JUSTICE AND HOME AFFAIRS COMMITTEE

Tuesday 4 July 2000
(*Afternoon*)

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JUSTICE AND HOME AFFAIRS COMMITTEE
25th 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

THE FOLLOWING MEMBERS ALSO ATTENDED:

Angus MacKay (Deputy Minister for Justice)
Ben Wallace (North-East Scotland) (Con)

CLERK TEAM LEADER

Andrew Mylne

ACTING SENIOR ASSISTANT CLERK

Alison Taylor

ASSISTANT CLERK

Fiona Groves

LOCATION

The Chamber

Scottish Parliament

Justice and Home Affairs Committee

Tuesday 4 July 2000

(*Afternoon*)

[THE CONVENER *opened the meeting at 14:15*]

The Convener (Roseanna Cunningham): Good afternoon, minister.

The Deputy Minister for Justice (Angus MacKay): Good afternoon. I am sorry to be late—I had it fixed in my head that we were starting at half-past 2. I apologise for keeping you waiting.

The Convener: It is probably because we are in the chamber—that is understandable.

Regulation of Investigatory Powers (Scotland) Bill: Stage 2

Section 13—Appeals to the Chief Surveillance Commissioner: supplementary

The Convener: We want to crack on, as we have quite a bit to do. We now come to amendment 40.

Michael Matheson (Central Scotland) (SNP): As the bill stands, an ordinary surveillance commissioner can refuse approval for the authorisation to carry out intrusive surveillance. The commissioner can also quash or cancel an authorisation. There is a process for an appeal to be made to the chief surveillance commissioner, but there are concerns about the lack of transparency around that process, in that the chief commissioner can refuse the appeal but does not necessarily have to advise those who have followed the appeal why it was refused.

The primary intention of the amendment is to ensure greater transparency in the appeals process and that a reason for how the chief surveillance commissioner reaches his determination is given.

I move amendment 40.

Angus MacKay: Section 13(2) requires the chief surveillance commissioner to report their findings to those with an interest in the appeal, such as the chief constable whose authorisation has been refused, quashed or cancelled and the ordinary surveillance commissioner who took the decision that is being appealed against. The chief surveillance commissioner is also required to report those findings to Scottish ministers. The amendment seeks to remove the provision that states, for the avoidance of any doubt, that they are not obliged to provide any reasons for the decision to anyone other than those I have mentioned.

The Executive cannot see any circumstances in which we would wish the chief surveillance commissioner's findings on an appeal against the quashing or cancellation of an authorisation to be more widely known. On that basis, we would prefer to retain this provision and ask Mr Matheson to withdraw the amendment.

Michael Matheson: If an authorisation is refused and any police officers who have been involved in requesting it go to appeal, will they be made aware of why the chief surveillance commissioner has made his decision? I understand that he will report, but what will be the nature of that report?

Angus MacKay: The area we are talking about here is solely in relation to intrusive surveillance, but the officers concerned would be made aware of the reasons for any decision.

Michael Matheson: They would be informed of that?

Angus MacKay: Yes.

Michael Matheson: I seek to withdraw the amendment.

Amendment 40, by agreement, withdrawn.

Section 13 agreed to.

Section 14 agreed to.

Section 15—General rules about grant, renewal and duration

Amendments 41 and 42 not moved.

Michael Matheson: The primary purpose of amendment 43 is to bring the bill into line with the present conditions that apply when granting a search warrant. Under present common law, a warrant has to be signed and dated, and has to detail the capacity in which the person who is granting the warrant is acting. It would therefore seem appropriate that a similar procedure should apply when granting authorisation under this bill. It would bring it into line with the common law as it stands in Scotland.

I move amendment 43.

Angus MacKay: The contents of written authorisations for the use of surveillance techniques will be specified in the order made under section 9(2)(c), which will be subject to draft affirmative procedure. The view of the Executive is that operational details such as those specified in

the amendment are probably more suitably included in such an order than on the face of the bill, but we are willing to undertake to consider whether such requirements as are laid out in the amendment should be specified in the order. On that basis, I ask Mr Matheson to withdraw his amendment.

Michael Matheson: I am quite satisfied with what the minister said about the matter being specified in the order. It is important that this is brought into line with the common law as it stands.

Amendment 43, by agreement, withdrawn.

Amendment 44 not moved.

The Convener: Amendment 45 is grouped with amendment 46.

Michael Matheson: As it stands, the bill allows for an oral authorisation to be given in urgent cases. That authorisation can last up to 72 hours— a period I believe to be excessive. The amendment seeks to lower to 24 hours the period for which an oral authorisation can last. That should allow sufficient time for any authorisation that has been granted to be made in writing and it would assist in tightening up some of the provisions to ensure that they are not misused at any time.

I move amendment 45.

Angus MacKay: The order-making power in section 15(8) allows ministers to impose additional time limits on the duration of oral authorisations for surveillance. In some circumstances, it will be appropriate for the period of 72 hours to be reduced. That is what the order will allow to happen.

It is the Executive's view that, in general, the period of 72 hours provides a reasonable balance between protecting human rights and ensuring that the work of crime enforcement officers is not unduly hindered. It is a matter of judgment and balance. Our view is that the 72-hour provision is suitable and appropriate.

For the committee's information, under the Police Act 1997, which contains similar provisions, only one oral authorisation has been granted for Scotland to date, which we think suggests that the provisions are not being abused. On that basis, I ask Mr Matheson to withdraw amendment 45. Shall I deal with amendment 46?

Michael Matheson: I missed out amendment 46 when I spoke.

The primary purpose of amendment 46 is to deal with the renewal of authorisations. It is important that when renewal of an authorisation is being considered, the person who is acting should be satisfied that the conditions that applied when the original authorisation was granted still apply. The amendment would ensure that the person who is granting authorisation is satisfied that the original requirements still stand before they issue any renewal.

Angus MacKay: Michael Matheson could consider not moving amendment 46. Section 15(6) provisions on the renewal of authorisations for the conduct or use of covert human intelligence sources are additional requirements. The requirements that are required, as it were, in authorising the use of a covert human intelligence source, which are outlined in section 4, would still stand in the case of an authorisation renewal, so the amendment does not seem to add any requirements that are additional to what is already in the bill.

Michael Matheson: I return to amendment 45. I take on board the minister's comments and his belief that 72 hours strikes a balance between the need for appropriate authorisation to be granted and human rights.

I was interested in the minister's comment that only one oral authorisation has been granted—and on a similar issue. On that basis, it seems appropriate to reduce the time to 24 hours, because ensuring that the authorisation is issued in writing within 24 hours would not place an undue burden on the police or on any other individual who grants an authorisation.

Angus MacKay: The Executive's view is that in all circumstances where it is safe and appropriate to do so judiciously, we would prefer to leave flexibility so that the individuals and organisations that are engaged in the fight against serious crime have maximum flexibility. Our argument is that such flexibility has been used properly in the past, as demonstrated by the figure that I gave. It is in the best interests of those agencies, and of those who wish to see them succeed, that we follow that routine.

Michael Matheson: On amendment 45, is it the Executive's intention to introduce appropriate orders to specify that those who grant an oral authorisation should issue it in writing as quickly as possible? While 72 hours is the end time, they should act as swiftly as possible.

Angus MacKay: Yes. The concern raised by Michael Matheson would be addressed either in orders or in the code of practice.

Michael Matheson: Will it be specified that those individuals must act as quickly as possible?

Angus MacKay: Yes.

Michael Matheson: On that basis, I seek agreement to withdraw amendment 45.

Amendment 45, by agreement, withdrawn.

Amendment 46 not moved.

Section 15 agreed to.

Section 16—Cancellation of authorisations

The Convener: Amendment 47 is grouped with amendment 47A, which would amend amendment 47.

Phil Gallie is not yet here, although he intimated that he would be here within half an hour of the meeting starting. I will ask Michael Matheson to speak to and move amendment 47 first. If Phil Gallie is unable to move amendment 47A, either it will be recorded as being not moved or another member can move it in his absence. We can deal with it either way, depending on whether he remains absent.

Michael Matheson: The primary purpose of amendment 47 is to ensure that when there is a cancellation of an authorisation, the covert human intelligence source is advised, in writing, of that decision within 24 hours. That would ensure that there is no undue interference with an individual's right to privacy. I believe that my amendment would help to tidy up the bill by ensuring that we also provide some protection to those who have been used as covert human intelligence sources.

I move amendment 47.

Angus MacKay: I absolutely understand the intent of the amendment in relation to the protection of covert human intelligence sources. In the vast majority of the cases that one might wish to examine, there is no doubt that a covert source would be informed that the authorisation was to be cancelled.

I will keep talking for as long as I can, so that Mr Gallie has the opportunity to take his seat.

Our view is that we do not think it is appropriate to include in primary legislation the issue that Michael Matheson raises in amendment 47. Although it is inconceivable that an undercover officer would not be told immediately that an authorisation had been cancelled, one can easily envisage circumstances in which the writing and sending of official letters from the police to agents or informants could compromise seriously their security and personal safety. For example, a letter could go missing or be sent to the wrong address, or whatever. However, we recognise that it is important that a source should be informed when an authorisation is cancelled. I am happy to assure the committee that that point will be dealt with directly in the code of practice.

By dealing with the issue in that way, we will allow officers to take into account the individual circumstances of each case and therefore to decide the most appropriate way of getting early and definitive guidance to undercover agents.

On that basis, I ask Mr Matheson to withdraw amendment 47.

The Convener: Phil, are you composed enough to proceed with amendment 47A?

Phil Gallie (South of Scotland) (Con): Convener, I apologise to you and to the minister for failing to take in everything that the minister said—I am sure that much of it would have covered the points that I wish to address.

Amendment 47A attempts to change the period mentioned in amendment 47 from 24 hours to 72 hours. That would ensure that, in the light of the practical issues faced in the field by the covert human intelligence source, the source has a chance to have the message that an authorisation has been cancelled relayed to them. It seems to me that 24 hours is a very short period indeed and that 72 hours might just be slightly more practical.

The Convener: Are you minded to move amendment 47A?

Phil Gallie: I think that that is what I meant to do. Yes, I move amendment 47A.

Angus MacKay: Phil Gallie's amendment mirrors current practice. I revert to the arguments that I put a few moments ago. We do not want to write the informing of sources about the cancellation of an authorisation into the bill; we want to include time scales and so on in the code of practice. We also want to leave flexibility for the enforcement agencies, so that they can use their judgment.

14:30

Phil Gallie: I am sorry, but I did not quite hear everything the minister said, although I heard the word "flexibility". I would have thought that a period of 72 hours, rather than 24 hours, would have given the flexibility the minister referred to.

Angus MacKay: I was trying to say that we do not want to write into the bill the specific instructions in either amendment 47 or amendment 47A—we want to leave that to the code of guidance, because that is a more appropriate way to deal with the issue.

Equally, as I said to Michael Matheson a few moments ago, we do not want to specify that individuals should be informed in writing, because that may not be a safe and secure method of dealing with covert human intelligence sources in certain circumstances. There may be safer ways in which to communicate that information.

Phil Gallie: I understand the minister's point and I do not want to prolong the argument, but I would like him to assure me that there is no chance of a case collapsing somewhere along the line if the 24-hour period is referred to—or of its being a factor in allowing someone to go free who should

not go free.

Angus MacKay: We cannot envisage how such circumstances would arise.

Phil Gallie: Okay—I accept the minister's assurance.

Michael Matheson: Will the minister clarify whether it is the Executive's intention to include in the code of practice the general principles on which my amendment is based? Those principles are that, whether in writing or in some other form, a covert human intelligence source will be notified within 24 hours of the cancellation of an authorisation.

Angus MacKay: The current code of guidance stresses that once the authorisation has been cancelled, a covert source must be informed as soon as practicable. We intend to put that measure into the code of practice. However, the code will have to come back for discussion and approval, so if members have concerns, there will be an opportunity to raise them at that stage.

Gordon Jackson (Glasgow Govan) (Lab): I cannot help but feel that most covert sources, who are, basically, informers, would not be over the moon about something in writing coming into their house. That would not be too cheery for most people who do that kind of work.

Michael Matheson: It could almost be, "Your terms of employment have now ceased."

Gordon Jackson: Or, "You are no longer an informer." I do not think that they would like that.

Michael Matheson: Or, "You no longer have to act in a covert manner."

The Convener: No one else has indicated that they want to speak on this group of amendments.

Amendment 47A is an amendment to amendment 47, and therefore we must deal first with amendment 47A.

Phil Gallie: I will not move amendment 47A.

The Convener: Strictly speaking, you have already moved it. Do you wish to seek the committee's agreement to withdraw it?

Phil Gallie: Yes.

Amendment 47A, by agreement, withdrawn.

Amendment 47, by agreement, withdrawn.

Section 16 agreed to.

Section 17—Functions of Chief Surveillance Commissioner

Angus MacKay: The purpose of amendment 73 is to provide that the ordinary surveillance commissioners, who will also be senior members of the judiciary, will be required to assist the chief surveillance commissioner in the functions under section 17(1). That duty will include keeping under review the exercise and performance of the powers and duties conferred by the act and reporting to the chief surveillance commissioner on any matter reviewed. The provision will ensure that the chief surveillance commissioner is able to delegate the work load to ensure that sufficient time is devoted to each matter under review. The chief surveillance commissioner will, at the same time, retain overall responsibility for overseeing the use of surveillance techniques by bodies that are covered by the act.

I move amendment 73.

The Convener: There does not seem to be a great deal of interest in commenting on this amendment.

Amendment 73 agreed to.

Section 17, as amended, agreed to.

Section 18 agreed to.

After section 18

Amendment 48 not moved.

Christine Grahame (South of Scotland) (SNP): I might take a little time over amendment 72—I am trying to work out how to present my argument. The best way might be to go through the extended amendment—which came about following the debate two weeks ago—and to refer to the *Official Report* of 21 June. I trust that the amendment addresses issues that were raised then.

The amendment as now drafted tries to be more specific about authorisation in different circumstances, as can be seen in subsections (1)(a), (1)(b) and (1)(c). The first talks about authorisation that is quashed; the second about authorisation that ceases; and the third about authorisation that is cancelled.

Although the duty remains on the relevant public authority to intimate its intention to inform, it is subject to a lot of safeguards. The first is in subsection (2), which provides:

"If the person who granted or, as the case may be, last renewed the authorisation considers that so informing the former surveillance subject would or might not be in the public interest, that person shall, not later than 7 days after receiving notification under subsection (1), object in writing to the relevant public authority."

The reason for setting that time limit is to avoid a dragging of heels. The number of days is negotiable, but there should be a time limit.

Subsection (3) inserts a guillotine by saying that if there is no objection under subsection (2) within the specified time limit, the authorised public

authority shall inform the former surveillance subject.

When the surveillance officer decides that he is going to do something, subsection (5) allows him to

"(a) make a final determination either—

(i) that the former surveillance subject be informed forthwith; or

(ii) that the former surveillance subject not be informed; or

(b) defer a final determination for such period, not exceeding 3 months, as he may specify, and inform the relevant public authority in writing of his determination or decision."

The reason for the option in paragraph (b) is given in subsection (10), which I will come to.

Subsection (6) says:

"On receipt of a final determination under subsection (5)(a)(i), the relevant public authority shall inform the former surveillance subject forthwith."

The first part of subsection (7) says:

"Where the Surveillance Commissioner defers a final determination under subsection (5)(b)—

(a) that Commissioner may, at any time within the specified period—

(i) make a final determination . . . or

(ii) further defer a final determination by extending (on one occasion only) the period specified under subsection (5)(b) for no more than one month".

The reason for deferral is given later in the amendment—it is so that the surveillance officer can make investigations into material that has been provided for him by the relevant public authority.

Subsection (8) contains mandatory tests:

"The Surveillance Commissioner shall make a final determination . . . only if satisfied that informing the former surveillance subject would . . . cause substantial prejudice to any ongoing operation; or . . . possible prejudice to any ongoing operation."

Under subsection (9), the information that is provided to a former surveillance subject would specify only

"the period within which the authorisation had effect"

and

"whether the authorisation was for intrusive surveillance, directed surveillance or the use of a covert human intelligence source."

Subsection (10) says:

"It shall be the duty of any relevant public authority within the meaning of this Act to provide an ordinary Surveillance Commissioner with such information as that Commissioner reasonably requires in relation to any matter referred for a determination".

That is the reason for a three-month extension period or a further extension period of one month and one month only.

This amendment responds to the issues raised in the *Official Report* of our meeting on 21 June. I accept the minister's point about

"a balance between protecting human rights and enabling the police to use methods that are essential to preventing or detecting crime."

That is why the information that is given to the former surveillance subject will not betray or disclose any of those operational methods.

The minister went on to say:

"The commissioner will also make an annual report to ministers, who will lay the report before Parliament after considering whether to exclude any material in the public interest. In fact, it is already existing practice for the commissioner to include in the annual report, which is sent to the Prime Minister and published by him, any instances in which procedures have not been correctly applied in the previous year."

What information will be provided, minister? Are we talking just raw numbers? If that is the case, the report should disclose cases when people ought to have been told. If, for example, there were only three such cases in one year, this amendment would assist those three individuals in their right to be told. They would not be left as just numbers.

At the meeting of 21 June, the minister also said that individuals would have "recourse to the tribunal", but he has conceded that that will be virtually impossible if there are good surveillance methods because people will simply not know that they have been under surveillance. It therefore seems to me—this point has been raised by the convener as well—that the tribunal is a red herring.

Talking about my amendment 48, the minister went on to say:

"The primary difficulty with this amendment, in our view, is that of deciding when the public interest is in favour of disclosure."—[*Official Report, Justice and Home Affairs Committee,* 21 June 2000; c 1491-93.]

We should consider the rights of the individual and balance them against the public interest; the minister addressed only the public interest, and not the rights of the individual. That could be challenged under the European convention on human rights. If people have been under surveillance because of a cock-up, or if they are innocent and there is no operational reason not to inform them that they have been under surveillance, they ought to be told. Not telling them, and leaving them as just figures in a report presented to Parliament, would be a breach of their human rights.

I may be wrong, but I think the minister

conceded that there may be rare occasions when there is a mistake and someone is put under surveillance for no reason. Even one instance of that would be a reason to build something into the bill to deal with such instances.

I am not saying that this amendment is perfect, but I feel that I have come a long way since the amendment that I presented two weeks ago—and I do not have the minister's resources. I do not think that there is no solution to this problem. Giving information to individuals who have been under surveillance should not cause difficulties. I understand that there may be political problems in promoting the idea that one might inform people that they have been wrongly under surveillance, but there are great advantages in having a strong and open democracy. I will be glad to hear the minister's reply.

Angus MacKay: Convener, you do not look as if you will be terribly glad to hear my reply. However, I will do my best to address the arguments raised by Christine Grahame. There is a general point of principle that I will return to, but there are also practical difficulties with this amendment as it stands. I would like to draw those difficulties to the committee's attention.

Subsections (1) and (2) of the amendment are unclear in their requirements for an exchange of correspondence between the authorising officer and the relevant public authority. For intrusive surveillance, the authorising officer will usually be a chief constable. It is difficult to envisage who would be the appropriate person to write to him or her with notification of an intention to inform the subject. Likewise, to whom would the chief constable write within the public authority if he or she objected?

Amendment 72 provides for final decisions to be taken within four months of the ending of a surveillance authorisation. Many of the operations that would be carried out will continue for much longer periods. Under such circumstances, a final decision not to notify would become necessary in many instances, merely because the decision—which might depend on the outcome of the operation—could not be postponed any further.

The commissioner would only be allowed to determine not to notify if there was a risk of prejudice to an on-going operation. That would exclude risks to future operations, and would exclude decisions not to notify on the grounds that techniques and capabilities were compromised or, perhaps most seriously, on the grounds that it could endanger the safety of undercover officers, informants or agents.

The amendment could, on one reading, also require notification, even where there was good evidence, that the subject was involved in crime, and that there was no on-going operation. That could be, for example, because investigative work had finished and charges were pending, or because the subject was out of the country or was serving a sentence for another crime.

14:45

Amendment 72 would be likely to destroy the effectiveness of covert human sources. It is inconceivable that anyone would agree to act as an informant or an agent if they were aware that the target of the investigation would be likely to be told that human sources had been used against them. Even if the identity of the source was not revealed, it would often be possible for targets to deduce the identity of the source, which would present a clear threat to the work of such covert sources.

On the principle of the amendment, any arrangements that attempt to provide for subjects to be notified, even where surveillance has been legitimately and properly authorised and carried out, are, in the Executive's view, unsafe and unworkable. That view is shared by the police, who consider that the combination of their internal procedures and the oversight arrangements will adequately safeguard the rights of the individual. The police are worried that notification may damage their capacity for dealing with professional and organised criminals, who are involved in the vast majority of the cases that require the use of surveillance techniques.

I will stop there, other than to comment on one point made by Christine Grahame. It is absolutely clear that notification as proposed in amendment 72 is not required under the ECHR. That was demonstrated in the case and judgment of Klaas v Germany in 1978. We are clear on that point.

The Convener: I am tempted to ask what the purpose of the tribunal is, but I suppose that that is the point of the entire debate.

Christine Grahame: I will read what you have said later, minister, and I will consider it, but I will make a few points.

On your point about whether there was an operation that might be prejudiced later, minister, the duty to inform would only be triggered if the intrusive surveillance was quashed, not renewed or cancelled. I am making a presumption—perhaps the wrong one—that the view that has been taken is that there is no merit or worth in pursuing further the investigation in question.

On the test, you referred, minister, to prejudice to on-going operations. In fact, the test, as phrased in the amendment, is

"substantial prejudice to any ongoing operation".

I am well aware of the necessity to protect on-going operations and to prevent any prejudice to other operations. That is built into the test. I stress that the measures would only be used on rare, clear occasions, in a situation where someone simply should not have been under surveillance. We are not talking about a case of someone who is a bit iffy, and might be iffy later on, if I can put it that way, but about a case of mistaken identity or of a clear error.

I can envisage circumstances in which a completely innocent person might be friends with someone of such a nature that they would require surveillance or would be under investigation. They might be completely unaware of that surveillance all their lives. It might not be in the interests of the innocent person to disclose to their friend that they have found out about their being under surveillance. They may have contacts—innocent as far as they were concerned, but not as far as their friend was concerned—with people who are, and ought to be, under surveillance. I can envisage such circumstances. There are other circumstances, however, under which it will be as clear as day that those individuals should not be under surveillance. It is such people who ought to be told that they have been under surveillance, under clear, contained guidelines.

I see the merit in the minister's argument about intrusive, directed or covert human intelligence sources, and I should let the minister know now that I will not push this amendment today. I am still trying to explore the possibility of a combined effort to build something into this bill that balances human rights and the public interest. I do not consider that an impossibility.

Gordon Jackson: I have a fairly clear view on this amendment. First, I understand the problems, as does Christine Grahame. We all understand that this is a difficult matter. To state the obvious for the record, nobody in this committee would want anything that could remotely prejudice or harm police operations. I totally accept that there will be lots of occasions where operations apparently produce nothing—nothing specific and no charges brought—but where there were good operational reasons for the surveillance, and where there should be no revealing of the fact that surveillance took place. I also accept that nothing should be revealed that would give away methods of surveillance. That would not be in the public interest.

Having had discussions with the police of late, I am also happy to accept that, in Strathclyde for example, present procedures are extremely thorough, and that any slackness and abuses of the past, if they existed, are not very likely to happen now. There are careful checks and balances before any surveillance operation is conducted. I am not suggesting that there is some gung-ho mentality towards conducting surveillance operations among the law enforcement agencies. I pause, however, to say that this is not a bill for this year, but for the future. If there were abuses in the past, we need to think what might happen in the future. We are setting up a long-term framework.

The bottom line is that there will be occasions where people are wrongly put under surveillance. I do not say that because of some conspiracy theory, but because that is simply the nature of such things: whether it is a cock-up, a conspiracy, a simple mistake or bad faith, it will be clear that certain people, over the years, should not have been put under surveillance.

If we are setting up a regulatory system under this legislation, in which we give, rightly and properly, to the law enforcement and other agencies—not just the police—a properly regulated power to apply to a surveillance commissioner or senior officer, and if that power allows the citizen to be put under detailed surveillance by covert sources, directed surveillance or, on occasion, surveillance using things planted in their houses, there is no reason why, when it is clearly discovered that a person has wrongly been put under surveillance, that person should not be told. That seems to be a reasonable and fair safeguard for the rights of the citizen. The presence of such a provision is likely to focus the mind as to when it is appropriate to conduct surveillance operations.

I do not want to get bogged down in the question of whether the surveillance was rightly or wrongly granted. That seems to be a barren argument. There will be occasions on which the surveillance has been wrong but the authorisation has been right, on the basis of the material given to the surveillance commissioner. In other words, the commissioner made the right decision on the information known to him, but it turns out later that the material was wrong. It may be, on occasion, that a surveillance authorisation should not have been granted. I do not want to go into such distinctions.

My point is very simple. There should be a provision in the legislation so that that where it becomes clear after authorisation has been given that, for whatever reason, a citizen should not have been the subject of a surveillance operation, the system is open about it. I am not against secrecy or against things being done covertly. As I said in the chamber, that is the nature of the modern world. I am against secrecy whose only purpose is to cover up a mistake that has been made. Too often in the past we have used secret public interest provisions when we did not want to reveal that things had gone wrong. I am wholly against that mentality.

I am glad that Christine Grahame will not push her amendment. Let me make clear that I would not have voted for it anyway because I think that the Executive should have until stage 3 to deal with this. There are several ways in which provision could be made—I will not teach my granny to suck eggs. It could be done by spot checks, or the power to tell people could be given to the surveillance commissioner—after all, we are told that that High Court judge should be trusted—or he could be given the power subject to the investigating authority appealing to a tribunal. There is any number of ways of dealing with this.

At the risk of being repetitious, I say that the purpose of such a provision is not to compromise operations or to help criminals, but to ensure that where someone has been put under surveillance wrongly, for whatever reason, they should be told that that has happened and it should go into the public domain. That would give the public the comfort of knowing that although the power of regulating serious powers is being given to law enforcement agencies, if someone is wrongly surveilled that fact will become public and will not remain a secret. I do not think that it is impossible to strike a balance here. I hope that the Executive will introduce such a provision before we have to argue this matter seriously in the chamber.

Scott Barrie (Dunfermline West) (Lab): Gordon Jackson has articulated most of what I wanted to say. Several members of the committee referred to this issue in the stage 1 debate, and we certainly need to consider it. I have a great deal of sympathy with what Christine Grahame has tried to do. I am not sure that I would have voted for her amendment, because it is too wide-ranging and parts of it need to be tightened up. However, the essence of the amendment is worthy of note.

As Gordon Jackson said, the amendment is about people who have been the subject of surveillance for which no reason has come to light and which has been done in a false manner. People need to know that they have been the subject of such surveillance. The question is how we can encompass that need. I take on board what the minister has said. His points are well made. It is a question of balancing two difficult factors. If we are to be able to tell the public that public authorities are being regulated, we have to show the public that regulation is in place and that it offers a vigorous way of regulating those authorities.

Euan Robson (Roxburgh and Berwickshire) (LD): The minister will agree that there is a degree of cross-party concern on this point. Almost all of us are concerned that the tribunal will have very little work because people will not know that they have been the subject of surveillance. Organisations other than the police may conduct surveillance. Although we may be entirely confident that the police will adopt stringent procedures and we may hope that other organisations do as well, the fact that many organisations work with these powers must be considered. There is a chance that they will be misused in certain instances. As Gordon Jackson said, we are making this legislation for the years ahead.

Perhaps the way forward is to invest the surveillance commissioner with the power to disclose information to individuals in certain circumstances. That can be hedged with qualifications and it can be subject to third-party verification. At least, in that way, where there are clear problems with a particular case—as Christine Grahame says, such cases will be rare and the problems would have to be clear—public confidence can be safeguarded. People will know that there is an opportunity for them to know when something has gone wrong—that will not be kept secret.

In summary, I hope that the minister can reconsider this issue as it is causing many of us a great deal of concern and it will be addressed at stage 3, whatever happens.

15:00

Pauline McNeill (Glasgow Kelvin) (Lab): It is right that the committee should hold a discussion with a civil liberties focus at stage 2. That is what we are trying to do before we leave the matter once and for all.

We also want to give due consideration to the primary purpose of the legislation, which is to ensure that we have the proper procedures and regulations in place for the surveillance of criminals. We know that there are cases in which more sophisticated criminals may know that they are under surveillance. We would not notify them that surveillance of them had come to an end. That is why I am cautious about what we may do here. I do not want to jeopardise police operations by imposing more restrictions than are absolutely necessary.

I will amplify some of the points that Gordon Jackson made, which we have to examine closely before we make a decision. A sub-category of those who are wrongly under surveillance are those who have been wrongly identified. An authorisation might be granted for the surveillance of Christine Grahame, but Maureen Macmillan is watched instead.

Gordon Jackson: You have just insulted both of them.

Pauline McNeill: You know what I am getting it. I did not choose those two people for any

particular reason, but just to illustrate the issue of the wrongly identified person coming under surveillance.

I think that I am right in saying that the regulatory regime for which the bill provides is just a reflection of the current position, under which someone who has been under surveillance has no right to know that that has been the case. If we were to change the bill, we would be creating a new right. Perhaps the minister can come back on that point. The primary purpose of the regulation is to mirror what we have at the moment. We are concerned that there have been periodic abuses such as interceptions of communications. We have to guard against such abuses.

I have two final points. The issue is not about cases in which nothing is found and the surveillance does not uncover anything, as that is no reason to consider introducing additional safeguards. It is about cases in which someone is clearly utterly innocent.

Although I acknowledge all the work that Christine Grahame has done on her amendment, it is not linked to the destruction of records. Ultimately, any individual who has been under surveillance would want to know that any records of that had been destroyed.

It is right to focus on this amendment. I will not support it, but it is important that our discussion is on the record. Any comments from the minister will be welcome.

Ben Wallace (North-East Scotland) (Con): I thank you, convener, for allowing me to join the committee at such short notice. It was rude of me not to give you formal notice of my intention to attend. I shall speak on amendment 72, giving my views on why it is important that, on an issue such as this, experience is presented to a committee.

The intentions of Christine Grahame's amendment are honourable, but the amendment cannot be supported. Surveillance is very much the modern fingerprint in crime fighting, and this bill is targeted towards crime rather than national security. Surveillance is a means of investigation. It is not often carried out to undermine people's status, or for secret agendas, but is the way to keep ahead of today's criminal who has already worked out how to get past fingerprint and DNA testing.

By agreeing to this amendment, we could be setting a precedent to inform a person if they are under investigation by the police for any reason. At the moment, if the police are investigating a complaint against anybody, that person has no right to be informed at a later date that someone made a complaint against them—about their poor driving, about their possessing stolen equipment or whatever. This amendment says that surveillance is slightly different, and that the person should be informed. Being under investigation, whether through surveillance or by any other means, is a personal issue, but it is not in the public interest for the law enforcement agencies to be put under an obligation to inform the subject.

There are concerns about national security. At stage 1, Margo MacDonald talked about a constituent of hers who was under surveillance because of an Irish connection. Such connections are effectively matters of national security, and are reviewed. If someone is monitored for political reasons, non-criminal reasons or environmental reasons, which are a matter for the Scottish Environment Protection Agency, that is dealt with at Westminster, in another ministry in which national security is reviewed annually. People sometimes find out later that they had been under surveillance. For example, Mr Mandelson is now well aware that he was under surveillance during his time in opposition, as are other members of the Cabinet. That surveillance still goes on and is appropriate.

I also question the words "what is apparent". Surveillance is used to confirm investigations, and this useful bill allows for consideration before permission for surveillance is given. It is to be hoped that all the checks and balances will be undergone before the surveillance commissioner puts a tick in the box for surveillance to go ahead. What is it that is apparent if, in the initial investigation, nothing happens, if there is no evidence or if the case is not substantiated?

When does that "apparent" become saving up information for the future? Some people have been involved in surveillance operations on and off for 25 years, in which it was only at the 25-year point that that person finally made a mistake and was brought to justice. Trying to define what is "apparent", when someone falls in and out of a category, is especially difficult in the context of surveillance. Surveillance is used because that type of person is probably good at evading detection and covering their tracks. They might belong to a criminal organisation for their protection. A kind of surveillance could also be undertaken by an informer. When would the name of the informer be made known to the subject of the surveillance?

Unfortunately, this amendment would do more harm than good. It suggests that the surveillance commissioner could review the surveillance projects. However, the surveillance commissioners would change and would never be involved in the detailed, grass-roots considerations that go into developing a source or a surveillance project. They would not have the time to do that, nor would they have the local involvement. Although

amendment 72 has honourable intentions, it would not be practicable.

Maureen Macmillan (Highlands and Islands) (Lab): I would rather not know whether I have been under surveillance—Gordon Jackson mentioned that issue last week—and many people feel as I do. I do not know how much it would add to the sum of human happiness for a policeman to come to my door and say, "By the way, you have been under surveillance for the past week."

However, that is not the point of this amendment, which is not so much about whether somebody would want to be told as about whether there should be some ultimate public safeguard against bad practice. It may be that the authorities would have to own up publicly to their mistakes, but that may be the only way in which to achieve that safeguard. If there is a sanction hanging over them, if they get it wrong or do not carry out the surveillance properly, or if they are cavalier in their approach, that fact can be made public.

The police are wary of giving organised criminals any kind of tool with which to pervert the course of justice, and a difficult balance must be struck between not making it easier for criminals and ensuring that power is not being used in a cavalier way. I look forward to the Executive lodging an amendment at stage 3 which will satisfy us that the right balance has been struck.

Phil Gallie: I recognise Christine Grahame's aim in lodging this amendment, and sympathise with it to a degree. However, I must question who would benefit most from it. Ben Wallace made some good points about the practical side of surveillance, and I congratulate the minister. If we went back to the bad old days of old Labour, we would find an impractical view being presented on an issue such as this. It seems to me that new Labour has come to terms with reality, and trying to address the issues in the way that the minister has chosen seems to offer the best way forward.

I would like to address seriously the points that Ben Wallace made. We are talking about the protection that Christine Grahame's amendment seeks, but I wonder how much protection the people in the field would get from its being made known that surveillance of an individual is being carried out. As Ben said, such surveillance could continue for a long time before anything was detected. Additionally, Maureen Macmillan said that she would not like to be made aware if such surveillance had been carried out on her. Whether we like it or not, surveillance is needed in the battle against modern crime. On that basis, the bill as drafted has got the balance more or less right.

Gordon Jackson: As I have said before, of course surveillance is needed in the modern world. No one has any intention of prejudicing operations. I am glad that Ben Wallace is here. I find his perspective on this matter genuinely helpful, as an element of expertise is involved. However, I want to address a couple of issues.

Although some surveillance operations continue for years, the person who is being monitored has not been chosen arbitrarily: they have been chosen because proper inquiries have been made. The same reasons for putting that person under surveillance would justify not telling them that they were under surveillance. No one is suggesting that just because a person has been under surveillance for 20 years, for a good and proper reason, they should be told about it. There must be an operational reason for them to be under surveillance, which could be valid for 25 or 30 years.

We are dealing with a situation in which it is clear that, for whatever reason, the person should not have been under surveillance. Protection against that situation is what this amendment seeks. We might talk about crime, drug enforcement and the dealers who are being targeted, but this is a much broader bill than that. It is not just about crime; it is about all kinds of things, such as health and various other public issues.

On the last occasion on which we met, the minister had an amendment passed about the kinds of authorities that may use surveillance. Police forces and the Scottish Administration could put us under surveillance, which I suppose could mean that someone was watching you from somewhere all the time, although I am not suggesting that that would happen. Health boards and health trusts, SEPA and any other body that the minister thinks in future should be allowed to use surveillance could do so as long as there is a positive resolution of Parliament.

This is about the whole state apparatus being subject to proper safeguards and, in good circumstances, being authorised to conduct intrusive surveillance on the citizen. It is not simply about the protection of the public from serious crime. Where the state apparatus is being officially authorised to use such measures, we are entitled to add a provision saying, "When this is done wrongly, it is appropriate that we be told about it." Phil Gallie has had a conversion since the last time this committee met. I do not have the papers in front of me, but he made the good point that that would allay the fears that people have.

15:15

Phil Gallie: I was persuaded by the wise words of the minister.

Gordon Jackson: I cannot make up my mind if it is your nose that is growing, Phil, or mine. You

have the grace to blush.

There are fears about the use of these powers, not by the Scottish Drug Enforcement Agency, but by the whole paraphernalia of the state apparatus. Let us have a provision so that when it goes wrong—and time scales might be 25 years, as Ben Wallace said—it should be disclosed. We should work something out along those lines.

The Convener: No one else is down to speak—[*Interruption.*] Just a second, Christine. No one else on the committee is down to speak.

Given the comments that have been made, I remind the minister that the reason this debate was triggered in the first place is that section 19 of this bill contains a provision that a person who is aggrieved by conduct will be able to complain to the tribunal. I still have not heard how that complaint is to be triggered if nobody is ever to be told that surveillance occurred in the first place. In that case, why is section 19 in the bill?

Christine, you wish to come back in.

Christine Grahame: Briefly, convener. Subsection (8) of my amendment 72 uses the words

"cause substantial prejudice to any ongoing operation".

It does not say "the" on-going operation. That makes it plain that if something was happening in a wider context there would not be disclosure. I am putting out this amendment as a feeler. It shows that I am well aware of all the public interest concerns. If there are clear examples of mistakes, for example, where the wrong person has been under surveillance, as Gordon Jackson put it, they ought to be told.

Ben Wallace has changed what he is saying since stage 1. I remember him saying that there were grounds for telling people that they had been under surveillance. I hope that he will think again, because it is plain that we are talking not just about surveillance of serious crime—drugs and so on—but about other forms of surveillance where it might be easier to make mistakes and be a bit more trigger-happy. This amendment is concerned with preventing mistakes and giving people the right to know. Regardless of whether the Executive is happy for people to have that right, it is appropriate that they have it.

Finally, authorisations are necessary not just on the grounds of public disorder or public health, but according to section 3(3), "for any purpose" that is specified by an order made by the Scottish ministers. Minister, you amended the bill so that an order may only be made under section 3(3) following its approval by the Parliament, but that still entitles the state to do a wide range of things. Checks and balances are required, and they should be applied to the state in specific and clear circumstances.

The Convener: Ben, you want to reply, but make it brief because the minister has a lot to do.

Ben Wallace: In response to Christine Grahame, I did say that at stage 1. I came here to inform. I used my experience to try to define when someone is totally removed from an investigation, but I was unable to do so.

Like Gordon Jackson, I question some of the agencies that this bill gives the power of surveillance to, but that does not make the amendment acceptable. It does not mean that people should be informed of surveillance just because we do not feel that particular agencies should be given the power of surveillance. I cannot see the logic in the amendment, or in the idea of someone being allowed to appeal against the authorisation of surveillance just because we do not think that SEPA should have the right to carry out surveillance.

There are agencies that should be given the power of surveillance. However, for too long Governments have got things wrong with regard to agencies that do not have the power of arrest. We encountered that with the security services. The law had to be changed about 10 years ago, because the security services were never given the power of arrest. Special branch policemen have the power to arrest but the security services never do.

If the minister gives surveillance powers to agencies that do not have the power of arrest, he should be careful about what happens when members of those agencies are compromised. What happens when they are in a position of danger? A man from the Department of Trade and Industry was murdered while investigating dodgy MOT certificates. The minister should take care that if he gives the power of surveillance, which often involves dangerous procedures, to agencies without the power of arrest, he does not endanger people with no ability properly to protect themselves.

Angus MacKay: Convener, I do not propose to rehearse the arguments again. We have covered most of this debate in previous discussions at stage 2, so I will not address the issues all over again. I accept that in this committee and beyond there is a range of deeply held views on this matter. There are one or two points that are worth addressing.

In respect of police forces and the other agencies that were listed in an amendment from the Executive at the previous meeting, serious crime is one of the qualifications that has to be met by any agency in order to receive authorisation for intrusive surveillance. If we are looking at direct surveillance or covert

surveillance, crime, rather than serious crime, is what the agencies are allowed to examine, but none the less, all agencies are subject to proper safeguards under the bill. They all have to be authorised in the same way and across a level playing field, so there is no lesser burden for particular agencies.

I should say that only the police can carry out intrusive surveillance. The same safeguards and checks are in place for all agencies. Also, they will all be subject to working to the same code of practice, and will be subject to review by the surveillance commissioner. The issue that has been raised is a red herring that should not be allowed to intrude on the nub of the argument.

There is a concern over one argument that has been made today, which is public interest reasons for not notifying the "perfectly innocent" brother or sister of someone who is not "perfectly innocent". There is a serious danger that that would create a class of citizens who have fewer rights than others, simply because they happen, for example, to be related to a criminal. That is a serious issue that must not be casually addressed, because we are saying that, in other circumstances, there would be a right and a requirement for disclosure. Two people in similar circumstances may be placed under surveillance and nothing may come of it. However, one of them may be the brother or sister of a criminal or someone involved in a serious crime. For that reason that person would not be entitled to disclosure. We would have to think seriously before making that distinction.

There is no absolute right to disclosure. There is no absolute right to be told that you have been under surveillance. There may be a right to be told in certain circumstances. It is one thing to describe, fairly straightforwardly, the circumstances in which we think disclosure should occur—for example, where, following surveillance, someone is found to have been put under surveillance improperly, whether in terms of the authorisation or as a result of what transpires from the surveillance. It is another thing to set out in legislation specific circumstances in which it is appropriate, safe and right to create a form of disclosure—that is a far more tangled web and a far more difficult thing to achieve.

As members will know, we have had two discussions in this committee and have not yet arrived at a satisfactory conclusion of the specific circumstances in which such disclosure should pertain. More worryingly—this is the greater challenge—we have not got seriously close to drafting an amendment to the bill that would be workable in practice. I remain pessimistic—as I was at the end of the previous session, which finished on this point—about the possibility of finding a workable amendment, but committed to having further discussions with members to see how their concerns might be met at stage 3.

At this point, I want simply to re-emphasise that there is a world of difference between articulating a general concern about certain circumstances and bringing forward specific, workable amendments that will sit with the legislation in a way that is safe and appropriate. We should not delude ourselves that finding such an amendment will be a simple matter. I am willing to engage in further dialogue, but there is a long path to travel before we can satisfy everyone's concerns.

Christine Grahame: I am trying to work out whether the minister's position has moved at all. Perhaps it has a little tiny bit. I seek leave to withdraw the amendment.

Amendment 72, by agreement, withdrawn.

Section 19—Complaints to the Tribunal

The Convener: We move to amendment 74, in the name of Mr Jim Wallace, which is grouped with amendments 75 and 68, also in the name of Mr Wallace.

Angus MacKay: These are technical amendments.

I move amendment 74.

Amendment 74 agreed to.

The Convener: Before we move to amendment 50, I advise the committee that tea and coffee are available. Do members feel that they would benefit from a five or 10-minute break? I see the minister is nodding. We will adjourn for five minutes and move to amendment 50 when we come back.

15:27

Meeting adjourned.

15:41

On resuming—

The Convener: We will get started again. We have reached amendment 50, in the name of Michael Matheson.

Michael Matheson: I will move amendment 50 with a sense of irony—given our previous debate on access to the tribunal—because the purpose of the amendment is to provide legal aid provision for those who reach the tribunal. Given that, so far, it is likely that somebody will reach the tribunal only because of a cock-up, I would not imagine that such a provision would place an undue burden on the current legal aid budget. We all welcome the tribunal system. We recognise that it provides some level of comfort as recourse for those who are aggrieved at being put under surveillance,

although we are not sure about how the tribunal will be accessed. Having got to the tribunal, the question is whether people will be able to bring their case or will require legal support to do so. Amendment 50 seeks to allow legal aid provision to be made available to an individual who takes a case to the tribunal.

I move amendment 50.

The Convener: Before I ask the minister to speak to the amendment, I must tell members that as a result of amendment 74 being agreed to, amendment 50 should read "under section 63 of the Regulation of Investigatory Powers Act". That is a minor knock-on effect of amendment 74 being agreed to.

Angus MacKay: Legal aid is not usually made available for tribunals. It was not made available, for example, for interception of communications or intelligence services tribunals, which dealt with similar matters. However, we intend to consider further the issue that is raised in the amendment, particularly in respect of the ECHR. I will write to the committee on that in due course. In the light of that, I ask Michael Matheson to withdraw the amendment.

Michael Matheson: I would like some clarification. The minister said that the matter will be considered. Does that mean that he will seek to lodge an amendment at stage 3?

Angus MacKay: I cannot give Michael Matheson any further assurance. We have not done so yet, but we intend to consider the matter further. We will write to committee members and we will try to do that before stage 3 so that members can take a view on future amendments. [*Interruption.*]

The Convener: Sorry, we have electronic problems—my Psion organiser is bleeping.

15:45

Michael Matheson: I take on board what the minister is saying. It is important that someone who arrives at the tribunal is able to make reasonable representation. As the minister has pointed out, there could be ECHR implications should a person not be in a position to make a reasonable case.

I am willing to take the minister's comments on board, but if nothing arrives from the Executive before the stage 3 debate, the matter should be brought back before the committee. We should ensure that anybody who goes to tribunal can obtain some legal aid. I therefore ask leave to withdraw amendment 50.

Amendment 50, by agreement, withdrawn.

Section 19 agreed to.

Section 20—Issue and revision of codes of practice

The Convener: We move now to amendment 51, which is grouped with amendment 64.

Michael Matheson: The minister has referred several times to the codes of practice that will be issued. The purpose of amendment 51 is to ensure that there will be a consultation period on them so that interested parties and organisations can make representations to ministers about their concerns or additions that they believe should be made. Amendment 51 would set a limit of

"not less than two months"

for consultation on the codes of practice. Given the purpose of the codes of practice, it is essential that there is a reasonable consultation period. At least two months is reasonable to allow all those who might be interested to make their views known.

Amendment 64 is about the regulations that relate to the bill, which the minister has also mentioned. It is important that there is also a consultation period on the regulations once they are published. Amendment 64 seeks to ensure that there will be such a period of consideration for interested parties and organisations.

I move amendment 51.

Angus MacKay: I am sympathetic to the intention behind amendment 51. The Executive intends to allow at least two months for consultation on the draft code of practice, but we are not clear about how amendment 51 would work, given that we expect to begin consultation before the bill receives royal assent. We intend to introduce proposals for consultation within the next two weeks. That might provide some comfort to Michael Matheson. I hope that Michael will accept my assurance that the code will be available for consultation for at least two months and that he will withdraw his amendment.

Michael Matheson: Could the codes of conduct be changed at some point?

Angus MacKay: What do you mean by that?

Michael Matheson: Could the codes be changed in the future?

Angus MacKay: Are you asking whether the codes could be changed two, three or four years hence, subsequent to being agreed to?

Michael Matheson: Yes.

Angus MacKay: Yes, they could be changed. I am not sure what the procedure for doing that would be.

Michael Matheson: What assurance can the minister give that there would be a consultation

period before revision of the codes and introduction of a new set?

Angus MacKay: Do you mean because it is not in statute?

Michael Matheson: Are you saying that there would be a statutory consultation period?

Angus MacKay: No, I am seeking clarification about what your concern is.

Michael Matheson: If the codes of practice were reviewed in two years' time and the Executive wanted to make substantial changes to them, what guarantee can the minister give that there would be a consultation exercise and, given that there might be a different minister in post, that it would last two months?

Angus MacKay: I can give no guarantee, but I do not think that there are such guarantees on codes of practice that relate to any other legislation. We would be getting into the realms of being specific beyond what was necessary. I am not sure whether Michael Matheson is happy to accept assurances that the Executive will seek to have due consultation at all times in the future.

Michael Matheson: I am relaxed about what the minister has said to the committee, but I am conscious that in future the codes of practice could change. I am concerned about what the codes would contain in that case. The minister has referred to the codes of practice on several occasions in relation to why the committee should not agree to certain amendments. Given the importance of the codes in relation implementation of the bill, I would have thought that it would be reasonable to conduct a two-month consultation if any new codes of practice were issued.

Angus MacKay: Section 20(3) begins:

"Before issuing a code of practice under subsection (1)"

and section 20(7) says:

"The Scottish Ministers may from time to time—

(a) revise the whole or any part of a code issued under this section; and

(b) issue the revised code."

Subsection (8) states:

"Subsections (3) to (6) above shall apply . . . in relation to the issue of any revised code."

Subsections (3) to (8) make it clear that before issuing a code of practice we, as ministers, must prepare and publish a draft of that code and consider any representations to ministers about it.

Subsection (9) states:

"The Scottish Ministers shall not make an order containing provision for any of the purposes of this section unless a draft of the order has been laid before, and approved by a resolution of the Parliament."

I cannot remember what time is required for a resolution to be laid before Parliament before it can be moved, but I think that a certain period of time is specified. Taken together, those sections give assurances in relation to Michael Matheson's concerns.

The Convener: The committee is a little uncertain. The initial advice appears to be that there is no such period.

Christine Grahame: Maybe I knocked myself unconscious with amendment 72, but will Mr MacKay clarify for me whether the draft codes of practice will be put out in the next two weeks and whether there will be a two-month consultation period? Will that be the cut-off point?

Angus MacKay: We intend to issue the draft code for consultation in the next two weeks. We were trying to say that there will be a minimum of two months consultation.

Christine Grahame: I am concerned—because of the summer recess, holidays and so on—that those two months will not be as effective as another two months in the year might be for various organisations and interested parties.

Angus MacKay: If we are successful in getting the draft codes out for consultation in the next two weeks, taking into account time before the recess and after the recess, we reckon that we can provide at least two months' consultation. That takes into account concerns that have been raised about the quality of consultation during the recess.

Christine Grahame: Thereafter, the provision in section 20(9), is that Scottish Ministers

"shall not make an order containing provision for any of the purposes . . . unless a draft of the order has been laid before, and approved by a resolution of the Parliament."

That is where I get lost. Would that be done by negative resolution or affirmative resolution?

Angus MacKay: It would be done by affirmative resolution.

Michael Matheson: Are we any wiser with regard to the time scale?

The Convener: No time scale is laid down for affirmative instruments. Is that right?

Angus MacKay: Yes, but the legislation makes it clear that we must publish our draft proposals and take cognisance of comments on and responses to any proposals.

The Convener: Will the consultation on the draft code be completed before we reach stage 3 of the bill?

Angus MacKay: It does not have to be.

The Convener: That is not an answer, minister. I appreciate that it may not have to be, but will it be?

Angus MacKay: The question is how the Justice and Home Affairs Committee would like its cake to be sliced. If we can get the codes out for consultation in the next two weeks, that would give us a good run at conducting a consultation until we come back after the recess, if the committee accepts that the quality of that consultation time is good enough. Given that that is the case, we can work as fast as possible to bring something back to the committee at the earliest stage.

Michael Matheson: I am satisfied with that. I ask leave to withdraw amendment 51.

Amendment 51, by agreement, withdrawn.

Section 20 agreed to.

Section 21—Interim codes of practice

The Convener: Amendment 52 is grouped with amendments 53, 54, 56 and 57.

Phil Gallie: Amendment 52 refers to interim codes of practice. It recognises that there could be a need for interim codes to be issued. On that basis, I do not approve of amendments 53, 54, 56 and 57, which are in Michael Matheson's name.

The interim codes should not have an open time scale, but should be subject to some form of restriction. Full codes should be available after about 30 days from the date on which the interim code was announced—or indeed before that, if possible. Such a time scale would be reasonable. In supporting section 21, I would have thought that minor amendment 52 would be of use to the minister.

I move amendment 52.

Michael Matheson: I do not agree about amendment 52, although I have some concerns about interim codes of practice. Any interim arrangement that might become a permanent arrangement or that could delay the finalisation of a code of practice causes me concern. Given the time scale that the minister has outlined, the codes of practice might already be in place by the time the bill was given royal assent. The section on interim codes would therefore be unnecessary.

I seek reassurance from the minister that any interim code of practice will be strictly interim and that it will not delay the finalisation of any codes of practice.

Christine Grahame: I have a similar point to that which was made by Michael Matheson. My concern is that the legislation will be long standing—that it will stand not only for this session of Parliament. Section 21 begins:

"The Scottish Ministers may, notwithstanding the provisions of section 20 above".

There are many built-in protections for codes of practice, none of which are brought into play if interim codes are issued. I have great concerns that the Executive—or future Executives—could introduce interim codes without restraint or examination by Parliament.

Angus MacKay: It is not our intention that an interim code should evolve into a permanent code. If the committee is intent on the code being finalised prior to stage 3, the matter will not arise. The Executive would prefer a less compressed consultation period. We want to allow for the possibility of a longer consultation to take fully into account all the concerns that might be raised. That might not be necessary, however—it would depend on the initial response.

Section 20 compels the Executive to issue a non-interim, final code of practice. However, there is a risk involved in fixing the life of the interim code—for a short time the bill might not provide the legal framework that is required by the European convention on human rights. That risk would be increased if the amendments that would delete the provision for an interim code were agreed to. The interim code of practice is required because there might be a period between 2 October—when the act must come into force—and the completion of the consultation on the final code of practice. If no code of practice is in place during that period, the bill as enacted would not comply with the ECHR requirements. In that respect, the amendments run counter to those that require the Executive to hold a full consultation on the code.

We intend to consult fully, but can do that only if an interim code is in place during the consultation. On that basis, I ask Phil Gallie to withdraw his amendment and Michael Matheson not to move his amendments.

Gordon Jackson: We should trust in the Executive's intention to introduce a proper code of practice as quickly as possibly. Removing the provision for the interim code or imposing a deadline might cause all kinds of problems. The Executive might want to delay the code if the consultation process runs on and results in an odd situation in which time has run out and we have reached the October deadline. I do not see the point in removing the flexibility that the Executive seeks, assuming that the committee accepts that there is no intention not to produce a final code of practice. The amendments would straitjacket the procedure into a narrow time band, which is not very helpful. The Executive is offering to start the process in the next few weeks.

Pauline McNeill: I have no difficulty with an

interim code and I am pleased about the consultation on the final code. Could I have some clarification on the role of the committee in scrutiny of the final code? When is that code likely to appear and to what extent will we have an opportunity to scrutinise it?

The Convener: There has been discussion about when the code might appear, but no date has been fixed. The final code would be the subject of discussion by the committee.

Pauline McNeill: That is the point on which I sought clarification.

16:00

Angus MacKay: There is no requirement in the legislation that the committee examine the draft final code, but the Executive anticipates that the committee will want to.

Pauline McNeill: I am happy to allow the Executive some flexibility on the interim code and so on, but ideally we should not reach stage 2 or stage 3 having agreed to something without seeing what the final version looks like. Again, we must give way to the sense of urgency. The Executive must at least give a commitment that the Justice and Home Affairs Committee will have a proper chance to scrutinise the code after it has been consulted on. I would be concerned if you could not give us that commitment, minister.

Angus MacKay: All I can do is indicate the date on which we intend to issue the draft code, the time scale that we intend for the consultation and make it clear that all interested parties should have time to give the draft code due consideration.

Pauline McNeill: You misunderstand me, minister. I am happy about the intended time scale. I simply want an assurance that, when the final code is drafted, the committee will have an opportunity to scrutinise the final version.

Angus MacKay: That is not a matter for me.

The Convener: The code of practice will be contained within an affirmative instrument. We will be designated as lead committee for consideration of that instrument. Is Pauline McNeill suggesting that we should examine the code at an earlier stage, rather than waiting until it is in the form of a statutory instrument? Sooner or later, the matter will come back to the committee.

Pauline McNeill: That is all I want to know.

Angus MacKay: That is not a matter for me to decide. However, if the code comes back to the committee as a statutory instrument, that would give Pauline McNeill the assurance that she seeks.

The Convener: If the code is not dealt with by stage 3, when the bill becomes an act, the orders and regulations that are enacted as a result of that act will be laid before Parliament. It would be rather surprising if the Justice and Home Affairs Committee was not designated as lead committee on a matter that arose from the legislation. The matter is almost certain to return to the committee at some time.

Phil Gallie: On this occasion, I will embarrass Gordon Jackson by saying that, given his comments on hamstringing the Executive, I will withdraw amendment 52.

Amendment 52, by agreement, withdrawn.

Amendment 53 not moved.

Christine Grahame: I asked to speak to the interim codes of practice on a point of clarification.

The Convener: I am sorry Christine, but we cannot go backwards.

Christine Grahame: It is an important point, convener. There is an error.

The Convener: We have made a decision and we cannot go backwards. We have moved on. I am now required to put the question on section 21. If you want to talk about section 21 in general, Christine, you can do so now, before we agree to it.

Christine Grahame: I want to clarify something. We have all been talking as though the interim code of practice is a one-off, but that is not what is suggested in section 21(1), which says that Scottish ministers may

"issue one or more interim codes of practice".

That makes me concerned.

Angus MacKay: Section 20 obliges us to issue a final and binding code of practice, irrespective of any interim codes.

Christine Grahame: We are not talking about an interim code of practice whose purpose is solely to allow the legislation to move on; we are talking about something that could run on once the legislation is enacted. More interim codes of practice could be issued.

Angus MacKay: Theoretically, they could.

Christine Grahame: That was the point that I wanted to make. I do not think that it was made clear in what was being discussed.

Angus MacKay: It would not be sensible to read section 21 without regard for section 20, which makes it clear that, notwithstanding interim codes, there is a requirement to have a final and binding code.

Christine Grahame: I feel an amendment coming on.

Section 21 agreed to.

Section 22—Effect of codes of practice

Amendments 54 to 57 not moved.

Amendment 75 moved—[Angus MacKay]—and agreed to.

Section 22, as amended, agreed to.

Section 23—Power to extend or modify authorisation provisions

The Convener: I call amendment 59, in the name of the minister. It is grouped with amendment 60, also in the name of the minister, and amendment 62, in the name of Michael Matheson.

Angus MacKay: Amendment 59 was lodged following concern expressed by the Justice and Home Affairs Committee and the Subordinate Legislation Committee. Amendments 59 and 60 remove the power under section 23 that permits ministers to reclassify types of surveillance that would fall within the definition of intrusive surveillance so that they become directed surveillance. We propose to retain the power to reclassify upwards to enable what is defined as directed surveillance to be treated as intrusive surveillance. That is to deal with situations in which it is felt that, although the surveillance is technically within the directed definition, it is thought to be a sufficiently serious infringement of privacy that it warrants being treated as intrusive.

The power will be subject to affirmative resolution. The committee may regard that as a positive departure. As the Subordinate Legislation Committee noted in its report, the retention of the power is important as

"the Convention is a living instrument that must be interpreted according to the differing values of society. It has never found itself to be bound by its own previous decisions and this is very clear from the case law. For this reason, legislation intended to meet ECHR concerns may require to be updated from time to time."

We would like to take this opportunity to rectify an error in the drafting of the order granting ministers the power to redesignate as intrusive acts currently classed as directed. The amendment ensures that that power is subject to affirmative resolution procedure.

I move amendment 59.

Michael Matheson: As the bill stands, a minister can make a provision that would allow for an authorisation for one type of surveillance to act as an authorisation for another type of surveillance. Given that the reasons for granting authorisation for intrusive surveillance and the reasons for granting authorisation for direct surveillance are of different levels of stringency, I consider it inappropriate that the authorisation for direct surveillance should also act as an authorisation for intrusive surveillance. However, I believe that that situation might be affected by amendment 59. If so, I would be grateful if the minister would clarify that.

Angus MacKay: Amendment 59 addresses the concerns that Michael Matheson is raising; I tried to deal with those points in my remarks.

Amendment 59 agreed to.

Amendments 60 and 61 moved—[Angus MacKay]—and agreed to.

Amendment 62 not moved.

Section 23, as amended, agreed to.

Section 24—Orders and regulations

Amendments 63 and 64 not moved.

Amendments 65 and 66 moved—[Angus MacKay]—and agreed to.

Section 24, as amended, agreed to.

Section 25 agreed to.

Section 26—General saving for lawful conduct

The Convener: I call amendment 67 in the name of Euan Robson.

Euan Robson: I am familiar with the concept of general saving for lawful conduct. However, it is appropriate to pause and consider what is a fairly intense section—that is to say, I found it intense when I tried to unravel it.

I understand the section to mean that, if a person conducting surveillance behaves in a lawful manner but does not abide by the strict terms of the act, they will not be open to prosecution. There is a risk that some might consider that to be a catch-all exoneration. People might think that, as long as they behave lawfully, they need not involve themselves in the details of what might be considered by some to be a burdensome procedure. If we accept that that might happen, we must also accept that some people might use the section for a more sinister purpose. They might try to get away with conducting surveillance with no regard for the provisions in the act and rely on the general saving for lawful conduct.

I have lodged the amendment in order to facilitate some discussion on the subject. I want to suggest to those who might be empowered by the bill that they should not seek to circumvent the provisions of the legislation by resting their conduct on section 26. I suggest that an obligation should be placed on such people to follow the procedures in the legislation.

I move amendment 67.

Angus MacKay: The simplest way of dealing with this amendment would be to restate why the Executive thinks that section 26 should be retained as it stands.

Our view is that there will be many grey areas in which it will not be clear whether authorisation is required. We do not want to make operations unlawful that would not be unlawful under the Human Rights Act 1998 because circumstances arise that would suggest that an authorisation should have been obtained.

In many operations, it will be unclear at the start whether a person's personal and family life is being interfered with. The bill tries to provide a permissive regime so that the authorising officer has discretion to decide whether covert surveillance carried out during an investigation or operation is likely to infringe a person's rights in respect of privacy for home and family. For example, surveillance by police officers in an unmarked car at a car park where there have been a number of break-ins and thefts would not intrude on anyone's privacy. In such a case, the aim of the operation might be to identify the person responsible for the crime and to arrest them, finding out information about the person only after the arrest. In such circumstances, it will be for the courts and the complaints tribunal to decide on a case-by-case basis whether a person's human rights have actually been infringed.

As we read it, the purpose of the amendment is to ensure that the general saving for lawful conduct does not affect any obligation on a person with powers under the bill to abide by its requirements. However, although we are sympathetic to that intention, our view is that the amendment does not serve any clear purpose. The requirement to observe the provisions of the bill arise by virtue of the need to comply with ECHR, otherwise there is no protection against a challenge under the Human Rights Act 1998. On that basis, we invite Euan Robson to withdraw the amendment.

16:15

Gordon Jackson: If I might join in the spirit of the discussion—occasionally I am genuinely curious—I will say that I entirely understand that the point of section 26 is to make it clear that, even though someone might not have authorisation, they might not be doing anything unlawful. However, Euan Robson's point is interesting. If this catch-all provision is included, what is the compulsitor for people to have regard to the bill, instead of just carrying on with much of the present surveillance without regard to the bill on the basis that the surveillance is covered by section 26?

Angus MacKay: It would be unimaginable for a chief police officer to ask his officers to carry out surveillance outwith the terms of the bill. There is a requirement for surveillance to be carried out as provided for in the bill.

Gordon Jackson: Euan Robson would say that, without his amendment, such a requirement is lifted. If surveillance is lawful without the bill, why do we need to bother with the legislation?

Angus MacKay: The requirement is not lifted. Police forces and others will be subject to the annual review by the commissioner, who will consider these matters case by case. I would have thought that, if the commissioner found any evidence that someone had acted gratuitously outwith the bill's requirements, those cases would go to a tribunal pretty quickly. In any event, any case that goes to court will be subject to scrutiny by the court.

Gordon Jackson: Most surveillance never gets anywhere near the court. Indeed, saying that the commissioner will review cases is a circular argument, as he can only review cases that he knows about. What is to stop police or health boards, for example, carrying on with surveillance that is currently lawful under this catch-all provision and not bothering with the legislation, especially if they think that the matter will not come to court? Although the police and, in particular, Customs and Excise will conduct surveillance, they would often sooner not have a prosecution or conviction, because they cannot reveal their surveillance without revealing their surveillance methods. That is not for any sinister reason; they would rather not tell people—rightly—that they were using spotter planes and so on.

Angus MacKay: After 2 October, all public authorities will be required to act within the requirements of ECHR, and the purpose of the bill is to make surveillance practices compliant with ECHR. As a result, if bodies do not comply with the bill, they will be acting outwith the requirements of ECHR. Using a catch-all provision in an attempt to bypass the requirements for proper authorisation for surveillance that intrudes on private and family life would mean that the surveillance was unlawful and open to challenge under ECHR.

Euan Robson: I am not entirely convinced that there could not be circumstances in which someone would use section 26 to circumvent the requirements of the bill. I understand the minister's comments about ECHR, but unless we state specifically somewhere close to this section that there is a duty or compulsion on those empowered to have due and proper regard to the bill, people may see an opportunity to avoid what in some

quarters is regarded as the onerous requirements under the bill. That is my sole concern. I quite understand that there will be grey areas; I just want to interject a safeguard to ensure that people do not think that, as a result of the way in which the section is framed, it can be used for purposes that none of us would find acceptable.

Angus MacKay: I am not sure how much more I have to add. Although I hear Euan Robson's point, the purpose of the bill is to make the use of types of surveillance, particularly intrusive surveillance, compliant with ECHR. Any organisation acting outwith the requirements of the bill—which are pretty clear—would not be in compliance with ECHR. It is unthinkable that chief constables would ask their officers to carry out surveillance outwith the terms of the legislation, by virtue of a general catch-all. I have tried to give an example of a specific circumstance in which surveillance would take place in the generality and would not specifically intrude on private or family life. However, I am not sure that I can really add much more to reassure Euan Robson; I do not see how his amendment adds anything more substantive to the bill.

Gordon Jackson: On a point of clarification, although it might be unthinkable for a chief constable to ask his officers to carry out surveillance outwith the terms of the legislation, that is not the issue; the issue is whether it is unthinkable for his officers to do so without asking his permission. The officers will seek authorisation, not the chief constable, who gives the directions. It is not quite unthinkable for more junior officers to see this catch-all provision as a way of avoiding the bill's requirements.

Angus MacKay: But that would be unlawful under ECHR.

Gordon Jackson: I am a great fan of ECHR. However, I thought that we were controlling surveillance because we wanted to, not just because ECHR was forcing us to. I genuinely worry about Euan Robson's point that this section might be used as a method of circumventing the provisions in the act. I know that that is not the intention behind the section and I am not suggesting that any chief constable would want to use it in that way; I just worry about how the section might pan out.

Euan Robson: The other point is that we might be talking about other organisations, not just the police. Although I will seek leave to withdraw my amendment at this stage, I am not content and will consider the arguments again at stage 3.

Amendment 67, by agreement, withdrawn.

Section 26 agreed to.

Section 27—Interpretation

Amendment 68 moved—[Angus MacKay]—and agreed to.

The Convener: We come to amendment 69, in the name of Michael Matheson, which is grouped with amendment 70, in the name of Phil Gallie. It must be pointed out that the amendments are alternatives. Amendment 69 does not pre-empt amendment 70 but, if amendment 69 is agreed to, amendment 70 will be become an amendment to leave out "more than 10" and insert "6 or more".

Michael Matheson: Amendment 69, to some extent, is pre-empted by Phil Gallie's amendment. I am interested to hear from the minister what constitutes a large group. Section 27(6)(b) states that

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

Subsection (7)(b) refers to conduct that

"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."

What does the minister consider to be

"a large number of persons"?

I am a Partick Thistle fan and I always think that the team has a large number of supporters, but a Celtic or a Rangers fan would say that it does not.

Scott Barrie: Is that why you chose 10 as the definition of a large number?

Michael Matheson: As a Dunfermline fan, you cannot say anything.

There are concerns, particularly among people who might demonstrate against nuclear weapons, for example, about whether five or six people or 125 people constitute a large group. The amendment seeks to specify that a large group is more than 10 people.

I move amendment 69.

Phil Gallie: I would echo Michael Matheson's argument, but he spoilt it when he referred to Partick Thistle. When we get the new stadium at Ayr United, we will show him what a large crowd is.

I suspect that the minister will have different views on what constitutes a large group. Half a dozen youngsters could pose a considerable threat under certain circumstances, just as 200 or 300 English fans could have in Brussels. I await the minister's words.

Christine Grahame: Perhaps the minister or Gordon Jackson could advise me on this. I seem to remember that the definition of a mob in criminal terms is two or three people—three people could carry out a mobbing. The question of

what constitutes a large number is therefore a serious one.

The Convener: I call the minister.

Angus MacKay: Thank you, convener.

The Convener: Were you hoping that I would overlook you?

Angus MacKay: Perish the thought. When Michael Matheson first started talking about a large number of people acting in concert for certain purposes my mind turned first to the committee, but it swiftly moved on.

Michael Matheson: Is 11 a large group?

Angus MacKay: It depends on the day.

Michael Matheson made the case perfectly for examining individual circumstances case by case. The definition of serious crime in section 27(7)(b) has been in use for 15 years, since the Interception of Communications Act 1985 came into force. It is also used in the Police Act 1997 and the Security Service Act 1996, where it governs authorisations for interference with property for what is termed wireless telegraphy—we would consider that by and large to be telephones. We are of the view that it is sensible that the same test be used for similar activities carried out by different bodies involved in investigating serious crime, which we will come on to in a later amendment.

Since 1985, the interception commissioner, who is, I repeat, a senior member of the judiciary, has published an annual report on the operation of the Interception of Communications Act 1985. None of the three individuals who has held the post—Lord Lloyd, Lord Nolan and Lord Bingham—has found cause to complain about the definition. Such references as have been made to the definition in their reports have been to say that all serious crime cases that they have seen fall squarely within the definition. As amendments 69 and 70 illustrate, it is difficult to quantify in the abstract the number of persons in pursuit of a common, criminal purpose that should be regarded as constituting a serious crime. It is therefore appropriate that each situation be examined case by case.

16:30

In the case of intrusive surveillance, the issue is not simply the number of people involved; the response must be proportionate to the crime concerned. Other methods must also be tried first. That is, or we intend that it will be, set out in the code of practice that we will introduce within whatever time scale—I forget the final conclusion that we reached on that question.

Our view is that it is appropriate that the definition be tested case by case. The attempt to inject a number—whether 10 or six—is arbitrary and, in our view, does not fulfil the purpose for which the amendments are intended.

Gordon Jackson: In principle, I tend to agree with the minister, although the fact that the security chaps—the interception commissioners—have never found a problem is not the entire answer. The one advantage of Phil Gallie's suggestion is that less than six is never going to be a large number, so anything more than six would always be within the terms of the bill. I can certainly foresee a situation in which a warrant that has been granted comes back and there is a serious argument in court about whether the warrant should ever have been granted because there was no evidence of a large number of persons.

Would a dozen be a large number of persons? To come back to the great line about who supports the worst-supported football team in the world, a judge may say that 12 people could in no way be called a large number of persons. The minister says that Phil Gallie's suggestion is arbitrary, which it is—I see that—but at least once that definition is laid down it ceases to be arbitrary and becomes fixed. The trouble with dealing with the issue case by case is that the judicial decision made in each case is arbitrary. The arbitrariness is introduced by not being definitive. Putting a figure of six or more into the bill is arbitrary, but having put it in, it ceases to be arbitrary—if people follow that rather convoluted argument.

If the definition is "a large number", we will never know how many that is until it is tested case by case, not at commissioner level—the commissioners have been quite happy, although we do not know the standard that Lord whatever applied to a large number—but in court. We will never be able to tell whether the definition will stand up in court, because each time there will be an arbitrary decision on what a large number is. I can therefore see that the phrase "a large number" might be unwise in future.

Angus MacKay: If I were a committee member who displayed such lack of faith in interception commissioners, I would be moving squarely against the bill and the use of surveillance commissioners.

Gordon Jackson: This is not about the commissioners.

Angus MacKay: With respect, let me finish my point. It is not appropriate to dismiss the view expressed by individuals who have held the post of interception commissioner—unless you happen to think that that post is not worth much. When the commissioners have commented, they have said that they felt the cases of serious crime with which

they have dealt fell squarely within the existing definition, which does not contain a precise number.

The fact of the matter is that, as soon as you fall for 10, you exclude all cases of nine or fewer, and as soon as you go for six, you exclude all cases of five or fewer. I am not sure what advantage there is in that approach.

Gordon Jackson: Let me try to explain.

I do not think that five could ever be a large number, but that is another arbitrary opinion. I do not want the minister to think that I have any criticisms of the interception commissioners who have considered this matter. On each occasion that they have had to grant an authorisation, they have been satisfied that the number of persons involved was large.

I am worried about the next stage. Let us say that one goes to the surveillance commissioner with a request for an authorisation that has the number 12 on it. The commissioner may say, "I have no problem with that, as 12 is a large number", and grant the authorisation. If Phil Gallie's amendment is accepted, one knows that that authorisation will be okay and will stick, and that the surveillance commissioner's granting of it will fall within the terms of section 27. However, six months later, that important case comes before a judge, who asks, "On what basis was the authorisation granted?" to which the surveillance commissioner replies, "I granted it for 12, because I thought that that was a large number." The judge might reply, "Well, I do not think that 12 is a large number." The arbitrariness comes in when there is judicial determination; that could have serious consequences.

Angus MacKay: The other side of that equation is that the arbitrariness comes in when a serious crime is being pursued by 11 individuals in concert, but one cannot implement intrusive surveillance, because it is specified under the act that that can only apply to 12 or more people.

Gordon Jackson: Phil Gallie's amendment suggests six or more people.

Angus MacKay: In that case, let us assume that five people are acting in concert, but because the act specifies six or more people, one cannot pursue them. On a case-by-case basis, one can examine what is required and what is proportionate, which is the other important factor. The use of intrusive surveillance must be proportionate to the activity that is being undertaken by a collection of individuals. One must have exhausted the other methods that are available, and that measure will certainly be included in the code of practice.

Christine Grahame: I revert to my understanding of the definition in law of what constitutes a mob. I think that a mob is three people, but it might be as low as two— [*Interruption.*] Two or more is a mob. Is that a large number? If two or more can be a mob, two must also be, in certain circumstances, a large number. In common parlance, a mob is seen as a large number.

Angus MacKay: I fear, convener, that we are going round in circles. One cannot consider this issue in isolation from the rest of the requirements. Whether permission for intrusive surveillance is granted depends on what is proportionate as a response to the specific serious crime that is being pursued. As I said, there will also be a requirement in the code that other methods must have been exhausted first, before intrusive surveillance is implemented against a number of individuals.

It is entirely reasonable that people should take a different view, given the nature of what we are discussing. However, in my view, it is much more sensible to pursue such matters on a case-by-case basis, rather than trying to set out in the legislation an appropriate number forever and for all circumstances.

Christine Grahame: Why not just take out "large" or "large number", leaving "of persons in pursuit"?

Angus MacKay: Because that definition has been used in the other legislation that I mentioned, where it seems to have worked well. In respect of that other legislation, the interception commissioners have never found difficulty with the definition, whether or not one regards their opinion as worth having regard to.

Christine Grahame: My suggestion would take us out of the problem.

Pauline McNeill: Just before we leave this point under section 27, I want to say that I do not have a problem with not specifying a number. However, in evidence, the section was referred to as one that we should be careful to scrutinise. For the record, would you clarify some points for me, minister?

Section 27(6) states:

"In this Act—

(a) references to crime are references to conduct"—

and, over the page, section 27(7)(b) talks about conduct that

"involves the use of violence".

Minister, I know that you have spoken to this issue when we discussed it before, but I want to be clear before we finally move on. I am worried that other acts specify the number of people in a crowd before public disorder can be said to have taken place. For example, it is unlawful in

industrial disputes for there to be six or more pickets. Do you think that section 27(7)(b) covers those situations?

Angus MacKay: The example that you gave is a civil offence, whereas we are talking about serious crime. Therefore, my understanding is that section 27(7)(b) would not cover that situation.

Pauline McNeill: I want to be clear that we have closed down all the issues that concern us about the bill's implications for civil liberties.

We have talked about mobbing and public order. During the miners' strike, when miners were going up and down the country, some of the codes of practice to which you referred were used to round them up. The phrase "for a common purpose" was used to enable arrests to be made, as the miners were said to be committing a crime. Can you confirm that that scenario would not happen if we were to leave section 27(7)(b) as currently drafted?

Gordon Jackson: The minister referred to proportionality, but I think that that is a red herring. I do not think that proportionality has anything to do with this.

There will be occasions when the surveillance that is authorised has to be proportionate, but if three is a large number of persons, people will eventually consider a case where it was authorised for 10 people. Although it is nothing to do with proportionality of surveillance, the question will be asked, "Did that meet the requirement?" or, in other words, "Was that a large number of persons?"

When a case comes to court, we will run the risk of having the authorisation struck out as unlawful because, on an arbitrary basis, a judge may say, "In my view, 10 is not a large number." The phrase "a large number" is vague. The judge might say, "In my view, 15 is not a large number." I cannot see five being regarded as a large number, under normal use of language.

It is painful to say this, but it strikes me that Phil Gallie's approach takes away the problem of arbitrariness. One could end up with the court, rather than the commissioners, having a problem when it considers whether surveillance was undertaken lawfully or not. If that happens, we will be in the lap of the gods as to whether that judge supports Celtic or Ayr United. In other words, one man's large number is another's small number. That is the danger.

Angus MacKay: I hear the point that Gordon Jackson makes, but he ignores the other side of the argument. It is arbitrary to set a number, because the involvement of any fewer people than are specified means that intrusive surveillance cannot be used in circumstances where serious crime is being planned. We are talking about a trade-off between one type of approach and another.

In all the circumstances, it is sensible and logical to leave it to the agencies concerned to consider the approach that they will take, and for the authorising individuals to consider the case that they will have to make subsequently to the judge, or whatever judicial authority, about the authorisation that they have given. They will have to take that decision in the knowledge that they may have to defend, before a judicial authority, what they believe are appropriate numbers of people on whom to authorise intrusive surveillance, relative to the serious crime that is being planned or committed.

Gordon Jackson: I am sorry, but I wish to add one further point.

I am a little disappointed. During our previous discussions of the bill, it was mentioned that the Executive might consider amending this subsection to make it clear that the conduct referred to is criminal conduct. I know that the minister thinks that that is a bad point, but, as I have said before, a very experienced lawyer misread the subsection, although I know that criminal conduct is referred to. Do you follow me, minister?

Section 27(7)(b) says

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

That has been read by any number of people, including some MSPs, to mean that such conduct does not need to be criminal; rather it is just a lot of people doing things together.

There is no question, minister, but that your officials are right, and there is no question but that, when section 27(7)(b) is read carefully, it refers to criminal conduct.

The Convener: I am concerned that this issue is going to catch fire again, as two more members want to speak. Rather than going backwards and forwards, I will ask Kate MacLean and Euan Robson to come in before I come back to the minister.

Kate MacLean (Dundee West) (Lab): We are going round in circles. I do not have a problem with subsection (7)(b) as it stands, but why does it have to refer to

"a large number of persons"?

If it said "a number of persons", one would not have to specify a number, nor would there be a subjective view of what is a large number and what is not. Cannot we remove "large"—I am getting a sore head.

Euan Robson: I would not be unhappy with removing the adjective "large". However, Gordon Jackson made a more substantial point when he suggested that the Executive should try to redraft section 27(7)(b) to avoid the misunderstanding that occurred in the evidence that was given to us. The misunderstanding was that the subsection dealt with a common purpose, rather than a common criminal purpose. Perhaps the minister could take away that suggestion and consider whether there is a better way of wording the subsection, so that it is absolutely clear.

Angus MacKay: The committee may want to reflect, before stage 3, on the removal of the word "large". If we remove "large", it may become easier rather than more difficult for agencies to obtain the authorisation that they want. It would mean that the authorisations would not be on a par with, for example, intercepts.

The Convener: We should not continue that discussion, as there is no amendment to remove the word "large". We can have this debate at stage 3, if someone so wishes. Let us stick to what is before us at the moment.

Angus MacKay: I am trying to remember what is before us at the moment.

The Convener: We have the amendments to replace "large number of persons" with "more than 10", or "6 or more"; we have Gordon Jackson's points—

Angus MacKay: What I meant was that, having listened to Euan Robson, I have forgotten the point that Gordon Jackson was making, to which I intended to return.

16:45

Gordon Jackson: My point was that the catch-all in section 27(7)(b):

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

applies only in a criminal context. It is to do with the definition of serious crime, and the official who is sitting to the right of the minister is correct.

People—very experienced people—have misread that paragraph of the bill by thinking that it refers simply to a large group of people acting politically or in some other way. There was a suggestion that the paragraph could be better drafted to make it belt-and-braces clear that the conduct to which it refers is criminal. That is what it says, but people have read it wrongly, and one should at least bear that in mind.

The Convener: I ask the minister to address specifically amendments 69 and 70. Gordon Jackson's point is much more general and is really a bit separate. We can deal with it when we decide whether to agree to section 27.

Angus MacKay: I hear Gordon Jackson's argument. I am not sure that the legislation as introduced is not sufficiently opaque, but we can revisit that matter at stage 3 if Gordon feels strongly about it.

As for Pauline McNeill's point, the individuals to whom she referred would have either to be committing a crime or to be planning to commit a crime, not just a civil offence. It would have to be clear that criminal activity was involved, and I think that—

Pauline McNeill: Mobbing is a criminal offence.

I would be worried about the consequences of a right-wing Government being in power once the bill has been enacted. During the 1980s, such legislation was used to arrest miners during industrial disputes, on the grounds that they were in pursuit of a common purpose. They were, allegedly, committing criminal offences by mobbing. I would not be happy unless the matter was clarified; it is a major civil liberties issue.

Angus MacKay: The best way to deal with that concern is for me to write to Pauline McNeill in detail about our intentions and how we think the legislation will work. If Pauline is not satisfied with how the point is addressed, we will have an opportunity to address it at stage 3.

We intend to resist amendments 69 and 70.

The Convener: Michael Matheson moved amendment 69. What do you wish to do, Michael?

Michael Matheson: Can I make a few comments?

The Convener: If they are very brief. We have had more than enough discussion on this point.

Michael Matheson: Apart from the "number of persons" being specified—as "more than 10" in my amendment or "6 or more" in Phil Gallie's amendment—there is a link to Gordon Jackson's point. I would like to think that the Executive would consider tidying up section 27(7)(b). If that can be tightened up, that may address some of the issues surrounding the expression

"conduct by a large number of persons".

At this stage, I seek to withdraw amendment 69, but I may revisit the matter at stage 3, depending on whether there are any changes to paragraph (b).

Amendment 69, by agreement, withdrawn.

Phil Gallie: I have stepped back from the debate to listen to what has been said, and I have become more convinced that there is a problem. I am tempted to move amendment 70, but I would be happy not to if the minister said clearly that he

would examine the question again.

I particularly liked Kate MacLean's suggestion. If the minister confirms that he will take the matter on board, consider the committee's deliberations and perhaps return to the matter at stage 3, I would not move the amendment. Without such reassurance, I would feel obliged to move it.

Angus MacKay: If Phil Gallie is asking me to undertake to lodge an alternative amendment for stage 3, the answer is no. If he is asking me to give an undertaking that, as with certain other issues, we will be open to argument between now and stage 3, and that we will give a fair hearing, the answer is yes.

Phil Gallie: I did not quite catch all that, but I think the minister has said that he will consider the matter further.

The Convener: The minister has undertaken to consider the matter, but is not committing himself to lodging an amendment on it at stage 3.

Phil Gallie: That is fine.

Amendment 70 not moved.

The Convener: The final amendment, number 71, is in the name of the Minister for Justice, and is grouped on its own.

Angus MacKay: Appropriately, we finish with an amendment that follows from having obtained legal advice that suggests that, as currently defined,

"preventing or detecting serious crime"

might actually exclude catching criminals and gathering evidence. Clearly, it is important to rectify that omission.

Amendment 71 therefore allows for the term to include discovering who has been involved, the circumstances of the crime and apprehending those who have been involved. That legal advice has prompted the Home Office to re-examine other statutes that use the same phrase, and to prepare similar amendments.

I move amendment 71.

Amendment 71 agreed to.

The Convener: The question is, that section 27 be agreed to. Gordon, do you wish to restate your general point at this stage?

Gordon Jackson: No.

Section 27, as amended, agreed to.

Section 28 agreed to.

Long title agreed to.

The Convener: Before we leave the Regulation of Investigatory Powers (Scotland) Bill, I wish to make some comments about an article that appeared in *The Herald* on 23 June. The article suggested, inaccurately, that the Scottish chapter of the Internet Society—ISOC Scotland—was refused the opportunity to give evidence to us at stage 1. The article said:

"the only extra-parliamentary consultation on the matter has been with those organisations whose names happened to pop into the minds of Justice Committee members at its April 4 meeting."

and continued:

"ISOC . . . asked to give evidence and on April 20 was invited to do so. But a parliamentary official withdrew the invitation by telephone . . . on the grounds that issues of relevance to ISPs would not be covered."

That is not a correct reflection of what happened. The clerks made the initial approach to ISOC Scotland and asked whether it would wish to give oral evidence. The clerks then wrote to the society, saying that, because the areas of concern that it had raised related only to the UK Regulation of Investigatory Powers Bill, not to the Regulation of Investigatory Powers (Scotland) Bill, it was no longer our intention to take evidence from the society. The invitation was not withdrawn completely. It was made clear to the Internet Society that, if it still wanted an opportunity to give evidence, that would be accommodated if possible.

It is worth putting that on record. We are not in the business of arbitrarily withdrawing invitations to give evidence.

Subordinate Legislation

The Convener: Members will notice that the agenda has been revised to include a motion from Phil Gallie, on the Discontinuance of Prisons (Scotland) Order 2000 (SSI 2000/186). The motion was lodged only today and, strictly speaking, that gave less than the normal notice required under rule 8.2 of the standing orders. Rule 8.1.2, however, allows for a motion to

"be moved without notice . . . exceptionally, as permitted by the Presiding Officer."

For the purposes of motions moved in committee, I appear to be in the place of the Presiding Officer, under rule 8.8, so I am allowing Phil Gallie to move the motion today.

I wish to make some comments about the issue of statutory instruments generally, but one of the reasons I am allowing Phil Gallie to move the motion today is that we have received quite a large number of statutory instruments at a late stage in parliamentary business. All six are instruments that are to come into force in July, although the 40-day period in which they can in principle be annulled by the Parliament does not expire until September.

We are in an unfortunate position. In practice, it would be awkward to annul an instrument after it was in force, so the committee's only real opportunity was to consider the instruments today. It would have been difficult for the committee to put them on an earlier agenda, since the Subordinate Legislation Committee has only just reported on them.

What this means, in effect, is that members have only this opportunity to comment on the instruments before they come into force and only a couple of days to look at the paperwork or to consider the implications. Some complex and important issues are raised by at least a couple of the instruments. The situation is unsatisfactory.

What the Executive has done with the instruments is permitted under the rules, but in practice it makes a nonsense of the 40-day period that is specified in the standing orders. Because of the late arrival of the statutory instruments, I am agreeing to Phil Gallie moving the motion today—albeit late, according to the standing orders.

Pauline McNeill: I thought this meeting was due to finish at 5 pm today. When will it finish?

The Convener: We will go on until we are no longer quorate, because we have a great deal of work to do.

Pauline McNeill: I presumed the meeting would finish at 5 pm. I can wait a bit, but I have already moved everything today in order to convene the Public Petitions Committee. I will have real difficulty if the meeting goes on until 6 o'clock.

The Convener: We deal with these matters now or not at all. We have to deal with the judicial appointments consultation, because that ends before we come back after the recess.

Phil, will you move your motion and make a brief comment? I am not proposing to allow this to run for 90 minutes, even supposing you could speak for that long on it.

Phil Gallie: I am grateful to the convener for the words she used to accept the motion. They described the situation adequately. I make no apologies for the late submission. If they consider our preparation of amendments for the Regulation of Investigatory Powers (Scotland) Bill and the Bail, Judicial Appointments etc (Scotland) Bill, everyone will recognise the pressures that we have been under.

The prisons issue has engendered some discussion in the committee in recent months. Indeed, when the Parliament was in Glasgow there was a debate on Barlinnie. Displeasure was expressed at overcrowding in the prison. Other aspects at that prison could be said to be related to the Discontinuance of Prisons (Scotland) Order 2000 in that, with the closure of Penninghame and Dungavel, the situation at prisons such as Barlinnie will become worse rather than better.

I make no reference to Longriggend, because members of the committee visited it and there seemed to be a unanimous feeling that it had seen its useful period of service. The closures at Dungavel and Penninghame caught most of us on the hop. They are premature; even at this late stage I would like to think that the ministers would think again. If the committee showed its displeasure with the order, perhaps they would be obliged to.

17:00

I do not intend to make political points about budgets or any such issue. I simply refer to the discussions that the committee has had, the concerns that all members have expressed over the overcrowding in our prisons and the fact that despite the aspirations of the Government for a fall in prison numbers, the numbers continue to rise.

I move,

That the Justice and Home Affairs Committee recommends that nothing further be done under the Discontinuance of Prisons (Scotland) Order 2000 (SSI 2000/186).

Angus MacKay: This is rather a pointless debate, as the issue of prison closures has been public for quite some time and has been discussed

in other places and in other ways. The Parliament has addressed the issues. The Discontinuance of Prisons (Scotland) Order 2000 is simply to allow the Scottish Prison Service to sell off the sites. Two of the three prisons have already closed; the third is due to close. There is no substantial advantage to be gained by debating this. I do not want to prolong the committee any further.

Scott Barrie: That is the point I wanted to make. Two of the prisons are closed. It is disingenuous of Phil Gallie to bring Barlinnie into the equation, because Penninghame and Dungavel are a different category of prison. I thought that the Minister for Justice had made that point when this was discussed extensively. It is not just the fact that we have prison estate that makes the Prison Service a difficult issue, but the type of prisons and the categories of prisoner that require to be detained in them.

It is wrong to try to oppose the order at such a late stage. We have debated the issue in the past. People may not agree with what the Executive is doing, but the arguments have been well rehearsed. We should not oppose the order.

Christine Grahame: I have sympathy with Phil Gallie. I agree that the order cannot be opposed at this late stage, but I think the closure of Penninghame is mistaken. It was an excellent open prison and I dispute the reasons for its closure.

The Convener: Phil, what do you wish to do with your motion?

Phil Gallie: I disagree that we have debated the issues. We were told that the closures would happen. We did not take a collective decision on the future of Dungavel and Penninghame. There have been debates in which the issues have been discussed, but we did not have the opportunity to determine the final outcome.

Scott Barrie says that we have considered the future of each of the prisons and recognise the justification for the closures. Bearing in mind the reports from the prisons inspectorate and the views expressed in the committee on those reports, I dispute that.

I find it strange that the minister objects to us lodging a motion against such an order. The idea of the Parliament is that we should be able to discuss such issues and to lodge motions. At the end of the day, the justification for lodging the motion is the view of the committee. We should not stand reproached for having lodged the motion.

Kate MacLean: Phil Gallie says that the minister does not have any right to object. Am I correct in thinking that the minister said that two of the prisons are closed? The order merely enables the Scottish Prison Service to sell the buildings and land. In fact, if we agreed to this, all that we would do is tie up capital assets. Is it correct that there is no possibility today of the committee stopping the closures going ahead?

The Convener: That may be the position for some of the establishments, but it is not necessarily the position for all of them. If it is the position for all the establishments, that emphasises what I said at the start about the process by which we are expected to deal with these matters, whether we agree with them or not, even though they are in effect foregone conclusions. There is an issue about the committee's ability to have an input into these matters.

Pauline McNeill: I agree. We are repeating ourselves when we say that this is another rush job. I am not happy that we have had so little time to discuss this. It could make the committee look pretty silly. We have scrutinised the Prison Service but have not had the chance to come to a conclusion, and to that extent I agree with Phil Gallie.

However, I agree with the priorities that the Executive has set on where cash is directed, and I will support the instrument as it will allow that to proceed. A proviso is that, as it is a short time scale, we should return to this matter when it is feasible for us to do so, to consider where prisoners have gone and how the process has been carried out. I hope that we will examine conditions in prisons under the new situation. With that proviso, I support the instrument.

The Convener: There is no doubt that we will return to the issue of prisons.

Gordon Jackson: I have to agree with the minister this time. I do not understand the point of the motion. Whether we did so long enough or well enough, we debated the Prison Service's decision to close three prisons. That has been a long-running dispute. Some have one view and some another, but the decision has been made, and those prisons are operationally shut or shutting. We are now left with three empty buildings, which are presumably looked after by watchmen. For some technical reason, one cannot sell off prisons unless they cease to be designated as that kind of property. It does not make any sense to keep those prisons lying there.

Phil Gallie: There is always the wild hope that if those buildings, particularly those at Penninghame, are still designated as prisons, it might be realised that they carried out a useful service and they might be reinstated as prisons. I do not believe that anything is too late. Therefore, I stand by the motion.

Kate MacLean: Can Phil Gallie explain why he would want to tie up capital assets? If we agree to the motion, that is what will happen in effect. I am a bit confused about that.

Phil Gallie: I do not want capital assets to stand empty for a long period of time. I would like the Government to reflect on the situation, particularly in respect to Penninghame. If there is any way of inducing a reconsideration, I am prepared to take that line.

The Convener: Phil Gallie has made his point. He has a motion before us, on which he is insisting.

The question is, that the Justice and Home Affairs Committee recommends that nothing further be done under the Discontinuance of Prisons (Scotland) Order 2000 (SSI 2000/186). Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Gallie, Phil (South of Scotland) (Con)
McIntosh, Mrs Lyndsay (Central Scotland) (Con)

AGAINST

Barrie, Scott (Dunfermline West) (Lab)
Jackson, Gordon (Glasgow Govan) (Lab)
MacLean, Kate (Dundee West) (Lab)
Macmillan, Maureen (Highlands and Islands) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Robson, Euan (Roxburgh and Berwickshire) (LD)

ABSTENTIONS

Cunningham, Roseanna (Perth) (SNP)
Grahame, Christine (South of Scotland) (SNP)
Matheson, Michael (Central Scotland) (SNP)

The Convener: The result of the division is: For 2, Against 6, Abstentions 3.

Motion disagreed to.

The Convener: We now have to go through the other statutory instruments, for which the clerk has prepared notes. I will go through them, and anyone who wishes to comment on them may do so. They are the Census (Scotland) Amendment Regulations 2000 (SSI 2000/194); Advice and Assistance (Scotland) Amendment Regulations (SSI 2000/181); Civil Legal Aid (Scotland) Amendment Regulations 2000 (SSI 2000/182); and Debtors (Scotland) Act 1987 (Amendment) Regulations 2000 (SSI 2000/189).

Christine Grahame: I have a question on the Debtors (Scotland) Act 1987 (Amendment) Regulations 2000. I was interested to see that, in the main, the Executive had accepted the Scottish Law Commission's recommendations. Were there any that it did not accept, or is that too hard a question for this time of day?

Angus MacKay: I am not in a position to give you a detailed answer, but I will find out that information.

Christine Grahame: It is a matter of interest because of the forthcoming cross-party parliamentary working group on diligence.

The Convener: The next instrument is the Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2000 (SSI 2000/187).

Euan Robson: I want to flag up the memorandum to the Subordinate Legislation Committee, which I found interesting. The Prisons and Young Offenders Institutions (Scotland) Rules were first made in 1994, and were then amended five times. This lot will be amended again for next year. Importantly, the memorandum says that some of the amendments that will come in in 2001 relate to policy issues.

We should take an interest in this. If it is at all possible, can we be told what is intended here? I have concerns about the regulations, which are not covered by these amendments and which would be encompassed under the general description of policy issues. None of the amendments have ever been codified into a coherent corpus. I think that we should flag up our concern that that should happen.

Phil Gallie: I give notice that, after the meeting, I will lodge a motion, partly on the basis of what Euan Robson has said but principally because there are several points that I would like to be debated. Out of courtesy to the committee, I thought that I would be putting too much on the agenda if I attempted to do it today.

Angus MacKay: I look forward to a debate with Phil Gallie once again. I assure Euan Robson that we intend to consult on the policy issues, so the committee will have every opportunity to comment.

The Convener: We have now noted all of the statutory instruments. I do not think that we need to detain you any longer, minister, although we have not finished our agenda. I thank you for coming this afternoon. We will see you tomorrow morning at 9.30.

Judicial Appointments

The Convener: Item 4 deals with consultation on judicial appointments. Michael Matheson will report to the committee, which will then consider its response to the consultation paper. Notes from the various meetings have been circulated.

Michael Matheson: I will try to be brief because I am aware that time is moving on and that members have other business to attend to.

I open by thanking Fiona Groves, who has assisted me in undertaking this process by organising meetings and producing notes for the committee. Members will see from the notes that have been provided that we met three organisations. We met the Faculty of Advocates, the sheriff court users group and the Scottish Human Rights Centre. There was a common view in those organisations that the process of judicial appointments had to change. They generally welcomed some of the suggestions that the Executive made in its consultation document, although some issues arose in relation to it. There was some difference in opinion between those in the legal profession and those outwith the legal profession on the way in which the criteria for appointment should change, but in general those from whom I took evidence welcomed the proposals.

A concern about the criteria for judicial appointments relates to the need to ensure that the legal profession—in particular the bench—is more reflective of modern Scottish society. Concerns were expressed about the absence from the bench of representatives from the ethnic minority communities and women. The fact has been highlighted that those who are currently training to enter the legal profession reflect the diversity in modern society more accurately. However, it will take some time before they come through the system. The view has been expressed that, if we are to set criteria for appointments, those criteria should ensure that women and people from ethnic minority communities who are suitably qualified are appointed to the bench as either sheriffs or judges.

17:15

I refer members to the seven points on the note that has been prepared by Fiona Groves. Under point 1, I have referred to the qualifications issue in relation to the quality of candidates. Everyone is agreed on the fact that people should be appointed on the basis of their ability; no one has called for any form of quota system to be introduced. If there is a fair and transparent appointments procedure, our judiciary will inevitably be more reflective of Scottish society.

Point 2 relates to the recruitment process. The legal profession recognises that there must be transparency in the process of appointing sheriffs and judges. Some questions were raised about how that transparency would be achieved. For example, vacant sheriff positions can be advertised in the national press, but judges' positions are not advertised in that way. It was discussed whether those posts should be advertised in the national press or in the specialist press.

If, after the posts have been advertised, the process involves a judicial appointments board, there may have to be two separate systems to deal with the recruitment of sheriffs and judges. For example, someone could approach the judicial appointments board for consideration as a sheriff, but they may have to be nominated by another interested organisation, such as the Faculty of Advocates, to become a judge. Any process that is instituted must differentiate between the way in which a judicial appointments board would appoint sheriffs and the way in which it would appoint judges.

Neil Brailsford—who was speaking as an individual member of the Faculty of Advocates, as the faculty had not finalised its views—expressed the concern that advertising judicial appointments in the media could deter individuals in the judiciary from applying for positions as sheriffs or judges. I was not persuaded by that argument. The issue is more about the confidentiality of the process, which people may think could be compromised by the advertisement of a position in the national press.

Point 3 concerns the establishment of the judicial appointments board. The evidence that was received showed a consensus that the board should be based in statute, although its size may vary. Some people have suggested that the board could increase in size if it were considering several applications for the position of sheriff, and that it could decrease in size if it were considering the appointment of only one judge. Another issue is whether the composition of the board should be biased in favour of the legal profession, or whether half its members should come from a lay background. There is also the issue of whether the period of tenure as a member of the board should be limited. It was suggested that, if the board is based in statute, the period of tenure could be set in line with that of the Scottish Parliament, which is four years.

There was consensus about the professional members who should be on the board, such as the Lord President or someone representing the faculty or the academic world. However, there was uncertainty over who should carry out the

appointing. It was suggested that the head of the Commission for Racial Equality or the head of the Equal Opportunities Commission could perform that task. Concern was voiced, principally by those in the legal profession, that lay members may not be of the right calibre or have an adequate understanding of the legal process. Any lay members of the board would have to be of a sufficient calibre. It was clear that people felt that the remit and responsibilities of the judicial appointments board should include the appointment of both judges and sheriffs.

Point 4 concerns management issues. It was generally recognised that sheriffs principal were in an ideal position to take on a greater role in managing sheriffs within their sheriffdoms. However, concerns were expressed over the current work load of sheriffs principal and whether it would be realistic to expect them to take on an extended role.

Given that there have been concerns over the code of judicial conduct—concerns about the way in which some sheriffs undertake their duties, such as the time at which they start and their general attitude on certain points—it may be that the sheriff principal should take on a greater policing role. There was general support for that idea, although those representing the legal professions questioned whether such a code was required. It was suggested that any such code should include minimum standards and guidance on the attitude of sheriffs towards specific matters. Someone may require interpreting services, to which the attitude of sheriffs varies—some see it as more important than others do. A code of conduct should cover such matters.

Point 6 deals with part-time sheriffs and temporary judges. It was generally recognised that part-time sheriffs and temporary judges were necessary and provided flexibility, although it was felt that the purpose of the appointment of part-time sheriffs and temporary judges should be made known. The view was expressed that that process should be carried out by the judicial appointments board, but that the issue could be pertinently dealt with in the Bail, Judicial Appointments etc (Scotland) Bill.

Point 7 concerns relevant international comparisons. One example that was drawn to my attention was that of the Netherlands, where there is a combined system of judicial appointments: 50 per cent of judges are recruited from recent university graduates and the remaining 50 per cent are appointed much later in their legal careers. I recognise that such a change would probably start an earthquake among the Scottish judiciary.

The Convener: That would be impossible in our system. The point is that, in countries such as France and the Netherlands, when people study law, they choose whether to study to become judges or to become practising lawyers—judges are recruited on that basis early on. That is not the way in which our system works.

Michael Matheson: I am aware of that. It was discussed at the time. However, the comparison is made so that we can consider whether we should go down that road in the future.

The Convener: That is akin to tearing up the whole system and starting again.

Michael Matheson: That is why I said that any such change would be of seismic proportions.

Maureen Macmillan: That system produces a much better gender balance.

Michael Matheson: I imagine that it does. That was just one suggestion from someone who gave evidence.

I am happy to take any questions.

The Convener: We want to give the clerks some guidance on how to draft a response. There is no expectation that we will be able to finalise it today. The draft response would be e-mailed to members in the early weeks of the recess. The closing date for consultation submissions is 31 July. We are seeking some assistance in drafting a response.

Let us go through the notes point by point. Point 1 was about criteria for appointment, qualifications, and qualities of candidates for the judiciary and equal opportunities. I am probably speaking for everyone on the committee in saying that we want to ensure the best possible candidates for the judiciary. Within that general provision, we would probably want a group of sheriffs and judges who reflect more nearly what we regard as normal society. However, that would have to be within the context of people who were the best possible candidates for the job. I say that again because I am not sure that the current system always produces the best candidate for the job.

Maureen Macmillan: By and large, High Court judges come from the Faculty of Advocates. What are the proportions of women and people from ethnic minorities in the Faculty of Advocates?

Gordon Jackson: In this generation, there has been a huge increase in the number of women.

Maureen Macmillan: We have to start by getting women and people from ethnic minorities into the Faculty of Advocates.

Gordon Jackson: That is half of it. When I was called to the bar in 1979, there were only two practising women members at the bar, perhaps three. Now, there are dozens upon dozens.

Maureen Macmillan: Okay. The selection process for judges must have some sort of tribunal or committee with the appropriate mix.

Gordon Jackson: That is just a time factor.

Michael Matheson: There was recognition that we must ensure not only that the judges who are appointed are more reflective of Scottish society, but that the system is open. Apparently, the demographic of people who are currently studying for law degrees is more reflective of Scottish society, particularly in respect of the numbers of women and people from ethnic minorities. However, it will take time for that to filter through the system. We must ensure that, when those students come to apply for judicial posts, the system is fair, open and transparent.

Gordon Jackson: One has to be careful on the representation of ethnic minorities. Very few members of the bar are from so-called ethnic minorities, although the number will undoubtedly increase. The basic problem is that, until recently, members of the ethnic minority community in this country did not go into the professions at all, certainly not the legal ones. For a variety of reasons, they would not enrol in courses that involved professional, vocational training. No system of judicial appointments can deal with that problem until it is addressed at a lower level.

Michael Matheson: We need to ensure that, when those people arrive at the appropriate point in their careers, there is a mechanism to ensure that appointments are open, transparent and fair.

17:30

The Convener: Gordon Jackson is making a good point. We are right to say that there should be a mechanism to ensure that judicial appointments are as open as possible. However, in order to increase the number of representatives of ethnic minorities on the bench, we must first address the issue of the number of people from ethnic minority communities who are practising law. It is axiomatic that a person will never get on to the bench unless they are already practising law. It may be worth specifying that that issue should be addressed separately.

Maureen Macmillan: Proper procedures for advertising and interviewing can be set up through the UK Commissioner for Public Appointments, Dame Rennie Fritchie, to ensure that such matters meet equal opportunities requirements. We must have proper procedures and we cannot hope that a well-balanced tribunal will be created by accident; it should be done through the Commissioner for Public Appointments.

The Convener: That takes us on to point 2, on the recruitment process. There was a certain amount of mirth about people not wanting it to be known that they had applied for a job unsuccessfully. It is fair to say that people do not like to apply for jobs, not get them and then have something that reflects on their professional standing. The current system operates on the basis that people who are unsuitable for the post are advised not to apply.

Michael Matheson: That point links to point 3, on the judicial appointments board. If someone applies to become a sheriff and their application and at least two references—for reasons of probity—are considered by the board, should that person be told just that they have not been successful or why they were not successful? Some companies inform people who have applied for jobs why they have been unsuccessful. That would allow people who wanted to reapply for the job to address the reasons for their lack of success the first time. There was some concern about whether the confidentiality of that system might break down. I am not particularly convinced by that argument. I am sure that we could create a system in which an individual could be told why they had not been successful. The question is whether the committee supports that point or believes that the issue should be considered further.

The Convener: We might run into a real problem when we consider how much of that information goes into the public domain. Under normal circumstances, if a person applies for a job, they either get it or they do not—no one writes an article about the fact that the person did not get the job.

Michael Matheson: How will that information enter the public domain?

The Convener: The appointment is a public one.

Michael Matheson: On that basis, if a judicial appointments board were set up, no one would apply to become a sheriff.

Christine Grahame: The legal profession operates very differently from Michael Matheson's example of managerial posts. Much of this has to do with the applicant's street cred, whether they are at the bar or practise as a solicitor. If someone is not selected and the reasons for that become public, that might have a significant impact on their standing within their profession, perhaps most unfairly. A person's position as a practising lawyer is based on their street cred.

I was concerned by a suggestion made by the Scottish Human Rights Centre, which said:

"The Board should tell candidates whether or not they had been assessed as meeting the required standard, and publish the list of results to ensure credibility of the process. Each candidate could be told (confidentially) why they did

not meet the required standard. The general criteria expected could be published in reports by the Board."

That sounds pretty draconian, and I would like to know the reasoning behind it.

Michael Matheson: I want to clarify something. The consultation document points out that publication of the list will be in the board's triennial report.

The Convener: That is a different issue.

Michael Matheson: I want to be clear about this. A job as a sheriff is advertised in the national press; an individual applies for it; the board considers the application, refuses it on whatever grounds and advises the individual why they have been refused. How can that information come into the public domain? The annual report might say that of the 700 applications considered, 500 were approved and 200 were not, and that 75 of that 200 were not approved because of lack of experience in criminal law, for example, and the rest for other reasons. That could be done without breaking confidentiality.

The Convener: Michael, the fact is that Christine Grahame is right. The Scottish Human Rights Centre has suggested publishing

"the list of results to ensure credibility".

Although the organisation says that each candidate can be told confidentially why he or she did not reach the required standard, if you publish a list of results, some people will clearly be seen not to have come up to standard.

Michael Matheson: How will they know? Someone applies to be a judge, the judicial appointments board considers the application and refuses it—

The Convener: Michael, read the briefing note prepared from the meeting. The Scottish Human Rights Centre proposes that the list of results should be published, and you can see from the feeling around the table that we do not agree with it. We are trying to give the clerks guidance here.

Michael Matheson: The proposal in the meeting was about publishing a list of reasons why candidates were not approved.

The Convener: That is not what the briefing note says.

Michael Matheson: That was the context of the discussion.

Christine Grahame: That is why I asked the question.

The Convener: The briefing note talks about publishing the list of results.

Michael Matheson: The list of results will not name candidates.

The Convener: Well, the proposal is profoundly misleading then. If publishing a list of results does not mean naming candidates, what does it mean?

Michael Matheson: You can have a list of results which specifies the reasons why candidates have been refused without naming them.

Euan Robson: What on earth would be the point of that? Would the list read "Someone was not capable because of" this reason or "Someone else was not capable because of" that reason? The inevitable question would be "Who are these someones?"

The Convener: I am not clear about this list of results. Perhaps the results would simply be stated in the broadest possible terms—for example: "We had 35 candidates for three vacancies for sheriff. Fifteen candidates had not been qualified long enough."

Michael Matheson: As I pointed out to Christine Grahame earlier, that was the nature of the discussion.

Christine Grahame: I am your friend, Michael. I was just seeking clarification. Perhaps you could clarify that bit in your report. The wording is not clear.

The Convener: Yes, the wording is extremely unclear.

Michael Matheson: Our report can reflect the need to address that issue.

The Convener: That is the point that concerns me. We do not want to set up a system that simply knocks back all the behind-the-scenes stuff, or to have a system in which the only people who apply are the ones who already know that they will get the jobs.

Michael Matheson: Yes, but we do not want to throw out the possibility of greater transparency because of a misguided concern. You know, I am not in the legal profession.

The Convener: The note states the Scottish Human Rights Centre's proposal in absolutely stark terms. Now you are saying that that does not represent the organisation's position.

Michael Matheson: I can see how you could interpret the wording like that.

The Convener: It is not a question of interpreting the matter; it has been presented in bald terms in the note, and is obviously a misinterpretation of what the Scottish Human Rights Centre intended. You can take it that, whatever else we are talking about, we are not talking about publishing results in bald terms. How far are you prepared to go in these results?

Michael Matheson: All I am talking about—

Christine Grahame: Michael has lost the will.

The Convener: To be honest, all that is required is to say which people were successful.

Michael Matheson: From evidence that I have taken, there are concerns about whether failed candidates should be informed personally and whether those results should be contained in some annual report. The results would not name individuals; however, if there is a consistency about why people are being refused—for example, if 15 have been refused because of a lack of experience—that could be mentioned. That would purely lead to greater understanding.

The Convener: I would like to see other practical examples of a similar approach in any other area. Perhaps we can get some information on that matter.

Michael Matheson: That is nothing to do with me.

The Convener: No, but I want to see what we are talking about here.

Maureen Macmillan: I do not know whether there are any examples; however, because the system is quite new, such results might give other potential candidates a steer about what is expected of them. If, as Michael Matheson says, too many people with not enough experience are applying, the results might indicate to other people that they should not waste the board's time if they do not have the experience.

Those analyses are undertaken all the time. I can offer only the example of examinations, where people receive a report afterwards to tell them where they did well or where they did badly. That gives a steer to teachers about how well they have been teaching their pupils. I know that it is not quite the same, but such feedback would be very important to failed candidates and to lawyers about what is and is not acceptable.

Christine Grahame: The test is not about feedback, but about what the public should know about the selection procedure for sheriffs. What comes into the public domain should really meet that public interest test.

Maureen Macmillan: Feedback encourages applicants—

Christine Grahame: That is an incidental point.

Maureen Macmillan: Surely we are here to encourage a bit of diversity.

Christine Grahame: That is not the point of publishing the list of sheriffs.

Michael Matheson: The recruitment process should be transparent, with open advertising of the posts. There is another issue about whether recruitment should happen on an ad hoc basis. Should vacancies for judges happen only when there is a vacancy, or should the board meet at set times during the year to consider a number of people on an approved list? That would mean that when a vacancy became available, a number of people would already have been approved.

Mrs Lyndsay McIntosh (Central Scotland) (Con): Will they be ranked?

Michael Matheson: No one would be ranked; there would just be a pool of people.

The Convener: We are now running into serious difficulties. We simply do not have time to deal with the matter at this level of detail.

Michael Matheson: I am not making the detail. It is up to the committee to decide whether it wants to do the report. I am just feeding back what I have been told.

The Convener: Yes, but we are now trying to organise a draft response. It seems to me that if we are going to discuss those issues in such detail, we will be in real difficulty. Can we all agree that we think that general criteria for selection should be published? I do not think that there is a difficulty with that.

Members *indicated agreement.*

The Convener: We can establish that as a basic position. We can also agree that we see the value in open advertising, which will advertise the criteria. I am not sure that we have to decide whether it should be ad hoc or periodic.

Michael Matheson: Consideration should be given to the arrangements for it.

The Convener: We can raise it as a question—will it be ad hoc or periodic? I do not think that we have to make an issue about it.

Michael Matheson: It is a process that should guarantee confidentiality.

17:45

The Convener: Confidentiality is important for the individuals concerned. That must be balanced against transparency. These are important public appointments. It is not easy to decide where the balance might lie, but we can say that there would be value in considering examples when the kind of thing that you are talking about happens: in an annual report there is a broad brush indication that, for example, too many of the people coming forward have insufficient experience. There is value in examining some of that, but it must be balanced against confidentiality. If it gets to the level of saying, "One person was refused because of X," I am afraid that in the legal community in

Scotland it would be about five seconds before everybody knew who that person was. That must be taken on board. We are talking about a relatively small community of potential members of the bench. In the main they know one another and it would not take much for those matters to become very well known. The public will also be interested in this via the media. We must be careful how we handle this matter.

Christine Grahame: It might be worth Michael Matheson looking at whether that kind of information is published on other public appointments.

Michael Matheson: Christine, I am not looking at anything. My job is finished. I have taken the evidence. It is for the committee to consider this. We should be quite clear about that.

The Convener: We could look at benchmark practice in other public appointments.

Michael Matheson: You can go and look at it.

Euan Robson: It might be helpful to consider the process by which the Auditor General for Scotland was appointed.

The Convener: We should examine the practices for other appointments that we could apply to this process. We are talking about publishing criteria, advertising the job and establishing criteria—which also emphasises the need for greater balance in the overriding context of people who are properly qualified.

On management issues and the role of the Lord President and the sheriffs principal, I do not want to go there as a committee. I am not sure that we are in any position to judge what the existing work load of sheriffs principal or the Lord President is. It may be enough to include a paragraph in our response that says that there may be an issue about relative work loads—if we impose a greater work load on some individuals—but without an assessment of existing work loads we cannot tell whether it would be too onerous.

I think that a code of judicial conduct would be useful. I do not know what other members think. Those of us who have practised in the courts are aware of occasions when judicial conduct has perhaps not been what it ought to be.

Michael Matheson: The evidence that I received suggested that it would be useful for judges and those who use the courts.

The Convener: Yes, I think that a code of judicial conduct is important. Decisions would have to be taken about what would be in the code, but I think we should go down that road.

In my view, part-time sheriffs and temporary judges should be covered by any judicial appointments system. If we are going to revise the judicial appointments system, it would be difficult to justify not including them.

Michael Matheson: That also was suggested in the evidence that I received.

The Convener: Are members happy with that so far? This should give some guidance to the clerks.

Michael Matheson: I missed part of what you said. Did we touch on lay representation on the judicial appointments board? There is an issue about whether it should be 50:50 or whether the balance should be in favour of people with a legal background.

The Convener: It depends on how you define lay. A professor of law at a prestigious university could be regarded as lay. Is he lay or not?

Michael Matheson: The view of the legal profession was that it should be someone of sufficient calibre.

The Convener: That does not exactly take us very far forward.

Gordon Jackson: A professor of law is not a lay person in the same sense as a professor of another subject.

The Convener: On the other hand, he is not a practitioner either.

Gordon Jackson: He probably is to a degree, oddly enough.

Michael Matheson: I do not think we should get bogged down on this, but the composition of the judicial appointments board should be given full consideration.

The Convener: It certainly should comprise some lay representation; how much is a different matter.

Michael Matheson: I favour 50:50, but another lawyer was against that. I do not think that we should specify the proportion. The evidence that I received from the three parties that were present was that the majority favour its being 50:50.

Christine Grahame: That is because they are not lawyers.

Michael Matheson: I am sorry, but that was the evidence that I took.

The Convener: From whom?

Michael Matheson: From the people you have notes from.

The Convener: From Neil Brailsford QC? Was he in favour of 50:50 representation?

Michael Matheson: No.

The Convener: I would not have thought so.

The Scottish Human Rights Centre was in favour?

Michael Matheson: Yes.

The Convener: And the sheriff court users?

Michael Matheson: Yes.

Christine Grahame: That is what you would expect.

Michael Matheson: I do not think that our committee report should reflect the evidence of one Queen's counsel because some lawyers on the committee are not keen on 50:50 representation.

Christine Grahame: This is a serious matter. It is about professional competence.

The Convener: It is a serious matter as it is about assessing people for some of the most important jobs in our society.

Michael Matheson: I do not think that we should specify anything. We should say that there should be lay members on the board and that its composition requires further consideration.

Gordon Jackson: The proposal of 50:50 representation worries me. It does not worry me because I am a lawyer. If I have to go to a consultant for my heart, I would sooner the folk who decided that it was appropriate for him to be a consultant knew about heart surgery rather than that a couple of lawyers and a few other people decided to make him a heart surgeon. I am keen on people having expertise.

Michael Matheson: That sounds like a good argument for keeping the status quo.

I do not think that there is any need for the report to suggest that lay representation is at a certain level. We can say—and the evidence is clear—that there should be lay representatives on the board. The proportion requires greater consideration.

The Convener: That is fine.

The relevant comparisons that are in the consultation document are almost impossible to apply to Scotland because they are not from our system. The systems that are more like ours are those in places such as Australia, Ireland, the United States and Canada. We do not have information on those.

I do not know whether that helps a bit. Members should keep a watch on their e-mail because the draft response will be sent around.

We will now leave the issue of judicial appointments. We do not need the official report, although we are not going into private session.

17:53

Meeting continued in public until 18:09.

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