

JUSTICE 1 COMMITTEE

Wednesday 20 September 2006

Session 2

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JUSTICE 1 COMMITTEE

31st Meeting 2006, Session 2

CONVENER

*Pauline McNeill (Glasgow Kelvin) (Lab)

DEPUTY CONVENER

Stewart Stevenson (Banff and Buchan) (SNP)

COMMITTEE MEMBERS

*Marlyn Glen (North East Scotland) (Lab)

*Mr Bruce McFee (West of Scotland) (SNP)

*Margaret Mitchell (Central Scotland) (Con)

Mrs Mary Mulligan (Linlithgow) (Lab)

*Mike Pringle (Edinburgh South) (LD)

COMMITTEE SUBSTITUTES

Brian Adam (Aberdeen North) (SNP)

Bill Aitken (Glasgow) (Con)

*Karen Gillon (Clydesdale) (Lab)

Mr Jim Wallace (Orkney) (LD)

*attended

THE FOLLOWING ALSO ATTENDED:

Brian Adam (Aberdeen North) (SNP)

Robert Brown (Deputy Minister for Education and Young People)

Des McNulty (Clydebank and Milngavie) (Lab)

Mr John Swinney (North Tayside) (SNP)

CLERK TO THE COMMITTEE

Callum Thomson

SENIOR ASSISTANT CLERKS

Euan Donald

Douglas Wands

ASSISTANT CLERK

Lewis McNaughton

LOCATION

Committee Room 1

Scottish Parliament

Justice 1 Committee

Wednesday 20 September 2006

[THE CONVENER opened the meeting at 09:58]

Item in Private

The Convener (Pauline McNeill): Good morning and welcome to the 31st meeting in 2006 of the Justice 1 Committee. It would be helpful if members could, as usual, switch off all electrical items that could interfere with the sound system.

Apologies have been received from Stewart Stevenson and Mary Mulligan. I welcome to the committee Brian Adam, who has joined us as a visiting member, and Karen Gillon, who is substituting for Mary Mulligan. I also welcome Des McNulty and John Swinney, who have joined us for this morning's business.

Under agenda item 1, we must consider whether to take agenda item 4, which involves discussions with our adviser on the Criminal Proceedings etc (Reform) (Scotland) Bill, in private. Do members agree to take that item in private?

Members indicated agreement.

Scottish Commissioner for Human Rights Bill: Stage 2

09:59

The Convener: Agenda item 2 is consideration of the Scottish Commissioner for Human Rights Bill at stage 2. I welcome the Deputy Minister for Education and Young People, Robert Brown, who is leading on the bill, and his team of officials—Jane McLeod, Matthew Lynch, Brian Peddie and Ed Thomson—who will support him.

I remind members that pre-emptions are noted on the groupings paper.

Section 1—Scottish Commissioner for Human Rights

The Convener: Amendment 120, in the name of Des McNulty, is grouped with amendments 121, 1, 122 to 129, 2 to 4, 8 to 10, 13 to 19, 22 to 38, 40 to 46, 51 to 63, 65, 66, 68 to 73, 75, 77, 79 to 82, 84, 85, 87, 130, 88 to 94, and 96 to 103. Members will note that the group, which includes a number of amendments that have been lodged by Des McNulty, is rather large. I will allow some latitude in the discussion to ensure that Des McNulty's amendments, as well as the Executive's amendments, are discussed fully. In a sense, I am suggesting that two miniature debates are involved, but we will stick with the procedure.

Des McNulty (Clydebank and Milngavie) (Lab): I am delighted to be at the Justice 1 Committee again—I seem to be becoming an ancillary member of it.

In discussing the amendments in the group, it will be necessary for me to comment on those that the Executive has lodged because I must persuade the committee that my proposals are superior to its amendments as well as to the proposals in the bill as it stands. That is what I will seek to do.

My concern is that if the Executive's amendments are agreed to, the people of Scotland will have not one commission for human rights, but two commissions for human rights. We are about to have the commission for equality and human rights, which will gather up existing equalities organisations and introduce a human rights remit that will encompass all four strands of the human rights remit that were identified by Rosslyn Noonan, who gave evidence to the committee. She talked about advocacy, harmony and diversity, discrimination and equal opportunities as the four main strands of its work. The number of staff who are employed by the existing bodies is expected to increase from 56 to 70. A significant number of those additional staff

will be employed in the field of human rights and will have responsibilities that will, I think, overlap with the responsibilities of the Scottish Executive's proposed commissioner. Meanwhile, the Scottish Executive has proposed to appoint five new members of a commission—some of whom may be part time—and additional support staff and to pay for premises to tackle just one of the four aspects. There is a fundamental question about overload, value for money and the clarity of what we are trying to do.

I draw members' attention to the design principles that were detailed by the Scottish public services ombudsman in supplementary evidence to the Finance Committee. She said that such principles should feature in any proposal for an additional body or office-holder. They were:

"1. Clarity of Remit: a clear understanding of the office-holder's specific remit

2. Distinction between functions: a clear distinction between different functions, roles and responsibilities including audit, inspection, regulation, complaint handling, advocacy

3. Complementarity: a dovetailing of jurisdictions creating a coherent system with appropriate linkages with no gaps, overlaps or duplication

4. Simplicity and Accessibility: simplicity and access for the public to maximise the 'single gateway'/'one-stop-shop' approach

5. Shared Services: shared services and organisational efficiencies built in from the outset

6. Accountability: the establishment of clear, simple, robust and transparent lines of accountability appropriate to the nature of the office".

None of those design principles, which should be applied to any new proposal in any context, applies to the linking of the proposals in question with the responsibilities and remits of the other relevant bodies—the commission for equality and human rights, which is the United Kingdom body that is being set up, and, in particular, the Scottish public services ombudsman.

My fundamental question is, do we need a separate body to be created to meet the requirements that have been identified? From the evidence that it has seen, the committee has identified the fact that there is a small gap to be plugged. I want to ask about appropriateness and the scale of the cost that is being applied. I have made reference to the 14 additional members of staff that are being appointed by the United Kingdom body. There are five human rights specialist posts, plus support staff posts. How many human rights people do we need in Scotland, given that the legislation that we pass is human rights proofed? In particular, how much advocacy activity is the public to be expected to pay for and on what basis?

I believe that there is an opportunity to do some advocacy work and I would accept the argument that we should find an appropriate mechanism to do that and that, perhaps, we should do that through the establishment of a commission that would guarantee the independence of that advocacy and advice. I question the idea that we need a separate body, costing at least £1 million a year, to take that forward. More than three quarters of that £1 million will be spent on staffing and overheads and less than a quarter will be spent on functional activity. That is the nature of such bodies and the cost of establishing a separate body.

Some clear issues have been identified by the Scottish public services ombudsman, amongst others, about the overlap of the proposed body's remit with hers. She feels that she has a human rights element within her work, as things stand. My proposal is not that the ombudsman should halve her time between human rights work and the ombudsman responsibilities; I suggest that housing the human rights advocacy function in the office of the ombudsman and making the ombudsman responsible for the human rights element and the ombudsman element would be a cost-effective way of taking forward the objectives of the bill and dealing with the gap that is there to be filled.

The bill does not require the new commissioner to share services or to make any use of the resources that are already available to the SPSO, nor does it deal explicitly with the potential for remit overlaps between the proposed body and the existing ombudsman. It is not just an issue of cost; there is an issue of confusion attached to the proposal. The basic requirement is that Parliament should be absolutely clear about what it is trying to do and that we should legislate appropriately. However, I think that there are too many unresolved issues involved in what is suggested. To some extent, I think that that was recognised in the committee's decision not to endorse the general principles of the bill at stage 1.

Some of the changes that have been made are welcome, particularly the decision not to appoint a chief executive. However, the fundamental issues, which are about shared services, clarity of remit, the overarching costs and whether they are proportionate to the need, have not been addressed.

The better course of action for the Parliament would be to make the responsibility of the commissioner for human rights a shared responsibility with the ombudsman. If that does not work, the position can be changed in two or three years' time. If we set up an alternative body with substantial additional costs that will last for an established time period—as a result of public

appointment procedures, people will be in place for five years—Parliament will restrict its capacity to put in place an appropriate, fit-for-purpose arrangement.

The opportunities for providing rationalisation have not been appropriately explored. Perhaps the proposal should not have been brought forward at this point, when there are many issues of uncertainty with regard to the equality and human rights issue. That aside, I think that my amendment 120 and the associated amendments will provide us with an adequate holding position that will allow us to deal appropriately with the human rights advocacy requirement. We will be able to do so in a cost-effective and proportionate way. There are very strong arguments for accepting the Scottish public services ombudsman's view that she could do that work and that her office would be the appropriate place for that work to be done.

I move amendment 120.

The Deputy Minister for Education and Young People (Robert Brown): Because of the summer recess, it seems a while since we discussed the issue. I am grateful to the convener for facilitating clearer debate on the nub of the issues than might have been allowed for by the accident of the way in which the amendments fell. For the avoidance of doubt, will I be allowed back in to speak on the substance of the commission?

The Convener: I need you to speak to your amendment 1 and the other amendments in the group. When you have done that, I suggest that we focus first on the public services ombudsman so that we can deal with any questions to Des McNulty. We can then focus any further debate on your amendments.

Robert Brown: So will I be allowed a second speech on the commission?

The Convener: Yes. I am totally flexible.

Robert Brown: It would be useful to consider the Scottish public services ombudsman separately from the debate about the architecture of the commission.

Nevertheless, I will set the initial debate in the context of the background to the proposal on the human rights commission and the stage 1 report and debate. The need for a separate body was approved by Parliament when it approved the general principles of the bill. That is the context in which we now operate.

The proposal for a human rights commission has been through a fairly long process. It has been the subject of two consultation exercises about the principle and the powers, leading to the commitment to the current bill in the partnership agreement of 2003.

The committee's scrutiny of the bill and the stage 1 debate centred on the governance and accountability of the human rights commissioner, but we all accept that there is an undercurrent of issues about the structure and relationship of all the commissioners; most of that does not relate specifically to the human rights commissioner. The Scottish Executive has responded to the issues that were raised by the committee and proposes to make significant changes to the proposed architecture and governance arrangements. Those changes meet the key concerns in full measure.

The commission format, operating within the strategic plan that was asked for by the committee, represents a substantial improvement to the bill and demonstrates the value of the committee's consideration of the matter and the committee system. That is the general point, to which I will return in more detail when we reach that part of the debate.

Des McNulty's amendments, which seek in effect to subsume the Scottish human rights commission within the structure of the Scottish public services ombudsman office, seem to be based on several fallacies. They prejudge a series of wider debates that the Parliament might want to have on the subject about appropriate relationships between a human rights commission and the other Scottish commissioners; about the crucial relationship with the Great Britain commission; and, above all, about the centrality of human rights concepts to the debate, which Des McNulty underplays.

We always envisaged that a human rights commission and the Scottish public services ombudsman would need to work closely together, but that there would also be close relationships with the other commissions. From the beginning, we have supported value-for-money arrangements for back-office functions, co-location with other commissions and other similar matters to which I will return.

First, I will deal with Des McNulty's point about the two human rights bodies. The commission for equality and human rights that he described is a GB body, which will deal with reserved functions; it will have little, if any, status with regard to devolved matters in Scotland. The commission was deliberately set up in that fashion against the background of knowledge of the proposal for the Scottish human rights commission. It is perfectly true that that could have been done differently. At the time, there was an argument for a United Kingdom or GB body that would have a role in Scottish devolved issues. The majority of the views that were gathered in the consultations went against that approach, which is why we are proceeding with the Scottish human rights commission as a body to deal with Scottish

devolved issues. It would have been possible to do it the other way, but that is not the way we are directing. To have no Scottish body at all—as implied by amendment 120—would lead to human rights being promoted to a lesser degree in Scotland than would be the case in England, Wales and Northern Ireland. That is very much the view of the GB body and its sponsors; it has left a Scottish-sized hole for the Scottish human rights commission.

10:15

I respect Des McNulty's long-held view on the matter, but I do not agree with him in respect of a number of detailed reasons and issues of principle, on which I would like the committee to pause for thought. First, the phraseology of Des McNulty's amendments does not reflect or sit well with the revised architecture of the human rights commission that I promised the committee and Parliament at stage 1 and which the Executive amendments will implement. I am in no doubt that the committee and the Parliament very much preferred the commission model to the commissioner one that Des McNulty's amendments seek to perpetuate.

Another fundamental problem with Des McNulty's amendments is the idea that the Scottish public services ombudsman, who already has a full-time and demanding position, should take on responsibility for the commission for human rights, which may well be similarly demanding. It seems contradictory to require the SPSO to take on the significant extra responsibilities that are envisaged for the commission for human rights while expecting her to continue to exercise her ombudsman duties on a full-time basis. There are only so many hours in the day. That aspect, which has not been explored thoroughly, would be fundamental and central to the way in which the commission would develop.

In addition, it is inconsistent with the principle of establishing a new post to stipulate that the post can be filled only by the holder of some other post. That proposal is certainly most unusual and must be, I suggest, on the edge of what is competent. In accordance with the principles governing public appointments to which the Parliament has committed itself—which aim to ensure accessibility to all public appointments and to encourage as wide and diverse a range of applicants as possible—the best person for the job should be appointed. Appointments should be based on merit in each case.

A connected issue is the qualifications that will be required for the post. Des McNulty's amendments make some rather extensive assumptions about the role of the Scottish public services ombudsman. Although her work involves

some application of human rights standards—she gave evidence to that effect—she does not claim to have, nor does she have, specific expertise in human rights. That is not her role. It is not intended that she should have that speciality, but such expertise is quite clearly involved in the role of the proposed commission for human rights. Similar issues arise in respect of the deputy public services ombudsman. In any event, it has been decided that the present deputy ombudsman should be reappointed for only one year, after which the role will be filled by SPSO staff. Therefore, there will be no deputy ombudsmen who could be appointed as deputy commissioners for human rights in the event that the bill was to continue to provide for a commissioner, rather than commission, for human rights.

Some of those problems—albeit not the problem of the ombudsman's expertise—could ultimately be resolved. However, a more fundamental problem is that, our view remains, only the creation of a separate human rights body can effectively fill the significant gap that will exist. In that context, it is worth noting that last week's report from Amnesty International, which concluded that many Scottish public authorities suffer from a lack of focus on human rights issues, called for more to be done to secure awareness and compliance. In evidence at stage 1, the public services ombudsman welcomed the bill and expressed her preference for the creation of a freestanding human rights body rather than the alternative of expanding her remit. In doing so, she noted the substantial differences between her role, which is reactive and focuses on individual complaints, and the proactive role of the proposed commission that will aim at more general issues. We need two different bodies for those two different roles. To say otherwise is a bit like saying that the specialist roles of orthopaedic surgeon and gynaecologist are interchangeable; they are not. It is not like that.

On amendments 122 and 124, we agree that the scope for the SCHR to share services, including premises and staff, should be fully explored so as to secure best value for money. To facilitate that, we have taken significant practical steps such as engaging in discussion with the ombudsman and her staff, the Scottish Parliamentary Corporate Body and the UK Government team that has responsibility for establishing the forthcoming GB commission for equality and human rights. All of that reflects the Executive's approach to public bodies generally.

We welcome both the increased attention that such matters have received during consideration of the bill and the wider review of accountability and governance of commissioners and ombudsmen that the Finance Committee, under Des McNulty's chairmanship, has recently

undertaken. However, it would be wrong for the bill to dictate a particular solution for those issues in the case of the SCHR. First, such a move would pre-empt consideration of other options that might in practice be more financially effective and would therefore prejudice our ability to achieve best value for money. In particular, that might be an issue because of the narrow straitjacket that Des McNulty proposes, whereby members of the SCHR could be drawn only from SPSO staff. That proposal seems to take no account of required qualifications for the role or, indeed, any of the operational requirements of the job of Scottish commissioner for human rights.

I am sorry to take some time over the issue, but it is important. A number of operational factors also need to be considered, especially the need for the SCHR to work closely with the GB commission for equality and human rights. That has led many stakeholders to call for the two bodies to be located in the GB commission's Scottish office, which is to be set up in Glasgow. In its stage 1 report, the Justice 1 Committee recommended that the corporate body give detailed consideration to the practical benefits to be realised from the co-location of the Scottish commissioner for human rights with either the ombudsman or the GB commission. We have worked with the corporate body to help to achieve that and believe that the process should continue, to enable all the relevant factors to be considered and options to be explored before a final decision is taken. This is a minor point, but in evidence to the Finance Committee the ombudsman said that she did not consider that shared services were necessarily dependent on co-location, because with the on-going development of web-based systems, to which she has made a considerable contribution, shared services can be managed efficiently and supplied across different locations. It is for the corporate body to take on board the options that exist.

Amendments 123, 125 and 126 relate to the bill's requirement that the Scottish commissioner for human rights have a chief executive. The amendments are unnecessary, because what they seek will be achieved by the new schedule 1 that will be inserted by Executive amendment 2, to which we will come later.

We have significant reservations about Des McNulty's proposal in amendments 127 to 129 that the commissioner should be the SCHR's accountable officer. The accountable officer's role is essentially to be the conscience of the organisation with respect to financial matters. It is important that the person who fills that role should have a clear responsibility, distinct from his or her normal line management accountability, to highlight any major problems, such as a significant breach of financial propriety, and, where

appropriate, to draw those problems to the attention of higher authorities such as the Auditor General for Scotland. Giving that role to the commissioner would remove an important control on the use of SCHR resources.

Finally, I will comment on the broader issues. I have no doubt that there is a wider debate to be had in due course, probably during the next session of Parliament, on the governance arrangements for both the commissioners and more executive-orientated bodies. As has been mentioned, a number of reviews in that connection are on-going. Those reviews may conclude that an amalgamation of functions has merit, although Des McNulty's promotion of the ombudsman's role is not the only game in town. Equally, they may conclude that there is merit in smaller bodies performing discrete functions and that amalgamation does not necessarily produce financial savings. That debate should not be resolved as a side issue during consideration of the bill, as there has not been an opportunity to test or argue for the centrality of human rights as a tool of analysis and a weapon for better government through experience of the role of the office of the Scottish commissioner for human rights. It is no accident that the case for a self-standing human rights commission has been strongly supported in a public letter in newspapers today—not just by the usual variety of human rights and equalities bodies, but by groups as diverse as ChildLine Scotland, Help the Aged, Scottish Women's Aid and the Church of Scotland's church and society council.

Des McNulty made a number of points about design principles, but I do not want to go into that issue in depth. I know that those points echo the Finance Committee's report and I do not disagree terribly strongly with them. However, I disagree very strongly with Des McNulty's suggestion that the Scottish commissioner for human rights does not meet the requirements. There is clarity of remit, which has been enhanced by the committee's work. There is distinction between functions—considerably more than between the functions of the ombudsman and those of a number of other bodies. There is distinct complementarity, especially with regard to the GB commission. The issue of possible co-location with the GB commission and the ombudsman is important, and the bill makes specific provision for that. The option of the ombudsman having an outreach presence in Glasgow in the office of the GB commission is still open for consideration by the corporate body.

This is a small point, but the bill provides for appointments for up to five years, not necessarily for five years. It is for the corporate body to decide, with some limitations, what the length of appointment might be.

I am sorry to have gone on at some length, but complex issues are involved. The central point that I ask the committee to bear in mind is that there is a considerable difference between specialising in human rights law and practice, which is what the human rights commission will be about, and the role of ombudsmen.

I hope that Des McNulty will take comfort from some of those observations and that he will withdraw amendment 120 and not move his other amendments, on the basis that the accountability and governance framework that the Executive proposes, together with the potential of the practical steps that I mentioned and the continuing liaison with the corporate body, will meet the substantive concerns that have been expressed about the human rights commission proposals.

Margaret Mitchell (Central Scotland) (Con): I regarded the bill as fairly horrendous to start with and I am appalled that the Executive has managed to propose to make it much worse. Value for money does not feature at all. The promotion of human rights and what would be in the best interests of people with a human rights issue have not been considered.

From the beginning of consideration of the bill, I have taken the same approach as Des McNulty has, which is that we do not need a commissioner and we certainly do not need a commission. We were catapulted into having the bill because of the Equality Act 2006 in England, which does not have a plethora of commissioners and which needed to establish a commission to address human rights issues. We in Scotland are in an entirely different situation, so the idea that not having a commission or a commissioner to promote human rights issues would mean less promotion is nonsense.

Value for money is nowhere to be seen in the Executive's proposals. The commission is to have five members. We do not know its cost, but it does not sound as though £1 million will be anywhere near enough. We will have staff, salaries, pensions, allowances and additional premises requirements. On top of that, the Executive has missed the opportunity to fund and engage with the voluntary sector—charities such as Shelter and those that deal with old-age pensioners. That sector has the expertise and experience to take up individual cases, which the bill would not allow a commission or a commissioner to do. That is an opportunity lost.

I agree entirely that the Executive's amendments are disproportionate to the problem and that there is a small gap to fill on awareness and promotion. The Scottish public services ombudsman would happily fit that role. When she gave evidence to the committee, she said that her remit could be extended. She might not think that that is the best way forward—who knows—but she

did not say that her workload would preclude that, because her office could staff up to deal with the role. In the circumstances, that would be the best way forward.

Convener, you will have gathered that I am more than happy to back Des McNulty's amendments. I hope that common sense will prevail in the committee so that we totally reject the minister's proposals.

The Convener: I imagine that members have questions for Des McNulty and the minister about their amendments. Since Des McNulty moved the lead amendment, questions about his proposals should be asked first, so that he can answer them. Questions about the minister's proposals can follow, after which Des McNulty will wind up.

10:30

Marlyn Glen (North East Scotland) (Lab): I will start from the same place as the minister did and remind the committee where we are. Parliament agreed to the bill's general principles and we are considering the detail of the bill at stage 2. It was helpful that the minister outlined the lengthy history of how we got here, because part of the problem is the long time that the process has taken, which has been unhelpful. In that time, the UK legislation has been passed, while we are not ready to pass our bill.

I reiterate that the UK legislation was designed to leave a gap. The Scottish Commissioner for Human Rights Bill is not a blind, knee-jerk reaction. We have not been forced into legislating. We asked for the UK legislation to be set out in a particular way so that we could consider devolved issues that involve human rights here in Scotland. It is extremely difficult to oppose that in the Scottish Parliament and to say that we do not want any control over such matters. Although I recognise that that is not what Des McNulty is proposing, I think that human rights are important enough to have a separate body to deal with them.

To underline the need for the promotion of human rights, I refer Des McNulty and the committee to the Amnesty International report that the minister mentioned. Entitled "Delivering Human Rights in Scotland", it deals with the performance of Scottish public authorities in that field and reveals that although the gap that we are trying to plug might be small in legislative terms, from the point of view of Scotland's public authorities' understanding of what action on human rights they are expected to deliver, the gap is immense and worrying. That underlines the bill's necessity.

I will now consider the detail of the proposals, which is what we should be doing at stage 2. The amendments in the name of Des McNulty seek to

push the human rights function into the office of the Scottish public services ombudsman, but adding on functions to an existing remit is extremely bad practice. We explored the idea at stage 1 and asked Alice Brown about it. We had a big discussion about putting the two services together, but the fact remains that it would not be a good fit to combine the human rights role with that of the ombudsman, whose function is to investigate complaints about the administration of public services. It would be difficult for people in the same office to cope with that tension.

The Finance Committee's report on its inquiry into accountability and governance did not consider the co-location of the SCHR with the Scotland office of the commission for equality and human rights, whereas at stage 1 we examined various options for co-location. Co-location is definitely a live issue, but I feel that what Des McNulty has proposed is certainly not the answer.

I appreciate the continued assurances that there will be an overall review of commissioners. Such a review would be a better way of meeting the Finance Committee's concerns on cost and efficiency and would be the right vehicle for clarifying the remits and working practices of commissioners throughout Scotland. Commissioners and ombudsmen have been set up in a piecemeal fashion and we need to draw back and assess the situation properly, but stage 2 of the Scottish Commissioner for Human Rights Bill is not the time to do that, so I will not be supporting the amendments in the name of Des McNulty.

Brian Adam (Aberdeen North) (SNP): I want to find out from Robert Brown and Des McNulty what impact their proposals are likely to have on the pool of human rights specialists in Scotland, which I understand is limited. A number of people in the voluntary sector provide such services, but the number of legal specialists in this area is extremely small. The point that the minister made about human rights being a specialised area might be important, but if we suck all the expertise into the commission and the commission spends three quarters of its money on administration rather than on the delivery of services, what services will be available? As a representative of the north-east of Scotland, I am well aware that my constituents have virtually no access to advice on European convention on human rights issues, which the commission will be expected to deal with. I seek a response on that.

Robert Brown and Des McNulty have approached the amount of overlap that will exist between the commission and the Scottish public services ombudsman from different angles. The minister acknowledged that, as things stand, there will be some overlap, but I want to know what his

proposals will do to reduce the amount of overlap and to increase the distinction between the different roles. I would certainly like to hear Mr McNulty's view on that.

I am not sure exactly what point the minister is making about qualifications. Is he suggesting that Mr McNulty's proposals do not specify what qualifications should be required of an officer in the public services ombudsman's office? Where is that kind of detail spelled out in the minister's proposals? Normally, such detail would appear in regulations. Is Mr McNulty's proposal deficient because it does not lay out the mechanics of the required qualifications?

I would also like the minister to elaborate on his statement that there is probably a greater distinction between functions in this case than there is between the functions of the Scottish public services ombudsman and those of the other ombudsmen, which might be more likely to overlap. Can the minister give examples of what he means?

Karen Gillon (Clydesdale) (Lab): I apologise if I ask questions that might be elementary, but I have come to consideration of the bill somewhat late, unlike many round the table.

The starting point for me is what we believe the Parliament agreed to at stage 1. My understanding is that the Parliament agreed to have a body to promote human rights in Scotland but did not agree what that body should be. That is why I voted at stage 1 as I did. Stages 2 and 3 are about the Parliament deciding what the body should be and how it should function.

I probably also start from the point that I do not share the view of many round the table that the GB commissioner could not have carried out their functions here in Scotland. Yesterday, Scotland's commissioner for children and young people commented on issues that are within the competence of the United Kingdom Parliament. In my view, there is no reason why the Scottish division of the GB commissioner could not have been allowed to comment on issues that are within the devolved competency of the Scottish Parliament. However, we are where we are.

I am probably drawn to what Des McNulty proposes, but I want to ask him a couple of questions. I am not sure whether I can support his amendments as they are, particularly those about the issue of staffing numbers for the commission within the public services ombudsman's office. My constituency work has made me aware that the office of the public services ombudsman—just one of the different names that we give to such bodies—is under considerable pressure from the current workload placed on it. I would probably be more sympathetic to Des McNulty's position if he

proposed an additional staffing resource for the ombudsman's office to help it to carry out the proposed additional functions.

On the issue of premises, I know that the general public around Scotland are concerned about the availability of ombudsmen outside Edinburgh. How would that concern be addressed if what amendment 120 proposes went ahead?

On the role of the Scottish public services ombudsman, how could we satisfactorily ensure that the ombudsman—or whatever they are called in the future—would be able to dedicate enough time to their two responsibilities, or to the additional responsibility, if we were to proceed in the way that is proposed? I would accept, though, that the additional responsibility is probably marginal.

Mr Bruce McFee (West of Scotland) (SNP): Frankly, I think that the bill and the amendments are a bit of a mess. I think that they were born from two compromises. The first compromise is that made between the Scottish Parliament and Westminster. We do not have full control of all our affairs, so we have created an artificial split under the heading of human rights, when in fact human rights should go right through everything that we do. The second compromise is that made between the Liberal and Labour parties when forming their coalition agreement.

Out of those two compromises has come, eventually, a proposal for one commissioner. This committee did not back that proposal. We could not back the general principle and we were concerned about overlap and cost. So what happens? The minister comes back and replaces the one commissioner with a commission that has a chair and possibly four other members. I wonder where we are going.

I did not serve as an MSP in the first session of the Parliament—and I was not particularly keen to come back for the next one—but it seems strange that the people who created all the tsars now seem to be railing against the fact that they did not set up any controls on their finances. The tsars were set up in a piecemeal fashion.

For the moment, we have to consider the principle rather than the detail. We are trying to deal with an area relating to devolved matters that the Executive originally wanted to relate only to the promotion of human rights—that was my understanding of the bill as introduced. So how best can that be done? I appreciate that the amendments in the name of Des McNulty might not be in the fullest of detail—that is probably why we have a stage 3 in the bill process—but we are being asked to decide on a point of principle. Do we set up a new organisation, with a chair and up to four members, or do we say that what we want

can be encompassed by another element of our system of tsars?

I do not find either of the two arguments especially convincing. If I have to choose between them—and I suspect that I will have to do so very shortly—I will have to choose amendment 120, if only to make the Executive rethink the issue more clearly. The Executive will have to resolve the piecemeal way in which the organisations have been set up. I have no great enthusiasm for Mr McNulty's proposal, but the Executive's proposal is even worse.

Mr John Swinney (North Tayside) (SNP): I thank the committee, of which I am not a member, for making me welcome. I am here to make a number of points on behalf of the Finance Committee. Now is probably the opportune time to raise these points with the minister, although I might raise them again after the minister has made further comments.

The Finance Committee is concerned about the Executive lodging a substantial number of amendments that will fundamentally recast the character of the bill and will have implications for the financial memorandum that the Finance Committee has already considered. We were originally asked to consider a Scottish Commissioner for Human Rights Bill, but as a result of the more than 100 amendments that the minister lodged about 10 days ago, we are now being asked to consider establishing a Scottish commission for human rights.

Having looked through the very detailed provisions in the amendments—for example, there is an entirely new schedule 1—the Finance Committee has asked me to relay its concerns and to ask the minister about the implications of the change in the configuration of the bill on the financial memorandum that we have already scrutinised and passed an opinion on.

The Parliament's standing orders are clear. Rule 9.7.8B states:

"If a Bill is amended at Stage 2 so as to substantially alter any of the costs set out in the Financial Memorandum that accompanied the Bill on introduction, the member in charge shall lodge with the Clerk, not later than the fourth sitting day before the day on which Stage 3 is due to start, a revised or supplementary Financial Memorandum."

I would like the minister to tell us whether it is intended that such a financial memorandum will be laid before Parliament in respect of the amendments that he has lodged.

The Justice 1 Committee will come to a judgment on the amendments in the name of Des McNulty and on those in the name of the minister. The committee should be given some sense from the minister—who is the member in charge of the

bill—of the implications of his proposals on the financial memorandum.

10:45

I could make a number of specific points about things that will have an impact on the financial memorandum. For one, we have gone from having one commissioner to having five members of a commission, but there is no direct, specific provision in the schedule for the remuneration of those members. There are also pension and allowances implications. The minister said that he has decided that there should be no chief executive, but subparagraph 11(1) of the new schedule 1 that is inserted by amendment 2, states:

“The Commission may, with the approval of the Parliamentary corporation as to numbers, appoint staff.”

It does not say that the commission cannot appoint a chief executive. The only thing that the parliamentary corporation can do under the schedule is to state how many staff the commission may have.

If I understand the process correctly, we will move on to a general debate about the issues later, but one of the Finance Committee's concerns is that there has been a proliferation of such bodies and that, at some stage, the Parliament will have to exercise its responsibility to judge whether we have got things right and what the money is delivering.

I turn to the point that Marlyn Glen and Bruce McFee made. In the Finance Committee's report on accountability and governance, which was published on 15 September, we told the Government that there should be a moratorium on expansion of the number of bodies until we resolve the issue. The issues that I raise with the committee today are ones that were raised by the Finance Committee. I would appreciate an answer from the minister on the financial memorandum and the likely financial implications of his proposal. We are concerned that the amendments that the Government lodged fundamentally recast the financial implications. We believe that the Justice 1 Committee is entitled to hear the detail before it makes a decision on the principle, which will then go back to the Parliament.

The Convener: To be clear, it is important to go back to the Justice 1 Committee's report. We considered at least three options—the lack of consensus led to that. It is important to mention that we did not endorse the general principles, although the Parliament did. The minister said something about the committee preferring the commission model, but I want to be clear about that. In our report, we said that we did not understand the logic of moving from the original

commitment to have a commission to the proposal to have a commissioner. We did not understand how we had got to that point.

Separately from that, the committee discussed the structural issues and how the human rights function would be exercised, but we came to no conclusions about that, not only because we were torn between the options but because we identified that there was only a small gap to be filled. We were concerned about duplication and about the number of commissions and other bodies that have human rights functions. In the debate, I and other members argued that, just because there is a GB commission and a gap is left, that is not a reason to try to fill it. I argued in favour of the devolution settlement and that has always been my constitutional position. We are not in the same position as England and Wales, so we have to try to shape something that suits our settlement.

The Parliament has a strong human rights function. The committee wrestles with human rights issues in relation to every bill that it considers, although it has been argued that access to specialist human rights knowledge would be helpful in the committee process.

The bill deals with the promotional role aspect of the human rights function. However the function is exercised, whether through the public services ombudsman or through a commission, having a strategic plan is vital. As a parliamentarian, I want to know where Parliament's resources are going to be spent. I believe in accountability as well as in some measure of independence for whoever is exercising that human rights function. However, it is not unreasonable that Parliament should be presented with a rough plan of where the human rights body or commissioner would want to go.

I would like to know how Des McNulty envisages the ombudsman exercising that function. I know that he is suggesting that the existing staff should be used, but how would that be done? Would they need a different type of training? Would they be ring fenced within the function of the ombudsman? What powers should the ombudsman have? My feeling, at the moment, is that we should stick with the promotional role, although I know that we are going to debate whether there should be other powers. Des McNulty talked about advocacy, and it would be helpful if he could say how the human rights function exercised through his model would operate.

The committee examined the public services ombudsman's current role in taking complaints from members of the public, but the Scottish Commissioner for Human Rights Bill envisages a different function, because there is no plan for people to take individual complaints to the commissioner. I am not sure whether Des McNulty

is suggesting that he would even out that function. If not, could he make it clear to the committee that there would be a distinction between the two roles? If a member of the public came to the ombudsman to talk about a complaint that was not necessarily human rights based, that would be okay, but if they were coming to the human rights department they would not, under the terms of the bill as drafted, be able to pursue a complaint. Does Des McNulty believe that that should change, or is he simply talking about the role that is envisaged in the bill, which is the promotion of human rights?

On the number of members of staff, I think that I am right in saying that the set-up would be a commissioner and two deputies under the bill as introduced and a chair and up to four members of a commission under the Executive amendments. I have some questions to ask the minister about who those people are. The amendment does not say that they are commissioners; it refers to up to four part-time members. I want to be clear about who appoints them.

I seek a guarantee with regard to the role of Her Majesty's chief inspector of prisons in Scotland, which is extremely important. I applaud what Andrew McLellan has done to highlight human rights issues and other rights issues—we can argue about whether they are human rights issues—in and around that field. In England and Wales, the role of the inspector of prisons has been almost demoted and I want a guarantee that that will not happen in Scotland.

The committee came to the view that if the bill is passed, the corporate body should at some future point address the question whether two of the bodies, or all three, should be co-located. I would like the minister to address John Swinney's question about cost implications—either savings or additional costs—attached to that. Members of the committee expressed the view that, whatever structure is used, they do not want a top-heavy structure with one person at the top—another chief executive. That would be a waste of money; I do not see why a small office, whether it is located with the public services ombudsman or whether it is a commission or another kind of institution, needs a chief executive. It might need an office manager, but the resources should be used to exercise the functions of the office, so I clearly do not want the body to have the power to create a top-heavy structure.

We need clarity on the issue. What is the function of a human rights person, whether the role is exercised through the ombudsman or through a commission?

I am interested in John Swinney's suggestion that there should be a moratorium to ensure that before we select a model we are satisfied that the

Parliament has made the right decision and that whatever model is chosen fits neatly with other bodies that have human rights functions.

At this point, I will let Des McNulty address some of the questions that were put to him.

Des McNulty: I associate myself with the comments that John Swinney relayed on behalf of the Finance Committee. The one point that I would like to add is that the Finance Committee did not call for a moratorium only in its most recent report; it did so some months ago.

To some extent, the fact that we are having this debate and the way in which it has gone underline the arguments for a moratorium and for not rushing into establishing the post. If issues are coming up to do with duplication, if there is a lack of consensus on the Justice 1 Committee and if there is uncertainty about the budgetary arrangements, it is questionable whether we are in a position to put in place good legislation. As a parliamentarian, I believe that we should be putting in place only good legislation. I take Karen Gillon's point that Parliament has approved the proposal that there should be a body to take forward human rights issues in Scotland, but the question is what the best method of doing that is. How can we minimise the tensions, contradictions and overlaps that have been pointed out?

My view is that the best interim step would be to link the role with the Scottish public services ombudsman. The best single argument in favour of that is probably the report that Marlyn Glen mentioned. If there is a lack of understanding of human rights issues in the public services, surely the office of the Scottish public services ombudsman—the body responsible for monitoring and dealing with issues that arise from individual complaints about the way in which public services work throughout Scotland—is the organisation that is closest to the situation and can best handle an advocacy role. There is a symbiosis between the ombudsman's complaint-handling role and an advocacy role. It would be a separate role, but the roles could usefully be combined.

Karen Gillon asked about additional staffing support. Additional staffing support would clearly be required. There would need to be some specialist support, be it one or two human rights lawyers, or one or two advocacy workers, or more. My suspicion is that the work could be achieved within the framework of the ombudsman far more cheaply and effectively than it would be by setting up a new and separate body.

On Robert Brown's comment that back-office functions have been taken into account, I do not believe that the Executive has addressed the issues of back-office support in either its first or its

second proposal, although I acknowledge that some modifications have been made

On the individual capacity of the ombudsman to take on the additional role, I accept that Alice Brown is busy and that she has a lot of complaint-handling work to do. I am not insisting that she as an individual should personally take on all the duties of investigating every human rights issue. In a sense, she would be a chief executive who is able to combine two roles—sorry, I mean that she, as a commissioner with two roles, would be able to allocate responsibilities to individuals to examine human rights issues. She would be the legal persona that would be accountable, but much of the work would be done by others. With adequate staffing and support, that role could be carried out by her far more cheaply than it could be by setting up an additional body.

11:00

Brian Adam referred to access in other parts of Scotland. I suspect that the worst thing to do in trying to create that access would be to set up a variety of different bodies, because they will all inevitably end up in either Glasgow or Edinburgh. If we created an ombudsman and human rights commissioner grouped together, the organisational format would provide more scope to spread some of the activity to other parts of Scotland. In her response to the committee, the Scottish public services ombudsman, Alice Brown, said that many of the investigatory skills in her organisation could be used in human rights work.

One important point that has not come out is the confusion for the general public. The more bodies with similar titles that we create, the more difficult it will be for people to find the one that they need. There is also the issue of circularity. Under the bill as it is set out, somebody who is not satisfied could go to the human rights commissioner or the ombudsman with the same issue, and the whole process could carry on for ever.

It seems to me that we are creating a potential monster. Brian Adam asked whether there are enough human rights lawyers. I do not know the answer, but I will put another question: should we, at the public expense, be finding them all jobs? That is an equally significant question. I presume that there would be a shortage at the UK level.

That gets us back to the issue of the significant gap. If there is a gap, the committee has already decided that it is relatively small and that the focus is on advocacy. How can that best be dealt with? I would argue that the best way in the present circumstances is to use existing organisations, identify a distinct role within them, and make the ombudsman legally responsible but in a

supervisory capacity, with the appropriate staffing support.

Parliament is in a difficult position, because many of the issues should have been resolved in principle long before now. I am just a member who is interested in good governance and value for money saying that there might be a better way. The onus is on the Executive to explain why the committee finds itself with a lack of consensus and clarity about the best way forward. My proposal in amendment 120 is modest, but it would provide better governance and value for money than the Executive's proposal.

The Convener: Have you had direct discussions with the ombudsman about whether she would adopt your model?

Des McNulty: The Scottish public services ombudsman has already responded to that question, and she would give the same answer now: it is for Parliament to decide how the responsibility is best dealt with. If Parliament decided that she should be involved, she would enter discussions on how that could work. She is not saying that her doing it is beyond question.

The Convener: I just wondered whether you had had any other discussions with her.

Des McNulty: I have spoken to her, and she repeated what she said to you.

The Convener: Minister, would you like to come back at this point?

Robert Brown: That would be helpful. I want to try to disentangle some of the overarching points. We are talking about a number of different issues that have been mixed up.

The first point is that the bill goes far further than other bills that have set up commissioners in dealing with issues such as co-location, control by the corporate body and staffing implications. It goes far further to take those issues on board, while bearing in mind the fact that it will be for the corporate body to sort out detailed matters, for example the appointment process, once the commission is established.

Coming in from the wing we have Des McNulty's amendments concerning the Scottish public services ombudsman. His proposal has not been consulted on, nor has it been subject to the Parliament's procedures. It is substantially different from the proposal that was consulted on, which attracted support from interest groups and received approval at stage 1. That is an important point. If Des McNulty's proposal were to be followed, evidence would need to be taken on all sorts of issues. Bodies would have to be consulted and their input would have to be requested.

The Executive is responding to the issues that were raised by the committee and others at stage 1. This is a somewhat lopsided debate, as it is concentrating on the Scottish public services ombudsman issue rather than on the Executive's amendments, but the architecture that we have suggested is a reasonable response.

Brian Adam's point about the spread of resource around Scotland is an important one, and it arises with a lot of Government and other bodies. There is an issue with Scotland having a relatively limited pool of human rights expertise. There are human rights lawyers, including advocates, solicitors and various kinds of independent specialists, but the pool is not inexhaustible.

It is wrong to say that three quarters of the budget of the human rights commission will go on administration. That is not the case at all. The guys who are appointed as commissioners will not just sit about doing nothing; they will exercise the functions of the commission. In the early days of the bill, there was an issue around the lack of a budget line for research and inquiries, but a good bit of such work will be carried out by the commissioner and the deputy commissioners themselves, as was proposed. Separating out the actual cost of the commissioners or the commission from the rest of the budget would create an artificial distinction. It is important that we have an idea of people's roles and functions, but separating out the costs in that way would be artificial, and it would not reflect the reality of the organisation as we would like it to be.

There is an important issue of expertise. It might not be necessary for all the commissioners to have a legal qualification, but it will be important for the commission to have the facility to call on human rights legal expertise. That is an important aspect of the bill. The human rights field is technical and complex, and it will be important that the commission is able to involve the proper expertise, in the same way as Alice Brown can provide expertise for the investigation of individual complaints.

Karen Gillon commented on devolved powers. I think that we have had the argument. We could have set up a body at UK level with responsibility for human rights, but the fact is that we did not. That was a deliberate response to the original consultation. There is no facility, broadly speaking, for the GB commission to involve itself in devolved inquiries. That is an important distinction.

Returning to the subject of expertise, Brian Adam's point about whether there are ways to make human rights expertise more readily available in different parts of the country might become an issue for the commission. However, that is nothing to do with the issue of the office, which is the least important aspect. It is more an

issue of resources, availability, accessibility and so on.

Bruce McFee talked about the commission having more people. We have never suggested that it should be a commission of full-time staff. The Executive's letter on the matter indicated that the chair of the commission will probably work full time, but that the other commissioners will not be full time. I think that the overall cost will be less than that of the original proposal for three full-time people. That falls entirely within the scope of the Scottish Parliamentary Corporate Body, which reflects Parliament's views.

John Swinney made an important point about the financial memorandum. I am aware of the standing order to which he referred. The Executive intends to produce an amended or supplementary memorandum prior to stage 3. That is appropriate, although it is probably not entirely necessary. The mainstream function of the commission and how it will operate will not be substantially changed by the architecture that we are putting around it.

The strategic plan offers a mechanism or process, rather than detail how the commission is to carry out its functions. Apart from the differences in salary arrangements—which are to the advantage of the Parliament—under the commission structure, it will not have major implications for the way forward. Nevertheless, we need to reflect on the Finance Committee's comments and respond as we can. Officials have continued to have detailed discussions with the corporate body, including discussions yesterday. We can provide the Parliament with information on that, which I hope will be satisfactory. However, the important point is that no change is intended in the overall budget—the Parliament is not being asked for more money or for a different total sum. The changes to the memorandum will be relatively marginal. They will try to reflect some of the comments that have been made and to clarify certain aspects.

If I may say so, Pauline McNeill made a relevant point in talking about Andrew McLellan, HM chief inspector of prisons. We have no intention of replacing, supplementing or overlapping with the work of the chief inspector. He has a particular role which, as the convener rightly pointed out, he carries out to applause from the surrounding multitudes. He obviously performs a sensible function. In many ways, the role of the chief inspector of prisons is an example of the role that the commission for human rights might fill, although in a more general way.

My final point on Des McNulty's suggestion is that, at the end of the day, when we have argued about the ins and outs, we could come up with proposals to co-locate any bodies. The Scottish public services ombudsman's role and function are

different from that of the proposed commission for human rights. The Scottish public services ombudsman is not expert in human rights and does not purport to be, although her work touches on aspects of human rights, as is the case with other ombudsmen. The commission for human rights will not carry out individual inquiries. Therefore, although an issue might arise about commonality of staff, that is not the main issue, because the commission will not deal with individual complaints, but will carry out the general promotional and general inquiry work that is laid out in the bill. There will be no change in that.

John Swinney made great play of the large number of amendments, but almost all of them relate to making the simple change from a commissioner to a commission. The proposed new schedule to which he referred will in large measure replicate the existing schedule 1, with appropriate changes and one or two other matters, which we will detail to the committee as we work through the bill.

We need to keep our eye on the ball. The committee has identified a devolved human rights gap, with which the GB commission cannot deal, that must be closed. That is the purpose of the bill and of what we intend to set up. If the committee and the Parliament do not move in that direction, a gap undoubtedly will arise in what we can do in the field of human rights, and Scotland will be the worse for it.

I am not sure whether I have missed anything, given that some complicated points have been raised.

The Convener: If you have, I am sure that members will ask you again.

Mr Swinney: The minister remarked on the increased provisions in relation to co-location. I simply point out to the committee that the provisions in amendment 2, which contains the Executive's proposed replacement for schedule 1, are no different from the provisions in recent legislation to establish other commissioners. I draw the committee's attention to an extract from the Audit Scotland report on the co-location of offices that was provided to the corporate body, which was critical of the fact that few opportunities have been taken to force co-location and of the fact that the Executive has taken little interest in it. I make that point to highlight that drift has occurred in the policy area that we are considering. At some stage, we will have to bring some order to it. We cannot keep adding to the confusion, duplication and lax attitude toward value for money. Somebody has got to introduce some order into the process.

The Convener: When you say somebody, do you envisage that being the Executive or the corporate body?

Mr Swinney: The committee has got to make that point and say that it is not prepared to pass the bill in its present form. The Finance Committee has said its bit, although the Executive is yet to respond to it. However, the Justice 1 Committee has to face the issue now. Through no fault of the committee, it must make the decision. I simply point out that many of the minister's arguments were about the strengthened powers on co-location, but those will not be new powers; they will be part of an architecture of which the Finance Committee and Audit Scotland have recently been critical.

11:15

Mr McFee: I will be happy to accept Mr Brown's criticism of my comment about the difference between the cost of a commissioner and two deputies in the first proposal and a chair of the commission and four commission members in the other if he can tell me what he anticipates the cost would be of the two proposals. If he says that I am assuming that one proposal is more expensive than the other, I presume that he has costed them. I do not think that he answered John Swinney's question, so will he tell me whether a new financial memorandum will be forthcoming?

Karen Gillon: I want to clarify exactly what the proposed commission will do. If I understand the minister correctly, it will not have powers of investigation. Who will investigate alleged breaches of human rights? I assume that the Scottish public services ombudsman has some role in that area and that the GB commission will also have a role. If the minister can answer that question before I ask another, it will help me to understand exactly who investigates breaches of human rights in Scotland.

The Convener: I will allow the minister to respond at this point.

Robert Brown: First, I say to John Swinney that I understand that the Scottish Commissioner for Human Rights Bill is the first bill setting up a commission or ombudsman to contain a provision on co-location. That new provision arose because the SPCB and others had concerns about their lack of powers over other commissioners in that regard. The phraseology has not been changed, but since stage 1 the provision has been supplemented by provisions on greater accountability. The new provision, which is in paragraph 10 of schedule 1 to the Scottish Commissioner for Human Rights Bill, does not exist in previous bills. It will give the commission

power over the location of its offices, subject to the approval of the SPCB.

Mr Swinney: I can read that, minister, but paragraph 10 of schedule 1 says absolutely nothing about co-location. The provision has been included in the most recent legislation to establish a commissioner in response to fierce criticism from Audit Scotland about the lack of such a provision, which is recorded in paragraph 155 of the Finance Committee's report of 15 September 2006. The minister says that reference to co-location is in paragraph 10 of schedule 1, but it is not.

Robert Brown: Allow me to finish my comments. I was going on to say that there is also provision to avoid duplication of functions; provision for the SPCB to have to approve the commissioner's budget; and—a point that I did not make earlier—provision to determine the terms and conditions of the staff appointed by the commission. Co-location might or might not be the absolute answer in some instances. There might or might not be space in existing premises or an opportunity, such as a break in a lease, to move to new premises. It is not necessary to include that specifically in the bill, although the committee might take a different view.

The bill, together with today's amendments, if they are agreed to, will confer on the SPCB sufficient powers to determine such matters and to exert considerable control over them. That is important. The provisions reflect some of the criticisms that have been made.

Bruce McFee spoke about costs. The financial memorandum includes figures for the salaries of the commissioner and depute commissioners as currently proposed in the bill. I think that the figures are £112,000 in the initial year and £224,000 in subsequent years. Under the proposed provisions, it is assumed that the chairing member will be full time and that there will be up to four other members of the commission, who will work perhaps 30 days a year. Although that is a matter for the SPCB, it is based on the experience of other commissions that operate in that kind of way. In that event, the cost will be £39,000 in the first year and £156,000 in subsequent years, which is a significant saving on the current provisions. I stress that the precise terms of appointment and the days involved will be for the corporate body to determine, based on the commission's requirements.

Karen Gillon asked who protects human rights. Human rights are embedded in Scots law, so they are defensible in court actions, which happens the length and breadth of Scotland all the time, in criminal and civil cases and in a variety of other ways. There is provision for people in individual cases to vindicate their rights in that fashion. In so far as the Scottish public services ombudsman's

work deals with issues relating to maladministration, there will be cases for which there is another remedy. One of the roles of the Scottish commission for human rights will be to conduct inquiries into the activities of public authorities and to determine whether they uphold people's rights in more general terms. There is a series of rights across the board. In education, for example, people whose rights to additional support for learning are thought to have been infringed have particular rights. There are appeal mechanisms that can lead to cases ending up in the courts. That will be the mainstream way of addressing such issues. It is not intended that even the GB commission will take on human rights complaints and follow them through by providing a remedy or support for an action. I stress that the GB commission will not have competence in respect of devolved issues.

Marlyn Glen: I welcome amendment 1 in particular, which addresses the criticism that the bill is trying to establish one person as the sole expert in human rights in Scotland. The Executive has improved the bill from that point of view. It is important that the committee recognises that we raised the issue and amendment 1 deals with it.

My question is about finances, and it relates to amendments 2 and 21. Amendment 2 states that annual expenditure proposals will need to be approved by the SPCB. I invite you now or later to indicate how that sits with amendment 21, which proposes a three-year plan. I am worried about possible conflict between the two provisions. The SPCB will consider annual expenditure plans, whereas the commission will be required to have three-year plans.

The Convener: Amendment 21 will be debated later, but you may address it now.

Margaret Mitchell: Minister, will you reflect on your comment that it would not be appropriate for the Scottish public services ombudsman to fill the role because that option was not consulted on? Does not that fail to take into account that, when issues are consulted on, sometimes the Executive totally ignores the majority of expressed opinions? Does not your assertion perpetuate a mistake?

You have made much of the possible substantial reduction in salaries. However, it is clear that we do not know how much staff, pensions and allowances will cost and what the implications for premises will be. Those matters have not been detailed and there are no firm proposals relating to them. Surely your assertion that it would be wrong to separate costs and functions is merely a euphemism for the fact that you do not have a clue how much the proposal will cost?

Karen Gillon: I have a couple of questions. If the commissioner, the commission or whatever we

call it were given permission to undertake human rights inquiries, on what subjects could it undertake an inquiry under section 6 that the Scottish public services ombudsman cannot cover? What agencies are not currently covered? I can find none.

Paragraph 7 of the proposed new schedule in amendment 2, which is on proceedings, says:

"The Commission may regulate its own procedure (including any quorum)."

Will all commission members require to be present when the quorum is decided?

Paragraph 12(3) of that schedule, which is on the accountable officer, says:

"Where the accountable officer is required to act in some way but considers that to do so would be inconsistent with the proper performance of the functions specified in sub-paragraph (2)(a) to (c), the accountable officer must ... obtain written authority from the Commission before taking the action".

Why are we to enshrine in law a provision that suggests that an accountable officer should be able to take action that is outwith their function?

Paragraph 13(4) of the schedule says:

"Sub-paragraph (1)(b) does not require the Parliamentary corporation to pay any expenses incurred by the Commission which exceed, or are otherwise not covered by, any proposals approved under sub-paragraph (2) or (3)".

which refer to annual accounts and any revisions. Paragraph 13(5) says:

"However, the Parliamentary corporation may pay those expenses."

Given that the Parliament has just been bitten on the proverbial backside by Scottish Enterprise for rather a large amount of money, why should we enshrine in law such a practice for the commission?

The Convener: I call Bruce McFee.

Mr McFee: My question would be better asked in relation to a later amendment, so I will hold it.

The Convener: I call the minister. I know that quite a lot of questions have been asked.

Robert Brown: We are getting into technical aspects; I will do my best to deal with the questions that I have been asked. Marlyn Glen suggested that a conflict might arise between the strategic plan and the budget proposals, but that is not so, because the two matters are separate. It is obvious that the strategic plan will have financial implications, but the plan will be at a fairly general level, which will be reflected in the budget. We should bear it in mind that the plan could be amended if need be, for example if discrepancies occurred. However, it will not be possible to

translate specifically from the plan to budgetary implications. Such a connection will not exist.

The corporate body and the Finance Committee will be interested in the budget for staffing requirements and other expenditure that will be needed. That will fall under the umbrella of the allocation that the Parliament makes to the new body. That partly answers one of Karen Gillon's questions. She talked about the accountable officer, accounts, audit and the ability to give approval outwith some circumstances. What she described is all standard practice in the arrangements that have been put in place in commissions and other bodies. The provisions are almost precisely replicated in the statute that established the Scottish public services ombudsman, so there is nothing new or unusual about them.

I do not know whether I can readily give an example of when the accountable officer might express the view that Karen Gillon mentioned; I do not believe that that has happened. However, I suppose that the accountable officer might have a view and that somebody else might have a different view. The only way to test that would be to have the matter reported to Parliament in some form. However, I do not think that that has happened. The provisions deal with an issue that is fairly unlikely to arise and have been expressed in terms that are standard not only among commissions but among similar executive bodies.

Karen Gillon asked about inquiries under section 6. I think that the position is still misunderstood. The public services ombudsman does not conduct inquiries into general aspects of the practice of public authorities; she looks into individuals' complaints of maladministration. She reports on those to Parliament, and that information is often useful in terms of more general issues arising out of it. However, she does not have a general inquiry power and I do not think that she would claim to have one—in fact, I think that she spoke about that in her evidence to Parliament.

11:30

One of the principal powers of the human rights commission will be the power to inquire into the policies and practices of particular public authorities. For example, a human rights adviser was called in to advise Carstairs hospital on how it carried out a range of its functions with regard to the human rights of the patients. A report was produced and the many changes that were made as a consequence led to the functions being carried out more satisfactorily. In fairness, that is an example concerning an individual body and the situation might not be quite the same under the bill when passed. However, it gives you an idea of the sort of thing that could be done by the commission

on a broader basis, in terms of applying human rights considerations to particular issues.

The Convener: I hear Karen Gillon saying that that is not the question that she asked.

Karen Gillon: I asked what additional organisations or institutions are included in the powers of the human rights commissioner that are not included in the powers of the public services ombudsman.

Robert Brown: Sorry, I misunderstood your question.

Karen Gillon: As we are talking about the possibility of giving the powers in the bill to the public services ombudsman, I would like to know what bodies are not currently covered by the public services ombudsman.

Robert Brown: It might be that the public services ombudsman has a wider role in terms of bodies. The Scottish Public Services Ombudsman Act 2002 lists the bodies that the ombudsman covers. The human rights commission is linked to the Human Rights Act 1998 and the powers that go with that. Section 17 of the bill defines a Scottish public authority as

“any other person who is a public authority within the meaning of the Human Rights Act 1998”.

That is the touchstone, as it were. As I understand it, the definition includes bodies that carry out functions on behalf of public authorities, such as bodies that provide services that have been tendered out. There is a fair degree of similarity between the roles of the two bodies, but the roles are expressed in different ways and there will be differences of detail.

Karen Gillon: It might be useful to have that detail before stage 3.

Robert Brown: It is in the bill and the 2002 act. The detail from our bill is here—

Karen Gillon: I take it that you are saying that no one who is not covered by the public services ombudsman is covered by your bill. I ask that with regard to the possible decision to give the power of inquiry to the public services ombudsman.

Robert Brown: I do not think that there is a significant difference in the bodies covered.

The Convener: That is our understanding. Whoever exercises the human rights function can exercise it in relation to the same types of bodies, as long as they come under the broad definition of what is a public body or a public authority. The role of the body with the human rights power would be to consider the application of the European convention on human rights and some other provisions emerging from other sources of human rights.

Robert Brown: That is right. The major difference is in the powers of inquiry that we propose. The ombudsman does not carry out inquiries in that sense at the moment. The function is substantially different.

The Convener: The inquiry power in the bill is stronger than the public services ombudsman's inquiry power.

Robert Brown: The public services ombudsman does not really have an inquiry power in that sense. She has a power to inquire into individual complaints, not into more general practices and policies of public authorities, which the commission would have.

The Convener: Since we started our consideration of the bill, there has been a lot of debate about the need to ensure value for money. The question of co-location relates to that as well as to efficiency. What is your view on having a stronger provision in the bill that would direct the SPCB to consider co-location more closely? I presume that the power would lie not with the Executive but with the corporate body, which would make the appointments.

Secondly, should the Parliament consider the commencement date? The function under discussion might be carried out by the Scottish public services ombudsman or it might come under this bill—and we might stick with the status quo or we might accept the Executive's amendments. However, whatever we do, we will have to make progress. Karen Gillon is right to say that Parliament has endorsed the idea that somebody should exercise the function, no matter how small the gap is. We are deciding who should exercise it, but we should be driven by the desire not to rush to get things done as soon as possible but to do things in the right way.

The commencement date will be important. Will you be discussing whether the date might now be later than originally envisaged? I do not think that there is a commencement date in the bill, but we can see a pattern. If Parliament gets to stage 3 by the end of the year, and if the bill is given royal assent at the beginning of next year, I would want us to ensure that the corporate body could exercise any functions that we give it in relation to co-location, public accountability and appointments.

Karen Gillon asked some detailed questions—and that is what stage 2 is for. Later, we will discuss further powers and we will have to be clear how the new body will function. Like Marlyn Glen, I am concerned that a single commissioner—which is what the bill as it stands would lead to—would feel duty bound to speak on every subject that fell broadly into the field of human rights, and would have no accountability,

no plan, no direction from Parliament and virtually no framework within which to work. Therefore, I am pleased that the Executive's amendments would lead to what I regard as a flatter structure.

Will the four appointments all be made by the corporate body, and will they be members of the commission? You have suggested that the role of deputy commissioners will include functions such as research. What kind of work will the other members of the commission—as opposed to the commissioner—do?

It will be important to have more than one type of member on the commission; it should be a collegiate body. Even if the function was given to the Scottish public services ombudsman, I would still be of the view that there should be accountability, some measure of independence, and a structure that allows me to see how people decide which human rights issues they take up. I would want transparency—whether we take up the Executive's model or Des McNulty's model.

This should not be about appointing human rights lawyers and human rights specialists. Of course we would expect to have such people on the commission, but there are trade unionists who, although not specialists in human rights, deal every day with trade union issues that are also human rights issues. I would like you to confirm that the structure that results from either the Executive amendments or Des McNulty's amendments will not just include a group of specialist human rights lawyers. We should ask the corporate body to ensure, through its appointments, that we get a range of people who have operated in the field.

Robert Brown: Those were all valid points. On co-location, I have already said that this is a new provision that has not been in any previous bill. We take the view that the power of the corporate body to control the matter also gives it power over co-location, if appropriate. Co-location might not necessarily be appropriate, but it might be. As I have said on a number of occasions, we have several options that depend on the direction of travel that the corporate body wants to take. I have no particular philosophical commitment to the present wording but given that we are not in a position to say specifically that the commission must co-locate with some other body because we do not know the precise staffing arrangements, the size of the facilities and so on—those are details that will have to be followed through during the implementation process—I am not persuaded that we can strengthen the current position. I am more than happy to consider and discuss it with the committee, but I doubt whether we can make it stronger in any practical way. The current phraseology gives the corporate body appropriate powers, particularly when put together with the

strongly expressed views of the committee and Parliament about avoiding duplication.

On the commencement date, we envisage that the body will be up and running by October next year, which is the commencement date for the GB commission. There is some logic in that, especially against the background of possible co-location. That is an achievable target when we consider the appointments process.

I have already expressed my long-held view that there are several debates to be had about the wider structures. I accept that a series of other agendas about the direction of travel of parliamentary commissioners and other executive bodies is swirling around the bill, and it is entirely appropriate that those debates should take place. However, the Finance Committee report went into the public domain recently and Lorne Crerar's report will come through in due course. The Procedures Committee has also done a report. The detail of those reports might or might not appeal to Parliament and other stakeholders in the field. They will require fairly wide consultation and those arrangements will take some time, bearing in mind the fact that the existing commissioners are in place and have premises, staff, powers, appointment periods and so on. The likelihood of any decisions being taken by Parliament about the broader structure—and I invite the committee to suggest that that is how it should be done—will not bear fruit for a little while yet. A lot of work will have to be done on the details.

That is not to say that we cannot take on board a series of issues about value for money, efficiency of operation and the sharing of back-office functions on which the corporate body has done a lot of work. I am not enthusiastic about the idea of the human rights commission, which will have been approved by Parliament by then, hanging about for an indeterminate period while all those issues are considered, but there is a wider issue and those decisions affect other commissions as well.

I think that I am right in saying that similar issues arose around the police complaints commissioner for Scotland—the committee will be familiar with that—and the Executive took a similar view on that. At the end of the day, a certain amount of sensitivity is required. We are dealing with parliamentary commissioners and commissions and they are not entirely matters on which the Executive should express a definitive view. It is a matter for Parliament to take such issues forward in appropriate collaboration with the Executive. The issue is wider than this bill.

On your important point about the types of member, human rights legal expertise in one form or another will have to be available to the commission. We envisage that the commission

structure will allow for several people with expertise or experience in other areas who can guide the commission. Experience of trade unions is a good example and there might be relevant people engaged in other areas of activity. That is linked to our later amendment about focusing on those whose human rights are not taken account of in the current situation, such as prisoners and others about whom there has been a lot of publicity. Deprived and excluded communities and individuals should be the focus of the bill. We will come to that amendment later, but it is important that there should be a reasonably wide spread of members in the make-up of the commission so that a variety of experience can be brought to bear.

11:45

The Convener: I want to rewind because I need to be clear about what you are saying. The decision about which model to go for is difficult. Under the Executive's proposals, the structure would remain the same, but I think that we need to make progress on it. I might be picking you up wrong, but it sounds as if you are saying that you want to stick with the 2007 date and that you do not think that it is for us to push co-location any further.

Robert Brown: I am not saying that at all. I am saying that co-location is central and that it can be dealt with under the current provisions. Indeed, discussions have taken place to facilitate the possibility of appropriate co-location. That option will be available to the corporate body when it comes to make appointments.

The Convener: That is fair enough.

The second issue is commencement. I received the Finance Committee's report only yesterday, so I have not got through it all yet, but I think that the Finance Committee's views on the matter are important. If you are saying that it is still the Executive's position that it wants to rush into implementation in 2007, I would be concerned about that. Is that your position?

Robert Brown: It is not a question of rushing into anything. As I have said, the commission has been consulted on for a very long time. Its structure fits in with that of the other bodies in the way in which I have explained. Space has been left for it in setting up the GB commission. Given that the GB commission will have a specific role in reserved matters and a Scottish office, it would be quite odd if it were to set up—

The Convener: If you are telling me that the door is closed on the commencement date, I will have to consider my position on the Executive's amendments.

Robert Brown: I am not saying that the door is closed on that.

The Convener: The GB commission is not the only issue. If I am right, the bill is likely to get royal assent in about March.

Robert Brown: If the stage 3 debate takes place in November, which I think is the plan, I would have thought that the bill would get royal assent earlier than that—perhaps in December or January.

The Convener: That would give us six or seven months to resolve issues such as value, accountability, appointments, co-location and where the commission fits in.

Robert Brown: Do not get me wrong—I am not saying that the commencement date is a closed issue. I am saying that, to date, the underlying assumption has been that the Scottish body would start its operation at the same time as the GB commission. The committee should remember that co-location is available as an option only until the GB commission makes its own arrangements and gets on with things. If commencement is delayed, one door on co-location may be closed.

The Convener: We know that the Scotland office of the GB commission will be in Glasgow and that the Scottish public services ombudsman is in Edinburgh. That illustrates why we did not resolve matters with the public services ombudsman. I would like all three bodies to consider co-location. All I am saying is that we have to put our foot down somewhere; unfortunately, it may have to be here. The Executive's intention on commencement is an important factor in how I will vote. I know that your preference is to proceed with the proposed date, but will you consider discussion about that at stage 3?

Robert Brown: Yes. It was not my intention to suggest that the door was closed on that; I was merely indicating the direction of travel. If the committee has particular views on the subject, we will listen to the committee and engage with it. However, I make the point that if the GB commission goes ahead and chooses its premises, which will involve a lease being signed and so on, that might close off one co-location option. It is important that we enact the bill at the proper time, if co-location is the direction in which we want to travel.

The Scottish public services ombudsman already has offices. I do not know what the terms of the lease are, when the break point is or what the space arrangements are, but it is my understanding that if there was to be co-location, new provision would have to be made to accommodate both the ombudsman's operations and the operations of the commission. That is why

there was interest in the suggestion that she could have a presence in the office of the GB commission in Glasgow. If that were possible, that would be an attractive option. Such issues should underlie the discussion about progress on implementation.

The Convener: I will allow some brief questions. After that, I will check that the minister has covered everything that he wants to say and will invite Des McNulty to sum up.

Mr Swinney: I have a comment on the final area that the convener raised with the minister, which I think goes to the nub of the issue of how things should proceed.

The Finance Committee wrestled with the issues in the report that we have just published in a genuine attempt to ensure that there was no duplication, lack of attention to value for money or congestion of infrastructure in the appointment of the commissioners. That was our ground. One difficulty that we encountered was an assertion made by various witnesses that once a body such as an ombudsman or commissioner is established, it is seen as an intrusion on their independence if Parliament says that it is going too far, spending too much money or locating its offices in the wrong place.

As paragraph 155 of our 7th report of 2006 states, Audit Scotland said to the corporate body:

"The optimum time for achieving efficiencies in shared services is generally when organisations are being established."

That point could not have come across more strongly than when we recently tried to say to various bodies that they were spending too much money and there was too much proliferation and overlap. Our experience was that the hands went up and people said that we were intruding on bodies' independence. Your point about ensuring that the system is right before it starts is central, because if it is wrong when it starts, it is next to impossible to get it under control afterwards.

The thinking behind the Finance Committee's recommendation that the Executive should consider a moratorium on the establishment of further bodies was to say, "Don't make the problem worse. Don't let any more horses out of the stable if we cannot get them back in." We all agree dispassionately that there is too much congestion in this policy area. There are too many players, and too much money is being spent. Once bodies are established, it is difficult to bring the situation under control without a suggestion that Parliament is intruding on their independence, which none of us wants to do. Your cautionary words about getting it right before we start and about the commencement date are the nub of the issue that the committee must wrestle with.

The Convener: May I clarify the Finance Committee's position? Do you mean that, once we make the strategic decision about how the function is exercised, we need to have a discussion about where that fits in the wider context of other commissions and bodies? Do you envisage that the corporate body, which makes the appointments, would have to consider asking another body to relocate?

Mr Swinney: Those are some of the practical difficulties that the corporate body would have to wrestle with but, in its defence, the corporate body will be exposed to the same allegation of interfering in the independence of bodies. For example, if it tells an organisation that it is located in the wrong place, it will be accused of intruding on its independence.

Our recommendation for a moratorium was designed to prevent the situation from getting worse and to advise the Government to let Professor Crerar's review, of which the corporate body can be part, consider some of the issues and try to make the architecture more transparent and efficient and less congested. Those objectives will not be served by adding into the mix another body that may have a stand-alone, distinct purpose. That reinforces the point that Des McNulty is making.

Karen Gillon: I have a question of clarification for the minister. I know that your position is different from Des McNulty's.

Robert Brown: That is reasonably clear.

Karen Gillon: Is my understanding right that, if we as a committee gave the general inquiry function to the Scottish public services ombudsman and wanted additional staffing—a deputy ombudsman—to perform that specific function, her remit would cover all bodies? Is it simply a question of the inquiry function and the promotion of human rights?

Secondly, you have yet to answer the specific questions that I asked you—you simply said that what I described has been standard practice in previous bills. I would argue that part of the Finance Committee's problem is that we—I am as guilty as anyone else—have not considered some provisions in bills in enough detail and that we have allowed far too much flexibility to organisations that are outwith the Parliament's financial control but for which it must pay money. I see the minister shaking his head. He might think that that is rubbish, but people are clearly saying that that is the case.

As convener of the Education, Culture and Sport Committee, I was responsible for taking through the Parliament the Commissioner for Children and Young People (Scotland) Bill. From then, I have learned salutary lessons about the details of bills

and the dialogue that must take place and, as a result, I am very concerned about the provisions in paragraphs 12 and 13 of the proposed new schedule that amendment 2 would introduce. I am thinking about my experience of Scottish Enterprise on the Enterprise and Culture Committee. Given that any money will come from the Parliament and not the Executive, I have not yet received any clarification of why provision should be made for people to prepare accounts and have those accounts updated as well as for extra expenses to be paid. If the Executive wants to make available extra money, that is fine, but any such money will come from the Parliament, not the Executive.

Robert Brown: The main point—which I think Karen Gillon accepts—is that the central player is the corporate body on behalf of the Parliament. I entirely accept that the corporate body has very general powers in that respect, but it is answerable to the Finance Committee.

The provision to which Karen Gillon takes particular exception says that the corporate body could pay certain on-the-edge or dubious expenses. It should be borne in mind that the operation of the commission, like that of any other commission or executive body, comes within the domain of the Parliament's budgetary provisions and the things that go with that. The Finance Committee's scrutiny, accountable officers and budgets are all important. The process has a structure of accountability—that is its whole point. I cannot envisage a situation in which the corporate body would decide to ask for money to make a payment in such a way, although I suppose that it might happen with some fringe issue. However, the provision applies in precisely the same terms for every commissioner or public body of that sort and—no doubt in a slightly different way—to the expenditure of executive bodies. The fact is that—

Karen Gillon: But do you not accept that the Parliament has had to pay money as a result of the actions of organisations such as Scottish Opera and Scottish Enterprise over which it has no financial control because it has been left with no option? In the light of the lessons that we have learned from the past, I am concerned about the bill's provisions.

Robert Brown: I do not want to enter into the issues surrounding Scottish Enterprise, but I understand that there could have been different options if another direction of travel had been preferred; however, other issues were involved. That is a different ball game in many respects because of the sheer size of the issue, but the reality is that any such body must stick within the budget that the Parliament has set it in order to meet its accountability and budgetary obligations. That is what the arrangements provide for. They

also make provision to deal with issues beyond that, although I cannot imagine the circumstances under which such issues would arise in connection with the bill that we are discussing. How to deal with such matters is very much at the Parliament's discretion, within the control of the corporate body and—in due course—within the control of the Finance Committee. In that context, we are certainly not talking about an out-of-control body.

The Convener: It would make sense to return to Marlyn Glen's question. She mentioned the budget and the strategic plan. You said that no conflict was involved, but should there be a relationship between the strategic plan and the budget? The strategic plan involves setting out areas in which money will be spent. If, for example, a mental health issue were thought to exist and the strategic plan says that research will be commissioned into the area, that suggests a likely budget. Whether the strategic plan should tie up with the budget may be worth considering.

12:00

Robert Brown: The strategic plan will feed into and be a foundation document for the budget. We should bear it in mind that we are primarily talking about a four-year strategic plan. Although the plan will feed into the budget, as I said, it will not translate readily into direct budget implications. For argument's sake, if it was said that in year 2 or 3 of the plan, research was to be undertaken into mental health, that would have to be tendered for or scoped out, but it would not translate into a precise figure. In the back of our mind would have to be the idea that one bit of research rather than 10 could be undertaken, because that would be manageable within the budget's broad parameters—that may be a matter of how long is taken to do the work or how it is staged. I do not see the formulaic connection between the strategic plan and the budget that your question suggests.

I will comment on John Swinney's observations about the commission's independence. I know something of that, as I served on the corporate body—as Des McNulty has done—from its early days, and I was responsible for commissioner issues. There is no doubt that we struggled with those issues, but in the more recent past we have had a developing view of Parliament's powers and position, greater willingness by the corporate body to exercise those powers and a considerable emphasis, which comes from the Finance Committee and others throughout the Parliament, on the accountability of those bodies to Parliament, certainly financially.

My personal view is that none of that interferes with bodies' independence, but the precise relationship has been governed by protocols and

agreements. That may well be the way forward, but under the proposals in the bill the corporate body would have much enhanced powers to flex its muscles—if need be—on financial and accountability issues.

I entirely accept that the optimum time for efficiency is the start but, as I have tried to say, such matters are mostly not for the bill. We have in place the mechanisms to enable us to act, and extensive conversations have taken place with the corporate body about the shape of implementation procedures and the direction of travel. We know a fair bit about all that at an official level, which will go towards smoothing out some of the issues. Perhaps we can provide the committee with a little more information on aspects of that; I will take official guidance on that. If that would help the committee's understanding of where we are going on some of the detailed issues, perhaps we could do something.

The Convener: I will take a brief question from John Swinney.

Mr Swinney: I am not sure whether the minister has thoroughly read the Finance Committee's report, which is an agonising document about the difficulties of resolving such issues. I am afraid that the picture that the minister paints of a superpowerful corporate body that has a suite of new powers to act is not one that I recognise from the evidence that the Finance Committee took.

The Convener: The committee is clear about the fact that we are trying to move on in the bill. However, I am sure that I am not alone in thinking that the bill does not go far enough. We will have to consider that at stage 3.

I ask the minister to summarise any points that have not been covered.

Robert Brown: I do not want to add much more. I suggest that a distinction exists between the arrangements in the bill, which will be significantly enhanced in comparison with those in other bills in the light of developing information from the Procedures Committee, the Finance Committee and others, and what may or may not happen to the general architecture and superstructure of bodies.

I am confident that, in implementing the arrangements in the bill, we can deal more satisfactorily with an awful lot of the issues that have been raised. However, if the commission is to fulfil the role that the committee has in mind for it, it must have both the powers to do that and the scope for the human rights element, which is central, to be at the forefront and not to be a by-blow of somebody else's provision. That is the big difference between my view and Des McNulty's: I do not see the human rights element as just a subsidiary part of the Scottish public services

ombudsman's operation. To be fair, I do not think that the ombudsman saw it in that way, either. She recognised several distinctions in relation to her powers and between how she and a human rights commission would operate.

We have had a wee bit of a lopsided debate because of the way in which it came forward. No doubt things can always be done differently, but I suggest that the phraseology and direction of travel that the Executive proposes is a much more satisfactory answer than the suggestion of the Scottish public services ombudsman taking over the function.

Des McNulty: I suppose that my task is to convince the committee that what I propose is better than the status quo—a standalone commissioner—or the Executive proposal, which is to establish a commission. I will make that point by drawing on some general features of the debate. When the Parliament passes legislation, it has a responsibility to be absolutely clear about what that legislation is intended to do, what remits it creates and how accountability is to be managed. The only conclusion that I can draw from the debate is that too many of those issues have not yet been satisfactorily resolved.

I am concerned—and the committee should be concerned—that there is a significant lack of consensus about the setting up of an independent commission with the proposed format. I believe that we should proceed only on the basis of a strong cross-party consensus and that we should have a great degree of clarity about how to proceed before we do so. I am not sure that we have those things. I do not think that many members of the committee, however they feel about the advantages and disadvantages of the proposals, feel comfortable with where we have got to.

The Finance Committee's view is clear. It believes that we should not proceed until we have sorted out the fundamental issues of financial accountability and accountability more generally. Some additional issues also come into play, including the concern about overlaps and duplication and the orientation of different bodies, which, as John Swinney said, are competing in a crowded field.

My proposal has the advantage of simplifying the position for the general public. The Executive's approach would add to the complexity of the terrain by creating an additional standalone body. My proposal would combine the functions with an existing body so that people who seek to get a human rights matter resolved will go to fewer different offices. The ombudsman has shown that she has the proven skills to take on the additional responsibilities. Some additional staff would be required, but there would be no requirement for an

additional receptionist, finance officer, human resources manager, specialist telephonists and so on.

Finance is an important issue. The public out there are interested in whether they get value for money. I am not sure whether they will be convinced by the number of angels dancing on the head of a pin, in terms of the independence or separation of bodies, if we can achieve the same outcome for significantly less money. I believe that we can do that by combining the functions of the proposed commissioner with those of the Scottish public services ombudsman's office.

Robert Brown added to the complexity of the issues in his responses to Karen Gillon's legitimate points about where the inquiry powers rest. The Executive needs to think carefully about that exchange because it did not contain great clarity. If I understood Robert Brown's answers correctly, they significantly added to the case for what I am suggesting.

My proposal is not fully worked out because, obviously, I do not have the resources that the Executive has. However, what I suggest is a pragmatic solution to how we should take things forward.

If the Executive wanted to pull back, rethink what it is doing and come back with a better proposal, I would be prepared to withdraw amendment 120. However, if the Executive intends to proceed with what it proposes, then what I propose should be at least given the opportunity to be considered alongside that, because I think that it has significant advantages.

The Convener: Are you pressing amendment 120?

Des McNulty: Unless the Executive says that it will go away and think again, I will press amendment 120.

Robert Brown: Just for the avoidance of doubt, convener, do I now speak to the main proposal on the commission? You indicated at the beginning that there would be a separate sub-debate.

The Convener: No.

Robert Brown: With respect, that is what you said. You said that there would be two separate debates, one of which would be on the ombudsman, and the other—

The Convener: Yes, that is why I moved to you. I allowed Des McNulty to answer questions in the first debate, and then I came to you. I asked you finally whether you felt that any issues had not been covered. The pressing of amendment 120 has now ended our consideration of section 1.

Robert Brown: I am sorry, but I thought you were referring to the on-going debate on the

ombudsman. That is my misunderstanding. I stood ready to explain the commission aspects of our proposal, which I still think need to be explained and dealt with.

The Convener: I thought you had done that.

Robert Brown: No, I had not. I was asked at the beginning to separate the two issues.

The Convener: Yes—that is why I went to Des McNulty, who summarised on the ombudsman. Then I went to you.

Robert Brown: I am sorry, but that was not clear to me. Perhaps that was the position—

The Convener: I took all the questions to you from committee members in relation to your proposal. I then asked you to come back on anything that was not covered.

Robert Brown: Yes, but I thought you were referring to the ombudsman proposal.

The Convener: Is there anything, then—

Robert Brown: I would like a brief opportunity to explain, if I may, the Executive's proposals on the commission, which is what I think should really have been the substance of the main part of the debate.

The Convener: Let me be clear. I will start from the beginning again. My feeling, as convener, was that there was a rather large bloc of amendments and that your amendments should be considered side-by-side with Des McNulty's because they are opposing proposals. Therefore, I made an informal suggestion that we should have a miniature debate around the issue of the ombudsman. We had that debate, in which most of the questions were directed to Des McNulty. In the second bit, most of the questions were directed to you. That was a way of separating out the debate to enable Des McNulty to answer his questions and you to answer yours.

I have to say also that I had to make a ruling as to whether Des McNulty's amendments are actually within the scope of the bill. The advice that I got was that they are on the borderline. I felt that, in the interests of the debate that we have just had, they should be included in the marshalled list. However, I point out for the record that I was given advice at stage 1 that to move from what is currently proposed in the bill to a proposal to follow the Scottish public services ombudsman model would be to go outwith the scope of the bill. That is something that I probably need to discuss again at stage 3.

I have allowed a lot of flexibility during the meeting. However, if you wish to speak now, you will need to be brief and address only points that have not been covered. I will still have to give Des

McNulty the last word. If he is satisfied with that, that is what I propose to do.

Robert Brown: I am grateful for that. I am sorry if there has been a misunderstanding on my part. What I wanted to do was explain the Executive's amendments a little bit.

In general terms, we are trying to create a commission instead of a commissioner. That really reverts to a proposal that was consulted on at an earlier point. In my view, that was actually a better way of drafting the bill. I was pleased therefore to support that aspect of the amendments.

Amendment 1 proposes replacing section 1 with a new section that would establish

"a body corporate to be known as the Scottish Commission for Human Rights".

Amendment 2 goes on to propose a new, revised schedule 1, which we have talked about. Most of the proposed new schedule would replicate the key provisions of schedule 1 as introduced, particularly those about office location, the number of SCHR staff, their terms and conditions of employment and approval by the Parliamentary corporation.

The Executive proposes other changes to the architecture of the commission, which we have also talked about. There would be a chair and up to four other members of the commission. I am not sure whether it is a major point, but I should explain that Her Majesty would appoint the chair on the nomination of the Parliament, which is similar to what happens with the existing commissioners. The Parliamentary corporation would appoint the other commission members, who could be either full time or part time. However, as I have indicated, we envisage that the chair would be full time and the other members part time, which is why I said that there would be administrative savings out of all that. We have proposed consequential changes because of that.

Incidentally, we think that the proposed method of appointment would make it a bit easier to go through the procedures than would a fully blown procedure involving a royal warrant.

We have also set out in paragraph 5 of proposed new schedule 1 the specific grounds on which commissioners could be dismissed, which could be done only if two thirds of those voting in Parliament voted for dismissal. That proposal came from the Procedures Committee report on the issue.

12:15

Proposed new schedule 1 would also do away with the requirement that the new body must have a chief executive. We have changed the provision by requiring that the SCHR's accountable officer

be a member of either the SCHR or its staff. The accountable officer would be designated by the parliamentary corporation. That would provide more flexibility.

As I mentioned already, we are also providing an explicit requirement—in paragraph 13(2) of proposed new schedule 1—for the commission to submit its proposed annual budget to the parliamentary corporation for approval. Again, that delivers on a previous commitment.

Other minor changes would bring the commission within the jurisdiction of the public services ombudsman and the information commissioner. Proposed new schedule 1 would simply provide those persons with the ability to investigate issues in the context of the SCHR. That is pretty much a fringe issue.

The 100 amendments that John Swinney mentioned would change the name of the new body from "Scottish Commissioner for Human Rights" to "Scottish Commission for Human Rights" and make other appropriate changes to the wording.

I thank the convener for providing me with an opportunity to explain the implications of some of the other amendments.

The Convener: Does Des McNulty have anything to add?

Des McNulty: I do not have much to add, as I have made my points about value for money and the overlap in remit.

My preference is still that the role of the new body should be combined with—not, as Robert Brown claimed, subsumed by—that of the public services ombudsman. In my view, that would not lead to any differentiation in status. I accept that issues of staffing and so on would need to be considered further if my proposal was accepted, but I will flesh out more of the detailed implications if my amendments are agreed to. In practice, however, that might rest with the Executive.

If amendment 120 is unsuccessful, I will need to consider the position in relation to future stages of the bill.

I press amendment 120.

The Convener: The question is, that amendment 120 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

McFee, Mr Bruce (West of Scotland) (SNP)
Mitchell, Margaret (Central Scotland) (Con)

AGAINST

Glen, Marlyn (North East Scotland) (Lab)
 McNeill, Pauline (Glasgow Kelvin) (Lab)
 Pringle, Mike (Edinburgh South) (LD)

ABSTENTIONS

Gillon, Karen (Clydesdale) (Lab)

The Convener: The result of the division is: For 2, Against 3, Abstentions 1.

Amendment 120 disagreed to.

Amendment 121 not moved.

Amendment 1 moved—[Robert Brown].

The Convener: The question is, that amendment 1 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Glen, Marlyn (North East Scotland) (Lab)
 McNeill, Pauline (Glasgow Kelvin) (Lab)
 Pringle, Mike (Edinburgh South) (LD)

AGAINST

Gillon, Karen (Clydesdale) (Lab)
 McFee, Mr Bruce (West of Scotland) (SNP)
 Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 3, Against 3, Abstentions 0.

I will use my casting vote, as I have always used my casting vote, in favour of the status quo. I am advised that that means in favour of the bill as it stands. Therefore, I cast my vote against amendment 1.

Amendment 1 disagreed to.

The Convener: I propose that we should stop there as it is clear that we will not get through the rest of the bill today and we have other business to consider, which we have already agreed will be taken in private, in relation to the Criminal Proceedings etc (Reform) (Scotland) Bill. I apologise to the minister and his officials, but we will need to return to the Scottish Commissioner for Human Rights Bill next week.

I imagine that members would like a brief break before we go into private session, so I suspend the meeting.

12:19

Meeting suspended.

Regulatory Framework Inquiry

12:26

On resuming—

The Convener: We are back in public session to deal with item 3, which concerns a Subordinate Legislation Committee inquiry. I had thought that we might have a brief discussion on our response to the Subordinate Legislation Committee's consultation on the draft report of its regulatory framework inquiry, but as we are running out of time I propose that we deal with the matter by correspondence. Is that agreed?

Members indicated agreement.

The Convener: We now go into private session.

12:26

Meeting continued in private until 13:22.

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