SUBORDINATE LEGISLATION COMMITTEE

Tuesday 6 June 2000
(*Morning*)

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SUBORDINATE LEGISLATION COMMITTEE
19th Meeting 2000, Session 1

CONVENER

*Mr Kenny MacAskill (Lothians) (SNP)

DEPUTY CONVENER

*Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD)

COMMITTEE MEMBERS

*Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP)
*Trish Godman (West Renfrewshire) (Lab)
*Bristow Muldoon (Livingston) (Lab)
*David Mundell (South of Scotland) (Con)

*attended

WITNESSES

Alison Coull (Office of the Solicitor to the Scottish Executive)
Hugh Dignon (Scottish Executive Justice Department)
Stuart Foubister (Office of the Solicitor to the Scottish Executive)
Colin Miller (Scottish Executive Justice Department)
Robert Shiels (Scottish Executive Justice Department)
Ian Snedden (Scottish Executive Justice Department)
Alan Williams (Office of the Solicitor to the Scottish Executive)

CLERK TEAM LEADER

Alasdair Rankin

ASSISTANT CLERKS

Ruth Cooper
Alistair Fleming

LOCATION

Committee Room 3

Scottish Parliament

Subordinate Legislation Committee

Tuesday 6 June 2000

(*Morning*)

[THE CONVENER *opened the meeting at 11:24*]

Regulation of Investigatory Powers (Scotland) Bill

The Convener (Mr Kenny MacAskill): Good morning. This is the 19th meeting of the committee. The first item on the agenda is delegated powers scrutiny. We will first consider the Regulation of Investigatory Powers (Scotland) Bill. I thank the witnesses for attending. I think that you have been advised of the nature of this committee's meetings. Perhaps you would like to make some opening remarks, after which the committee will ask you to clarify various matters.

Ian Snedden (Scottish Executive Justice Department): Thank you, Mr MacAskill. Perhaps I could say who we are. I am Ian Snedden, the head of police division in the justice department of the Scottish Executive. On my immediate left is Hugh Dignon, who is responsible for the day-to-day activities of the RIP bill. Also present are Mr Alan Williams, who is a solicitor at the Scottish Executive with responsibility for justice department matters, and Charlotte Carpenter, who is also involved in work on the bill.

Before we get into detailed consideration of the bill, I want to bring some developments that might be helpful to the committee's attention. We intend to introduce some changes to the subordinate legislation at stage 2. I am sorry for springing them on the committee at such short notice. The changes have arisen from discussions with the Deputy First Minister and in consultation with Home Office colleagues, and are designed to reflect concerns about the UK and Scottish bills.

The first proposed change is to the powers contained in sections 3(3)(d) and 4(3)(d), which allow ministers to specify additional purposes for which directed surveillance and the use of covert human intelligence sources may be authorised. As the bill is drafted, those two powers are subject to the negative resolution procedure; however, the Executive intends to amend the bill to ensure that the powers will be subject to affirmative resolution procedure. That change reflects the fact that sections 3(3)(d) and 4(3)(d) extend both the primary legislation contained within the bill and the powers beyond those specified in the bill.

Furthermore, although it was previously implicit, the Executive now wishes to make it explicit that ministers may specify additional purposes for the use of directed surveillance or human intelligence sources only if the purposes are compatible with those allowed under article 8(2) of the European convention on human rights.

The second change proposed by the Executive is to the subordinate power contained in section 5(3)(c) of the bill. As drafted, the bill gives ministers the power to designate public authorities that will be able to authorise directed surveillance and the conduct or use of covert human intelligence sources. That order is subject to the negative resolution procedure. The Executive proposes that the bill should be amended so that public authorities requiring to use such techniques will be specified in a schedule of the bill. The amendment will contain the provision for a power enabling ministers to add or remove public authorities from the list in the schedule. It is proposed that any changes to that schedule would be subject to affirmative resolution.

Finally, we have picked up an error. We propose to amend a mistake that relates to the powers contained in section 23(1) of the bill. At present, that power is drafted as being subject to the negative resolution procedure, but as the subordinate legislation memorandum and references in section 24(3) of the bill suggest, it was intended to be drafted so as to be subject to affirmative resolution.

I hope that that is helpful. I apologise for bringing these changes at short notice.

11:30

The Convener: Thank you.

Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP): Will you clarify which subsection of section 4 you are talking about, because I could not follow your evidence on that?

Hugh Dignon (Scottish Executive Justice Department): The first changes that Mr Snedden mentioned are to sections 3(3)(d) and 4(3)(d), both of which concern the powers for Scottish ministers to add additional purposes for which surveillance or use of covert human sources may be authorised. In both cases, we wish to make it explicit that it will be within the terms of the convention and subject to affirmative resolution.

The Convener: You have answered some of the points that we were going to raise, but there will probably be others. It may be easiest for the committee if we go through the matter section by section. No points arise in sections 1 or 2, but there were various matters in section 3, although

some points have been addressed. Do members of the committee wish to raise any questions on section 3?

Fergus Ewing: In relation to section 1, I have a point on the drafting on which I would be grateful for the evidence of our witnesses. A distinction is drawn between surveillance that is intrusive and that which is not. Is not all surveillance intrusive per se?

Hugh Dignon: The approach of the bill is to divide surveillance into two categories: that which is most intrusive—which we have called intrusive for the purposes of the bill—and that which is less intrusive, which we have called directed surveillance. It could be argued that any sort of surveillance is intrusive to some extent. However, we feel that, for the purposes of this bill and for the purposes of making surveillance compatible with the convention, it is useful to divide it up into two different categories.

Fergus Ewing: I raise it only because I imagine that some smart lawyer might use it as the basis for challenging the whole classification in the act at some future date, on the grounds of possible non-compliance with the ECHR. Would you be troubled about that?

Hugh Dignon: No, we would not be particularly worried about that. We feel that in some ways this bill goes further than is required by the convention, which does not require us to separate surveillance into different categories. It requires that surveillance should be in accordance with law and for certain specified purposes. We have added the distinction between types of surveillance for further protection of civil liberties, so that the most intrusive forms of surveillance will be those that are subject to prior approval by senior judicial figures in the form of the surveillance commissioners. It is not a matter for the ECHR whether surveillance falls within one category or another.

Ian Snedden: The whole thrust is to try to ensure that the processes in the bill are compatible with the ECHR.

The Convener: In sections 3(3) and 4(3) we have

"(a) for the purpose of preventing or detecting crime or of preventing disorder;

(b) in the interests of public safety;

(c) for the purpose of protecting public health".

I appreciate why you may wish to keep powers open for any situation that may arise, but what situation do you envisage that is not addressed by those sections? They seem to be all-encompassing from a public safety or state security point of view. Crime, disorder, safety and health are covered. Why do we need additional unspecified powers, even if they are to be dealt with by affirmative as opposed to negative resolution?

Hugh Dignon: As we said, any additional powers specified by Scottish ministers would have to be compatible with the convention. Two powers are specified in the convention but are not in the bill. They relate to the protection of morals and the protection of the rights and freedoms of others. We have not put those in because we are unable to envisage any circumstances in which public authorities would want to use surveillance for those purposes.

The convention is a living instrument and circumstances might arise in which surveillance that is being carried out is thought more properly to fall under those purposes, in which case we could use the powers to introduce the purpose to the bill. Alternatively, a social situation might arise in which the powers might be used. We cannot envisage such a circumstance at the moment, however.

The Convener: We have discussed, in relation to other bills that have enabling legislation, having some form of super-affirmative procedure. Such a procedure would require the standing orders to be amended, but would allow parliamentary groups and members greater opportunity to delete and amend statutory instruments instead of simply accepting or rejecting them. If we strayed into the areas of morals and third-party rights—I had not thought about those aspects—would there be a possibility of having a super-affirmative procedure that could allow debate on a quite contentious subject?

Hugh Dignon: I am not familiar with the super-affirmative procedure that you mention.

The Convener: At present, we have either negative or affirmative procedures. A super-affirmative procedure would allow there to be greater debate and would bring the situation closer to that which exists with principal legislation. Members would be able to amend the legislation, rather than take it or leave it.

Alan Williams (Office of the Solicitor to the Scottish Executive): I recall that the Deregulation and Contracting Out Act 1994 contained something similar to that. The context is different in this case because you are talking about whether to add a purpose rather than to fine-tune a purpose. It might be that there are urgent reasons why that purpose would need to be added, but if there were something complicated about the procedure, it might not be appropriate to do that.

Fergus Ewing: The terms of section 3(3)(a) allow an authorisation for the purposes of preventing disorder. If an elected MSP were perceived to be a threat to order, I presume that

there would be nothing to prevent a surveillance authorisation being granted.

Ian Snedden: That would be unlikely. It would be possible but any surveillance has to be proportionate to the issue under consideration.

Fergus Ewing: I am not suggesting that such surveillance would be particularly enlightening or exciting.

Would you accept as a matter of principle that, in order to ensure compliance with the ECHR, the use of subordinate legislation powers should be eschewed?

Hugh Dignon: Our legal advice is that subordinate legislation is perfectly compatible with the convention.

Alan Williams: In principle, and as I understand the position, whether the rules that establish the foreseeability criterion are in primary or subordinate legislation causes no real difficulty with article 8 of the convention. The main issue is whether the criterion is established in accordance with the law, and there is no real difficulty with article 8 if that is done by a Scottish statutory instrument or under an act of the Scottish Parliament, provided that the terms are reasonably clear.

Fergus Ewing: We have advice about the approach taken by our counterpart committee at Westminster. Paragraph 41 of that committee's special report for the 1998-99 session states:

"The Committee hopes that this Bill may help to establish a precedent whereby provisions designed to ensure that legislation is implemented compatibly with the European Convention on Human Rights are not normally left to secondary legislation but included on the face of the bill."

Should not the Scottish Parliament be trying to implement that principle, rather than departing from it?

Alan Williams: Section 3, as read with sections 1 and 2, sets out the basic scheme. Therefore, the scheme is set out in primary legislation. Nothing in section 3(2) introduces any form of subordinate legislation. I am not quite sure if I have picked up your point.

Fergus Ewing: Section 3(3)(d) entitles ministers to grant authorisation in terms of secondary legislation, for any purposes that they may consider desirable.

Alan Williams: It does not; it merely introduces the possibility that a further purpose could be inserted into the scheme. The scheme that authorises persons to grant authorisations for these purposes is set out in the primary legislation.

Fergus Ewing: Agreed, but the principal point is whether it would be better to set forth the purposes, which Mr Snedden described in his opening remarks as the protection of morals and the protection of the rights and freedoms of others. Surely it would be better to state those purposes in the bill, given that you already accept that there may be circumstances, although you cannot envisage them at present, in which these criteria would be used by ministers to authorise surveillance?

Ian Snedden: As Mr Williams explained, the purposes that are set out in the bill are the primary purposes for which we would expect authorisations to be used. I take Mr Ewing's point about the other purposes. At this point, we do not think that those purposes will be necessary, but this section will give ministers the opportunity of introducing new purposes while still allowing Parliament to consider them.

Fergus Ewing: We hear that argument day and daily: the justification for subordinate legislation is to give ministers flexibility. All members of this committee recognise that there must be a degree of flexibility, as no one can see what life will throw at legislators. However, we are not dealing with a common or garden statutory instrument in this case; we are dealing with the surveillance of individuals.

Section 3(3)(d) seems to me to give ministers the power to do whatever they want and to set out whatever criteria they want. We are talking about the right to privacy as set out under article 8 of the convention and, therefore, surely the different approach suggested by the Westminster committee should be taken because of the interest in protecting the privacy of the individual. We should follow that principle, and there are far too many departures from it in this bill.

Hugh Dignon: At the risk of repeating Mr Snedden's comments, the power in section 3(3)(d) will not be completely open and unrestricted if the Executive amendment, which we are considering, is accepted by the Parliament. The power will be explicitly constrained by the requirement that it must be compatible with the convention and subject to affirmative resolution.

However, the general question about whether it would be sensible to include those two other purposes has been raised. There are only two other purposes—either they are not reserved under the terms of the Scotland Act 1998, which reserves matters such as national security, or they are not already included in the bill. That leaves only the two to which I referred: protection of morals and protection of the rights and freedoms of others. We could take away that point and discuss it with ministers, although I do not know if they would think it appropriate to include those purposes in the bill. The general principle that we have observed hitherto is that if we cannot envisage the circumstances in which we would

use those purposes, it is better not to include them. At present, we are thinking about that.

11:45

Bristow Muldoon (Livingston) (Lab): The position that has been laid out by various representatives of the Scottish Executive is a reasonable one. The Executive does not envisage that such surveillance will take place with regard to those two sections of the ECHR. I disagree with Fergus Ewing. The subordinate legislation does not give powers to ministers. They can introduce subordinate legislation; however Parliament has to approve it by affirmative resolution. At the end of the day, that is a brake on what ministers can introduce. There is another brake, in that subordinate legislation would still have to be compatible with the ECHR. This is not as big an issue as it has been made out to be today.

The Convener: Do members have any points to make on sections 3 or 4? It seems not.

With regard to subsection 5(1), I understand that you do not wish to specify ranks because situations may be fluid, but could not you list ranks so that we have some idea of the level of seniority at which these matters will have to be initiated, and have a power under subordinate legislation to change the list? I appreciate that situations may be fluid—for example, will chief superintendents and chief inspectors be with us in years to come? However, it may be better if we at least specify in the bill, "or such other ranks as may supersede them", or something like that. Do you have any comments on that?

Hugh Dignon: Under section 5 the rank that we have in mind with regard to the police service is superintendent. However, it is worth bearing in mind that other public authorities will be able to use this bill to authorise directed surveillance and the use of covert human sources—for example, various parts of the Scottish Executive or perhaps Scottish local authorities. They will not have superintendent grades, and we are in the process of consulting with those bodies to work out what would be the appropriate equivalent. We can specify superintendent for the police, but it would not be straightforward to specify ranks for the other public authorities that we have in mind.

The Convener: Given that you are bringing in a schedule for subsection 5(3)(c) that details relevant public authorities, surely it would be appropriate that we should know the level of seniority of those who can initiate proceedings? I am surprised that the level at which what may be a major intrusion can be initiated is as low as superintendent. If we are talking about local authorities, surely we should know the level of seniority that would apply? Would it not be reasonably easy to specify the level of superiority in the schedule, so that at least Parliament could debate whether the senior clerk of the North of Scotland Water Authority—which Fergus Ewing flippantly referred to before the meeting opened—was senior enough?

Hugh Dignon: I would like to clarify something before I answer your question. Section 5 is concerned with those who are entitled to grant authorisations for surveillance under sections 3 and 4, which are concerned with directed surveillance and covert human sources. Under section 5, authorisation of intrusive surveillance will be given only by chief constables or the director general of the National Criminal Intelligence Service, and will require the prior approval of a surveillance commissioner.

On your question, our reasoning is that that level of detail is not usually appropriate for primary legislation, which would not set out whether the grade of a particular clerk in a particular local authority is equivalent to or has the same job weight as a police superintendent. An order by Scottish ministers will specify job titles, ranks, grades and equivalents of the individuals who will be entitled to grant authorisations for those categories of surveillance. That order will be laid before the Scottish Parliament.

The Convener: Are there any other questions on section 5?

Fergus Ewing: I am pleased that there will be a schedule that lists the public authorities that would have such powers. I say that not least because, apart from the police force and the National Criminal Intelligence Service, I can think of no public authorities that could conceivably be empowered to grant authorisations for directed surveillance or covert human intelligence sources. Will you give a few examples? Does the Executive consider that the Inland Revenue is a public authority that might be granted such powers?

Hugh Dignon: Yes. The Inland Revenue could be granted such powers, but not under this bill. The Inland Revenue would be likely to seek such authority under the UK Regulation of Investigatory Powers Bill, because it is a reserved authority. As I understand it, the Inland Revenue carries out directed surveillance in major cases of tax evasion and tax fraud and it uses informers occasionally. We envisage that the bodies—other than the police—that might be authorised under the bill might include, as I mentioned, various parts of the Scottish Executive. That includes departments that are responsible for fisheries protection, wildlife protection and other agricultural sectors. It also includes Scottish local authorities, which might be involved in trading standards enforcement; making test purchases would count as an undercover operation and would, therefore, fall within the

definition of covert human sources.

There is a range of organisations that quite properly carry out such activity. We think that it is right that they should be brought within the terms of the bill.

Fergus Ewing: Is the operation of bodies such as the Inland Revenue—to take the example that you mentioned—supervised by the police?

Ian Snedden: It is not supervised in the sense that you mean. As Mr Dignon says, a number of agencies within the Scottish Executive, such as the Scottish Fisheries Protection Agency, carry out directed surveillance. The Food Standards Agency might well carry out directed surveillance against organisations that it has concerns about. It was thought proper that that agency should be brought within the terms of the bill.

Fergus Ewing: I want to pursue this matter. One can understand the desirability of granting such powers of surveillance and investigation for the purpose of pursuing people who are suspected of tax evasion or public debt of any kind. However, is a distinction drawn between a person who is suspected of having evaded their liabilities and a person who is subject to ordinary debt collection?

Hugh Dignon: It needs to be made clear that none of the surveillance by the Inland Revenue will be authorised under this bill; it will be authorised under the UK Regulation of Investigatory Powers Bill. Mr Williams will correct me if I am wrong, but I believe that such surveillance is allowed for the purpose of collection of taxes, duties or excises that are owed to central Government. I am not an expert on how that is interpreted.

Other public authorities that carry out surveillance will need to conform to the legislation and the code of practice in the same way as the police do. We expect authorities to operate to the same standards of professional conduct and probity across the piece. The police will not have different standards from other public authorities.

Fergus Ewing: If surveillance is allowed only for the collection of taxes that are due to central Government, does that preclude the granting of powers to non-departmental organisations—colloquially known as quangos—for the purposes of collecting their debts? Can such bodies get tapping orders or authorisation to survey non-payers?

Alan Williams: First, clause 27(3)(f) of the UK Regulation of Investigatory Powers Bill states that a purpose of surveillance is

"assessing or collecting any tax, duty, levy or other imposition, contribution or charge payable to a government department".

My understanding of "government department" would not include non-departmental public authorities. However, in so far as we are talking about UK public authorities, I think that the power of the Secretary of State for Scotland—similar to that of the Scottish ministers—to specify other public authorities, would be used if we carried out directed surveillance.

Fergus Ewing: Does that mean that bodies such as water authorities could be "relevant public authorities" for the purposes of section 5(3) of the Scottish bill, and so appear in a schedule?

Alan Williams: That would not, as I understand it, be the case in relation to the collection of tax, which is the responsibility of a government department. Other authorities could be added only in connection with criminal matters, rather than the collection of taxes. If there were a criminal offence—evading a licence duty or some such thing—that might be interpreted as a purpose that would fall within prevention of crime. However, that would not fall under the purpose of the collection of duty.

You mentioned oversight of surveillance. My understanding is that the surveillance commissioners would have general oversight of the exercise of the powers, in terms of both the UK bill and the Scottish bill.

The Convener: Am I right to assume that there might be a broader definition? Would, for example, the Scottish Environment Protection Agency be included in the schedule in order to allow it to pursue cases of environmental dumping, which could be conceived of as quasi-criminal? Would SEPA be the kind of organisation that could be given surveillance powers?

Hugh Dignon: We are still considering how detailed the list of organisations in the schedule will be and whether we will list the individual departments of the Scottish Executive. We might list the Executive as a general body and specify later in the order the individuals who may authorise surveillance. Certainly, SEPA is one part of the Executive that we envisage might carry out surveillance under the Scottish bill.

The Convener: Would not there be a considerable democratic deficit if the schedule simply listed the Scottish Executive? No one is suggesting that the National Galleries for Scotland would want to carry out surveillance, but I can understand why SEPA might—I would, perhaps, support that. However, I would be wary of a schedule that listed only the Scottish Executive rather than specifying the range of targets that the bill is attempting to cover.

Hugh Dignon: I take that point and it is something that we will need to consider. We will need to consider which organisations have a legal

identity and can be named in the bill. My colleague Mr Williams can probably add to this comment, but it might be that individual parts of the Executive do not have a legal identity and cannot, therefore, be identified. However, in the course of bringing the schedule to the attention of Parliament we would be happy to set out which parts of the Executive we envisage would be able to use the powers.

Alan Williams: I have nothing to add to that. I would have thought that that power related to public authorities, which are defined in section 5(4) as including the Scottish Administration. We could consider whether the power could or should specify parts of the Scottish Administration. A question that I have not yet considered is whether that power exists already, but we will give that further consideration.

The Convener: No points have arisen in relation to sections 6, 7 and 8.

I welcome the preliminary points that you made about moving from negative to affirmative procedure. In view of the concession that was made in the parallel legislation south of the border following representations, is there an argument that it might be appropriate to move to the affirmative procedure for section 9(2)(c)?

Ian Snedden: We had not thought that it was necessary to have the affirmative procedure for that, but we will certainly pass on your concerns to ministers.

The Convener: Section 16(4), on the substitute power—

Ian Snedden: Sorry. On a point of clarification, in our memorandum we said that the procedure for section 9(2)(c) would be affirmative.

The Convener: That is my mistake.

12:00

Fergus Ewing: Section 9(2)(c) allows ministers to make an order to clarify what information must be provided before an intrusive surveillance order can be made. Is it the intention of the Executive that the detail of that should be contained within a code of practice?

Hugh Dignon: Yes. A form will also be drawn up that police officers will have to fill in and submit to their chief constable for authorisation, which will then be passed to the surveillance commissioner. The code of practice will tell police officers what information is needed. They will be guided by the fields that must be completed on the form.

Fergus Ewing: That will be very helpful. As we discussed, the police must know what is expected of them and what information is required when an intrusive surveillance order is being considered.

Ian Snedden: As we said when the minister was giving evidence, the codes of practice will be published in draft form.

Fergus Ewing: At stage 2?

Ian Snedden: We are working on them with colleagues at the moment.

Fergus Ewing: Will they be published before the bill completes its passage through Parliament?

Hugh Dignon: We envisage that the code will certainly be available before the bill receives royal assent. I cannot be certain that the draft will be available before stage 2. To some extent, we are in the hands of the operational practitioners who are involved in drafting the code of practice. Once they have finished that draft, they will make it available to the public for further comment. My guess is that we are fairly close to a draft being available for wider release—probably in the next couple of weeks—but I do not know whether that will be before stage 2.

Fergus Ewing: There must be a code at the moment. I presume that it is just a matter of adapting the existing code.

Hugh Dignon: The existing code that is used by the police is not based on the approach that would be taken under the bill. The code was drafted by the police in anticipation of the ECHR, but it does not reflect the bill exactly. As I said earlier, the code that the police use relates solely to the police. The code that we envisage will relate much more widely to other public authorities that use the techniques in the bill.

The Convener: You are talking about bringing in an interim code prior to royal assent being granted. Section 21 provides for an interim code.

Hugh Dignon: The reason why provision for an interim code is included is that we can envisage a situation in which the draft code is available, but is out for wider public consultation and we have not completed the consultation or the affirmative parliamentary procedure that would bring the code of practice into statutory effect for 2 October. That is the date from which the ECHR will apply to police matters.

In such circumstances we would wish to bring in an interim code that would—in all probability—be the same as the draft code that is under discussion. Such a code would be temporarily statutory so that the police were able to act within the terms of the law for an interim period until the code of practice that is the subject of consultation was complete and ready to go through Parliament.

The Convener: If an interim code was brought in under section 21, is not it possible that that interim code would persist, unless a time scale was specified in section 20(5)? Even if discussion

is taking place, there is nothing to bring in a permanent code or to make the interim code permanent, although the interim code might be accepted subject to consultation. Would there be some merit in requiring that a code be brought in by a specified time? My question might be superfluous, but on strict reading of the bill, is not it possible that measures that were brought in under section 21 would become the code of practice because nothing else was introduced?

Alan Williams: I take your point. However section 20 introduces a mandatory duty to issue the code. There is also a mandatory duty to consult on the code, so there should be some legal control over Scottish ministers should they fail to consult.

The Convener: Can I have clarification on section 23(1)(c)? In what circumstances is it envisaged that surveillance will be treated in that way?

Ian Snedden: We recognise your concern about downgrading surveillance and the Deputy First Minister is aware of that concern. We will tell him again that you have raised the matter with us. It might be that ministers will take a view on that.

The Convener: I am grateful for that because there seem to be no checks and balances. I do not want to scaremonger, but the bill should provide some balance.

Fergus Ewing: Because section 23(1)(c) provides for intrusive surveillance to be treated as directed surveillance, the points that Mr Snedden made in response to queries about section 5(3), which does not apply to intrusive surveillance, mean that bodies such as SEPA could engage in intrusive surveillance, such as phone tapping and so on. There is nothing to stop quangos tapping phones if intrusive surveillance is reclassified as directed surveillance.

Ian Snedden: Phone tapping is quite separate from the provisions in the bill. Telephone interception will be included in the UK bill, in which a separate section will clarify that matter. The clause to which you refer covers only the police.

Fergus Ewing: In that case, I misunderstood the section, but intrusive surveillance is defined in section 1(3) as involving

"the presence of an individual, or of any surveillance device, on any residential premises".

I assumed wrongly that "surveillance device" could include a phone tap, because I was not sure what other types of device might be involved. The point of principle remains the same, however. If intrusive surveillance can be downgraded by ministers through subordinate legislation, bodies such as SEPA would be entitled to engage in it.

Hugh Dignon: As Mr Snedden indicated, we are discussing with ministers how that part of the section might work. There is a reasonable chance that we might see some amendments to it. The reasoning behind the section is that it should reflect the fact that the ECHR is a living arrangement and that courts will take views about how we should interpret various types of surveillance. In that way, it will fit the terms of the convention and give ministers the flexibility to respond to that. We recognise that downgrading intrusive surveillance raises specific concerns, which we are prepared to address.

Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD): I would be grateful if you did that, because I think that we are pretty uncomfortable with that section.

Ian Snedden: We will convey your concerns about that point to the Deputy First Minister.

Fergus Ewing: I am sorry to be a bore, convener, but I have one final point that arises from the case report—on Khan v UK—with which we have been provided. I believe that the case has not been finally decided, but the judgment that was issued was in favour of Mr Khan and it awarded him quite a lot of money. That was decided on 5 May. Are you familiar with that case? I was not, until last night.

The case illustrates what seems to be a worrying problem for the Executive, given that it has gone down the route of using secondary legislation. In the case of Khan v UK, Mr Khan was regarded as having a right of privacy under article VIII of the ECHR. The Government said that it was entitled to protect the public interest by reference to the law, but there was no domestic law on the use of covert listening devices that applied. Therefore, because there was no law in place, the European Court of Human Rights decided that Mr Khan's right to privacy had been violated. Am not I right to say that there is no law until such time as those statutory instruments are issued? Therefore, until that is the case, the legislation is by definition ECHR non-compliant.

Alan Williams: On the Khan case, my understanding is that the activities that were involved in that case are covered by part 3 of the Police Act 1997, which enacted a code that enables police and customs officers to enter premises. They used a form of trespass because they wished to obtain information on serious crime. I believe that in that case the type of activities in which Mr Khan was involved would have fallen within the definition of serious crime. As far as Khan v UK is concerned, if those circumstances arose after the commencement of the Police Act 1997, they would be covered in Scotland and in England.

In relation to matters that are not connected with serious crime—such as directed surveillance and the use of covert human intelligence sources—the purpose of the legislation is to ensure that for Human Rights Act 1998 purposes the scheme is in accordance with the law on 2 October. The intention is that the provisions—including all the subordinate legislation that is required—will be in force on 2 October so that the police are protected from that date. The police cannot be subjected to challenges under the Human Rights Act 1998 before that date, because it will not have commenced, but from that date they will be subject to protection in terms of the Human Rights Act 1998.

The Convener: I do not think that there are any other questions.

Thank you very much for coming. We are grateful for the preliminary information that you gave the committee on those matters. It might have taken the wind out of our sails, but it has probably circumvented a lot of discussion.

We would usually discuss our views on the matter, but we have witnesses waiting to talk about bail. Do members want to have a quick discussion while matters are still fresh in our minds, or shall we bring in the witnesses who are waiting and deal with both matters contemporaneously thereafter? I am open-minded; what do other members think?

Ian Jenkins: Bring on the next witnesses.

Bail, Judicial Appointments etc (Scotland) Bill

12:15

The Convener: Good morning. We are sorry to have kept the witnesses waiting. Unfortunately, matters dragged on longer than we expected. If you would like to make some preliminary opening remarks, you may do so. You will have been advised of the criteria and purposes of the committee; we do not go into policy, but concern ourselves with efficacy and other such matters.

Colin Miller (Scottish Executive Justice Department): The memorandum that we have written for the committee sets out the powers contained in the Bail, Judicial Appointments etc (Scotland) Bill to make subordinate legislation. It concerns two of the three components of the bill, which contain proposals on part-time sheriffs in district courts, but not the proposals on bail. If it would help, we will be happy to take a moment to outline exactly what those powers are.

The Convener: That would be useful.

Colin Miller: I shall ask Stuart Foubister to say something about the proposals on part-time sheriffs. After that, Robert Shiels will say something about the provisions on district courts.

Stuart Foubister (Office of the Solicitor to the Scottish Executive): Three powers relate to part-time sheriffs. The bill replaces the office of temporary sheriff. In the light of the High Court decision in November last year that a hearing before a temporary sheriff was no longer considered an independent and impartial tribunal under article 6 of the European convention on human rights, we intend to create a new judicial post of part-time sheriff.

The first power being created by the bill is in new section 11A, which is being inserted into the Sheriff Courts (Scotland) Act 1971. It is a power to allow Scottish ministers to appoint part-time sheriffs by regulation and to comply with such procedure and consultation as may be prescribed before making appointments or reappointments to the office of part-time sheriff.

The second power is in new section 11A(5). The concept is that we are starting with a figure of 60 for the number of part-time sheriffs throughout Scotland. That figure cannot be exceeded without returning to the Parliament with an order from Scottish ministers to vary the number.

The third power is in connection with the tribunal provision made in new section 11C, whereby the tribunal is empowered to remove from office a part-time sheriff if it is considered that he is unfit

for office by reason of inability, neglect of duty or misbehaviour. The power is given to Scottish ministers to make regulations providing for matters such as the possible suspension of

"a part-time sheriff from office . . . the effect and duration of such a suspension";

and making

"further provision as respects the tribunal . . . including provision for the procedure to be followed by and before it."

All three statutory instrument-making powers are subject to the affirmative resolution procedure.

Robert Shiels (Scottish Executive Justice Department): Section 7 of the bill inserts new subsection (8A) into section 9 of the District Courts (Scotland) Act 1975. The new subsection will provide that

"In making appointments of justices of the peace, the Scottish Ministers shall comply with such requirements as to procedure and consultation as may be prescribed by regulations made by them."

For many years, it has been the custom to follow what is set out in a small red book, marked "in confidence", which contains guidance notes for appointment, for the procedures to be followed and for the consultation to be carried out before appointing justices of the peace.

It has been concluded that those matters might better be set out in a statutory instrument, rather than following a document marked "in confidence".

The Convener: Thank you. Unless you have anything further to say, it is probably easiest to go through the matter in the terms in which it has been narrated, dealing first with the question of sheriffs.

This question might stray on to policy, but it occurs to me to ask what the logic is in dealing with part-time sheriffs in a different manner from that used in dealing with permanent sheriffs. Is there not an argument that a part-time sheriff is a sheriff and that, while there might be differences in pension rights, salary, appointment and, to some minor effect, removal, a sheriff is a sheriff, whether part-time or permanent? Therefore, the method of appointment should have some consistency.

Stuart Foubister: I do not think that there are huge differences in the manner of appointment. The main difference is that permanent sheriffs can have a royal warrant. The formal responsibility for an appointment, or for recommending an appointment, is placed on the First Minister, who can take it forward to the Queen, as opposed to it being Scottish ministers simply making the appointment.

The power to prescribe procedures and consultation is new in the context of part-time sheriffs. That feeds into our current general consultation exercise on judicial appointments, and we will be considering the feedback on that. There might be a role for some form of judicial appointments board to express views prior to Scottish ministers making the formal appointments.

The Convener: That is the follow-up point: I can appreciate why, in view of the cases that arose, there is a problem and a crisis that must be addressed. Is there a danger, however, that we are going down one route with part-time sheriffs, which might well be superseded by our route on judicial appointments?

Stuart Foubister: I am not sure that I would refer to a danger of that route being superseded. As you say, we need to do something now for the part-time sheriffs. It is recognised that such a flexible resource is useful and necessary in the short term.

One of the reasons for the flexibility in the regulations for appointment procedures and consultation is, I hope, so that the arrangements can blend in with those which might result for judicial appointments to other levels—permanent sheriffs and the Court of Session. In due course, it is likely that there will be some legislation in that general area. At that point, the system that is in place for part-time sheriffs might be brought more into line.

Colin Miller: It is conceivable that the proposals in the bill might serve as a building block. It is with that in mind that the first of the powers to make regulations is put in place, to avoid putting something in the bill that might fairly quickly be overtaken by developments.

For the efficient running of the sheriff court, there is a fairly imperative need to replace the temporary sheriffs, so we need to legislate to create the new judicial office. However, as Stuart Foubister said, at the same time we are conscious that the consultation paper on judicial appointments is in the background, from which a great deal might flow.

With regard to the way in which the bill is constructed, the regulations provide the flexibility to put proper arrangements in place for appointment procedures and consultation, and—with the Parliament's agreement—to amend them to take account of whatever emerges from the consultation process on judicial appointments.

Ian Jenkins: It sometimes bothers us that too much is left to subordinate legislation. You are asking that this be considered a practical matter, which makes sense in the shorter term.

Colin Miller: Very much so.

Ian Jenkins: It is not a principle that you are working on.

Colin Miller: It is impossible to say whether, if there were a judicial appointments bill following the consultation exercise, it would be necessary—as the convener was suggesting—to overhaul the appointment procedures altogether. It is conceivable that that might be the case, but it is not possible to say so now because the Executive is only just embarking on the consultation process on judicial appointments. In effect, this process allows the part-time sheriffs to be appointed, by virtue of the bill, but preserves the position to some extent.

We should also say that any regulations under any of those powers can be made only with the agreement of the Parliament. The Executive will need to return, once the consultation on those powers is complete, to seek the Parliament's authority for the regulations.

The Convener: With regard to the basis of the ECHR decision, I understand how the hire-and-fire problems that arose are dealt with, but do you feel that the question of impartiality has been fully addressed? It appears that the problems that have been highlighted in relation to the nature of who appoints and the separation of powers—all of which were canvassed—might not be addressed to the same extent here.

Stuart Foubister: We have two decisions to bear in mind—that of the High Court in November, in the Starrs and Chalmers case, and the more recent one concerning temporary judges, in the Clancy v Caird case. Some of the comments that were made in those two decisions point in different directions, but it is fair to say that, even in the case of Starrs and Chalmers, there was not huge criticism of the appointment procedures. The key features were the power to hire and fire and the lack of security. The Executive takes the view that the system that we intend to institute for the appointment of part-time sheriffs is ECHR compatible.

The Convener: Let us move on to new section 11C, on the removal from office of part-time sheriffs. I understand that it is your intention to consult senior judiciary, but there is no formal requirement.

Stuart Foubister: That is correct.

The Convener: Are you satisfied that that is adequate as it stands, or should it be beefed up?

Stuart Foubister: That is a good point, which we will want to consider. In this area, we consult the judiciary as a matter of course. Consultation is prescribed only with the Lord President, but in practice it goes wider—it takes in the sheriffs' interests, for example. However, we may want to consider the absence of any requirement for consultation on the face of the statute.

Fergus Ewing: Would that include, under new section 11A(2), making obligatory the discretionary power to issue regulations?

Stuart Foubister: The reason why the current proposals are for that power not to be obligatory is principally one of timing. There is a strong wish to get part-time sheriffs appointed and in place as soon as possible, once the bill has been approved. In practice, the sort of consultation that we are prescribing may be conducted for the first tranche of appointments. However, we would not want to hold them up further by making the regulations before the appointments are made.

Fergus Ewing: I can see the practical problem, but I am thinking of future appointments of part-time sheriffs. As part of the consultation process that is to be followed prior to such appointments being made, should not it be compulsory for the Executive to bring forward regulations setting out the procedure to be followed and those who are to be consulted?

12:30

Colin Miller: I see where you are coming from. We would not want to put in place a hurdle that would make it impossible to appoint at least some of the new part-time sheriffs in the short term. We would also not want to rush the consultation process or the regulations. The regulations require parliamentary approval, and it will almost certainly not be possible to bring regulations before the Parliament before September. The hope is that, if the bill receives royal assent before the summer recess, some part-time sheriffs can be appointed to assist sheriff courts during the summer vacation.

If you are suggesting that the bill should impose a requirement on the Executive to come up with regulations and, once it has done so, to comply with them, and if that could be constructed so as not to preclude us from appointing the first tranche of part-time sheriffs, we could consider that.

Fergus Ewing: That is exactly what I am suggesting. I should be pleased if it could be considered.

Colin Miller: We will do that.

The Convener: New section 11C(3) deals with the constitution of the tribunal. New section 11C(4)(a) deals with regulations for investigation and suspension of part-time sheriffs. If we are talking about a tribunal that is constituted to order suspension, but section 11C(4)(b) does not deal with either constitution or suspension, what is it driving at?

Stuart Foubister: There are two elements to it. The first part of the subsection states that the Scottish ministers

"shall make such further provision as respects the tribunal as the Scottish Ministers consider necessary or expedient".

That is almost a catch-all provision. We feel that this is slightly untravelled territory, as removals from the judiciary are few and far between. We would not wish to leave ourselves in a situation where, if such cases arose, we were unable to learn from experience and were without powers to fill gaps.

The second part of subsection (4)(b) is simply a power to make

"provision for the procedure to be followed by and before"

the tribunal. We have in mind determining the form that investigations might take and whether they might include the giving of evidence before the tribunal.

David Mundell (South of Scotland) (Con): Are you satisfied that the reference in new section 11A(5) to the number 60 and the Scottish ministers' apparent ability to change that number will deal with the issues that were raised in the Starrs and Chalmers case? There does not seem to be any qualification of the Executive's ability to increase that number.

Stuart Foubister: The measure is new in so far as under the previous system of temporary sheriffs, there was no numerical control of that sort. In that sense, it is a reaction to the Starrs and Chalmers case that the power to increase the number is subject to parliamentary control through an affirmative resolution. The number may also be decreased, but if the number were to be increased, the Executive would expect to have to make a well-argued case as to why more part-time sheriffs were required. There is certainly no intention to supplant the permanent judiciary.

Colin Miller: As you will realise, 60 is slightly less than half the present number of temporary sheriffs; the fact that that number has been set in the bill is a conscious recognition of the fact that the system had become too dependent on temporary sheriffs. The number is a best estimate of the ceiling that we envisage, but there is a desire to keep flexibility. As Stuart Foubister said, that flexibility is in both directions: an increase or a decrease in the number of part-time sheriffs to be appointed at any one time may be proposed. We will get a better idea of how part-time sheriffs will operate once they are up and running. At this stage, we do not want to bind ourselves to a particular figure only to discover that it is too high or too low. As Stuart also said, any proposal to change the number would require an affirmative resolution of the Parliament.

Ian Jenkins: Is the idea behind this also to ensure that the use of part-time sheriffs does not become too embedded in the system? They would be used for run-of-the-mill cases in a way that avoided having to use permanent sheriffs.

Colin Miller: It is intended that they should be there for relief—for example, to provide cover during holidays or for sickness.

The Convener: As there are no further questions on that, we can move on to chapter 2.

I can understand the thinking behind new subsection (8A) and I welcome some review of the matter that it deals with, but the wording is extremely broad and there is no outline of the procedures or consultations that would be required. Could not that subsection be expanded on?

Robert Shiels: There are 32 advisory committees which are under a duty in their district to find suitable candidates from all sections of the community to be justices of the peace. In so doing, the committees may use whatever methods they deem appropriate. The way in which the committees go about the business of finding suitable candidates clearly varies across Scotland. In this part of the bill, what is being sought is a general power to enable us to consult. I have already had meetings with the District Courts Association, and further meetings will be held shortly in relation to the review of the district courts. It is important to see the subsection in the context of that review.

On 22 May, the minister, Mr MacKay, gave evidence to the Justice and Home Affairs Committee and made it clear that—perhaps somewhat unusually—he was inviting comments on the remit of the review. Interested parties were not being presented with a remit but were being invited to say what they thought should be reviewed in the course of considering the efficiency of the district courts. You mentioned the vague nature of new subsection (8A), but that is partly to allow for further discussions with the appropriate parties. As I say, there are 32 committees, and practice seems to vary.

As I said, the traditional approach has been set out in guidance; some general principles can be distilled from what has been written in that book of guidance, and those matters are very much what would be put in the delegated legislation. I am conscious that subsection (8C) states:

"No such regulations shall be made unless laid in draft before, and approved by resolution of, the Scottish Parliament."

If what was produced at the end of the consultation period were not acceptable to the Scottish Parliament, it could be rejected.

The Convener: Is not the danger that we would then have to either accept or reject it? I understand why district courts will be reviewed and I can understand that, although the urgency

might not be the same as that created by the Starrs and Chalmers judgment, this provision anticipates a problem. However, I am surprised that the minister should undertake consultation at the same time that he is firing through legislation. Usually, one would consult and legislate, not legislate and consult.

Colin Miller: There is a short-term problem with the district courts and possible ECHR incompatibilities, which needs to be fixed in legislation. There is also a feeling, which has been around for some time and which Mr MacKay expressed to the Justice and Home Affairs Committee, that there ought to be a wide-ranging review of the district court and its place in the judicial system, which would go beyond ECHR considerations and the scope of the bill, and would be a long-term process.

On the power of appointment, after consultation it is intended to formalise in regulations—they will then be in the public domain—informal procedures that have existed for a considerable time. The power in the bill to make regulations reflects an ECHR concern. It is without prejudice to the longer-term review of the structure, organisation, powers and functions of the district court.

David Mundell: It is surely unsatisfactory not to include as much as possible in primary legislation, given what Mr Shiels said about removing procedures from the booklet that was marked "in confidence".

Colin Miller: We could present a proposal to the committee and Parliament enshrining the present procedures in the form of regulations. We have taken the view that as the procedures have been around for some time and have not been fully in the public domain, they should be the subject of consultation before we produce proposals for regulations.

David Mundell: That reinforces the convener's point about the process.

Alison Coull (Office of the Solicitor to the Scottish Executive): Can you clarify whether your concern was about the width of the power in the primary legislation or about the fact that we have not specified in our memorandum what we are envisaging?

The Convener: Both.

I understand the need to anticipate possible scenarios—we do not want to face meltdown in the district courts as we have faced problems in the sheriff courts. However, whom are we consulting, and over what period? If not many people will be consulted, over a short period, what is the rush? If many people will be consulted, over a long period, is not there a danger that we will build by way of subordinate legislation a key and integral part of the review of district courts? I support a review of the district courts, but we seem to be back to front on the issue.

Colin Miller: It is important to emphasise that the scope of the consultation in new subsection (8A) and of any regulations that are made subsequently relates simply to the procedures for the appointment of justices. There is no doubt that the review of the district courts, which Mr MacKay announced, will go far beyond that, to consider questions about the powers and structures of district courts, and their place in the system. That will be a longer and more wide-ranging review.

We expect that the process of consulting and of introducing regulations for the appointments of justices will be a shorter-term and more straightforward exercise. The starting point is to invite everybody to comment on the changes that could usefully be made to the procedures that are set out in the booklet to which Robert Shiels referred, when we put them in the form of a statutory instrument.

The Convener: Does not this question return to logic and first principles? If we are undertaking a review of district courts, surely the first question is about the philosophy and purpose of district courts. Are they there to reflect local authority boundaries? Are they there to reflect the desires of local authorities through elected members? I understand that historical anomalies mean that the locations of various courts no longer tie in with where people live—I see other members smiling at that.

We are in danger of installing a pillar of what we are setting up while consultation is on-going. If we are to move away from district courts being based on local authorities or reflecting local perspectives through elected members, should not the matter be dealt with at the outset rather than setting hares running?

12:45

Colin Miller: I understand what you are saying. The point is that the purpose of the bill is to rectify the possible ECHR incompatibilities that we have identified. Certainly, that involves the arrangements for the appointment and removal of justices, which are set out in the bill. Nobody has yet suggested that any of the procedures that are set out in the booklet raise ECHR incompatibilities, but when we are introducing statutory arrangements for the appointment and removal of justices and for statutory security of tenure for justices, it seems undesirable that that statutory edifice should rest on a completely non-statutory appointment process. Therefore, as part of the process of tidying up the possible ECHR incompatibilities surrounding the appointment and

removal of justices, it seemed sensible to create a power to present proposals for regulations to Parliament, which would in effect supersede the non-statutory processes. We envisage that they will be presented to Parliament sooner rather than later.

You are right to say that after a major review of the district courts, primary legislation might be required to amend the District Courts (Scotland) Act 1975. Depending on what arrangements were being put in its place, you might wish to revisit at that point the provisions in the bill on the appointment of justices. Conceivably, we could move away altogether from the present system. That cannot be predicted at this stage. In effect, we are trying to anticipate the immediate ECHR incompatibilities in the present arrangements.

The Convener: The committee has discussed a form of super-affirmative procedure, which would give more options to parliamentarians. Are you prepared to consider that? This seems to be the legislative equivalent of a blank cheque—you can bring in what you like, when you like, after consulting whom you like over whatever period you like. If there were a super-affirmative procedure, we would not have to take it or leave it, and we would have at least some opportunity to dissect it on the floor of the chamber.

Alison Coull: I will comment on the points of concern that you raised earlier and reiterate some of what Colin Miller has said. The review of the district courts is perhaps slightly separate. In putting the procedure in regulations, we wanted to give transparency now to the appointment procedure. It is because we thought that it was appropriate to be as flexible as possible that the power is wide and it is not specified what the procedures or the consultation will be. That has not been finally decided.

Some procedures exist in the booklet, but other procedures might also be appropriate. That is why we thought that we should consult on the regulations. We could certainly consider the super-affirmative power.

Colin Miller: I see no difficulty with the committee examining the draft regulations and questioning officials or ministers about them before they are laid before Parliament.

The Convener: The super-affirmative power is not so much for members of this committee, who would be able to consider draft regulations anyway, as for individual members who represent particular party political or constituency views and who are often left with the option of rejecting or accepting legislation in whole. We have already discussed the issue with regard to the National Parks (Scotland) Bill.

Fergus Ewing: In section 7, the proposed new subsection (8A) says:

> "In making appointments of justices of the peace, the Scottish Ministers shall comply with such requirements as to procedure and consultation as may be prescribed by regulations made by them."

Does the Executive intend to bring the regulations into force at the same time as the act?

Colin Miller: Not necessarily.

Alison Coull: That is not our intention. There would not be enough time for the consultation process. After the act comes into force, there will be a period—perhaps not very long—in which some appointments will be made under the old system before the regulations are introduced.

Fergus Ewing: Going back to basics, I understand that the Executive accepts that although a specific challenge has not been made under the ECHR to the appointment of justices of the peace, the procedure might fall foul of the ECHR in the same way as the appointment of temporary sheriffs did. Is that correct?

Alison Coull: That is not quite our position. There are problems with the provisions for the removal and firing of justices of the peace, which is what the ECHR focused on in the case of temporary sheriffs. Although there was no real criticism of the appointment process, we felt that it was desirable to put some transparency into the system with this bill.

Fergus Ewing: But there are concerns that the appointment and removal of justices of the peace must be ECHR compliant.

Alison Coull: Yes. We do not think that the present system is not compatible.

Fergus Ewing: You think that it is compatible.

Alison Coull: We think that the present system for appointments is compatible.

Fergus Ewing: However, you have decided that councillors can no longer be full justices as opposed to signing justices.

Alison Coull: That is correct.

Fergus Ewing: Other than that, you have not said anything about how justices of the peace will be appointed except that regulations might be made under new subsection (8A).

Colin Miller: Yes.

Fergus Ewing: Is that not unacceptably skeletal?

Colin Miller: There are two points to make about that. First, as some of the matters in the bill are urgent for various reasons, it was our hope to get the bill on the statute book before the summer recess if possible. With such a time scale, it would simply not be possible to conduct a meaningful

consultation exercise and replace a fairly long-standing and detailed informal arrangement with a proper, considered set of regulations. That said, if the bill does not obtain royal assent before the recess and is still before the Parliament in September, we might be able to propose regulations in those two or three months.

The other point is that until such time as new regulations are introduced, appointments will continue to be carried out in accordance with existing non-statutory guidelines. Although no one has suggested that such guidelines are incompatible with the ECHR, it seems undesirable to make appointments indefinitely the subject of informal and unpublished guidelines when we are putting appointments and removal procedures on a proper statutory footing.

I agree that in an ideal world it would be desirable for the regulations for appointments to be available at the same time as the bill, but there is also a strong argument for taking a proper opportunity to review existing procedures and to come back to the Parliament with proposals for proper regulations.

Fergus Ewing: I would be the last to argue that the world is ideal. Although I am reassured by your welcome indication that regulations might be introduced in a few months' time, should there not be the same additions to the bill for the appointment of justices of the peace as there are for the appointment of part-time sheriffs under proposed new section 11A(2)? There should be a requirement, not a discretionary power, to consult; and if there is such a requirement, the bill should also specify the persons whom the minister is required to consult.

Colin Miller: As we said in the context of part-time sheriffs, we are perfectly prepared to consider urgently the requirement to consult with a view to lodging amendments to the bill. However, we will need to consider whether, in the time available, it is feasible to specify in the bill the parties that should be consulted.

Fergus Ewing: There is a suggestion that the parties to be consulted might include the Lord President. Is there a particular aversion to consulting Parliament?

Colin Miller: Do you mean about the particular individuals as opposed to the procedures?

Fergus Ewing: No. I am talking about the criteria that will be applied. In certain parts of Scotland there is a feeling that there has been a geographical bias about the types of people who have become sheriffs. There have been similar concerns among people from ethnic minorities and females. Would it not be desirable to bring Parliament into the consultation to allow such concerns to be reflected through the democratic process?

Colin Miller: We will consider such areas when we overhaul the red booklet and introduce proposals for regulations. That sort of detail would be too much to specify in the bill and we would want to consult on the issue before settling on any particular arrangements. Robert, do you have any thoughts on that?

Robert Shiels: No.

Bristow Muldoon: I am a little bit confused about why we are pursuing certain measures, particularly in light of questions about elected members that you and Fergus Ewing raised. If the current system is compliant with the ECHR—as someone pointed out—why should we change it? Although I understand the justification for a consistent appointments system for all justices, I do not understand why elected members should be excluded from it.

I recognise that the question of independence in judicial appointments could introduce problems with the current system of appointing elected members, but I do not understand why they could not be appointed under the same system as other people. Not only elected members have a political affiliation; many people in the community have political affiliations of one sort or another. I do not understand why one section has been excluded.

David Mundell: Given your concerns about elected members, did you consider other measures that would have allowed them to remain as justices, or was it just decided that they would not be and that was it?

Alison Coull: May I clarify one point? Elected members will be subject to the new appointment procedures in so far as they can still be appointed as signing justices, so they will be covered in that sense. However, they will not be eligible to be appointed as full justices.

13:00

Bristow Muldoon: What is the justification behind that? Surely there are many other people who have political affiliations that may be just as strong as those of elected members. Why are they not subject to the same qualifications?

Colin Miller: The rationale underlying the proposals that are set out in the bill concerns the close relationship between councillors, ex officio justices and local authorities, which under present arrangements are also responsible for district courts. In the Executive's view there is a clear risk of incompatibility in those arrangements. That is why the bill provides essentially that councillors and ex officio justices should no longer be able to sit as full justices. In other words, it is proposed that they should not be bench-sitting justices.

I was asked what other options the Executive considered. The policy memorandum for the bill explains that another possible avenue would have been to divert fine income away from local authorities. That is the main reason why there is a risk of incompatibility. Under the convention, what is required of any court is that it is seen to be an independent and impartial tribunal. The argument is that since a local authority has an incentive in maximising fine income, a court that is part of a local authority cannot be seen to provide an independent and impartial tribunal.

One option that was considered by the Executive and which was suggested by the District Courts Association was to divert fine income away from local authorities. That point was raised when Angus MacKay gave evidence to the Justice and Home Affairs Committee. As it happens, the convener of that committee expressed doubts as to whether it would be within the Scottish Parliament's competence to make the necessary changes to the financial arrangements if that option had implications for the Scottish block.

When it considered the options, the Executive's view was that diverting fine income away from local authorities and making the necessary compensating arrangements for local authorities and for the Executive would be too difficult and complex in the time available. It is, however, another way of approaching the problem.

David Mundell: I would have thought that given that you have a large number of experienced people as justices, particularly in rural areas—certainly in the south, councillors are prominent—you would have wanted to take whatever steps you could to retain that experience base rather than exclude those people if, as Bristow Muldoon highlighted, there are no political issues.

Colin Miller: In terms of Starrs and Chalmers, the point at issue in ECHR terms is an independent and impartial tribunal. We take the view that fine income is a major part of that consideration. It is at least arguable whether a district court in which politicians sit, and which is part and parcel of the local authority, would constitute an impartial and independent tribunal. That gets close to some of the grounds upon which the Starrs and Chalmers case in relation to temporary sheriffs was decided. There are certainly bits of Starrs and Chalmers that people could argue are challenged along those lines.

Having said that, I would not suggest that that was the main reason the Executive opted for the option that it has chosen. Diverting fine income away from local authorities and possibly reconstituting the base of district courts—for the sake of argument taking district courts out of local authorities altogether, which would resolve the problem—are options that play into the long-term review of the district courts that Mr MacKay announced. It is not something that ministers felt they wanted to rush into in the time scale that was available for getting this bill on the statute book.

Fergus Ewing: I want to pursue Bristow Muldoon's point, which has not been answered clearly. Why have councillors been singled out to be excluded from getting on the bench? An MSP recently became a judge; that was not a disqualificatory factor. In any event, surely the ratio decidendi of Starrs was not that the temporary sheriff was an elected politician; it was that the temporary sheriff owed his security of tenure to elected politicians. Surely that is a completely different distinction, yet you have decided to disqualify all councillors, some of whom may be independent councillors and have no party political affiliation at all. Rather than sorting out the mischief that has been identified by Starrs, you have addressed another matter altogether.

Alison Coull: Our concern is not with the fact that councillors are political appointees. Our concern is with the financial link local authorities have with district courts, which could lead to the perception—and it is merely perception; nobody is suggesting that there are any difficulties with councillor justices—that there is not an independent and impartial tribunal.

David Mundell: In what context?

Colin Miller: In Starrs and Chalmers, the court went out of its way to say that there was no suggestion of any lack of impartiality in relation to temporary sheriffs. The case was decided, and temporary sheriffs were removed, purely on the basis of a possible perception that they were not able to act as an independent and impartial tribunal because of the lack of security of tenure.

In relation to councillor and ex officio justices, our concern is their link with local authorities and local authorities' links with district courts. The question is how to sever that link. One approach is the approach that is set out in the bill, and it seems to us that it is the quickest and easiest way of resolving the problem. Another approach would be to take district courts out of the local authority ambit altogether, but that is something to be looked at in the context of a longer-term review of the district courts.

A third and final option is to divert fine income away from local authorities, but that raises considerable complexities of its own, not least, as the convener of the Justice and Home Affairs Committee pointed out, the competence of the Parliament.

Mr Mundell: I suspect the reality is that there is zilch fine income and that it costs money to recover fines. In my former life in BT I used to be very concerned when justices awarded £2 a week

for costs when someone had vandalised a phone booth as it cost the company a lot of money to process it each time the postal order arrived.

Bristow Muldoon: I suspect I am in danger of straying into the area of policy rather than subordinate legislation, but the line of argument is interesting. The question of fines seems marginal—most local authorities would regard the income from fines as a peripheral part of their overall income.

The question about security of tenure is not answered by the appointment of part-time sheriffs, in that they can be reappointed at the end of five years. Are we not creating a system in which the problem with the security of tenure of sheriffs brought up by Starrs and Chalmers continues? We have part-time sheriffs who can be reappointed, who could be deemed to want to satisfy the wishes of the people who appoint them when they are coming up to a possible reappointment, but we are dealing with a problem with the income from fines that was not identified in this case. We are dealing not with the problem that was identified, but with a problem that has not been raised.

Stuart Foubister: On part-time sheriffs, the main emphasis in Starrs and Chalmers was section 11(4) of the Sheriff Courts (Scotland) Act 1971, which allowed ministers to remove a temporary sheriff at will; there was no security of tenure whatsoever. The Clancy v Caird case was about a temporary judge at the Court of Session. The standard period for commissions is three years and reappointment is by the Executive. That passed muster with the court. I do not think that we would read Starrs and Chalmers and Clancy v Caird together as saying that the only acceptable form of tenure is for life. We have proposed security of tenure for five years, subject to the usual ground of dismissal of unfitness for office, so in our view the part-time sheriff system we are instituting addresses the problem of Starrs and Chalmers.

David Mundell: On that issue and that of fines, is the position based on your and Alison Coull's legal advice? What is the legal opinion? To me it seems clear that any sensible person could argue against what is suggested about fines. It is patently ridiculous that councillor justices would impose higher fines to accrue money for their local authority.

Colin Miller: It was not necessary to suggest that there was any evidence of bias or partiality on the part of a temporary sheriff to persuade the court that there was an ECHR incompatibility. As we have said, it is not an actual taint that we are addressing in the proposals but the perception of that.

Stuart Foubister: I know it may seem odd: it was examined further in Clancy v Caird. It is not just any perception, but the test of perception that an objective, reasonably informed observer would make. There must still be a fear that if fine income is directed to a local authority there could be a not entirely unreasonable perception that a councillor on the bench could be swayed in that way. There is no suggestion that anyone is acting improperly but, as Colin said, in Starrs and Chalmers there was no suggestion that any temporary sheriff was biased; it was a matter of structures.

Fergus Ewing: To follow what David Mundell said, it is fanciful to suggest that because justices of the peace are elected councillors they are going to impose higher fines to benefit anyone. As a practising solicitor for 20 years that seems to me to be a ludicrous suggestion.

Stuart Foubister: If there is a factor that is impinging on their judicial function—

David Mundell: Why would a well-intentioned citizen who is a justice of the peace not think that too and say, "What about a few extra quid for the local council?"

13:15

Colin Miller: That argument could apply to any form of fine because ultimately they benefit the revenue as a whole. As Stuart Foubister said, it is a question not of actual or conceivable bias but of whether a reasonable person might reasonably perceive a possibility of bias. Like every other issue in relation to the ECHR, it is a question of risk. None of us can say until the courts have determined it what is or is not a breach of the convention but, not to put too fine a point on it, we have had our fingers burnt on temporary sheriffs.

There are quite clearly convention points that could be argued and therefore, as has been suggested, they will sooner or later be argued in relation to the district courts. We are satisfied that the proposals set out in the bill will achieve compatibility. We are not saying that there are no other routes that would have led to the same result, but for the three main elements of the bill—bail, district courts and part-time sheriffs—there are strong arguments for getting ECHR compatible proposals on the statute book as soon as possible.

One of the reasons for Mr MacKay's decision to undertake a wholesale review of the district courts is to enable the Executive to consult on the wider options. I am sure that we will return to fine income in that context. The immediate and overriding objective of the bill is to ensure that we have ECHR compatible arrangements for the district courts on the statute book as soon as possible. The Executive is satisfied that, in so far as we can be certain of anything in relation to the ECHR, these arrangements would stand the test

of court challenge.

David Mundell: I am not arguing against that, but I am concerned that a large number of competent people are being ruled out of being justices. That is unfortunate.

The Convener: I thank the witnesses for coming.

Regulation of Investigatory Powers (Scotland) Bill

The Convener: To return to the Regulation of Investigatory Powers (Scotland) Bill, we have had the wind taken out of our sails but we should not complain about that. We can welcome the concessions—if that is the right word. There are areas of concern that remain. I am not happy with the description of seniority—I do not see that specifying the level is an insurmountable problem, particularly given the powers involved.

David Mundell: That is a very important point, convener. Drawing on previous experience, we know that one of the difficulties with the interception of communications legislation was that there was no definition of senior officer. That made it difficult for others to determine to whom that might apply. The public are not familiar with the ranking and seniority within public organisations and the civil service. It is important that that is defined to a reasonable extent.

Bristow Muldoon: The argument that has been put forward is perfectly reasonable and I support it. We might be straying beyond our direct remit. Perhaps we should draw the matter to the attention of the lead committee, rather than dealing with it ourselves. I recognise that we are dealing with subordinate legislation because the Scottish ministers can introduce restrictions. However, the base remit should be set by the lead committee and we should be considering whether it is reasonable to use subordinate legislation to amend the bill in future. There might be changes in organisational structures and the definition of ranks within those structures. That would not necessarily require us to introduce further primary legislation. There should be a baseline in relation to the schedule, but future amendments could be made through subordinate legislation.

The Convener: We can, within a degree of specification, indicate that we are not satisfied. We can flag up the issue and suggest that something that would be amended by subordinate legislation should include some element of specification. We should be able to say “or such equivalent rank” so that if a post changes, the legislation will apply to the new equivalent rank.

Fergus, the points that you wanted to raise in relation to sections 1 and 2 have been addressed. The points under sections 3, 4 and 5—apart from the matter that Bristow Muldoon has just flagged up—were dealt with by the concessions. On section 5, Bristow has suggested that we draw to the attention of the lead committee the fact that we think that there should be a greater degree of specification within the schedule, which we welcome. We did not have anything to address in

sections 6, 7 and 8. The Executive indicated that it would consider the issue that we raised under section 9(2)(c). That was where we went off at a tangent.

Bristow Muldoon: Did the Executive indicate that the instruments would be changed?

The Convener: It was an affirmative procedure. I was going off at a tangent there. The memorandum was clear.

Fergus Ewing: I welcome the concession that public authorities under section 5(3) would be listed in the schedule. It would be reasonable to say that we welcome that commitment. However, that still leaves the general power to vary the schedule. Some public authorities may be listed, but not all of them. I am still rather concerned that this is something that should be on the face of the bill.

The Convener: The schedule would be part of the bill.

Fergus Ewing: I am talking about the possession of a residual power to add or subtract from the schedule by subordinate legislation.

The Convener: That would have to be done under an affirmative procedure. Does that satisfy your concerns? Personally, I understand why the addition and removal of organisations might be necessary, perhaps because new organisations have sprung up. We do not necessarily need a super-affirmative procedure, because we would only be adding one or two bodies as they arise. The inclusion of the schedule has addressed many of my concerns.

Fergus Ewing: I agree. There has been no objection to the need to add new bodies, perhaps because a body has been renamed. However, I am unsure whether there should be a residual power to add pre-existing bodies. Perhaps the power should be restricted to cases where there has been a change of name, a successor body or the creation of a new public authority.

Ian Jenkins: Surely the Executive must be allowed to use a bit of common sense.

Fergus Ewing: I do not want to push it. I am just thinking of the advice that we have been given.

The Convener: I can understand why things are not specified, because circumstances may change, some matter may be criminalised and the relevant body may have a legitimate interest in dealing with it. One can look back to a time when environmental matters did not have such a high priority, yet nowadays, I could envisage circumstances in which SEPA might want to make use of surveillance to tackle dumping of hazardous waste and so on. The concessions can be welcomed.

Fergus Ewing: I would go along with those comments, convener, particularly in the light of that clarification.

It was hinted that section 23(1)(c) was going to be dropped.

The Convener: Yes. Before we move on, I should mention section 20(5). Perhaps it is a moot point whether the interim code of practice should have a time scale. I accept the logic of the Executive's comments and the fact that it is prepared to publish a draft code. However, the interim code should have a time limit.

Fergus Ewing: On a slightly different matter, there is a concession that all the subordinate legislation would be brought in at the same time as the commencement of the act. That met several of our objections.

The Convener: I think that the Executive said that the interim code would be introduced with the act, but the question is whether the interim code might become a permanent code de facto, because a permanent code is never created. Although there is some discussion about the interim code, it does not have the same level of consultation as we would expect for a permanent code. Perhaps we should ask for a reasonable time limit for the introduction of a permanent code. In terms of section 20, there are more powers for a judicial review of a fixed permanent code than an interim code. I am open-minded about what a reasonable time scale might be—six months or a year.

David Mundell: That is a fair point.

The Convener: Should we indicate that we would like a code of guidance? It may be for a lead committee such as the Justice and Home Affairs Committee to decide on what is a reasonable time scale. Should we suggest a set period or leave it unspecified?

Fergus Ewing: Six months seems reasonable. It might be helpful to give the Justice and Home Affairs Committee a steer on what we think would be appropriate.

The Convener: We could suggest that there should be a time limit and that six months might be reasonable, but that we would be happy with a different time scale, provided that it is fixed. That would create something for the Executive to work towards. It would allow the Executive to co-ordinate its consultation plan and introduce a timetable. If there is no set final date for the consultation, it might just stagger on before grinding to a halt.

As Fergus Ewing said, the officials appeared to back-track on section 23(1)(c). I do not know whether we should indicate that we are concerned about the subsection, as it does not contain any

criteria or definition.

Ian Jenkins: The officials said that they would look into that.

The Convener: Should we welcome that and indicate that we think that it is important?

Fergus Ewing: It is absolutely absurd and indefensible that this bill should set out two distinct procedures to be followed, one in respect of the most intrusive surveillance and another in respect of less intrusive surveillance, and then introduce an opaque provision that would allow the Executive to disregard completely the classification on which the bill is based. The Executive must drop this provision, as it seemed to hint it would.

13:30

The Convener: Should we say that we find the section unacceptable in its current form?

Members *indicated agreement.*

The Convener: That concludes our discussion of the Regulation of Investigatory Powers (Scotland) Bill.

Bail, Judicial Appointments etc (Scotland) Bill

The Convener: We now return to the Bail, Judicial Appointments etc (Scotland) Bill. Do members have any points to make about chapter 1, on temporary and part-time sheriffs?

David Mundell: It is worth restating the point that you made at the start, convener, that a part-time sheriff is not a sheriff who works part-time. I do not think that that issue was dealt with.

The Convener: I agree. I have more sympathy with the Executive in regard to chapter 1 of the bill than I have in regard to chapter 2. In chapter 1 there is a clear problem, following the Starrs and Chalmers case, for which we need a quick fix. On chapter 2, the Executive's position seems to be that there is no need for a quick fix. Even though the current procedures are ECHR compatible, the Executive is seeking even wider powers than it is seeking in chapter 1.

I am willing to go along with the Executive on chapter 1. The officials acknowledged that they would look into the issue of consultation, and I was satisfied with their explanation for section 11C(4)(b), which is a catch-all provision; I can live with that. Unless members are otherwise minded, I am happy to accept that, subject to our view that it should be revisited—which may or may not stray into a policy area. I was not particularly worried about chapter 1, but chapter 2 gives cause for concern.

Fergus Ewing: One specific point arising from the excellent legal advice that we have received was that in the Starrs and Chalmers case concern centred not on the basic principle of temporary or part-time sheriffs dealing with cases when permanent sheriffs were unavailable, but on the fact that in Scotland the system had been expanded inappropriately, to the extent that such judges were being used routinely to avoid the need to appoint permanent, full-time sheriffs.

According to the evidence that we have received today, section 11A(5) states that there should be no more than 60 part-time sheriffs. I object to that on two grounds. First, it seems rather arbitrary to say that half the previous number of temporary sheriffs is okay. It does not deal with the objection in principle to temporary sheriffs that was made in the Starrs and Chalmers case. How do we know that 60 is okay? Why should 60 be okay when 120 was not? No explicit justification for that has been given—although, to be fair, that point was not pursued today. Secondly, section 11A(5) goes on to state that the Executive may add to the 60 part-time sheriffs. There may be a limit of 60 for the time being, but it can be altered. That may lead to

problems. Our overriding concern is to make this bill ECHR compliant.

Bristow Muldoon: There are others around this table who have greater wisdom in legal matters than I have, but it seems to me that the major issue arising from the Starrs and Chalmers case concerns the potential dismissal of sheriffs. The number of part-time sheriffs is irrelevant to that. The important issue is security of tenure over a five-year session. Any proposal to increase the number of sheriffs—correct me if I am wrong—would have to come before the Parliament, so justification for that increase would be required. Presumably any new sheriffs would be appointed under the same terms as the existing sheriffs, so ECHR compatibility would not be an issue. Any decrease would be the result purely of natural wastage rather than of a requirement for some sheriffs to retire early. I do not see that this provision raises any of the issues in the original case that was brought under the ECHR.

The Convener: I have an open mind about the points that we want to make. The bill is being considered by the Justice and Home Affairs Committee at this very moment.

Fergus Ewing: I am not saying that the figure of 60 breaches the ECHR. I am saying that, given the legal advice that we have received, I am concerned that there is a possibility that it might constitute a breach, because it does not seem to deal in a principled way with part of the decision in the Starrs and Chalmers case—although I appreciate the point that Bristow Muldoon has made about the main issue in that case.

David Mundell: I asked the officials about the figure of 60. They said that they had thought about it.

Ian Jenkins: I would go further than you, convener. The Executive has accepted that this is a rushed bill, for emergency purposes, and that it is not ideal in every respect. We should be very careful about delaying the bill if that means that the gap cannot be filled, unless we think that an important principle is at stake. We have received assurances from the officials that they will consider the issue again, and there is provision for affirmative procedures. We should not stand in the bill's way.

The Convener: The figure of 60 may lead to difficulties, but I doubt that it would fundamentally undermine this legislation. This is a quick fix. We could mention that we are surprised that a number has been specified, as 60 seems an arbitrary figure, but it is unlikely that it would be contested under the ECHR.

Fergus Ewing: We have raised the issue at this meeting. I guess that the Executive will peruse what has been said and take heed as appropriate. I will not push the point further.

The Convener: Section 11A(2) indicates that the Executive will comply with procedure on consultation. That is lacking in specifics, but it may answer some of our concerns about section 11A(5). We can understand where the Executive is coming from and appreciate the time pressures under which it is operating—although even before I arrived here a year ago there was talk in the legal fraternity that this disaster was looming. However, apart from the points that have been made, there is nothing in chapter 1 that we want to flag up with the Justice and Home Affairs Committee. That leaves us with chapter 2, on which we may have more to say.

David Mundell: I felt that the answers that were given by the officials were totally incompatible with the opening presentation, which was about putting the procedures set out in the red book into a statutory format. Everybody is in agreement with the aim of taking the appointments away from in-confidence red books and having it out in the open, but that is not being achieved.

Secondly, although again slightly off our remit, the argument as to why councillors should be debarred was not convincing. The Executive had its fingers burned in relation to temporary sheriffs so it may be nervous of court rulings, but I would have thought that it would have wanted to fight for councillors' right to be justices. This is a serious problem for many areas that have relied on councillors and are having to face that group being taken out with no trained people to replace them.

That may be on the policy side, but I feel that this is far too important a matter to be left to subordinate legislation and in the vague way that it has been done.

The Convener: I agree with you. Without straying on to policy matters, what is before us is section 8, which is such requirements in such circumstances as it wishes to do after such a period of consultation, consulting with whomsoever, when and over what time scale it likes. That might be legitimate if a quick fix was required, but the evidence before us today was quite clear. The Executive does not see it as ECHR incompatible; moreover, the minister indicated at another committee that he is keen for a consultation and review.

I have views about district courts and how they operate, I would be sympathetic to the Scottish Courts Administration taking them over and allowing elected members to remain. That is not for us, but the criterion is whether it is acceptable and it would seem to be unacceptable in any circumstances. When there ain't a problem, why is the Executive proceeding in this way?

Fergus Ewing: I was astonished by the evidence today. I found it utterly unconvincing and I agree with everything that David Mundell said. I would have thought that the qualifications of councillors to serve as justices of the peace at that level of case were excellent. The idea that they could be influenced in the performance of their duties by the fact that fines are a source of revenue to local government is one of the most ludicrous and risible suggestions that I have ever heard. I am surprised that it could be advanced seriously as justification for anything.

The Executive could consider several possible solutions. First, it could make fines a source of revenue of central Government and deal with an adjusting factor to local government in compensation or, second, it could take local government out of the judicial system by making the Scottish Courts Administration responsible for the administration of that level of court.

As was said earlier, I appreciate that the Executive has to have a quick fix to deal with the backlog and the practical problems that face sheriff courts and other courts throughout the country. However, removing elected councillors—many of whom I suspect are doing an excellent job, which I do not think will be done readily by other people—is not a quick fix. It is fixing something that is not broken. It is completely inappropriate and I support the comments made by David Mundell and Bristow Muldoon.

Bristow Muldoon: I am sure that local government would not be up in arms about the suggestion that we consider whether it should retain fines—it might be a lot more concerned about several other aspects of its finance. Elected members who have served as JPs for many years have raised this issue with me. The Executive would be wise to reconsider this matter and have discussions with the Convention of Scottish Local Authorities on a solution that would allow elected members to continue to serve as JPs.

Ian Jenkins: Can that be achieved in the time that the Executive wants to bring this bill in?

David Mundell: The Executive did not put a single piece of evidence forward as to why chapter 2 is needed. I accept chapter 1, but in relation to chapter 2 the Executive has expressed confidence that the current district court set-up is ECHR compliant.

Bristow Muldoon: A willingness to reach such a solution within a relatively short time scale would be a step forward from where we stand at the moment. The Executive should consider that.

The point has been made that many justices committees do not exactly have huge queues of people wanting to take on the positions. Many elected local members are well placed to take that role.

Ian Jenkins: Do you accept the Executive's argument that somebody might challenge these decisions and then it might blooter a whole lot of things, perhaps retrospectively? The whole system might be thrown into chaos if someone challenged it.

Fergus Ewing said earlier that, as a solicitor, you would try this, that and the other—as a solicitor, you would try a challenge. I should record that Fergus Ewing shrugged his shoulders.

Fergus Ewing: Solicitors will try any old argument.

Ian Jenkins: Of course, and they sometimes win them.

13:45

Bristow Muldoon: My understanding is that councillor JPs have been suspended from sitting in cases pending this issue being considered. The period of suspension on them sitting in cases could be continued pending resolution of this issue.

David Mundell: That is my understanding as well. There is no imminent issue.

The Convener: If the Executive had been less bullish about how confident it was about upholding any ECHR argument, I might have had some sympathy, although I would still have argued that it needed to give some outline as to what the period of consultation may be and who it might consult. There must be something in the Executive's mind; Angus MacKay has already been to the Justice and Home Affairs Committee and said that there would be a review. It must have some view of where it is going. The witnesses said that they felt that everything was ECHR compatible, and if they were challenged, they would have the fallback position of suspension and coming back to this committee. It seems to me that this is premature.

David Mundell: It is also the lowest common denominator. You start to get into the argument that anyone who has an interest in their community is not able to be a justice. They may consider that the local authority or central Government would benefit.

Bristow Muldoon: They will get the potholes fixed if they put a big fine down.

The Convener: Unless Ian Jenkins is otherwise minded—

Ian Jenkins: No. I was just putting the other side of the argument.

The Convener: We concede on chapter 1, but not on chapter 2.

Docks and Harbours (Rateable Values) (Scotland) Order 2000 (SSI 2000/Draft)

Electricity Lands and Water Undertakings (Rateable Values) (Scotland) Amendment Order 2000 (SSI 2000/Draft)

The Convener: We move on to agenda item 2, which is draft affirmative instruments. I think that Fergus Ewing wanted to raise a point.

Fergus Ewing: The two statutory instruments on rating have the usual Executive note appended. However, in the case of the instrument about docks and harbours the note is undated. Every Executive note that I have seen attached to statutory instruments has been dated. Similarly, the instrument regarding electricity, land and water undertakings does not have a specific date; it is dated May 2000. This may not be an entirely arcane point. It would be helpful if the Executive could in future ensure that the Executive notes bear the date on which they are written or conveyed to this committee.

The Convener: We will flag up the point that Fergus Ewing has raised. No other points arise.

Animal Feedingstuffs from Belgium (Control) (Scotland) Revocation Regulations 2000 (SSI 2000/158)

The Convener: We now move to agenda item 3, which is negative instruments. No matters arise in relation to SSI 2000/158.

Food (Animal Products from Belgium) (Emergency Control) (Scotland) Revocation Order 2000 (SSI 2000/159)

The Convener: A minor footnote is missing on SSI 2000/159. No points arise apart from that.

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (North Coast) (Scotland) Revocation Order 2000 (SSI 2000/156)

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (Scotland) Revocation Order 2000 (SSI 2000/157)

The Convener: Finally, on the two instruments not subject to parliamentary control, no points arise.

That brings us to the end of this mammoth meeting, to make up for all the short meetings.

David Mundell: It is another record.

Fergus Ewing: We should thank the official report and other staff here for unwittingly having drawn the short straw.

David Mundell: They can take back the fact that they have participated in a record meeting.

Meeting closed at 13:49.

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