JUSTICE AND HOME AFFAIRS COMMITTEE

Monday 15 May 2000
(*Afternoon*)

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JUSTICE AND HOME AFFAIRS COMMITTEE
18th 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

Michael Clancy (Law Society of Scotland)
Professor Christopher Gane (University of Aberdeen)
Detective Chief Superintendent Gordon Irving (Association of Chief Police Officers in Scotland)
Anne Keenan (Law Society of Scotland)
Murray Macara (Law Society of Scotland)
Jim McLean (Law Society of Scotland)
Assistant Chief Constable Graeme Pearson (Association of Chief Police Officers in Scotland)

CLERK TEAM LEADER

Andrew Mylne

ACTING SENIOR ASSISTANT CLERK

Alison Taylor

ASSISTANT CLERK

Fiona Groves

LOCATION

Committee Room 2

Scottish Parliament

Justice and Home Affairs Committee

Monday 15 May 2000

(*Afternoon*)

[THE CONVENER *opened the meeting at 13:35*]

The Convener (Roseanna Cunningham): I have received apologies from Phil Gallie and Lyndsay McIntosh, neither of whom can make today's meeting.

Scott Barrie (Dunfermline West) (Lab): I think that Maureen Macmillan mentioned last week that she could not attend today, convener.

The Convener: In that case, we have apologies from Maureen too. I am aware that Euan Robson has to leave at about 3 o'clock, so he will be sneaking out then.

Scott Barrie: Is there a quorum?

The Convener: Well, the low attendance is the unfortunate knock-on effect of holding a meeting on a Monday at relatively short notice—something that we are trying to avoid in the future. I should explain the last-minute room change for this meeting. We are in room 2 because the Education, Culture and Sport Committee is meeting today and, because of a certain amendment to the Standards in Scotland's Schools etc Bill, the media requested the facility to broadcast that committee's proceedings. I agreed to that, and I do not think that there would have been any point digging our heels in about staying in room 1.

Does the committee agree to meet in private at the next meeting, on 22 May, to consider a draft report on the budget process? That is in keeping with our normal practice when considering draft reports. Is everybody agreed on that?

Members: Yes.

The Convener: You sounded uncertain, Pauline.

Pauline McNeill (Glasgow Kelvin) (Lab): It is just that I will have to give you my apologies for that meeting, convener. I was able to shift my arrangements for today, but I will not be able to do so for next week.

The Convener: I also want to raise the matter of our report on the Carbeth hutters petition. Do committee members feel it appropriate that I suggest to the conveners liaison group that the matter might be considered as an item of future debate in the chamber as committee business?

Members: Yes.

The Convener: It would be quite useful. We would not be guaranteed to secure that, but, given that we have carried out the report, I think that it would be reasonable.

Petitions

The Convener: Item 1 on the agenda is the two petitions that we have been trying to get round to at the last couple of meetings. We will certainly deal with them today as we have simply put them at the top of the agenda. The first petition is number PE89, from Eileen McBride, to repeal the legislation which allows non-conviction information to be included on an enhanced criminal record certificate. Everyone will have received the clerk's note that was circulated with this petition, as well as the letter dated 28 April 2000 from Mrs McBride. We need to consider what to do about the petition.

As the note from the clerk indicates, the letter from the Minister for Justice raises the possibility of an issue in connection with the European convention on human rights. I certainly think that, regardless of anything else that happens today, we should ask the minister to keep us informed of progress in preparing the code of practice that he refers to.

Do members wish to make any input on this issue? Are there any proposals for taking this matter forward? I am loth to close off discussion of the matter at this stage. If there is a human rights issue, we should at least keep the matter alive. I wonder if it is appropriate to follow one of the options that has been suggested, which is to

"seek other views on the likely implications of the use of these Certificates"

and to ask for views about the wider human rights aspects.

Scott Barrie: The issue raised in the petition is potentially quite serious. The information that we have would suggest that the likely legal position is less than clear-cut. The situation is therefore unlikely to go away. Either we can deal—or plan to deal—with it now, or it will raise its head at some indeterminate point in the future. We do not want things to pop up unexpectedly, and I think that we should consider this matter. However, I for one am not in a position to make any decision today based on the information that we have received so far. Perhaps we need to take further information on the matter from other parties.

Pauline McNeill: I am interested in the particular point of this petition. We have to satisfy

ourselves that there is no contravention either of our existing domestic law or of ECHR. Our law is that someone is innocent until proven guilty. I feel that we need a justification for the enactment of part V of the Police Act 1997. I feel very uncomfortable about this. I am aware that there will be reasons why non-conviction information about an individual would be held, but I would also like us to be satisfied that that does not contravene our law. I am not convinced that we can justify breaching such a fundamental human right as being considered innocent until proven guilty.

The Convener: Does anyone have anything else to input on this matter?

I propose that, at this point, we write to some other organisations and, at this stage, seek their views in written form. The Scottish Human Rights Centre is one such organisation, and the Law Society for Scotland's criminal law group might be another. We may be able to raise the matter with prominent academics and commentators. I think that we should proceed on that basis at the moment and see what the balance of opinion is. We could then make a decision on whether to take the matter further.

Scott Barrie: Given that some of the effects of the existing legislation relate to the protection of children, I wonder if it would be useful to talk to some children's organisations about this.

The Convener: That is a good idea. Does anyone else have any suggestions? We will write to a selection of organisations, canvass views and return to the Minister for Justice, saying that we wish to be kept informed on the code of practice. It may be worth while asking the police to give us their views—although they may retreat to the "We'll do as we're told" line of defence.

The next petition for our attention is PE102 from James Ward. It calls for the Parliament to investigate the alleged illegal sequestration of the petitioner, and invites the committee to consider changes in the law—specifically, to consider the provision of a right of appeal against sequestration orders. I think that I am right in saying that there is, at present, no right of appeal against an award of sequestration, although I think that the person who is subjected to such an order can petition the Court of Session for recall of the award.

13:45

I would like to restate the position that the committee has taken before: this committee cannot and should not become involved in rehearsing individual cases. We do not have the right or the locus to do that. We are not a court of further appeal; we cannot and should not have any powers in a judicial capacity. I am not minded that we should change the view, which we have held from the outset, that we should not pursue individual cases.

We can, however, consider the general issue of rights of appeal in sequestration cases. We can also seek information on the current situation and on whether there are any proposals to change it. Following the decision of the Parliament on poindings and warrant sales, the implementation of legislation is likely to be delayed to allow a wider review of the law as it relates to debt. Sequestration would clearly be part of that wider review. It would not be unreasonable for us to write to a number of organisations for general information—along similar lines as we will do with the previous petition. We should seek a range of views on the issue of appealing against sequestration, and we should find out exactly how often sequestration is used.

If no one wants to add anything to that, we will proceed by gathering written evidence until we see whether sequestration will come under the overall debt review. Once we have that evidence, we can bring this issue back on to our agenda.

Draft Regulation of Investigatory Powers (Scotland) Bill

The Convener: Item 2 on our agenda is the draft regulation of investigatory powers bill. We have further evidence to take on the general principles of the draft bill, and we welcome witnesses from the Association of Chief Police Officers in Scotland: Assistant Chief Constable Graeme Pearson and Detective Chief Superintendent Gordon Irving. I do not know whether you wish to take a few minutes to make some general comments or whether you are ready to go straight to questions. The Scottish bill pertains almost exclusively to the actions of the police in Scotland in so far as covert surveillance techniques are concerned. We will be focusing on that.

Assistant Chief Constable Graeme Pearson (Association of Chief Police Officers in Scotland): It might be helpful if we give a brief introduction. The draft regulation of investigatory powers bill does not propose new powers for the Scottish police service. The bill that is under consideration today is on directed surveillance, intrusive surveillance and the conduct and use of covert human intelligence sources.

Members of the committee will be well aware of the challenge that we face from serious and organised crime. It affects all our communities in Scotland. When one deals with organised and serious criminals, it is unfortunately necessary that the police force should have access to the kind of tools and resources that allow people to be brought to the criminal courts so that the courts can then decide their guilt or innocence. ACPOS would welcome the introduction of legislation that contained the kind of powers and guidance that officers already have, and that would allow the Parliament to review the law in respect of those powers.

The Convener: Could you clarify that? Evidence that we heard last week suggested, as you have done, that this draft bill would not introduce anything new, but would simply put on a statutory basis what was being done in practice. What powers do you have at the moment to conduct covert surveillance operations?

Detective Chief Superintendent Gordon Irving (Association of Chief Police Officers in Scotland): At the moment, the power lies in a code of practice, which has been designed by both the Association of Chief Police Officers and the Association of Chief Police Officers in Scotland, along with other law enforcement agencies. The code of practice came into effect from 1 January, with full enactment from 1 April. We saw it as a temporary solution until legislation went before both Parliaments.

The Convener: A code of practice is not a power under which you can operate. What is the statutory basis under which you will conduct covert surveillance operations until 2 or 3 October?

Detective Chief Superintendent Irving: At the moment, operations come under the normal criminal law—operations to investigate crime and to prevent crime. With the introduction of the ECHR, we saw that it would be necessary for the police service to have the legislation in place that would underpin our activities.

The Convener: So this legislation would impose statutory controls where, at present, there are no statutory controls at all?

Detective Chief Superintendent Irving: Yes.

The Convener: May we have a copy of your code of practice?

Detective Chief Superintendent Irving: Yes, I can arrange for that.

The Convener: Thank you—that would be very useful.

Euan Robson (Roxburgh and Berwickshire) (LD): What happens when authorisations are granted that are subsequently found to have been granted for the wrong reasons or to have been improperly granted? In the draft bill, it says that evidence gathered in such circumstances "may"—"may" is the word used, not "must"—be destroyed. In circumstances where information has been gathered when there was no valid authorisation for the surveillance, what would be the police's view? Would the police presume that the evidence should be destroyed rather than not destroyed?

Assistant Chief Constable Pearson: Where evidence had been gathered improperly, or where circumstances had changed and we were no longer interested in a particular individual, I think that our normal approach would be to dispose of the evidence. It is not our normal practice to retain information that is neither pertinent nor appropriate. In the circumstances that you outlined, that principle would have been breached.

The Convener: Would you be comfortable with a presumption of destruction unless there was good reason not to destroy? Is that how you operate anyway?

Assistant Chief Constable Pearson: Yes.

Christine Grahame (South of Scotland) (SNP): I apologise for being late. I was not back as quickly from the Borders as Euan Robson was.

Professor Miller, who gave evidence to the committee last week, had no problems with the

draft bill in principle, because it regulates an existing framework. Nevertheless, he said:

"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".—[*Official Report, Justice and Home Affairs Committee*, 10 May 2000; c 1213.]

Do you feel that there is not sufficient definition of what constitutes the type of people who might have to be surveyed in the first instance? Do your concerns echo those of Professor Miller?

Assistant Chief Constable Pearson: I do not have concerns in that regard. It is difficult for the draftsmen to outline at the outset all the circumstances that would fall within the remit of the legislation. We have operated under guidelines for some considerable time and the evidence of our operations is such that we have had an absence of complaint about our activities and about the focus of our inquiries. I am not complacent about that, but evidence of how the legislation is enforced, once enacted, may make it appropriate for you to return to the subject and redefine problem areas.

Christine Grahame: Do you tell people that they have been under surveillance when that surveillance has led nowhere?

Detective Chief Superintendent Irving: The short answer is no.

Christine Grahame: I see. That point was also raised by Professor Miller.

Detective Chief Superintendent Irving: There are strict guidelines on which individuals we may survey. It would be inappropriate for us to tell an individual that he had been under surveillance, as it might detract from a future surveillance operation.

Christine Grahame: We need to see those guidelines, just as we need a code of practice on surveillance.

My next point is about the warrants or certificates that you get to do your surveillance. As I understand it, it is not like a warrant to search, when you can be stopped in your tracks if it is a fishing warrant or if you find something that was not within its compass to start with. The other authorisations can be retrospectively authorised if you find something that was not in the original application, can they not?

Detective Chief Superintendent Irving: In the main, it is highly unlikely that such an authorisation would take place. For instance, if an officer who was employing a normal, routine directed surveillance found that, in the course of the surveillance, he had moved to intrusive surveillance on a temporary basis, it would be incumbent on that officer to apply retrospectively for authorisation for the other form of surveillance. There are circumstances in which an individual could be following someone and have to step off into private property to avoid detection.

Christine Grahame: I was not talking about moving from directed to intrusive surveillance. I wondered about the basis of the application for surveillance in the first place. You cannot just say that you want to survey someone; you must have a purpose. If, in doing that, something else comes to light, can that be authorised retrospectively? Suppose you were looking for drugs and you find something else.

Detective Chief Superintendent Irving: If one had a directed surveillance and found something else during the course of that surveillance, it would be appropriate for the police service to collect that intelligence to be utilised. Is that the point that you were trying to make?

Christine Grahame: I think that it might be challengeable on that basis.

The Convener: That is not a matter for the witnesses.

Christine Grahame: I find it interesting that the police have said that, as it might leave things open to challenge.

The Convener: The police accept that they might be going into a new scenario.

Assistant Chief Constable Pearson: Very much so.

The Convener: If you undertake surveillance work on somebody, realise after a week or two that you have got things completely wrong and are wasting your time, and pull the plug—as I am sure must happen from time to time—or if something goes wrong for whatever reason, how would section 19 of the draft bill, on complaints to the tribunal, come into play?

You have already said that it has not been your practice, for obvious reasons, to tell people that they are under surveillance; that would somewhat destroy the point of covert surveillance. Regardless of what that surveillance shows—and sometimes it must show nothing untoward and effectively serve to eliminate suspicion about the individual concerned—would anyone ever be in a position to complain to the tribunal?

Detective Chief Superintendent Irving: Let me put it in context. Surveillance is an extremely expensive resource for the police service and is not entered into lightly. There are numerous checks and balances in relation to authorisation of surveillance. A complaint about intrusive surveillance would have to go to the commissioner in the first instance in any event before full implementation. If a complaint were to go to a

tribunal, we would see that tribunal as a one-stop shop for complaints.

The Convener: That is not really what I am asking. How does that remedy ever get triggered? By definition, nobody will know that they are under surveillance. From your point of view, what could possibly be the purpose of section 19? I make no judgment about this, as I understand the position that the police are in, but it would be the police's view that, if surveillance were properly conducted, nobody would ever know that they were under surveillance. Therefore, nobody would ever know whether they were in a position to trigger the remedy under section 19. Do you understand that Catch-22 position? Will section 19 therefore be a bit academic in practice?

14:00

Assistant Chief Constable Pearson: To some extent, the Catch-22 position that you have outlined is part of the difficult area that the committee is examining. As Mr Irving has indicated, enormous hurdles must be overcome before we activate policing of that nature, and those checks and balances should have ensured that our target areas are as accurate as it is humanly possible to make them. It is true that there may be people in the public domain who are oblivious to the fact that they have been under the attention of the police. However, it is difficult to imagine a process whereby we could send them notification after the event without affecting a continuing inquiry. Although one individual might innocently come within the confines of a surveillance operation, others who are connected to that individual might still be live.

The Convener: Does that cast some doubt on how useful section 19 will ever be in practice?

Assistant Chief Constable Pearson: It is always useful to have the ability to follow through. How one activates that ability is, I accept, very difficult in the circumstances that you outlined.

The Convener: It does not seem likely that many people would ever be in a position to do anything about it, as they would be unlikely to know that they were under surveillance.

Going back to Professor Miller's evidence last week, he said that there was no real difficulty with the bill. However, he had a slight concern about the extent to which it might legitimise what he called entrapment or honey traps. At the risk of making police work sound more interesting, dramatic and exciting than it actually is, can you comment on that concern, which has also been raised in the press?

Assistant Chief Constable Pearson: The introduction of legislation will make such possibilities less and less of a daily occurrence. The fact that there is guidance from the Scottish Parliament about the rules and directions that police officers should follow ensures that our operational guidelines will follow through, not only on the word of the enactment but also in its spirit. We already have very strong guidance to officers to prevent such allegations being made in court.

The Convener: At the same time, you must always be concerned that any evidence you collect will be admissible in a trial.

Assistant Chief Constable Pearson: Indeed.

Pauline McNeill: I am having some difficulty making this real for me. I want to pick up on some of the issues that Roseanna Cunningham raised about section 19. What is the situation now? What scope do you have at the moment? The bill refers to agencies, but what agencies are we talking about? Is it mainly the special branch?

Detective Chief Superintendent Irving: The agencies to which this provision might apply include HM Customs and Excise and the security service. Under the police force would be included the National Crime Squad and, possibly, the Scottish Crime Squad.

Pauline McNeill: Is the special branch included under the police?

Assistant Chief Constable Pearson: It includes any organisation with a—

Pauline McNeill: Would the special branch be the main agency as far as the police were concerned?

Assistant Chief Constable Pearson: No.

Pauline McNeill: When you suspect someone of a serious crime, you obviously have some evidence to start with. How much evidence would you have to collate before triggering a request for covert surveillance? Can you give us an example of when such a request would be triggered?

Detective Chief Superintendent Irving: As I said earlier, covert surveillance is a very expensive resource, so we do not use it at the drop of a hat. It has to be necessary and proportionate. There has to be plenty of intelligence available to those who give the authorisation, to ensure that the resources being deployed could not be deployed better elsewhere. There would have to be numerous pieces of intelligence to suggest that the individual concerned was involved in criminality.

Pauline McNeill: You say that someone would ask for authorisation. In the police force, what rank of officer would request authorisation of further surveillance?

Detective Chief Superintendent Irving: It would probably start at the level of the inspector who was the team leader for the intelligence-led operation concerned. A directed surveillance would be authorised by a superintendent. Intrusive surveillance would be authorised by a chief officer.

Pauline McNeill: I would like to ask you about some issues that Allan Miller raised in his evidence to the committee. My question relates to section 27(7)(b), on interpretation, which refers to one of the tests as being

"that the conduct involves the use of violence, results in substantial financial gain or is conduct by a large number of persons in pursuit of a common purpose."

The committee was genuinely concerned about that subsection, because we were not sure what it would mean. Do you currently have power to use surveillance in regard to

"conduct by a large number of persons in pursuit of a common purpose"?

We have in mind large demonstrations—demonstrations about the environment, trade union demonstrations, demonstrations about nuclear disarmament and so on.

Detective Chief Superintendent Irving: The provision could apply to a member of a drugs fraternity that is normally made up of two, three, four or five persons coming together for a purpose.

Pauline McNeill: I think that the subsection is worded deliberately so as not to mention serious crime. It refers to "substantial financial gain" or

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

That suggests a separate category from serious crime. The subsection reads as if people could be rounded up if they were thought to pose some other danger.

Assistant Chief Constable Pearson: Exactly which subsection are you referring to?

Pauline McNeill: I am referring to subsection (7) of section 27, headed "Interpretation", on page 19 of the bill. It reads:

"Those tests are—

(a) that the offence or one of the offences that is or would be constituted by the conduct is an offence for which a person who has attained the age of 21 and has no previous convictions could reasonably be expected to be sentenced to imprisonment for a term of three years or more;

(b) that the conduct involves the use of violence, results in substantial financial gain or is conduct by a large number of persons in pursuit of a common purpose."

Detective Chief Superintendent Irving: Do you want us to interpret each of those?

Pauline McNeill: I wondered whether you thought you had those powers now. We read the subsection as going beyond surveillance of someone suspected of a serious crime.

Detective Chief Superintendent Irving: It could apply to football casuals who are going to an area to cause trouble prior to a football match. Surveillance of that sort would take place at the moment.

The Convener: Could it be extended to apply to Greenpeace or Friends of the Earth? I have in mind concerns about issues such as genetically modified crops.

Detective Chief Superintendent Irving: At the moment that is not the case in Scotland. Any groups subject to surveillance would have to be very extreme. There are plenty of other cases involving drugs and criminality for which we would want to use surveillance.

The Convener: So you think it is about priorities.

Detective Chief Superintendent Irving: Yes.

The Convener: What about those of us who are members of political parties that wish to overthrow the British state?

Assistant Chief Constable Pearson: The subsection refers to "violence" and "substantial financial gain". That indicates the level of threat that we would have to perceive before involving ourselves in this type of surveillance.

Pauline McNeill: I am not convinced that that is what the subsection says, as it finishes by referring to "substantial financial gain" or

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

I will not ask you to interpret that, because that is our job, but are you saying clearly that you do not have that power now and that you would not authorise covert surveillance of a Campaign for Nuclear Disarmament demonstration? I understand that you would have that power.

Detective Chief Superintendent Irving: We would if we suspected that there would be major disruption to public order.

Pauline McNeill: So a senior officer would authorise surveillance of a demonstration because it would amount to

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

Detective Chief Superintendent Irving: No, it would probably be surveillance of an individual or a few individuals within a group who were identified as persons likely to cause major public order problems.

Assistant Chief Constable Pearson: In those circumstances, there would need to be a

perceived threat. In my view, the existence of an organisation pursuing a common cause would not be sufficient to justify covert surveillance.

The Convener: You talked about the drain on resources that covert surveillance imposes and said that, because of that, you had to think carefully about whether it was necessary. Roughly how many surveillance operations take place in Scotland each year—I do not expect a precise figure—and roughly how many people would be subject to surveillance?

Assistant Chief Constable Pearson: Before giving the figures, I want to add one caveat. Expense is an important consideration, but so is the appropriateness of the technique in relation to people's civil liberties—the two go hand in glove. It is not a matter of whether we can afford it, but of whether that level of police activity is appropriate in the context. The total number of surveillance operations across Scotland is somewhere in excess of 1,500 a year.

14:15

The Convener: That is quite a lot.

Assistant Chief Constable Pearson: That is across the whole of Scotland and in all circumstances—the use of informants, ordinary surveillance and intrusive surveillance. That is the figure for all categories of surveillance.

The Convener: Will all categories of surveillance be covered by the legislation?

Detective Chief Superintendent Irving: Yes. Directed or intrusive surveillance will be covered. That means all 1,500 operations.

The Convener: Roughly how many people are under surveillance? There may be more than one person per operation.

Assistant Chief Constable Pearson: It would be difficult to give that figure without going through each individual case.

The Convener: But would not there frequently be more than one person per operation under surveillance?

Detective Chief Superintendent Irving: In the main, one person will be under surveillance. In some operations there will be two or three. It is extremely difficult to give the exact number.

The Convener: In a sense, this question follows on from some of the points that Pauline McNeill raised. Section 3(3) talks about authorisations and indicates different categories of activity. I am curious about the difference between them.

Everybody understands what is meant by

"for the purpose of preventing or detecting crime",

but what is the difference between "preventing disorder" and

"in the interests of public safety"?

How would you differentiate between "public safety" and "public health"? Are you able to give hypothetical examples of what might fall into one or other of the categories to help us?

Detective Chief Superintendent Irving: The recent demonstrations in London are an example of preventing disorder and acting in the interests of public safety—members of extreme groups taking over a demonstration, causing damage and potentially endangering members of the public.

The Convener: But can you differentiate between preventing disorder and acting in the interests of public safety? I am curious as to why one is bracketed with detecting crime and the other is separate.

Detective Chief Superintendent Irving: It is all in the drafting. As far as we are concerned, preventing disorder could be something that is totally separate from detecting crime.

The Convener: Yes, but how is that differentiated from public safety?

Assistant Chief Constable Pearson: Local authorities would perhaps be interested in preventing the spread of E coli, for instance, if information came forward about—

The Convener: Is not that public health?

Assistant Chief Constable Pearson: Yes—or public safety.

The Convener: We ask the same question of everybody. There are a number of different categories and we need to try to establish what each of them means in practice. Your answers suggest that the definitions are not really that obvious.

Assistant Chief Constable Pearson: Public safety is probably someone else's expertise. It might include, for example, the sale of faulty goods—refurbished refrigerators and that kind of thing. Public authorities might want to investigate the circumstances, but it is not something in which we would usually be involved.

The Convener: Maureen, did you have a question?

Maureen Macmillan (Highlands and Islands) (Lab): You have covered the questions I wanted to ask, convener.

Euan Robson: Subsection 2(2) talks about civil liability and suggests:

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

(a) is incidental to any conduct"

and so on.

Being a layman in such matters, I am worried that there may be circumstances in which a bystander could be severely prejudiced. For instance, if someone was filming from a car, which moved off and ran into the back of another parked car, the legislation suggests that there would be no civil liability. Am I reading the bill incorrectly? What is your view? What is the current practice? If a situation such as the one I described develops, what happens about liability in relation to third parties?

Detective Chief Superintendent Irving: If an officer involved in a surveillance operation strayed temporarily on to private property, that officer would not be subject to any civil liability. However, if the officer was filming and was involved in a road accident—although I find it hard to imagine circumstances in which he would be driving and filming at the same time—he would be subject to the same procedures as any other member of the public.

Euan Robson: I am concerned about whether that subsection gives carte blanche to anybody involved in certain authorised activities. Will they have no civil liability in any circumstance? You gave the example of an officer going into private ground in the course of his duty. If he inadvertently let a pedigree dog out of its kennel or out of the garden and the dog was run over—I am trying to think of circumstances that might occur—is it currently the case that the officer would have no civil liability whatever?

Detective Chief Superintendent Irving: We need to get back to the idea of what is proportionate. If an officer strayed off the course of a surveillance on to private property and inadvertently opened a gate and the owner's dog ran away, I would hope that he would not be subject to civil liability. However, if the officer were involved in criminality—for example, if he committed an offence by driving a vehicle and filming at the same time—he would have to be subject to the same procedures as any member of the public.

Euan Robson: I was not suggesting that the officer was driving, but he might be filming in a car whose driver drives into the back of another car. I was not suggesting that the police drive and film at the same time. I am sorry.

Detective Chief Superintendent Irving: It would be difficult to outline all the sets of circumstances in legislation, but the use of surveillance has to be proportionate.

Euan Robson: Thank you.

Christine Grahame: I have two questions. My first follows on from Roseanna's question on subsection 3(3) about the various categories, which are also reflected in subsection 4(3). Subsection 3(3)(d) requires authorisation

"for any purpose (not falling within paragraphs (a) to (c) above) which is specified . . . by an order made by the Scottish Ministers."

From your experience, can you think of an example that does not fall within those other three categories?

Assistant Chief Constable Pearson: We have not exercised our minds on that question, as it is none of our business, to be quite honest.

Christine Grahame: But from your experience, does everything fall into the other categories?

Assistant Chief Constable Pearson: Anything that has been of interest to the Scottish police service has fitted into the categories that have been outlined so far.

Christine Grahame: So, you can think of nothing that might require a catch-all provision.

My second question is about search warrants. Can you clarify the current situation? What does one have to state when one applies for a search warrant? Will these authorisations be different? I have raised a concern about getting authorisation for one thing, but then finding something else. If that happened and you got an urgent authorisation, would it apply retrospectively? I want to get my head round what happens now and what will happen.

Detective Chief Superintendent Irving: As far as the search warrant is concerned, the police officer would go to the procurator fiscal. Thereafter, the application would, in short, go before a sheriff, who would grant—or otherwise—a warrant for search. As far as—

Christine Grahame: That was too short. Would the warrant be for a specific purpose?

Detective Chief Superintendent Irving: Yes.

Christine Grahame: How much has to be specified? That is what I am trying to get at.

Detective Chief Superintendent Irving: You would have to specify the type of material that you were probably looking for.

Christine Grahame: That is what I am after.

Detective Chief Superintendent Irving: That might be stolen property, firearms, or whatever. You would also have to show that you had good reason for making the application.

Christine Grahame: Right. What would happen if you found something else while you were searching?

Detective Chief Superintendent Irving: It would be incumbent on you, if you were searching, to seize that property.

Christine Grahame: If, while you were searching with that warrant, you found something else—say drugs—instead of weapons, what would happen?

Detective Chief Superintendent Irving: You would seize it and take forward what you found.

Christine Grahame: Sorry?

Detective Chief Superintendent Irving: You would seize it, and report the person concerned to the procurator fiscal.

Christine Grahame: And then?

Detective Chief Superintendent Irving: The matter would go before the court.

Christine Grahame: Would that be solid? I do not know; I am not a criminal practitioner.

Gordon Jackson (Glasgow Govan) (Lab): It is fine.

Christine Grahame: Okay. That is fine. I just wanted to ask.

You can see what I am trying to get at. If, having been authorised for a public health matter, you then got into another category and said, "We have discovered that it isn't a public health thing, it's some kind of political demonstration", would you have to go back and get authorisation? Is that how the system functions? Would that be like for like?

Assistant Chief Constable Pearson: We are getting ourselves into a bit of a hole about how the system will operate in practice. Fortunately, the vast majority—a huge percentage—of what we are dealing with is serious crime.

Christine Grahame: I understand that.

Assistant Chief Constable Pearson: Unfortunately, the individuals who are involved in serious crime do not fall into one category of crime; they tend to be multi-talented. As a result, although we may pursue them in one avenue, other avenues will crop up. As Mr Jackson said, the process that has been outlined has been accepted by the Scottish courts.

In practice, not many difficulties arise in this regard. The courts decide whether what the police officers have done in the circumstances has been fair. If officers had to outline exactly what they sought to achieve, could deal only with what was outlined in the initial agreement and were unable to touch anything else, that would be difficult. Enforcing that on a day-to-day basis would be almost impractical. The officers must proceed on the best information that they have and, in the interests of justice, be as open and transparent as possible with the knowledge that they have at the time of making the application.

If the officers were to proceed on a drugs search—that seems to be the subject just now—but came across, say, firearms, it would be nonsense for them to say that the firearms were out of bounds and to have to walk away.

Christine Grahame: Say that you found neither drugs nor firearms, but discovered that the individual was planning a demonstration about genetically modified foods or something. Would that come under public interest?

Assistant Chief Constable Pearson: There would be no criminality involved in that, so we would have no interest in it.

Christine Grahame: One man's disorder might be another man's demonstration.

The Convener: My only concern about that is, where is the criminality element about protecting public health or the interests of public safety? Perhaps the police do not get involved in such things; we may be talking about other groups of people. There could be serious public health matters that do not involve any criminality.

Assistant Chief Constable Pearson: Yes.

The Convener: You could be investigating drugs, then realise that you have stumbled across something completely different, which does not involve criminality but is about public health.

Assistant Chief Constable Pearson: Yes.

The Convener: On the basis of what you have said, if we follow through on existing practice, you would be equally entitled to draw that to the attention of the relevant authorities.

Assistant Chief Constable Pearson: We would have a public responsibility in those circumstances.

The Convener: Yes.

Gordon Jackson: You may or may not want to answer this—we are just trying to get honest answers, if possible. Do you think that putting all this in statute is a good thing, or would the system be better left the way it was?

Detective Chief Superintendent Irving: The legislation has been brought in, primarily, to ensure compliance with ECHR when it is introduced on 2 October. I think that it is a good thing. It provides regulation for such activity and an overview and redress for members of the public.

Gordon Jackson: Will it have any adverse effect on policing ability? That is what some people worry about. I suspect that one of our number, who is missing, might worry about that

quite a lot—if I may say so in his absence. I can anticipate the line that some people would take and imagine them having a legitimate worry that we were shackling police effectiveness.

14:30

Assistant Chief Constable Pearson: It is down to the committee's abilities to try to ensure that that does not occur. As I said in my introduction, our real areas of concern are serious and organised criminals. They move quickly, and have the ability to use technology and move before the authorities can get through the process of debate, committee and discussion.

As Mr Irving said, it will be useful to have clear legislation to guide us on what is acceptable and unacceptable in a modern Scotland. The challenge for the Scottish Parliament is to ensure that that legislation is effective in enabling all the authorities to combat a serious threat to communities in Scotland and to the country's financial well-being.

Gordon Jackson: The example that is in my mind is in section 4, which deals with "covert human intelligence sources". That is a lovely, lovely phrase for something for which we have used a simpler term for many a long year. In section 4(6), there are strict rules about how that source has to be dealt with. He has to have a handler, and the handler has to have another person, presumably senior, who is handling the handler and the source. Then someone—it does not have to be another person, it could be the same one—keeps records of everything that the source is doing.

I have the impression sometimes that a lot of unofficial things go on. I do not mean improper things, but for all the years that I have dealt with the police, I am deeply conscious that I never know what is actually going on. I am also conscious that police work—at grass-roots, detective constable level—depends on sources, or informers. The system would not work without that; at pub level, that is how it functions. Are you satisfied that all the formal requirements will not put over-admin on to the system? I am referring to all those levels of handlers.

Assistant Chief Constable Pearson: All the admin, as you describe it, is there not only to ensure that we can demonstrate externally the appropriateness of our relationships with informants, but to protect individual officers, who—as you will know—have in the past been subject to allegations because of their relationships with individuals who are seen as being part of the criminal world.

Some of the administrative processes may be inconvenient, but they will ensure that proper account is taken of the way in which we administer information, that proper value is attached to that information and that young detective constables—as you described them—are more attuned to a formal, healthy way of administering people who operate outwith the police service. The processes will also ensure best value from the use of the information that is obtained.

I do not suggest that you were hinting at this, but it may be that, in the good old days, such things operated informally and with great effectiveness. As a former young detective constable and detective sergeant, I have a dim memory of some of those experiences. However, in a modern Scotland, it is appropriate that we administer the systems properly. From time to time, the public want to know what went on, when it went on and who was involved. Unless we have such a system of monitoring and recording, we are unable to demonstrate the facts as requested.

Gordon Jackson: Again, this might not be a fair question. You have said that you have a dim memory of being a young detective constable. I have an equally dim memory of the current chief constable of Strathclyde police being a young detective constable and behaving in certain ways, which were perfectly right, but were not as regulated as they would be nowadays.

Do you think that the view that you have, as very senior officers, would be shared across the grass-roots level? I have often found that senior police officers reach a stage where all this is behind them and they are happy with the systems, whereas the officers on the street are not so keen on them. There is often a difference in views. I know that we can go and ask the grass-roots police, but you are here, so I am asking what you think.

Assistant Chief Constable Pearson: I do not know whether to feel insulted by that remark or not. [*Laughter.*] Although it has been some time since I operated at detective constable and detective sergeant level, I hope that I am not out of touch with the reality of what is happening. Detective officers have a difficult role to play in the modern world. Things are complicated out there. Some of the criminals that we deal with have access to substantial wealth and resources. It is incumbent on the Scottish police service to ensure that its officers are properly protected—not only in a physical sense, but in a moral sense—from attempts to corrupt them or to make unfounded complaints against them.

Many officers would much prefer that they could go back to the easier days of previous decades, but when they think about the implications of what they suggest and the experiences that they have had in the past 10 or 15 years across the UK, they realise—quite sensibly—that all this admin, as you describe it, is for their benefit as well as for the

benefit of the service.

Gordon Jackson: I am sure that it is for their benefit. I find myself in an odd situation, as I have spent all my life arguing with the police about keeping the rules. I now find myself wondering whether we are going to over-shackle them, which is a slightly odd position for me to be in. We must strike a balance between protecting officers and ensuring proper public accountability, while also ensuring that the police can operate. Do you think that the bill strikes that balance?

Detective Chief Superintendent Irving: From a practical point of view, the bill strikes the balance perfectly. The officers are aware that there are guidelines and checks and balances. The senior officers are there to ensure that those are implemented. Young officers who handle informants are reassured by the fact that everything that they do is supervised. I think that the bill strikes the right balance.

Gordon Jackson: Authorisations for covert intelligence and direct intelligence will be granted by a rank to be determined by the Scottish ministers. At what level do you think that that should be?

Detective Chief Superintendent Irving: For directed surveillance, it should be superintendent level. For intrusive surveillance, it should be—

Gordon Jackson: The rank is specified for intrusive surveillance, but for covert surveillance—directed surveillance and the use of informers—the rank is to be specified.

Detective Chief Superintendent Irving: I think that it should be superintendent rank. That activity is something that happens daily; it is part of the bread and butter of intelligence-led policing.

Gordon Jackson: Except in emergency circumstances, the intrusive surveillance under this section must be authorised by the chief constable. Chief constables tell us that they are very busy people and in my experience they are. It is a huge job to be chief constable of, for example, Strathclyde. Does that provision put an extra burden on that one person in the force or is intrusive surveillance not such a big issue?

Assistant Chief Constable Pearson: The suggested step of intrusive surveillance is so serious—and is viewed as such within the service—that the chief constable should be involved in any decision. That indicates the approach that is taken internally to all the matters that we have discussed this afternoon. None of these avenues of investigation are taken willy-nilly; none of them are pursued casually. If there is a proposal to go down those roads of investigation, operational officers take extra steps to ensure that the information is accurate, that the means that are being proposed are appropriate and that no other avenues can be followed to achieve the objective. That is reflected in the seniority of the police officers who will check and decide whether the proposed action is appropriate.

If one decided that one was going to take a more casual approach—if I can put it in those terms—the knock-on effect would perhaps be to decrease the seriousness with which one viewed the steps that one was going to take.

Gordon Jackson: If you are saying that the chief constable's head is on the block, you had better get it right.

Assistant Chief Constable Pearson: If we are saying that the chief constable's head is on the block, I think that he would like to be part of the decision-making process.

Gordon Jackson: Fair enough.

The Convener: Thank you very much for coming to speak to us. No doubt we will see you again, as part of some other inquiry.

I now ask the witnesses from the Law Society of Scotland to move into their seats.

Thank you for coming. We have Michael Clancy, who has been in front of the committee before. Also here are Anne Keenan, the deputy director of the Law Society of Scotland, Jim McLean, the convener of the society's intellectual property committee, and Murray Macara of the criminal law committee.

I do not know whether you want to make general comments about the bill. This committee has received the note on the UK bill from the Law Society of Scotland. You will all be aware that the Scottish bill is much narrower and relates to specific activities of the police rather than to electronic aspects, which are being dealt with by the UK bill. Would Michael Clancy like to make a brief introductory comment?

Michael Clancy (Law Society of Scotland): We are grateful, once more, that you thought fit to invite us to comment on a measure. I hope that the contribution that we make will be of use to you.

The Law Society of Scotland has still to work this bill right the way through its committee and council structure. What we say is the collective view of a working party, comprising members of the criminal law committee and the intellectual property committee; other views may arise as the bill progresses.

In general, the society welcomes the idea of legislation on investigatory powers, although there are concerns about aspects of the bill. The way that we have divided up the apportionment here is that we have some concerns about sections 1, 2, 3, 4, 5, 6—

The Convener: Can we be clear that we are talking about the Scottish bill alone?

Michael Clancy: Yes—the Scottish draft bill. We also have concerns with sections 13, 15 and 16, which leaves only two or three sections that we do not have concerns about. Having said that, I know that committee members will have issues that they want us to focus on, so it is over to you to direct us.

14:45

The Convener: You will have heard some of our questions to the police. May I direct you to section 19 and the issue of the complaints tribunal? What is your response to the reasonable concern that the section is almost unenforceable since, by definition, how would anybody ever know that they were under surveillance in the first place?

Jim McLean (Law Society of Scotland): We have not worked out an answer to that. On the one hand, the tribunal is a sensible solution. On the other, as you say, if people do not know that they are under surveillance the tribunal might never be used. I imagine that they would find out after the event.

Michael Matheson (Central Scotland) (SNP): I have a question on the helpful note that you gave to members. The police evidence was interesting, in that they said that one of the reasons for the bill was to ensure that the codes of practice under which they operate comply with ECHR. Naturally, as a committee and as a Parliament, we have a responsibility to ensure that the bill does that. However, it is interesting that you have major concerns over the bill's compliance with ECHR. In particular, you refer to article 6 of ECHR and the right to a public hearing before an independent and impartial tribunal. You highlight a possible conflict of interest when a minister of the Crown authorises a warrant to deal with something that is in the interest of the Crown. Could you expand on that? Do you have a possible solution to the problem?

Anne Keenan (Law Society of Scotland): The starting point is that ECHR sets out de minimis rules; that is, all contracting states must comply with its basic points. That is the minimum, but we can strive to have more than the minimum in our law. From case law that I have come across, it may be argued that the granting of warrants by the secretary of state is compliant with the convention. However, to protect individuals, it may be better to have some form of judicial recourse, and a right for sheriffs to grant some of the authorisations that are referred to in the bill. For example, with regard to search warrants and other types of orders, it is common that recourse may be had to a sheriff, therefore it might be appropriate to give consideration to such recourse in the bill.

Michael Matheson: The problem with that goes back to Roseanna Cunningham's point. If someone does not know that a warrant to undertake surveillance has been applied for, how can they request judicial recourse?

Anne Keenan: That depends on the way in which authorisations are granted. Rather than the secretary of state granting authorisations, it could be a case of the police applying to a sheriff for them.

The Convener: The bill that we are dealing with does not involve the secretary of state granting authorisations. We must be careful. You are asking questions about the UK bill, Michael.

Michael Matheson: Yes, but that is what was referred to—

The Convener: I know that the Law Society's note refers to the UK bill.

Michael Matheson: In Scotland, senior police officers would grant authorisations.

The Convener: Yes. Because we have two bills, one relating to the police in Scotland and the other—

Michael Matheson: Could not the same point therefore be argued for a senior police officer?

Anne Keenan: Yes; it is a similar point. Instead of applying to a senior police officer in Scotland, recourse could be had to a sheriff.

Michael Matheson: The other point that you highlighted concerned privileged information. You referred to the legal profession's privilege with regard to access to information. Obviously, that is an issue of concern for your profession. Does similar concern extend to the medical profession?

Jim McLean: Yes. The legal profession operates two different kinds of confidentiality with respect to information. One is privileged information, where we are operating as part of the justice system and people are seeking advice. The other is confidential information, which is a lesser form of confidentiality, when we are doing transactions for people. There is a concern with privileged information. I do not think that it would ever be proper for a lawyer to be a covert human intelligence source in the privileged sense, but it could, and would, happen for confidential information. One would have thought that a doctor or clergyman should never be a human intelligence source. There may be certain occupations that should never be used in that way.

Euan Robson: I wish to ask a question on civil liability in section 2. Should I be concerned about the phraseology of the section, which suggests to me as a layman that in almost no circumstances

would there be any liability if I were injured as a third party when caught up inadvertently in lawful surveillance? Am I missing something, or do I have grounds for concern?

Michael Clancy: We would seek clarification of the extent of the immunity from suit, in particular in relation to section 2(2)(a), which states that a person will not be subject to any civil liability in respect of conduct that is

"incidental to any conduct that is lawful".

When I sat in on last week's meeting and heard this matter being raised, it brought to mind many scenarios where "incidental" could be construed as part of the whole. It might be difficult to separate out a substantial aspect of the conduct from something that might be incidental to the conduct. Jim McLean also had an issue with this.

Jim McLean: Apart from that general point, my concern is directed at immunity from breach of confidentiality and breach of the right of privacy. May I talk about privacy, convener, because there is an issue that is of more general concern? The bill and its UK counterpart are based entirely on the concept that the only problem is with the public authority. It is true that ECHR and the Human Rights Act 1998 are about the public authority, but one of the duties of the public authority is to secure the rights of the citizen under ECHR against anyone, including against the private sector. There is nothing in the proposed legislation that gives any code or guidance for private surveillance, which is not authorised by any public authority.

Would it be appropriate if I indicated a concern about the relationship between this legislation and some other legislation that covers covert human intelligence sources? There is concern about the meshing of the draft Scottish bill—and the UK bill—with the laws on money laundering, especially with regard to the law on tipping off. At present, there are three sets of laws relating to drugs, terrorism and other crimes. They deal with money laundering, with three sets of prohibition against doing anything that might tip off the alleged criminal to the fact that an investigation is under way. Those laws give immunity from breach of confidentiality in such situations, which acts as a sort of informal requirement to become a covert human intelligence source. If a person is to avoid the offence of tipping off—having formed a suspicion that money laundering is going on—he must then co-operate with the police and carry on with whatever transaction is going on. That is not an enviable position for an individual to be put in.

This bill provides for a much more directed and structured way for dealing with surveillance, and—

The Convener: "This bill"? The Scottish draft bill or the UK bill?

Jim McLean: The Scottish draft bill. It allows for dealing with the situation that I described and provides for the protection of someone who finds themselves in that position. Section 2 overrides not only questions of confidentiality, but any question of rights of privacy, even in the private sector—and that is coming up under ECHR, one way or another.

The draft bill provides for a reasonably structured way of dealing with this matter, and I hope that the opportunity will be taken to clarify the relationship between authorised surveillance under the draft bill and the informal system under the Criminal Justice Act 1988 and other legislation. There is concern about that relationship.

The Convener: Do you have further questions, Euan?

Euan Robson: No—I will need time to take in those comments.

Christine Grahame: I am finding it difficult, when we are working just a little bit on a bill, to keep to the agenda. I want to ask Michael Clancy about the Law Society's note to us. When you refer to clause 10 allowing

"the Secretary of State or senior official to alter warrants or certificates"

does that refer to the UK bill?

Michael Clancy: Yes.

Christine Grahame: So I do not need to go and look at all that?

Michael Clancy: No, you do not.

Christine Grahame: I was just asking about authorisation of certificates and of the police. That is not relevant?

Michael Clancy: The note to which you refer is about the Regulation of Investigatory Powers Bill, not the draft regulation of investigatory powers (Scotland) bill.

Christine Grahame: I understand the problems of separation of powers for the tribunals and appointments, with regard to ECHR. Perhaps this is not in the draft Scottish bill either. Professor Alan Miller noted that the tribunal—the creation of which is provided for in the bill—can consider only the procedures that have gone through and the form of the procedures, not the substance. Does that represent a breach or potential breach of ECHR?

Anne Keenan: Yes.

Christine Grahame: If everything else is by the by, and no other pals are involved, should the party who has been under surveillance be told—once they have been cleared—that they have been under surveillance?

Michael Clancy: If it were me, I would like to know, but I do not know if that would be possible, operationally.

Christine Grahame: In terms of ECHR, do you think that that person should be told that they had been under surveillance, if all other matters had been resolved?

Jim McLean: I do not think that that is absolutely necessary. If there has been a good reason and a legal framework for the surveillance, I am not sure that the individual is entitled to know that it ever happened.

Christine Grahame: So we are back to "how would they ever know" and "how could they ever challenge it" and "was it for a good reason"? They will never know whether it was for a good reason.

We are handicapped because we have not seen the codes of practice. Roseanna Cunningham has asked for the existing police guidelines, but we do not know them. Is it essential that we consider the draft codes of practice before proceeding any further with amending or considering the draft bill?

Murray Macara (Law Society of Scotland): It is a matter of common sense: such consideration would be necessary.

Christine Grahame: I just wanted you to put that on record—thank you.

Michael Clancy: There are other aspects of the bill for which prior consultation would be useful. There are various provisions under which Scottish ministers are permitted to make orders under the bill, but there is no provision for consultation on draft orders. A requirement for such orders to be consulted upon would also be a useful addition. Notwithstanding the general spirit of things today, a legal obligation to consult could be helpful.

15:00

Christine Grahame: You have triggered it again, Mr Clancy—I asked a question about one section. I cannot remember which, but it does not matter as it is repeated in section 4(3)(a), which reads:

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

There is also the catchall, provided in sub-subsection (d):

"for any purpose (not falling within (a) to (c) above)".

Can you think of anything that would fall within that and which would require that section?

Murray Macara: It is a mirror image of the UK legislation, which is drawn in far wider terms—it includes HM Customs and Excise and various other functions. Sub-subsections (a), (b), (c) and (d) all appear in the UK legislation.

Christine Grahame: But do we need subsection 3(d)?

Michael Clancy: It is difficult to say whether it is needed in a substantial way. Knowing, however, that ministers always like the comfort of a catchall provision, I am sure that they would agree with the need for it. There may be things that fall outwith sub-subsections (a), (b) and (c) that we have not had time to figure out. If you want, I will give some thought to section 4(3)(d) and try to come up with some examples for you.

Christine Grahame: That would be helpful.

Pauline McNeill: Your opening remarks indicated that you have a number of concerns about the draft Scottish bill. What is your biggest concern?

Murray Macara: One concern is about the operation of section 6, which relates to intrusive surveillance. Intrusive surveillance relates only to preventing and detecting serious crime. The definition of serious crime is lifted straight from the UK legislation, and is dealt with under section 27 subsections (6) and (7) of the Scottish bill. Subsection (6) reads

"In this Act— . . .

(b) references to serious crime are references to crime that satisfies the test in subsection (7)(a) or (b) below."

We have no problem with subsection (7)(a), but subsection (7)(b) gives rise to some concerns. It reads

"that the conduct involves the use of violence, results in substantial financial gain or is conduct by a large number of persons in pursuit of a common purpose."

There are many activities which are not unlawful but which involve "substantial financial gain" or which involve

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

That is a straight lift from the UK bill—are we to go a separate way if the committee shares our concerns on the definition of serious crime?

Pauline McNeill: We are already examining that point. In your view, does section 27(7)(b) extend the existing police codes, or does it reflect the powers that are already there?

Murray Macara: I must express a measure of ignorance: I do not know the current police guidelines on that matter. I have serious concerns about what is meant by "serious crime". Anyone can understand what subsection (7)(a) means, but one has some difficulty understanding what sub-subsection (b) means. There are also ECHR implications—I notice Professor Gane nodding his head in the public gallery. There are implications under article 8 of ECHR on the operation of that definition.

Pauline McNeill: I want to take you back to something you skimmed over earlier about situations that are not covered. I think someone said something about being worried about private situations that are not covered. Can you say more about that?

Jim McLean: People are under the impression that there is no privacy right in the UK, because, so far, such a right has not been established in case law, and the convention has not been drawn upon in order to form that case law. However, the right of privacy exists under the convention and if that right is invaded, there has been a violation. We will find that privacy law will come, one way or another, whether from the courts or from legislation. When that law comes, there will be a need for some analogue of the regulation of investigative powers legislation in order to cope with private investigations into fraud or whatever. I hope that that issue is considered sooner rather than later, because people who conduct private sector investigations will not know quite where they are for a while. They will not have the comfort of knowing about the code and, at the same time, they will not know where the case law is heading after 2 October. They will have nothing else to go on.

Pauline McNeill: Are you suggesting that privacy law should be included in the draft bill, or are you drawing our attention to that issue for the future?

Jim McLean: Getting the bill through is probably the more urgent task, but privacy law should be in place in the fairly near future, as there will be difficulties after 2 October.

Pauline McNeill: You said that certain occupations should never be used as intelligence sources, such as the legal and medical professions. Why is that?

Jim McLean: I should be clear that I do not mean that there are no circumstances in which that would be appropriate for the legal profession—it depends on the capacity in which the lawyer is operating. For example, is he giving advice in the context of privileges? It would probably almost never be appropriate for an advocate. For a solicitor, it would depend whether he was dealing with a person as an adviser on the law—on rights, duties, potential claims and so on—or whether he is carrying through a transaction, such as buying and selling land or whatever. That is a different situation, and I do not think that it would be inappropriate in that circumstance.

The medical profession must speak for itself, but it is difficult to imagine when it would ever be appropriate to use members of that profession as an intelligence source.

Pauline McNeill: Let us take as an example a serial rapist—someone who had committed a serious crime—who is the subject of a covert operation. Is it your position that it would never be appropriate for a legal or medical person to assist in hinting whether or not the right suspect had been identified?

Jim McLean: That implications of such situations should be investigated further, as mapping out such examples is never easy. However, there is cause for concern.

Gordon Jackson: For me, the draft bill is strange, because it regulates surveillance operations, which the police have carried out for years. We have had evidence from senior police officers and from Professor Alan Miller about police surveillance. I mean no disrespect to any of those witnesses, but people have their own agendas, so if I had expected a conflict, it would probably have been between those bodies of evidence. However, the opposite is the case: both tell us that, by and large, it is quite a good bill and strikes the balance quite well. Would the Law Society—or those representatives of it who are present—agree with that view?

Michael Clancy: By and large.

Jim McLean: By and large will probably do.

The Convener: Jim McLean had an interesting tone when he said that, which suggests that perhaps his response was not quite so clear cut.

Gordon Jackson: We were not overwhelmed by his enthusiasm.

Jim McLean: The draft bill has fuzzy edges, but it is better than having nothing. It is an improvement, and a lot of thought has gone into it.

Gordon Jackson: I do not want to have a private argument with Murray Macara, but I did not quite understand the problem with the definitions in section 27(7).

Section 27(7)(b) refers to conduct that

"involves the use of violence, results in substantial gain or is conduct by a large number of persons in pursuit of a common purpose."

I agree that one could have a

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

in non-criminal situations, such as at Ibrox or Parkhead. However, the bill seeks to deal with crimes. Section 27(6)(b) says:

"references to serious crime are references to crime that satisfies the test in subsection (7)(a) or (b) below."

Therefore, reading

"the use of violence, results in substantial gain or is conduct by a large number of persons in pursuit of a common purpose"

in a criminal context is the common-sense approach. I find it hard to imagine that anyone would read that section as applying to non-criminal activity.

Murray Macara: I am conscious of the example of

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

There must be large groups of persons with common political interests who veer between criminality and legitimate contact.

The Convener: Such as Greenpeace or Friends of the Earth?

Murray Macara: Exactly—or people who have an interest in animal liberation.

Gordon Jackson: We may have to go back to the drafters on this interesting point, but I think that, in the draft bill, serious crimes are crimes of the nature described in section 27, and that therefore section 27(7)(b) refers to criminal conduct. Perhaps it is badly written.

Murray Macara: It may be simply a problem of draftsmanship and nothing else. We understand that that section refers to crime, and the police would have the same understanding. It may be just a petty comment, but it leaped out when we read the draft bill.

Gordon Jackson: Perhaps the word "crime" should be inserted into section 27(7)(b)—

Murray Macara: So that the intention is clear.

Gordon Jackson: That would be simple.

Michael Clancy: There are also questions of certainty—what is "substantial financial gain"? One person's "substantial financial gain" may not be another's. What is a "large number of people"? Do all the people in this room make up a "large number"? In comparison with Gordon Jackson's analogy of a football park, they might not.

The Convener: I want to take Mr McLean back to some of his initial comments about ECHR. He expressed a concern that our discussions about the draft bill and about human rights tend to relate to public authorities, the Parliament, Government agencies or whatever. We are in danger of forgetting that ECHR also applies to a range of other activities, such as how the state protects one's right to privacy, for example. Out of interest, do you think that the extensive use of CCTV could be challenged?

Jim McLean: Some people take that view, but I do not, because it seems to me that there is no question of privacy when CCTV is used in a public place. When someone believes that they are in a private situation, but CCTV is being used—

The Convener: Regardless of who is using the CCTV?

Jim McLean: Yes, but I do not know whether everyone would share my view.

The Convener: In your view, as soon as someone walks out their front door, anyone is entitled to take pictures of them, follow them or take notice of them, regardless—

Jim McLean: I do not have a problem with that happening in a public place, although I understand that it might involve a covert element of targeting someone. However, the general surveillance that might happen in some streets does not, to my mind, raise a civil liberties problem, although I am aware that other people see that situation differently.

Michael Matheson: In your note, you refer to the interception commissioner, which is a very grand title. I presume that that refers to the UK bill.

Anne Keenan: Yes.

Michael Matheson: Is the surveillance commissioner the equivalent position in the Scottish bill? I may have overlooked the relevant sections, as I have had only a quick look at the draft bill.

Michael Clancy: I do not think that the interception commissioner applies to the Scottish bill.

Anne Keenan: There are different commissioners to be appointed under the UK bill—I think that the surveillance commissioner is a separate and distinct matter.

Michael Matheson: So, will there be no interception commissioner in Scotland?

Anne Keenan: It serves a different purpose.

Michael Clancy: The interception commissioner will deal with the interception of telecommunications and is found in part 1 of the UK bill.

Michael Matheson: It has no bearing on the Scottish bill.

Michael Clancy: No, it has no bearing on the Scottish bill. It is in the UK bill.

The Convener: I have one final question. I want to get your view on record on section 11 of the draft bill on "Quashing of authorisations etc". Subsection (1) states that a surveillance commissioner "may" quash an authorisation, if it turns out that there were no reasonable grounds for it, and subsection (4) says that he "may" order the destruction of records. Do you think that the word "may" should become "must" in those two provisions, unless there is a reason against that?

15:15

Murray Macara: When we first read section 11, we thought that in every instance where the word "may" appeared, the word "shall" should be substituted. The more we thought about it, the more we were concerned about the fact that the destruction of records is a once-and-for-all event, and it might be that on subsequent inquiry the records should be available. Although, at first sight, it would appear desirable that records should be destroyed in certain circumstances where the surveillance commissioner so authorises, in other circumstances it might be better that records are saved.

Jim McLean: We were concerned that if the word "must" were substituted for "may", it might have a chilling effect on the readiness of the surveillance commissioner to find that surveillance had been unjustified.

The Convener: You think that the surveillance commissioner might decide that fewer cases were unjustified.

Jim McLean: Knowing the irreversible consequences of such a finding might make it difficult for him.

The Convener: What is your view on the retention of records, regardless of whether authorisation was unjustified? Presumably, we would be saying that records of the three-week surveillance of Michael Clancy, which exposed no wrongdoing whatever, should nevertheless be retained.

Michael Clancy: It is because I lead such a boring life.

Jim McLean: The position is not perfect, but I would not expect it to be.

The Convener: Bad luck, Michael.

Draft Bail, Judicial Appointments etc (Scotland) Bill

The Convener: We now take off our regulation of investigatory powers hat and put on our bail and judicial appointments hat.

We thank Professor Gane for agreeing to speak to us about the draft bill. The bill came before the committee only fairly recently and, at a wild guess, I would say that we are not up to speed on the detail, although members will be clear about what the bill seeks to fix—apart from any other reason, there has been so much publicity about that.

We invited you to speak to us because you have done a lot of work on the implications of the European convention on human rights for the justice system. As, in effect, the bill fixes two problems that have already arisen and seeks to fix one that it is perceived is likely to arise, we thought that it would be useful to hear directly from you about this and related matters. Would you start by saying a few words about the problems that have arisen and the problems that are likely to arise, for example, in relation to bail, if we do not proceed with the bill?

Professor Christopher Gane (University of Aberdeen): Your summary of why the bill is at present before the committee is entirely accurate. In a sense, the bill is designed to fix some problems that have emerged consequent upon the activation of the European convention on human rights in Scots law.

With regard to bail, the first difficulty that the bill addresses is the category of offences that are not bailable under the present law. That is incompatible with article 5 of the European convention on human rights, as confirmed by a sequence of recent decisions and, most important, by a decision of the European Court of Human Rights in a case called Caballero v the United Kingdom. That case arose out of the provisions in English law that excluded murder and certain other offences from bail, in the same way as the Criminal Procedure (Scotland) Act 1995 excludes certain offences from bail.

The second issue connected with bail that the bill addresses is the right of an accused person to automatic consideration of bail. The present law requires individuals to apply for bail but, in two recent decisions involving Malta, the European Court of Human Rights held that the right to liberty and the right to release pending trial are not dependent on application by the accused person, but must be automatically addressed by the court when the person is brought before the court. According to the convention, that must be done promptly.

A couple of subsidiary matters are not quite so clear under the convention, but it is none the less right for the bill to address them. There is the question of bail when a person is already deprived of their liberty. The bill makes it clear that the fact that one has already been deprived of one's liberty and is alleged to have committed a further offence should not preclude one from consideration of bail. There is also the removal of what might be described as discrimination between persons who appear before a sheriff and jury and those who appear before a high court and jury, and the right of appeal for individuals in those circumstances. At the moment, the law tends to make it more difficult for individuals who are charged with more serious offences and held in custody to get access to bail.

The concerns, as I understand from the public press, relate particularly to the removal of the bar on bail for certain serious offences. That seems to be an inevitable conclusion of the activation of the European convention on human rights in domestic law. If I have a substantial criticism of the bill, it is not for what it says but for what it fails to say. It makes no attempt to address the question of which criteria the court should use in determining whether a person should be deprived of their liberty without bail.

The bill also fails to address a number of other questions that might be lingering in the background, such as where the burden lies in establishing whether a person should be deprived of their liberty and which standard the court is meant to apply in making that decision. Those issues have not been well addressed in the bill so far.

The Convener: Phil Gallie, the member who is likely to have pressed you hardest on this issue, is unfortunately not present today, so Gordon Jackson and I are playing advocate.

Gordon Jackson: We shall be good Tories for a minute.

The Convener: I have two questions. First, what would happen if we did not enact these changes? Secondly, you have expressed a couple of criticisms. Can you expand on what might be the fall-out from not addressing those issues in this bill? Would we be laying ourselves open to challenges further down the line?

Professor Gane: If we did not remove the distinction between bailable and non-bailable offences, come 2 October—if not at the moment—any instance in which bail was denied to a person who was, for example, charged with murder, would be incompatible with that person's convention rights. Simply on that ground, his detention would be an unlawful act.

The same applies to the automatic consideration of bail. The European Court of Human Rights has clearly said that an individual arrested on suspicion of having committed an offence has the right to have his or her deprivation of liberty considered automatically without application. If we do not do that, we are in violation of the convention and certainly on 2 October such a failure would be an unlawful omission under section 6 of the Human Rights Act 1998.

A significant weakness in the bill is its failure to offer any guidance on how the courts should exercise their discretion on bail decisions. That matter is addressed in paragraph 17 of the Executive's policy memorandum, which says:

> "The Executive considered whether to list on the face of the legislation the common law criteria that the sheriff must consider in exercising his power, but decided that this would add nothing and might simply confuse the position at common law."

I do not find it convincing to say that setting something out in clear statutory language would confuse matters; it might just help to clear up some current difficulties with common law. More important, the Executive goes on to say:

> "It would also make it more difficult for the courts to reflect future developments in domestic or Strasbourg case law. The Executive considered that it was more appropriate to leave the matter as one of common law so that judges could take a reflective and reactive approach as Convention jurisprudence and social conditions and attitudes develop."

Two comments can be made about that statement. First, it leaves the courts in the difficult position of having to work out as they go along the extent to which the present criteria for granting bail are compatible with the criteria established in the convention case law. That is an unfair exercise, which in some contexts might prevent injustice to an accused person, but might also lead to a situation where a person is inappropriately released from custody.

We must also understand the complex relationship between the common law and the case law of the European Court of Human Rights. Once the Human Rights Act 1998 comes into force in the autumn, our courts will in any case be required by section 2 of the act to have regard to the case law of the European Court of Human Rights. It is not a question of legislating now in a way that would subsequently make things difficult under Strasbourg case law; we must have regard to Strasbourg case law anyway, although we are not bound by it. I might be making a hostage to fortune, but I would not have thought it beyond the ingenuity of legislative draftspersons to construct a set of statutory guidelines that indicated which of the present criteria should continue to be used and the relative weight that should be given to them. After all, this is not an issue on which the European Court of Human Rights has been reticent; and it is not an issue on which it is terribly

far away from most of the decisions made in our courts anyway.

Two significant differences arise as a result of the convention. First, there has been the rejection by the European Court of Human Rights of the statement that the gravity of the offence is, of itself, sufficient reason to deprive a person of their liberty pending trial. The court has been fairly clear that that is not a sufficient reason to deprive a person of their liberty before they have been convicted. The second difference relates to the strength of the case against the accused; again, that in itself is not regarded as sufficient reason to deprive a person of their liberty.

15:30

In case law in Scotland, when there is an especially serious crime, and the Crown is opposed to bail, there must be very good reasons for going against the indications of the Crown. That is incompatible with the convention. On the other hand, there are plenty of indications in convention case law that the criteria that the Scottish courts are comfortable with, and are used to using, are compatible with the convention. It is not at all unreasonable to suggest that we should place those criteria in the bill.

Christine Grahame: I have one question on bail and another on justices of the peace. You mentioned some difficulties in the common law with regard to bail. I might be reading the wrong things into your presentation, but do those difficulties arise because there is no standardisation in Scotland across sheriffdoms? Is that what you were saying?

Professor Gane: Yes. That is what is reported to me by practitioners in different parts of Scotland—especially by practitioners with experience of working in different parts of Scotland. Certain criteria are more relevant for some sheriffs than for others. That is not uncommon.

Christine Grahame: As I understand it, there are two categories of justices of the peace—signing justices and full justices—to get over the problem that arises when there is not a separation of powers. The local authority cannot be seen to be sitting on the bench as well as running the courts and collecting the fines.

Is there not another way round the problem? I have received a submission from South Lanarkshire Council, suggesting that—rather than using a hammer to crack a walnut—any fines levied should not go back to the local authority, and that paying the administration costs of the district courts should not be the obligation of the local authority. That would deal with the problem of not having a separation of powers, and it would then be possible to keep justices in place who have local knowledge, who have seen people coming through the system, and who can say, "I know who you are, I have seen you before, Jimmy."

Professor Gane: That would be an alternative solution. Removing justices who happen also to be councillors might not be a good thing for the court: you would be removing people who were already making a significant contribution to public life in Scotland. I know many people who are involved with district courts and who think that removing such people could, in some cases, weaken the courts.

Christine Grahame: If we cannot have councillors, where would other full justices come from? In its memorandum, the Executive says that there are no financial implications. It seems to me that there must be financial implications for somebody, unless the number of justices is being cut. I am not sure about that.

Professor Gane: I am not sure, either, what the financial implications of this would be. I am not privy to the calculations. I assume that financial considerations are highly pertinent to the decision that has been made not to make greater use of paid justices—of stipendiaries.

Christine Grahame: What about personnel? Would there be sufficient experience out there if this were to go ahead and exclude the current justices?

Professor Gane: I have only anecdotal evidence, but I understand that the situation is variable throughout the country. There are district courts where there is no difficulty in finding staff, and there are areas in Scotland where it is not easy to find enough district court justices.

Christine Grahame: I see. Thank you.

The Convener: Before I bring Gordon Jackson in, let us return to the issue of the councillors who are justices of the peace as well. Some of us have started to receive letters about this, and that is what Christine Grahame was referring to. They suggest resolving the issue by way of an amendment. I think that Christine was a little kind in the way that she described that solution.

What those letters suggest may not be within our competency in this Parliament, which is a problem. They suggest an amendment to the bill that would seek to remit all fine income to the Exchequer and, in return, allocate it to local authorities through increased revenue support grant. From the Exchequer, it would have to come back to us via the Scottish block grant, before it then came back via the revenue support grant. I suspect that that is a clumsy mechanism for achieving that end result.

It may be unfair to ask you this without having given you prior warning, but can you think of other ways by which the defect could be cured without resorting to barring councillors from being justices of the peace? If you cannot answer that now, that is okay. If any ideas occur to you over the next week or two, you might be kind enough to let us all know.

Professor Gane: I would like some time to answer that question, but I am happy to respond to the committee.

The Convener: We would be interested to hear your response. That is clearly going to be one of the big issues throughout Scotland, concerning what this bill proposes. Sooner or later, we will all receive letters on the subject.

Gordon Jackson: I wanted to address paragraph 17 of the Executive's policy memorandum, but that has been dealt with. I find what you say a little difficult to accept, but I suspect that there is nothing more that you can say. We just disagree, and that is the end of it. Perhaps you can help me further. Why do you recognise such an advantage in putting statutory guidance—to use the phrase of the week—in place? Experience may show that the more there is in statute, the more problems there are, because of the battleground over definitions.

As the common law develops, appeals will be made in Strasbourg, with people eventually approaching the Privy Council of the House of Lords if they feel that, although they should get bail according to Strasbourg, they have not got it. Why do you not find such flexibility attractive?

Professor Gane: Because it increases the risk of inconsistency of decision making and, at least in the short term, of the application of the common-law principles vis-à-vis what is or is not permitted according to the Strasbourg jurisprudence. Over the medium to long term, that risk of inconsistency might diminish. However, at the moment there is no reason why we should take that risk.

Gordon Jackson: Would a solution be—as happened many years ago—for the Lord Justice Clerk simply to issue guidelines to sheriffs? That would not be in statutory form but would produce a measure of consistency, although the common-law guidelines would still be flexible, as the sheriffs all know that the Lord Justice Clerk is the common ground of appeal from them. Would that be useful?

Professor Gane: I am not sure how to phrase my answer to that without sounding offensive to just about every senior member of the judiciary. I do not think that it is necessarily appropriate, in a democracy, to concede to the judiciary what might be more appropriately regarded as legislative matters.

Gordon Jackson: What I had in mind was not the Lord Justice Clerk taking the place of the legislature and inventing new guidelines, but him spelling out the common-law guidelines, bearing in mind that he spells them out anyway when the decisions of individual sheriffs are appealed to him. It is his job to spell out what the common law is. I am saying merely that he should spell it out in advance, for the sake of consistency.

Professor Gane: It is very unusual in Scots law for the courts to issue that kind of interpretive guidance. They will not do it on sentencing.

Gordon Jackson: The Lord Justice Clerk did it before, many years ago.

Professor Gane: There was a statement around 1921.

Gordon Jackson: That is before my time.

Professor Gane: Before mine, too.

There is nothing inconsistent in the proposition that the basic framework should be contained in legislation and supplemented later on. However, my first preference is for important matters—we are dealing here with the deprivation of individuals' liberty—to be set out in a statute.

Pauline McNeill: I want to pursue the question of whether this should be prescribed in law. You said that we must have regard to ECHR case law, which does not allow for rejection of bail on the grounds of the gravity of the offence or the strength of the case. I could not see what other grounds there would be for not allowing bail.

My second point is related to that. I understand that, at the moment, the police would hold a murder suspect in custody for seven days while they gathered evidence. That would include conducting an identity parade and so on. However, if a suspect automatically had the right to appear before a sheriff and request bail, that might hamper police investigations. For that reason, I have concerns about prescribing this in law. Leaving the provision rather general might allow us to get the balance right between letting the police do their job and gather the right evidence and applying the ECHR.

Professor Gane: You are right. We have to strike a balance between the public interest in having crime efficiently and fairly investigated, and the public interest in protecting people from unnecessary deprivation of their liberty.

I said that, apart from the instances to which I have referred, there was no significant inconsistency between what the Scottish courts do and what the European Court of Human Rights stipulates. There are several factors that the ECHR would consider to be relevant when deciding whether people have been improperly

deprived of their liberty under article 5 of the convention. They include: the risk of the alleged offender absconding, to which a court can properly have regard when deciding whether bail should be granted; whether the individual will interfere with witnesses; whether there is a risk of the suspect offending while they are released from custody on bail; and the interest of the prosecutor in pursuing the investigation against the offender.

There are other criteria with which we are rather less familiar. They include protection of public order, which tends not to feature in Scottish discussions of bail. Interestingly, the European Court of Human Rights reckons that, in certain instances, it is relevant to have regard to the need to protect the offender. Many of the criteria that the ECHR recognises would be familiar to the Scottish courts as well as to Scottish offenders.

Does that answer your question?

Pauline McNeill: The first part of it.

Professor Gane: And the second part was?

Pauline McNeill: The automatic right to go in front of a sheriff to determine bail or not could hamper police investigations, could it not? The way that I read it is that a person would come before a sheriff virtually within 24 hours.

Professor Gane: Probably, yes.

Pauline McNeill: But at the moment, in Scotland, suspects are kept in custody for seven days.

15:45

Gordon Jackson: Pauline McNeill is wrong. The police do not keep suspects in custody for seven days. People come before the sheriff within 24 hours, by which time they are out of police control. They are not suspects, but people who have been cautioned and charged and can no longer be questioned by the police. It is the sheriff who puts them in custody for seven days.

The difference is that the sheriff will need to consider bail at that stage. It has been fairly automatic that people did not get bail for seven days, to allow inquiries to be completed. Now the sheriff will need to consider whether granting bail may hamper other inquiries. The good thing is that it will be for the authorities to make a statement to justify that, rather than it being automatic. It is not true that police hold people as suspects for seven days. They go to the sheriff within 24 hours and the sheriff puts them in jail, out of the hands of the police.

The Convener: I wish to ask more generally about the way that cases would be argued under the European convention on human rights in respect of bail. As we are aware, Scotland has strict rules about the length of time people can be held in custody. We have far stricter rules about that, as far as I am aware, than any other jurisdiction in the European Union, including England and Wales.

Professor Gane: Absolutely.

The Convener: Cases involving bail are argued before the European court. Would the counterbalance be taken into account? For example, would the judges bear in mind the fact that, under Scottish jurisdiction, bail—as opposed to custody—is very different to what it might be in Spain, where people could be held for years before reaching trial? It has puzzled me whether that is taken into consideration.

Professor Gane: You have touched on a rather complicated part of the theory of the convention. However, it is entirely appropriate within the context of the human rights dimension of the Scotland Act 1998 and the Human Rights Act 1998 for a Scottish judge to construe the European convention on human rights in the light of the Scottish experience. We are not bound to constrain ourselves to the standards and criteria that are applied by the European Court of Human Rights. You are right on that point, convener.

The other interesting point is that bail is one of the things that relaxes the timetable in criminal proceedings.

The Convener: That is right—it is a year and a day.

Professor Gane: Your general question was how free we are to construe the convention, particularly in the context of bail, according to local standards. We are really quite free, I think. We cannot disregard what is said in Strasbourg, but we do not have to be bound by it. The only trouble is that further down the line, if we develop an interpretation of the convention that is subsequently challenged in Strasbourg, we have to be able to show that that interpretation is different to but not incompatible with the convention rights.

The Convener: This is an issue in states that routinely hold people in custody for considerable periods without granting bail. In other jurisdictions there are extremely strict rules, and one would expect bail to be applied less freely because of the time limit protection. Are you suggesting that we could say that our strict rules on time limits in relation to custody mean that we are not required to follow the strictures on bail?

Professor Gane: That argument must be considered in the context of the European Court of Human Rights approach, which is to say that when it comes to deprivation of liberty at the pre-trial stage, the rule is liberty and custody is the

exception. We must consider our argument against that kind of presumption in favour of bail. As far as I am aware, the European Court of Human Rights has never read its own case law in the terms that you suggest. However, it would not be impossible for us to interpret the case law in that way.

The Convener: Thank you. That concludes our questions, Professor Gane. Would you be so kind as to consider the issue of councillor justices of the peace and whether there might be alternative mechanisms to those suggested in the bill? If, having thought about it, you decide that there is no alternative mechanism, it would be very helpful for us to know that.

Professor Gane: I will certainly do that.

Subordinate Legislation

The Convener: Agenda item 4 is a technical matter.

I move motion S1M-841,

That the Committee agrees to consider the draft Census (Scotland) Amendment Order 2000 and the Census (Scotland) Regulations 2000 at its meeting on 22 May, and that debate on the two instruments be limited to 30 minutes.

Motion agreed to.

The Convener: I remind members that next week's meeting is also on Monday afternoon. The clerks are attempting to finalise witnesses for next week. At present, the first item on the agenda is the census motions. The minister will be here to answer questions. If members have any substantive issues to raise, they should notify the clerks.

We will deal with the stage 1 evidence on the draft bail, judicial appointments bill. The Executive team will attend the meeting. We will also hear evidence from representatives from Victim Support, who will want to talk about the bail issues, and the District Courts Association, who will want to talk about the issue of councillor justices of the peace. Those members who have not yet received the letters that have started to come in might want to contact their local councillors independently to establish the general feeling.

The last item of the meeting will be a discussion on our draft response on the budget process. That item will be held in private. I regret to say that other statutory instruments are appearing on the horizon. We will decide whether it is appropriate to put those on the agenda.

Gordon Jackson: On the draft regulation of investigatory powers bill, I was struck by the fact that sweetness and light was breaking out. Everyone says that there is no problem with it. I asked the ACPOS witnesses what the people on the ground—the detective constables and sergeants—thought about it, and they assured me that there is unanimity throughout the ranks. I was rather sceptical about that. I would like to know what the operational officers think about the burdens that the bill is imposing on them.

The Convener: Do you want to hear evidence from the Scottish Police Federation or the Association of Scottish Police Superintendents?

Gordon Jackson: I would like to hear from the Scottish Police Federation, to get the detectives' point of view.

The Convener: It would be useful to contact the Scottish Police Federation and ask for an initial comment on the bill. We might be able to squeeze in the SPF to give evidence.

Meeting closed at 15:54.

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