JUSTICE AND HOME AFFAIRS COMMITTEE

Wednesday 10 May 2000
(*Morning*)

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JUSTICE AND HOME AFFAIRS COMMITTEE
17th 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

Colin Baxter (Scottish Executive Justice Department)
Hugh Dignon (Scottish Executive Justice Department)
Angus MacKay (Deputy Minister for Justice)
Professor Alan Miller (Scottish Human Rights Centre)
Lindsay Montgomery (Scottish Legal Aid Board)

CLERK TEAM LEADER

Andrew Mylne

ACTING SENIOR ASSISTANT CLERK

Alison Taylor

ASSISTANT CLERK

Fiona Groves

LOCATION

Committee Room 1

Scottish Parliament

Justice and Home Affairs Committee

Wednesday 10 May 2000

(*Morning*)

[THE CONVENER *opened the meeting at 09:34*]

The Convener (Roseanna Cunningham): Although not all committee members are present yet, we will start—at least all the parties are represented in the room. I have received apologies from Gordon Jackson and Michael Matheson. The Local Government Committee has been sending members to other committees to keep an eye on the budget process, so Donald Gorrie might appear at some point.

A new member of the clerking team, Alison Taylor, has been appointed. She is the acting senior assistant clerk in place of Shelagh McKinlay. Alison was previously the assistant clerk to the Equal Opportunities Committee. We welcome her and hope that she enjoys her time with the Justice and Home Affairs Committee.

A forward programme is contained in the papers for the meeting. All members should have a copy. Two new bills were sent to us last Thursday afternoon. Strictly speaking, they are not formally bills yet, but drafts. We are allowed to talk about them and send them out to people, but they have not been introduced yet. Both bills have to be turned around in the same short time scale. That causes us some difficulties. As members will see from the forward programme, the difficulties in timetabling our work are becoming marked. There is little agenda space for anything. Because of that, I have to say, reluctantly, that it is unlikely that we will be able to do more work on domestic violence this side of the recess. We need to have a discussion about that.

Maureen Macmillan (Highlands and Islands) (Lab): That is disappointing news. I spent yesterday afternoon doing work on a draft bill with Lesley Irvine from Women's Aid. I could be ready to present something quite soon.

The Convener: As members will realise when they look at the forward programme, the difficulty is that, effectively, the committee now deals only with legislation—and not legislation of our own making. It is impossible to see where we can fit in any detailed consideration of domestic violence.

Christine Grahame (South of Scotland) (SNP): I have raised this before, but I would like it on the record that I do not regard this as a good turn of events. The purpose of this committee is not solely to examine the Executive's legislation; there is supposed to be a balance. I read that only 14 per cent of our time—if we are lucky—is being spent on business other than Executive business. I share Maureen's concerns. The issue is hugely important to women and it is important that the Parliament deal with it. I would like the serious point to be made to the Parliamentary Bureau and the Executive that we want this on our agenda.

The Convener: The Parliamentary Bureau will say that we are in charge of our own agenda. Because of the work load that has been imposed on us, it is now almost impossible to fit any other items on to the agenda.

Phil Gallie (South of Scotland) (Con): The problem is that the Executive and ministers are pulling legislation off the hat rack like there is no tomorrow. The fact that this session of Parliament has another three years to run means that legislation should be well thought out and planned in. No planning at all is coming from the Executive: it is simply reacting to every other issue.

We must remember that this committee does not have a revising committee sitting above it and that it is supposed to take evidence and consider carefully the requirements of bills. Thereafter, we are expected to scrutinise bills in some detail. What the Executive is asking of us is totally unrealistic. A stand must be taken at some point. I recognise the pressures that you are under, convener, but if the Parliament is to mean anything, the committee should surely have a say in the matters that it feels are important—albeit recognising a planned approach to legislative change.

The Convener: I have been invited to attend the Parliamentary Bureau meeting next Tuesday afternoon specifically to talk about the next stage of the Abolition of Poindings and Warrant Sales Bill. A decision has not yet been made on which will be the lead committee for that bill at stage 2, but I will tell the bureau—as I have just told the committee on the issue of domestic violence—that if the bureau were to refer that bill to us at stage 2 it would be impossible for us to deal with it this side of the summer recess.

There is no solution to the problem at the moment. The only solution is the nuclear option—of the committee refusing point blank to deal with any matter that is referred to it. I have tried to highlight, in many quarters, that the committee is getting close to using the nuclear option, although I hope that I will not have to detonate very soon. I live in hope that we will find a solution. As I have said before, discussions continue; unfortunately, they appear to be progressing at the normal, bureaucratic speed of this Parliament—which is to say not very fast at all.

Phil Gallie: The committee had a meeting at which our programme was discussed—at which point we determined that Monday 15 May and Monday 22 May were days on which members were already totally committed to affairs in their constituencies. On that basis, we decided that we would not meet on those days.

The Convener: That is not true, Phil. I undertook to go away and find out what the options were. It would have been possible to shift one of those Monday meetings to the following Tuesday, but if we had done that we would have lost an hour: we would have been able to have only a two-hour meeting on the Tuesday. Given our work load, we cannot afford not to use up all the available time.

Pressure is being put on committees to meet in Glasgow and Stirling on Mondays between the beginning of June and the summer recess. As yet, we have no precise dates. I do not know whether members are inclined to consult their diaries about Mondays in June at three weeks' notice. Are there any dates that would be manageable?

09:45

Maureen Macmillan: Would those be extra meetings?

The Convener: No, they would be alternative meetings. I know already that I cannot attend a meeting on 12 June.

Mrs Lyndsay McIntosh (Central Scotland) (Con): Nor can I.

The Convener: I ask members to indicate whether they would be free on Mondays in June and in the first week of July. There may be no free dates, but we should at least consider that proposal, as we have a bit of notice.

I referred to a second bill—the draft judicial appointments etc bill—which also appeared last Thursday on the same basis as the draft investigation of regulatory powers bill. The bill has not been officially introduced, but we will be allowed to talk about it. We must try to identify witnesses who can give evidence on it and have issued a provisional invitation to Professor Gane of the University of Aberdeen, who is an authority on some of the issues that are raised by the draft bill. We will invite the Executive and the Law Society of Scotland, but we must identify other potential witnesses. If members have any suggestions for witnesses for that bill, they should communicate them to me and the clerk over the next couple of days.

How do committee members feel about that other bill? My initial take on it is that it is not hugely contentious, as it is designed to fix defects. The defects have been hugely contentious, but the attempt to fix them should not be. Do members have any views on that? We are trying to get an idea of how much work we will have to do on it at stage 1.

Phil Gallie: I have not considered the judicial appointments issues in much detail, but I believe that the bail issues could be fairly contentious and I imagine that those are the issues on which our attention will be concentrated.

The Convener: Okay. That might help us to decide on potential witnesses. If nobody else has any comments, we will move on to item 1 on the agenda. These days, it takes us a long time to get to the first item on our agenda.

Draft Regulation of Investigatory Powers (Scotland) Bill

The Convener: The minister is here, with his Executive team. I invite him to make a brief opening statement to explain the overall thrust of this bill, how it fits with the Westminster Regulation of Investigatory Powers Bill and why it needs to be passed quickly, given the controversy it is beginning to generate.

The Deputy Minister for Justice (Angus MacKay): Good morning. I apologise on behalf of Jim Wallace, the Deputy First Minister, who was due to attend today's meeting. As committee members are aware, he is performing duties on behalf of the First Minister during his period of convalescence. The Deputy First Minister is therefore unable to be present.

In consequence, I am performing the duties of the Minister for Justice and have, at very short notice, agreed to step in. I apologise to members of the committee if the contribution that I am able to make is somewhat limited. As you mentioned, convener, I have with me a number of officials who will support me in discussing oday's items. I intend to help the committee as much as possible. If there are any issues that we are unable to address directly, I shall deal with them in writing immediately after the meeting has finished. I shall begin with a short statement on the draft regulation of investigatory powers (Scotland) bill.

The bill is part of a 20-year programme of reform to put police intelligence, security services and law enforcement on a properly regulated statutory basis. Other acts in the programme of reform include the Police and Criminal Evidence Act 1984, the Security Service Act 1989, the Intelligence Services Act 1994, the Criminal Investigations and Procedure Act 1996, the Police Act 1997 and, now, the Regulation of Investigatory Powers Bill at the Westminster Parliament and this draft bill going through the Scottish Parliament, on the regulation of covert investigative techniques involving surveillance or the use of covert human intelligence sources.

The underlying aim of the programme of reform is to secure a better balance between law enforcement and individual rights and to try to ensure proper compliance with the European convention on human rights.

The draft regulation of investigatory powers (Scotland) bill will provide a statutory system of controls for the use of surveillance and related techniques by Scottish police forces and National Criminal Intelligence Service operations in Scotland. It will also cover any other public authority, as specified by Scottish ministers, that may require to use directed surveillance or covert human intelligence sources, but not intrusive surveillance.

The draft bill does not introduce new police powers. The use of surveillance and human sources is long established as an effective method of tackling crime and it is important that those methods can continue as valuable weapons. The draft bill aims to strike a balance: to safeguard the rights of individuals to their privacy without hindering the effective use of the methods employed by law enforcement agencies.

The draft bill defines the categories of covert investigation techniques it seeks to regulate as follows. "Intrusive surveillance" involves a high expectation of privacy, or surveillance on residential premises or in any private vehicle. "Directed surveillance" relates to a specific investigation to obtain information about, or to identify, a particular person, or to determine who is involved in a matter under investigation. "Covert human intelligence sources" involves the use of informants and undercover officers.

Less intrusive, overt, forms of surveillance, such as closed-circuit television for crime prevention, public order or traffic management, are excluded on the basis that the members of the public who are monitored are aware of the monitoring in circumstances in which there is a low expectation of privacy.

To ensure that all covert investigation techniques are compliant with the ECHR, the draft bill will ensure that the law clearly covers the purposes for which the techniques may be used, which authorities may use the powers, who can authorise each use of the power, independent oversight and a means of dealing with complaints and redress for the individual. That is in keeping with the approach established in preceding legislation regulating the use of investigative techniques.

That will mean that all types of intrusive surveillance will need to be authorised either by the chief constable of a police force or by the director general of NCIS. Before the authorisation can take effect, it will need—except in particular cases of urgency, which are qualified—to be approved by a surveillance commissioner, who is an independent senior member of the judiciary. The surveillance will be allowed only to deal with serious crime, where it is proportionate to what is sought to be achieved and where there is no alternative means of achieving the objective.

Directed surveillance and the use of covert human intelligence sources will be authorised at a lower level, but the use of the powers to authorise the methods will be reviewed by the chief surveillance commissioner.

We do not foresee any need for Scottish ministers to be involved in the process of authorisation, and the draft bill will make no provision for them to have that role. For people who believe that they have been wrongly treated, the draft bill will also establish a right of complaint to a tribunal.

On urgency, under article 8 of the ECHR, everyone has the right to respect for their private and family life, their home and their correspondence, but it is explicitly recognised that there may, in a democratic society, be circumstances in which it may be necessary for the state to interfere with that right.

The use of surveillance to which the draft bill applies may be open to challenge under the ECHR because it involves interference by public authorities with private and family life in a way that is not regulated by law. From 2 October this year, those public authorities would be acting unlawfully if their activities were incompatible with article 8 of the ECHR. The draft bill aims to remove that risk.

Assuming that the Parliament passes the draft bill and that it obtains royal assent, the Executive aims to bring the act into effect by 2 October, which is the date when the Human Rights Act 1998 commences.

In relation to the police and NCIS for the purposes of preventing crime, protecting health and protecting public safety, the draft bill mirrors part II of the Regulation of Investigatory Powers Bill that is currently concluding its House of Commons stages at the Westminster Parliament.

Following the Sewel motion agreed to by the Scottish Parliament on 6 April, the areas covered in parts I and III of the bill are to be dealt with at Westminster. Those areas are either clearly reserved under the Scotland Act 1998 or were open to interpretation with regard to their devolved or reserved status, so there would have been a risk of challenge in the courts to the Scottish Parliament's competence to legislate for the activities in question. Other areas were clearly within Scottish legislative competence, but we believed a UK-wide arrangement would be more effective.

Part I of the Regulation of Investigatory Powers Bill updates the Interception of Communications Act 1985 to take account of developments in the telecommunications industry. It introduces statutory controls on law enforcement access to communications data including billing information and the destination, frequency and duration of calls—in addition to the controls on powers to intercept actual communications.

Part III provides powers to allow public authorities to demand the decryption of encrypted material for specified purposes. Part IV contains provisions establishing the roles of the surveillance commissioners, the tribunal and the code of practice. Part V contains miscellaneous and supplemental provisions.

The most important direct link between the draft Scottish bill and the Westminster bill is the tribunal. During the Sewel debate, we proposed that the tribunal established under the Regulation of Investigatory Powers Bill would be the forum for complaints about activities that were, or could have been, authorised under the Scottish legislation. The rationale for that was that it was important for the tribunal to be able to develop clear expertise in this specialised, sensitive area. That would have been very difficult to achieve on the narrow base of cases likely to be generated in Scotland alone.

Clause 60 of the Westminster bill contains enabling powers to allow the Home Secretary to make rules for the tribunal's procedure, which must be approved by the Westminster Parliament. Officials are discussing how consultation will take place with Scottish ministers on the rules to take account of Scottish requirements.

The bill will not introduce new powers; it will regulate and control methods that are already in use. It will have a positive impact on civil liberties in making the use of covert investigation techniques compatible with the ECHR. It will specify the purposes for, and circumstances in which, surveillance and covert human sources can be used. It will specify who can authorise the use of the techniques; it will provide independent oversight, including the power to quash authorisations; and it will provide procedures for complaints and redress.

That concludes my opening comments, convener. I am of course happy to take questions. I will invite some of the officials who are with me to deal with some of your more detailed inquiries.

The Convener: Thank you, minister. I would like to ask one or two questions about timetabling and so on. You have clearly explained why the draft bill needs to become law by 2 October. I do not think that you have explained adequately why we are getting the bill only in May, given that the bill it mirrors was introduced in the House of Commons on 9 February. I was down in Westminster on Monday night, voting at the report stage of the UK bill. I am quickly going through a comparison between part II of the Westminster bill and the Scottish bill. I can see one or two small differences, but it is essentially the same.

Why was the Scottish bill not introduced long before May this year? The result of the delay is that a timetable has been forced on this committee for no apparently good reason, causing us great difficulty with our work load.

10:00

Angus MacKay: I acknowledge the strain that the committee is under with the broad legislative work load that the Executive has placed on it and its wish to deal with its own business. The Executive has been aware for some time of the need to legislate on this area and has been actively considering how best to strike the right balance between effective law enforcement and the protection of human rights.

Obviously, as the Scottish Parliament has existed only for a year, the concept of parallel legislation being considered contemporaneously by both Parliaments is new. It is vital for effective law enforcement that the Scottish and Westminster bills should fit seamlessly together to ensure that criminals do not escape through legal loopholes. As a result, the process has been very complex and the Scottish Executive and Home Office officials have had to co-ordinate their activities closely over a period of months.

As well as trying to ensure compatibility between the UK and Scottish bills, we have tried to resolve certain complex legal issues of legislative competence to avoid the possibility of implementing a regime that was susceptible to challenges in the courts on the grounds that the Scottish legislation was not competent to regulate the activity or body in question. At all times, we have been keen to secure a level playing field for the legislation which is being developed and passed in England and Wales and in Scotland.

The Convener: I am not sure that that answer is satisfactory. People knew about the House of Commons bill before it was introduced, which was three months ago. In contrast, we are only getting the draft Scottish bill now with an imposed end point, which causes us serious difficulty as we have to deal with another piece of legislation at the same time. If this is going to happen with other pieces of legislation, the Executive should attempt to get on the case considerably earlier. As a consultation process was undertaken at Westminster prior to the bill's introduction there, I wonder why this Parliament was not involved much earlier on.

Angus MacKay: Convener, you make a fair point about the length of time between the introduction of legislation at Westminster and its introduction here. All I can do is reiterate the complex issues at stake and the fact that we are at a relatively early stage on a learning curve as far as contemporaneous legislation is concerned. I am certainly happy to take on board your point that where similar circumstances occur in future, we will try to get the issues before the committee far earlier.

The Convener: You have been careful to say that this bill raises very complex issues. It has been three months from the bill's introduction in Westminster until today, when we have received the draft Scottish bill, which is not being formally introduced today. We must assume that those three months have been necessary to deal with the complex issues that you mentioned. Nevertheless, you expect the committee to do the same in two months. Frankly, that is not reasonable.

If the issue is that complex and that potentially controversial, should the committee not have the maximum possible amount of time to allow us to deal with those complexities? Although I do not expect you to answer that question, I want to make that point strongly. If this legislation is so complex that the Executive required that amount of time to get it to the committee, it is complex enough for this committee to be allowed the maximum amount of time to deal with it. We are not getting that time.

Angus MacKay: We want to ensure that the committee has sufficient time to consider appropriately any and all legislation, and that applies to consideration of this draft bill. However, in this case, the difficulty lies with the requirement to ensure that, in respect of part II of the bill, the proper competences for the Parliament vis-à-vis the reserve powers of Westminster in relation to some specific UK agencies such as HM Customs and Excise be taken into account in great detail.

Now that the question of where the competence for those issues or agencies lies has been resolved, that is less of an issue for the committee than substantive issues such as how the legislation should be implemented, the circumstances in which activities should be authorised, the operation of the tribunal and the lines of accountability. Although the process has taken quite some time—and I hope that in future it will not take the same length of time, as we have already been through the learning curve—many of the issues that it took us some time to resolve should not necessarily detain the committee, as they involved resolving how specific competences would be dealt with in relation to reserved and devolved powers.

The Convener: It is for this committee to decide what should be examined, and there will be some difficulty with our time scale should we decide to range reasonably widely in our considerations.

Phil Gallie: The convener mentioned a consultation session that was undertaken at Westminster before the UK bill was introduced. However, in the documents that surround the bill's publication, ministers said that the legislation was far too complicated to go out to consultation in Scotland. Will the minister explain why there was a consultation period in England, but not in

Scotland?

Angus MacKay: The consultation period in England applied to parts I and III of the Westminster bill, not to part II, which the draft legislation under consideration today mirrors. That means that there was no pre-legislative consultation period for that part of the Westminster bill.

Phil Gallie: The minister has outlined some of the principal changes to the bill and has emphasised the fact that 2 October is a critical date because of the incorporation of the ECHR. However, because of the Scotland Act 1998, the ECHR has already been incorporated into Scottish legislation. What surveillance techniques have been used by police in Scotland since the implementation of the Scotland Act 1998 and the incorporation of the ECHR? Have the police been unacceptably restrained recently because of conditions surrounding surveillance, or have they been acting outwith the ECHR since implementation of the Scotland Act 1998?

The Convener: When did you stop beating your wife, minister? [*Laughter.*]

Angus MacKay: I think that I will move on to the substance of my answer without giving Mr Gallie the customary thanks for his question.

It might be helpful if I make a few comments on the position prior to 2 October 2000. The Lord Advocate must act compatibly with convention rights and prosecute accused persons only when the act of prosecution is compatible with those rights, including the right in article 8 to respect for private and family life. That obligation has applied to the Lord Advocate since 20 May 1999. The Lord Advocate's duties to act compatibly with convention rights include the duty to seek convictions only on the basis of evidence that has been obtained and led in a manner compatible with the accused's rights under article 8 of the ECHR.

The use of intrusive surveillance techniques by the police and other agencies interferes with the right of the individual affected under article 8. Such techniques will be compatible with article 8 if they are utilised in a manner that is compatible with article 8.2, and, in particular, there must be a legal framework that regulates such techniques, given the article 8.2 requirement that a legitimate interference with private and family life must be

"in accordance with the law".

If intrusive surveillance techniques are applied to an individual when he or she might be said to a have a reasonable expectation of privacy in the absence of a basis in law, any evidence obtained might be said to be irregularly obtained.

Although it does not follow, either in Scots law or under the ECHR, that irregularly obtained evidence will inevitably be inadmissible, there is a risk that any evidence obtained as a result of obtrusive techniques that do not have a legal basis will be held to be inadmissible, and that convictions may be successfully appealed against on that basis. That is the position in relation both to cases commencing before 2 October 2000 and to cases commencing after that date, given the obligations on the Lord Advocate under the Scottish Act 1998. This point has yet to come before the appeal courts.

Phil Gallie: Given that statement and the responsibilities of the Lord Advocate, were specific guidelines issued or were the police advised by the Lord Advocate as to the situation? Were they told that they should re-examine their techniques in the interim?

Angus MacKay: The various enforcement agencies operate under an existing code of practice that was developed by the Association of Chief Police Officers in Scotland and other enforcement agencies. At present it is a voluntary code of practice, but this legislation, if passed, would require a code of practice that would have the force of law. Further guidelines will need to be developed, but they may be similar to the existing voluntary guidelines.

Phil Gallie: I am concerned that, because of the incorporation of the ECHR into Scots law through the Scotland Act 1998, a date has been set by which the guidelines may have changed. Did the Lord Advocate ensure that the guidelines that were in operation before the incorporation of the ECHR were relevant after incorporation?

Angus MacKay: I am not sure that I understand the question fully, but I make the point that the ECHR does not apply to policing activities until 2 October this year.

Phil Gallie: So the Scottish police are not acting within the ECHR, despite its incorporation into Scots law under the Scotland Act 1998?

Angus MacKay: It is my belief that, given that a voluntary code of practice is already in operation, the police are acting in compliance with the ECHR. The point that I am making is that at present they are not required to comply with the ECHR. They will be required to comply with the convention from 2 October 2000.

Phil Gallie: I have several questions, but other members of the committee may want to speak first.

Christine Grahame: Like the convener, I am concerned about the speed with which you want us to deal with this bill, which is very complex. I have no problems with having a statute to regulate something that is already happening. We should

know what the position is, it should be transparent and there should be codes of practice. Interim codes of practice are at the heart of this proposed bill, but this committee never sees those codes. The same thing is happening with other legislation. We cannot consider the structure of the bill without knowing what is contained in the codes of practice.

I am concerned about our ability to scrutinise the bill, even at this stage. In your policy memorandum you say:

"No formal consultation has been undertaken on the Bill."

It does not bother me if the Executive gets itself into trouble by not taking time over this legislation, but I want to make it plain that the Justice and Home Affairs Committee is not getting a chance to consider it. We have only another two mornings to take evidence on the bill at this stage.

In an interesting short paper by Professor Alan Miller, who is present and from whom we will hear later, he says:

"it is necessary to consider the approaches taken throughout Europe and beyond such as Canada and Australia to take into account a wider range of international human rights conventions and obligations."

Have you done that? Some of the articles that I have seen indicate that much that is contained in this bill, particularly relating to e-commerce, has been rejected by other legislatures.

The Convener: We need to be careful, as many of the articles to which you refer were written about the Westminster Freedom of Information Bill. The e-commerce controversy relates to the Westminster bill, not this one.

Christine Grahame: I may have misread this, but does not surveillance relate not only to telephone communications, but to mobile phones and computers?

Angus MacKay *indicated disagreement.*

Christine Grahame: That is fine.

My next point relates to comparisons with European practices. If I am making mistakes, it is because of the pressure of trying to acquaint myself at such a rate with what is coming before us, so that we can ask pertinent questions and produce good legislation. What is happening in Europe in this area? Has the Executive taken that into account?

Angus MacKay: I will deal with two of the points that Christine Grahame made. The first related to codes of practice. What exactly was the question about?

Christine Grahame: As has happened previously, codes of practice are referred to here as interim codes of practice but the committee does not have sight of them. It is improper for the committee to consider the basic legislation without seeing the codes of practice.

10:15

Angus MacKay: The existing codes of practice are available on the internet, which may provide members with some guidance on current practice in this area. As I said earlier, there is nothing new here. The bill would not increase the powers that are available to the enforcement agencies, but would regulate them in an appropriate way that is compliant with the ECHR. The existing voluntary codes of practice provide some indication of the sort of statutory codes of practice that may come into effect after the legislation is passed.

The codes of guidance that will be attached to this legislation will have statutory force and we will consult on those. I accept that they will follow the legislation, but members of this Parliament will have the opportunity to discuss them fully before they come into effect.

Christine Grahame: What comparisons have been made with the approach taken by other legislatures and with the situation in Europe?

Angus MacKay: I am not sure what comparisons have been made. I am happy to check that point and to write to Christine Grahame with an answer. The intention is to develop a coherent regulatory regime that deals with established practices here. As I mentioned at the start, that is part of a process of evolution involving different pieces of legislation that have attempted to formalise and regulate the way in which surveillance can take place. This bill is intended to develop established practice.

Christine Grahame: Are you saying that if I download the existing codes of practice—I like to be technical—I can be pretty certain that those will be the same as the forthcoming draft codes?

Angus MacKay: No. If you obtain access to the existing codes of practice, which are freely available on the internet, you will see what the current operating regime is in relation to the existing powers. This bill, if passed, will not extend those powers. You can, therefore, assume that they provide a reasonable basis on which to establish the new guidelines and codes of practice. However, it would not be fair to say that the new codes of practice will be the same as the existing codes.

Christine Grahame: You said that we will get to see the draft codes of practice. When? What is there to prevent us from considering them as we consider the bill?

Angus MacKay: I invite Mr Dignon to address that point.

Hugh Dignon (Scottish Executive Justice Department): Codes of practice are currently being considered by working groups of practitioners in the area from both north and south of the border. When they have completed their deliberations, within the next six to eight weeks, the codes will become available for wider public consultation.

Euan Robson (Roxburgh and Berwickshire) (LD): Minister, I wish to ask five questions about the text of the bill. I shall be brief. I do not understand some of what is written. However, certain issues are raised by the five points.

First, on section 1(5), I do not understand what type of surveillance is being suggested. I can envisage circumstances where surveillance that is apparently not supposed to be intrusive is in fact intrusive. Perhaps I have completely misunderstood what the section is dealing with, but it is not clear to the average informed layman what is meant here.

In two further sections, 3(3) and 4(3), an authority is given to ministers to introduce orders for other purposes. It seems as if a fairly extensive power is being given to ministers. I appreciate that an order has to come before Parliament, but what is intended here? There are always unforeseen circumstances but surely, with many years experience in this field, we ought to be able to get a proper list that Parliament approves. There would be no need for this provision, which may give ministers a fairly extensive power.

Section 11, "Quashing of authorisations etc", seems fine, except for the destruction of evidence. If an unauthorised or illegal surveillance order is placed on someone, it is not just a question of "may destroy the records"—the records of that unauthorised surveillance—as indicated in sections 11(4) and 11(5); "must" should be inserted instead of "may".

Further, even if there is an inconclusive surveillance, there is a strong argument that records "must" rather than "may" be destroyed. When records have been obtained in an unauthorised or insubstantial manner, we do not want them hanging around so that they may be used against someone on a later occasion.

I was interested that you mentioned redress. I have looked through section 19, "Complaints to the Tribunal", and I cannot find any reference to redress in the bill. It may be my mistake, as the text is difficult to read. As I read it, section 19 says that one can make a complaint and the tribunal can judge on that complaint, but then, "Thank you very much", end of story. I need some evidence of how redress is to be obtained for the individual.

Last but not least, I have tried my best to understand section 26, "General saving for lawful conduct", but frankly I cannot. Is it an excuse clause? A get-out clause? What is its purpose?

I am sorry to burden you with five questions. If you wish to write in reply, that is okay. However, important issues are raised by the draft bill. Maybe I have misunderstood some of the sections, but those are the type of issues that the committee will wish to consider.

Angus MacKay: Kate MacLean is whispering to me that, in the spirit of "Who Wants to be a Millionaire?", I should elect to phone a friend on some of those questions.

The Convener: Now, minister, we know you enjoy your visits to the Justice and Home Affairs Committee.

Angus MacKay: I elect to write to the member on his last point, on section 26, because it is the most complex question. It may be the most satisfactory solution for all concerned if I try to explain in writing what is intended.

The first question related to section 1(5). Such a circumstance might occur when a directional microphone or a camera with a powerful lens was being used external to a building or a vehicle in order to gather information, but where such a device would not be capable of gathering information of the same quality or detail as a device placed, for example, within a car.

A camera would not generally be used within a car anyway, but it would not be regarded as intrusive, since all it would reveal was who was in the vehicle. A directional device might be used to try to pick up elements of a conversation within a vehicle but, for a number of reasons, it might be incapable of producing the same quality or consistency of information as a device planted within a vehicle. For example, there may be loud traffic or difficulty with the signal because of the distance. That would not be regarded as being as intrusive.

However, if the device were capable of picking up information that was as detailed as if the device had been placed within the vehicle, that would be regarded as intrusive. In those circumstances, a different approach would require to be taken. It would fall within the competence of another area of the bill.

Euan Robson: I understand the point about vehicles, but let us say we are in a house and there is a directional microphone somewhere outside, that directional microphone might be as intrusive as something that was hidden under a desk.

Angus MacKay: In which case it would require to be dealt with under the part of the legislation that deals with intrusive surveillance.

Euan Robson: What happens if somebody says, "It's outside—it is not intrusive surveillance", and it is only found to be intrusive after the event?

Angus MacKay: We would expect a view to be taken at the outset about the capacity of the device being used. That may not satisfy you, but that is the answer to that point. We are at the pre-legislative stage and we have the opportunity to explore those issues further.

On sections 3(3)(d) and 4(3)(d), which are similar or the same, I cannot remember the precise phrase that Euan Robson used—I think it was catch-all—but at present the Executive does not have any specific additional purposes in mind, so it is a contingency measure. However, it would not be open to an authorising officer to add to the list of the lawful purposes, if he or she felt it necessary. That would need to be done by Scottish ministers. In that event, any purpose that Scottish ministers wished to add to those for which surveillance and covert human sources may be used would have to be compatible with article 8 of the ECHR. If it were not compatible, it would defeat the purposes of the bill.

Secondly, the Parliament would have the opportunity to strike down the purpose proposed by the minister because, as it says in the two relevant sections, the direction from Scottish ministers could only be given by an order made by the ministers before the Parliament; therefore, the Parliament would have the opportunity to debate and refuse.

Euan Robson: In other words, Parliament would decide on the order before any further purpose was added.

Angus MacKay: Yes.

Euan Robson: So there is no way in which that purpose could be brought into effect without Parliament, there is no temporary or emergency provision—

Angus MacKay: Within the legislation, there are emergency provisions for certain circumstances, but not in relation to that point.

Euan Robson: Thank you.

Angus MacKay: The next point is—

Euan Robson: Destruction of records. It is the point about whether, when there has been an unauthorised surveillance, the records "must" rather than "may" be destroyed.

10:30

Angus MacKay: Section 11(4) refers to two circumstances, one in which an ordinary surveillance commissioner quashes an authorisation under the section following a re-authorisation and one in which the surveillance commissioner quashes an initial authorisation.

The surveillance commissioner would be a senior member of the judiciary, and I presume that members would have some confidence in the view that such a person would take. That is not to say that that would necessarily satisfy members about the wording of the proposed legislation. I accept that there this a distinction between "may order" and "must order"; that is a matter that members will want to debate.

It is worth debating whether it is appropriate for a commissioner to be required to direct the destruction of evidence that might still be admissible, depending on the circumstances in which they decide that the surveillance was inappropriate. We have to bear it in mind that that senior member of the judiciary will be taking a view that he or she does not share the judgment of the authorising officer about the circumstances at the time of the initial grant or of a subsequent renewal. There are several issues to be explored.

Euan Robson: The final point was on redress procedures, under section 19. If something goes badly wrong and there is a complaint to the tribunal, and the tribunal finds in favour of the complainant, what process is followed to provide redress for the complainant? I cannot find anything in the bill, although the minister alluded to it in his opening remarks.

Angus MacKay: I will have to write to Mr Robson on that point. As I said, procedures are being developed and are the subject of current discussions, some of which are about the involvement of Scottish ministers. Once those discussions have reached a resolution, we will bring the matter back to members for further debate. In the meantime, I will write to the member on the matter.

Pauline McNeill (Glasgow Kelvin) (Lab): I would like to clarify this part of the bill. Is phone tapping included in the UK bill or in the Scottish bill?

Angus MacKay: That comes under part I of the Westminster bill.

Pauline McNeill: Who has the power to authorise a phone tap in Scotland?

Angus MacKay: At present?

Pauline McNeill: Where will that power lie eventually?

Angus MacKay: Once the legislation has been passed, that power will lie not with Scottish ministers, but with the director general of NCIS and a range of other specified individuals. I can ask for the list to be read out if necessary.

Colin Baxter (Scottish Executive Justice Department): Perhaps I can clarify that point. The interception of communications is a reserved matter; the Home Secretary is responsible for authorising interception. However, there is an order that devolves to Scottish ministers the power to authorise interception in relation to serious crime. That is a power that lies with Scottish ministers under Executive devolution.

Angus MacKay: Is that clear?

Pauline McNeill: Yes. There are several references to surveillance of which the subject is unaware. I am thinking of section 1(8)(a), which states that

"surveillance is covert if, and only if, it is carried out in a manner that is calculated to ensure that persons who are subject to the surveillance are unaware that it is or may be taking place".

What is the test for being unaware? Is it objective or subjective? There have been notable cases in the past when the Home Secretary gave an authorisation to tap the phone of someone—Campbell Christie, the general secretary of the Scottish Trades Union Congress, Joan Ruddock and others—without their knowledge. How is the awareness of the person under surveillance tested?

Hugh Dignon: The section refers to surveillance—following and observing a person's comings and goings—rather than the interception of communications. The intention would be that the surveillance would be covert—the person would not know that they were under surveillance.

Pauline McNeill: Euan Robson's questions have helped to translate the jargon. Can you give me two or three common circumstances in which the bill would apply?

Angus MacKay: Let me see. Let us take the issue of drugs. An individual might be suspected of being involved in the distribution of drugs on a scale that would constitute a serious crime. Officers of a particular enforcement agency might apply for authorisation for intrusive surveillance to establish the nature and extent of the illegal operation and who else might be involved. They might want to determine whether there is a network of distribution, the source of supply and how the network operates. Intrusive surveillance would be authorised in those circumstances. However, I remind members that those are the current circumstances—no new police powers are being authorised under the bill.

Pauline McNeill: I understand that, but I want to be clear.

Angus MacKay: Would it be helpful if we were to construct two or three such scenarios to illustrate how different parts of the bill might come into effect?

The Convener: Yes. I would like an example of at least one hypothetical public safety scenario and one protecting public health. There are separate paragraphs in section 3 on preventing crime or disorder, on public safety and on protecting public health. I would like to know what the differences are and to have some examples of how the bill would apply in those circumstances.

Angus MacKay: That might be helpful to others as well. I will ensure that we do that as soon as possible.

The Convener: Thank you.

Maureen Macmillan: We have been talking about the fact that telephone tapping and e-commerce come under the Westminster bill. Is there some confusion about who is responsible for what? For example, if officers are tapping the telephone of a drug dealer, as well as focusing a camera on their house and looking at their e-mail, will the officers have to apply to different people for permission to do those things?

Angus MacKay: In the example that you have cited, individual Scottish police forces would be allowed to carry out such activity, under the auspices of part I or III of the UK legislation.

Maureen Macmillan: What about the draft bill?

Angus MacKay: Scottish police forces will operate in terms of the intrusive, covert surveillance that is set out in the draft Scottish bill, which dovetails with the UK legislation.

Maureen Macmillan: Will the police have to apply on two separate forms or to two different people? Will things be more complicated?

Angus MacKay: No, the legislation should simplify things. It unifies, or distils, a number of pieces of existing legislation. It makes clearer the duties and obligations on the authorising individuals and on the police or another agency that seeks to use the particular surveillance method. It makes clear the circumstances in which such surveillance may be used.

I am not sure that my answer has been helpful.

Maureen Macmillan: I am not sure that it has been, but thank you anyway.

Phil Gallie: Minister, if Euan Robson, who is our legal eagle, has difficulties, you will recognise the

difficulties that some of the rest of us have.

Section 1(2)(a) refers to

"specific investigation or a specific operation".

To follow on from the comments that you made to Pauline McNeill, I feel that the word "specific" needs a definition. You referred to drugs; I wonder how far "specific" needs to go when a particular authorisation is being considered. In the war against drugs, would one authorisation cover a whole range of localities, individuals and circumstances?

Section 1(2)(c) covers surveillance that is undertaken

"otherwise than by way of an immediate response to events and circumstances".

That suggests that there could well be emergencies in which surveillance could be put into operation without authorisation. Is that a correct interpretation?

Angus MacKay: To answer your question on the definition of "specific", my understanding is that an individual or group of individuals would have to be clearly focused on.

Phil Gallie: Would people be named?

Angus MacKay: Yes, they would have to be named in the authorisation.

Your second question was on section 1(2)(c). It is correct to say that, in an emergency or in pressing circumstances, there could be directed surveillance. However, that would be subject to immediate ratification, and would happen only in specified circumstances.

Phil Gallie: That seems quite wise.

I would like to ask about the use of "covert human intelligence sources". In recent court cases, vulnerable people have been forced to reveal their identities in the full view of the court. There is a human rights element. Does the bill seek to protect such witnesses?

Angus MacKay: No, it does not. I do not think that it would be appropriate for the bill to do that, although it might be appropriate for other legislation to do so.

Phil Gallie: Given that there is a recognisable concern and that we are talking about human rights, is not an opportunity being lost?

Angus MacKay: I think that what you suggest would almost certainly be declared to be outwith the scope of the bill; I am not sure that the Presiding Officer's legal advisers would accept that that area falls within the title of the bill.

Phil Gallie: I can think of advantages of doing what I suggested, but for the moment, I will accept that it falls outwith the scope of the bill. Perhaps the question could be raised again at a later date.

Christine Grahame: I might have picked you up wrongly, minister, but I think that you said that you thought that the chief surveillance commissioner would be a senior member of the judiciary. Section 27, under the heading of "Interpretation", states:

"'Surveillance Commissioner' means a Commissioner holding office under section 91 of the Police Act 1997 . . . and 'Chief Surveillance Commissioner' shall be construed accordingly".

What does that mean? I do not understand how it ties in with your comment on the chief surveillance commissioner being a senior member of the judiciary.

Angus MacKay: Section 91(2) of the Police Act 1997 states:

"The persons appointed under subsection (1) shall be persons who hold or have held high judicial office within the meaning of the Appellate Jurisdiction Act 1876."

I am certainly unable to quote from the 1876 act.

Christine Grahame: It was not a trick question; I just did not know that judges lurked somewhere in a police act. Your answer was helpful.

10:45

The Convener: Are there any other questions for the minister?

Phil Gallie: He can have a final question from me, if nobody else is asking one.

Paragraph 21 of the policy memorandum states that the bill

"will have no impact on . . . island communities"

or

"local government".

How can that statement be made when the bill obviously affects everybody in Scotland?

Angus MacKay: The intention of the statement is to point out that there is no particular or specified impact. That does not mean that there will be no general impact.

Phil Gallie: I am relieved to hear it.

The Convener: Does Euan Robson have a final final question?

Euan Robson: Yes, final final. Section 2(2), on lawful surveillance, states:

"A person shall not be subject to any civil liability in respect of any conduct of his which—

(a) is incidental".

My concern is that that seems to give carte blanche to people who are involved in surveillance activities, absolving them from liability. For

instance, if someone is filming someone else from a car and runs into another vehicle, do they have no liability for the accident? We cannot have a situation in which people who are involved in these activities are not open to normal civil liabilities—except when their conduct is directly related to the task in hand. Perhaps the minister could consider that point at a later date.

Angus MacKay: Mr Robson makes a serious point that deserves consideration. We will take it away; once we have given it further thought, we will write to Mr Robson and then perhaps have further discussions. I can see the importance of his point.

The Convener: The minister has undertaken to do quite a lot of writing. I do not want unduly to overburden the minister and his team, but the committee has only two more scheduled meetings, for taking evidence at stage 1. They are next Monday afternoon, and the following Monday afternoon. It will probably be essential rather than just useful to have answers to some of the questions that we have asked this morning before we ask more questions of other witnesses.

For example, many of the questions relate directly to the Association of Chief Police Officers in Scotland, representatives of which will give evidence next Monday afternoon. I appreciate that the time scale is short, but it would be greatly appreciated if we could get as much information as possible as quickly as possible.

Angus MacKay: In dealing with the Abolition of Feudal Tenure etc (Scotland) Bill and the Adults with Incapacity (Scotland) Bill, the committee and the Executive have developed a constructive relationship. Notwithstanding the delay between the introduction of the Westminster bill and that of the Scottish bill, I hope that we can continue that. I hope that I can ensure that information is passed on as quickly as possible on a range of matters. In this instance, we will try to ensure that before the weekend, members will have received the written replies that we have undertaken to provide.

The Convener: That would be ideal. I raise the matter because the answers to questions that we asked regarding budget information came quite late in the procedure. We had to proceed without having seen the information. Our meetings are weekly and we need the information as we go.

Angus MacKay: I will discuss with officials ways of providing the information. We will undertake to get it to members by the weekend. If members need information on anything, they can contact me directly and we will try to ensure that there is an immediate turnaround.

The Convener: That concludes item 1 on the agenda, but it does not excuse the minister, who will have to stay for item 2.

Budget Process

The Convener: Item 2 on the agenda is scrutiny of the 2001-02 budget. Some of the minister's personnel are changing, but I note that one official is staying.

I remind committee members of the purpose of this exercise. We are expected to report to the Finance Committee on the relevant chapter of "Investing in You" so that that committee can take an overall view of the budget proposals. We should ask whether the aims and objectives that are set out in chapter 5 are the right ones—in other words, do we think that the Executive will spend money on the right things? We should also ask whether the distribution of money among the principal headings in table 5.24, in which figures are expressed in real terms, is about right and whether the overall figure for justice and the Crown Office is sufficient. I remind members of the objectives because we have a tendency to get bogged down in the detail, which would not be appropriate at this stage.

I am not sure whether there is a necessity for you to speak first, minister, unless you feel hugely moved to.

Angus MacKay: I would like to inform members that I have had less time to prepare for this than I had to prepare for the regulation of investigatory powers bill. I apologise for the fact that I will rely heavily on officials.

I am not sure whether this will be helpful, but I could offer committee members contact with one or two of our senior justice department finance officials in an informal setting. Having read copies of the *Official Report* of previous committee meetings, I am aware that there is a thirst for information of a detailed nature about figures, acronyms, practices, flows of money and so on. I believe that an information-gathering session similar to the one that the minister and I had after our arrival would be helpful.

The Convener: Thank you. That might be useful and we will take you up on your offer if we can fit that into people's diaries.

Before we begin, I again remind members that there have been many detailed questions and that I am hoping to steer committee members away from anything too detailed.

I will start by asking the minister two general questions that arose from the issues that we discussed last week. While a number of targets are indicated for the various bodies, there is no indication of whether last year's targets were met. We have no way of assessing whether previous performance has been up to scratch. I know that some information has come in as a result of

questions that we asked last week, but I do not see information about targets. Could you explain why it was decided not to include information about previous performance in the document as a comparator?

Table 5.13, which details the Scottish Police College performance indicators, gives specific and clearly measurable targets. We cannot assess them using a previous year's targets—which would have been helpful—but next year, we will be able to use the targets that are in this document to assess the performance. The same cannot be said of all the chapter, which contains much vaguer, less measurable targets elsewhere. That will make it harder to measure the performance of certain departments. How did that unevenness come about?

Angus MacKay: I am not sure what the answer is to your last question, but I accept that the information is uneven. I also accept that it would be more useful if an assessment were given in each of the sections as to whether the preceding year's targets had been met. We intend to provide that information in future years. I am not clear about the specific reasons for the variation in the information. I assume that it might relate to historical factors to do with data collection and the extent to which individual departments or sections performance-manage the outputs of their activities. I appreciate that that does not fully answer your question, but all I can do is assure you that we will undertake to move towards a performance management structure across the Executive and that we will include in future reports information about the success of attempts to meet targets in previous years.

The Convener: I am certainly mindful of the fact that this is the first time that the budget has been under scrutiny. By putting it under the microscope, we can be sure that lots of issues will be raised that may not have been considered before.

Phil Gallie: Notwithstanding the minister's opening remarks and his comment about preparedness for this session, I would have thought that, given current pressures, he would find it difficult to sleep at night thinking about the justice and home affairs budget. He will certainly have had time to become well acquainted with the figures, if we assume that ministers had serious input into the overall budget settlement announced by Jack McConnell. Given that and given the promises that the Deputy Minister for Justice and Home Affairs and his leader, Jim Wallace, made when they were in election mode, why have police budgets been squeezed so much? Why is there such a large reduction in the number of serving policemen? The budget does not seem to reflect the need to reverse that trend.

11:00

Angus MacKay: Mr Gallie will not be surprised to hear that I am not sure that I accept the contention that the police are underfunded. Neither am I sure that the justice department or its activities cause me sleepless nights. I thought Mr Gallie was going to refer to himself when he talked about sleepless nights, but he failed to do so.

Police grant-aided expenditure for 2000-01 is £742 million, which represents an increase of £27 million, or 3.8 per cent, on the preceding year. Last year's funding of £715 million was £24 million higher than the previous year, an increase of 3.4 per cent. In addition, we gave the police a further £4.7 million last October specifically to assist them with the policing of the millennium celebrations. We are unambiguous in our commitment to giving the police service our strongest support.

The Scottish Executive and chief constables are committed to best-value principles and to the need to deliver efficiency savings. Mr Gallie will be aware that, given the additional money that has been made available to the police as a result of the chancellor's budget announcement, the Scottish police service can expect to receive substantial additional resources. Mr Gallie will be relieved to hear that I will not announce details of that today, but I hope that we will be in a position to make an announcement in the near future. The matter is the subject of discussion at the Scottish Cabinet and should be resolved within the next 10 days or so. In addition, the general priority that we attach to the police service will be reflected in the consideration given to overall expenditure in the next spending review.

More immediately, the Scottish Executive has set up a short-life working group to assess the funding required to resource the police service beyond the period of the current comprehensive spending review. We will consider carefully the outcome of that in taking decisions about future funding for the police. This is a relatively new approach. We are trying to take a more objective and more structured view of the kind of investment strategy required in policing and policing support services in coming years.

Mr Gallie and I have clashed on police numbers in the past. I repeat what I have pointed out before. When direct police officer and support staff numbers are taken into account, the figures are, I believe, at their highest ever level. The idea of civilianisation, expressly supported by chief constables, was to increase the number on the streets of officers who would otherwise be detained doing office jobs. It is therefore not irrelevant to say that the fact that civilian numbers together with police numbers are at a record level means a significant difference in the capacity of the police forces to deliver protective and detective

services.

Phil Gallie: The figures that I have seen suggest that the fall in the number of policemen has not been made up for by the increase in the number of civilian posts. That is an area of dispute between us.

One thing that cannot be disputed is the fact that the outturn figure for 1998-99 was £31.4 million and that the plans for 2001-02 show expenditure of £31.9 million. That is hardly anything other than a stand-still budget, which recognises that there is a fall in the funding required to meet the Government's aspirations. What account was taken in the figures of early retirement and the continual build-up in pension fund requirements, given the fact that the pension fund for police is revenue provided?

Angus MacKay: Will Mr Gallie repeat the two figures he quoted, so that I can find the table to which he refers?

Phil Gallie: Table 5.24 on page 78 of "Investing in You" says that outturn in 1998-99 was £31.4 million and that planned expenditure in 2001-02 is £31.9 million.

Angus MacKay: The first thing to point out is that a direct comparison cannot be made, because the pension sums to which Mr Gallie refers fall outwith the police central Government allocation and are funded, I think, through the local authority contribution, which is made elsewhere.

Phil Gallie: Has the local authority contribution been increased to meet that requirement?

Angus MacKay: We are just trying to find the relevant table so that we can give you the right figure.

Table 5.18 on page 74 shows that there is a significant increase—approximately £40 million—in the investment in police current grant from the outturn figure in 1998-99 to the projections for 2001-02.

As I was trying to point out, the figures that Mr Gallie quoted are police central Government figures—in other words, figures for the 51 per cent of police funding that goes to central policing services, such as the Scottish crime squad, the livescan fingerprint service, DNA services and other services provided centrally across Scotland. The pension figures are covered by the police current grant in table 5.18. The figures speak for themselves. There is an increase of £40 million over the period referred to.

Phil Gallie: I thank the minister for correcting me on that. Can he explain where the central Government's contribution to policing lies? Does it lie within the allocation made to local authorities? In which table can I see the amount of the central Government's contribution to normal police officer services?

Angus MacKay: That figure, which is the 51 per cent of police costs that is contributed by the Scottish Executive, falls within the figure in table 5.18 on police current grant. On top of that, local authorities contribute 49 per cent to expenditure to make up the 100 per cent. Table 5.19 on police GAE gives the total figures. Disturbingly, the plans for 2001-02 say "N\a"—not applicable. I am not sure what that means.

Phil Gallie: I think that all of us are a bit unsure.

Angus MacKay: I am advised that it means that, at this stage, GAE for individual services has not yet been split up.

Phil Gallie: If that is the case, and given that local authorities plan expenditure on a year-to-year basis, what guarantee does the Executive have that local authorities will meet their percentage payment expectation? How relevant are the figures?

Angus MacKay: Grant-aided expenditure applies to a number of service delivery areas in local authority budgets. We are not dealing only with individual local authorities; in the case of police forces we are dealing with police boards, which can be composed of a number of police authorities. At present, only two or three police authorities are not spending at GAE, as directed by the Scottish Executive. Those that are not spending at GAE are within a small margin of error on either side. As far as I am aware, that does not have a significant impact on the capacity of the individual boards to deliver policing services. It should be noted that, if a local authority decides to spend beyond its GAE prediction, the additional costs must be met 100 per cent by the local authority.

Phil Gallie: In recent times, expenditure from local authorities has moved up towards the GAE limit. In the past, it did not always do so. We shall wait and see. Thank you for that answer.

Maureen Macmillan: You will not be surprised to learn that I am going to ask about civil legal aid yet again. I understand that it is demand led; the budget reflects the demand for civil legal aid. However, the amount of money that is being spent seems to be falling. There is a projected saving of about £9 million as a result of fiscal fines and so on.

Angus MacKay: That is criminal legal aid.

Maureen Macmillan: I beg your pardon. Nevertheless, the budget is not differentiated between civil and criminal legal aid. If there is £9 million that has not been spent, rather than regard it as a saving, should not we consider other ways of spending it where there are gaps in accessing

justice? We should use savings from other areas to widen access to justice.

Angus MacKay: There are two points worth making, one of which has already been made. The legal aid budget, as you said, is demand led. If the call on the legal aid budget goes beyond what has been budgeted for, we would have to try to find sources from other areas in the department, or from outwith the department in extremis, to ensure that those demands are met.

The £9 million saving made in the legal aid budget in preceding years as a result of the fall in demand could, of course, be concentrated elsewhere in the legal aid budget, civil or otherwise. However, we must take a global view of the justice department budget. Although money is allocated to various sections of the department, those allocations are guidelines with greater or lesser rigidity, but there are constant flows across the budget into other sections and departments. When a saving becomes material, we must consider all competing demands on the justice department's budget.

There are a number of projects and areas, such as crime prevention, community safety and preventing and responding to domestic abuse, where expenditure is needed and where we are now providing significant funding. Those moneys are available only because we are willing and able to consider transferring money from other parts of the budget as the demand increases or decreases. That applies to the legal aid budget as it does to any other budget.

We cannot justify ring-fencing a given amount for legal aid without considering the other priorities that are competing for those resources. One could argue that, in theory, that £9 million should be retained in the legal aid budget and directed at specific issues, but in practice that is not appropriate.

Maureen Macmillan: What has happened to the pilot scheme for extending repayment of legal aid?

Angus MacKay: I am drowning in a sea of paper, but I shall answer your question in a moment.

Maureen Macmillan: Will that scheme continue?

The Convener: Before you answer that, minister, I should remind Maureen that legal aid people are coming to the committee to give evidence. Those questions might be better directed at them.

Angus MacKay: I know that there are concerns about contributions. Maureen Macmillan is referring to the Scottish Legal Aid Board's pilot study into extending the period over which a contribution has to be paid. The report on the study has only recently come to hand, but we will agree to fund the extra costs associated with the extended payment periods. I hope that that will provide some comfort to members who felt that action was needed in that area.

Maureen Macmillan: Thank you.

11:15

Christine Grahame: In his evidence to the committee on 2 May, Professor Frank Stephen said that, although expenditure on legal aid is proportionately pretty much the same in Scotland as it is in England, 62 per cent of legal aid expenditure in Scotland is on criminal cases. He also said that, in England, a person pleading guilty gets legal aid, but that that does not happen in Scotland. The impact of that striking difference is that people want to negotiate a plea bargain or a plea in mitigation if they are pleading guilty. That has an impact in turn, as Gerard Brown of the Law Society of Scotland said, on the cost of legal aid. One can understand why people do that to get a better deal out of the system. Has the Executive considered and costed any plans to make legal aid available for guilty pleas? The European convention on human rights might also have an impact on entitlement to legal aid, and I would welcome the minister's comments on that.

According to Professor Stephen, 11 per cent of civil legal aid applications are abandoned after being granted. Because contributions have to be made, people are not taking legal aid and are therefore being denied access to justice, even though they have shown that they have probable cause. Professor Stephen's evidence shows that the proportion of applications rejected has increased substantially over the decade. Will the minister deal with that issue?

My final question is about costing the impact of devolution issues and ECHR issues on the budget. ECHR claims are anticipated and you may have to take them on board, and there are also grey areas in relation to which matters are devolved and which are not. Do you have an audit of that to date and do you have a projected figure in your costings for the justice department?

Angus MacKay: Last night I read the *Official Report* of the evidence given by Professor Stephen at the previous meeting and I noted with interest the statements that he made. I have some information to pass on to the committee.

The argument, as I understand it, is that making legal aid available for guilty pleas would effectively save the taxpayer money. In fact, the report referred to last week does not contain substantial amounts of hard evidence to support that view at this time. The report devotes half a page, out of 40 pages, to the issue.

There appears to be some confusion about what legal aid is available for guilty pleas. Legal aid is already available for those who intend to plead guilty, under the advice by way of representation schemes. In 1998-99, more than 119,000 grants of advice were made in criminal matters, and almost 16,000 grants were made in respect of ABWOR. Those grants cost the taxpayer more than £10 million. The duty solicitor scheme also costs approximately £1 million each year.

Another point that is worth making is that those who argue for legal aid for guilty pleas have not made clear how that new provision might work in practice. For example, should that provision be made for all offences or just for specific categories? Should existing eligibility rules apply or should new ones? Those questions would have to be addressed. Furthermore, primary legislation might be needed to effect such a change. Given what the committee considered for the first 15 minutes of this meeting, I am not sure that that would be thought the best use of time, although it might be. It may be necessary to amend section 21(3) of the Legal Aid (Scotland) Act 1986, which refers to pleas of not guilty.

Our tentative estimate would be that, contrary to the underlying assumption of the proposal, extending criminal legal aid as has been suggested might cost as much as £6 million each year, depending on the criteria that are used—that is a critical factor. That money is not readily available—we discussed the limitations of the legal aid budget earlier—and would have to be found at the expense of other initiatives.

It has been suggested that Scotland is out of step with England and Wales, where legal aid is available for guilty pleas, but the preliminary inquiries that our officials have made of the Lord Chancellor's Department suggest that the same availability generally exists both north and south of the border. Legal aid may be available in certain circumstances for guilty pleas in Crown courts, but not in summary criminal cases. However, in Scotland, provision is available under the Legal Aid (Scotland) Act 1986 for a court to grant legal aid. I am not sure what the substantive difference is, except that, before 1 April 2000, a contribution would have been required from an accused person in England and Wales. The situation in England and Wales is now in line with that in Scotland, where no contribution has been required. That is the information that has been given to me, following my reading of the report to which Christine Grahame refers. That is an area that would bear further examination, and further excavation of the facts might be useful.

The Convener: Christine, I do not want us to go any further down this road, as we are some way off what we should be doing in this budget exercise. We need to return to the principles.

Christine Grahame: I thought that there would be an impact on the legal aid budget and that funds would be released for others.

The Convener: We are spending too much time on this kind of detail at this stage. We will revisit the budget procedure and consider that level of detail later in the year.

Angus MacKay: Oh joy.

Christine Grahame raised two other points, one of which was on legal aid. I am afraid that I cannot remember the specific point.

Christine Grahame: It was whether you had reflected on the fact that the number of abandoned civil applications is running as high as 11 per cent. That is much higher than in previous years.

Angus MacKay: The committee discussed that issue when I produced two statutory instruments on funding for legal aid. A variety of factors can be at work in abandoned cases, and it is unclear whether there is a uniform explanation for them. That should be examined further, as there would be concern if individuals were abandoning cases for reasons that were not beneficial.

For legal aid support under the ECHR, the notional figure that has been budgeted for this year is £3 million. The figure for next year is £5 million.

Euan Robson: I have a brief question on the Criminal Injuries Compensation Board. I am not sure what has happened to its funding. It has been suggested that that provision—some £5 million—has been transferred to the Home Office. I am not sure whether the Criminal Injuries Compensation Board is a devolved or a cross-border body. Does the Executive intend to examine the role of that board, to evaluate what it is doing and whether it is performing as we would expect it to?

Angus MacKay: The scheme is a cross-border one. Any attempt to evaluate or change it would therefore fall beyond the immediate remit of the Scottish Executive. In the past two years, it has been subject to a revision and is now a tariff scheme.

Euan Robson: So, there is no role for this Parliament to look at the—

Angus MacKay: No, that is not true. Any conclusion about revising the scheme would have to be reached on a GB-wide basis: it would not be within the scope of the Parliament to make a decision unilaterally. We would want to take account of various factors. However, the matter is devolved, so it is within the competence of the Parliament to examine in any respect the working of the scheme and its application in Scotland. As a GB-wide scheme, however, any revision would

require to take into account GB-wide factors.

Mrs McIntosh: I have one question for the minister. Previous questioning dealt with Victim Support Scotland. I have access to correspondence from the convener, which shows that the figures are in dispute. That will have an impact on the services that are provided by VSS and the programme that it will be able to undertake. I know that you are committed to using the services that VSS can provide, particularly for training judges and legal staff. Can you comment on that inconsistency?

Angus MacKay: I can comment on the Executive's funding of VSS. In its 1998-99 report, VSS stated that 85 per cent of its funding for 1999 came from the former Scottish Office. That is a substantial percentage, of which many other voluntary organisations in Scotland would be envious. This year's grant to VSS, for local services, is £1.2 million; for area headquarters and associated costs it is £325, 000; and for training it is £27,000. The total grant for victim support services under section 10 of the Social Work (Scotland) Act 1968 is £1.57 million, and £27,000 is also payable under section 9—in relation to training—which brings the total to £1.6 million. In addition, VSS will also receive up to £660,000 this year under section 10 for the roll-out of witness support services in the sheriff courts. The total grant is therefore £2.26 million.

Mrs McIntosh: I am questioning this merely because I understand, from the correspondence, that the services that Victim Support Scotland provides may be in jeopardy because of a lack of funding and the timing of the announcements.

Angus MacKay: I am not sure whether VSS has raised those points with us directly. Notwithstanding the point that you are making, VSS is not part of the base line, but recurringly funded from in-year savings. I am sure that VSS is conscious of receiving its funding on that basis. I presume that the fact that that has happened in successive years gives them some reassurance that that funding is likely to be available to them again.

Mrs McIntosh: If you have not already heard from VSS, you will in the near future.

Angus MacKay: VSS has not raised that matter with us directly.

Phil Gallie: I have to keep this brief minister, but I have a question on the important issue of prisons. There is effectively a reduction in prison funding. We have seen recent reports from the chief inspector of prisons expressing great concern about conditions in prisons such as Barlinnie. The number of people in prison is going up. How can we accept that the prison budget is going down?

Angus MacKay: There is no reduction in the baseline budget for the Scottish Prison Service. Prison numbers are steady at present: they are not increasing. As you will be aware, £13 million of end-year flexibility was transferred from the prison budget to the rest of the justice department budget, but the service's baseline budget has not been reduced. The service retained £11 million of end-year flexibility out of a total of £24 million, and that is available to it.

11:30

The Convener: Minister, may I direct you to table 5.24, in which the figures are expressed in real terms? It shows a clear decline in funding for the Scottish Prison Service, from £199.9 million in 2000-01 to £195.9 million in 2001-02.

Phil Gallie: They are your figures minister, not mine.

Angus MacKay: That is an unusual occurrence, Mr Gallie. Convener, you are right to point out that those are real-terms figures.

The Convener: So in real terms there is a decline.

Angus MacKay: Those are the real-terms figures. The committee can draw its own conclusion.

The Convener: I have an endless number of questions minister, but you will be glad that I do not have time to ask them all. However, I will ask a couple of them and ask the rest in a letter.

Under the criminal justice social work section, on page 64, is the Executive proposing to increase the use of non-custodial orders or is it merely relying on the courts to make more use of the mechanisms that are already available? Are we planning to increase the ways in which non-custodial orders can be made, or is it simply that you are going to continue to make desperate efforts to get various sheriffs and justices to use the existing ones?

Angus MacKay: It would be fair to say that there is an element of both. A variety of disposals are available to the courts, and greater use could be made of them. We will seek to encourage that where appropriate. You will be aware that in a number of specific areas, drugs for example, we intend to look more closely at non-custodial—or custodial-related, but not immediately custodial—orders. With that in mind, it is fair to say that if we take those forward, it would be the Executive's intention to look at expanding the range of non-custodial orders that are available.

The Convener: We have had information about the Victim Support questions that were asked last week. I am not sure whether this is one of the

matters that Lyndsay McIntosh was getting at. Table 5.4, which is not expressed in real terms, indicates that aid for victim/witness support is static this year and next, at £1.3 million. We had a debate last week about that £1.3 million for 2000-01 actually being £1.57 million. Leaving that aside, either way, the proposals for 2001-02 show a decrease. I am sure that if the figures were translated into real-terms figures the decrease would be even bigger.

Minister, towards the bottom of the page, one of the objectives is

"To promote and develop services which provide support for victims of crime and witnesses through funding of Victim Support Scotland."

The target is to

"Increase from 41,000 referrals in 1998-99 to 48,000 in 2000-01."

There is no target for 2001-02. How can Victim Support reasonably be expected to cope with increases in referrals when its funding will not increase accordingly?

Angus MacKay: The figure for Victim Support in table 5.4 does not take account of in-year funding, to which I referred earlier, because it is funding that recurs annually but is not in the baseline budget. That funding is therefore not in the projections for 2000-01 and 2001-02. Unfortunately, that means that the figures in table 5.4 do not present the full picture in respect of funding for victim and witness support. It may be that we can do further work to make that information available to you when we are dealing with—

The Convener: But the funding still will not increase, will it?

Angus MacKay: The advice that I am getting is that if in cash terms we are going to meet the pressure that is appearing, the funding will increase, but I can probably give you a more thorough answer to that question in writing once we have had the chance to source—

The Convener: I am concerned about the disparity between the target, which is an increase in referrals, and the funding, which does not show a corresponding increase.

Angus MacKay: That is because these figures do not show the whole picture, which is why I am saying that once I get the information I can give you a more complete picture.

The Convener: We have been through the issue of figures not showing the whole picture during previous meetings.

Angus MacKay: I appreciate that. May I say a bit more about Victim Support? I know that the evidence to the committee from representatives of Victim Support Scotland concerned the fact that the figures shown for Victim Support in the annual expenditure report disagreed with the 2000-01 grant for the organisation. This explanation might help. During the 1996 public expenditure survey, Victim Support Scotland received an additional £200,000 in grant for one year only.

The Convener: We have all had the letter that explains that apparent discrepancy.

Angus MacKay: However, succeeding budget exercises in the Scottish Office and the Scottish Executive failed to find additional baseline funding for Victim Support, so the initial budget of £1.3 million has remained static, but at the same time, because it was acknowledged that Victim Support would face significant difficulties should it receive less than £1.5 million, we managed to keep Victim Support funding at £1.5 million, evidenced by the figures that I think you have received for outturn and the estimate figures in table 5.1, by transferring in on an annual basis additional provision from in-year savings accrued elsewhere in the budget.

The Convener: The target fails to go beyond 2000-01. The target for increasing referrals goes up only to 2000-01, which we are in. There is no target for 2001-02. That is a gap, given that we are supposed to be talking about 2001-02. I will leave that issue for now, because we are pushed for time and I know that the minister will want to get away.

If the minister turns to pages 74 and 75, he will see something that looks a little odd. There may be a good reason for it. We have been looking at table 5.18 in respect of the police, but I wish to look at it in respect of asylum seekers. The estimated figure for asylum seekers for 1999-2000 is £8.8 million, but 2000-01 and 2001-02 are budgeted at zero. None of us imagines for a minute that money will not be spent on asylum seekers in Scotland in this financial year and the next, so what is happening?

Angus MacKay: My understanding is that about £5 million of the £8.8 million for 1999-2000 relates to Kosovan refugees. I say that by way of information. The reason for the figures for 2000-01 and 2001-02 is that that expenditure head is transferred to the Home Office. It is now funding those activities.

The Convener: In total?

Angus MacKay: Yes; that is my understanding.

The Convener: In total?

Angus MacKay: Yes.

The Convener: So expenditure on asylum seekers has come out of the Scottish budget until now, but that will no longer happen.

Angus MacKay: My understanding is that effectively we have been carrying out that function as an executive agency, but the funding is now wholly covered by the Home Office.

The Convener: It might have been useful to show that in the table. These are presentational issues, but simply producing a table of the sort that we have here is not particularly helpful.

Angus MacKay: Earlier, I offered the committee a meeting with senior finance officials. The budget contains a number of quirks and oddities that would become much clearer in the context of a presentation from them. That might help to iron out some of these issues.

The Convener: I will desist from asking the other two pages' worth of questions; I will follow them up in a detailed letter.

I thank the minister and his team for attending. We have not yet completed item 2 of the agenda and will now hear from the chief executive of the Scottish Legal Aid Board and the board's director of legal services.

I welcome Mr Montgomery and Mr Murray. As you are already aware, the committee is extremely interested in the legal aid budget. Because we run the risk of going into too much detail for a budget exercise, and because members are tending to pre-empt a decision by the committee to undertake, when its timetable permits, a review of legal aid in Scotland, I will be strict with members. Some members' eagerness to get that review under way is overcoming their concern to keep themselves in order during this stage of the budget scrutiny. Am I making myself plain?

Christine Grahame: I will not ask a single question.

The Convener: That would be a pity, because it would mean that we had invited two witnesses to appear for no purpose.

Maureen Macmillan: I want to ask about details of the pilot scheme for civil legal aid contribution repayments over two years, which I have discussed with you previously. What difference has that scheme made to take-up of civil legal aid? How much do you think it will cost?

Lindsay Montgomery (Scottish Legal Aid Board): I reckon that it will cost between £250,000 and £280,000 in a full year. It is not a huge amount because we get back a great deal of civil aid through recoveries or expenses, which means that the net cost will be in the order of between £250,000 and £280,000.

The pilot indicated that through the extension of instalments, about 14 per cent of people would take up legal aid who otherwise would not. We have added in a little extra for people who, having consulted their solicitor, have heard what the contribution may be and decided not to apply. That means the figure may be between 14 and 20 per cent.

Maureen Macmillan: When will the scheme come into operation?

Lindsay Montgomery: As soon as we can get the administrative arrangements in place following the minister's announcement. The cost is not likely to reach £250,000 for another two years. In the first year the cost will probably be no more than about £60,000, which is marginal.

Maureen Macmillan: I do not think that I am allowed to ask you about policy issues, which are part of the minister's remit, so I will avoid getting into the whys and wherefores of family tax credit and so on. I think you know my views on the lack of access to justice in some quarters. I hope that this pilot scheme, when applied to the country as a whole, will make a difference.

11:45

Christine Grahame: If I waver from the straight and narrow, please tell me, convener. Professor Stephen said that 32 per cent of expenditure on legal aid goes on summary cases in sheriff courts where no trial takes place. That also accounted for 49 per cent of the increase in expenditure. It may not be proper for you to comment on the questions I asked about legal aid being available for guilty pleas, but when you look through auditing accounts—which show what is really happening on the ground—do you think that the criminal legal aid bill could be reduced if legal aid were available earlier for pleas in mitigation and plea bargaining?

Lindsay Montgomery: As the minister said, we have the assistance by way of representation scheme, which is designed in part to put people in the same position as their counterparts in England. Having looked at the figures, we would want to work with the justice department to see whether there is something underlying them that we have not yet worked out. We do not think that it is clear that doing what you suggest would save money. In my short experience at the Legal Aid Board, I have found that everything is much more complex than initial figures show and I suspect that that may be true in this case. However, we want to examine the issue—along with eligibility—as we think there are difficulties with access.

Christine Grahame: A figure of £3 million is projected for the legal aid bill for European convention on human rights issues. Are you satisfied that that will be sufficient? Perhaps it is too much.

Lindsay Montgomery: I doubt that it will be too much. To be frank, I have sympathy with the

Executive in having to come up with a figure at all, as it is extremely difficult to say what the bill will be. We are probably less concerned than the Executive is, because the budget is demand led—if it turns out to be more, the Executive will have to find the money. However, we think that the Executive has made a reasonable stab at it, given the amount of information that we have at the moment, which is not much.

Christine Grahame: Can you provide the committee with any information about why 11 per cent of applications are abandoned, even though legal aid is offered? I imagine that there is still a solicitor's bill.

Lindsay Montgomery: We do not always receive information on why applications are abandoned or why offers that we make are refused. It seems to happen for a wide range of reasons. Sometimes people resolve the problem before the process goes too far, which is a positive outcome for them and for us. However, contributions are also a major factor—people get so far and then decide that they cannot afford to proceed further. We hope that the change to the contribution arrangements will have an impact on that. We will monitor it over the next year to see whether there are other issues that we need to address.

More generally, we are trying to increase contact with the people for whom we provide legal aid and to get information from them on why they do certain things. That could be a useful way of getting better answers to some of these important questions.

Christine Grahame: Are you going to do a survey of people who make applications?

Lindsay Montgomery: A survey may not be the best approach. We may try to obtain targeted information, possibly from solicitors as well as independently. At the moment we lack information on the outcome of cases, which makes me slightly uncomfortable.

Christine Grahame: I see. I have been disciplined.

Phil Gallie: About 6 per cent of expenditure on legal aid goes on administration. What moves has the Legal Aid Board made recently towards efficient provision of services? Do you seek capital investments to reduce administration costs in the long term?

Lindsay Montgomery: I will deal with the second question first. We, and many solicitors who contact us, want to do our business through e-commerce. That would save them and us a large amount of money in administration costs. We have submitted a paper to the justice department that points out some of the investments that would make a big difference in that area and would lead to a reduction in the number of people we require for certain activities. That will be our major drive over the next two or three years.

On internal operations, we are in the process of carrying out a major review of applications, which are the bulk of our activity, with a view to identifying areas where we can become more efficient. However, at the moment my main concern is our effectiveness rather than our efficiency. We are looking hard at how we can improve consistency in decision making and in the information we provide to the people with whom we deal. That will be our main drive over the next year or so. We have indicated to the department that some investment in additional staff resources will be required to deal with matters such as the European convention on human rights. We will need more lawyers to deal with the cases that will come before us. We must strike a balance between investing to be better and increasing our efficiency

Phil Gallie: Given that the budget is bottom-line fixed, I imagine that if you intend to increase staffing that will account for a considerable proportion of your administration costs.

Lindsay Montgomery: It will account for the bulk of the costs.

Phil Gallie: That does not appear to be reflected in the figures that are presented in the document.

Lindsay Montgomery: Our submission to the justice department says what we think will be necessary over the next couple of years and the figures in the submission are slightly higher than those to which Phil Gallie referred. No doubt the department will want to discuss the figures with me soon.

In the previous financial year there was higher investment in staffing and on capital projects than was indicated in the original figures that were set three years ago.

Phil Gallie: If you were to take the e-commerce route, would that perhaps require capital investment? Staff levels might be frozen so that there was a break-even in the longer term and an improvement in effectiveness.

Lindsay Montgomery: My guess is that that would lead to reductions in staffing levels for a number of activities. As well as there being an improvement in how well we do our job, there would be a net gain to the taxpayer over five or six years.

Phil Gallie: Can you give the committee a breakdown of the £127.3 million budget in respect of the proportion spent on criminal legal aid and the proportion spent on civil legal aid?

Lindsay Montgomery: Spending on criminal legal aid ranges between about 58 per cent and 62 per cent of the total.

Phil Gallie: That is not reclaimable. Is the other 38 per cent reclaimable and recyclable?

Lindsay Montgomery: Civil legal aid uses between £30 million and £34 million, minus the recoveries we make, which total about £11 million each year. The net cost is in the low twenties of millions of pounds.

Pauline McNeill: I want to ask about increasing access to justice. Are there any changes to rules regarding civil or criminal legal aid—which would not impact on the budget—that you would like to see?

Lindsay Montgomery: I am not sure whether this is the best place to discuss details of changes to our regulations that we would like to see. There are a number of things that we feel could be changed, which would improve access to justice. That is particularly so of the civil regulations, which is where the major difficulties lie. The board is hoping to examine in detail what we can do under regulation 18 of the Civil Legal Aid Regulations (Scotland) 1996, which is the special urgency provision. That constitutes about two thirds of our civil business. We might—by making minor changes in our practice—be able to expedite access to justice. The problem is not only about contributions; other aspects are involved. That will be a major piece of work in the next six months. There might be some budgetary impact, but we do not think that the changes would cost a huge amount.

The Convener: I want to ask about the objectives and targets on page 67 of "Investing in You". Have those objectives and targets been imported?

Lindsay Montgomery: The Executive produced the document and the figures are based on figures or materials from other documents. We have a separate corporate plan, which will be published.

The Convener: I wanted to get on to that. This morning I mentioned the disparity between the objectives and targets that have been set for different areas. Some of the objectives and targets are very detailed and are easily measurable, but others are not.

Lindsay Montgomery: We have a separate document that sets out our targets and objectives.

The Convener: Can the committee see a copy? It is difficult for the committee to undertake real scrutiny if we do not know what targets you have set for your organisation and how well you have done in achieving your targets in previous years.

Lindsay Montgomery: We will be happy to provide the committee with the document.

We submit the document to ministers—

The Convener: So they have the document.

Lindsay Montgomery: Officials have seen a draft. We will finalise the document in the next week or so. It will go to ministers who will say whether they are happy with the targets that we propose. At the end of the day, they set targets for the Legal Aid Board as a non-departmental public body. That is why the targets are different from those of other organisations that are agencies or parts of the department.

The Convener: Will the targets relate to 2001-02?

Lindsay Montgomery: Our corporate plan will cover the three-year period from 2000-01 to 2002-03.

The Convener: Could the committee have a copy of the previous three-year corporate plan?

Lindsay Montgomery: Yes.

Phil Gallie: Why—for the layman—do you expect criminal legal aid accounts to be paid on time when no such reference is made in relation to civil legal aid accounts being paid—

The Convener: At all. [*Laughter.*]

Lindsay Montgomery: Our targets cover all types of application and account, but criminal legal aid is mentioned because that is where we had a major difficulty last year. We changed the system. Previously we expected a percentage of the account to be paid within so many weeks, but we now expect all to be paid within 30 days.

The Convener: We have established that the Executive's choice of objectives and targets is a rather arbitrary selection by officials from outwith the Legal Aid Board. It will be useful for the committee to see the board's own objectives and targets.

Lindsay Montgomery: We will send you our existing corporate plan and the new one.

The Convener: Have members been sent those already?

Lindsay Montgomery: I would be surprised if the committee does not have the previous plan. On the new plan, we have conducted a major fundamental review of the targets and indicators including public meetings and meetings with local faculties of solicitors.

Christine Grahame: I want to clear something up. If, when the Legal Aid Board submits its targets, ministers examine them and do not like them, do they get changed?

Lindsay Montgomery: Theoretically, yes.

Christine Grahame: So the committee will not necessarily see the targets that you really want to set.

Lindsay Montgomery: The process is brand new.

Christine Grahame: That is why I am asking—it was a brand new thought that I had.

Lindsay Montgomery: We—as a non-departmental public body—are, in the first instance, accountable to the justice department. Ministers are required to set targets if they disagree with ours, or to agree our targets. We are going through that process. In future years I expect that our corporate plan will be available to the committee and to ministers earlier than the new one. We have done a lot of work on reviewing our targets and indicators and the plan is about two months late.

Christine Grahame: Will what the committee sees have been processed through ministers and sent back to you? We could ask about that when we see the targets.

Lindsay Montgomery: You might want to ask the minister whether the targets might also be sent to the Justice and Home Affairs Committee when we give him them. My guess is that it might of more than marginal interest to the committee. [*Laughter.*]

The Convener: There are no further questions at this stage, but I am sure that you will be back before the committee at some point.

I adjourn the committee for brief pit stops and cigarette smoking.

11:59

Meeting adjourned.

12:03

On resuming—

Draft Regulation of Investigatory Powers (Scotland) Bill

The Convener: I bring the meeting to order. People are still coming back, but I want to get cracking, as we have kept Professor Miller waiting for an inordinately long time. As he was a member of the consultative steering group, he has a professional, perhaps fatherly, interest in how matters are progressing, even if he is not directly involved in them.

I welcome Professor Miller and thank him for being patient enough to listen to our discussion. We now have to do one of our many mental leaps and return to the draft regulation of investigatory powers bill. Unfortunately, because we had originally invited the Minister for Justice to give evidence this morning, we had arranged the agenda so that his evidence on the two issues would be back to back. If we had realised in sufficient time what would happen, we might have changed things to give you a shorter wait and us a shorter jump.

I invite you to make a short opening statement. It will be useful if you set out your overall view of the draft Scottish bill, but we expect that you will have to refer to the UK bill. Because there are two bills, it will be helpful if members make it very clear which bill they are talking about; otherwise, we will get into a mess.

Professor Alan Miller (Scottish Human Rights Centre): Given the morning that you have just had, the last thing that you want is for me to say that, on the one hand, the bill is not that bad but, on the other, it is not that great. However, that is often all that one can say about certain things in life.

On the one hand, I do not think that the draft bill deserves excessive criticism. It should be welcomed. Its stated aim is to provide a legal framework for police surveillance to attempt to achieve ECHR compatibility, so it will be an improvement on the present situation. I think that that is recognised by everyone. The draft bill tries to find a fair balance between individual privacy rights and the public interest.

On the other hand, we all know that, to all intents and purposes, this is a UK bill. We should be aware that the UK has a poor record on the issue of surveillance and ECHR compatibility. Members should also be aware that the ECHR is really only a safety net; it is the lowest common denominator among the states of the Council of

Europe. By no stretch of the imagination could it be considered a lofty aspiration or the highest standard for the protection of human rights in its jurisdiction that a country could attain. Therefore, a certain amount of vigilance is required over the bill.

A central question that concerns the committee and the Parliament is whether the Scottish part of the bill is compatible with the ECHR. In the time that you have to consider the draft bill, how do you begin to determine whether it is compatible? At face value, it is arguable that the draft bill could be interpreted in a way that is compatible with the ECHR. That may not be enough to satisfy the test of compatibility. I will explain why not, and give the reasons why we have to scrutinise this or any other bill from an ECHR perspective.

The European convention on human rights is case-driven. It deals with the facts and circumstances of cases that come before a court. It deals not necessarily with the fine print of legislation, but with how legislation is applied in the real world once it is passed. You may want to pay attention to the question of whether the draft bill is sufficiently clear. For example, does it give adequately defined grounds for lawful surveillance so that it will prevent the police from arbitrarily breaching privacy rights under article 8? Will it be enough to prevent the police breaching article 8 by acting disproportionately—operating surveillance when it is not strictly necessary?

The real test of compatibility is to anticipate how the legislation will be applied in real cases and whether the courts will be satisfied that the legislation was sufficient or whether it was too broad and allowed too much discretion and potential abuse by the state. I think that there may be room for concern that, in parts, it is too broad, too vague and there may be inadequate procedural safeguards. Therefore it may lack the quality of law required to make it compatible with the ECHR.

For example, I refer members to section 6 on intrusive surveillance. Under section 6(2)(a), the ground for authorisation to be given is

"for the purpose of preventing or detecting serious crime".

What is serious crime? Section 27(6) states the definition of serious crime. Section 27(7)(b) states

"that the conduct involves the use of violence, results in substantial financial gain"—

and this is the important part—

"or is conduct by a large number of persons in pursuit of a common purpose."

Is there a potential danger that that definition could be open to an interpretation that could lead to intrusive surveillance of, for example, trade unionists involved in industrial action or of environmental protesters on some cause or another who may be doing no more than peacefully protesting, may be engaged in lawful conduct and have no criminal purpose? They would be doing no more than exercising their human rights under article 10 of the ECHR on free speech or article 11 on freedom of association. That is a potential danger because of the inadequate definition.

Although I recognise that we can only deal with the Scottish part II of this bill, it should be said, in passing, that a similar problem may exist in the UK bill. It will apply to Scotland to a certain extent when agencies such as HM Customs and Excise, the Ministry of Defence and the security services carry out surveillance under the UK bill in Scotland. They have wider grounds, which would include national security and the economic well-being of the UK. That definition may also be too broad and open to a certain amount of abuse. It might provide more of a safeguard if serious crime was better defined and dealt with criminal offences that relate to national security, such as espionage, terrorism and conspiracy. The economic well-being of the UK might be more strictly defined to include criminal offences such as fraud, embezzlement, counterfeiting and so on. Adequacy of definition is one area of concern that members might want to consider.

The other two points that I will make are on the adequacy of procedural safeguards. First, it may not be strictly necessary under the ECHR, but the Strasbourg court's case law is clear that it is preferable, and safer, to have a greater degree of independent control over the authorisation procedures, especially as the more serious the interference with someone's privacy and the more intrusive the surveillance, the more stringent the safeguards will be required to be.

Section 10 of the draft bill relates to the authorisation required for intrusive surveillance. That surveillance is not allowed to take effect, other than in emergency situations, before it has been approved by a surveillance commissioner, because it is so intrusive—more so than other forms of surveillance, which are called directed surveillance. It may be a problem, in the real world, when this begins to operate, as some forms of covert human intelligence sources involve, for example, infiltration by undercover agents who befriend someone to find out information and engage in their conduct. They engage in the person's conduct as part of their investigation. There is a scale. We could anticipate cases where a very severe form of interference with privacy may take place, which might well be sufficient to mean that there should be some degree of similar protection.

A surveillance commissioner should be required

to authorise that form of covert human intelligence investigation. For example, if one of your constituents is a drug dealer and an undercover agent is sent to befriend the person and get information, it is quite obvious that this is done and, if nothing comes up, that is fine. However, the person may be innocent. The police may have had misinformation or may be targeting this person for other reasons. It could be such an intrusion to find out all sorts of intimate information about that person's relationships, their families and their business that it would be safer and inspire more public confidence if a degree of authorisation was required by a surveillance commissioner.

12:15

I have a second point on the adequacy of the safeguards. This may not be strictly necessary under the convention, but the convention is only a safety net. Without greater judicial control and without prior authorisation from commissioners for the more serious forms of surveillance it might be more difficult to gain public confidence, especially in the light of the fact that there is no provision in the bill for subsequent notification to be given to an individual after the event that he or she has been subject to surveillance. It may well be that, when such notification could be given without it jeopardising the objectives of surveillance, it might reduce the element of chance in the matter. If the person accidentally finds out, through a leak or a cock-up, that they have been subject to surveillance, only then can they challenge the lawful nature of that surveillance and make a complaint to the tribunal. It may well be that some thought should be given to notification after the event.

There must be a balanced approach. Let us say that a drug dealer is subject to this form of surveillance and nothing comes up, but the police are still suspicious. You could understand that they would not want to be under a compulsion to notify that drug dealer, "By the way, we did not get anything for the past three months, but we have to tell you now." That would clearly not be in the public interest. However, it might be a trade unionist, a Greenpeace activist or an ordinary citizen about whom a lot of information had been obtained and there was no basis for the surveillance. This person was a completely innocent constituent. Is there not an issue that they should be made aware that they had been subject to surveillance? Not only should information that came up be destroyed, but the lawfulness of it should be retrospectively challenged by that constituent to ask, "Why was I put under surveillance in the first place?"

I ask the committee to accept that my comments are preliminary. We are all in the same position. There will be a conference on 13 June at which colleagues and I, having had more time to consider those proposals, will examine in more detail the ECHR compatibility of this bill. I hope that, by then, we will have some idea of the practice in other countries in Europe and beyond. The convener of this committee has been invited to take part in that. I hope that 13 June is not too late and that the committee's chance to make informed comment will not have passed. That will be a useful forum for a more detailed consideration with regard to compatibility.

Phil Gallie: I am a bit perturbed to hear Professor Miller's comment that the UK has a poor record in this. Given the number of people who come to the UK to seek refuge, such as asylum seekers, it would seem that the UK must have a pretty good record. Why did you make that comment?

Professor Miller: Because of the hard evidence from cases that have been taken to the European Court of Human Rights in Strasbourg from the UK. Those cases have led to this bill being introduced and to the bill repealing parts of the Interception of Communications Act 1985, which was the result of a UK case that was lost at Strasbourg.

There was a case last year, from Britain, when the police drilled a hole in a wall and placed a bug so that they could listen to the conversation in a neighbouring house. That was done according to secret Home Office guidelines. That was claimed to be a breach of article 8 of the convention, and the case was upheld when it was taken to Strasbourg. That is part of the reason why we are now sitting round discussing the draft bill.

Back in the 1980s, there was a similar case—that of Malone—which resulted in the introduction of the Interception of Communications Act 1985, tribunals and so on. The track record of the European Court of Human Rights in Strasbourg is there for all to see, and it has found that Britain has not complied with the convention in this area on several occasions. Britain is not alone—other countries are also in that position—but the UK does not have a very proud record.

Phil Gallie: I suggest that, given the sensitivity of the subject, that is probably quite a good record, if the UK has been taken to the European Court of Human Rights on only one or two occasions. Perhaps other countries are not quite as open as the UK is in relation to these measures.

That apart, you referred to lack of quality in the law, and to the fact that human rights are all important. When you talk about human rights, how do you balance those of the vast majority of citizens who never fall under the finger of suspicion with those of people of whom there is good reason to be suspicious and for whom the

draft bill is designed, with respect to intrusion into their affairs?

Professor Miller: The ECHR provides precisely that—it provides for the idea of proportionality. One must have a reasonable balance between the public interest—the aim that one is trying to serve, such as prevention of crime and so on—and the privacy rights of the individual. That is the quality of the democracy in which we all want to live. States have the task of finding that balance, which is then tested by the courts in accordance with the convention. The convention is a balancing exercise—it is a framework within which balance is addressed.

Phil Gallie: What are the principal changes that make the draft bill different, in your mind, from existing practice?

Professor Miller: The minister made fair comment this morning. The draft bill will not give the police greater powers. Rather, it will regulate those powers in a framework that attempts to be compatible with the ECHR and, to a large extent, I think that it will be compatible. That is why I say that, on the one hand, the draft bill should be welcomed, as it is an attempt to improve the situation and, in significant areas, it does so. However, there is still room for some concern as to whether the draft bill has the necessary qualities of being sufficiently strictly defined and of containing enough procedural safeguards, such as having a greater involvement of judicial authorisation in particular.

In that context, the draft bill is, undoubtedly, a step forward.

Christine Grahame: I am grateful to you for your paper, much of which you have addressed, and for your comments on how people know that they are under surveillance. Phil Gallie appears to be quite content with that, but I am clear that I have been under surveillance at some point. My telephone lines in the Parliament have been investigated, and I still await a satisfactory explanation. Yes, Phil—some of us are worried about surveillance, not just of organisations but of political parties.

Professor Miller, you remarked that the provisions of the draft bill, in regard to groups of people for example, were vague and fluffy. What do those provisions mean? There are grave concerns about that.

I want to raise the issue of codes of practice. While that issue may be a red herring, would it be relevant for us to have sight of the codes of practice along with the bill, given that they have statutory import?

Professor Miller: Yes, I think so. While I might have picked up the minister's comments wrongly, I think that he confirmed that Parliament would be able to scrutinise the codes of practice. They are important because it would be difficult to have enabling legislation without seeing how it is to be applied in the real world. That is what the nub of the test will be. If the legislation that provides for those codes of practice is too vague and too broad, the potential for abuse exists.

For example, one case—not from the UK—that went to the European Court of Human Rights involved the bugging of a lawyer's telephone line. His line was bugged not because he was suspected of anything—my goodness—but because one of his clients was under suspicion. Much of the confidential discussion that the lawyer had in the course of his professional practice then became known to the state and, therefore, confidentiality was breached. While the relevant legislation said that it would respect the confidentiality of professionals and so on, there were no mechanisms, regulations or codes that sorted out how that confidentiality would be respected. How does one discriminate between a conversation that should be known to the state and one that should not be? That is why codes of practice are important.

Christine Grahame: We have been given a time scale of six to eight weeks for the codes of practice; we must see them when we are considering amendments to the bill at stage 2.

Professor Miller: Yes.

Christine Grahame: On the Scottish human rights—not, not Scottish. I think that I am inventing it, although that would not be a bad idea. On a Scottish human rights commission—

The Convener: Do you mean the Scottish Human Rights Centre, or—

Christine Grahame: Professor Miller's paper says:

> "Canada, Australia and, close to home, Northern Ireland and soon the Republic of Ireland have human rights commissions to assist legislators and the public in this respect and a decision is still awaited as to whether there is to be a Scottish Human Rights Commission".

Do you think that this kind of legislation will operate properly only if we have a Scottish human rights commission?

Professor Miller: With hindsight, many people will agree that, when we embarked on constitutional change—the Scotland Act 1998 and the ECHR—we should have established an independent, authoritative human rights commission, which could give independent advice to the Executive and identify problems in advance. It could also be a resource for Parliament in situations such as we are facing with the draft bill, and for local authorities, which, come October, will

have to ensure that their actions are compatible with the ECHR and which will want to know what best practice is. Not least, it could be a resource for the public, who have been left out of the debate. Inevitably, public authorities tend to look after their own houses and to get them in order. However, the public have not been given any real understanding of the significance for them of the rights that they are being given under the Human Rights Act 1998.

Therefore, the experience of other countries, such as Canada and Australia or, closer to home, Northern Ireland, is that a commission is indispensable when undertaking constitutional change. Certainly, the United Nations recommended that such a commission should go hand in glove with constitutional change.

Christine Grahame: You made an important point when you said that people do not know when they have been under intrusive surveillance—Phil Gallie might have been for years. It is not good enough that one has somehow to stumble accidentally upon it. I understand that the role of a Scottish human rights commission in part would be to advise the individual, if the bill were to contain provisions to deal with that problem.

Professor Miller: A delicate, difficult balance must be struck. For example, Germany has a subsequent notification procedure. A surveillance commissioner may think, "Well, there are still reasonable grounds to suspect that this person is involved in serious crime. We didn't get the information this time, so I'm not going to tip him off." That is a commonsense approach.

Christine Grahame: I understand that.

Professor Miller: However, there might be other instances where it is clear that the person under surveillance is innocent and always has been. Their privacy has been interfered with, and that person can claim that they should have been made aware of the surveillance, and should be able to challenge that decision retrospectively.

Euan Robson: I have three questions.

You referred to the conduct of

"a large number of persons in pursuit of a common purpose".

Surely one must read section 27(7) in the context of section 27(6). Section 27(6) refers to

"the crime that satisfies the test in subsection (7)(a) or (b)".

I understand precisely what you meant, but I can also see the other meaning that could be construed by reading those subsections together. Perhaps the bill should read "common criminal purpose" or, by deleting "common", should simply read "criminal purpose", such as a large number of persons who are conspiring to rob a bank, for example, or to plant a bomb or some such. Rather than it being a matter of principle, I think that it might be more a matter of drafting.

Do you have any views on the destruction of evidence after an authorisation has been found to be improper? My personal view is that such records should be destroyed—there should be an imperative to that effect, so that evidence is not left lying around when unsatisfactory authorisation has been granted.

Will you also address the question of redress? There is the tribunal, but I cannot find a process for redress. There could be serious circumstances in which someone is severely prejudiced. The bill does not give any indication of the proper process for recompense.

12:30

Professor Miller: Those are significant points. One can look to other criminal law provisions on the destruction of evidence. If someone who has been arrested and prosecuted is DNA profiled, fingerprinted and all that, and is eventually acquitted, the evidence must be destroyed. That is part of the law. Why therefore should the same not apply? The same balance might have to be struck.

In making decisions, a commissioner should be under a stronger obligation to ensure that, if there is no on-going interest in a person or in maintaining the information and no other objective of the surveillance to be realised—as in the case of the drug dealer they did not get one time—the information is subject to destruction.

However, at the same time, we do not want to tie the commissioner's hands completely if there is a legitimate, on-going interest in a person. Simply because they did not get the information during the three months does not mean that the information they did get, which could assist later, should have to be destroyed.

I heard what was said about redress. I read somewhere—I think that it was in the UK bill—that the intention is that the tribunal will be given the powers under section 7 of the Human Rights Act 1998. That means that the tribunal will be given sufficient powers to provide a remedy to someone whose challenge is that their rights of privacy under the European convention on human rights have been breached as a result of surveillance. There are various claims, damages, findings and orders that the tribunal could make.

I have heard concerns that the nature of the tribunal is such that it might not be compatible with the ECHR, in the sense that its scope to assess whether surveillance was properly authorised is limited. The tribunal cannot examine the merits—the facts and circumstances—of a decision, only

the procedure and the form that the surveillance took. That in itself might be a breach of article 6 of the convention, on the right to a fair and public hearing. The tribunal might be challenged if it cannot look into the meat of the decision rather than just checking that the proper procedures were carried out.

Euan Robson: Forgive me if I have missed this in the UK bill, but if questions of redress sit in the UK bill, should they be repeated in the Scottish bill?

Professor Miller: That is probably not necessary. The UK bill provides for the tribunal and the Scottish bill provides for access to that tribunal. I might be being too complacent, but I do not think that there need be a problem.

Pauline McNeill: It is apparent to me that we should have had Professor Miller in before the Executive. That was a bit unfortunate. I found what he said very useful. It made me wake up to what the bill is really about. His evidence was very useful.

I have two questions. First, would cases where surveillance is authorised for one purpose, but information is found for another purpose—say, another crime is committed—be covered by the act, or is that covered by the rules of evidence?

Professor Miller: The member touches on a point that was not explored this morning. If evidence is obtained as a result of surveillance and a person is subsequently prosecuted, and there is a request to introduce the evidence in court against the person, there are a whole range of issues about whether the evidence was lawfully obtained. The defence needs to know the details of the surveillance operation and about all the information that was obtained. There can be a challenge based on whether the surveillance should lawfully have been authorised in the first place.

We have concerned ourselves only with the immediate breach of someone's privacy rights, but there are other issues relating to the trial and the role played, for example, by an undercover agent. Mr Gallie raised a point about witnesses needing protection and being forced to be exposed in court. Other concerns have been raised about entrapment, for example, where an undercover agent induces someone to commit an offence that they would not otherwise have committed.

There was a case in Linlithgow a few months ago. It was a drugs bust in a club and an undercover woman agent induced someone to procure drugs for her. He was then charged and prosecuted. The court clarified the situation in Scotland with reference to the convention. When an undercover agent goes beyond passive information gathering and induces the target to do something that they would not otherwise have done, that is entrapment, which is a breach of the European convention. There are difficult judgments to be made in the course of surveillance operations.

Pauline McNeill: I heard what you said about the UK's record. We will not examine that today, but it worries me, because the paragraph to which you drew attention uses the kind of language that could be used to justify, for example, the tapping of phones. There was one famous, high-profile case in which Ford, I think, tapped the union's phone because it was felt to be a matter of national importance, as the car industry set the rate for other workers around the country. I am therefore well aware that the UK's record has stretched the point quite a bit.

Notwithstanding what Euan Robson pointed out, why is that sentence in there? What was it designed to do?

Professor Miller: The wording is open to interpretation and could be used to justify surveillance of people who might be involved in forms of protest, be they environmentalists or animal liberation activists. We are all familiar with such protest movements, which can on occasion result in criminal activity. The danger is that the wording is not defined strictly enough for us to be confident that the legislation will not be open to abuse once passed.

The Convener: I am sorry. I was going to bring Phil Gallie back in, but I have just been advised that another meeting is booked for this room and that we have overrun our time. I am afraid that members will have to follow up questions with Professor Miller themselves. I did not know about the other meeting.

There were some petitions on the agenda—we will not be able to deal with them. I have asked for them to be put at the top of the agenda for the meeting on Monday afternoon next week. We will definitely deal with them then.

I thank Professor Miller. He will probably hear from us again.

Before everyone rushes off, I ask members to look at their diaries and let the clerk know when we can arrange the private meeting with officials from the finance department that the minister offered us this morning.

Meeting closed at 12:37.

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