The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 6 January 2015

Session 4

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JUSTICE COMMITTEE
1st Meeting 2015, Session 4

CONVENER

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

DEPUTY CONVENER

*Elaine Murray (Dumfriesshire) (Lab)

COMMITTEE MEMBERS

*Christian Allard (North East Scotland) (SNP)
*Roderick Campbell (North East Fife) (SNP)
*John Finnie (Highlands and Islands) (Ind)
*Alison McInnes (North East Scotland) (LD)
*Margaret Mitchell (Central Scotland) (Con)
*Gil Paterson (Clydebank and Milngavie) (SNP)
*John Pentland (Motherwell and Wishaw) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Kevin Gibson (Scottish Government)
Graeme Waugh (Scottish Government)
Paul Wheelhouse (Minister for Community Safety and Legal Affairs)

CLERK TO THE COMMITTEE

Joanne Clinton

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 6 January 2015

[The Convener opened the meeting at 10:15]

Decision on Taking Business in Private

The Convener (Christine Grahame): Good morning and welcome to the Justice Committee's first meeting in 2015. I ask everyone to switch off mobile phones and other electronic devices, as they interfere with broadcasting even when they are switched to silent. No apologies have been received.

Under item 1, the committee is invited to agree to consider in private items 7, 8 and 9. Item 7 is consideration of a draft report on the Modern Slavery Bill legislative consent memorandum; item 8 is consideration of a draft report on the draft Public Services Reform (Inspection and Monitoring of Prisons) (Scotland) Order 2014; and item 9 is consideration of a draft report on the Assisted Suicide (Scotland) Bill. Do members agree to consider those items in private?

Members *indicated agreement.*

Subordinate Legislation

Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2015 [Draft]

10:15

The Convener: Item 2 is consideration of the draft Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2015, which is an affirmative instrument.

I welcome to the meeting and wish a happy new year to Paul Wheelhouse, the Minister for Community Safety and Legal Affairs; Denise Swanson, head of the access to justice unit in the Scottish Government; and Alastair Smith, from the Scottish Government's directorate for legal services.

I believe that Paul Wheelhouse wants to make a brief opening statement.

The Minister for Community Safety and Legal Affairs (Paul Wheelhouse): I do indeed, convener.

The Convener: It is a pretty self-explanatory piece of subordinate legislation, minister, but I am feeling kind. I think that a minute will be sufficient.

Paul Wheelhouse: Thank you very much for the late Christmas present. Happy new year, everybody.

The Convener: There should be no deviation, repetition or whatever. Thank you.

Paul Wheelhouse: There are three affirmative orders being made under the Regulation of Investigatory Powers—

The Convener: So you are just going to deal with all of them.

Paul Wheelhouse: I am sorry; we have the instruments in the wrong order.

The Convener: You should deal with just the first piece of subordinate legislation.

Paul Wheelhouse: Apologies, convener. My folder is in the wrong order.

I will be very brief. The Children and Young People (Scotland) Act 2014 amended the Children's Hearings (Scotland) Act 2011. The amendments make provision for a pre-hearing panel to determine whether an individual who was previously deemed to be a relevant person should continue in that role.

The regulations make consequential amendments to the Advice and Assistance

(Assistance By Way of Representation) (Scotland) Regulations 2003. The amendments ensure that children and relevant persons will have access to assistance by way of representation where a pre-hearing panel is considering whether an individual should continue to be a relevant person.

The Justice Committee will wish to note that stakeholders are supportive of the changes. I understand that the Law Society of Scotland has written directly to the committee to confirm its support.

The amendments also ensure that access to justice is maintained at the right time and for those who need it most.

Thank you very much, convener.

The Convener: Are there any questions? The regulations are pretty self-explanatory. Giving people the right to representation in those very important circumstances seems to be an absolutely sensible thing to do.

Item 3 is the formal debate on the motion to approve the regulations. I invite the minister to move motion S4M-11913.

Motion moved,

That the Justice Committee recommends that the Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2015 [draft] be approved.—[*Paul Wheelhouse*.]

Motion agreed to.

The Convener: As members are aware, we are required to report on all affirmative instruments. Are members content to delegate authority to me to sign off the report?

Members *indicated agreement.*

Regulation of Investigatory Powers (Covert Surveillance and Property Interference – Code of Practice) (Scotland) Order 2015 [Draft]

Regulation of Investigatory Powers (Modification of Authorisation Provisions: Legal Consultations) (Scotland) Order 2015 [Draft]

Regulation of Investigatory Powers (Covert Human Intelligence Sources – Code of Practice) (Scotland) Order 2015 [Draft]

The Convener: Item 4 is consideration of three further affirmative instruments. This is a different kettle of fish.

The minister is still here. I will allow a seamless transition and changeover of officials.

I welcome from the Scottish Government Graeme Waugh from the investigatory powers team, police division, and Kevin Gibson from the directorate for legal services.

Do you want to make an opening statement, minister?

Paul Wheelhouse: I will get it right this time, convener.

Before the committee are three affirmative instruments that are being made under the Regulation of Investigatory Powers (Scotland) Act 2000, or RIPSA. It is worth pointing out at the outset that nothing in the orders provides any public authority with additional powers.

I begin with the draft Regulation of Investigatory Powers (Modification of Authorisation Provisions: Legal Consultations) (Scotland) Order 2015. In 2010, the House of Lords, in considering an appeal from the divisional court in Northern Ireland, agreed with that court's decision that directed surveillance under the Regulation of Investigatory Powers Act 2000 of communications between lawyers and their clients breached article 8 of the European convention on human rights, on the right to respect for private and family life.

The secretary of state did not challenge the divisional court's decision that the procedures used to authorise directed surveillance were disproportionate to the infringement of an individual's right to a private consultation with a lawyer, particularly given the lack of a requirement for independent and high-level scrutiny of such authorisations. In Scotland, the authorisation of directed surveillance is mostly regulated by RIPSA, and the relevant provisions of that legislation are for relevant purposes the same as those that have been successfully challenged in the House of Lords. As a result, it is necessary to adjust the authorising regime for directed surveillance of legal consultations under RIPSA.

RIPSA contains provisions that allow Scottish ministers to reclassify particular types of directed surveillance as intrusive surveillance, and that reclassification has three main effects that operate to restrict the use of directed surveillance in defined cases and to enhance independent oversight of the process. First, it narrows the circumstances in which directed surveillance can be used to those in which it is necessary to prevent or detect serious crime. Secondly, it restricts the office-holders who can authorise such surveillance to the chief constable of the Police Service of Scotland, or any other senior officer designated by him, and to the Police Investigations and Review Commissioner. Thirdly, it requires authorisation to be notified to an ordinary surveillance commissioner, and prevents that authorisation from taking effect unless the

commissioner approves it. A commissioner will provide that approval only if he or she feels that the authorised surveillance activity is both necessary and proportionate.

As for the fourth order that has been made under RIPSA and which the committee is considering this morning—the Regulation of Investigatory Powers (Authorisation of Covert Human Intelligence Sources) (Scotland) Order 2014—I briefly point out that that negative instrument seeks to put in place a similar framework for the authorisation of covert human intelligence sources, whose activity might involve matters that are subject to legal confidentiality. Again, the order significantly tightens up existing arrangements.

The two remaining affirmative instruments—the Regulation of Investigatory Powers (Covert Surveillance and Property Interference – Code of Practice) (Scotland) Order 2015 and the Regulation of Investigatory Powers (Covert Human Intelligence Sources – Code of Practice) (Scotland) Order 2015—are technical in nature, and their purpose is to put in place the revised codes for covert surveillance and property interference and for covert human intelligence sources, and to revoke the existing codes, which were published in 2002. Since the codes were published, there have been a number of changes. As well as reflecting issues to do with legal confidentiality and undercover operatives, which the committee is considering, the codes reflect a number of organisational changes that have taken place over the past 12 years—not least, of course, the amalgamation of Scotland's police forces into the single Police Service of Scotland.

Thank you, convener, for the opportunity to speak to the orders.

The Convener: Thank you very much, minister. I note that you referred to the negative instrument that we will consider under item 6 on our agenda. That is fine.

We will hear first from John Finnie, and then from Alison McInnes and Roderick Campbell.

John Finnie (Highlands and Islands) (Ind): Good morning, minister. You said that there are no additional powers as a result of the orders, but you will be aware of the significant public concern about the level of surveillance in Scotland. What reassurance, if any, can you give us that the changes will be adhered to by United Kingdom security and police services, as opposed to Scottish security and police services?

Paul Wheelhouse: The regime will ensure that surveillance will be used only when it is proportionate and necessary to do so, and in some cases that involve serious crime. In other jurisdictions on these islands, certain procedures have already been established, have had time to bed in and are, we believe, working effectively. To our knowledge, no concerns have been raised about bodies outside Scotland abusing them.

I very much note the member's point and identify with the concerns that he has raised. We need to be seen to be acting proportionately and taking such steps only when necessary and not in situations that fall outwith that definition. I am happy to keep a close eye on how things operate in practice and see whether any concerns arise in due course.

John Finnie: Thank you. I want to raise a number of issues that have been highlighted in the letter from the Faculty of Advocates, which you will be aware of. The letter notes:

> "The grounds upon which the powers may be exercised are more limited than the powers under the equivalent UK Orders and that too is welcome."

You will acknowledge, then, that the regime in Scotland is tighter.

Paul Wheelhouse: Yes, and that is very much the point that I emphasised in my opening remarks. We are not giving investigatory authorities any additional powers. We are tightening up the delivery of the provision in practice and making sure that it complies with the decision that was taken in Northern Ireland. We are taking our own approach to the issue, and we are satisfied that our approach to ensuring that the matter is properly overseen by the commissioners, and, indeed, by the police, is robust.

John Finnie: I imagine that it would be argued that any prosecution that relied on a level of surveillance that did not comply fully with procedures in Scotland would be flawed. How would the Scottish Government respond if there was any activity at the UK level that did not follow those procedures—for instance, during a prosecution outwith Scotland's jurisdiction?

Paul Wheelhouse: We have on-going dialogue with colleagues across the UK about the operation of such matters, and we learn from experience elsewhere. I am sure that, similarly, those colleagues will learn from us about how we deliver our approach. If concerns come to light elsewhere in the UK about the implementation of the orders that might have implications for our approach and framework, we will need to take those on board. If such issues come to light, I certainly undertake that I will look again at the procedures.

However, we are confident that the orders that are in front of the committee represent an appropriate approach to tackling the issue that was brought up by the court case in Northern Ireland. They will make sure that Scottish legislation complies with the ECHR.

John Finnie: On that particular court case, which hinged on legal professional privilege, and accepting the issue of the iniquity exception, the Faculty of Advocates says:

"The issue is, accordingly, not only of interest to lawyers and to those who seek the advice of lawyers (whether in the context of civil or criminal matters), but is of structural importance in a constitutional democracy governed by the rule of law."

The faculty goes on to say:

"it is evidently intended that surveillance under these SSIs may be authorized even in circumstances which would not engage the iniquity exception."

Is it not a matter of grave concern when a body of lawyers speaks so strongly about an issue?

Paul Wheelhouse: I certainly respect the views that have been expressed by Mr Wolffe on behalf of the Faculty of Advocates. We believe that we have a choice about how we take the issue forward. Do we give clarity to legal professionals and those who use legal services about the circumstances, in terms of premises or location, in which a higher test will be applied to the use of surveillance of private matters? We believe that our approach will give that clarity, so a legal adviser will be able to tell their client that, if they are conducting discussions on legal premises, an additional degree of scrutiny will be applied to any application to undertake surveillance of that conversation.

We would face a practical difficulty if we did not define the location where advice was given. How would we know in advance that a conversation would take place that would be of a legal nature and therefore subject to the test? We are having to wrestle with the practicality of the delivery of an important principle.

I very much recognise Mr Wolffe's comments on the public being able to trust in the confidentiality of the advice that they get from and comments they make to their solicitor. I totally respect that position, but we have to ensure that there is a practical solution to the use of surveillance and that we give clarity to those who might be affected, by setting out in legislation when the higher test would apply. We have to get around the real difficulty of identifying in advance that a conversation would take place, whether it was about a legal matter or about the criminality that we were trying to identify.

John Finnie: Do you envisage more use of the legislation, especially given the fact that its intended purpose is to prevent and detect serious crime, which the police would say is their entire raison d'être?

10:30

Paul Wheelhouse: We need to be able to authorise such activity when it is necessary and proportionate, in relation to serious crime, the risk of serious crime or public safety being at risk in other respects. I hope that that is demonstrated by the fact that we are tightening up the requirements in terms of authorisation before such techniques are deployed.

In reality, however, unless there is an increase in the underlying need for such surveillance to take place because of an increase in the prevalence of serious crime—I am sure that all committee members hope that that will not happen—there will not need to be an increase in the use of surveillance as a result of the legislation. Indeed, the legislation tightens up the requirements for the deployment of such surveillance to make it more difficult and to ensure that more checks and balances have to be gone through so that it is properly scrutinised before it is deployed. I hope that I can give confidence to people in the wider community that an appropriate approach is being taken to ensure that surveillance techniques and human resources—informants and others—are deployed only where that is necessary and proportionate to the crimes that are believed to be being committed.

John Finnie: Thank you. Can I ask one final question, convener?

The Convener: Before you do that, I ask the minister to go through the practicalities. Let us stick with the issue of lawyer confidentiality, where there is a real test of human rights concerning confidentiality and privilege. How would the surveillance operate? Who would apply to the commissioner? What evidence would be put before them? How would it be set out? I think that the minister is trying to ensure that there is not a fishing expedition, and the committee would not want somebody to undertake surveillance without due cause. I ask him to go through how it would work. That would be helpful to me. If Police Scotland thinks that a person is up to serious crime and they have gone away to talk to their lawyer or they are talking to their lawyer in prison, what is the process for surveillance of that?

Paul Wheelhouse: Consultation with a lawyer can happen in a number of different situations.

The Convener: What is the process for getting to the position of being able to undertake covert surveillance?

Paul Wheelhouse: There is an enhanced degree of oversight through the Office of Surveillance Commissioners. If an investigation requires a degree of surveillance or it is necessary to enter premises under other statutes—

The Convener: Sorry, minister, but I want to stick with the lawyer bit. Who goes to whom, what do they present, when does the authorisation happen and how is the surveillance done?

Paul Wheelhouse: I will bring in Graeme Waugh, if I may.

The Convener: That would be helpful.

Paul Wheelhouse: He will give you chapter and verse about the process.

Graeme Waugh (Scottish Government): We are talking about serious crimes, so at the point when the police are thinking about seeking an authorisation they will already have a body of information and intelligence to hand. They will be required to submit an application form that clearly sets out why they believe surveillance is necessary, giving background on the individual that they are interested in and what that individual's activities have entailed. Once they have set out why they feel that surveillance is necessary, they will set out why they feel it is proportionate, which will require them to explain why it is the only way for them to get the information, that they have tried other methods and that those methods have failed or are impractical.

The application form then goes to the authorising officer, who, in this case, will be the chief constable or one of the chief constable's designated officers—a designated officer will be an assistant chief constable or above. If the authorising officer is content with the application form, they will authorise the surveillance and that decision will be transmitted to the Office of Surveillance Commissioners, which will be required to approve it before any surveillance can take place.

The Convener: Who are those people?

Graeme Waugh: The Office of Surveillance Commissioners is an independent, judicially led body that is based in London but covers the entire UK. The surveillance commissioners and chief surveillance commissioner are appointed under both the UK Regulation of Investigatory Powers Act 2000 and RIPSA, which is the equivalent Scottish act. They oversee the use of any—

The Convener: Are they judges?

Graeme Waugh: The chief surveillance commissioner is an ex-High Court judge. There are two commissioners who provide knowledge of Scots law—Lord Bonomy and Lord MacLean are the current Scottish commissioners. A fairly high level of judicial oversight is applied. The commissioners reassure themselves that they are content with the necessity and proportionality of the surveillance, and they give the okay for the surveillance to take place.

The Convener: The lawyer will be unaware that the surveillance is happening.

Graeme Waugh: Yes.

The Convener: As his or her client will be.

Graeme Waugh: Yes.

The Convener: That was helpful. I just wanted to understand how the process worked in practice.

John Finnie: I have a final brief question about the lack of an equality impact assessment. We are told:

> "There are no equality impact issues and an EQIA has, therefore, not been completed. It is extremely unlikely that any particular group will be impacted by the provisions contained in the code."

Given the surveillance that is often undertaken covertly at the UK level, is that genuinely the belief?

Paul Wheelhouse: I go back to my original point that we are not giving the investigatory authorities any additional powers. If anything, we are tightening the regulation of the powers. We are putting no one at a disadvantage. If you like, we are making the process harder by applying a higher test to the use of surveillance technologies and human resources.

It might be helpful if Mr Finnie explained why he is concerned about the equality impact issue. Perhaps I am misreading what he is saying.

John Finnie: If the existing arrangements disproportionately impact on a certain category—I am thinking of young Muslim men—there will still be a disproportionate impact on that group, although the new arrangements might not create an additional impact.

Paul Wheelhouse: I understand the point that Mr Finnie makes. However, I return to the point that the draft orders do not change the landscape by giving additional powers. I could understand the point if they were to increase the likelihood that someone of the Islamic faith might be targeted for surveillance for a particular reason. However, there is a level playing field, as everybody is affected equally, regardless of their background.

If it is suspected that someone has committed a serious crime, they will be subject to the test in any case but, under the provisions in the draft orders, a higher test will be applied in Scotland for the deployment of surveillance. There will need to be a higher degree of certainty that it is necessary and proportionate, so I hope that the provisions will improve the targeting and make it more evident than it is at present that it is necessary and proportionate to use surveillance in each and every case in which it is deployed. I hope that the impact will be positive rather than negative.

That is my interpretation. However, I appreciate the point that Mr Finnie makes. I am certainly mindful that we want to avoid any situation where we seem to be treating any particular group in society unfairly.

John Finnie: For the avoidance of doubt, I am not questioning the bona fides of the Scottish Government in relation to this. I just wonder how realistic it is to apply a tight regime to bodies over which the Scottish Government—and the Crown Office and Procurator Fiscal Service and the Lord Advocate, who is responsible for the investigation of crime—has no direct control, which are the UK bodies.

Paul Wheelhouse: I appreciate the point that Mr Finnie is making.

Alison McInnes (North East Scotland) (LD): The client-lawyer privilege is a fundamental right. We already have the iniquity provision, which is appropriate, and it allows covert surveillance when the privilege is being abused for criminal purposes, but the dean of the Faculty of Advocates argues that the draft orders go further than that. I believe that we should stray from it only in compelling and exceptional circumstances.

You talked about situations when there is concern about serious crime. The debate at the United Kingdom level at Westminster was about national security or a threat to life, but I understand that you have widened that to serious crime. Will you give me examples of where you believe surveillance would be appropriate?

Paul Wheelhouse: If you will bear with me, I am just getting my notes. The point is understood. We appreciate the point that Mr Wolffe has made in relation to the use of the provisions and the broadening out.

It is worth while to say that serious crime is defined in statute. I will relay the definition to the committee as it gives—I hope—a degree of clarity about what we mean. Serious crime is defined in section 31(6) of the Regulation of Investigatory Powers (Scotland) Act 2000 as follows:

"In this Act—

(a) references to crime are references to conduct which constitutes one or more criminal offences or is, or corresponds to, any conduct which, if it all took place in any one part of the United Kingdom would constitute one or more criminal offences; and

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

Section 31(7) states:

"Those tests are—

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

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

It is worth putting that on the record as the definition of serious crime.

I acknowledge Alison McInnes's point about the different definitions that are used in Scotland and the rest of the UK. We believe that the measure is proportionate. Similar measures have already been tested through the courts, in that a judicial review of RIPA has been undertaken. I will bring in Kevin Gibson on that point.

The approach has stood up in terms of its application in relation to ECHR. We believe that we are bringing forward a package to the committee today that is proportionate, complies with ECHR and satisfies the necessary adjustments that we need to make in light of the court decision in Northern Ireland.

Kevin Gibson (Scottish Government): I do not have a great deal to add. The national security aspect is an additional element in the UK legislation. The UK deals with serious crime in the same way as we do, so it can authorise such surveillance in relation to national security and serious crime whereas, for obvious reasons, we can do so only in relation to serious crime.

Alison McInnes: That is helpful.

At Westminster, assurances were given to my colleague Baroness Hamwee that such information obtained can be used only to counter a threat and not for criminal proceedings. Will you give the committee the same assurances?

Paul Wheelhouse: We can say that the codes of practice in Scotland require such direct surveillance to be used only in compelling circumstances, such as when there is a threat to life or limb. Only if it has been assessed that there is a risk of such a crime will such surveillance be deployed.

I hope that that gives you a sense of the gravity of the potential crime to which such surveillance applies. While the terminology used might differ in some respects, the test that is applied to the deployment of surveillance is of a similarly high level.

Alison McInnes: My point is that the information obtained by intrusive surveillance of privileged client-lawyer discussions should be used only to counter an immediate threat to life and not for further criminal proceedings. Can you give that guarantee?

Paul Wheelhouse: I believe that that is the case, but I will check with Graeme Waugh that that is the intent of the approach that has been set out.

Graeme Waugh: That is the intent.

The Convener: Surely evidence that is obtained under covert surveillance cannot be used in criminal proceedings in court, because the person has not been made aware of their rights. Surely it is used just for investigatory purposes.

Paul Wheelhouse: That ties in very well with the point that was made about the threat to life or limb. If such evidence is used to help prevent an immediate threat to someone's life or limb, that is a legitimate use of—

The Convener: Yes, but not in court proceedings.

Paul Wheelhouse: That is what I am confirming, convener.

The Convener: There is a key demarcation in relation to a person being aware of their right to be silent. Such evidence cannot be used; it cannot seep into court proceedings.

Paul Wheelhouse: I defer to Kevin Gibson on the legal position, but that is my understanding.

Kevin Gibson: It is very unlikely that such evidence could be used in criminal proceedings, if for no other reason than that it is legally privileged information.

Roderick Campbell (North East Fife) (SNP): I refer to my entry in the register of interests—I am a member of the Faculty of Advocates.

In the faculty's submission, James Wolffe QC on the faculty's behalf questions

"whether the SSIs draw the boundaries sufficiently tightly, given the importance of lawyer-client confidentiality."

He makes the point that

"Where there is a reasonable apprehension that the iniquity exception applies (in relation to serious crime), the surveillance or the use of the source may, of course, be characterized as 'necessary for the purpose of preventing or detecting serious crime'."

It is therefore accepted that such surveillance may be necessary and proportionate.

However, Mr Wolffe goes on to say that

"the converse is not necessarily true. Indeed, as the draft Code of Practice states, legal privilege does not apply to communications made with the intention of furthering a criminal purpose".

I read that as concern about a theoretical position in which there would be a lack of reasonable apprehension. If it was felt that there were such issues, I wonder in a practical sense to what extent the draft code of practice could be kept under review and to what extent—if at all—there is any accountability as to the operation of the measure.

10:45

Paul Wheelhouse: Roderick Campbell and the Faculty of Advocates have raised important issues. As I said to Mr Finnie, I accept the importance of protecting the trust between a lawyer and their client, and I acknowledge the degree to which the system depends on that trust. I very much respect the opinions that Mr Wolffe, Mr Campbell and Mr Finnie have expressed.

There might be circumstances in which the operational requirements for surveillance are not focused on the lawyer or any legal communications. The point that I made to Mr Finnie—probably in a ham-fisted way—was that there are circumstances in which there is a choice to be made between looking at the issue from the point of view of the location or premises in which advice is given and applying the general principle that surveillance can be done at any time, and considering the need to use regulations that work on a non-property-specific basis.

Nevertheless, surveillance activity might at some point result in privileged communications being obtained inadvertently. We are seeking to create a regime that allows the operational requirements to be achieved while acknowledging that a higher level of protection needs to be afforded to matters that are subject to legal confidentiality. In a nutshell, we are doing our best to protect individuals' rights and the confidentiality of legal advice, except in very unusual circumstances in which a serious crime is being planned or undertaken.

I hope that we can keep the operation of the code of practice under review. If there are concerns about the techniques that are deployed in practice, we will reflect on them—I take the point. We are making the best stab at tackling the issue that we can make at this time, but that does not mean that the approach is set in stone. If it transpires that there are difficulties, we will listen to and address representations from the legal profession and other stakeholders about the need for modifications.

Roderick Campbell: I am grateful for that reassurance. It is as well to stress that the Faculty of Advocates said that the orders are an improvement on the existing state of play.

Paul Wheelhouse: We should not lose sight of that.

Roderick Campbell: The issue is just that there is concern about whether they improve the situation 100 per cent.

The Convener: How would people know that they had been under surveillance? I tried to amend the Regulation of Investigatory Powers (Scotland) Bill on that issue when the bill was going through the Parliament—my amendment failed, as usual. The minister said that things will be kept under review, but let us go back to lawyer-client confidentiality. How would people know that they had been under surveillance, if everything turned out to be wrong and the legislation had been misapplied? Who guards the guards, at the end of the day?

Paul Wheelhouse: I am grateful for the opportunity to respond to that point. The Office of Surveillance Commissioners has access to knowledge about the extent to which the approach is deployed by all the relevant bodies that can use surveillance, so it is a repository of information about what is happening on the ground and can keep an eye on practice. If the office has concerns about surveillance under the guidelines that we are considering, I imagine that it will review the approach in due course.

The Convener: Would the people even be told, though? I agree with Roddy Campbell that the orders tighten up the situation. The dean of the Faculty of Advocates welcomes the approach, the previous dean did not object to it and the comments come rather late in the day—I understand that. However, although the Office of Surveillance Commissioners might look at activity and say that it was not appropriate, would anyone else know that? Would people be told? Is there data on where the approach has been misapplied, or is such information secret?

Paul Wheelhouse: It is not necessarily secret. On the point about data on how often, in what circumstances and how appropriately the approach is deployed, it is worth reminding the committee that the Office of Surveillance Commissioners can refuse an application. If the office felt that surveillance was inappropriate, I hope that it would refuse the application.

The Office of Surveillance Commissioners considers the necessary and proportionate use of surveillance and can keep the data under review, so it will understand trends in the deployment of the approach, if trends emerge over time—for example, in relation to the groups of people who are affected. That relates to Mr Finnie's point.

As far as I am aware, we do not have access to that information, so we cannot monitor that ourselves. We rely heavily on the Office of Surveillance Commissioners, which is charged to ensure probity in the use of surveillance.

The Convener: We do not know what the Office of Surveillance Commissioners has said or done or what evaluations it has made. I understand that serious criminal investigations have to be protected, but there is a balance to be struck.

Paul Wheelhouse: I agree that there is a balance to be struck. Perhaps Graeme Waugh can add something about the relationships through which the commissioners can review the information and the degree to which they can ascertain its probity.

Graeme Waugh: There are two aspects to the commissioners' role. I described the first aspect earlier, which involves them approving or quashing an application. The second aspect involves annual inspection. Police Scotland will be inspected every year by commissioners and, probably, some of their inspectors. They will go through the paperwork and reassure themselves that everything is as it should be. If they have any recommendations to make based on their findings, they will make them to the chief constable, who will be obliged to remedy matters.

The answer to the question whether people will know that they have been subject to surveillance is that, if it has been done properly, they will not. However, if anyone feels that they have been the subject of unlawful surveillance or have been surveilled illegally, they can appeal to the Investigatory Powers Tribunal, which will take forward their complaint and respond accordingly.

The Convener: Have there been any applications to the tribunal?

Graeme Waugh: The tribunal was established under RIPA and RIPSA in 2000, and there have been a number of appeals to it. Its website lists the cases that it has dealt with and the decisions that it has made. I could not put a number on them.

The Convener: We can find that out.

Graeme Waugh: Yes.

Margaret Mitchell (Central Scotland) (Con): Client-lawyer privilege is a fundamental right, and it is right that my colleagues have questioned the minister robustly. However, much has been made of Mr Wolffe's late submission. I note that he did not take the opportunity to take part in the consultation. No one has mentioned that none of the seven consultees opposed the proposals. They included the Law Society, Her Majesty's inspector of constabulary, Police Scotland, the Scottish Human Rights Commission, the Scottish Information Commissioner and two others who wanted to remain anonymous. That is significant.

I took on board the point that the minister made in his opening statement, which was that the test that Mr Wolffe suggested should be applied as

"a reasonable basis for apprehending that the legally privileged communication is made with the intention of furthering a criminal purpose or the lawyer is himself party to criminal activity"

is unworkable, as it is practically impossible to determine that in advance.

On whether the measure is proportionate, I think that the definition of "compelling" as being a risk to life and limb means that the Government has done a good job in striking the right balance and delivering the protection that is necessary in what is a serious situation.

Paul Wheelhouse: Thank you for that.

Elaine Murray (Dumfriesshire) (Lab): Happy new year, minister. Like Margaret Mitchell, I noted that the majority of respondents had not raised the concern that Mr Wolffe raised, which came in fairly late in the day. The letter to us is dated 9 December and says that Mr Wolffe raised the issue with the appropriate official in the justice department and had copied the letter to Mr Matheson. I know that the Christmas period has intervened, but has there been an opportunity to respond to Mr Wolffe? If so, have you had an indication from him as to whether he has been reassured by any such response?

Paul Wheelhouse: I will direct that to Graeme Waugh, as I believe that he is the official who is referred to in the letter. I am not aware of any feedback being given to the Faculty of Advocates, but Graeme may be able to add something.

Graeme Waugh: Mr Wolffe called me a day or so before the committee received his letter to apologise for having missed the consultation and to let us know that he would be writing to the committee. We had a general conversation about what the legislation was trying to do. His thoughts were very much as set out in his letter. He accepted that what we were doing was a significant tightening up, but he still had the professional concern that is set out in his letter. There has not been an official written response to him.

Elaine Murray: This legislation is noticeably tighter than the UK legislation. In terms of Mr Wolffe's specific concerns, is the UK legislation tighter than ours? I find it quite difficult to get to grips with his actual objection to the legislation. I was not quite sure whether he was saying that, although we have already gone further than the UK legislation, we should be going even further than that, or whether he was pointing out some deficiency in the Scottish Government's approach.

Paul Wheelhouse: My understanding is that the approach that is being taken in Scotland is similar to the approach that is being taken in England. In that respect, we are not doing anything that has not been done in relation to RIPA in England. Indeed, we are trying to ensure that, across the UK, we are reflecting the outcome of the decision in respect of Northern Ireland and responding to concerns about the ECHR. We have not done anything additional that might upset the Faculty of Advocates.

I understand the point that Mr Wolffe has made on behalf of the Faculty of Advocates. I am grateful to Margaret Mitchell for reminding us that the majority—in fact, all—of the respondents were broadly supportive of our approach. I understand that the concern is a more general one about the extent to which any access should be given to client-lawyer discussions. That is the more fundamental issue that Mr Wolffe is directing his comments to.

Elaine Murray: Presumably, given that this legislation is improving the situation, that is already the case, so nothing unusual is being brought in through this legislation.

Paul Wheelhouse: Indeed. That is my view. What we are doing is making it less likely that someone could have their right to privileged discussions with their lawyer contravened through surveillance.

The Convener: Fine. John, do you have a short question?

John Finnie: Yes. It is for the minister, but it is perhaps more likely to be answered by Mr Waugh. It is about the reference that was made to the number of applications. Would it be competent for any body outwith Scotland to make an application under this legislation?

Paul Wheelhouse: I will ask Graeme to answer that.

Graeme Waugh: The bodies that can make an application are named in RIPSA. UK bodies will be caught by the equivalent order made under RIPA.

John Finnie: Even if it was for surveillance operations in Scotland?

Graeme Waugh: It would depend on what the surveillance operation was for. If it was for a reserved function, such as national security, it would be made under RIPA.

John Finnie: What if it was for a serious criminal matter that straddled the border?

Graeme Waugh: If it was for a serious criminal matter, the likelihood is that Police Scotland would make the application. The National Crime Agency would make the application under the equivalent order made under RIPA. There is a provision in RIPA that recognises that some bodies function throughout the UK. Previous to the NCA, we had the Serious Organised Crime Agency. Rather than such UK-wide bodies having to apply one regime south of the border and a different regime north of the border, it is acknowledged in RIPA that they operate UK-wide and make their authorisations under RIPA. There is exactly the same process for application, authorisation and oversight.

John Finnie: Who would be in charge of a criminal investigation in Scotland that relied on this legislation if it was a UK body that applied?

Graeme Waugh: The UK body would be in charge. Whichever body applied for the activity would be responsible for it.

John Finnie: Would it report to the Lord Advocate in Scotland?

Graeme Waugh: Yes.

The Convener: Could joint applications be made by Police Scotland together with a UK body on matters that straddle the border?

Graeme Waugh: Yes. An application could specify that, for example, Police Scotland and the NCA would work together. One of the bodies would take the lead and get the authorities in place.

11:00

Alison McInnes: Minister, you said that the surveillance commissioners have to authorise—or not—the application. How many applications have been made in the past year? How many refusals have there been?

Paul Wheelhouse: I am afraid that we cannot give that information to the committee because it is held by the commissioners. I understand that, in the past, the Office of Surveillance Commissioners has said that it would not publish that information. We do not have access to the information to be able to provide it to the committee today.

Alison McInnes: How are you able to understand whether the legislation is being appropriately applied?

Paul Wheelhouse: Clearly, we will have an on-going dialogue about the implementation of the legislation. I am happy to come back to the committee—in writing if I may, convener—about how we propose to engage the commissioners about the legislation's effectiveness.

I ask Graeme Waugh to say whether there has been any discussion with the commissioners about how they wish to progress the matter.

Graeme Waugh: The Office of Surveillance Commissioners publishes an annual report. Its reports are laid in the Scottish and Westminster Parliaments. Any indication that it is dissatisfied with how things are working will most likely be set out in its annual report.

The Convener: But the report does not give the numbers.

Graeme Waugh: Figures are provided in a number of tables at the end of the reports. I am not sure that those are as specific as the committee might want them to be.

Paul Wheelhouse: I do not imagine that the figures are broken down and that Scotland can be compared with other geographical territories.

Graeme Waugh: I think that the figures are broken down.

Paul Wheelhouse: Oh—they are. Perhaps we can come back to the committee with information and previous examples if that would be helpful.

The Convener: Okay.

Christian Allard (North East Scotland) (SNP): I want clarification on a couple of matters. Margaret Mitchell said that everybody agreed with the Government. Although it is great to see that everybody accepts that the Government is going in the right direction, why is it that nothing would have happened had the case in Northern Ireland not arisen? Did any of the bodies make recommendations before that case?

Paul Wheelhouse: I am not aware that any recommendations were made, but I ask Kevin Gibson to say whether he is aware of any concerns being raised prior to that case.

Kevin Gibson: No, that is the first example of concerns being raised of which we are aware. We responded to those concerns, as did the UK Government.

Paul Wheelhouse: It is a response to case law. Until legislation is tested, you are not entirely sure how noble gentlemen and ladies will interpret it. In this case, the concerns were not picked up prior to the case being brought to court. Everyone had to respond to the determination that was made in the Northern Ireland case.

Christian Allard: Secondly, Kevin Gibson said that the use of evidence from covert operations in criminal proceedings would be very unlikely. Will he clarify his point?

Kevin Gibson: I cannot comment on what would happen in every case. In general terms, the information is unlikely to be capable of being used. First, there would be an arguable breach of someone's right to remain silent and not to incriminate themselves if their private discussions were recorded without their knowledge and, secondly, the information obtained might be legally privileged. In general, you are not required to disclose privileged information in court proceedings.

Christian Allard: Is there no need to tighten up the rules and make that clear?

Kevin Gibson: How the information is used later on is a separate issue; it is not governed by this legislation particularly.

The Convener: Thank you very much. I conclude the question session. We have pried into this and exercised our scrutiny enough.

Item 5 is the formal debate on the motions to approve the instruments considered under the previous item. I invite the minister to move S4M-11910.

Motion moved,

That the Justice Committee recommends that the Regulation of Investigatory Powers (Covert Surveillance and Property Interference – Code of Practice) (Scotland) Order 2015 [draft] be approved—[*Paul Wheelhouse*.]

Motion agreed to.

The Convener: I invite the minister to move motion S4M-11915.

Motion moved,

That the Justice Committee recommends that the Regulation of Investigatory Powers (Modification of Authorisation Provisions: Legal Consultations) (Scotland) Order 2015 [draft] be approved.—[*Paul Wheelhouse*.]

The Convener: Do any members wish to speak in the debate on the motion, or have we exhausted all the debating points?

John Finnie: I merely observe that the time that the discussion, which has been very helpful, has taken indicates the level of concern that there is about the issue. I think that it has been time well spent.

The Convener: Yes. I am now persuaded of the case for what is proposed because it will tighten up matters and because the Scottish Human Rights Commission does not have concerns, but it was important for us to test the arguments that were put forward by the dean of the Faculty of Advocates. Those are markers that will allow us to see how things turn out. We look forward to further details now that we have prised out information about the Office of Surveillance Commissioners report, which is interesting. We will look into that further.

Motion agreed to.

The Convener: I invite the minister to move motion S4M-11916.

Motion moved,

That the Justice Committee recommends that the Regulation of Investigatory Powers (Covert Human Intelligence Sources – Code of Practice) (Scotland) Order 2015 [draft] be approved.—[*Paul Wheelhouse*.]

Motion agreed to.

The Convener: As members are aware, we are required to report on all affirmative instruments. Are members content to delegate to me responsibility for signing off the report on all three instruments?

Members *indicated agreement.*

The Convener: I thank the cabinet secretary and his officials for attending.

Regulation of Investigatory Powers (Authorisation of Covert Human Intelligence Sources) (Scotland) Order 2014 (SSI 2014/339)

The Convener: Item 6 is consideration of three negative instruments, the first of which is SSI 2014/339, which alters the authorisation arrangements for the conduct or use of a covert human intelligence source under RIPSA in certain cases. The Delegated Powers and Law Reform Committee did not draw the attention of the Parliament to the order. Do members have any comments on it?

I will take the silence to indicate that members have no comments. Are members content to make no recommendations on the order?

Members *indicated agreement.*

Mutual Recognition of Criminal Financial Penalties in the European Union (Scotland) (No 2) Order 2014 (SSI 2014/336)

The Convener: The second negative instrument for our consideration is SSI 2014/336, which gives effect to framework decision 2009/299/JHA on the application of the principle of mutual recognition to financial penalties. It aims to enhance procedural rights where financial penalties have been imposed at trial in the absence of the persons concerned.

The Delegated Powers and Law Reform Committee agreed to draw the attention of the Parliament to the order on the ground that it breached the minimum period between the laying and the coming into force of an instrument, but it was content with the explanation that was provided. Do members have any comments on the order? Is there life out there?

John Finnie: Can I just check which instrument we are talking about? Is it SSI 2014/337?

The Convener: We are on the order on mutual recognition of criminal financial penalties in the European Union.

John Finnie: I would like to make a brief comment. I am pleased that we have the European arrest warrant in place, because there could have been difficulties if the UK had opted not to continue with the relevant measures. The committee monitored that issue over a period of time. I am delighted that the UK Government has seen sense on it.

The Convener: That is not really relevant, but you wanted to say it and you are feeling the better for having done so.

John Finnie: I thought that it was relevant, but there you go.

The Convener: You got it out of your system.

John Finnie: The issue is mentioned in paragraph 19 of the paper, if that helps.

The Convener: Absolutely—you correct me.

Are members content to make no recommendation in relation to the order?

Members *indicated agreement.*

Mutual Recognition of Supervision Measures in the European Union (Scotland) Regulations 2014 (SSI 2014/337)

The Convener: The third and final negative instrument for consideration today is SSI 2014/337, which gives effect to framework decision 2009/829/JHA on the European supervision order, which promotes mutual recognition within the EU of judicial decisions relating to non-custodial pre-trial supervision measures that may be imposed on an accused person in criminal proceedings.

Again, the DPLR committee agreed to draw the attention of the Parliament to the regulations on the ground that they breached the minimum period between the laying and the coming into force of an instrument, but it was again satisfied with the explanation that was given.

Do you have any comments to make on SSI 2014/337, Mr Finnie?

John Finnie: I again refer to paragraph 19, which says:

> "Where the issuing State issues an arrest warrant for breach of a supervision measure, the European Arrest Warrant may be used to return the individual back to the issuing State for trial."

I am very pleased that we have the European arrest warrant in place.

The Convener: You are there.

Roderick Campbell: I echo what John Finnie said. The committee was right to take the concerns about the UK opting back into the relevant measures seriously and to keep the issue under review.

The Convener: Are members content to make no recommendation in relation to the regulations?

Members *indicated agreement.*

The Convener: Thank you very much.

11:10

Meeting continued in private until 12:33.

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