FINANCE COMMITTEE

Tuesday 22 September 2009

Session 3

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FINANCE COMMITTEE
21st Meeting 2009, Session 3

CONVENER

*Andrew Welsh (Angus) (SNP)

DEPUTY CONVENER

*Jackie Baillie (Dumbarton) (Lab)

COMMITTEE MEMBERS

*Derek Brownlee (South of Scotland) (Con)
*Linda Fabiani (Central Scotland) (SNP)
*Joe FitzPatrick (Dundee West) (SNP)
*James Kelly (Glasgow Rutherglen) (Lab)
Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD)
*David Whitton (Strathkelvin and Bearsden) (Lab)

COMMITTEE SUBSTITUTES

Gavin Brown (Lothians) (Con)
Kenneth Gibson (Cunninghame North) (SNP)
Lewis Macdonald (Aberdeen Central) (Lab)
Liam McArthur (Orkney) (LD)

*attended

THE FOLLOWING ALSO ATTENDED:

Margaret Smith (Edinburgh West) (LD)

THE FOLLOWING GAVE EVIDENCE:

Tam Baillie (Scotland's Commissioner for Children and Young People)
Michael Clancy (Law Society of Scotland)
Kevin Dunion (Scottish Information Commissioner)
John Howison (Transport Scotland)
Professor Alan Miller (Scottish Human Rights Commission)
Stewart Stevenson (Minister for Transport, Infrastructure and Climate Change)

CLERK TO THE COMMITTEE

Dr James Johnston

SENIOR ASSISTANT CLERK

Mark Brough

ASSISTANT CLERK

Allan Campbell

LOCATION

Committee Room 4

Scottish Parliament

Finance Committee

Tuesday 22 September 2009

[THE CONVENER *opened the meeting at 14:00*]

Forth Crossing (Contingent Liability)

The Convener (Andrew Welsh): Good afternoon and welcome to the 21st meeting of the Finance Committee in 2009, in the third session of the Scottish Parliament. Apologies have been received from Jeremy Purvis; there are no other apologies. I ask everyone present to turn off mobile phones and pagers, please.

Agenda item 1 is consideration of a contingent liability that the Scottish Government proposes to enter into. Members will recall that, under the written agreement between the Finance Committee and the Scottish Government, Scottish ministers must seek the approval of the Finance Committee before entering into a contingent liability of more than £1 million. Under the agreement, the committee is required to consider a proposed contingent liability within 20 days, and to decide whether to approve the proposal or to propose an amendment. Scottish ministers must then either accept the amendment or notify the committee that they disagree. It is then for the committee to decide whether to allow ministers to proceed, or to refer the matter to the Parliamentary Bureau to schedule a debate.

We have before us a letter from the Minister for Transport, Infrastructure and Climate Change, explaining a proposed contingent liability in respect of the Forth replacement crossing. Members will remember that last week we took evidence from Transport Scotland officials, and as we had some outstanding questions, we agreed that we would take evidence today from the minister.

I therefore welcome to the meeting Stewart Stevenson MSP, the Minister for Transport, Infrastructure and Climate Change; John Howison, the project director for the Forth replacement crossing; and Ainslie McLaughlin, the director of major transport and infrastructure projects.

I remind members that, after they have asked any questions that they may have, I will ask them whether they approve the proposal. I also remind them that the issue before us is the proposed contingent liability; we are not discussing any other issues relating to the Forth replacement crossing. I stress that to members. We should also avoid any commercially sensitive issues.

I ask the minister to make his opening statement.

The Minister for Transport, Infrastructure and Climate Change (Stewart Stevenson): Thank you. It is a pleasure to be in front of the Finance Committee for—unless my memory fails me—the first time as a minister.

I am here today to ask for the committee's consent to an undertaking to repay to bidders the costs that they incur in preparing bids for the new crossing and approach roads in the specific circumstances that would make that undertaking a contingent liability. My request is in line with the agreement that was reached between the Scottish Government and the Finance Committee in 2005. The circumstances of the request are fully set out in my letter to the committee.

I should first say that a contingent liability, as distinct from a liability that would be expected to appear in the accounts, will only arise because of a future event. I will say more about that. We are not talking about things that have happened in the past.

The limit of the undertaking is £10 million in relation to each bidder, or an aggregate figure of £30 million. There are two specific future circumstances in which the undertaking would lead to an obligation to make a payment. Those are either that the Scottish Parliament declines to pass the bill on the crossing, so the authority to proceed does not exist, or that Scottish ministers decline to award a contract, on grounds other than the unacceptably high value of the bids. Parliament has indicated its support for the replacement crossing, and I cannot see Scottish ministers exercising their discretion to discontinue the project other than in the circumstances of the bids being of an unacceptably high value.

The risk is therefore remote, but I am advised by my experts that it is one that could compromise or reduce the competition if we do not cover it. We need to remove all doubts about our commitment to the project, and the contingent liability to which I am asking the committee to agree clearly spells out that commitment.

Committee members asked last week whether such arrangements are unique. The Republic of Ireland provided similar guarantees to bidders on its roads programme when it ran the procurement and statutory procedure processes in parallel, to attract international contractors who otherwise would not have been prepared to bid. In Scotland, a guarantee was given to contractors who were bidding for the upper Forth crossing against the threat of a late challenge in the courts to seek to overturn the orders. The sum involved in that case

was below the threshold for notification to the committee. In the event, the threat did not crystallise into an appeal and the work is now completed.

This is the first time since 2005 that such an issue has been referred to the committee, which reflects the special nature of the case. The process for approving the scheme departs from the normal course for approving a road scheme and requires an act of the Scottish Parliament rather than an order of the Scottish ministers. The act will be passed after the expenditure of the bidding process has largely been incurred. The situation steps out from the normal course of business and makes the committee the correct place for a decision to be taken. However, that does not mean that the provision of a bidding guarantee is a unique event.

Last week my officials told the committee about the need to maximise the interest of the industry in the tender competition. Interest cannot be taken for granted simply because of the value of the contract that is proposed. A limited number of companies worldwide have the skills, experience and resources to lead the project or to support a bid leader in a balanced consortium. Much interest was expressed during the early stages, but it is important to note that in many cases that will have come from companies that will seek to be part of a wider consortium.

Two programmes of work in the United Kingdom have been drawn to our attention by potential bidders: crossrail and the UK nuclear programme. We have recognised the need to work to secure an effective response to our project. We promoted meetings with industry leaders, we held an industry day to explain the project and we published a prior indicative notice in the *Official Journal of the European Union* before the formal start of the procurement exercise in June. The view is still being expressed to us that barriers to participation need to be removed.

We need to remove all doubts about our commitment to the project and we need to assure bidders that they will be competing for a contract that shall be awarded. Bidders need to be comfortable that the substantial sums and resources that they will place at risk are targeted at a winnable contract and that the risks are well understood and proportional. That is crucial for any bidding decision and it is especially important for a large, one-off project, so we have decided to proceed on that basis.

Comment about the project since last week's meeting has covered issues that go wider than the contingent liability. I am always happy to engage with the committee on any matter to do with spending. When the bill is introduced there will be further opportunities to probe the detail and I am sure that the Finance Committee will play a key role in doing so. I am happy to answer members' questions.

The Convener: Thank you, minister. I welcome Margaret Smith, who is substituting for Jeremy Purvis—

Margaret Smith (Edinburgh West) (LD): I am here as a local member.

The Convener: I beg your pardon. I invite questions from members.

Jackie Baillie (Dumbarton) (Lab): I welcome the minister to the meeting. On whether the arrangements are unique in Scotland, I refer to the *Official Report* of last week's meeting, which is publicly available. At that meeting, I asked Ainslie McLaughlin:

"Is it correct to say that we have never had a contingent liability that sought specifically to cover companies' tender costs?"

He responded:

"That is correct."—[*Official Report*, *Finance Committee*, 15 September 2009; c 1464.]

Are you saying something different now, minister?

Stewart Stevenson: I am saying that this is the first time that a proposed contingent liability has had to be brought to the committee. There was a brief period in relation to the upper Forth crossing when we examined the position carefully and had a modest contingent liability.

I should say that contingent liabilities come in all shapes and sizes. There are those of sufficient size that they must be recognised. In this case, where the authority for proceeding with the project lies with the Parliament, it is absolutely appropriate to bring the matter to the committee. In the case of the upper Forth crossing, the contingent liability was part of normal business, as there appeared to be the threat of a legal challenge that could have affected the progress of that project. The previous Administration was anxious that it not be compromised—quite properly so—but the sum involved was below the one that we bring to the committee.

If it is helpful to the committee—I do not feel forced to do this—I can give examples from elsewhere in the UK of situations that are perhaps more similar in quantum to that involved in the Forth replacement crossing.

Jackie Baillie: The point that I was making is that the situation is unique in Scotland, in that this is the first time that a contingent liability of more than £1 million has been reported to the committee and that approval has been sought.

Stewart Stevenson: That is correct.

Jackie Baillie: It is helpful to be clear about that.

I will explore the question of risk with you. Like you, I think that, when the Parliament votes 127 to 2, it makes clear its view on the Forth replacement crossing. I do not envisage that view changing, so I assume that you agree that the parliamentary scrutiny of the bill in and of itself does not pose a risk. In addition, you said that you could not think of a set of circumstances in which the Scottish ministers would decline to proceed with the contract. If those are such low-risk items, where does the risk lie and why are we being asked to approve a contingent liability?

Stewart Stevenson: I concur with what Ms Baillie has said on Parliament's view. Of course, it is entirely possible that the Parliament could take another view at another time, as it is entitled to, although that seems a relatively remote prospect. The greater risk in the eyes of the bidders is that, particularly in difficult economic times, circumstances will change and cause the project to be postponed and moved back—in effect, cancelled. It costs the public purse not a single penny to provide cover for that through a contingent liability that enables ministers to proceed in the way that they wish to proceed. It is simply a piece of insurance that companies have. The existence of the contingent liability—debated and recognised in the form that we are taking it forward in the committee—gives bidders that confidence at no cost to the public purse. Therefore, it is a particularly valuable instrument for ensuring that we keep the procurement part of the project moving forward.

The primary risk will lie in the ministerial decision-making process and any change in circumstances that might arise. The provision simply gives the bidders extra cover, which reassures them.

Jackie Baillie: How long could the Scottish ministers delay before a contingent liability kicked in?

Stewart Stevenson: The bids that bidders will make will be, as is normal, time limited—they will have an expiry date. It is always possible to negotiate with bidders, but the date cannot simply be pushed out indefinitely without the bidders' consent. Therefore, there is a clear time line within which the decision must be made. If we went beyond that limit, the decision to progress would, by default, not have been made and the bidders would be entitled to reconsider their bids and rebid or choose not to rebid.

We are talking about the periods within which the bids would be valid. I ask John Howison to tell us for how long we would expect the bids to be valid after receipt because, to complete the answer, it would be necessary to have that information.

John Howison (Transport Scotland): We expect the bids to be received in December 2010. They normally come with a three-month acceptance period. As the minister said, and as Mr McLaughlin said at the committee's previous meeting, it would be possible to go back to the bidders to ask whether they would be prepared to extend the period marginally. However, if it was extended beyond six months, we would run into difficulties with procurement regulations and, possibly, people's willingness to proceed with the project.

14:15

Stewart Stevenson: I will point out some of the implications of that. It means that the agreement to proceed on the basis of the bids that are submitted, assuming that the contracts are affordable—the caveat that I mentioned—would be made around the time of the next Scottish Parliament elections. Of course, I expect to be there making the decisions at that time but, on the overall environment, there would be slightly more political uncertainty surrounding the project. That gives the context as to why the provision of a contingent liability reinforces our ability to keep the project moving forward. In broad terms, we are looking at around Easter 2011.

Jackie Baillie: I would always advise ministers not to get too comfortable in their seats.

On the basis of what you have just said about the uncertainty surrounding the next Scottish Parliament elections, is it possible that the tender process could start later, after the parliamentary scrutiny of the bill? As I understand it, we have until 2016 to build the bridge.

Stewart Stevenson: That is correct, but we should bear in mind that the shortest period over which the bridge can be constructed is, we think, about five years. Obviously, the tender process and the bids will confirm or contradict that, but experience tells us that a project of such magnitude will take a period of that order and cannot really be done in much less time. There is a civil engineering law called Boehm's law, which members could have a look at offline if they wished and which might inform them helpfully on the subject.

We have already started the procurement process. That is not an absolute—it does not mean that we must proceed. We have talked about coming to a decision in about 18 months. That gives you a sense of how long the procurement process takes. Because there is very little slack between the ending of the procurement process, the awarding of the contract, the starting

of the work and the five years' effort to complete by 2016, if we delayed for the period that the member suggests, in essence, we would move the project back certainly by 18 months and probably by two years. That could bear scrutiny at a later date, and I would not want to put words in my officials' mouths, but that would be the broad effect. It is precisely to retain the momentum of the project and to ensure that we have a project that is capable of being delivered for service in 2016 that we are working on the bid and procurement process in advance of having the parliamentary authority to complete the project.

The Convener: I call David Whitton, to be followed by Joe Fitzgerald.

David Whitton (Strathkelvin and Bearsden) (Lab): Minister, last week, your officials told us that there had been more than 30 expressions of interest thus far and that, in all likelihood, those would be boiled down to a number of consortia, with perhaps four or five companies in each consortium, all of which I presume would be multinational companies. Therefore, the risk would be spread. My question to your officials was why on earth we would provide a contingent liability when the risk to the companies was much less.

Stewart Stevenson: The risk is not less as a proportion of the costs of preparing the bid—it remains constant in relation to the proportion of the overall consortium that an individual company has. We expect that not all the companies that will join consortia will be of equal size. There is likely to be scope for specialists in the consortia. The bids will be for the immediate approach roads and the bridge crossing. The road engineers who build the approach roads will have a different skills set from that of the design engineers who will do the calculations on the loads on the cables that will hold up the bridge. A series of specialist engineering and civil engineering activities are associated with the project, so potentially a wide range of companies will be involved in the consortia.

Some of the 39 companies that have expressed interest to varying degrees are very big international companies, and others are relatively small companies with specialist skills. We will seek to enter the final stage of the process with three bidders, which will presumably be consortia, as it would be very unusual—although not impossible—for a single company to come forward. Although Mr Whitton is right to say that the risk is spread over more companies, the risk in relation to what the companies are spending on preparation is a pretty constant proportion.

David Whitton: You said in your opening statement that a view had been expressed that the barriers to participation needed to be removed. What do you mean by that?

Stewart Stevenson: It is very simple. We are seeking multimillion-pound, eight-figure bids from consortia in an environment in which there are fewer major civil engineering contracts around. Historically, in this business, a company would have typically expected to win—to give very broad-brush figures—one in three contracts for which it bid. Given that there are fewer contracts at present, we would expect—although the evidence is not comprehensive—that that ratio is currently falling; in other words, a company might win only one in five of the contracts for which it bids.

The associated risk for a consortium in making a bid of that character has therefore risen in the current difficult times. We are seeking to create an environment of improved certainty; and the provision of a contingent liability—which, by moving forward in the way that is planned, costs us not a single penny—will deliver the benefits of increased certainty and reduced risk for the bidders. That reduced risk means that the interest rates that the companies are paying on their overdrafts will also be reduced because interest rates are, after all, merely a risk-pricing mechanism. Contingent liability reduces the costs to some extent, but, more fundamentally, it gives a piece of insurance that enables the bidders to maintain the type of relationship that they want to have with their bankers.

David Whitton: I will paraphrase that slightly—I know that you will correct me if I am wrong. Are you saying that one of the reasons why we are putting forward the contingent liability is so that the multinational companies can have a good relationship with their bankers?

Stewart Stevenson: No, that is not the point that I am trying to make. I am simply saying that, in general terms, companies—big and small—throughout the world have less access to borrowing than they once had. In those circumstances, they are following a strategy to reduce and minimise their risks by bidding for fewer contracts that they might have a greater chance of losing.

We are simply removing the risk equation, which puts up the price that the bankers will charge the bidders for the money that they draw from their bank to maintain their cash flows. That is what it is about: bankers are not, and never have been, a friendly lot, one way or the other, and we are ensuring that the bankers see that the risks that are undertaken by the companies to which they are lending are being contained and reduced. The interest rates that would apply to those companies' borrowings will therefore be lower. That removes the barriers to bidders bringing forward bids—at no cost to the public purse.

David Whitton: But there is a cost to the public purse. We heard evidence from officials last week on the subject, and we discussed a potential situation in which three companies come forward; the bid goes ahead, one company wins the contract and the other two companies lose. The officials told us that in that event, the two companies that lose would be given their expenses up to the limit of £5 million, so there would still be a £10 million hit on the public purse.

Stewart Stevenson: No—that is a misunderstanding of what we are talking about. That is not a contingent liability—it is a liability, which is an entirely different issue. We are talking about a contingent liability, which depends on a future decision or action being taken.

The issue to which Mr Whitton refers has nothing to do with contingent liability; it is to do with liabilities and commitments made beforehand that are inescapable. We are talking simply about the contingent liability circumstances that will spring into action only if a future event occurs. The issue to which he refers is of a different character altogether.

David Whitton: Okay, I get you. I note that about £30 million is set aside for the bridge this year. Is that the contingent liability that we are talking about or is it something else?

Stewart Stevenson: No. Contingent liabilities never appear on the balance sheet—that is the whole point of them. Only liabilities—in other words, commitments that have already been made—appear on the balance sheet.

David Whitton: So the £30 million is for something else entirely.

Stewart Stevenson: Correct. It is for progressing the project.

David Whitton: Okay, that is fine.

Stewart Stevenson: Just for clarity, the whole point about contingent liabilities in a business sense and in Government is that they only ever appear in the accounts as footnotes; they never appear in the numbers. It is for precisely that reason that it is proper that we draw it to the committee's attention; you will never see such contingent liabilities in the Government accounts otherwise.

The Convener: I call Joe Fitzgerald.

Joe FitzPatrick (Dundee West) (SNP): FitzPatrick. That is three times that he has done that to me. [*Laughter.*]

It is now in the public domain that the Government is seeking a contingent liability. What message would be sent to potential bidders if a contingent liability were not offered? How would that impact on the number of bidders and the value of the bids submitted?

Stewart Stevenson: It would be likely to have the effect of suggesting to a potential bidder—or to me at least—that there was uncertainty. I take this opportunity to reinforce what Jackie Baillie said at the outset: the Parliament has made it clear with only two dissenting voices that the Forth replacement crossing has to go ahead. We will have some robust debates on the detail when we introduce the bill, which is right and proper and part of the normal parliamentary process. Were we not to make it clear that we are registering a contingent liability, uncertainty would increase, which is unlikely to be helpful.

James Kelly (Glasgow Rutherglen) (Lab): We heard in last week's evidence that the bill will be introduced to Parliament in November and that it is expected to be approved by March next year. We heard today that the tendering process will run from December 2009 until December 2010. You say that one of the risk elements is failure to get parliamentary approval and that you are seeking a contingent liability fund of £30 million, which is based on having three bidders. Why are we being asked to approve a full contingent liability of £30 million when parliamentary approval—one of the risk elements—will be complete by next March, a full eight months before the end of the tendering process?

Stewart Stevenson: Generally, I view risk as having two parameters. The first is to assess the likelihood of risk crystallising into an event. The second is to consider the impact of that crystallisation on those who are affected by it. The £30 million relates to the latter. In other words, the impact on the bidders of the project not proceeding is independent of where the risk has come from.

14:30

Mr Kelly quite rightly points to the Parliament being on track to approve the bill. Incidentally, we do not think that the timetable is as optimistic as is stated. We do not think that the bill is likely to be passed until the end of 2010. The bill is different from many of our bills. It is not legalistic, and it affects the substantial private interests of many of Mrs Smith's constituents and others. I doubt that it can be dealt with by next March from introduction in November this year—we have not announced the exact date of introduction, but November sounds about right.

The important questions to ask about risk are what the sources of risk are, how likely they are, and what the cost would be if they happened. Relative to the sources of the risk or the likelihood of it happening, the cost of a risk is invariant.

James Kelly: I note your comments on the parliamentary timetable. What you say seems to be different from the indications that we received last week.

The issue of risk remains. Have you taken a view in relation to risk and the contingent liability from the Auditor General for Scotland?

Stewart Stevenson: No, we have not taken such advice. Remember that contingent liability does not have a financial cost if it does not happen. It is—and I speak from my professional life—a normal part of project management to consider what the contingent liabilities associated with a project might be.

Convener, I want to go back to the *Official Report* of last week's meeting. It is perfectly possible that the melange of issues that came up last week led to confusion. Ainslie McLaughlin said:

"We expect to be in a position to award the contract in the spring of 2011, by which time we would expect the Forth replacement crossing bill to have been enacted."—[*Official Report*, *Finance Committee*, 15 September 2009; c 1468.]

I think that that is the only place where we made material reference to the timetable. Subject to anyone pointing out otherwise, that is what we have said on the record, so I hope that what I have said today is not seen to diverge from that. If I am incorrectly advised, please draw it to my attention.

James Kelly: You wrote to MSPs over the weekend about the Glasgow airport rail link and said:

"Scottish Ministers are committed to ensuring that investment continues to be targeted towards maintaining front line services and supporting sustainable economic growth."

I wonder how contingent liability and the general approach of making payments to bidders who are not successful sit with the objectives that you outlined in your letter.

Stewart Stevenson: I make the point that that is about liabilities and not contingent liabilities. It is an issue of another character and I suspect that the committee will wish to return to it and consider it in a wider sense. However, it does not touch on the issue that is before us today.

James Kelly: I have one final question, because I want to be clear. I understand the difference between liabilities and contingent liabilities that you described in your answer to David Whitton. What liabilities are in the £30 million that you announced last week in relation to payments that might be made to unsuccessful bidders?

Stewart Stevenson: We have not yet made that kind of commitment. We are looking to do as was done in the case of the London tube bids, for example, where John Prescott made payments of £134 million to cover one bidder's expenses and £116 million to cover another's. It is standard to make allocations for such payments in certain circumstances, in order to gain support for very big projects. We seek to do that—indeed, that is already in the budget that Parliament has approved, but it is not a matter that is directly related to today's subject. Clearly, it concerns the same project and you should quite properly seek to get the right answers, but it is a different matter altogether. Making payments to unsuccessful bidders is about supporting the process, not about contingent liabilities, which crystallise if the project is cancelled or suspended before the expiry of bids.

James Kelly: I wanted to be clear about the matter. Regarding the £30 million figure in the budget, what figure has been set aside for liabilities for bids that are not successful?

Stewart Stevenson: We have not yet done that.

James Kelly: But you have published a budget—are you saying that there is no such figure included in that sum?

Stewart Stevenson: No. You should bear it in mind that the figures that we are talking about come at a later date. However, they are part of the normal budget lines of the Government, which are put in front of Parliament.

James Kelly: So you are saying that there has been an inclusion within that £30 million, but you do not really know what the figure is at this point.

Stewart Stevenson: Given that we have not yet received any bids, it is not possible to give you the certainty. However, we are very clear what our cap is.

James Kelly: But you have published a draft budget.

Stewart Stevenson: We are clear about what our cap is. I return to the point that—

James Kelly: But what is the cap?

Stewart Stevenson: You have just stated it.

The Convener: I think that we have gone as far as we can in relation to that line.

Linda Fabiani (Central Scotland) (SNP): It would be worth putting on the record today something that we touched on last week. In the unlikely event of the replacement crossing not going ahead and our becoming liable for contingent liability, it will not necessarily be a cost of £30 million that will be applied. I think that it was Mr Howison who said last week that the costs that come in under contingent liability funding would have to be interrogated, with a fair sum given for work expended. Could we have an outline of the

steps that would be taken by those in control of the tender process at our end to ensure that any costs paid out under contingent liability were justified?

Stewart Stevenson: The member describes the process extremely well, and I associate myself with that. We have a general duty in everything that we do to ensure that we are paying out against work that has actually been done. Were we to find ourselves in the circumstances of the project being cancelled, with contingent liability converting to liability, with money actually having to be paid—that is what happens—you could bet your bottom dollar that we would examine extremely closely the work that had been undertaken by the bidders. The bidders know that that would be the case in those circumstances, and they would require to keep an adequate audit trail, both for their own auditors—as they would in the normal course of business—and for us, should they find themselves in the unlikely situation of the contingent liability crystallising, in order to justify any sums that would then fall to be claimed, within the cap that we are setting today.

David Whitton: I want to go back to something that you said earlier, minister. The contingent liability before us is a one-off—it is the first time that it has been done. I am not particularly bothered what happens in other legislatures—they have to do what they have to do. Are you telling us that, given that there is a reducing number of such contracts, and that life is pretty tough for contractors, we will have to have such a contingent liability for every major construction project from now on?

Stewart Stevenson: Bear it in mind that this particular project requires a greater proportion of specialist skills, with a smaller pool to fish in. If we had, for the sake of argument—and I would love this to be the case—£1 billion to spend over the next five years on roads, we would be in a much wider market, with many more companies available to do that work, with its more standard procedures. That would not be considered a one-off construction.

You are asking me whether I expect such arrangements to be made every time. I can say with some certainty that the answer is no, it will not happen every time. Can I say that it will not happen again? No, I cannot say that.

The Convener: I will allow a quick question from Jackie Baillie before the final question, which will be from Margaret Smith, who is the local member.

Jackie Baillie: I just want to understand the timescales. As the tender process takes one year, if the process is started now, it should be completed by the end of 2010. Given that there is no uncertainty associated with the parliamentary process or with ministers or with the level of interest—that has been positive, which is most welcome—it strikes me that the only uncertainty arises from the fact that the minister wants to announce the project in March 2011 and that Scottish Parliament elections are uncertain by their very nature. Given that the minister has taken the long view by pushing the tender process back, might not the certainty that we all seek be delivered by pushing the process back by three months?

Stewart Stevenson: Broadly, I associate myself with Jackie Baillie's remarks that the likelihood of such risks crystallising into actual events that matter is pretty low, but it is not zero. In providing the proposed contingent liability at no cost to the public purse—forgive me for repeating that as often as I have done—we seek simply to tick the box against a particular source of risk that will be eliminated. The contingent liability—which will have a financial cap, although people can still spend what they like on their bids—will simply oil the wheels of the process and help us to focus on other areas in which those who take forward major projects will always need to engage, debate and discuss with bidders and others.

Jackie Baillie: However, there is no technical reason why the project announcement could not be pushed back by three months.

Stewart Stevenson: That is correct. However, I am not entirely certain that pushing the project back would provide us with a free lunch. My project management guru is Professor Fred P Brooks, who writes about information technology. He advises: "Take no small slips". He also states:

"How does a … project get ... late? Answer: One day at a time!"

If days are lost at the beginning of the project, we can be absolutely certain that they will never be got back at the end. Therefore, a three-month slip would potentially compromise us in 2016, and we cannot pretend that we fully understand what the situation will be then. We simply must maintain momentum.

Also, I cannot really be certain about an environment in which there will be a Scottish election. Not just Scottish Parliament elections, but all elections have uncertainties associated with them. I have utter confidence about the election but, nonetheless, people outside will probably consider there to be uncertainties. Frankly, I do not think that moving the announcement by three months would make much difference to the view that bidders will take now in the commitments that they make in the bid process.

Jackie Baillie: Convener, I will stop after this question. Our shared objective is to try to minimise risk and to use the opportunity to save the public

purse £30 million, which I am sure that the minister would sign up to. My suggestion is simply about ensuring that we minimise that risk.

Stewart Stevenson: As someone from Fife, I discovered when I went to university that the people of Aberdeen thought that the Fifers were mean. Well, they were right.

Jackie Baillie: Is that a yes?

Stewart Stevenson: Yes.

The Convener: Minister, the mere mention of elections simply reminds us all of our mortality.

Margaret Smith: The mere mention of uncertainty about what happens after elections reminds me of Edinburgh trams and the Edinburgh airport rail link. Elections can be very uncertain times for transport infrastructure projects.

I seek clarification on what the minister described as a caveat about why ministers might change their minds about the project. He said that he could perceive no reason why ministers would not go ahead with the project other than the high cost of bids, because bids need to be affordable. You will know, minister, that I have some concerns about the need to ensure that bids not only are affordable but are from suitable tenderers. Can you give us a bit more information about that caveat? Is it very much about the high cost of bids? What if you were to get to a point at which you did not feel that you had received suitable tenders from people who could actually do the job?

14:45

Stewart Stevenson: Bear it in mind that there is a qualification process that should exclude inherently unsuitable bidders from what we hope will be a final list of three. There would be little point in sitting down with people with whom we already knew, for whatever reason, we did not wish to do business—that would be bizarre. If we manage the process correctly, we should get there.

The high cost of bids is, of necessity, something that does not cause the contingent liability to spring into action; that is perfectly proper. The prospective purchaser has, at the outset, given an indicative cost range that they expect the bids to come within. If the bidder is outwith that indicative cost range, the risk is transferred back to them, because they have come outside the client's indicative cost range. Bluntly, if the bidder comes to the view that they cannot deliver within the indicative cost range, the duty is on them to stop work, indicate that they are not bidding, and withdraw from the process. We do not, by following this process, take all the risk back from the bidder—the bidder is left with substantial risks. We are merely taking one particular category of risk, which is unlikely to crystallise, off the bidder's table in an attempt to lubricate the process.

The Convener: We must draw this session to a close. Before we do, minister, do you have a final statement to make?

Stewart Stevenson: From my point of view, the subject appears to have been thoroughly covered, and I thank the committee for its attention and engagement. I look forward to your decision, whatever it may be.

The Convener: Do members have any further comments?

As there are no further comments from members, I will put the question.

The question is, that the committee approves the contingent liability in the terms outlined by the minister's letter. Are we agreed?

David Whitton: I am sorry, convener; I did not realise that you meant to put the question when you asked whether there were any further comments.

The Convener: I have put the question, but you may comment.

David Whitton: The minister was asked whether he had taken advice from the Auditor General. The matter that we are talking about is a fairly unusual occurrence that involves a large sum of money, and I wonder whether we should have the advice of the Auditor General about whether the course of action that is being proposed is reasonable. Of course, that would delay our decision by a week.

Linda Fabiani: Is that in the earlier agreement between the Finance Committee and the Government?

The Convener: We have been through a long process, Mr Whitton, and your point could have been raised much earlier in the proceedings. We have reached the vote and I have asked the question.

David Whitton: With all due respect, the minister was asked whether the Auditor General had been asked to give a view, and the minister said that he had not. I do not want to hold up the proceedings—if you want to press the question, that is fine. I simply raise the point.

The Convener: What you are really saying is that we should wait until we get a response from the Auditor General. However, if we operated on that basis, we would be here forever on all the questions.

David Whitton: I take guidance from you, convener.

Jackie Baillie: In terms of the functions of the Finance Committee, we should take scrutiny of all these issues very seriously. This is the first time that we have considered a contingent liability of this nature. I have been much more persuaded by the minister this week than I was last week—I say that with all due deference to his officials.

The use of the contingent liability is an exceptional circumstance. If it would not overly delay things, it might be useful, in the interests of having a robust mechanism in place, to ensure that we have some comment from the Auditor General.

The Convener: I suggest that it is up to the minister to take further advice. Does the minister wish to comment?

Stewart Stevenson: We are at a sensitive stage of the process—remember, people are already engaged in the bidding process—and the suggested action would not help. I would not suggest that it would be unhelpful, but it would certainly not help. However, if the committee feels that the matter is important, I am happy to proceed on that basis, take that advice, and share it with the committee. That will be in advance of the bill being lodged, so I do not think that that would be an unreasonable way for us to proceed.

The Convener: I would have preferred it if all this had arisen when I asked for comments.

Linda Fabiani: Can I clarify whether, leaving aside the issue of advice from the Auditor General, we will proceed to make a decision? I am confused.

The Convener: I have put the question, but I have suggested that if the minister wishes to contact the Auditor General, that would be up to him, regardless of any decision that we make.

Linda Fabiani: That would happen in conjunction with our taking a decision.

The Convener: I have put the question and I propose to go to a vote on it. The minister has commented.

Stewart Stevenson: I clarify that I am happy to consult the Auditor General and to share the results of that consultation with the committee, but it would be extremely helpful if a decision could be made today.

The Convener: I hope that that is quite clear and satisfactory.

The question is, that the committee approves the contingent liability in the terms outlined by the minister's letter. Are we agreed?

Members *indicated agreement*.

Linda Fabiani: May I make a post-comment?

The Convener: No.

I suspend the meeting for a few moments to allow the witnesses to change over.

14:51

Meeting suspended.

14:53

On resuming—

Public Services Reform (Scotland) Bill: Stage 1

The Convener: Item 2 is continuation of our evidence taking on the Public Services Reform (Scotland) Bill at stage 1. Our first panel consists of only one witness—there were meant to be two. We welcome Michael Clancy, who is director of law reform at the Law Society of Scotland.

I will begin with a general question. The Law Society has expressed concern about the nature of the delegated powers in part 2 of the bill. I ask Michael Clancy to expand on those concerns and to give us his views on the matter.

Michael Clancy (Law Society of Scotland): I thank the committee for inviting me along to give my views—as a panel of one—on the bill. It is always a pleasure to appear before the committee.

Before we proceed, I will declare two interests. First, I am a member of the positron emission tomography advisory group, which is a national health service body. Secondly, I am a member of a short-life working party on tissue collection, which will start work in the next few weeks. Although neither body is mentioned in the bill, I thought it appropriate to draw my membership of them to the committee's attention.

The convener's question is broad ranging. As the committee has seen from the evidence that others have submitted, it touches on the central point of part 2—the very wide-ranging order-making powers that are contained in sections 10 to 13. The society is concerned about wide-ranging order-making powers—so-called Henry VIII powers. In the context of Scottish legislation, I have been trying for years to get people to call them James VI powers instead. I will keep plugging away.

The order-making power in section 13 would allow Scottish ministers to amend

"a public general or local Act of Parliament (whenever passed) or an Act of the Scottish Parliament".

Furthermore, an order made under section 10 may

"modify any enactment, instrument or other document".

Those are extremely wide-ranging powers. What is the problem with that? It is that they are powers to make orders that are subject only to the affirmative resolution procedure. The trouble with affirmative resolution procedure is that it does not require the same level of scrutiny—nor, indeed, should it—as the procedure for an act of Parliament. There may be pre-legislative consultation, but you all know that an order that goes through the Scottish Parliament or the United Kingdom Parliament is not subject to amendment—it can be either voted for or voted against. It is quite difficult to get into the detail of the order.

The committee will also know that, under the Parliament's standing orders, a committee is limited to 90 minutes debate on an order. The fact that the average bill takes between six and 12 months to go through the Scottish Parliament—there was one notable exception last year, when a bill was passed in one day—shows that the level of scrutiny and the amount of time that parliamentarians would have to consider such powers would be extremely curtailed.

Those are some of our general concerns about the order-making powers.

The Convener: I am aware that a panel of one witness could be called an interrogation. I will try to ensure that it is not so.

Derek Brownlee (South of Scotland) (Con): You mentioned, as have others, the comparable UK legislation. Has the Law Society, in coming to the views in its written submission, taken account of how the powers, as they exist in UK legislation, have been exercised and the route by which the current legislative provision was arrived at? Are we getting incredibly excited about something that is likely not to be used frequently in practice? Are there lessons from the UK experience on which we can draw?

Michael Clancy: When the Legislative and Regulatory Reform Bill went through the UK Parliament in 2004-05, the society made representations on the powers contained in it. When it was introduced, it was the subject of extraordinary criticism. Some people called it a constitutional affront, and said that it was subverting the role of Parliament and was effectively surrendering parliamentary powers to ministers. Hilary Armstrong was the Minister for the Cabinet Office at the time; I attended a meeting that she held with Pat McFadden MP to discuss the bill. As a result of the broad range of criticisms, the bill was rolled back from being so extraordinarily weighted towards ministers.

I made enquiries of the Regulatory Reform Committee in the House of Commons. It is always difficult to get hold of people during parliamentary recesses; nevertheless, I received material—I have it here—that discloses that the committee has, so far, considered 12 regulatory reform orders under the 2006 act and has not rejected any legislative reform orders by way of veto. However, it has invoked the super-affirmative procedure to suggest changes and, on one occasion, it expressed reservations about an

order, and that led to a debate in the House of Commons.

15:00

I also sent the Regulatory Reform Committee a copy of the Public Services Reform (Scotland) Bill, because it expressed an interest in it, so the Finance Committee may receive further comments as the bill proceeds. I will give a flavour of the orders that have been effected under the 2006 act. They cover issues such as miscellaneous provisions on insolvency, dangerous wild animals, limited partnerships, minor variations to premises licences and club premises certificates, local government animal health functions, supervision of alcohol sales in church and village halls, insolvency advertising requirements, verification of weighing and measuring equipment, the governance of Lloyds in the insurance market, local government consent requirements, consumer credit, and the Health and Safety Executive. That is a broad range of issues but, with 12 orders since 2006, the Regulatory Reform Committee has not been excessively employed, I would say.

Derek Brownlee: That is busier than the legislative programme here.

Michael Clancy: You might say that—I cannot possibly comment.

Derek Brownlee: I would not expect you to.

In your thinking, are the bill's provisions just an "affront"—you used that word, although I do not suggest that it necessarily represents your opinion—and so flawed in principle that they should never be in the statute book, or can sufficient safeguards be constructed? Is the debate about the principle or the safeguards that are necessary to make the provisions acceptable?

Michael Clancy: That is an interesting question. If sufficient safeguards were constructed to make the power broadly acceptable, the bill would be radically different. That would, in effect, involve writing in a super-affirmative plus procedure. I think that at the committee's previous meeting Professor Page said that he thought that the provision had the tenor of an opening bid, but I am not so cynical about ministers' intentions. I am more inclined to say that the provision was created in good faith, but with a perception of the relationship between Parliament and ministers that was balanced too much in favour of ministers.

Jackie Baillie: I want to return to a point that Derek Brownlee raised, because I wonder whether I am making an appropriate distinction. Is it fair to say that what is going on down south is the reform of regulatory bodies to reduce the burden of regulation, but that what is going on up here is more of a general reform to reduce the number of public bodies but not necessarily to reduce the burden of regulation?

Michael Clancy: The powers under sections 10 and 11 are certainly aimed at the number of bodies rather than at the regulatory burden.

Jackie Baillie: Perhaps setting a target of a 25 per cent reduction without an idea of which bodies it would be better to merge to reduce the regulatory burden was the wrong starting place.

Michael Clancy: Yes.

Jackie Baillie: I will move on to the super-affirmative plus procedure, which I have previously heard described only by professors. Does not that procedure in essence resemble the initial stages of scrutiny of a bill? Why are we inventing yet another procedure? Is it not better to stick with primary legislation and have issues that are clearly important debated in Parliament?

Michael Clancy: Super-affirmative procedure in the House of Commons or the House of Lords invokes circumstances in which ministers can choose which form the order to be introduced will take. If memory serves me, a proposal for a super-affirmative order can be laid, and then within 60 days of the proposal representations should be made. After 60 days have expired, ministers may lay a draft order before Parliament, together with a statement of any representations. During a further 60-day period, the Regulatory Reform Committee must report on whether the draft should be approved. That has a flavour of stage 1 examination, but it is not stage 1 examination as we understand it here because it is only about ministers and not about the people who might be affected by the order or the people who might have views to give on it.

What people are thinking about in relation to super-affirmative plus procedure is that it offers an opportunity not only to quiz ministers, but to take broader evidence or even to require amendment of an order, which takes us into a mini-bill situation. As you heard in my response to Derek Brownlee, that would mean the creation of an alternative bill procedure. We do not really need that.

Jackie Baillie: That is also my view. I am sure that we will hear in due course from the bevy of commissioners who are seated behind you in the public gallery. Do you have any worries about the independence of the parliamentary bodies that are listed in schedule 3?

Michael Clancy: I most certainly do, although—I hasten to add—not as they are constituted currently. "The bevy of commissioners", as you put it, guard jealously their independence, just as they ought. Schedule 3 lists not only commissioners but other bodies, some of which have quasi-judicial

functions, such as the children's panel, the Lands Tribunal for Scotland and the Judicial Appointments Board for Scotland. You will remember the Lord President's comments about the Scottish Court Service and his anxieties about its requirement to be independent. Independence from ministers is an essential aspect of the constitutional function of all those bodies.

Similarly, as members know, the Commissioner for Children and Young People (Scotland) Act 2003, the Scottish Commission for Human Rights Act 2006 and other acts went through Parliament—sometimes not without their portion of controversy—on the basis that Parliament would make recommendations to Her Majesty, who would then make appointments. That signals to me the intention of this Parliament to ensure that those bodies and their sisters and brothers in the commissioner stable would be protected and reinforced. That is not something to be given up lightly to ministers. Those bills were subject to the full panoply of legislative procedure—scrutiny, evidence taken from a range of bodies at stage 1, amendments made at stage 2 and further consideration at stage 3—and the Parliament certainly intended that the bodies should be independent of ministers. It is difficult to conceive of a way in which that intention, at such a short distance from the bills' enactment, should be usurped.

David Whitton: I will be more direct than Mr Brownlee, who danced around the matter: is it the Law Society's view that the bill is a constitutional affront?

Michael Clancy: It takes a lot for me to use phraseology such as that. You are a politician and can use that kind of phraseology, but I would say that the bill is a difficult one that needs to be examined closely. It cuts across what I was taught about the separation of powers.

David Whitton: I will quote from the Law Society's evidence. You state:

"These provisions are constitutionally significant"—

your phrase is probably a bit more delicate than one that I might use—

"and at the very least the powers proposed to be used under these provisions should not be used as a replacement for primary legislation or full scrutiny by the Parliament."

You have eloquently expressed your views on that point in response to my colleague Jackie Baillie.

You go on to pose the question:

"Is it appropriate that the order making power should extend to such bodies?"

We have just heard from you in reference to commissioners. Could you amplify the comments that you make in your written evidence about the Mental Welfare Commission for Scotland? You clearly have strong views about whether it should be included in schedule 3.

Michael Clancy: Indeed—and having written that evidence, I really have to stand by it. The point about the Mental Welfare Commission was raised with our mental health and disability sub-committee some time ago. There was a suggestion that the commission might be subject to some revision. Our sub-committee met Government representatives on a number of occasions earlier this year to express concerns about the future of the Mental Welfare Commission, during which meetings the sub-committee was assured that the commission would not be included in the bill, as had originally been intended. That was confirmed in a formal announcement by the Minister for Public Health and Sport on 13 February. Instead, there was to be a separate consultation, which is now on-going.

However, the Mental Welfare Commission for Scotland does appear in the bill. We think that, pending the outcome of the consultation, it is inappropriate for it to be included. Furthermore, it is clear from the views that its representatives gave in evidence last week to the Health and Sport Committee that the Mental Welfare Commission is also of that view about its inclusion.

David Whitton: Do you think that all the bodies that are listed under section 2 should be removed from the bill, or should you work your way through them and justify each inclusion?

Michael Clancy: Do you mean under schedule 3?

David Whitton: Yes—I beg your pardon: I meant schedule 3.

Michael Clancy: I have very little experience of, for instance, Quality Meat Scotland, except in a consumer capacity, or of Caledonian Maritime Assets Ltd. However, the society does have experience of and has, as you might expect, had contact with the various bodies listed in schedule 3 that are more in the justice arena. It is difficult simply to have all those bodies listed without rationale.

That brings me back to an earlier point: there was a singular lack of consultation in relation to the provisions. One might reflect on the consultative steering group's principles of openness, accountability, consultation and power sharing, so we must think hard about introducing such measures without adequate consultation of interested parties, including the listed bodies themselves.

Although that does not answer the question, it edges towards an answer. A case-by-case analysis of each of the listed bodies would

probably be the best way forward. Justification of their inclusion in schedule 3, if schedule 3 survives the committee's scrutiny, will doubtless be something to which ministers will shortly be turning their attention.

James Kelly: I move on to the proposals on scrutiny. In your submission, you comment that the provisions on user focus would "not be appropriate" for the Accounts Commission, the Mental Welfare Commission and the Office of the Scottish Charity Regulator. You feel that such a duty might compromise their independence. Can you elaborate on that?

15:15

Michael Clancy: Indeed. Sections 92 and 93 and schedule 13 contain the provisions on user focus. Section 92 states that the bodies

"must make arrangements which—

(a) secure continuous improvement in user focus in the exercise of their scrutiny functions, and

(b) demonstrate that improvement."

There is also a power for Scottish ministers to step in with guidance, and section 94 contains a duty of co-operation.

The society is concerned about those provisions because, although user focus is a fine idea where the duty is owed to the user, where the duty might be owed to the public at large or to some higher interest such as the protection of vulnerable people, that might not square with a duty focused on the user. When one considers the Mental Welfare Commission for Scotland, which has duties under the Adults with Incapacity (Scotland) Act 2000 and the Mental Health (Care and Treatment) (Scotland) Act 2003 to protect the rights, including the human rights, interests and welfare, of very vulnerable people, one sees that those duties must have an independent focus rather than a user focus. Users of the Mental Welfare Commission for Scotland's powers are by definition very vulnerable people.

Similarly, under the provisions of the Charities and Trustee Investment (Scotland) Act 2005, OSCR has responsibility for the registration, monitoring and compliance, and decommissioning of charities. Again, that is a duty owed to the public rather than to what one might describe as the user of the function or the body that wants to become registered as a charity.

Such bodies have a higher order of duty than those that simply provide some kind of service.

Derek Brownlee: I want to pick up on the user focus point, albeit from a different angle.

Section 92(4) defines a service user as someone who

"will or may use the service in the future".

The list of bodies that are subject to the user focus duty includes the drinking water quality regulator for Scotland and health improvement Scotland—we all drink water and use the national health service—the chief inspector of constabulary and the road works commissioner. Under a plain interpretation, the list of people who could be defined as users of a service must therefore encompass everyone in the country.

The duty that section 92(1)(a) imposes on the bodies listed is to

"secure continuous improvement in user focus"

and to demonstrate that. User focus is defined as

"the involvement of users … in the design and delivery of scrutiny functions … and the governance of the listed scrutiny authorities."

Is that not such a general provision, encompassing so many potential different individuals with different views on what should or should not happen, that it becomes almost a nonsense to encapsulate it in legislation? Is it not more fundamentally about policy than something that ought to be enforceable through primary legislation?

Michael Clancy: Service users are important people because they invariably pay for the service in one way or another. One would not automatically denigrate the idea that the organisation should have the user in mind when it provides a service—certainly not. User focus is quite an important aspect of the provision of services by organisations such as the drinking water quality regulator. We all know the dangers of poor quality water.

From that general principle, one can take the idea that the drinking water quality regulator must surely already have in mind an obligation to be user focused. The sentiment behind the provisions—that the user should be in mind—could be expressed by way of extra-statutory guidance or codes of practice, or something like that. I agree with Derek Brownlee that statutory provisions that impose such obligations sit somewhat uneasily with the crispness and clarity that one expects from a statute. Furthermore, what happens if there is a failure to have the user focus? If it is simply a failure to meet the statutory obligation, remedies might be at the hand of the user of the service. There might be court remedies or judicial review, or something like that. However, under the bill, the failure would lead to ministers being parachuted in with guidance. That is where there is an anxiety. Ministers can impose guidance on that.

Derek Brownlee: Under sections 93(6) and 93(7), if a scrutiny body does not comply with

guidance, the remedy is for ministers to require the body to provide a written explanation of that, which they can publish. In relation to section 92, there must also be a broader remedy for dissatisfied users that is separate from the remedy for when a body has not complied with the guidance, because there might not be guidance for the body in question. Does section 92 in effect give anyone who is a user of a service that is listed in schedule 13 a right, however unlikely it is to be exercised, to seek judicial review of decisions that it could be argued do not demonstrate continuous improvement in the involvement of users in the design of services?

Michael Clancy: You know as well as I do that an opinion on whether someone has a right to judicial review is something that Queen's counsel scratch their heads about all day long. I might take the substantive element of that question back and think about it but, on first flush, any failure of a statutory body to act reasonably, or any contravention of a statutory duty, could give rise to an action for judicial review. Whether any consumer of drinking water, for example, would have title and interest in that is another matter. It is also another matter whether there would be title and interest for any person who, after having his or her wallet stolen in the street, found that the police did not arrive when they had been called and who then took the matter to the inspectorate of constabulary. Section 92 contains an obligation that does not seem to have any correlative sanction for non-compliance, other than the kind of actions that I have spoken of.

The Convener: Linda Fabiani has what I suspect will be the last question.

Linda Fabiani: It is always nice to have the last question.

To return to earlier questions, the bodies in the schedules that we have talked about all receive public funding. There are valid arguments from all sides about how much direction should be given to such bodies. However, there is a distinction between bodies that are publicly funded by the Parliament and those that are publicly funded by the Government. Are those that are funded by the Parliament a specific case in considering the rights and wrongs of who directs?

Michael Clancy: Funding is only one element of dependence. There was a long-running debate—anyone who is interested can look it up—in the *Journal of the Law Society of Scotland* in the 1970s.

Linda Fabiani: I will run away and look it up after the meeting.

Michael Clancy: I will send you the citation.

The debate was between Sir David Edward—he was plain old David Edward then—and a professor at the University of London, and it concerned the meaning of independence. The conclusion was that independence is a state of not being dependent. Funding is a clear way of tracking dependence. Making a distinction between bodies that are funded through ministers and bodies that are funded by Parliament gives you a neat and ready reckoner for schedule 3 but less so for schedule 13. Even for schedule 3, however, that model falls down in some respects. For example, the Scottish Legal Complaints Commission, which is mentioned in schedule 3 under the Legal Profession and Legal Aid (Scotland) Act 2007, is funded neither by ministers nor by Parliament—it is funded by the legal profession. It was created by the 2007 act in such a way as to ensure its independence by having Scottish ministers make the appointment with the consent of the Lord President. Jackie Baillie will remember well the arguments from those dark days of 2006.

Jackie Baillie: They were quite bright when you were before the committee.

Michael Clancy: Ah, charming as ever.

It is not as easy as one might think to make such a split. In any event, having those bodies in schedule 3 and trying to ensure their independence from ministers goes way beyond their funding. The Scottish Legal Aid Board funds litigants who may be suing Scottish ministers—in fact, every day of the week they may be suing Scottish ministers. It will certainly provide funds for the defence of people who are being prosecuted by the Lord Advocate as a public authority.

We must go a step beyond the balance sheet. It is about the ethos of independence, having clear lines of independence and maintaining independence from ministers in such a way that it eschews any possibility of any interference in their day-to-day consideration—even the inference that, somewhere along the line, some minister may take a dim view of what has gone on in one of those bodies. It is not about the current group of Scottish ministers; it is about the people who will succeed them, who may not even be born yet. The question is the relative balance of power in our constitution. The Parliament is celebrating its 10th anniversary. At the moment, the balance of power is about right, but the bill would radically change the balance of power.

The Convener: We have had a long session. Do you have any last-minute comments to make?

Michael Clancy: No. I would just like to thank you all for listening to me. It has been a great pleasure to appear before you.

The Convener: We thank you for your advice, based on substantial knowledge, on what are

deep, fundamental democratic principles. Your evidence is much appreciated.

I suspend the meeting until our next witnesses can take their place.

15:29

Meeting suspended.

15:32

On resuming—

The Convener: Our next panel of witnesses consists of the parliamentary commissioners who made written submissions to the committee. I welcome Tam Baillie, Scotland's Commissioner for Children and Young People; Kevin Dunion, the Scottish Information Commissioner; and Professor Alan Miller, who chairs the Scottish Human Rights Commission.

I will start off with a general question. The witnesses have all made submissions about part 2 of the bill. Before we come on to that, I ask for comments on the bill as a whole—on the contribution that it might make to public services reform and simplification, and to improving scrutiny and accountability of services. What are the bill's wider implications?

Tam Baillie (Scotland's Commissioner for Children and Young People): I have one general comment on the bill: I understand the Government's desire to simplify the range of bodies that are under consideration, but there is a balance to be maintained between that process and maintaining parliamentary scrutiny. I have already commented in my written submission that the balance is tipped too far in favour of expedience.

Professor Alan Miller (Scottish Human Rights Commission): Like Tam Baillie, I recognise and support the bill's general purpose and intention to simplify the public sector landscape. On the other side of the coin is the concern that we should all be vigilant that the protection of rights—particularly those of the most vulnerable members of our community—is not undermined by any diminishment of the effectiveness of scrutiny and regulation as a result of that simplification.

Kevin Dunion (Scottish Information Commissioner): I associate myself with that comment. The Government's intent has been made clear and I do not take issue with it. My concern—which has also been expressed by Michael Clancy—is that Parliament cannot tie the hands of any future Government, but the bill would grant extremely wide-ranging powers that go well beyond tidying up and efficiency measures and would change fundamentally the basis of accountability and scrutiny of Government.

The Convener: We are deeply into the democratic balancing of power and responsibilities.

Jackie Baillie: I have an obvious question. We have seen the answer to it in the submissions, but I will ask it for the record. Why should the witnesses' organisations not be listed in schedule 3?

Kevin Dunion: What is at the heart of the case I am proposing for removing the Scottish Information Commissioner from the bill is that I fail to understand why my office is still in the bill, particularly after the recent review of Scottish Parliamentary Corporate Body supported bodies, which made it quite clear that my efficiency would be subject to scrutiny and accountability, but my office's direct functions would not be subject to direction.

The ministers have made it quite clear that they are trying to use their resources sensibly and efficiently, with the taxpayer in mind, by reducing the burden for bodies

"for which Ministers are ultimately accountable."

Those are the words that they have used. My fundamental contention is that I am not ultimately accountable to ministers, but to Parliament, and it designed the Freedom of Information (Scotland) Act 2002 with that safeguard. It was not glossed over. As Jackie Baillie knows, Parliament debated that point hard to make sure that we got an independent information commissioner. Indeed, there is now some discussion down south, where the information commissioner is appointed by ministers, about whether the Westminster Parliament should consider introducing legislation that would bring it into line with Scotland. I would hate to see Scotland going in the opposite direction and removing the right of Parliament to be ultimately accountable for the Scottish Information Commissioner.

Professor Miller: I think we all well understand that the matter is about constitutional independence. As chair of the Scottish Human Rights Commission, I am proud to be held to account by the members of the committee and your peers in Parliament. That is as it should be, but more important than my feelings about it is that Scotland should be proud of it.

In 1993, the United Nations General Assembly approved the Paris principles of best practice for setting up national human rights commissions around the world. There is no doubt that the Scottish Government, which introduced the bill to establish the Scottish Human Rights Commission, had the Paris principles in mind. The Scottish

Parliament clearly had them in mind when it debated the bill, as did the Review of SPCB Supported Bodies Committee. All of us in Scotland should cherish that.

My office is applying for UN accreditation as a category A national human rights commission, which means that it can represent Scotland and Scottish opinion in all the processes of the human rights system within the UN. If the commission's independence was seen to be subject to interference as a result of the bill, it would be compromised in the UN's eyes and—which is probably more important than that, to be frank—in the eyes of the public in Scotland. The perception of independence and public confidence in that independence is most at stake. It would be severely tested if the provisions in the bill were to be passed.

Tam Baillie: I do not want to repeat what Kevin Dunion and Alan Miller said, but I endorse it.

Michael Clancy said that we would jealously defend our independence. I have been in post for four months and my experience is that that independence is well respected by parliamentarians. The measure of that is in the acts that set them up and the independence that has been built in to each of the offices. We are not acting out of self-interest; our offices' independence is a reflection of the parliamentary system and the people in it.

David Whitton: The list that is included in schedule 3 seems to be a huge catch-all. Apart from your bodies, should others not be on that list?

Professor Miller: I sat and listened to Michael Clancy, which is always a pleasure and an education. He referred to a number of bodies that I identify with, such as the Judicial Appointments Board for Scotland and the Scottish Legal Aid Board, which are crucial to the administration of justice in Scotland. My concerns are not just about the Scottish Human Rights Commission or the other office-holders of the Parliament being on the list; the independence of bodies such as those that I just mentioned is also critical. There are other bodies listed in schedule 3 about which members should be concerned.

David Whitton: All three of you have said that you understand why the Government is doing this; it is an attempt to narrow down the public bodies landscape. Far be it from me to give it advice, but would it help the Government if it were to listen to what a number of witnesses have told us, which is to revisit schedule 3 and make the list a bit smarter?

Tam Baillie: As was suggested earlier, the starting point should be the order-making powers themselves. By suggesting that the Government should simply go through the list, we make the assumption that an order itself can strike the balance between ensuring parliamentary scrutiny and simplifying the process. However, as Michael Clancy pointed out, the more robust the safeguards in the order-making power, the closer we get to parliamentary scrutiny—which means that, in the end, the process comes to resemble that for a bill. We need to find the level of safeguard that is workable if the order-making powers are to be retained.

Kevin Dunion: I can see the merit of revisiting the list, but Michael Clancy—and, indeed, some of us—have put the strong case that some of our functions are clearly quasi-judicial and are therefore of a different order. Secondly, bodies such as mine were created to simplify things and to provide better and cheaper access to decision making and justice. If there were no Scottish Information Commissioner, people would probably have to go to the courts. I do not think that it makes sense for the Government, having created a body that is quasi-judicial in nature but is actually much cheaper to operate, to begin to draw us back in and make us not dissimilar to a quango, which is not really what we are.

David Whitton: Mr Clancy also said that there had been a "singular lack of consultation" on the proposals. Was there any consultation of the three of you about your inclusion in the list or, indeed, about your views on the bill's purpose?

Professor Miller: There was no consultation of the Scottish Human Rights Commission. Another concern that we have about the measure is that there would be no public consultation on an order that sought, for example, to impact on the functioning of the Scottish Human Rights Commission. When Parliament established our commission, it wrote into the Scottish Commission for Human Rights Act 2006 that in everything that we do we should place an emphasis on the most vulnerable and voiceless people in Scotland. Those people would continue to be voiceless if the measure in the bill were to be agreed to and the Scottish Human Rights Commission which was, after all, brought into being for their benefit, was to be impacted on without their views and experience being taken into account. In short, not only was the commission not consulted, but those for whom it was established will not be consulted on any negative consequences.

Kevin Dunion: I was not part of any consultation and made my submission like any other person in Scotland in response to the bill as published. I have to say that I was extremely surprised to find that we were still in the bill; I felt that we had had a very constructive dialogue with the Government and the Scottish Parliamentary Corporate Body and that we had co-operated well with the Review of SPCB Supported Bodies

Committee. All the commissioners and ombudsmen clearly recognise the need to reduce costs and the regulatory burden, and they want to play their part in that work. I thought that we had reached an agreement in that respect. I share the view of the Presiding Officer, who also seems to be surprised by the fact that we remain encompassed within the proposed legislation.

Tam Baillie: I was also surprised, particularly in the light of the recommendations of the Review of SPCB Supported Bodies Committee. Initially, I thought that those who had drawn up the bill had thought that that committee might have made different recommendations, but had simply left it to stand.

The Convener: We are coming to the end of a very long process. If you have any supplementary written information, please send it to us.

Linda Fabiani: Having read your three submissions, I get the feeling that you do not believe it incumbent on yourselves to be ultimately accountable to ministers. We have taken that on board, but I notice that unlike Kevin Dunion and Professor Miller, who have simply asked for their own organisations to be removed from schedule 3, Tam Baillie in his submission recommends that all

"organisations whose nature and functions require independence from government should be removed".

Do you see it as the role of Scotland's Commissioner for Children and Young People to make recommendations on behalf of other organisations?

Tam Baillie: I might have overstepped the mark there, although I believe that the general principle stands. I repeat what I said with regard to my reading of politicians' respect for the independence of our offices. People have certainly respected the need for my office to be independent of ministers and accountable to Parliament.

Linda Fabiani: With regard to respect for parliamentary integrity and for the bodies that are supported by Parliament, you will have read not only the letter from the SPCB to Government ministers but the response from the bill team, which will have been directed by ministers. Does that response, which says that

"Ministers have indicated that they will consider Stage 2 amendments to the PSR Bill in light of Parliament's consideration of the RSSB Committee report"

give you any comfort and reassure you that your current position can be maintained with ministers' agreement?

15:45

Professor Miller: It is a proof-of-the-pudding thing—we will just have to wait and see. It would certainly help if the committee took a view on the matter. I was very reassured by the SPCB letter, which I hope will resonate with members and will influence the Government's decision to lodge the amendments that should be lodged.

The Convener: In relation to the safeguards in the section 10 power, Tam Baillie has commented in some detail on the sections on proportionality, necessary protections and so on, and on parliamentary procedure and consultation. Do you wish to add to those comments?

Tam Baillie: I was just acknowledging that the bill contains safeguards, even though they are not sufficient and still represent a challenge to parliamentary scrutiny. Although we should respect the desire to build in such safeguards, the fact is that, as the earlier discussion about their robustness demonstrated, we might find ourselves going down a route that is closer to the parliamentary process for a bill.

Kevin Dunion: The bill contains certain preconditions and safeguards that might be entirely sufficient if the changes in mind are simply tidying-up measures or minor alterations. After all, I do not want Parliament to become preoccupied with relatively minor changes. However, the bill could allow for fairly significant changes that should require amendment to primary legislation, which would, in any case, be my preference.

I can certainly imagine a number of scenarios that might arise. Let us say for the sake of argument that I, as commissioner, take a decision that the Government does not like and in response the Government exempts a whole class of documents or decides to create a second body, such as a tribunal, to which it can appeal its case—in other words, it does not attempt to challenge me on a point of law but simply takes its case somewhere else. Such a situation could well happen under the order-making powers in the bill. I am sure that Parliament would not have wished that to happen when it passed the Freedom of Information (Scotland) Act 2002, and it should not be allowing it to happen under this bill.

Joe FitzPatrick: Do you accept that that is not the intention of ministers?

Kevin Dunion: I make that absolutely clear in my submission. I mentioned the point solely because it is the kind of thing that has happened in other countries. There has been absolutely no canvassing of it in Scotland.

The Convener: It is a classic case of checks and balances.

I think that you have outquestioned the committee. Do you have any final comments?

Kevin Dunion: I am content. Thank you very much for the opportunity to give evidence.

The Convener: Thank you for your evidence and your attendance this afternoon. If you wish to make any other comments, please do not hesitate to make a supplementary written submission.

Decision on Taking Business in Private

15:47

The Convener: Our final item is to consider whether to discuss our work programme in private at next week's meeting. I propose that we do so. Do members agree?

Members *indicated agreement*.

Meeting closed at 15:47.

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