

JUSTICE COMMITTEE

Tuesday 10 February 2009

Session 3

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JUSTICE COMMITTEE

5th Meeting 2009, Session 3

CONVENER

*Bill Aitken (Glasgow) (Con)

DEPUTY CONVENER

*Bill Butler (Glasgow Anniesland) (Lab)

COMMITTEE MEMBERS

*Robert Brown (Glasgow) (LD)

*Angela Constance (Livingston) (SNP)

*Cathie Craigie (Cumbernauld and Kilsyth) (Lab)

*Nigel Don (North East Scotland) (SNP)

Paul Martin (Glasgow Springburn) (Lab)

*Stuart McMillan (West of Scotland) (SNP)

COMMITTEE SUBSTITUTES

Aileen Campbell (South of Scotland) (SNP)

John Lamont (Roxburgh and Berwickshire) (Con)

Mike Pringle (Edinburgh South) (LD)

Dr Richard Simpson (Mid Scotland and Fife) (Lab)

*attended

THE FOLLOWING GAVE EVIDENCE:

Kenny MacAskill (Cabinet Secretary for Justice)

Ben Plouviez (Scottish Government Change and Corporate Services Directorate)

Elizabeth Sadler (Scottish Government Police and Community Safety Directorate)

CLERK TO THE COMMITTEE

Douglas Wands

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Andrew Proudfoot

LOCATION

Committee Room 4

Scottish Parliament

Justice Committee

Tuesday 10 February 2009

[THE CONVENER *opened the meeting in private at 10:42*]

11:30

Meeting continued in public.

Decisions on Taking Business in Private

The Convener (Bill Aitken): Item 2 on the agenda is a decision on taking business in private. The committee is invited to decide to consider in private at future meetings its future work programme and an approach paper for the anticipated criminal justice and licensing bill. Is that agreed?

Members indicated agreement.

The Convener: Item 3 is also a decision on taking business in private. The committee is invited to decide to take in private item 7 on today's agenda and any future consideration of draft reports on the legislative consent memoranda—LCM(S3)15.1, LCM(S3)16.1 and LCM(S3)17.1—lodged by Kenny MacAskill MSP, Cabinet Secretary for Justice. Is that agreed?

Members indicated agreement.

Borders, Citizenship and Immigration Bill

11:31

The Convener: I welcome the said Cabinet Secretary for Justice, Kenny MacAskill, who is accompanied by Elizabeth Sadler, head of the organised crime unit in the police division of the Scottish Government. Mr MacAskill, I invite you to make an opening statement.

The Cabinet Secretary for Justice (Kenny MacAskill): The draft legislative consent motion seeks approval for the United Kingdom Parliament to apply sections 1 to 4 of the UK Borders Act 2007 to Scotland. Those sections allow a designated immigration officer at a port or airport to detain for up to three hours, pending the arrival of the police, someone who is subject to an outstanding arrest warrant.

The power of detention relates to non-immigration offences and falls in a devolved subject area, so the Parliament's consent to legislate is required. The relevant provisions appear in clause 49 of the UK Borders, Citizenship and Immigration Bill, as introduced to the House of Lords on 15 January.

Last week, the clerk to the Subordinate Legislation Committee drew to our attention the fact that clauses 34 and 35 of the bill seek to bestow order-making powers on the Scottish ministers, potentially bringing those provisions within devolved competence. I do not intend to seek the Parliament's agreement to those provisions being included in the UK bill because I have agreed with the UK Government that they are unnecessary and will be removed from the UK bill at the earliest opportunity.

Scottish Government officials were not consulted about those provisions, which I understand were added shortly before the bill was introduced to help future-proof the legislation. They would have given the Scottish ministers a power to amend by order any devolved provisions in part 1 of the bill. However, as part 1 does not include any devolved functions, the powers are unnecessary. The UK Government has agreed that they will be removed and, for that reason, the LCM does not cover those provisions.

Clause 49 will ensure that Scotland's borders are as secure as those elsewhere in the UK and that Scotland cannot be perceived as an easy way into the UK, where wanted people can enter and leave without hindrance. There is currently what might be seen as a loophole in the law that could mean that an immigration officer would have to allow a wanted person to enter or leave Scotland

even if they were aware of an outstanding arrest warrant in that person's name. Immigration officers in England and Wales already have a power of detention; clause 49 extends that power to Scotland, with appropriate safeguards.

Although the provisions will strengthen the law, I should make it clear that the position in practice will be largely unchanged. Police are routinely present at our major ports and airports, and they have primacy for policing in Scotland, including at our airports. Advance notification of passenger data allows immigration officials to alert the police to wanted persons who are either entering or leaving the country. Even when the port does not have a constant police presence, notification normally allows the police to attend and detain the wanted person when they arrive.

At present, if an immigration officer is aware of an outstanding warrant but the person arrives before the information is passed to the police, the officer is unable to hold that individual pending the arrival of a police officer. To ensure that Scotland's borders remain as secure as those elsewhere in the UK and that those who are subject to arrest warrants cannot enter or leave the country unhindered, the provisions should be applied in Scotland.

The provisions also set out the offences of absconding from, assaulting and obstructing an immigration officer who is exercising the power of detention, and the maximum penalties for those offences.

The bill will close a potential loophole and ensure that immigration officers can support the police effectively in tackling crime. I therefore ask the committee to support the legislative consent memorandum.

Bill Butler (Glasgow Anniesland) (Lab): I have just one question. Have immigration officers been placed in the invidious position that the cabinet secretary described?

Kenny MacAskill: We are not aware of that happening, but changes are occurring because of the establishment of the UK Border Agency and changes in customs and immigration operations. We all expect changes to how arrivals at and departures from airports are dealt with. To an extent, the bill prepares for them.

In our discussions with the police, and with their full support, we have always recognised that the police forces in Scotland should have primacy. The bill will deal with a potential gap when a police officer is not present and information comes to light that somebody who has landed or who is seeking to depart is subject to a warrant. Three hours is an appropriate time for which to be able to detain such an individual while waiting for police to arrive.

We are maintaining the primacy of the police because, if an altercation occurs on an aeroplane or if somebody misbehaves in WH Smith or Costa Coffee in the departure lounge, that is a police matter that the Scottish police should deal with. The bill will deal with a small number of incidents that have not yet arisen but which might occur because of changes in the system. We are just preparing for every eventuality.

Bill Butler: Are the police content with the provisions?

Kenny MacAskill: The police fully support them.

Robert Brown (Glasgow) (LD): I want to be clear about the circumstances in which such a situation might arise. The provisions postulate a clear-cut position in which immigration officials know of a warrant, in which case they may or may not need the three-hour power. Will in-between positions apply in which it is thought that a warrant might exist? From where does the information for officials come? Do they have direct access to knowledge of warrants? Does the information come from the police? How does the system work?

Kenny MacAskill: The major ports and airports will be dealt with. We have sophisticated computer systems that record arrivals and departures not only for security purposes but for other reasons—for example, when tragedies occur on aeroplanes or ships, we need to know who was on board. A great deal of information is already collected. In the main, anything that is flagged up should be brought to officials' attention.

In most circumstances, when people arrive at Edinburgh, Glasgow and Aberdeen airports—the major points of embarkation—a police officer is routinely present. Even Stranraer normally has a police presence. However, people might land at places where only an immigration officer is present or, for some reason, information might come to light only as a person is boarding or leaving a vessel.

Giving clear examples is difficult, because we do not expect such situations to arise often, as police will be present and prior information will be available. However, as I said, somebody could suddenly appear when, for whatever reason, no police officer was present. We want to ensure that, if it comes to light that somebody who seeks to depart from the country is subject to a warrant, we can detain them.

Robert Brown: I am asking not for examples but for information about the process. I ask out of genuine ignorance. Is a routine check made on passenger lists? Do the police pass on the names of people who are subject to outstanding warrants? How does the system operate?

Kenny MacAskill: I understand that such matters are all dealt with by the cross-fertilisation of databases. Such issues are flagged up on databases that are available not only to the police through the police national computer but to other agencies, such as the UK Border Agency. The system flags up whether somebody is subject to an outstanding warrant or should be watched in relation to terrorist activities. Data are shared among organisations that share the common goal of making Scotland and the United Kingdom safer.

We seek simply to achieve the appropriate balance between ensuring that the police have primacy at our ports and airports, which is what they want and what we desire to provide, and dealing with instances in which police officers are not present. We expect most such situations to be dealt with by technology rather than by sound policing or investigation but, in some instances, using the provisions will be appropriate.

Nigel Don (North East Scotland) (SNP): I would like to push the issue to the limit. Can you envisage a situation in which an immigration officer does not have a policeman close by, makes a phone call to the police, and the police say, "Aye. That's the man. We need to hold him"? Should the immigration officer arrest the person on the basis that the policeman has said that they should?

Kenny MacAskill: We would not expect the trigger to be the word of the police officer; rather, it would be the information that came to light to the border immigration officer. We propose to give immigration officers the power to detain individuals for a maximum of three hours, and they must tell the police about individuals.

I will give an unlikely scenario. Somebody could land at Wick airport, where there could be an immigration officer for whatever reason. Information could come to light to that officer, and nobody from Northern Constabulary might be there. The trigger for action would be the immigration officer phoning Northern Constabulary and saying, "I've got this guy, who I can hold for three hours." I would be surprised if the police said, "Well, actually, there is a warrant, but we're not interested." The trigger would be the information that is available and the warrant, not the say-so of the police officer. The police officer's responsibility would be to exercise our constabularies' primacy of policing.

Nigel Don: My concern is about who will know that a warrant exists. From what you have said, I understand that information systems in front of an immigration officer would enable him to work out who the person in front of him appeared to be.

Kenny MacAskill: Absolutely.

Nigel Don: Let us suppose that the computer has broken down. Such things happen. I am simply trying to establish how much good information an immigration officer would need. What quality of information would he need before he could act?

Kenny MacAskill: If the computer system had broken down, it would be difficult for the officer to know about the person. We are trying to ensure that people on the sex offenders register do not fly to or from Bangkok or anywhere else, and that people who are seeking to escape justice here or fleeing justice elsewhere in the world do not travel. A lot depends on the software, but the information that will be available to immigration officers will be the same as that which is available to police constables, except for some that is not available because it is clearly categorised as sensitive.

We are simply trying to ensure that we have only one police force in Scotland per se, consisting of our constabularies. We have the UK Civil Nuclear Constabulary at Wick and the British Transport Police, but our constabularies will have primacy. People will be given specific powers to ensure the safety of our communities and communities elsewhere by being able to detain people for up to three hours. In light of Scotland's geography, we think that that is more than adequate time for a police officer to come and take away an individual.

The Convener: We have received representations from the Scottish Refugee Council, including on the complaints procedure. It has stated that the complaints procedure in Scotland might not be as robust as procedures elsewhere in the UK. Do you want to comment on that?

Kenny MacAskill: Yes. There are difficulties in that respect that we must consider. We are working to reach an agreement with the police complaints commissioner for Scotland so that he can oversee certain complaints that have been made about UK Border Agency staff in the same way that he oversees complaints that have been made about police officers. That seems to us to be the appropriate approach.

Immigrants, refugees or others may complain about UK Border Agency members of staff, who are predominantly based elsewhere. It seems to us that the police complaints commissioner is the appropriate person to deal with such complaints, given that we are talking about quasi-police powers, if we can put things in that way. We are working towards having a repeal and review system.

Robert Brown: Is legislation needed to make that possible or can you do what was done with the criminal injuries legislation in the early days, when there was a non-statutory arrangement?

Kenny MacAskill: I think that we are talking about a section 104 order, but the process is relatively straightforward. We do not expect any requirement for primary legislation.

11:45

Elizabeth Sadler (Scottish Government Police and Community Safety Directorate): A section 104 order, under the Police, Public Order and Criminal Justice (Scotland) Act 2006, allows the police complaints commissioner for Scotland to enter into agreements with a range of UK police and police-related bodies to arrange for any complaints about their personnel in Scotland to be dealt with by that commissioner. The section 104 order provides the framework for taking forward such agreements.

Robert Brown: Was that order made by the cabinet secretary or was it another kind of order?

Elizabeth Sadler: The order was made under section 104 of the Scotland Act 1998 as a consequence of the 2006 act. The order deals with a range of issues in the 2006 act on which primacy for the legislation rests with the UK Government. The specific provision allows the police complaints commissioner for Scotland to enter into agreements with UK bodies that allow the commissioner to investigate allegations against those bodies' staff who operate in Scotland. Discussions are taking place with UKBA about allowing complaints against its staff in Scotland to be dealt with in the same way.

Robert Brown: So you are saying that the cabinet secretary and his UK counterparts will facilitate arrangements and make them happen.

Elizabeth Sadler: Yes.

The Convener: Members have no further questions. We will consider the memorandum under agenda item 7.

I suspend the meeting briefly to allow the cabinet secretary's team to change seats for item 5.

11:46

Meeting suspended.

Coroners and Justice Bill

11:47

On resuming—

The Convener: I welcome back the Cabinet Secretary for Justice, who is joined from the Scottish Government by Gerard Bonnar, who is the head of the summary justice reform branch in the criminal procedure division; Ben Plouviez, who is the head of the information services and information systems division; and Andrew McConnell, who is a policy adviser in the enterprise and industry division.

I invite Mr MacAskill to make an opening statement on the Coroners and Justice Bill, which is UK Parliament legislation.

Kenny MacAskill: I am seeking to promote the legislative consent motion on the UK Coroners and Justice Bill, which covers three sets of provisions that extend to devolved matters.

The first set is on criminal memoirs. The bill introduces a scheme to recover profits that criminals make from publicising the stories of their crimes. The scheme will apply when convicted criminals write or contribute to accounts of their crimes. It covers all forms of publication, such as books, films and the internet. It has a public interest test and follows existing guidelines and limits on asset recovery in other cases.

It is hoped that the change in the law will act as a powerful deterrent to criminals who seek to profit from their crimes through publicising their stories. Scotland has a separate jurisdiction on the matter, but the Scottish Government considers it important to take a common approach throughout the UK. For any scheme to be effective, comprehensive UK legislation will be more workable than introducing complex legislation in both Parliaments on different timescales. Having UK-wide provisions will help to avoid cross-border issues such as the exploitation of differences between Scottish laws and laws in other parts of the UK by those who seek to profit from publishing material about their crimes.

The second set of provisions relates to the European Union services directive, whose aim is to open up the internal market in services in the same way as it is open for the movement of people, capital and goods. It ensures that service providers can operate anywhere in the EU, free from burdensome or discriminatory restrictions. The directive must be implemented before 28 December 2009.

The provisions that the LCM promotes will allow the Scottish Government to have all the powers that it requires to implement the directive through secondary legislation under the European Communities Act 1972, by disapplying the limitation on penalties that can be included in secondary legislation that is made under that act. The relevant clause in the Coroners and Justice Bill will not implement anything in itself. However, if the Parliament agrees to the legislative consent motion, Scottish ministers will be able to implement the directive by secondary means through the normal legislative process.

The third set of provisions covered by the LCM relates to the creation of a power for ministers to create information-sharing gateways. The aim is to enable ministers in the UK Administrations to permit bodies to share personal information where there is a need and a willingness to do so.

The proposal to create such a power came from the data-sharing review that Richard Thomas and Mark Walport carried out during 2008. They identified that some safe and beneficial information sharing is prevented, either by specific legal obstacles or by the lack of necessary legal powers for public bodies. The power referred to in the LCM will allow ministers to overcome barriers when it might not be practical to gain individual consent to sharing, but such sharing is necessary and proportionate to achieve a policy outcome. The draft motion before the committee will allow the bill to change the functions of Scottish ministers so that they will have the power to issue orders when the information relates to a Scottish matter and the proposed sharing of that information is between Scottish bodies.

It has been argued in the press that the bill as it stands offers insufficient safeguards on the use of the power; that question will, no doubt, be debated at Westminster. The issue for us to consider today, however, is about ensuring that the powers that Scottish ministers have with regard to devolved matters are no less than those of the other UK Administrations. I have asked officials to look at how we can put in place effective procedures for consultation and notification when Scottish ministers have occasion to consider the use of the power in practice.

It is in the interests of good governance and an effective justice system that the provisions of the Coroners and Justice Bill that relate to criminal memoirs, the EU services directive and the power to create information-sharing gateways, in so far as those matters fall within the legislative competence of the Scottish Parliament or alter the executive competence of the Scottish ministers, should be considered by the UK Parliament.

Bill Butler: You spoke about information-sharing gateways. For clarification and for the

record, what kind of information sharing would be, as you put it, "necessary and proportionate"? Are you and the Government satisfied that there are sufficient safeguards with regard to the devolved matters that you mentioned?

Kenny MacAskill: Such matters are, to some extent, always under review, which is why there will be a debate. There are two things to consider. First, if we did not consent to the legislation, the powers would be put in place anyway, but UK ministers rather than Scottish ministers would exercise them and deal with the issues. Therefore, the question is not whether we agree with the proposals, but whether we wish there to be some accountability and some recourse to ministers in the Scottish Government, as opposed to leaving it all at Westminster.

Secondly, it is clear that, as a society and as members of different political parties, the views that we hold on such issues ebb and flow, which is why a debate will be held at Westminster. The Government's view is that the issue is not the technology, but how it is used. There have been certain instances in which technology could have been used in a beneficial way—for example, by allowing the sharing of data in a way that would have supported Government departments in targeting poverty and addressing problems in areas where there are high levels of need. There are cases in which such data sharing could have been constrained.

This issue is not just about the restrictions and limitations on sharing data in relation to targeting individuals for criminal justice reasons; some of it relates to using information to ensure that certain health, social or economic matters, for example, can be dealt with. Views will ebb and flow and will doubtless be debated.

I do not know whether the officials wish to add anything.

Ben Plouviez (Scottish Government Change and Corporate Services Directorate): I will add a couple of useful examples. The cabinet secretary referred to the fact that the targeting of information at the poorest families in the digital switchover process was prevented by the legal barriers between Government departments and the contractor. It was not possible to direct the information specifically at individuals in need.

The difficulties that were experienced in attempting to use a convenient existing and beneficial identifier so that we could proceed with the national entitlement card in Scotland were considerable, and primary legislation was necessary to overcome them. In such areas, the powers will simplify a power that we already have under primary legislation.

Kenny MacAskill: The Government does not support identity cards—we see them as a gross waste of money. However, given the constraints on us—because UK matters are involved—if there is to be an entitlement card, we should maximise the benefit. It can be of benefit to share information between departments and bodies.

Bill Butler: I am grateful to the cabinet secretary and Mr Plouviez for giving the committee examples of the kind of information sharing that the cabinet secretary referred to as “necessary and proportionate”. That clarifies the issue.

Robert Brown: Our note on the LCM suggests that the facility to hold fatal accident inquiries in Scotland for Scottish servicemen might be dealt with by a subsequent LCM relating to the bill. Has agreement been reached on that?

Kenny MacAskill: I had a meeting with the Lord Advocate yesterday, and the Lord Advocate and I are to have a videoconference discussion with Westminster ministers tomorrow. Regrettably, it was not possible to address the matter at this juncture, but we hope to return shortly with a measure that will, we hope, reduce, if not eradicate, the pain that service families have had to endure. I hope that tomorrow we will resolve the matter finally between the Government here and that in London.

Robert Brown: That is helpful.

I welcome most other parts of the LCM, but I have several questions on the significant issue of data sharing. Paragraph 12 of the LCM states:

“Where information is to be shared between Scottish and UK bodies, or”—

fairly obviously—

“where the sharing would relate to reserved functions, the power to create such a gateway would reside with the appropriate UK minister.”

That suggests that, under the bill, it would be open to UK ministers to require the Scottish ministers or Scottish public authorities to set up almost any information-sharing arrangements that might be required to implement the ID card scheme, which the cabinet secretary mentioned. Not to beat about the bush, that is a wide power. I understand the point about the need for information sharing on issues such as the digital switchover, but should not major issues such as ID cards or the problems of information sharing between devolved functions that arose in the previous session of Parliament be examined through the primary legislative process in the Parliament?

Do you accept that the bill will give UK ministers the power to direct Scottish departments and public services to share information for the purposes of ID card arrangements? Do you also accept that powers will be given to the Scottish

ministers, for devolved functions only, in relation to sharing pretty much any information that they might want to be shared, but without that being examined through the primary legislative process, which in the past the Parliament might have thought appropriate?

Kenny MacAskill: I understand the concern, although I must say that the power is to allow, not to require. Therefore, there is the hopeful safeguard that no Scottish Government would seek to use or abuse the power—we certainly give that undertaking. The power is not forced on us; it is a power that we could seek to exercise in relation to matters that come to us from whatever level at Westminster.

There is a constitutional issue about where such issues should ultimately be decided. Clearly, members of the committee and the Government have different views about where powers should lie and on other matters that are part of the devolution settlement. I return to the point that not proceeding with the LCM would not stop the process; it would simply mean that certain matters would not be dealt with by the Scottish ministers, for which they would not be held accountable.

You are correct to flag up possible consequences. The powers that the UK could use would allow, but not require, the Scottish Government to proceed in a certain manner. The Government has a great deal of concern about a variety of issues relating to ID cards. On those matters, we will seek to act appropriately and proportionately. We think that the Government should be accountable to the Parliament—

Robert Brown: I am sorry to interrupt, but I want to be totally clear. The power to create a gateway, where the information is to be shared between Scottish and UK bodies, will lie with UK ministers. There will be no role at all for the Scottish ministers in that regard, or for the Scottish Information Commissioner, if I understand the matter correctly.

Kenny MacAskill: We have the Government's national conversation, and other political parties are involved in discussions about where power should lie. However, we have no role in that—

12:00

Robert Brown: Has the Scottish Government made any representations on these matters to the UK Government?

Kenny MacAskill: I am not aware that we have made specific representations, but debates are on-going at Westminster. The Scottish Government has set out its position quite clearly on where we stand on ID cards, which is the primary matter that is exercising people's minds

about data sharing. As my colleague Ben Plouviez explained, our view is that the use of technology in certain areas is not only benign but beneficial, such as in relation to tackling poverty and deprivation. We simply seek to strike a balance to protect the public's interests.

Clearly, some of the issues are constitutional. We are aware that we are frequently accused of always seeking to have constitutional battles, but we have such battles when they are appropriate. We have made representations to the UK Government. The memorandum seeks to ensure that powers reside with Scottish ministers, who are accountable to Parliament, rather than with UK ministers, who are not.

Robert Brown: You will forgive me for saying so, but you have confirmed that you have not made representations on the matter. The bill is capable of amendment, so the UK Government could respond to legitimate issues that were raised without our getting into a constitutional fangle. If I understand you correctly, you and your colleagues and officials have made no representations about involving the Scottish Information Commissioner or providing a role for Scottish ministers in the sharing of information between UK and Scottish bodies, or anything of that sort. Is that correct?

Ben Plouviez: There have been discussions on the powers in the bill. Where the purpose of information sharing relates to a devolved matter, the UK minister must obtain the consent of Scottish ministers. An information-sharing gateway between a UK body and a Scottish body can be created only by a UK minister but, if it relates to a devolved function, the consent of Scottish ministers must be obtained. The provisions maintain the primacy of Scottish ministers within the devolved functions.

Robert Brown: Let me explore that, as I am not sure that I fully followed that point, which is not stated in our papers. Are you saying that, for information sharing between UK bodies and Scottish bodies, the power will lie with the UK ministers but the consent of Scottish ministers must be obtained? That is not what our papers say.

Ben Plouviez: If the information sharing relates to a devolved function, that is correct. If the information sharing is for the purpose of a reserved function, Scottish ministers will need to be consulted but their consent will not be required.

Robert Brown: For the sake of argument, let us take the cabinet secretary's example of ID cards. The consent of Scottish ministers would not be required but their permission would be sought. Is that where we are at?

Ben Plouviez: Yes, although it would depend on what function of ID cards was being considered.

Robert Brown: Do Scottish ministers regard that position as satisfactory?

Kenny MacAskill: No. Scottish ministers seek an independent Scotland within the European Union with a normal nation state's powers, including on matters such as how the state deals with its citizens and how it deals with data.

We have made it clear that we view ID cards as not simply an intrusion on civil liberties but a gargantuan waste of public money at a time of great pressure on public services. I can give a clear assurance that the Scottish Government has made its position on ID cards clear. Indeed, my colleague Fergus Ewing has made that clear to the Parliament. If the committee so wishes, I am more than happy to tell the UK Government that the committee's view accords with our position, which is that such matters should be dealt with by the Scottish Government.

However, some matters are reserved under the devolution settlement—which we seek to challenge through the national conversation and, ultimately, through a referendum—so we cannot buck against them. Therefore, where UK provisions provide practical benefits in tackling social and economic inequalities, we will seek to ensure that they are available to our people.

Robert Brown: Regardless of all that, have you made no representations to UK ministers on the issue to date?

Kenny MacAskill: We have made representations on ID cards—

Robert Brown: But not on the issue that we are discussing.

Kenny MacAskill: No. Such matters are part of our on-going dialogue with the UK Government, which straddles departments. The issues in the bill are dealt with not just by the Ministry of Justice but by other departments. As I said, if the committee so wishes, I am more than happy to add information sharing to the list of the various matters that I discuss in meetings with UK ministers, which include firearms, drink driving and a whole array of issues that we believe would be better dealt with by the people and Government of Scotland.

Robert Brown: I will ask one final question, if I may, convener—I am sorry that I am taking some time over this.

The Convener: It is an important issue.

Robert Brown: My question relates to devolved functions in which there is no UK element. We are taking powers through UK legislation to enable data sharing between devolved bodies. Is that not manifestly something the detail of which we should examine ourselves? Should we not consult

appropriate bodies on it, identify the issues that might arise and deal with the matter in the Scottish Parliament? Is it not the sort of thing that the Parliament was set up to deal with in the first place?

Kenny MacAskill: Yes. Things will come through and will be discussed and debated in due course. We are taking an enabling power that will allow us to address matters such as those that we discussed in connection with the digital switchover. There are clear cases in which it seems appropriate that we should be capable of dealing with such matters if they are benign. More controversial cases are linked to other discussions about the limits of freedom of information. Those matters are subject to continuing debate. The Government has not written a blank cheque; the matters will be dealt with cause by cause and case by case.

Robert Brown: Will you give us an indication of the way in which you will determine what is benign and what is not, and what sort of things might be done under the power and what might not? That question is clearly important for civil liberties, as the power concerns personal information and privacy in a series of ways. As you rightly say, it might be okay to implement some data-sharing arrangements, but others would raise serious issues around consent and individual rights.

Kenny MacAskill: Security is reserved to Westminster and outwith the control of the Government and the committee.

Robert Brown: We are talking about devolved issues.

Kenny MacAskill: On devolved issues, we are not looking for an impediment to sharing information but, if and when such situations arise, the matter that you raise should be addressed. The power is about having the ability to share data if it is beneficial to do so, as opposed to being restricted in how we share it. The debate on those matters continues. Where should the limits of freedom of information and data sharing lie? We are in an information age and must ensure that we have appropriate powers. However, equally, we must ensure that we have appropriate checks and balances, as you are correct to point out. That is why other matters will doubtless come back to the committee in some form in due course.

Robert Brown: Do you not accept that the power is one on which the Parliament should form a view through the full legislative process, rather than one that should be delegated to ministers through the rather truncated process for Scottish statutory instruments?

Kenny MacAskill: We already have broad barriers; we also have the ability to introduce measures in subordinate legislation at any time. It

would be inappropriate to require primary legislation on the issue. We are having a political debate as opposed to a legislative one. You are right to say that there will doubtless be proposals that will cause controversy, which will have to be discussed and debated. However, that does not require any legislative debate. We have the legislative framework and the Parliament must decide where the parameters should lie. It is a political discussion, not a legislative one.

The Convener: The points that Mr Brown raised highlight the tensions that could exist, particularly under legislation on identity cards. Are you satisfied that, were the Parliament to agree to the legislative consent motion, there would be no danger of the power applying in Scotland by stealth, for want of a better word? I accept that that is not your intention.

Kenny MacAskill: There are matters that are beyond the Scottish Government's control because of the devolution settlement. On a variety of matters, the Westminster Government can legislate in ways that we do not support and with which we do not agree—indeed, it has done so. I cannot give you the assurance that you seek because I cannot stop the Westminster Government legislating on ID cards, terrorism or even road traffic matters. It could introduce measures with which we disagree. For example, the Parliament supports a reduction in the drink-driving limit, but it is constrained.

However, we see merit in taking the power through an LCM because it will be taken anyway and it is much better that the Scottish ministers, who are accountable in devolved areas, should exercise it in those areas. Mr Brown was right to flag up issues, but the power will allow—not require—the sharing of data.

I cannot give a categorical assurance that actions with which we disagree could not emanate from Westminster, but I assure you that the Scottish Government will not seek to abuse the powers that it holds. The broader issue that Mr Brown correctly raised is a matter not for legislation as such but for a political debate about where the barriers should lie, although I accept that legislation may ultimately be required.

The Convener: I was anxious to get reassurance from you that the UK bill would not affect devolved powers, and you have given me that reassurance.

Stuart McMillan (West of Scotland) (SNP): I have a point of clarification that relates to provisions on criminal memoirs. Would the scheme that the UK bill proposes cover speaking tours by convicted criminals? The issue is not mentioned specifically in the LCM.

Kenny MacAskill: I have done some speaking tours and, in the main, they are usually predicated on something that someone has published. Would the scheme that the bill proposes catch someone who was invited to give a lecture at Our Dynamic Earth? The short answer is that we would need to check that and to discuss the matter with colleagues south of the border. Perhaps it is a moot point.

There is no doubt that whether any public or private body should pay someone in such circumstances is open to debate, but I am happy to undertake to investigate the matter. It is a moot point whether income from a speaking tour would be covered by the provision on publication. Publication on the internet is covered. You raise an interesting and valid point. I think that it would be viewed as unacceptable to allow a convicted offender to keep the profits of a speaking tour. We will seek to address the issue by working with our English colleagues, because it would be reprehensible if it were possible to prevent former criminals from being paid for speaking tours in one part of the UK but not in another. We will investigate that.

The Convener: It might be helpful to point out that, in that context, the definition of the word "exploitation" is particularly apposite.

Kenny MacAskill: The definition of "exploitation" is probably wide enough to cover such activity.

The Convener: In my view, it would be, but that is a matter for your officials.

Angela Constance (Livingston) (SNP): I have a further question about criminal memoirs. Is the cabinet secretary content that the extent of the prohibition is thorough enough? One can envisage a situation in which a convicted offender might work in partnership, or collaborate heavily, on the compilation of a book of which, on the face of it, they were not the author. Convicted offenders could write about the offences of other notorious offenders with whom they might have shared a cell, which would obviously cause great hurt and offence to victims.

Kenny MacAskill: The line has to be drawn at some point. It is clear that neither we nor the Government south of the border wants to restrict freedom of expression to too great an extent, even if we find what is expressed to be reprehensible. There are restrictions as regards sexual exploitation and parameters have been set on a variety of matters to do with public decency. The LCM is more about exploitation than what is written; it is about ensuring that convicted offenders do not benefit from what they write. Many of us would agree that some of what is written is in bad taste. Frankly, I find a variety of

books about real crime distasteful but would not seek to ban them. That is not the intention. The purpose of the LCM is to deal with those who seek to profit by exploiting their criminal deeds.

If criminal X wrote criminal Y's memoirs, we would seek to deal with criminal Y, to ensure that they did not benefit in any way. We could not necessarily prevent someone who had a talent for it from penning some prose, but we could ensure that their compadre would not benefit financially. The purpose of the measure is not to restrict freedom of expression; it is to prevent people from making any substantial gain by exploiting their crimes. We recognise that there will be murky areas—for example, ghost writers. To some extent, the proposed scheme is akin to civil recovery, when we use our powers to ensure that we tackle people who say that they are running a legitimate company that we know is a front for organised crime. It is a question of having the appropriate laws and investigating matters diligently. The measure in question is about profiting from writing rather than about the writing per se.

12:15

Nigel Don: I would like to push that a fraction further. Suppose that I am a notorious criminal and my son and heir decides to write a book about my crimes and take the profits—which might be an interesting way of overcoming inheritance tax issues. Would he be caught by the proposal?

Kenny MacAskill: Not unless the book became part of a criminal enterprise, in which case it would be dealt with. Such matters are dealt with specifically. There are manifest injustices that are clearly unacceptable. I know that Paul Martin, who is not here today, has rightly pursued a case that has caused great distress to a family in his constituency. We know that there are people who ghost-write books that glorify crime and that individuals who have committed crimes profit from those books. That is what we are seeking to target. We are not seeking to get into questions of taste or of what can be written. We do not have the power to do so, and, to an extent, it would be inappropriate for us to do so in any case.

We cannot devise a law for every possible scenario. Books that purport to be written by people who are involved in criminal activities tend to be ghost-written, and we have to ensure that those criminals do not benefit from those books. The issue of criminal families is a matter for the serious crime task force, which will do what it can to tackle them.

I repeat that the aim of the proposal is to stop individuals benefiting from writing or publishing material or from having material ghost-written for

them. Families and communities have suffered, and the ethos of the proposal is that people should not be able to profit from the harm that they have perpetrated.

The Convener: We all share that view.

As there are no other questions, I will suspend the meeting briefly.

12:17

Meeting suspended.

12:17

On resuming—

Policing and Crime Bill

The Convener: Agenda item 6 is consideration of a legislative consent memorandum on the Policing and Crime Bill, which is United Kingdom Parliament legislation. The Cabinet Secretary for Justice and Gerard Bonnar remain with us for this item; Elizabeth Sadler returns to the table; and we are joined by Anna Ross, the policy manager of the police division of the Scottish Government.

Kenny MacAskill: The legislative consent motion will seek approval for the UK Parliament to apply provisions in three areas of the Policing and Crime Bill to Scotland. Those areas are the creation of an offence in Scotland of breaching a football banning order that has been issued in England and Wales; outgoing extradition requests in other EU member states; and the amendment of provisions in the Proceeds of Crime Act 2002 on publishing and laying the appointed person report in the Scottish Parliament.

In the week following the UEFA cup final last year, I wrote to the Home Secretary to ask when legislation would be brought forward to address the loophole in the law on cross-border recognition of football banning orders. I am glad that that has been done in the Policing and Crime Bill, and I consider that this matter of mutual concern is best resolved in one piece of legislation. The bill provides that football banning orders that are issued by courts in England and Wales apply to matches that are played in Scotland and makes it an offence to breach such an order in Scotland. It creates an offence in Scotland of breaching the conditions of an FBO that has been issued in England and Wales. It also makes it easier for police to enforce FBOs when the individuals concerned live in a different part of the UK. I want to ensure that Scotland cannot be seen as a safe haven for those who would involve themselves in violence and disorder at football matches. I support the provisions of the Policing and Crime Bill that will help to achieve that by ensuring that FBOs can be recognised and enforced on both sides of the border, regardless of where they were made.

The bill makes a number of changes in relation to outgoing extradition requests to other EU member states. The provisions alter the executive competence of the Scottish ministers and will therefore be subject to the legislative consent motion. First, the bill makes provision to cover situations in which extradition is sought from another country and the person is, at the time of the request, imprisoned or serving some other

form of detention. For example, another EU state that receives a European arrest warrant under such circumstances may make surrender subject to a condition that, after the case has been heard in the UK, the person is returned to the EU country in question.

There are a number of difficulties with the existing rules that govern the process, as set out in the Extradition Act 2003. The bill clarifies some technical points in that regard and grants Scottish ministers the power to give an undertaking to return the person to the requesting state at the conclusion of the Scottish proceedings. The bill also enables Scottish ministers to give an undertaking in relation to the treatment of that person in the UK. Furthermore, provision is made in relation to the effect of any sentence that is given by a UK court should the person subsequently return to the UK.

Secondly, the bill makes provision for ministers to undertake to return an extradited person when that person is not currently serving a sentence in the other country. It is possible that the country may allow extradition on the condition that the subject of the extradition request is returned. The bill will enable Scottish ministers to undertake that the subject of an extradition request will be returned to the extraditing state at the conclusion of the UK criminal proceedings, so that they may serve any sentence that is handed down by the Scottish courts in that country. Further provision is made in relation to the effect of the sentence that is given by a UK court.

Thirdly, in relation to the operation of both the new undertakings, it is confirmed that nothing in the provisions will require the return of a person where the Scottish ministers are not satisfied that that would be compatible with the European convention on human rights.

The third and final area of the Policing and Crime Bill that will be dealt with by the legislative consent motion amends the Proceeds of Crime Act 2002. The amendments mostly fall under areas of competence that are reserved to Westminster. There is one measure, however, that alters the executive competence of the Scottish ministers in laying the appointed person report in the Scottish Parliament and publishing it. The bill will allow the police to seize high-value goods on arrest, but only when a criminal confiscation order is anticipated and if there is a danger that the assets will be dissipated. The appointed person report will cover searches that are conducted under the new provisions and which did not receive prior judicial approval or approval by a senior police officer, and which led to no property being seized or detained for more than 48 hours. In such cases, a report must be made to the appointed person outlining why the investigators

thought that they had the power to carry out such a search and why it was not possible to obtain prior approval. The appointed person will be under an obligation to submit an annual report to Scottish ministers, with general conclusions and, if necessary, to make recommendations. The report will be laid in Parliament and will be published. The consent of the Scottish Parliament is required, as appointing the appointed person and laying the report in the Scottish Parliament will add to the functions of the Scottish ministers.

Although the Scottish Parliament would be able to legislate for devolved matters, there is no suitable opportunity for it to do so in the near future. I therefore believe that it is sensible that the provisions in the Policing and Crime Bill relating to football banning orders, extradition and the proceeds of crime should be dealt with through the Westminster route on this occasion. I therefore ask the committee to support the draft legislative consent motion in the memorandum that is before it. I am happy to deal with any questions.

Stuart McMillan: I have a question regarding football banning orders. Has any work been done on, or consideration been given to, situations involving UK nationals who now reside outwith the UK? Would it be a matter of them returning to the UK to show or hand over their passport before any international matches took place?

Kenny MacAskill: Such situations are usually the subject of criminal surveillance. I am referring to the people who are sometimes viewed as the main players—no football-related pun intended—some of whom might indeed have gone elsewhere. The purpose of the bill is to deal with the lacuna that has existed whereby we have not been able to deal with people—on either side of the border—because of certain problems.

Your point relates to police intelligence. Having been out with the police at a football match in Glasgow, and knowing about the cross-border travel that takes place—people had come up from south of the border seeking to get involved in football violence—I have no doubt about the information that is provided to the Scottish police from south of the border. Information is available about people from the UK, from north or south of the border, who have gone to reside elsewhere.

We are aware that, tragically, football hooliganism exists not just within the confines of the British islands; there is trouble in Russia and elsewhere. It is dealt with by Europol, Interpol and police intelligence north and south of the border.

Stuart McMillan: I will explain why I posed that question. With the international life that some people have these days, football fans do not necessarily stay in Scotland, England, Wales and Northern Ireland. Many people travel back to the

UK for club and international matches. An individual may have had a banning order placed on them, but may now stay in Hong Kong, for example, or a European country. Is that situation being considered?

Kenny MacAskill: The short answer is yes, but it is not dealt with under the legislative consent memorandum before us; perhaps it would be dealt with more under the legislative consent memorandum that the committee considered previously, on the UK Border Agency. Some people will be flagged up—sex offenders, football casuals or whoever—and we wish to ensure that they are dealt with. The LCM that is before the committee is about the reciprocity of football banning orders; it deals with the gap or omission that had, through nobody's fault, arisen. We had to remedy that.

I have no doubt that people travel not just from London to Glasgow or Glasgow to Manchester, but such matters are dealt with elsewhere. To an extent, that is more of a matter for the databases and information that we collate, subject—as Mr Brown and others mentioned—to our getting the balance right.

The Convener: The issue is fairly straightforward, I think. Are there any further questions?

Nigel Don: The Policing and Crime Bill includes all sorts of things about prostitution and sex offences that will not be covered by the legislative consent motion. Does the Scottish Government propose to examine that area in the future?

Kenny MacAskill: We legislated on sex offences very early on in our term of office, and action is under way. Crime changes and evolves—not just in relation to where prostitution takes place, but with regard to its connection with people trafficking. Prostitution is being dealt with by specific legislation here in Scotland, and it is an area that we continue to review.

On football banning orders, we see clear merit and benefit in working with the UK authorities. In other aspects, we are seeking to consolidate the law in Scotland; the law in those areas has always been significantly different north and south of the border.

The Convener: There are no further questions. I thank the cabinet secretary and his officials for their attendance. That concludes the public part of the meeting.

12:27

Meeting continued in private until 12:42.

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