottish public authority in the Scotland Act 1998, which specifically excludes cross-border public authorities, so it is outwith Parliament's competence to include them in Scottish freedom of information legislation. We can provide members with information on the number of bodies.

Maureen Macmillan: The convener has just indicated to me where I can find the information.

The Convener: I have suggested that Maureen might start by looking at the Scotland Act 1998.

Keith Connal: An order was made under the act, setting out the bodies.

Christine Grahame: I come to this sceptically, as someone who asks lots of questions of the Executive, but who has great difficulty getting information from it. You have stated how much more vigorous it is intended that the Scottish act should be. My main concern about the proposed legislation, whether under a devolved Scottish freedom of information act or under a UK regime, is about who holds the information. That will be the key to the problems that Parliament and the Scottish public will have in operating under the proposals.

We will want a lot of information that we simply cannot get using the more vigorous, open and democratic legislation that is proposed. It will come under the English regime, which is discretionary, which has all sorts of built-in conditions and which can only recommend, not order.

I have had difficulty with a number of issues. For example, I might ask a question about complaints about low-flying aircraft in the south of Scotland. That is an environmental issue relating to sound pollution. I would not be interested in the defence side—my complaint would have nothing to do with knowing about defence and weapons, but would have to do with environmental issues.

Whether that issue is reserved or devolved would make no difference under the proposed legislation, because the relevant information would be held by the Ministry of Defence and I would not be entitled to have it. Therefore, I could not pursue the matter—that is my big problem with the proposed legislation.

I appreciate that there are matters relating to jurisdiction and to the information that is held, but I think that a really indep—I almost said the word independent. A really democratic Scotland would have access to information on devolved matters wherever that information was held, and would have reciprocal agreements about that with the rest of the UK.

I would like to hear witnesses' comments on that.

Michael Lugton: We fully understand what you are saying, Ms Grahame. While we are not here to defend the UK scheme, it is fair to say that the UK Government's intention is to open up government in the south. A statutory regime will give people

more means of getting information. They will not depend on a non-statutory code.

If people do not get the information that they want, they will still have access to the commissioner, who will be able to recommend that the information be released. I imagine that there would be some moral or other pressure on the authority concerned if it chose not to accept the recommendation of the commissioner.

It might be that none of that is as satisfactory as the scheme that we have in mind, but it seems that the UK Government is trying to move in the right direction, and that the scheme that it has in mind might make it easier to get information.

Euan Robson (Roxburgh and Berwickshire) (LD): Is it proposed in the legislation to define the public interest test for exemptions? Do you have a preliminary description of what that test might be?

I am not clear about why the question of harm or substantial prejudice is applied to content-based, but not to class-based, exemptions. I can envisage a situation in which it might be sensible to apply it to class-based exemptions.

11:45

Keith Connal: Our understanding is that the public interest is defined nowhere in legislation. It is not defined in the UK bill, and we are not aware that it is defined in any other legislation that refers to requirements to consider the public interest in making a decision or disclosure. That is partly because no single factor can define the public interest.

Consideration of the public interest is made case by case. We intend to provide Scottish public bodies with some guidance on the factors or criteria by which an assessment of public interest should be made when disclosing information. We do not necessarily see that as easy to do, but we think that it is necessary to attempt to give some guidance. That is an area of further work.

Euan Robson: When you say "we", do you mean the Executive?

Keith Connal: Yes. The Executive will attempt to assist public authorities in providing some guidance on how to define public interest.

Euan Robson: But should not it be about what Parliament feels the public interest might be?

Keith Connal: I would not like to suggest that the Parliament should not define what the public interest is. Our experience from the UK setting is that Westminster has nowhere defined public interest in terms such as "the public interest shall be the following." Factors are referred to that one might consider in assessing the public interest. It is nowhere defined in a single statement.

Euan Robson: If no one has defined it in UK legislation, how are you able to give guidance?

Keith Connal: We thought it inappropriate to leave public authorities hanging. By that I mean telling them that they are obliged to consider the public interest in disclosure—which we see as a strength in the proposals—and that it is up to them how they do that. That would provide no guidance whatsoever.

One avenue that we are exploring in the light of the white paper, "Your Right to Know"—hailed as very positive when it was published in 1997—is whether in consideration of the public interest we should consider the purpose of the legislation.

It was argued strongly that there should be a section on the purpose of the legislation, against which one would determine whether the disclosure decision was consistent. That would be one way of determining whether the final decision on the public interest met the purpose of the legislation.

Euan Robson: That is an issue that we will have to return to—it is interesting to explore that.

Keith Connal: It is not straightforward. We have said that it is an important question that we will consider further.

Michael Lugton: As Keith Connal said, if we have a section in the bill on the purpose of the legislation, that should provide a statutory basis for debate on what constitutes public interest in particular cases.

If we have statutory provision of that kind, the commissioner will, presumably, develop a body of case law based on it, which will help to inform subsequent decisions about whether information should be released in the public interest. Also, if a section on the purpose of the legislation is included, one might legitimately ask—in response to each request for information—whether the decision to release or withhold information is in line with the overall purpose of the act.

One might also ask whether the decision is consistent with other relevant legislation. There are ways of getting a clearer idea of how the public interest should be interpreted for the purposes of freedom of information, but those ways are not straightforward.

Euan Robson: What about the harm test and class-based exemptions?

Keith Connal: In paragraph 4.9 of "An Open Scotland" we try to explain the difference between class-based and content-based exemptions. When information is given a class-based exemption it is assumed that the substantial harm test has already been met—the information was placed in that category because of its sensitivity.

For both class-based and content-based exemptions there is a requirement to consider the public interest. We see that as one of the stronger aspects of the proposals. We do not suggest that for information in those classes there is no need to consider the public interest. That would, in effect, exclude the information and that is not what we want.

Euan Robson: Can you remind me who decides that the harm test has been applied effectively to the class-based exemption?

Keith Connal: In the first instance the public authority must satisfy itself that information falls into class-based exemption or, if it falls into content-based exemption, that the harm test is satisfied. The authority would then have to consider the public interest, which is a second test. If an applicant remained dissatisfied with a refusal, they could appeal to the information commissioner, who would have the power to order disclosure of the information in the public interest.

Euan Robson: Would there be guidance for public authorities on class-based exemptions and, if so, who would provide it?

Keith Connal: There will be explanatory notes with the bill, and, as there is with the current code of practice, there will be guidance on the application of the exemptions and the tests and on all aspects of the legislation.

Euan Robson: Convener, we will have to return to this issue.

The Convener: We will not have vast amounts of time to do that, but we will return to the issue of freedom of information throughout the progress of the bill.

Michael, yours will be the last question.

Michael Matheson: It is a brief question that has been answered partly in the responses to Euan's questions. You mentioned having a section on the purpose of the legislation. Do you believe that the guidance on public interest that will be issued should be given legal status?

Michael Lugton: That is a policy question. The consultation document discusses whether there should be a section on the purpose of the legislation.

Michael Matheson: I ask that question because I am conscious that you could be drafting the policy.

Michael Lugton: No. We will be advising ministers, and they will take decisions on policy issues, including that. I am sorry if that sounds bureaucratic, but on this issue ministers will make the decision.

The Convener: Thank you. That concludes the committee's questions. I will call a brief adjournment. I want members to be back at noon, so that we can have a full 30 minutes with Mr Goldberg.

11:54

Meeting adjourned.

12:02

On resuming—

The Convener: I thank Mr Goldberg for agreeing to come through to Edinburgh today. He was not able to listen to all of the Executive evidence, which no doubt he would have found helpful, but he was nevertheless here for the last 10 minutes or so, so he may have some comments to make about it. Mr Goldberg will make a brief opening statement, then members can ask him questions.

David Goldberg (Campaign for Freedom of Information Scotland): The Campaign for Freedom of Information Scotland regards it as a privilege to be invited to appear before the Justice and Home Affairs Committee, and appreciates the invitation.

Recently, in the diary in *The Herald*, Tom Shields asked one of the great philosophical questions of all time: why does CFIS just have a post office box number? The simple answer is that we do not have enough money to have an office. However, the more serious answer is that our body is not independent of the national Campaign for Freedom of Information. So CFIS really means the Campaign for Freedom of Information in Scotland.

Some of you may know my colleagues: Dr Derek Manson-Smith from his work for the Scottish Consumer Council, and Carole Ewart, who is the former director of what was the Scottish Council for Civil Liberties. We three attempt to organise CFOI activities in Scotland. That is why I have been invited to appear today. On an upbeat and positive note, the campaign welcomes the Scottish Executive's initiative and the broad thrust of the consultation document, which includes good coverage of the themes and issues.

I would like to move on to a consideration that has occupied me recently in the light of publicity surrounding children's panel hearings, independence and temporary sheriffs and evidence in road traffic crimes: compatibility as mentioned in paragraph 2.21 of "An Open Scotland".

Compatibility has not been commented on much. It is worth examining that paragraph, which says that the minister must certify that the provisions of any act are not

"incompatible with the European Convention on Human Rights."

First, one might argue that there is a gap in the provisions of the ECHR because although article 10 attempts to promote and protect freedom of opinion and expression of ideas and talks about giving and receiving information, there is no mention of seeking information.

The Council of Europe is not entirely silent on that matter. A recommendation was made to ministers in 1981—R(19)81—on access to information held by public authorities. Some years ago, I asked for information on the UK representative's position on that. Members will not be surprised to hear that I received a response that ran: "Sorry, the minutes are confidential and we cannot reveal to you the position of the UK Government or its representative on the Committee of Ministers."

I should mention—more pertinently, perhaps—that an expert group on access to official information has been meeting for more than a year. It is chaired by an interesting Swedish person called Helena Jäderblom, who attended a conference that we held in Glasgow in November. She thinks that the UK situation is unique in Europe in terms of the interaction between a UK freedom of information bill and the Scottish bill. It is likely that by the end of the year that group will propose either a soft instrument—an updated recommendation—to the Council of Ministers, or a treaty.

Compatibility might have been an odd subject with which to start my comments, but it is important in the light of recent developments to assess how it will fit into the general European context. We must be aware of developments in the Council of Europe and of any potential treaty that might establish legally binding provisions for states that sign up to and ratify it. Such a treaty might be open for signature by the end of the year.

A side issue is whether any members of the Scottish Executive sit on the access to information group or receive information about its deliberations. A UK representative from the Home Office's freedom of information unit attends those meetings, but I do not know what the lines of communication are between the group and the UK Government.

Where does a freedom of information act in Scotland fit into a freedom of information regime? It is proposed that there should be an act of the Scottish Parliament under which people will have enforceable legal rights of access to certain information. That would be a tremendous leap forward from the campaign's point of view.

Convener, I am happy to be stopped at any point and for members to jump in with questions. I may be succumbing to the tendency of all university lecturers, which is to start to lecture.

The Convener: It had occurred to me that you were going into lecture mode.

David Goldberg: In that case, should I stop there? I am happy to do so.

The Convener: Are there specific matters that you think we should address?

David Goldberg: Yes.

The Convener: You raised the European dimension—

David Goldberg: I will move on from that; I set that as the general context.

Where will the freedom of information act fit in? If it is just to be one act of Parliament inter pares, how will it relate to any other statute that prohibits the disclosure of information? Will it have any priority? Will it set out any principles that will set a constitutional position in Scotland to which all other legislation must relate? You have to bear those questions in mind.

Those questions are linked to that of the purpose clause, discussion of which I overheard as I came into the room. Just before I came to this meeting, I happened to be surfing the Home Office freedom of information unit's website and found the Government's response to the report from the House of Lords select committee on the draft freedom of information bill. The report is admirable and I commend it to members of this committee. The Government's response to the notion that there ought to be a purpose clause is that it agrees with the principle that

"the Long Title should be amended by leaving out the words 'make provision about the disclosure of information' and substituting 'facilitate the disclosure of information'. This would clarify the draft Bill's purpose of providing a framework for transforming the 'culture of secrecy' in British government".

That is from paragraph 82 of the Government's response.

The campaign is in favour of a purpose clause. I think that such a clause would be useful in setting out the interaction of the freedom of information act with the way in which all other statutes ought to be interpreted. It is important to establish a benchmark that the freedom of information act will not be just a statute inter pares with all other statutes.

Unlike South Africa, for example, where the Parliament has recently enacted its freedom of information bill, we do not have a written constitution. The South African act implemented the South African constitution. If you do not have a constitution in that sense, how do you make what is arguably a constitutional change that has a structural significance that is not confined merely to that of an ordinary act of Parliament? Something has to link the freedom of information act to other statutes or other laws.

The Convener: I will kick off with the question that I asked the Executive at the beginning, which concerns the impression that one gets from the consultation document. Are the proposals likely to obviate the necessity to go through the American freedom of information procedures to find out information about governmental practices in the UK? Would the proposals cure that requirement?

David Goldberg: The answer is yes and no.

The Convener: Of course it is—you are a lawyer.

David Goldberg: No—I am only an academic lawyer; that is why you get a long-winded, rather than a brief, yes and no.

In truth, it is like bringing rights back home—it is the same philosophy as the human rights act, but that act does not prevent any ultimate appeal to Strasbourg. Some of the exemptions, ministerial vetoes and certificates—the scope, indeed the very existence, of which we have some serious reservations about—that are proposed in the consultation document might mean that it would still be useful to find another avenue of accessing information.

The Convener: So we might still require the American door to be open to us?

David Goldberg: Yes.

The Convener: Are there other questions from individual members? Euan, do you want to investigate the same issue on which you probed the Executive team?

Euan Robson: What is your view about the public interest test and whether there ought to be some definition of it? I want to examine class-based exemptions and the fact that the authority with the information makes the initial decision about whether to release information. I do not know whether you caught the exchanges at the end of the previous evidence session, but does the campaign have any views about including a public interest test in the statute and making it specific?

12:15

David Goldberg: Yes, we would have broad sympathy with that approach, which would mean that the public interest test would be sourced not just under the code of practice, but in the guidelines, and that there would be more detailed references to it. The next question would be how to make the test more specific, instead of leaving some general phrase to the interpretation of someone else, who in the first instance would presumably be the information commissioner.

Although there are no particularly original views on what disclosure in the public interest should involve, there are four main grounds for such disclosure. First, a denial to access information might be overturned because evidence about the

perpetration of crime or fraud might be disclosed. Secondly, the information commissioner might feel that information from, for example, an internal departmental review that had the potential to cause substantial harm should be released because it might facilitate health and safety for individuals or groups of individuals. Thirdly, information should be disclosed when non-disclosure would continue a person's wrongful conviction. Finally, information should be disclosed when it would reveal the evidence or existence of misconduct or widespread and systematic corruption within any particular body to which the proposed act would refer.

I am not entirely sure about this question, convener, and I do not want to be making these comments as a matter of fact. The Data Protection Act 1998 might contain references to the four grounds that I outlined; however, I would need to check that.

The Convener: Do you have a view about the position of the Lord Advocate and the Crown Office, which will be broadly exempt from the legislation?

David Goldberg: Yesterday, the clerk sent me an e-mail about some of the issues that the committee might consider today. Although I have to be honest and say that the campaign has no particular position on the matter, I will make two points about it. First, there is a difference between decisions about disclosure and non-disclosure and decisions which proffer reasons for disclosure or non-disclosure. We should move to the presumption that reasons will be given for such decisions. I think that the Lord Advocate should at least be required to make known the criteria by which he decides when an investigation might be prejudiced.

Secondly, the issue of timing has to be addressed. All too often, issues about the disclosure of information are discussed in terms of all or nothing. However, it is important to bear in mind the fact that time might or might not have passed in relation to the event for which information is sought. That nuance is not taken into account very often. For example, in the US, people argue that, at first blush, the exemption on grounds of commercial confidentiality—that revealing information would prejudice a party who owned that information—stands up; however, because enough time might have passed, there might no longer be any serious risk of substantial prejudice to that commercial confidentiality.

Michael Matheson: My point relates primarily to one of my previous questions. A recent report from the Canadian commissioner has highlighted that one of the major problems in implementing a freedom of information regime is culture, particularly in public service bodies. The bodies continually refer cases to the commissioner when there is no need to do so; had the culture in the public sector changed, the bodies would have dealt with the cases themselves.

The consultation document refers to the establishment of a working group of senior officials from the Executive and a cross-section of Scottish public authorities to examine this issue. I am concerned about the time scale of the process and whether sufficient groundwork will be done to change the culture in public sector bodies before the legislation comes into force. Do you have any views on that concern? Do you have any ideas about what should be done to change the culture?

David Goldberg: The answer is yes to both parts of your question. Ironically, the campaign is almost more interested in the latter part of the consultation document. I do not want that statement to be misunderstood; at the end of the day, the crucial element is the effective implementation of the law. It is all very well to have hugely important debates about the difference between harm-based and content-based exemptions. Although we are moving from the status of a code that is reviewed by the parliamentary commissioner for administration to a law, the campaign is more concerned that the law should be effectively implemented. As a result, issues of culture and training, charges and the status and role of the office of the information commissioner almost become the drivers for an effective freedom of information act.

The committee will be aware of the Home Office's advisory group on openness in the public sector report, which was published in December 1999. The whole report, which is about 70 pages long, is available on the freedom of information unit's website. I cannot claim to have examined every detail of it, but it is a useful starting point because it seriously addresses attitude and the management of information storage, retrieval and distribution. There is an impressive acceptance of that principle. That said, a cursory glance at the report leads one to conclude that it promises much but that the real issue is how its proposals will be delivered.

How such a culture and training will be funded is also important. Some of my colleagues and I have had very interesting discussions with the members of the Scottish Executive who are driving this process forward. I think that the Executive is taking the issue seriously.

It might be more important to ask what the application of the culture and training will be to the other bodies to which the proposed act will refer. In a certain sense, discussions that I have had have made me confident that central Government

in Scotland is taking freedom of information seriously and sincerely. The side issue is how that approach will translate in all the other bodies.

The Convener: Are there other questions? Have we run out of issues, Phil?

Phil Gallie: I apologise, convener—I was not here at the beginning, so I will not come in now.

David Goldberg: No apology needed. I am relieved not to be asked a question by Mr Gallie. I thought he was going to ask why we need legislation at all, as Conservative policy was, "A code of practice is perfectly adequate—why the hell do we need a law?"

The Convener: It may be difficult for you to answer this point, but it is useful to talk in terms of specifics sometimes. Today, I discussed with the clerk the way in which the parliamentary committees operate. At the moment, we discuss and formulate draft reports in private, as our view is that, until a report is finalised, it does not represent the committee's views. To conduct those discussions in public would confuse the issue, as we are tossing up the pros and cons of a particular position. I am curious to know whether you think the demands of the freedom of information legislation—whenever it appears—would enforce a change in that practice.

Annexe C of "An Open Scotland" lists exemptions and refers to "Internal discussions and advice" which, I suppose, includes the kind of parliamentary committee discussions that I just mentioned, as they could be regarded as internal discussions. It also includes:

"Information relating to:-

. . . the operation of any ministerial private office".

Given that the Scottish Parliament has come through the lobbygate row, can that exemption stand? My specific questions are about the Parliament's procedures and the way in which we operate—it would be interesting to hear your views.

David Goldberg: I will answer that with a more general point. The Scottish Parliament is referred to at paragraph 2.6 of the document, which says that

"it is within the legislative competence of the Scottish Parliament to include within the scope of Scottish Freedom of Information legislation information held by the Scottish Parliament and the Parliamentary corporation. The Executive will consider with the Scottish Parliament authorities whether the Parliament"

wishes to be covered by the legislation.

With respect, that is the fundamental and daunting question that the Parliament and its committees must take on board, rather than whether the legislation will cover any particular committee or its deliberations. The consultation document does not seem to include the Parliament comprehensively as such, which must be sorted out—

The Convener: Before I worry about the position of committees?

David Goldberg: Yes.

I think that the committees and the Parliament have two fundamental roles to play. First, the question must arise whether the independence of the information commissioner means that he or she should be an officer of the Parliament, in some sense of that term. Indeed, should the Parliament, or the parliamentary corporation, be responsible for the mechanism of trawling for a commissioner rather than leaving that up to another body?

Secondly, it would be useful to mandate in law that one of the committees—presumably the Justice and Home Affairs Committee—should have a statutory duty to review the proposed act, its impact and operation and so on, at intervals of not less than three and not more than five years.

The Convener: Just what we need—more work.

David Goldberg: I am sorry about that, but I think that that is an important point.

The Convener: I appreciate that.

David Goldberg: It is important that that duty is not simply left as being at the Parliament's discretion. The experience of Australia, in particular, is that the work of the parliamentary committees, or of Administrations that have reviewed the Australian legislation, has been informative and hugely useful. A parliamentary committee is an appropriate forum for that work. That is where I see the Parliament fitting into the proposed legislation.

12:30

The Convener: I see that Michael Matheson is looking a wee bit puzzled.

Michael Matheson: No—I was just looking across the chamber.

The Convener: As there no further questions, I thank David Goldberg for coming to speak to us. Members know that Professor Alan Miller is coming to a future meeting.

Before David Goldberg leaves, I wish to ask whether the Campaign for Freedom of Information Scotland has made a submission to the consultation process?

David Goldberg: Let me take this opportunity to remind members of an invitation that has been sent to all MSPs, and to which you, convener,

have given a positive response. The meeting, which is free of charge, will be held in the City of Edinburgh Council's chambers on Friday 25 February between 10 o'clock and 1 o'clock. The campaign does not simply adopt positions, as we see ourselves as a sort of facilitating body within Scottish civil society, enabling a platform for people to come together, to catalyse and to inform one another and so on.

The Convener: Every committee member will have received information about that meeting and I hope that, if members are unable to attend, they will ask their researchers to attend.

David Goldberg: I mentioned the meeting in the context of your question about our submission. To an extent, we would like our submission to be informed not just by what we think we should lobby on, but by a consensus of other people's views and reflections.

The Convener: I asked the Executive witnesses to stay in case they wanted to mop up issues raised by David Goldberg's evidence, although the tenor of the way in which that information was presented probably makes that unnecessary. It does not seem to me that his evidence requires a response from the Executive at this stage. What are Mr Lugton's views on that?

Michael Lugton: Thank you, convener, for giving us the opportunity to stay on and hear David Goldberg's evidence. It would be a waste of everyone's time if we tried to respond to his points now, although we will certainly take them on board.

One minor point arose on the international body to which David Goldberg referred. I have been advised that the keeper of the national archives for Scotland attends the expert group meetings for which we, in the freedom of information unit, have begun to receive papers. We are considering whether we should seek to attend those meetings, now that we are gearing up our policy on freedom of information.

Apart from that, we were happy to hear what has been said today and to take on board both the committee's views and those of David Goldberg.

The Convener: Thank you.

David Goldberg: Thank you again, convener, for the privilege of appearing before this committee.

The Convener: With that, I close today's meeting. We will meet again next Tuesday morning—members will recall that there are a number of different items on the agenda because it will be another non-bill meeting. We will return to the Adults with Incapacity (Scotland) Bill on 29 February.

Meeting closed at 12:33.

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