The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 10 January 2012

Session 4

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JUSTICE COMMITTEE
1st Meeting 2012, Session 4

CONVENER

*Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP)

DEPUTY CONVENER

*Jenny Marra (North East Scotland) (Lab)

COMMITTEE MEMBERS

*Roderick Campbell (North East Fife) (SNP)
*John Finnie (Highlands and Islands) (SNP)
*Colin Keir (Edinburgh Western) (SNP)
*Alison McInnes (North East Scotland) (LD)
*David McLetchie (Lothian) (Con)
*Graeme Pearson (South Scotland) (Lab)
*Humza Yousaf (Glasgow) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Kevin Dunion (Scottish Information Commissioner)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

Committee Room 6

Scottish Parliament

Justice Committee

Tuesday 10 January 2012

[The Convener *opened the meeting at 10:00*]

Interests

The Convener (Christine Grahame): Good morning and welcome to the first meeting in 2012 of the Justice Committee. I wish everyone a happy new year. As usual, we have a very busy meeting and I ask everyone to switch mobile phones and other electronic devices off completely, as they interfere with the broadcasting system even when switched to silent. We have received no apologies for absence.

Item 1 is a declaration of interests. I welcome Jenny Marra to the committee and invite her to declare any relevant interests.

Jenny Marra (North East Scotland) (Lab): I have no relevant interests to declare.

The Convener: Thank you very much.

Deputy Convener

10:00

The Convener: Item 2 is the choice of deputy convener. The committee is required to select a new deputy convener and the Parliament has resolved that he or she should come from the Scottish Labour Party. I invite nominations for the position.

Graeme Pearson (South Scotland) (Lab): I nominate Jenny Marra.

Jenny Marra was chosen as deputy convener.

Decision on Taking Business in Private

10:01

The Convener: Item 3 is a decision on taking business in private. Do members agree to consider item 8 in private? [*Interruption*.] I cannot hear you.

Members *indicated agreement.*

The Convener: Thank you very much. I suspend for a minute to allow the witness to come in.

10:01

Meeting suspended.

10:02

On resuming—

Freedom of Information

The Convener: We move to the main item on today's agenda, which is an evidence-taking session on freedom of information—[*Interruption*.] Please settle down, children. We will take evidence from Kevin Dunion, the Scottish Information Commissioner, who, as we will know not just from his report but from the press, has just published "Informing the Future", in which he outlines his views on the current state of freedom of information in Scotland. Mr Dunion kindly offered to attend today's meeting to answer any questions that the committee might have about the report.

Kevin Dunion and I go back eight years—we are both surviving through it all. I welcome him to the meeting and invite him to make some opening remarks before members launch into questions.

Kevin Dunion (Scottish Information Commissioner): Thank you, convener. I was just counting back myself. I think that the last time I gave evidence to a justice committee was when I was an advocate of freedom of information and the Freedom of Information (Scotland) Bill was going through Parliament and being scrutinised by the Justice 1 Committee under the present Justice Committee convener's very capable leadership.

Before I demit office as Information Commissioner and as we approach the 10th anniversary later this year of the passing of the Freedom of Information (Scotland) Act 2002, I thought that it might be useful to come back to the committee to take stock of where we are, how well the act has been implemented and how it is progressing and to give you my thoughts on how we might safeguard and strengthen it for the future.

Given that, under the 2002 act, I am required to lay before Parliament an annual report on my office's operation, the number of cases that I receive and the types of cases that I make decisions on, I will not cover any of that ground this morning. The fact is that freedom of information is now part of the fabric of Scotland's public life. Undoubtedly far more information is being not just disclosed by public authorities in response to FOI requests but published by authorities that have clearly understood the concept of public accountability and openness.

The special report highlights some of the key issues that overarch each of my annual reports and certain issues that have still to be resolved or addressed. However, nothing that I say should diminish the fact that, both in this country and—as I know from being called on to advise on the implementation of new FOI laws around the globe—internationally, Scotland is seen as a very strong part of the international FOI community.

Before we move to questions, I want to draw some of the report's highlights to members' attention. First, awareness in Scotland of FOI rights is at an all-time high, which is undoubtedly driving some of the increase in the number of appeals that I have received. In my time as commissioner, I have received 3,500 appeals but, this year, there has been a sharp increase, with the number up 25 per cent from last year. International experience tells us that that increase will continue for some time before it plateaus.

The nature of requests is also changing. The fact that about 25 per cent of the cases that I receive concern employment rights, finances and cuts in grants to communities represents a clear shift away from education and crime to more bread-and-butter issues that affect the everyday lives of people in Scotland.

My report highlights two particular issues, the first of which is—I am sad to say—the on-going matter of designation. The 2002 act contains provisions for ministers to designate bodies carrying out public functions. On a couple of occasions, we have come close to designations being made; however, we have never quite got there and, as you will know from the report, I am concerned that we are losing rights in Scotland by failing not just to extend them but to safeguard them. People such as council tenants and users of council services who once had the right to ask questions of local authorities can no longer do so—or at least can no longer be assured of receiving a response or of having a right of appeal to me.

Secondly, I feel that the commissioner's powers could be strengthened to carry out investigations and bring cases to a close more quickly. At the moment we are in a good position—I have no cases that are older than 12 months and, on average, I close my cases within four. However, we need to do better. With the increasing number of appeals that I am receiving, efficiency gains can be made only by reducing the period of investigation.

With that, I am happy to lay the report before the committee and to take members' questions.

The Convener: Thank you very much. I will take questions from members.

John Finnie (Highlands and Islands) (SNP): I thank Mr Dunion for his report. I found it very interesting—particularly his view that rights in relation to arm's-length organisations are being removed rather than potentially being extended.

The report quotes the Government as saying that

"any extension of legislation is not favoured by the majority of those bodies proposed for coverage at the present time."

Perhaps that is hardly surprising, but what is your view on that?

Kevin Dunion: It is hardly surprising, but the Government did not say that all the bodies opposed the move. There is no need for a big-bang approach here; for example, additional bodies could be designated monthly or annually.

From my discussions with some of the organisations, I know that, such was the certainty that the Government was going to go ahead with designation, they were expecting to be designated and, in gearing up for that, they had been organising their affairs, preparing publication schemes and even appointing staff. A Government does not carry out consultations until it is minded to designate. In effect, it asked those bodies whether there was any overwhelming reason why it should not go ahead with designation; indeed, the Government had already said that the move was not burdensome and was proportionate.

As a result, I am not entirely clear why the Government has decided to row back from designation. The key point is that many of the bodies in question—for example, public authorities' leisure and cultural trusts—were already covered in large part by freedom of information, were already dealing with requests and had already built in the administration. They faced no additional burden through designation.

Moreover, our work has shown that there is overwhelming public support for designation. Indeed, that support is growing. A recent poll that Ipsos MORI carried out for us found that 88 per cent of people in Scotland favour the designation of leisure and cultural trusts. The figure for public-private partnership companies that deal with school and hospital building and maintenance is 83 per cent and for housing associations it is 82 per cent. Those figures have risen considerably since we last asked the question two years ago, with the figure for local authority trusts up by 13 per cent.

The people want those bodies to be designated. As the commissioner, I have a statutory role to advise the Government. I would like the designation to happen and I thought that the Government wanted it, so I am disappointed that we are not there yet.

John Finnie: I have a question on a specific organisation: the Association of Chief Police Officers in Scotland.

The Convener: Before we move on to that, I ask Kevin Dunion to name the organisations that are geared up and ready. Do you have a list?

Kevin Dunion: Some local authority trusts were already dealing with the issue. When they moved out of local authority control, they were in a position to deal with requests. I have spoken to Glasgow Housing Association and found that, although it is disgruntled at being the only housing association to be earmarked for designation, it is gearing up to deal with FOI.

The Convener: Are there any others? It is useful for us to know, so that pressure can be put on the Government.

Kevin Dunion: I have not drawn up a shopping list of bodies by assessment.

The Convener: Members have supplementary questions on the issue of bodies that are geared up. Is that all right, John?

John Finnie: Yes, of course.

Alison McInnes (North East Scotland) (LD): This is a follow-up to John Finnie's point. Mr Dunion, do you have any sense that local authorities, health boards or other public bodies are trying to circumvent freedom of information?

The Convener: That is a different question, and we will come to it. I wanted to get a list of the organisations that are geared up and I thought that your question was a follow-up to that. We will move on to circumvention, but that is a separate line of questioning.

Graeme Pearson: Mr Dunion, you indicated that organisations were gearing up and were, you thought, on the verge of being covered by the legislation. Looking back, do you have any notion of why the next step was not taken? Was it because of a slip of the pen or because time ran out? Why did the Government not proceed to extend the legislation to those other organisations?

Kevin Dunion: I honestly do not know. You would have to ask ministers about the ministerial response to the designation process. The process had two stages. First, there was a general consultation on whether designation should happen and what types of bodies should be covered. Then, ministers made it clear that they would focus on three categories of organisations: local authority trusts, PPP companies and private prisons, with ACPOS and the GHA as additional bodies. As required by statute, ministers then consulted those bodies saying that they were minded to designate them. It was not a neutral approach—ministers clearly said what their intention was. At that point, the expectation was that designation would take place, which is why some bodies were gearing up in anticipation,

because the signals were there. It is for ministers to explain why designation did not happen.

Graeme Pearson: So you have no explanation at all—you just do not understand.

Kevin Dunion: My understanding is based on what ministers have said. At the time, they said that they thought that it would be premature to designate before some of the deficiencies in the legislation had been remedied. We now know that the amendment bill that ministers propose is largely technical and does not really address any deficiencies that affect designation. I have simply seen comments from Government spokespersons quoted in the newspapers and I have not spoken to the Government on the issue, so I do not propose to make any comments on that point.

Jenny Marra: Do you know whether the ministers considered the fact that the bodies that you say should be designated are paid for by the public pound, as you put it in your report, but have come out of designation? Do you know what consideration was given to that issue at ministerial level?

Kevin Dunion: I think that strong consideration was given to that. It is clear that the ministers used a criteria base to consider which bodies they would designate. They set out a two-pronged approach. One prong, which was the key element, was whether a body carries out functions of a public nature. If we regard the building and maintaining of hospitals or the running of prisons as public functions, the bodies that I mentioned recognisably fall into that category. The second prong was whether designation would be proportionate or whether the burden would be disproportionate. Using the criteria of whether a body spends the public pound in delivering public services and the burden that designation might place on a body, the ministers narrowed down the proposed designation to those three categories. On that criteria base, the ministers excluded housing associations more generally. They approached the issue in a considered fashion.

Jenny Marra: Did the ministers make the wrong decision in refusing to designate those bodies?

10:15

Kevin Dunion: The ministers made their decision and, as the commissioner, I made my recommendation. I supported the ministers being minded to designate the bodies and chose, therefore, not to raise other bodies that might be designated—I wanted to see the first tranche go through and to get that established before I raised any additional bodies for designation. Yes, I am disappointed, but it is a matter for the ministers.

The Convener: We are not going to have the cabinet secretary before us, but we can certainly write to him, particularly regarding those bodies that you were aware were prepared to be a first tranche and which many of us would like to see designated. The previous Justice Committee had great difficulty in examining the position of private prisons such as Kilmarnock prison, and I think that many members would now be sympathetic to such institutions being designated, if I may speak on behalf of the committee.

John Finnie: ACPOS's position is anomalous, given that the other two staff associations—indeed, the entire police service with the exception of that staff association—are covered by the legislation. Are you able to share with us the reasons why ACPOS was not designated initially, given that your report refers to public confidence in the system as a key factor? Perhaps the reform of the police service in Scotland offers the opportunity, rather than designating the service, to have it as a de facto that the entire new service is subject to the legislation.

Kevin Dunion: The police are covered by the legislation and the ministers were minded to go ahead with the designation of ACPOS. However—I do not want to put words into their mouths—I think that they may feel that the position has moved on somewhat. The Cabinet Secretary for Justice has proposed a reduction in the number of police forces in Scotland and it may be thought that ACPOS may not survive in its current form, instead taking a considerably different form.

You will note that the equivalent body in England, the Association of Chief Police Officers, has now been designated by the coalition Government and is covered by the Freedom of Information Act 2000, whereas ACPOS has not been designated. That type of body is increasingly being considered for designation because it is a decision-making body. In other words, discussions go on within it and it makes decisions that are rolled out almost as operational policy—at least, as guidance—throughout Scotland. The tack that is increasingly being taken down south is to look at such decision-making and regulatory bodies—bodies such as the Local Government Association and the Law Society—and to consult about their being brought under the scope of the act. The perspective is moving from how public money is being spent to how decisions are being made that affect the expenditure of that public money and the carrying out of public functions.

John Finnie: If £14 million had been spent but there was no audit trail of the decision making, that would affect public confidence in the police service, would it not?

Kevin Dunion: You clearly have something in mind.

The Convener: Obviously. Share it with us, John—or will it be left a mystery?

John Finnie: It could be any sum of money.

The Convener: So, it is a putative £14 million, not an actual £14 million.

John Finnie: It might be £14 million or £15 million.

The Convener: The mystery continues.

Kevin Dunion: There is an expectation—which, I am sure, is shared by the Auditor General—that there will be a paper trail, in old-fashioned terminology, to show how a decision has been arrived at and carried into effect. People often want to ask not just what a decision was, but how it was arrived at, which is why FOI is often seen as an important tool in public accountability or public audit.

David McLetchie (Lothian) (Con): In your report, you say that the 2002 act

"allows the Commissioner to propose to Ministers bodies which should be designated".

Is that a formal proposal mechanism that you have used, or have your proposals been subsumed within the review and within the report that you are now making?

Kevin Dunion: The act simply states:

"The Commissioner may from time to time make proposals to the Scottish Ministers".

It does not specify the form in which that could be done. It could be done by an e-mail or letter; it does not require any formal process.

When the act was a year old, I wrote to the minister—then Margaret Curran—to indicate that I believed that the act should be extended, and I indicated a range of bodies, which is largely the same range as is in the current report, that should come within the scope of the act. Similarly, when the present Administration consulted on the issue, I supported my proposals and made reference to the fact that I had statutory functions. That bolstered my proposals as not just anybody's opinion but my opinion in my role as commissioner. You are right that I have not made any formal report, but there is no provision or need to do so.

David McLetchie: I presume that one of the principal objections to the extension of the 2002 act to private contractors that provide services on a contractual basis to local authorities and other public bodies is the idea of commercial confidentiality. What are the limits of commercial confidentiality? What is legitimate commercial confidentiality in such a situation, as opposed to the term being used as a cloak to avoid the disclosure of information that would be readily available if the service were provided in-house?

Kevin Dunion: The 2002 act refers to disclosure that would

"prejudice substantially the commercial interests of any person",

and confidentiality is a separate issue in the act. Both provisions may be used to prevent information from being disclosed—and properly so.

In reality, the issue is one that was raised prominently prior to the act coming into effect but which has not been nearly as prominent in my decisions or in any reaction to my decisions. Public authorities and companies have quickly grasped what can be properly withheld. That includes things such as the unit price of a product, so that a competitor cannot find out how a company has costed it. However, things such as the winning tender for a contract and the contract itself are not only now in the public domain but increasingly being published by public authorities with no companies prominently expressing concerns about commercial confidence.

The useful guidance that the Scottish Government now issues encourages public authorities to make their position clear and to encourage companies when tendering to indicate what is genuinely commercially sensitive, as opposed to the boilerplate that used to exist on almost all contracts and which was there because companies required it. Increasingly few cases of conflict of commercial interest now emerge.

On the nature of the organisations that I am recommending for inclusion in the 2002 act, let us be clear that we are talking about commercial contracts at the upper end of the scale for number and length. We are talking about contracts lasting 25 to 30 years to supply a significant public function; we are not talking about five-year contracts to provide services on an entirely commercial basis to public authorities. I estimate that, of all the organisations that we have talked about in the designated categories, we are talking about 75 bodies across the whole of Scotland. The proposal would not open the floodgates by any means.

Humza Yousaf (Glasgow) (SNP): On page 23 of your report, you talk about the ineffectual nature of the sanctions, in particular with reference to section 65 of the 2002 act. I think that this relates to a question that Alison McInnes asked. Do you think that, because of the ineffectual nature of the sanctions, some bodies are concealing, destroying and altering their data?

Kevin Dunion: I sincerely hope not. It is, of course, difficult to get evidence on that, but to my

mind there is nothing to suggest that that is happening. There have been instances in which I have been concerned that destruction has occurred. Destruction can include deleting an e-mail that may be within the scope of a request—the request having been made and somebody in the authority deciding that the course of action that they want to take is to avoid the information's going into the public domain. Closed-circuit television footage, for example, could be erased, and the question would be whether it had been done deliberately or as a matter of course.

My point is that my ability to use my reasonably considerable powers to work with the police and the procurators fiscal towards a prosecution is considerably hampered by the fact that prosecution has to take place within six months of the offence taking place. Often, the fact that an offence might have been committed comes to light only well into the course of an investigation, which might mean that even if I have sufficient evidence to take a case to the procurator fiscal, there is no prospect of a prosecution. That means that I will not necessarily go down that route.

If anybody in an authority is tempted to destroy information after a request has been made, the fact that the sanction is more likely to be used may discourage them from committing the offence.

Humza Yousaf: I have two questions in relation to what you have said. Are you having discussions with the Government to push it to include that measure in the proposed bill? Other than extending the time limit for prosecutions, what other new sanctions could be introduced to stop bodies destroying data?

Kevin Dunion: The Government has responded well to the proposal. It included in the consultation that was launched before Christmas a proposal to amend section 65 of the 2002 act, which would extend the period to 12 months. There are various ways in which that could be done, and I am perfectly comfortable with the idea that if the prosecution has to be brought within 12 months of the offence, it will capture those about whom we are concerned.

The other mechanism would be to use the existing powers of the commissioner. If it appears that the offence took place outside the period, perhaps more naming and shaming might be required, and we could highlight where we think unjustifiable obstruction had taken place, even if it were outwith the period in which a prosecution could be brought.

Roderick Campbell (North East Fife) (SNP): On the issue that Humza Yousaf raised of the general loss of data, section 65 is predicated on an intention of preventing disclosure, and it also refers to erasing of information. Have you any comments, more generally, about the erasure of information? It is quite difficult to show that someone has destroyed information for the purposes of prevention of disclosure as opposed to other reasons. Do you have any comments on preservation of data generally?

Kevin Dunion: You are quite right. In some cases that I have investigated, I have come to the conclusion that information has been deleted as a matter of routine and not with the purpose of avoiding disclosure, or that it was done mistakenly; in other words, it should have been available to be disclosed but was not. In those cases, I have made recommendations about ways in which record keeping can be improved. Those cases involve situations in which, for example, an authority has a policy that requires e-mail in-boxes and so on to be cleared every 30 days and does not take into account the fact that FOI requests might be received. It is not sufficient for an authority to say, "That's our routine." The routine must be adjusted to meet the statutory obligations; the statutory obligations must not bend to meet the administrative processes of the organisation.

CCTV recordings are quite often overwritten and, again, measures must be taken to determine whether a request has been made for CCTV footage before it is erased, so that an alternative tape can be used or the images can be transferred to another tape before they are overwritten. That happens in some cases, but the process can involve some technical difficulties. In one case, the authority thought that it had retained a master copy but found that it had become corrupted, and the original copy had been overwritten. There are problems with electronic storage in particular.

The converse of that, of course, is that it is often quite difficult to properly destroy information. I cannot go into it in detail, but there was a case in which information that had been held appeared no longer to be held. I was able to use the powers that are available to me as the commissioner to get a back-up tape going back some considerable time—I got it from an authority that held that information—and I was able to demonstrate that the information had been held at the time of the request and was deleted after the request had been made. The clear concern was that there had been deliberate destruction, but that case was out of time and could not proceed to prosecution.

Roderick Campbell: How far do you believe the Public Records (Scotland) Act 2011 will assist?

10:30

Kevin Dunion: It will assist. We worked closely with the keeper of the records of Scotland in helping to shape the 2011 act and to promote it

through Parliament, and I am delighted to see it on the statute books. It sets out a kind of good-practice framework that authorities should respect, and I think that we will increasingly need to have audits of authority practices. As the Scottish Information Commissioner, I am certainly happy to work with the keeper of the records of Scotland to carry out joint audits or to work on his behalf when I carry out audits more generally of public authorities' functions and look at the record keeping, particularly with a mind to recovering information to respond to FOI requests. Record keeping has long been a Cinderella issue, but as many commissioners around the globe have said, if we do not retain the information, there will be no information to freely disclose. Therefore, it is the bedrock of FOI.

Alison McInnes: You were right to point out in your report the importance of FOI for the people of Scotland. It is at the heart of community empowerment and active citizenship, so we should not be afraid of it; rather, we should encourage it.

I want to test how much you sense that public bodies that are covered by the 2002 act are trying to circumvent it. You talk in your report about coming forward with a series of different reasons for refusing requests. I am interested in exploring that with you.

Kevin Dunion: At the outset, I say that Scottish public authorities have embraced the compliance element of FOI pretty well. When I look around the world, I certainly think that we have done a really good job. People's requests are, by and large, recognised as FOI requests. There is quite a challenge in Scotland, as people do not fill in a form in which they say that they want something under the FOI act, as people would do in New Zealand, Queensland or South Africa. They simply send an e-mail, but authorities are now geared up—as a result of the work that we have done and the training that has been done—to recognise FOI requests and respond within the timescales. They work hard to respond within 20 days. We are up at 70 to 80 per cent, which is a not unreasonable figure, although I would like to see better. Some authorities are worse than others, but when authorities withhold information, they try to explain why they are doing so. The broad picture is therefore really good.

Of course, there are authorities that have let things slip. I am at the sharp end. We have clearly indicated how they could improve, and many of them have improved quite markedly with no additional resources, simply by doing the job better.

To be perfectly frank, other authorities have taken a jobsworth approach to some exemptions. They apply as many exemptions as they can and are determined to thwart requests. I am particularly concerned that the number of exemptions that have been deployed means that an overzealous and somewhat tangential approach has been taken.

Other authorities decidedly have a problem with particular applicants or types of applicant—the press comes to mind—and something of an adversarial relationship may be developing with some of the more vexatious types of request. I should be able to cut across some of that, get into the decision making and say, "Look, let's cut to the chase. What is the issue here? Let's take a decision," rather than there being a constant exchange of e-mails and information notices with people trying to come to decisions in processes that may be protracted and may ultimately mean that the information is given to the applicant 12 or 14 months after they requested it.

Alison McInnes: That is helpful.

The Convener: What is preventing you from naming and shaming public bodies? This is your parting shot. Is there something in the legislation that prevents you from doing that, or do you not name and shame bodies just because it is better to work in that way—to woo them and to persuade and educate? You talked about naming and shaming earlier.

Kevin Dunion: Yes. I have chosen not to go down that route. The commissioner has fairly significant powers, so when I take decisions to order authorities to release information, I try to spell out in great detail in my decision notice why they have to do so and where they may have failed.

I do not agree that, simply because an authority is found to have wrongly withheld information, it follows that it is flouting the 2002 act. It might have a genuinely held concern that, for example, it would be disclosing personal information. It might be that it is being overly cautious in that regard, so I might tell it that it can disclose the information. I am hardly going to name and shame authorities for doing what they think is the right thing.

There are a few instances in which I think that an authority's approach could be relaxed. Again, my approach is not to name and shame them. I now send in a team of officers to assess the authority's practice to see whether it exemplifies poor practice. If it does, we can issue a practice recommendation, but more often we say what they are doing well and what they are doing not so well, and we produce a voluntary plan with the chief executive to make changes and improvements over a reasonable time. That is more useful than simply naming and shaming on every occasion when an authority has done something wrong.

The Convener: So you would not get to a point at which you would say, "I've done everything I can—we've gone in and educated them and tried to help them and now something has to be done." Has there ever been a point at which you have thought, "That's it. I've had enough"?

Kevin Dunion: No. That has happened down south, but not here. There is a provision that allows me to issue an enforcement notice and to require an authority to make specific improvements, but I have never had to do that because I have always managed to secure improvements through voluntary practice action plans.

Alison McInnes: You spoke about erasure of information. Some of us hear anecdotally not that people are erasing information but that they are no longer gathering it in the first place. People say, "Let's meet round the water cooler and talk about this. Let's not e-mail each other." Do you have evidence of that approach being taken? If so, how can we tackle it? It undermines the culture of freedom of information.

Kevin Dunion: Probably the biggest concern that any information commissioner has is that information is not being created. We have all experienced it. I have been present at meetings at which it has been mentioned and people have said, "Turn your ears off, commissioner."

Let me be clear: I do not mind people having conversations. The telephone has been invented, and not every exchange that leads to a decision will be documented. However, there has to be some record of the substantive process by which a decision is arrived at—the options that were considered and the reasons why a decision was carried into effect. There might be material that was created in between times, such as discussions on drafting and other exchanges, that would in any case be disposed of, and which would not form part of the long-standing official record. I have no great concern about that. However, I would be concerned if people were deliberately meeting or exchanging e-mails through personal e-mail addresses in an attempt to avoid FOI requests. It has been suggested that that has happened down south, and my counterpart there has issued some guidance on it.

That approach needs to be at least looked at for the future. There is no doubt that I have come across instances of it. Because its practice has improved, I can mention that the Water Industry Commission for Scotland had a strange administrative set-up whereby it claimed that it did not take notes at any meetings, that it briefed all its staff orally, and that its diary entries were destroyed after each expenses claim was settled. Therefore, in large part, no information was being held for requests that were made. Through my assessment, I pointed out that that was entirely inappropriate, and as well as getting an assurance that it would be addressed, I know that action has been taken by the new chief executive to remedy that administrative practice. It was probably the worst example of an organisational culture that I have come across.

Alison McInnes: Thank you.

Jenny Marra: I am thinking of the situation during the election campaign last year, when our Government spent a lot of taxpayers' money to try to block the release of information on one of its policy ideas, through the Court of Session. Given your experience, will you characterise the Government's approach to freedom of information?

The Convener: You have landed with a bang, Jenny. Let us hear the commissioner's response.

Kevin Dunion: When parties are in government, they do what all Governments do and robustly defend their right to take decisions in what they regard as ministerial private space, and when they are in opposition they attack ministers for doing that. That is as true of the previous Administrations as it is of the current Administration.

I think that they are all wrong, to be perfectly honest, and the courts have supported my view that there cannot be a blanket exemption, irrespective of the public interest, for material about formulation of policy. Information that is exchanged and held within the Government is not all about the formulation of policy; it is often about the implementation or operation of policy. That is simply the effect of the conduct of public affairs, to which any public body must have regard when it is asked for information.

The particular case that was asked about brought to bear two key points. One is how we calculate the degree of public interest, which is difficult. It could be argued that everything that the Government does is in the public interest, but I recognise that it is expected and reasonable that a Government should begin to think about its policy options and how they might be effected without people necessarily looking over its shoulder. However, at the same time, there is now a culture of our increasingly wanting to know what options the Government is considering so that, for example, we can see what are the worst options that would have to be dealt with. Modern Governments try to include people in that decision-making process as they go through it and not just at the end, when the decision is announced.

There were two elements to the court case on the local income tax. One was straightforward in that at the end of the process I ordered the

Government to release information and it decided initially that it did not agree with my decision and would challenge it in the Court of Session, but subsequently withdrew the challenge. That kind of situation has happened on several occasions with a number of authorities. The second element was early in the process, when I used an information notice to try to get information that was necessary to my investigation about what the Government knew as opposed to what it held. Again, an initial challenge to that was withdrawn, because we were able to come to a satisfactory settlement on how the investigation could proceed.

I do not want to characterise anything particularly on the part of the Government; I am simply saying that, like the previous Government, the current Government has used its powers to challenge me as commissioner and to challenge me in the courts on my interpretation of the law.

Jenny Marra: Does that happen in other countries as well?

Kevin Dunion: Yes. Commissioners are challenged on their decisions.

Jenny Marra: Are they challenged by the Government?

Kevin Dunion: Yes. Down south, of course, the commissioner is challenged in a tribunal, which is a much easier route to go through, then subsequently in the courts.

The key point that I want to get across is that the argument that I consistently receive—I have said this directly to the Government, so it is nothing new—is tantamount to claiming that some information that is held by the Government is covered by a kind of class exemption simply because it is held by the Government. That is not necessarily the case. A lot of the information is not about formulating policy, so it is subject to the same substantial harm tests as any information that is held by public authorities. Further, if the information is about formulating policy, I tend by and large to agree with the Government that the information should not be discussed.

However, information should sometimes be disclosed in the public interest, which is what the 2002 act says and what the commissioner does. Such information can be high profile, politically challenging or embarrassing, but that is why the commissioner, rather than a minister, must decide on what should be disclosed.

Graeme Pearson: My original question has been covered by Alison McInnes—I thank her very much—but I have a supplementary question. Initially, there was a lot of angst about the cost of freedom of information and the impact on organisations of your requests. With hindsight, now that you are leaving and going to pastures new, how do you assess the impact in terms of finance and the way in which the organisations do business and adhere to the needs of FOI? Was there much ado about nothing?

Kevin Dunion: There was not “much ado about nothing”. Evidence is difficult to get because we deliberately do not record every FOI request to a public authority. As I pointed out earlier, we do not fill out any special forms. Every request, however innocuous or easy to respond to, is technically an FOI request. Authorities tend to record only requests that are difficult, complex or politically challenging. Of course, those are also the most expensive requests to deal with. They are often voluminous and often require consideration of a number of exemptions or internal consultations in order to recover the information.

10:45

There is no doubt that what was initially feared did not come to pass. We carried out research prior to the coming into effect of the 2002 act, asking authorities what they thought they would have to spend. Very few authorities employed more than one additional member of staff and many simply accommodated the work within the existing staff complement. Very few authorities initiated changes to their records management systems solely because of FOI. Other drivers, such as the Data Protection Act 1998 or business efficiencies, were much more likely to have been the cause of such investment. The up-front costs of FOI were not nearly as much as authorities thought they would be.

The experience of authorities has been variable; health boards have not received as many requests as they thought they would, while a number of local authorities have received more than they anticipated. Glasgow City Council receives a lot of requests, and as a consequence we see a number of appeals from Glasgow, although the council has accommodated the 2002 act well and responds well within 20 working days in the majority of cases.

There is no doubt that there will be difficulties, as training budgets and investment in information technology and staff, which is crucial, come under review and jobs are consolidated. I am beginning to see the consequences in terms of the number of appeals that come to me because an authority has failed to recognise or respond to a request. For such cases to come to me on appeal is a waste of everyone’s money.

Humza Yousaf: You are moving on to pastures new, as Graeme Pearson said. With any body that regulates or scrutinises public bodies, is it the case that some people say that the commissioner or regulator is far too close to some bodies? Is

there a standard or code of conduct by which the commissioner operates, so that they cannot be golfing and drinking buddies with chief executives of public bodies? If there is not, should there be? If there is such a code of conduct, should it be strengthened before the new commissioner is appointed?

Kevin Dunion: We adhere to the Nolan principles, as other public authorities in Scotland do. However, you are right to suggest that there must absolutely be a perception of independence. That does not mean that we cannot and should not engage with both authorities and users of the legislation. Through my policy and information team, we have sought to develop case studies, to draw people's attention to how the 2002 act is being used and used well.

For example, we have good insight into how the legislation has been used by campaigners who are tackling hospital-acquired infection in the Vale of Leven hospital, which came to light through FOI and led to a public inquiry, and how it was used by parents to stop the closure of rural schools, which led to the setting up of the Scottish rural schools network.

The fact that Scotland is a small country is a benefit—awareness of FOI is much higher in Scotland than it is in England, and the system is used more effectively—but we have to balance our engagement so that we are not seen to favour one side over another. I have never had any criticism from that perspective. I do not think that I have ever golfed or dined with a chief executive—

Humza Yousaf: I should say that I was not making an accusation. I remember a discussion in the Public Audit Committee about whether the relationship between a body's internal auditors and Audit Scotland could be cosy at times, which might mean that things slipped through the net. Are you saying that you see no danger of that happening, if the commissioner adheres to the basic Nolan principles?

Kevin Dunion: I think that my relationships have been quite the opposite; you would be hard pushed to find a chief executive who finds me cosy—[*Laughter*.]

Humza Yousaf: Is there also an issue to do with journalists and campaigners getting too cosy?

Kevin Dunion: That is absolutely an issue. We judge, but we also have a statutory responsibility to promote awareness of the 2002 act and to promote good practice, which is why my staff will go into a public authority, not to find fault but to assist. The whole tenor of such an assessment is different from that of an investigation into an appeal or complaint. We initiate the contact, so the tenor is quite collegiate.

It is similar with applicants. By and large, the applicant is given an opportunity to give us their views in the course of an investigation, but that is it. A decision will be arrived at. However, after the fact, we get to understand what applicants were interested in. That is an important element of a forgotten area of the 2002 act. I have the power to effect settlement, rather than coming to a formal decision. If I know what the authority's concerns are and what the applicant really wants, I am able to find common ground without the need for a formal decision against or in favour of somebody. About 25 per cent of my cases are now closed using that process. That can happen only because of the engagement with both sides.

Roderick Campbell: Do you have a view on vexatious requests? Is there such a thing or is there no evidence of them in Scotland?

Kevin Dunion: I would rewrite that element of the 2002 act if I could, but I cannot think of any useful way of doing that at the moment.

There is no doubt that authorities believe that the act is being used vexatiously—in other words, in a way that causes them disproportionate difficulty. However, the measures that one would apply to a vexatious litigant cannot be applied in FOI. We cannot remove somebody's FOI rights; it is not the same as their not being able to take court action on a specific case.

Authorities and I find it difficult to come to the conclusion that someone is acting vexatiously. When we do, the applicant gets extremely agitated because the matter may be one that concerns them greatly and they may feel that each of their requests is well intended. However, the sheer volume of those requests may overwhelm the authority. We reach that conclusion in the clear understanding that the volume of requests has overwhelmed the authority's resources and nobody could respond within 20 working days.

North and south of the border, we find it difficult to give guidance on that. To the authorities' credit, they rarely take recourse to claiming that a request is vexatious—there is no provision for saying that an applicant is vexatious, and that is the difficulty. However, to my mind, authorities should claim that a request is vexatious because the alternative is to argue that we should introduce a charging regime to try to choke off requests. That is not the way to deal with the few instances in which an authority genuinely struggles to cope with requests from one individual or organisation.

The Convener: You said that Scotland does very well, and I know that the Scottish regime is tougher than the English system. Are there any other international examples of good practice that

might help to inform any amendment of the 2002 act or any new bill?

Kevin Dunion: This is not about informing any amendments or any new bill, otherwise I would have made such proposals, but I will give an illustration to show that the powers of the commissioners in some other jurisdictions are increasing and the reach of the legislation is keeping pace with public functions.

For example, the act that was recently passed in Brazil—a huge and fast-emerging economy—encompasses companies that have entered into contracts with public bodies to carry out what we regard as public functions. The power of enforcement lies with the equivalent of the Auditor General. The Brazilians have written it into their legislation that, if such companies fail to respond to FOI requests, three sanctions are available: the first is to issue them with a warning; the second is to issue them with a fine; and the third is to suspend them from tendering for future public contracts until they have remedied their practice. That is an interesting way of going about it.

The commissioners in India have the power to fine civil servants, so we may find the registrar of the University of Delhi or the senior finance official of a major public authority, for example, being fined if they fail to respond to FOI requests.

Increasingly, other sanctions are being considered. However, whatever additional measures we put in place, the root element must be the power of appeal to a commissioner. Consideration has been given to whether we could use a housing charter or codes of practice to shadow freedom of information without having full-blown statutory rights, but the point is that the statutory rights have led to information being disclosed.

Many of you will remember the code of practice that applied to local authorities and central Government or even the environmental information regulations, which were statutory. However, because there was no great power of appeal in Scotland before the 2002 act came into effect, they were wholly ineffectual.

The statutory right to information is what works. That is why I say that we should safeguard the rights in the 2002 act and ensure that people do not lose the rights for which we fought hard and which the previous Justice 1 Committee did well to craft.

The Convener: Thank you very much. I wish you all the best, wherever you are headed next.

I suspend the meeting for five minutes before we move on to the next item on the agenda.

10:55

Meeting suspended.

11:03

On resuming—

Petition

Fatal Accident Inquiries (PE1280)

The Convener: Item 5 is consideration of PE1280, by Julia Love and Dr Kenneth Faulds, which calls for the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 to be amended to require a fatal accident inquiry to be held when a person from Scotland dies abroad.

We first considered the petition in October 2011, and we agreed to write to the Cabinet Secretary for Justice to request an indication of when the Scottish Government intends to introduce legislation to amend the 1976 act. From their papers, members will see that the committee has now received the cabinet secretary's response, in which he reaffirms the Scottish Government's commitment to amend the act but states that he is unable to provide a timeframe for that.

The petitioners have also provided a letter for the committee's consideration, which was circulated to members electronically yesterday; they should have it in front of them now.

Do members have any comments or suggestions on what action—if any—the committee can usefully take in respect of the petition? I refer members to page 2 of paper 2, which provides some options.

David McLetchie: I suggest that we opt for option (b), which is to keep the petition open as the petitioner requests. With regard to option (c), I do not think that the reply that we received from the cabinet secretary is appropriate. On reading the fourth paragraph of his letter, I am absolutely none the wiser as to whether any amending legislation will be introduced during the current session of Parliament. It is very equivocal and evasive on that subject. If you are committed to doing something and you have five years in which to do it, you should do it.

Although the legislative programme is busier than it was in the previous session of Parliament, it is nothing like as busy as it has been at other times, certainly in comparison with the first session of Parliament. I do not accept that that is sufficient reason not to bring forward legislation at some point in the next two or three years.

Roderick Campbell: I agree with David McLetchie's comments on the way forward, but I do not share his views on the fourth paragraph of the cabinet secretary's letter, which are a wee bit harsh. I think that we must give the cabinet secretary the benefit of the doubt on whether the legislation will be brought forward at some stage in the current session of Parliament. I read the letter as saying that the Government cannot be absolutely sure when that will happen. I agree with David on the basic premise of keeping the petition open.

Graeme Pearson: I agree with David McLetchie, and I think that it is lamentable that it has taken such a long time to achieve no movement. I hope that members will forgive my ignorance on such matters, but we have talked on previous occasions about members' bills and bills that we can focus on ourselves. Could we consider this issue for that type of bill, or is it too complicated? What is the advice on that?

The Convener: We could certainly explore that. My understanding is that because the Government has not brought forward a consultation or any proposals, there is nothing—I think—to prevent us from proceeding. Perhaps that would give the Government a push. If it introduces legislation at some point when we have something in train, that may accelerate matters. I do not know how you feel about that.

Graeme Pearson: When I read the papers at the weekend, I thought that this was a good opportunity for us to take up that cudgel, and I would be keen to follow through on that.

The Convener: I suggest that, rather than discussing something without having a background paper, we ask the clerks to prepare a paper on how we might go about introducing a committee bill ourselves. We could then discuss that at next week's meeting, focusing on the process, whether such a bill would be competent in the circumstances and so on.

John Finnie: I think that you have covered it there.

The Convener: We need to look at it all, and no doubt the cabinet secretary is listening to us. It is not necessary to write to the cabinet secretary to put the issue on the agenda for next week—or do members wish to do so? We will obviously keep the petition open.

David McLetchie: I agree with that, convener. However, with regard to the proposal that we consider a committee bill on the issue, we should not think that, just because this is the only item before us, that is it. There might be other matters in the legacy work that was left for this committee that members might view as more appropriate subjects. I certainly think that we should have a background paper on the process, and that this matter is a very good candidate for such a process.

The Convener: We have talked before about the fact that the first Justice 1 Committee brought

forward a committee bill. Such bills have been a rare breed since then, and I think that it is time that we reactivated the process: this issue might be a candidate. I am not suggesting that it definitely is, but we should find out about the process and whether such a bill would be competent in the circumstances.

As I said, the cabinet secretary will no doubt know that we have discussed the issue today and that we are not content with the time delay in bringing forward legislation. Would the action that I have suggested be appropriate?

Roderick Campbell: I have no problem with that.

The Convener: Okay. We will keep the petition open.

Subordinate Legislation

Confirmation to Small Estates (Scotland) Order 2011 (SSI 2011/435)

11:08

The Convener: Item 6 is two negative instruments, the first of which is the Confirmation to Small Estates (Scotland) Order 2011. The Subordinate Legislation Committee has not drawn the Parliament's attention to the instrument on any of the grounds in its remit. Do members have any comments?

Alison McInnes: I have a comment on the prior rights of surviving spouses. I was looking at the summary of the analysis—

The Convener: That is the next instrument.

Alison McInnes: Sorry—I thought that we were taking the instruments together.

The Convener: You are ahead of us—I am glad to see that you are full of energy and determined to move on. There are no comments on the Confirmation to Small Estates (Scotland) Order 2011. Are members content to make no recommendation on the order?

Members *indicated agreement.*

Prior Rights of Surviving Spouse and Civil Partner (Scotland) Order 2011 (SSI 2011/436)

The Convener: The second instrument is the Prior Rights of Surviving Spouse and Civil Partner (Scotland) Order 2011. The Subordinate Legislation Committee has not drawn the Parliament's attention to the instrument on any of the grounds in its remit. Do members have any comments?

Alison McInnes: I understand that the general thrust of the instrument, in reviewing the financial limits, is to ensure that the surviving spouse is able to remain in the family home. However, some concerns have been expressed during the public consultation around whether it swings the balance too much away from the rights of children. I fear that the real issue is that people should not be leaving estates intestate and ought to make a will. It would be interesting to know what the Government has done to raise awareness on that issue, because it needs to make that clear.

Roderick Campbell: I seek clarification from the clerks as to what, in reality, the committee can do in relation to the instrument.

The Convener: We could annul—it is in your notes. Paper 4 states:

"Negative instruments are instruments that are 'subject to annulment' by resolution of the Parliament for a period of 40 days after they are laid."

We could write to the cabinet secretary to get a response by next week if the committee has any concerns.

Roderick Campbell: I was concerned about the substantial increase in the limits, which has been picked up by the newspapers and of which I was not previously aware. I find it hard to justify such a substantial increase, and I would like more information from the Government on that.

The Convener: Shall we write to the minister on that basis? I will circulate the letter that goes out and sign it off.

Members *indicated agreement.*

The Convener: We will continue that matter next week.

Act of Adjournal (Amendment of the Criminal Procedure (Scotland) Act 1995) (Refixing diets) 2011 (SSI 2011/430)

The Convener: Item 7 is consideration of an instrument that is not subject to any parliamentary procedure. The Subordinate Legislation Committee has not drawn the Parliament's attention to the instrument on any of the grounds in its remit. I see that members have no comments. Are members content simply to note the instrument?

Members *indicated agreement.*

The Convener: We now move into private session as agreed earlier in the meeting.

11:11

Meeting continued in private until 11:52.

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