OFFICIAL REPORT
AITHISG OIFIGEIL

DRAFT

Standards, Procedures and Public Appointments Committee

Thursday 27 November 2025

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Thursday 27 November 2025

CONTENTS

STANDARDS, PROCEDURES AND PUBLIC APPOINTMENTS COMMITTEE
23rd Meeting 2025, Session 6

CONVENER

*Martin Whitfield (South Scotland) (Lab)

DEPUTY CONVENER

*Ruth Maguire (Cunninghame South) (SNP)

COMMITTEE MEMBERS

Emma Roddick (Highlands and Islands) (SNP)
*Sue Webber (Lothian) (Con)
*Annie Wells (Glasgow) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Katy Clark (West Scotland) (Lab)
Carole Ewart (Campaign for Freedom of Information in Scotland)
Rona Mackay (Strathkelvin and Bearsden) (SNP) (Committee Substitute)

CLERK TO THE COMMITTEE

Catherine Fergusson

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Standards, Procedures and Public Appointments Committee

Thursday 27 November 2025

[The Convener opened the meeting at 09:00]

Decision on Taking Business in Private

The Convener (Martin Whitfield): Good morning. I welcome everyone to the 23rd meeting in 2025 of the Standards, Procedures and Public Appointments Committee. I have received apologies from Emma Roddick, and I welcome Rona Mackay, who is attending as her substitute.

Agenda items 4 and 5 relate to consideration of the recommendations of the Scottish Parliament gender-sensitive audit and to guidance on the code of conduct. Under agenda item 1, do we agree to consider items 4 and 5 in private?

Members *indicated agreement.*

Freedom of Information Reform (Scotland) Bill: Stage 1

09:00

The Convener: Agenda item 2 is an evidence-taking session on the Freedom of Information Reform (Scotland) Bill. I welcome Katy Clark, the member in charge of the bill. She is supported today by Carole Ewart, the director of the Campaign for Freedom of Information in Scotland. Thank you both for joining us. I will hand over to you, Katy, to make some opening remarks.

Katy Clark (West Scotland) (Lab): I thank the committee for allowing me to appear today and for the work that you are undertaking to scrutinise this member's bill. I also take the opportunity to thank all those who have engaged with the process: those who responded to both consultations, those who attended events, those who met me to discuss the bill and those who have taken part in the committee's proceedings. In particular, I thank Carole Ewart, from the Campaign for Freedom of Information in Scotland, who has worked with me throughout the process, and the Scottish Information Commissioner and his office, who have worked with us on some of the details.

The bill attempts to bring together work that has been carried out over a number of parliamentary sessions and the recommendations of the four Scottish Information Commissioners who have been appointed since the Freedom of Information Act (Scotland) Act 2002 was enacted. The bill contains a set of specific technical proposals, which have considerable support; it also makes provision to give the Parliament a power through its committee system that could lead to a parliamentary vote to designate a body.

The Public Audit and Post-legislative Scrutiny Committee's review of the 2002 act, which was conducted in the previous parliamentary session, made recommendations that are included in the bill, such as the introduction of a "pause the clock" mechanism and recommendations to ensure proactive disclosure in a more systematic and accessible format for the public.

Successive Information Commissioners have consistently recommended modernising the operation of FOISA, including expanding FOI coverage to more public functions, improving record keeping and information management, and enhancing the commissioner's power to ensure compliance.

The bill is also a recognition that rights have been lost in many sectors due to outsourcing. My bill seeks to reflect on the practical recommendations that have been made, and we

have attempted to respond to, and reflect in the bill's provisions, the issues that have been raised by stakeholders during the process. I had a number of meetings with the former minister during the process.

Carole Ewart and I are happy to answer questions.

The Convener: Thank you, Katy. As the convener, I will grab the opportunity to kick off. You have already discussed the recommendations that came out of session 5, and you have talked about how all those who have held the Information Commissioner role have indicated shortcomings that they have identified. On a personal level, are you a bit disappointed that a member's bill has been required to deal with the reform?

Katy Clark: Yes. The bill was taken forward as a result of frustration with the Government's failure to act. After a great deal of lobbying to try to get the Government to come forward with recommendations, Carole Ewart from the Campaign for Freedom of Information Scotland asked me whether I would be willing to take forward a member's bill.

The Convener: We are at the tail end of the parliamentary session. You have pointed out some of the issues at evidence sessions that you have attended, but do you want to put on the record formally your concerns about the time that is left in the parliamentary session for your bill?

Katy Clark: I am concerned. The bill is in the same position as a number of members' bills. That is not the fault of any individual member; unfortunately, the Parliament is not geared up to provide support to members. I would have preferred it if the bill had come before the committee earlier in the parliamentary session, but my view is that there is still time.

I have met with the Government a number of times over the years during the bill process, but I have not really had feedback until it made a submission to the committee last week. I have had a great deal of feedback from other stakeholders, and we reflected that in the drafting of the bill.

The original draft bill, which the Campaign for Freedom of Information in Scotland presented to me, has been amended quite substantially to take into account the views of stakeholders, including those who could be designated under the bill and the office of the Information Commissioner.

The Convener: The Scottish Government has identified a number of issues: the duty to publish, the creation of an offence and the resourcing implications. It is concerned about whether those issues can be addressed. Do you have concerns about that, or have we received sufficient evidence to draw conclusions? I will ask you about the financial memorandum in my next question, but what is your response to the Government's concerns? To make a précis of the Government's response, it is saying, "These are really big issues, and we need time to think." Are the Government's concerns legitimate? Does your bill, as drafted, address them? Given the evidence as you understand it, could the bill, if it were to proceed, be amended to address them?

Katy Clark: I will focus on the issues that you specifically mentioned.

People have argued, over many years, for proactive publication, and it has been recommended by Information Commissioners and other stakeholders who work regularly with freedom of information. The proposals around proactive publication are also based on what has happened in other jurisdictions. The view is that, although the 2002 act was framed with the best of intentions, the reality is that the publication schemes have not worked. The proposals have been developed over many years, and there is a great deal of consensus around them among those who are interested in and engaged with the issues, who see them as a more effective way to take things forward. In particular, all four Information Commissioners support the proposals in the bill. We have moved forward on the basis of that consensus among all the stakeholders, who tend to be people who are quite actively involved in FOI.

On the new offence, I heard last week's evidence. The new offence is in addition to offences that are already on the statute book but that are very rarely used. It is hoped that the offence will have a deterrent effect—that is how it was envisaged. It has been proposed as a result of a specific set of circumstances, but it is hoped that it will never be used. Basically, it deals with a loophole that has been discovered. Again, the proposal has the full support of the Scottish Information Commissioner's office. Indeed, we worked with it on this and other parts of the bill to ensure that they were drafted in a way that was workable for that office.

The Convener: That is helpful.

Let us turn to the financial memorandum and the duty to publish. As you have articulated, including just now, the duty to publish is a reframing of an existing obligation—it is where we want to get to. Therefore, you have suggested that the duty is, in effect, cost neutral, because we are just moving on. The Government does not agree with you. What is your evidence for your position? What is your view? Does proactive publication simply reframe an existing duty, which therefore already encompasses it? Alternatively, given the evidence that we have heard about the changes that might be required, particularly in councils, do

you think that the Government might have a point in saying that the provision could require resource?

Katy Clark: The policy intention behind the bill is not to add costs. As you will be aware, the 2002 act does not require anybody to create any new information; the requirement is simply to provide information that already exists. However, the intention of the bill is to effect a culture change with regard to proactive publication, and the view is that that will reduce costs.

The committee will have heard that, in itself, the bill will not automatically lead to any new designations. However, if there were new designations, those bodies would also be required to conform to proactive publication.

The view is that the codes of practice on proactive publication that would come from the Information Commissioner would make it very clear to organisations what they would require to do to comply with the duties, but obviously that would apply only to information that already exists. I know that the Information Commissioner spoke last week about the consequences that could flow from proactive publication, which could lead to organisations providing information in a different way and in more of a standard data format. Every committee in the Parliament would probably recognise that as an issue.

As you know, the legislation does not require new information to be provided. I hope that proactive publication would make it easier for the public to get information, reduce the number of FOI requests and ensure that any FOI requests were cheaper to process.

The Convener: In your introduction, you made the point that this is actually a technical bill rather than a bill that covers massively new ground. You have said that the financial memorandum is accurate in that you are reframing an existing obligation. However, you also talked about the bill trying to achieve cultural change, and we all know that cultural change is incredibly difficult to achieve and invariably comes with costs. What is your view on that specific issue?

Katy Clark: A large part of the cost of the bill will lie with the Information Commissioner. That has been fully costed, because the commissioner will be the main driver of the implementation of the bill. Many people in the FOI community would say that the bill will not cost anything, because it simply requires organisations to do what they should be doing anyway. For example, in relation to training, there is already a statutory obligation on public authorities to update training on an annual basis. Some people would argue that the bill should not require any more money, because that work should be happening anyway.

However, we have not framed the financial memorandum on that basis, and we recognise that how organisations respond will vary. Some organisations might spend a huge amount of money on trying to implement the bill, but others will not. That is why the Information Commissioner's role in relation to the codes of practice is important in making it really clear to organisations what they require to do to comply with the legislation.

The Convener: That, in essence, would also be your thesis in response to the point that new designations would cost money. When there is a new designation, much of the work of the Information Commissioner will already have been done, unless the individual, authority or entity wants to spend a fortune. Designation will be presented as a step, and a newly designated body should not fear it, because, if it is a well-run organisation, it can comply easily.

Katy Clark: The only new designations that would automatically take place as a result of the bill would be those under section 3, on publicly owned companies. People can already make FOI requests about those companies, but any requests would have to be made to the public body that owned the company in question. We hope that there will be savings, because it will no longer be necessary to go to the parent body, which would otherwise have to retrieve the information from the publicly owned body and then provide it to the member of the public or whoever made the FOI request. In drafting the financial memorandum, we looked at those organisations. We costed in that there may be a cost for the publicly owned body, but we hope that that cost would be transferred from the organisation that owns it.

The evidence that the committee has heard and, indeed, the evidence that was put before me is that there is a very wide range of views and evidence on the cost of an FOI request. The amount that different organisations spend varies tremendously. Sometimes, the cost is said to be related to the efficiency of the organisation's systems and the amount of resource that it decides to put into FOI compliance.

The policy intention behind the bill is to reduce cost, and we hope that that will happen through standardisation and the codes of practice. However, we recognise that when there is a designation of a new body—it could be a very large body—there will be costs for that body, and we have outlined those in the financial memorandum.

In general, those costs will not be borne directly by the Scottish Government; they will be borne by the new body. That body might be a multinational company, a third sector organisation or a charity. It could also be a private body—for example, it could

be a privately owned care home, if the Parliament decided to go down that path. However, all those matters will be looked at by the Parliament when the Scottish ministers come forward with a recommendation for a designation or, indeed, if the Parliament decides to use the designation mechanism that is proposed in the bill.

The Convener: That is very helpful.

09:15

Ruth Maguire (Cunninghame South) (SNP): Good morning. I will ask about access to information that is held by public authorities and further powers to designate Scottish public authorities. On the presumption in favour of disclosure, the Scottish Government and the Information Commissioner told the committee that existing legislation and the code of practice already support that happening, so why does it require amendment in legislation?

Katy Clark: You are absolutely correct that the existing legislation requires that. Indeed, international law requires it, but the reality is that the system is not working well. The way that the legislation was framed in 2002 has meant that the system has not worked in the way that was envisaged. People who are actively involved in the sector believe that a proactive publication duty and very clear codes of practice and guidance from the Information Commissioner about what that actually means are far more effective. Indeed, that is how it is done in other countries, where it appears to be successful.

Ruth Maguire: You have described your approach to further powers to designate Scottish public authorities as proportionate. Respondents to our call for evidence and witnesses who have appeared before the committee have spoken about the pace of designation being slow. We have heard reflections from the Government on why that has been the case, but, overwhelmingly, the responses that we have had use language such as “glacial”. How will your proposal speed up the pace of designation?

Katy Clark: We hope that, if the bill is enacted, the Scottish Government will deal with those matters more speedily and that designation will speed up. We even hope that the discussion that is taking place today will help to speed up the process of designation.

However, as you know, there is also a new mechanism in the bill that would allow a parliamentary committee to get involved, should it choose to do so. I will use the care example that is currently being looked at by the Scottish Government. The Scottish Government may come forward in the next session of Parliament with proposals to designate parts of the care sector as FOI compliant. It would be quite a big political issue if the Scottish Government were to fail to do that, and a committee of this Parliament—it would be likely to be a health committee—could decide to use its time to consider the issue. It could put out a call for evidence, take evidence from all parties, including the Scottish Government, the sector and campaign groups, come to a view and make a recommendation to Parliament, which could then debate the issue. Obviously, changes to standing orders would be required to enable that to happen.

That would require a committee to decide that it was going to use its time in that way, so it would be likely to happen only for a big political issue. I hope that the fact that the Scottish Government would know that there might be enhanced scrutiny when ministers failed to act would help to drive designations.

Carole Ewart (Campaign for Freedom of Information in Scotland): I will add some information to that answer. Presumption in favour of openness must be emphasised, because what has been happening is unsatisfactory. The statistics that are produced by the commissioner show that 75 per cent of requests result in all or partial information being disclosed. If the bill is passed, in practice, that kind of information could be proactively published. The model publication scheme is currently not working.

The nine classes of information in the model publication scheme are relevant to the kind of FOI requests that people routinely make. Those include:

> “How we take decisions and what we have decided ... What we spend and how we spend it”

and

> “How we procure goods and services from external providers.”

If information under the nine categories was published in the way that it is supposed to be published under the model publication scheme, we would not be talking about proactive publication now. However, that is not happening, which is a cultural issue. When the *Dundee Courier* came out in favour of the bill, it very explicitly said that the legislation needs to also change the culture, which we certainly endorse.

The pace of designation has been glacial, which is why an alternative—

The Convener: I apologise for interrupting you, Carole. I am conscious of the time, because we have a lot to get through. The session is for the member. A substantial amount of what you have talked about has been submitted in evidence, so we have heard it. I am conscious that we want to hear from the member in charge of the bill rather

than consider evidence that we have already heard, because, if the bill progresses, we must also establish the amount of room that we have to make changes. However, thank you for that contribution.

Carole Ewart: That is helpful.

Ruth Maguire: What is your assessment of the root cause of the delays in using section 5, and can you speak to how your bill would address those?

Katy Clark: That is a bigger question. Why Governments do not always act as quickly as they could is not a party-political question. I suppose that they listen to stakeholders from all sides and always face pressures not to act as well as pressures to act. It is difficult to explain why decisions are taken not to act, but I presume that it is because matters are complex.

You have heard evidence about stock transfers. When council houses moved to housing associations and other bodies, there was a loss of rights and it took 13 years for those to be brought back. There has been a loss of rights in many sectors, such as when there was outsourcing in the justice sector—there is no sign of those services coming back to being run by the Scottish Government. Rights have been lost and political decisions have not been made to maintain those after services have been transferred.

As you have heard in evidence, ScotRail is now back in public ownership, because of which we have FOI rights again. Designation does not seem to have been significantly onerous for that body. The housing associations and other bodies that are now required to comply with the legislation receive only a relatively small number of requests.

Ruth Maguire: Why does there need to be a statutory obligation to formally consider proposals that are made by the Scottish Information Commissioner?

Katy Clark: It would strengthen the commissioner's position and help to drive the bill's intention, which is to ensure transparency, accountability and openness. Part of the reason is to ensure better use of the public pound and better public policy.

Ruth Maguire: You spoke a little about parliamentary committees potentially being able to designate bodies as public authorities. You have covered why you think that their being able to do so is appropriate, although you can add more to that if you wish.

The proposal would require there to be consultation before a resolution to designate bodies was passed. You will have heard the Scottish Government's concerns about how proposals would be initiated and how the Parliament would assure itself that consultation was adequate. What process do you envisage for initiating resolutions and ensuring robust consultation?

Katy Clark: In general, it would be a matter for committees themselves, but including the detail in the standing orders could be an option. It is the transparency of the process that would ensure whether it was robust. All stakeholders—the sector, private bodies, representative bodies and the Scottish Government—would be involved and would have the opportunity to make representations. It would be a far more transparent and, I would argue, robust process because of the public scrutiny that it would involve. However, it would be an additional mechanism; it would not be instead of the existing mechanisms.

Ruth Maguire: Thank you. It is helpful to get that on the record.

The Convener: How long do you think a designation should take? I know that that is a really hard question to answer.

Katy Clark: It is a hard question. Sometimes, the designation might be for only one small body that employs a relatively small number of people and does not work with a considerable amount of money; the Parliament might take the view, for political or other obvious reasons, that it should be compliant with the FOI legislation. At other times, the designation might be for a massive sector. Therefore, it is difficult to say, because it depends on the proposed designation, how much evidence is involved and how complex that is.

The Convener: The reason I asked is that, unless committees have a procedure in place, through standing orders or some other method, by which designations can be started, processed and decided, we could end up in the situation that we are in with post-legislative scrutiny, in which lots of committees would love to do something and are genuinely interested in it, but, because they have such little control of their timetabling, it never comes about. We risk creating a solution that is never used, which would only perpetuate on-going frustration. At present, that frustration is directed towards the Scottish Government for its frankly glacial pace, but that could be turned on to committees if they have no way of fulfilling the requirements.

Katy Clark: I fully recognise those points, which would be a matter for the committee system. Presumably, something would have to be seen by the committees as a political priority. In the aftermath of Covid, care homes might have been considered a political priority and an area that a parliamentary committee would identify to launch an inquiry into, whereas that is far less likely to

happen for areas on which there is perhaps less public attention.

My proposal is to make available an additional mechanism, which would strengthen the role of the Parliament to hold the Government to account.

The Convener: You have specified that it would be an additional mechanism by which designation could happen, but do you also see it as an angel on the shoulder of the Government to ensure that it accelerates its own role in designation?

Katy Clark: Very much so.

Ruth Maguire: That is helpful.

The Convener: Sorry, Ruth. I did not mean to cut across you.

Ruth Maguire: That is okay.

Specifically on the section 5A resolution, can you clarify your intention on timing and whether standing orders would need to be amended in order to provide certainty? That question refers to evidence that the Scottish Government is uncertain about when the legal change would take effect.

Katy Clark: Do you mean the section 5 reports to the Parliament?

Ruth Maguire: I was asking about the debate in the Parliament after Scottish ministers have used the section 5 power to designate a new public authority.

Katy Clark: So, you are referring to the designation of a new body?

Ruth Maguire: Yes.

Katy Clark: Okay. The whole purpose of section 5—and, indeed, the whole bill—is to increase accountability and to drive designations. The reports are intended to drive awareness of the designation of bodies and to create the parliamentary space for such a discussion to take place. The policy intention is to incentivise the greater use of ministers' power to designate. The intention of the 2002 act was always that bodies delivering public services would comply with freedom of information requests, so the reports would be a regular opportunity to review the Scottish Government's work to deliver that.

Ruth Maguire: Thank you. I will stop you there, Katy, because I was perhaps unclear in my question. The uncertainty is about when the legal change would take effect under the resolution in proposed new section 5A of the 2002 act.

Katy Clark: Is the legal change that you were referring to the designation of a body following a vote by the Parliament?

Ruth Maguire: Yes.

Katy Clark: I think that that kind of detail would have to be put into standing orders. The advice that we got was that it would not be appropriate for that level of detail to be included in the bill.

It may well differ from one designation to another. If there was a view that the designation of a body needed to be done speedily and the matter was discrete and capable of being curtailed, it may be that the implementation could happen in a very short time. For other matters, it would be different. I think that that would have to be laid out in the proposal that was put before the Parliament.

09:30

Ruth Maguire: So, you envisage it being in standing orders rather than—

Katy Clark: It could be in standing orders. It might be something that the relevant committee would look at. For example, in the case of a large sector, the committee might have a view on the timetable for implementation. In the case of a single body and a relatively discrete matter, the committee might take the view that implementation could happen either immediately or very quickly—say, within a month, three months or six months. I do not think that it would be appropriate to put that in the bill, because it would depend on the designation.

The Convener: Obviously, standing orders cannot direct legislation. However, the motion that would be debated in the Parliament could articulate the date when the designation would take effect. Is that the vehicle by which you see the designation occurring, rather than it being made by the minister and subsequently reviewed in the debate? Do you see Parliament having that role in debating the motion as the vehicle of designation?

Katy Clark: Yes, and it would depend on the framing of the motion that was put before the Parliament. It may depend on the circumstances, and there may well be occasions when that is part of what the Parliament is debating. There may be different views. Different political parties might take different positions about how speedily something could happen. There could be agreement on the principle, but some people might say, "This will take longer to implement," while others might say, "No, we want this done now." That would be a matter to be debated.

In reality, how quickly the order could be implemented and the designation made would depend on the nature of the designation, so it would be unwise to have a standard rule.

Ruth Maguire: I appreciate that. My next question is on the requirement to debate the Scottish ministers' section 5 reports. Do you see

that mechanism as a way of providing additional scrutiny? Do you envisage that it would speed up the designation of bodies?

Katy Clark: That is the hope. I was asked to take the bill forward partly as a result of frustration about the glacial progress of new designations. The hope is that, if Parliament debated such matters on a standing basis, it would move the issue higher up the agenda and lead to more designations. In such debates, ministers would probably want to be able to say that they had intentions and plans and to give commitments to the Parliament, which we hope would be honoured.

Ruth Maguire: That is helpful. Thank you.

Annie Wells (Glasgow) (Con): Good morning. My first question is about the provisions on requesting information in section 6 of the bill. Can you confirm that the proposal on correspondence addresses is intended as a technical amendment to clarify the existing position that an email address is sufficient for a valid request to be made? How do you respond to the Scottish Government's view that the current drafting may not make it clear enough that an electronic address alone is acceptable?

Katy Clark: That is the intention, and section 6 has been drafted on that basis. Again, it is a technical amendment. With the bill, we have attempted to bring together all the changes that have been recommended for which there seems to be a strong body of support or a consensus, and this is one of them. The provision has been drafted by parliamentary draftspeople, and the wording in the bill is the drafting that they felt was robust. We have had alternative versions, but this is the version that we were advised was appropriate.

Annie Wells: The Scottish Government's view is that the drafting might not make it sufficiently clear. Has the change made it clear enough, or does more work need to be done with the Scottish Government to make it clearer?

Katy Clark: The advice that I had was that it was sufficiently clear. However, I am open to amendments. The provision is a technical amendment, so if the view is that it is not sufficiently belt and braces, there is scope to amend it. We are very amenable to discussions.

Annie Wells: Thank you for that.

The Convener: Your view is that an email address should be sufficient and it does not need to be an email address and postal address—is that right?

Katy Clark: Yes.

Annie Wells: Thank you, convener, for clarifying that.

My second set of questions is about time for compliance and the "pause the clock" proposal. The Scottish Information Commissioner suggested an alternative model for the provisions on time for compliance in order to allow a short initial period of clarification requests, after which any delay would be deducted from the response time. Why did you decide not to adopt that approach, and what are your views on its merits or otherwise?

Katy Clark: The intention behind my proposal, which has come from those who are directly involved in the process, is to speed up the process and encourage early clarification. Again, I view it as a technical amendment. There seems to be consensus that this is the right approach among those who are heavily involved in freedom of information, such as information commissioners, academics, the Campaign for Freedom of Information in Scotland and those who use freedom of information regularly. The issue was also looked at by the committee in the previous parliamentary session.

Carole Ewart might want to add something because you have raised a technical point.

Carole Ewart: As you quite rightly point out, Annie, there has been discussion around this. On balance, it was felt that the amendment had to be kept simple for the public to understand. Pausing the clock is a concept that people readily understand, which is why we came down in support of it.

Annie Wells: Thank you very much for that clarification.

My final question is on the repeal of the Freedom of Information (Scotland) Act 2002 (Time for Compliance) Regulations 2016 for grant-aided and independent special schools. Why do you believe that the 2016 regulations create inequalities for freedom of information rights?

Katy Clark: I will bring in Carole Ewart on that, because she has done a huge amount of work on the issue.

Carole Ewart: The regulations did not make sense when they were passed by the Parliament. To go back to my previous answer about keeping legislation simple so that the public can readily understand it, the maximum response time is currently 60 working days for independent and special schools and 20 working days for state schools. We, in the Campaign for Freedom of Information in Scotland, could never understand why there was that disparity. Some of our most vulnerable children are in special schools, so it did not make sense.

The problem has been exacerbated by the passing of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024, so we believe that the current regulations are untenable. The human rights impact assessment that we were required to present with the bill makes that point. The days are working days, and there is a difference between 20 working days and 60 working days. If a private or independent special school is closed, the working-day count would not apply.

Annie Wells: Thank you very much for that clarification.

Sue Webber (Lothian) (Con): My questions are on enforcement and the Scottish Information Commissioner, because a number of sections of the bill would make technical updates to enforcement powers. Section 9 would bring in a new exemption for information that is provided to the Scottish Information Commissioner during the investigation of appeals process. Why is that necessary?

Katy Clark: I think that the Scottish Information Commissioner gave some real examples in relation to that last week. The intention is to ensure that the person who seeks the information gets the information that they are entitled to. The amendment to the 2002 act would enable the Scottish Information Commissioner to assist in that process, so an exemption is appropriate in order to enable the legislation's intentions to be delivered. The Information Commissioner spoke about real examples last week.

Sue Webber: You were here last week. We have heard that the Scottish Government believes that, as drafted, the exemption is not limited to FOI requests made to the commissioner in respect of information held by him. The Government's view is that, under the bill, once information was provided to the commissioner, it would become exempt even if it would not previously have benefited from an exemption. How do you respond to the concerns that that could allow the original authority to rely on that exemption and withhold the same information in response to other requests?

Katy Clark: Proposed new section 41A of the 2002 act refers to section 47(1) of that act, in which a narrow set of circumstances apply. It says that a person who is dissatisfied with a notice or

"the failure of a Scottish public authority to which a requirement for review was made to give such a notice ... may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act."

That is a very narrow set of circumstances.

Sue Webber: If it is your intention that the exemption should apply only to the commissioner, should the provision be amended to make that clearer?

Katy Clark: It is clear in the bill that the provision relates to information that is provided only to the commissioner and that the circumstances that are outlined in section 47(1) of the 2002 act have to apply. The provision is based on experience in practice that this can become an issue, and it would assist the Scottish Information Commissioner in their work if the exemption was allowed. On that basis, it is a reasonable request from those who have worked in the commissioner's office.

Sue Webber: Section 10 of the bill would amend section 43 of the 2002 act, which sets out the general functions of the Scottish Information Commissioner. You consider it necessary to have a statutory power to require individuals, rather than just the public authority, to provide information when it is necessary for the commissioner to perform their statutory functions. Is that correct?

Katy Clark: Yes—that is correct. Agents of a public authority are normally employees who are carrying out a specific function of that public authority.

Sue Webber: Section 11 proposes repealing paragraph (a) of section 48 of the 2002 act, which prevents the Scottish Information Commissioner from investigating how its office handles information requests. What is your rationale for removing that specific restriction?

Katy Clark: That is for consistency; the view is that there would be a firewall. The repeal would mean greater accountability and consistency in the implementation of the legislation. That is the thinking behind it. [*Interruption*.]

Carole Ewart is pointing out to me that other regulators investigate themselves, so it is not a new approach—it would adhere to that general principle.

Sue Webber: The bill does not provide for the repeal of paragraphs (b) and (c) of section 48 of the 2002 act, which prevent the Scottish Information Commissioner from investigating the handling of appeals about the handling of information requests by a procurator fiscal or the Lord Advocate in their capacity as head of criminal prosecution and investigation of deaths in Scotland. Why was repeal of paragraphs (b) and (c) not included in the bill, even though consultation on that was recommended in session 5 of the Parliament?

Katy Clark: Some things have been included and some things have not, because we are trying to get a consensus. I might well have wanted to have more things in the bill that have not been put

in, but we are trying to make proposals on issues where there was less controversy and more consensus among stakeholders.

You are talking about one of the areas not only where there was less consensus but where issues were raised about legislative competence. Therefore, the view was that it was probably better not to include it in the bill.

There are quite a few matters that we could have included in the bill but did not, because we thought that we might run into problems and that there would be different views. We have attempted to coalesce the proposals around areas that have broad support.

09:45

Sue Webber: Indeed, the Scottish Government indicated last week that there might be issues with legislative competence, including in relation to the procurator fiscal and the Lord Advocate.

Katy Clark: Those issues could be raised at stage 2.

Sue Webber: On section 12 of the bill, you have indicated in the policy memorandum that the use of enforcement notices to require compliance with the codes of practice should be seen as a "last resort". The Scottish Government has indicated to us that it has concerns that making the codes of practice enforceable would give them the status of law. Why do you consider it important that a practice recommendation can ultimately be enforced?

Katy Clark: As was outlined in last week's evidence, we must give power to the Information Commissioner. All the evidence seems to suggest that their having power acts as a deterrent and ensures that bodies comply with their requirements. In effect, that is a way of policing the bill's implementation.

The provision that you have just raised, the offences under the 2002 act and the new offence that the bill proposes are in place not because we believe that they would be used regularly—we hope that they would never be used—but as a deterrent and to give power to the Information Commissioner.

I know that the commissioner gave a specific example last week of using his powers to ensure that there was compliance before having to take formal steps. There was another example of that in the newspapers this week. I hope that, although the bill would give the Information Commissioner powers, that does not mean that they would have to be used. However, those powers would ensure that public bodies complied with reasonable and lawful requests that were being made.

Sue Webber: We have received correspondence from the commissioner on the specific example that you referred to, and you are correct in saying that the matter has been widely covered in the press this week.

Section 13 of the bill deals with the First Minister's veto power. Why do you believe that the veto should not be retained, even in a more limited form, as suggested by the Scottish Government? The Scottish Government stated last week that it wished power to be retained. Your position is different.

Katy Clark: Last week was the first time that we have had a detailed response from the Scottish Government, so we have not really been able to take its views into account before. There has been a consensus that, because the power has never been used, it should be removed, and that, with regard to public trust, it is inconsistent to have that power in place. At the end of the day, those matters are political, but proposals have been made over many years that the power should be taken away because it is not needed.

Sue Webber: We heard some examples from the minister last week—including, I think, in relation to national security—but there are other mechanisms.

Katy Clark: The examples that were used would all be covered in other ways. I cannot envisage why the power would be required, but, if the Scottish Government had strong views on the matter, it could lodge amendments at stage 2. The evidence that we have taken and the views from stakeholders show that the power is not required. There is strong support for its removal.

Sue Webber: Yes, and the issue relates to optics, trust and respect. I understand that.

In relation to section 14, the Information Commissioner explained to the committee that late compliance with decision notices has resulted in unnecessary expenditure for his office. If a public authority ultimately complied with the substantive requirements of a decision notice, even if it was late, what practical benefit would pursuing enforcement through the courts for late compliance deliver?

Katy Clark: The position is very similar to the other examples that have been put to me. Although I hope that it would never be used, this is another provision that is intended to be a deterrent and to help drive organisations to deliver on their legal functions and statutory obligations.

Sue Webber: You are referring to a bit of a behavioural or cultural change.

Katy Clark: Exactly. The hope is that the provision would not be used, but there might be extreme cases in which the Information

Commissioner felt that it was in the public interest for the matter to be taken forward.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Good morning. The bill states that there is a need for a new Scottish Information Commissioner power to share information with Audit Scotland. Am I right in thinking that that would be an extension of existing powers?

Katy Clark: If it is okay, I will bring in Carole Ewart.

Carole Ewart: Thank you for the question. In fact, it was reported this week that, following the Scottish Information Commissioner's ruling about a local authority abolishing a job without any paperwork to substantiate the decision, Audit Scotland took action. When matters are reported in the press, it has an impact.

There is a determination for freedom of information to serve the public sector as well as the public. If the Information Commissioner comes across information that he thinks is relevant to the functions of Audit Scotland, which manages the public pound on our behalf, an explicit duty should apply.

Rona Mackay: If I understood you correctly, the commissioner has that power anyway.

Carole Ewart: It was not clear that the commissioner referred the case, but it was clear that what Audit Scotland did followed on from the commissioner's public statement on his website. The bill would make the position more explicit. It helps to understand the rules in advance—for example, in legislation—and for the public to be reassured that there will be a flow of information. It is a bit like child protection, is it not? Lots of different silos are collecting information, and it is only when they share it that they realise that there is a pattern and that action is required.

Rona Mackay: Can I ask about the replacement of the publication scheme duty for public authorities with a duty to publish? As somebody who is relatively new to scrutiny of the bill, I found that quite mind-boggling and a bit confusing. In effect, does that mean that you want local authorities to be more proactive?

Katy Clark: Yes.

Rona Mackay: They have a duty to publish anyway.

Katy Clark: The hope is that the bill will lead to culture change, where more information is proactively published. As the Information Commissioner outlined last week, the codes of practice would outline the type of information that it was useful for an organisation to publish, and he would work with the organisation in relation to that.

It is also hoped that that would lead to a reduction in the number of FOI requests and, therefore, that there would be savings as a result of that cultural change, because information would already be readily available. The Information Commissioner's office says that we can often predict the kinds of FOI requests that are going to be made. If that information was proactively published, the public would not need to rely on the FOI mechanism.

Rona Mackay: On the issue of savings, some local authorities and a university have said that they would need more money for the duty to publish. What is your answer to that?

Katy Clark: The intention is a cultural change and not to require organisations to get new staff. There is not a policy intention or a wish that organisations should get more staff to perform the function. It is more about how existing—

Rona Mackay: If it is set out in statute, and if organisations are legally required to do it, they might say, "We can't do it unless we get more staff, and that's going to cost more money."

Katy Clark: The 2002 act requires only information that already exists to be provided. There would not be a requirement to create new information, but there may be a requirement, working with the Information Commissioner over time, to publish information that already exists in a more readily accessible way, automatically, before there is a request.

Rona Mackay: The Scottish Government is not happy with that proposal and fears that it could have the unintended consequence that local authorities are obliged to publish all the information that they hold. The bill does not specify any limits on that. Could that be addressed at stage 2? Does the bill need to specify limits?

Katy Clark: I think that that would be clear in the publication code that the Information Commissioner produced. Those information codes would be specific to sectors or perhaps even organisations. Their requirements should not be onerous and would depend on the organisation's resources. This is about a culture change, not putting additional resources into functions. It is about how people use the time.

A consultation process would lead up to the publication code. Therefore, to use the specific example that you have cited of local authorities, which are a large and significant set of bodies, I imagine that there would be an intensive consultation process with them about what might be in the publication code.

The Convener: Let us turn to the designation of a freedom of information officer. There has been a lot of support for that, but there has also been

evidence to say that it is unnecessary. One of the challenges appears to be that the designation needs to be of someone who is high enough within an organisation to have an effect, whereas the work of freedom of information is frequently done by staff at a much lower level. How will we get over the challenge of holding a designated official responsible when internal documents will suggest that everything has been designated to a lowly person, things have gone wrong and it is their fault? How do we make sure that the designation works at the level that—I think—you anticipate, so that cultural change can be driven by a senior person without the blame being poured down the ladder to someone else?

Katy Clark: The proposal comes from FOI officers themselves. It has been discussed for many years, since long before I became involved in the issue.

Often, freedom of information officers are also data protection officers. They see how that function operates; it has a statutory basis. The provisions in the bill have been mirrored on the provisions of data protection legislation. FOI officers say that, when they are data protection officers, their organisation complies with the law and with their requests; however, when it comes to freedom of information, because they do not have the statutory authority, it is sometimes very difficult for them to get their organisation to comply with that legislation. They believe that, if they had the same statutory footing for freedom of information as they have as a data protection officer, they would be able to perform their functions better. That is the rationale.

Because, often, someone is a data protection officer and an FOI officer, I cannot imagine that there would be a grading issue. The policy intention is not to create new roles—although we have had to detail that in our financial memorandum—but to give more authority to those who are already doing the work, which would, I hope, lead to savings, because their requests will be complied with, rather than their having to go through an extended and lengthy process before information is released. The purpose of the provision is to empower those who are attempting to deliver on the 2002 act.

The Convener: So, the purpose behind it is to reflect for freedom of information the success that data protection officers have brought to the system.

As a by-question, we have heard evidence that, if you then include records management, you are bringing together the three areas that are crucial to the issue and probably crucial to the cultural change that you have referred to. Did you consider merging those three roles in the bill?

Katy Clark: No. We have attempted to bring together concepts and proposals that have been on the table for quite a lengthy period of time. There may well be other things that could have been included, but we have attempted to coalesce around the areas in which the Campaign for Freedom of Information in Scotland, other bodies and the Information Commissioner are in agreement. I appreciate that the Scottish Government is taking a different view on some aspects of the bill. However, when it comes to the stakeholders who have engaged with the process, what is in the bill is not necessarily what everybody wants, but it is what everybody is comfortable with.

The Convener: One thing that we have heard some evidence about is that very small organisations may struggle to provide that different role. However, you are suggesting that that role is complementary to the data protection role, for which there are no exclusions, so someone must be responsible for that. The resource implication is therefore very small for that designation, because it is probably the person who is doing it anyway.

10:00

Katy Clark: In larger organisations, that would definitely be the case. In very small organisations—although very few of them would need to comply with the legislation—the chief executive might have that responsibility.

The Convener: That is very helpful.

I want to talk to the offences that have been suggested and considered. We have heard lots of different evidence about the matter, and you have mentioned that, although you would hope that a lot of those offences would never be used, the aim of the provisions is to change the culture. Do we need to create another offence just to change the culture and the approach to freedom of information?

Katy Clark: Well, the specific offence that is being proposed comes out of a specific set of experiences. It is a defined set of circumstances. I would argue that there is a gap in the legislation. You will be well aware, convener, that the threshold of beyond reasonable doubt for criminal conviction is high and that it would be necessary to prove intent—that somebody intended to alter documents, with the intent to prevent disclosure. The threshold would be high, and we would hope that it would never be used. However, it would make it clear to Government and officials that, if they thought a FOI application might come—because it was self-evident that that was highly likely—that material should be protected.

The Convener: Are you comfortable with the unusual circumstance that the time for prosecution

would run not from the event but from the start of the investigation? In essence, the three years for prosecution would not run from the destruction of documents but from the start of the investigation—unlike many offences, which are occasioned by the actual act. That might be inevitable because of the circumstances of the offence.

Katy Clark: The time would run from the point at which any reasonable person, and perhaps everybody, would be of the view that it is likely that there might be a freedom of information request because of the nature of the material and of the issue.

The Convener: Is that not the challenge, though? A reasonable person might think that it runs from the date on which something went into the shredder. However, if the facts did not come out until a few years later, and the time would then run from that investigation, it is my understanding of the—

Katy Clark: It might well be that, at the time that information was destroyed, it would not have been reasonable for that person to believe that it would become a massive issue five or 10 years down the road. In those circumstances, there would not be a case to take through the courts. The provision has been envisaged and framed on the basis that the offence would be used in exceptional circumstances.

Existing offences are framed in very similar terms. The provision is mirrored on existing offences that have been in place for many years but would extend to the situation where records were altered at an earlier stage, before an FOI application was made. We know that those other offences have very rarely been used. Although we have worked in our financial memorandum on the basis that they will be used once or twice a year, that is very difficult to conceive in reality.

The Convener: One of the other criticisms that have been levelled at the provision is that, although it would hardly ever be used, local authorities would now potentially have to store information for ever and a day, because they would be concerned that, at some point in the future, someone would come along and say, “This person deliberately got rid of it.” How would you answer that?

Katy Clark: The Information Commissioner dealt with that very well last week. The publication codes would make very clear to a local authority what information they would require to keep or to publish. The threshold is high, and it would have to be an extreme set of facts that led to the Information Commissioner deciding to try to seek a prosecution, and the Crown Office would then obviously would have to take a view. I imagine that it would be an extreme set of circumstances in which it would be felt in the public interest to pursue a prosecution of that nature.

The Convener: I am glad to hear that. My final question is over the Scottish Government’s concern about the specific commencement of the act, because of the need for everyone to understand what might happen with regard to the new offence. Have you got any views about an extension to the commencement, or are you open to having discussions about the matter before stage 2?

Katy Clark: The offence would be a criminal offence. The set of circumstances that are likely to lead to the Information Commissioner and the Crown Office wishing to proceed with a prosecution would probably be such that the view would be that it would be appropriate for the legislation to be in place.

I am not sure of the exact nature of the consultation that would take place in relation to the criminal offence. There might be a need for consultation in relation to proactive publication and the type of information that is published. However, in relation to the destruction of records, the threshold is so high that—

The Convener: Let me ask the question differently, then. Is it the case that there is no intention for a retrospective criminal offence that would cover events that occurred before the commencement of the act, irrespective of the fact that the time for prosecution might run from the point of the start of an investigation?

Katy Clark: No, this is not a retrospective piece of legislation.

The Convener: That is fine. Thank you.

I thank Carole Ewart and Katy Clark for attending this morning. If thoughts or views come to mind, as sometimes happens the second you step outside of the door, you know where the clerks are in order to reach us, and vice versa, should we have any questions further to our deliberations, I hope that you do not mind our reaching out to you for answers.

10:06

Meeting continued in private until 10:41.

Official Report
Room T2.20
Scottish Parliament
Edinburgh
EH99 1SP

Email: official.report@parliament.scot
Telephone: 0131 348 5447

Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

All documents are available on
the Scottish Parliament website at:

www.parliament.scot

Information on non-endorsed print suppliers
is available here:

www.parliament.scot/documents

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@parliament.scot

The Scottish Parliament
Pàrlamaid na h-Alba