JUSTICE 1 COMMITTEE

Wednesday 27 September 2006

Session 2

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JUSTICE 1 COMMITTEE
† 34th 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

Robert Brown (Deputy Minister for Education and Young People)
Des McNulty (Clydebank and Milngavie) (Lab)

CLERK TO THE COMMITTEE

Callum Thomson

SENIOR ASSISTANT CLERKS

Euan Donald
Douglas Wands

ASSISTANT CLERK

Lewis McNaughton

LOCATION

Committee Room 6

† 33rd meeting 2006, Session 2—joint meeting with Justice 2 Committee held in private.

Scottish Parliament

Justice 1 Committee

Wednesday 27 September 2006

[THE CONVENER *opened the meeting at 10:30*]

Item in Private

The Convener (Pauline McNeill): Good morning. I welcome everyone to the 34th meeting of the Justice 1 Committee in 2006. I ask members to do the usual and switch off any gadgets, which interfere with the sound system.

Under agenda item 1, I invite the committee to consider whether to take item 5 in private. Item 5 is consideration of our approach to the Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill. Is that agreed?

Members *indicated agreement*.

Scottish Commissioner for Human Rights Bill: Stage 2

10:30

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

Section 1—Scottish Commissioner for Human Rights

The Convener: Amendment 149, in the name of Des McNulty, is grouped with amendments 150 to 164, 139 and 165 to 167. Pre-emptions are noted on the groupings paper. I have allocated about 15 minutes for the debate on the group; we must complete our stage 2 consideration today.

Des McNulty (Clydebank and Milngavie) (Lab): As you indicated, convener, the amendments in the group are linked. The focus of the amendments is to be found in lead amendment 149, which seeks to remove the reference in section 1 to the

"deputy Scottish Commissioners for Human Rights",

and makes provision for

"an acting Commissioner if … the office of Commissioner is vacant, or … the Commissioner is for any reason unable to act".

The other amendments in the group serve as tidying-up amendments; they remove references to the deputy commissioners and so on. In my view, the worst argument that can be made for having deputy commissioners is that they are required to provide an acting function. In making provision for acting arrangements, I have dealt with the issue.

The argument for not having a deputy commissioner role in the bill is twofold. First, having read the policy memorandum and studied the range of duties that are prescribed for deputies, I see no justification for their role—the workload is not sufficient. The minister said that the deputy commissioner positions may be part time and that having two deputy commissioners would not imply that there were three full-time posts. I appreciate that. Nevertheless, the Executive has not made the case for the posts. In the event of the bill being passed, three different commissioners will not necessarily be able to manage a greater workload than a commissioner acting with the support of staff could do.

In any event, it is bad practice for the bill to create three Crown posts. The Finance Committee's report "Inquiry into Accountability and Governance" reflects public opinion on the creation of tsars. One of the problems with the bill as it is drafted is that three tsars for human rights—a commissioner and two deputy commissioners—will be appointed. That practice has not been adopted in other legislation. It would be better for the bill to create only the post of commissioner for human rights and not deputy commissioners, for whom there is no justification in terms of workload.

Secondly, I refer the committee to the comments that John Scott made in the chamber two weeks ago on the reappointment of deputy ombudsmen. He said that the experience of the Scottish public services ombudsman since the passing of the Scottish Public Services Ombudsman Act 2002 was that the deputy ombudsmen posts led to a lack of flexibility. The posts are not required in the management structure of the ombudsman's office. The express will of the Parliament, in agreeing to the Scottish Parliamentary Corporate Body's motion, was that the deputy ombudsmen posts should continue for a further year, with a view to their abolition and replacement in due course by staff appointments.

It seems to me that the experience in the SPSO's office is likely to be reflected in the context of the human rights commissioner. We have an opportunity, while the bill is being considered at stage 2, to get rid of the problem or to avoid its arising by making provision for the appointment of staff, rather than deputy commissioners, to work for the commissioner for human rights. That would give maximum flexibility and adaptability with regard to workload, and would put the minimum onus on the commissioner's office in making the appointments and on the SPCB and the Parliament in creating the posts.

Those are the two arguments: there is no workload and nothing to demonstrate that the posts are required; and the evidence from other offices is that the creation of deputy posts causes problems. In that context, it is better to allow for the provision of staff, which amendment 149 and the subsequent amendments would do.

I move amendment 149.

Stewart Stevenson (Banff and Buchan) (SNP): When the convener of the Finance Committee brings to us his experience, and the experience of that committee, of drawing things up efficiently and effectively, we should listen carefully. I know that we, on this committee, like to get lots of bangs for our buck but in this case we can see lots of bucks but not many bangs. With the right person in post, the modest responsibilities that the bill creates for a Scottish commissioner for human rights could be discharged without too many people joining the public payroll.

We must remember that this is a parliamentary appointment and that it should, therefore, be lifted out of the hurly-burly of party politics. Whatever the future complexions of Parliament and Government, we all carry responsibility for this. I therefore commend the efforts that Des McNulty has made to slim down and focus what the bill will create. I will support amendment 149.

Mike Pringle (Edinburgh South) (LD): I am sorry that, as a result of what happened last week, we are again talking about a commissioner. I hope that the Executive will seriously consider, at stage 3, reverting to what we discussed last week—the idea of a commission.

I disagree with Des McNulty. The deputy commissioner posts would be part-time posts, and it would be important to have somebody who could be available—even on a part-time basis—to stand in when the commissioner, if there was only one, was conducting an inquiry under the power in section 5. He might be conducting a serious inquiry into one public authority or another, which might be taking up a considerable amount of time. After that, under section 9, he would have to write a report, which would be extremely onerous and would also take up a considerable amount of time.

While the commissioner was doing all that, would nothing else be happening? If other issues came to his office, it would be only right for there to be somebody there to stand in for him who was able to take on the workload and the responsibility and who had the respect of the person who went to the office. I think that there should be deputy commissioners and I will oppose Des McNulty's amendments.

Margaret Mitchell (Central Scotland) (Con): I take the opposite view. I regret the fact that the amendment to give the functions to the Scottish public services ombudsman was defeated last week. However, we are where we are.

Des McNulty's amendments are eminently sensible. No case has been made for the proposed number of deputes with regard to the workload that will be connected with the commissioner's awareness-raising and promotion functions. From the experience of the Scottish public services ombudsman, for whom deputes were created, whose abolition is now being considered, it is clear that those functions could and should be performed by staff. I welcome Des McNulty's amendments, which are sensible and constructive, and I will support them.

Mr Bruce McFee (West of Scotland) (SNP): My problem with the bill is straightforward: it is

neither fish nor fowl. I will be minded to support Des McNulty's amendments if the minister tells me that the powers that the commission or commissioner will eventually exercise under the bill are how the Executive sees the situation panning out. The bill seems to propose a cumbersome structure for the powers that the commissioner will exercise, and some powers that I would have expected to see in a proper human rights commissioner bill are not there.

The problem is that we have the structure for one thing but the powers for another. Does the minister intend to lodge amendments at stage 3 to address the powers of the commissioner to inquire into individual cases and to expand the role of inquiries? That would perhaps justify the structure that is proposed. At the moment, the bill is clearly a compromise between the two coalition parties. As a consequence, it is neither one thing nor another—it is a mess.

Mrs Mary Mulligan (Linlithgow) (Lab): I listened carefully to Des McNulty and I think that he made some relevant points, especially about the experience of the ombudsman's office in which the post of deputy exists. Unfortunately, I was not here last week, but I agree with Mike Pringle: I would have preferred to be discussing a commission, rather than a commissioner, this morning. However, we must respond to what is in front of us.

I would prefer the commissioner's office to have a flatter structure. That issue has been part of the discussion that the minister has had with the committee. I am, therefore, interested to hear from the minister the reasoning behind the creation of the post of deputy. Given the fact that there are so few appointed positions, it seems a bit like overkill. Why does the Executive still think that it is necessary to have deputies identified, instead of enabling the commissioner to bring in people to work on the relevant human rights issues as and when they see fit?

The Convener: Perhaps the minister will confirm that the bill provides for up to two deputies. Who would decide the number of deputies? Would that decision be made in consultation with the Scottish Parliamentary Corporate Body or would it be a matter for the commissioner?

Like Mary Mulligan, I would prefer the commissioner's office to have a flatter structure, as was discussed at stage 1. For me, that would be key to the operation of the body. If at any point we are going to head in the direction of having a commission rather than a commissioner, we need to look at the members of the commission and what powers might be vested in them.

I acknowledge Des McNulty's point that the climate in which we are discussing the bill is different from the climate that has existed in past years, because of the need to rationalise and tidy up the number of commissions that we have, while recognising the element of financial accountability that goes with that.

The Deputy Minister for Education and Young People (Robert Brown): Members have made a number of genuine and relevant points. To an extent, the debate is a rehash of some of the issues that we covered last week, albeit with a new set of amendments from Des McNulty to a rather different effect. Last week, Des McNulty wanted to appoint the deputy ombudspersons as deputy commissioners; today, he proposes to do away with them altogether. Although I appreciate that he is trying to deal with some of the implications of the view that he and the Finance Committee take on such matters, that shows some of the problems that we have in trying to deal with such issues piecemeal rather than as part of a review of the commissioners as a whole. I think that that is the better way that Parliament will need to take in due course.

I will deal with the commission point first. Ministers will have to decide before stage 3 whether to return to the option of establishing a commission rather than a commissioner, which the committee rejected last week on the casting vote of the convener. The proposal was promised at stage 1 and was brought forward in response to the expressed view that there should be a more collegiate structure to the body. It is linked very much to the issue of the strategic plan, which we will consider later this morning. Whether or not we return to the idea of a commission at stage 3—I hear the voices in favour of that—it would be a retrograde step to leave the commissioner in splendid isolation, without deputies, whom we thought could be full time, but who would more likely be part time.

10:45

Several other points arise. The absence of deputies could make the human rights commissioner less representative of different interests in society, a problem that bedevilled or concerned the committee at stage 1. The United Nation's Paris principles state that the plurality of society should be reflected in the membership of the organisation. We have endeavoured to stay within those principles in the bill, but that would be less likely if there were a single office holder. Also, dispensing with deputies could make the commissioner less accountable internally and more of a perceived single source of expertise externally, which I know concerns committee members. Another issue that has been touched

on, although it is not the main one, is that removing the provision for deputy commissioners would probably not in practice deliver significant cost savings, because the tasks that the deputies would undertake would have to be done by staff instead, so additional staff might be needed.

We are conscious of the Parliament's recent decision not to reappoint deputy Scottish public services ombudsmen beyond a further year. However, that does not mean that having deputy ombudsmen is now thought to have been a mistake at the beginning of the office's existence. In seeking the Parliament's agreement to the decision, the Scottish Parliamentary Corporate Body recognised expressly the valuable role that the deputy ombudsmen have fulfilled in getting the SPSO's office up and running. It is important to stress that the deputy ombudsmen's main initial role was to assist the ombudsman in establishing her office by providing knowledge and expertise of particular sectors. That was against the background of the arrangements that were being put in place to unify several functions.

Deputy commissioners for human rights could make a similar contribution, at least in the short term. It is sensible to give the Parliament the option to decide whether to appoint deputy commissioners, probably following consultation with the commissioner. As has been said, the power is a permissive one that will allow up to two deputy commissioners to be appointed. The Parliament would not have to appoint deputy commissioners, but it is important to have the flexibility of an option to do so, particularly during the establishment of the office and against the background of the wider role or remit for the senior body, whether or not we have a commissioner. That would be a decision for Parliament to make in the light of the prevailing circumstances, whereas Des McNulty wants to rule out the option completely from the outset.

On a point of detail, it is important to note that amendments 158 and 164 would go further than the existing provisions in the bill and the equivalent provisions in the Scottish Public Services Ombudsman Act 2002 by restricting appointment as acting commissioner to members of the commissioner's staff. Des McNulty rightly included provision for that eventuality but, under the bill at present and the 2002 act, any person could undertake the role. Members of staff might well assume that role, but there is a need for flexibility and an ability to deal with the situation appropriately and as the circumstances warrant.

Des McNulty and committee members have made several interesting points, but it is important to say that the office of the commissioner for human rights will be different from that of the public services ombudsman, with different purposes and requirements, and it will be at a different stage in its development. I am not convinced that the proposed changes would deliver meaningful improvements in the governance and accountability of the Scottish commissioner for human rights. In some ways, they take us back to issues with which the committee was concerned earlier.

On the other hand, some of the aspects that have been raised have merit. One reason why the Parliament reconsidered the appointment of deputy Scottish public services ombudsmen was the concern that having several Crown appointees in a relatively small office might be somewhat top heavy. A case could be made for revisiting the issue and considering whether the deputy commissioners for human rights could be appointed by the SPCB. That point was taken on board in the proposed new schedule that would have proceeded in the direction of a commission. We want to revisit that, because it is not necessary to appoint deputy commissioners through the panoply of Crown appointments. I am more than happy to consider that further.

I am not certain that Des McNulty's amendments in the group address properly all the consequential effects of deleting the provision on appointing deputies. Nor am I certain that there would be no undesirable practical effects. I want to consider that in detail. In short, I would like to consider the comments that have been made about the structure. Some of them have merit, but we want to consider their implications. We also want to consider what to do about the idea of having a commission rather than a commissioner. I hope that against that background, and bearing in mind that we are seeking the best governance arrangements for the SCHR, Des McNulty will be prepared to withdraw amendment 149.

Further issues arise from what members have said in the debate. Bruce McFee made an interesting point about setting up the structures for one body but providing the powers for another. I do not agree with him on that. The structure that will be in place will enable the commissioner to do many important things to promote and propagate human rights and to deal with inquiries. The power of inquiry is quite wide ranging and can involve a series of issues around the practices and operation of Scottish public authorities. That power is not trivial, and the committee has made it clear that it wants to operate it within a structure. The deputy commissioner, if we have the commissioner structure rather than the commission structure, will provide a bit of balance and breadth to the arrangement that would not otherwise be there.

Mary Mulligan and other members spoke about having a flatter structure. What we propose is not

particularly onerous, especially if we think in terms of part-time appointments, flexibility and Parliament's ability to decide whether to have the deputies in the light of experience and discussion.

The SPCB is central to the implementation arrangements. I am sure that, in its decisions, the corporate body will reflect on the conversations that have taken place throughout the passage of the bill. We expect the SPCB to consult and take guidance from the commissioner if the appointment goes ahead.

The issue of staff requirements and the role of the deputy commissioners would be taken on board in that context. My plea to the committee is to leave the flexibility in the bill—to leave the options available—on the understanding that some of the practical implications for Crown appointments and governance arrangements will be returned to. We would like to look into those arrangements a bit more. I hope that the committee will not agree to Des McNulty's proposal to delete the references to deputy commissioners from the bill.

The Convener: I want to be sure about this matter before we vote. It is a matter for the corporate body, albeit in consultation with the Scottish commissioner for human rights, whether to appoint any deputies. It does not have to do so.

Robert Brown: That is absolutely right. It also has powers over staff numbers and conditions, as we discussed last week.

Des McNulty: I appreciate the minister's difficulty in having to argue for a bill that he does not necessarily believe in. Many members of the committee are in the same situation. The minister argued for a commission approach but, as a result of the position that was taken last week, we are left with a bill for a commissioner. I can try to amend only the bill that is in front of me and the minister can discuss only the bill that is in front of him.

The case that I have made for not having deputy commissioners seems to be strong. Nothing has demonstrated that there would be sufficient workload to warrant two additional commissioner posts. There is nothing in the policy memorandum to indicate that, and there is nothing in the bill's scope that positively makes the case.

Mike Pringle mentioned nothing happening should the commissioner be otherwise occupied. That point is spurious—if that were the case, the Scottish public services ombudsman would not have been quite so keen to go down the route that she suggested. She is not suggesting that nothing will happen if she is engaged on a particular task.

My suggestion is that there should be a commissioner with a specialist task, part of which will be advocacy. A skilled public relations person or advocate might be required, but they need not necessarily be a lawyer. Different skills might be required. We should allow for flexibility not by having deputy commissioner posts, but by allowing the commissioner to work out his or her plan and strategy, to identify the workload that needs to be handled and to appoint staff accordingly, subject to the approval of the SPCB and based on the strategic plan. That would give the SPCB a much more significant and appropriate role than the minister proposes. If we specify in legislation the appointment of two deputy commissioners, it will be difficult for the SPCB to argue in principle about the appointment of those posts and it will not be able to have a genuine debate about the workload.

The fundamental point is that the bill asks us to appoint three additional commissioners when the Finance Committee has argued strongly for a moratorium on such appointments. I appreciate that the minister disagrees with me about the commissioner for human rights. To be seen to argue for the commissioner plus two deputy commissioners compounds his problem and I seek to extract him from that situation.

The minister said that the commissioner would be unable to deal with his responsibilities under the Paris principles if he were left on his own. The relevant point is that the Scottish public services ombudsman has made it clear that she can meet her responsibilities under the Paris principles without deputy commissioners, so I do not see why the commissioner for human rights would be unable to do so.

If, as many committee members agree, we need a flatter structure, the logic of that position is not to approve the deputy commissioner posts. Given where the bill is, there are strong arguments for my amendment 149, which I will press.

The Convener: The question is, that amendment 149 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)
Stevenson, Stewart (Banff and Buchan) (SNP)

AGAINST

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

The Convener: The result of the division is: For 3, Against 4, Abstentions 0.

Amendment 149 disagreed to.

Section 1 agreed to.

Schedule 1

SCOTTISH COMMISSIONER FOR HUMAN RIGHTS

Amendments 150 to 153 not moved.

The Convener: Amendment 133, in the name of the minister, is grouped with amendments 134 to 137, 131, 138, 132 and 140 to 142.

Robert Brown: The Executive amendments in the group will implement commitments that the Executive gave at stage 1. They take into account the committee's concerns at stage 1 and issues that the Procedures Committee and the Finance Committee raised about commissioners generally. Members will be aware that we have taken such matters on board where possible. The amendments will make significant improvements to the architecture of the proposals, by which I mean how the commissioner will relate to Parliament and the structures in which the commissioner will do his or her work.

Amendment 133 sets out the grounds on which the commissioner can be dismissed and provides that a parliamentary motion for dismissal of the commissioner will require support from at least two thirds of those who vote. Both those elements reflect the recommendation of the Procedures Committee in its report on Crown appointments. That issue has arisen in discussion about other commissioners.

Amendments 134 and 140 change references to the commissioner and deputy commissioners receiving a "salary" to "remuneration". That will reflect the fact that they will not be employees of the Parliament or the Crown.

Amendment 135 removes the provision in paragraph 4 of schedule 1 that prevents the commissioner and deputy commissioners from holding other offices or employment without the parliamentary corporation's consent. Arguably, the removal is not strictly necessary, but it is proposed to avoid any implication that the post of commissioner or deputy commissioner will be expected to be a full-time appointment as a matter of course. The time commitment that is expected of the commissioner and deputy commissioners will, of course, be for the Parliament—specifically, the corporate body—to determine.

11:00

Amendment 136 introduces a new sub-paragraph that states that the commissioner must

"have regard to the desirability of sharing premises with another public body"

when determining the location of his or her office premises. Compared with Des McNulty's amendment 131, I believe that that strikes the right balance by ensuring that co-location options will be considered without dictating any particular solution before specific and costed options are considered.

Co-location may not be the only or best option, although, as I explained at last week's meeting, we have taken steps to make it a viable option for the SPCB to consider. In any event, the question is one of the effective, economic and efficient use of resources rather than just the "benefit" to the commission, which is the term used in Des McNulty's amendment. I respectfully suggest that our amendment 136 is more focused, although obviously I do not disagree with the thrust of what Des McNulty is trying to do.

Amendment 137 is consequential on Des McNulty's amendment 123, which was debated last week. I would like to talk briefly about amendments 123, 125 and 126. I undertook at stage 1 to lodge amendments to remove the statutory requirement for the SCHR to have a chief executive. Those changes were contained in the new schedule 1 that we proposed in amendment 2, which was withdrawn following last week's decision on the commission issue. Amendments 123, 125 and 126, which were lodged by Des McNulty, who got ahead of us, were debated last week and achieve the same effect. I propose to support them and ask the committee to do so too.

Amendment 138 reflects our agreement to remove the requirement that the chief executive be the accountable officer. Instead, the parliamentary corporation will be required to designate the commissioner, a deputy commissioner or a member of the commissioner's staff as the accountable officer.

Des McNulty's amendments 127 to 129 would make the commissioner the accountable officer. I explained last week that I have significant reservations about that proposal, which I still believe should not be specified in statute. In particular, amendment 129 would remove the obligation on the accountable officer to notify the Auditor General if he or she were required to act in a way that was inconsistent with his or her obligations. That is an integral part of an accountable officer's function of ensuring financial regularity and propriety. I am sure that the committee has come across it before, and a provision similar to paragraph 12(3) in schedule 1 appears in the Scottish Public Services Ombudsman Act 2002.

Amendment 138 provides a much more flexible alternative to Des McNulty's amendments, giving the parliamentary corporation the power to designate whom it believes to be the most appropriate person as the accountable officer and setting in place the appropriate checks and balances.

Amendment 141 adds a new explicit requirement for the SCHR to submit its proposed annual budget to the parliamentary corporation for approval. That delivers our commitment at stage 1 in response to the requests made by the Finance Committee, the Justice 1 Committee and the SPCB.

Des McNulty has also included provisions regarding the approval of the SCHR budget in amendment 132. However, the amendment would not require the SCHR to submit budget proposals by a date specified by the SPCB, as Executive amendment 141 would. In addition, amendment 132 would not leave the SPCB any discretion to pay at least some of the commissioner's costs if the budget were not finally agreed. For example, if discussion of even small budget items—a facetious example would be the number of paperclips—remained on-going at the start of the financial year, the SPCB would have no choice but to withhold all payments to the commissioner. In other words, the SPCB would shut down the commissioner. That would have implications for staff salaries and other payments that the commissioner was contractually obliged to make. Executive amendment 141 gives the parliamentary corporation more flexibility, but at the same time is unambiguous that Parliament retains ultimate control of the budget, in line with the direction that we have moved in as we have considered the governance arrangements for the commissioner.

Amendment 142 removes the definition of the commissioner's financial year, as that is made redundant by the inclusion of the information in amendment 141.

I move amendment 133.

The Convener: As you probably noticed, minister, I allowed you quite a lot of flexibility in referring to amendments that we have previously debated, but your comments were relevant.

Des McNulty: I am pleased that the Executive is taking on board my proposal to remove the requirement for the unnecessary post of chief executive.

I turn to the points that the minister made on the accountable officer. The Finance Committee has considerable concern that the current arrangements for accountability in Audit Scotland allow the Auditor General to appoint the board and simultaneously act as the accountable officer. The circularity of those arrangements seems to be replicated in the bill. The staff, the deputy commissioners and the commissioner would have a significant role to play in the appointment of the accountable officer. It would therefore be dangerous to separate out the role of accountable officer from that of the commissioner. For the commissioner to act as the accountable officer gives clarity on where accountability rests.

If the person who was appointed to act as the accountable officer by or through the commissioner found any inappropriate expenditure, it would be difficult for them to report that, given that they would be reporting on someone to whom they in turn were accountable. The proposed arrangement in my amendments 127 to 129 is the more coherent option. In fact, the arrangement is the one that replicates most closely the practice that has been put in place for other commissioners and ombudsmen. The argument that the minister put forward does not appear to be financially sound.

I turn to amendment 131, which addresses the sharing of services and resources, and represents the approach that the Finance Committee considers to be good practice. The parliamentary corporation and the commissioner should be placed under a duty to consider shared services and resources. Historically, the commissioners and ombudsmen have been good at saying that they do that, but the practice has been less good. The point at which a body is created is a crucial time for such a duty to be placed on the SPCB and the body; it should be in the legislation. By including the duty in the bill, we would clearly demonstrate that we were pointing the commissioner in the direction of good practice. That is what the Finance Committee said in its report "Inquiry into Accountability and Governance". Only in that way will real savings be achieved. If the parliamentary corporation subsequently decides that the commissioner should share services and resources, it will be more difficult to realise the full benefits.

Stewart Stevenson: If the committee was persuaded to support your amendments 131 and 132, would it also be proper to support any of the amendments in the group in the minister's name?

Des McNulty: We all want to get an amalgamation of what is contained in my amendments and what the minister is saying. The second sub-paragraph in amendment 132 reflects the idea that, if the SPCB receives an unsatisfactory budget bid, it can refer the matter back to the commissioner. That is the appropriate way of dealing with such a situation. The wording of that sub-paragraph is not to be found in the minister's proposal. If the committee were to agree to my amendment 132, that would be helpful. You could then ask the minister to tidy things up by incorporating into the provisions in amendment 132 anything he thinks is required from his amendment 141.

Mrs Mulligan: I listened to what the minister and Des McNulty said on the issue of the accountable officer. As a member of the Audit Committee, I recognise the value of the role of accountable officer. At first, I thought that having

the commissioner as the accountable officer was the most appropriate option. However, I then thought back to my experience in a local authority, where another member of the executive body and not the chief executive was the accountable officer. Both options can work. I ask both the minister and Des McNulty to say something further about why their proposal is superior. Both clearly encompass the option of having the commissioner act as the accountable officer, but the minister's amendment 138 leaves the matter open and I wonder why he thinks it important to do that.

Mike Pringle: The committee discussed the question of a chief executive at some considerable length, and we agree with Des McNulty and the minister that the SCHR does not need one.

The question of the office's location should be reasonably flexible and left up to whatever we are left with in the end, whether that is a commission or a commissioner. The commissioner might well try to agree to a co-location, but Des McNulty has implied that people have not been very good at sharing offices. I am not sure that that is a good reason for saddling the new body with an obligation to share. Sharing is a good idea, but the location of the office must be left as flexible as possible, so I support the minister's amendment 136, because it allows for that flexibility.

The Convener: I want to deal with the question of whether there should be a chief executive. If I recall rightly, the stage 1 report shows that the committee was unanimous in its view that the SCHR should be a small body that would not require a chief executive because that would lead to a very top-heavy organisation.

We also had questions about the budget being eaten up by staff, deputy commissioners and a chief executive, and we were concerned that there would not be a lot left in the budget for the commissioner to fulfil their function. That is in our stage 1 report, and it was a fundamental reason why we believed that a chief executive was not necessary.

When he replies to the debate on this group of amendments, can the minister confirm whether the human rights commissioner could still appoint a chief executive if the Executive amendments were agreed to? I want to be clear about that. As I said, we did not want a top-heavy organisation with a commissioner, deputy commissioners and a chief executive because there would then be four people who thought that they represented the organisation; we want a flatter structure. It is not just about an accountable officer, but I would be concerned if the minister told me that the commissioner could still appoint a chief executive if the amendments were agreed to.

I am beginning to take a stronger view about co-location. I wonder whether there is scope in the bill to say more about what the other commissions should be doing. It would be a shame if all the responsibility lay with the SCHR. The Parliament cannot just say, "This is what we think, but go on and do what you want." The buck has to stop somewhere, and we have a responsibility to force the sharing of costs among commissioners and those who are charged with similar duties, whether they be the SPSO or the office of the Great Britain commission for equality and human rights that will operate in Scotland. Will there be any scope at stage 3 to comment on the duty of the other commissions that we fund to talk to one another and the SCHR about co-location and the sharing of costs?

11:15

Mrs Mulligan: When Mike Pringle raised the issue of the sharing of offices, it triggered something in my memory from the committee's discussions. There are merits—both financial and in relation to the workload—in sharing offices. However, I appreciate that we might not be able to take a decision about that at this stage because of the position in which we find ourselves.

I remember our discussions about whether the Scottish commissioner for human rights should share an office with the Scottish public services ombudsman or the commission for equality and human rights that Westminster will set up. The CEHR will have an office in Glasgow and the ombudsman is based in Edinburgh, so the new commissioner will not be able to share space with both bodies. If we are committed to the idea of sharing space, the issue remains to be resolved. It is right to leave the flexibility to determine the most appropriate location with the commissioner. However, when that decision is made, the Parliament should take a view on it. The Executive amendments would probably allow that to happen.

Margaret Mitchell: On amendment 131, I am persuaded that the sharing of services and resources is a sensible way forward in the current situation, which is far from ideal. Reference has been made to proposals that were discussed but not properly considered at our meeting last week.

Amendment 132, which would require the commissioner to submit an annual budget and which contains other provisos, would build sufficient safeguards into the system in the context of financial accountability, so I am happy to support it.

I seek clarification on amendment 138. Would it rule out the creation of the post of chief executive?

Marlyn Glen (North East Scotland) (Lab): It is unfortunate that our discussion on an important bill is concentrating on administrative detail. I do not dispute that we should consider financial

accountability and controls, but I am concerned that such matters are overshadowing the substance of the bill. The convener said that the buck must stop somewhere, but it is regrettable that the buck stops with the proposed human rights body.

Last week, it seemed that there was movement in the Executive to review the whole set-up around commissioners. We cannot ask one body to consider co-location without considering the other bodies, too. The sharing of services and premises depends on many factors, such as leases and people's contracts. We are in danger of tying things up instead of waiting and dealing with the whole system properly later. I would appreciate comment from the minister on the Executive's intentions in that regard.

Des McNulty: Convener, may I respond to two questions that members asked about the amendments that I lodged?

The Convener: Yes.

Des McNulty: On Mary Mulligan's point, the normal pattern in local authorities is for the chief executive to be the accountable officer. However, a specified individual—it is normally the director of finance—might be the accountable officer for particular areas of responsibility to do with their post. Had we been going to appoint a chief executive, it might have been appropriate to include the duties of an accountable officer in the remit of that post.

I am concerned that the Executive's approach would create the potential for the accountable officer to be a person other than the commissioner, without the post being defined in the necessary way. Also, the person could be accountable to the commissioner for that aspect of their work. That would be bad practice, to which the committee should not consent. The default position, which operates in all the other commissioner contexts, is that the commissioner is the accountable officer and accountability to the Parliament is exercised through the SPCB. That seems to me the correct architecture of accountability and there is a defect in what the minister proposes.

On amendment 136, locational decisions should not be for the commissioner. The commissioner may have views on location and what services it would be appropriate to share, but the responsibility for making such decisions, based on advice, should be with the SPCB.

The minister's amendment 136 says that the commissioner must ensure

"efficient and effective use of … resources"

and

"have regard to the desirability of sharing premises with another public body."

I understand that that is exactly what happened with the Scottish information commissioner, but he decided on his own initiative to go to St Andrew's and told the corporate body that it could not prevent him from doing that. Amendment 136 would allow the same thing to happen again, which is why I argue strongly for amendment 131, which I have lodged as a substitute.

I think that the minister's amendment 137 would allow the commissioner to appoint a chief executive. The commissioner would be unwise to do so, bearing in mind the discussions that have taken place in the committee but, to give an example, the commissioner for children and young people appointed one for her office. If the committee's intention is to rule out the appointment of a chief executive, I suggest that it not agree to amendment 137, which would allow one to be appointed.

Robert Brown: Many points have been raised, but I endorse Marlyn Glen's point that members are trying in the bill to deal with a series of issues to do with other commissioners. That is not possible, which is why, in the context and in the lee of the Finance Committee's report, the Procedures Committee's report and the reports that are still to come from Lorne Crerar and others, there will be a debate—which will obviously now be in the next parliamentary session—about the direction of travel on those issues.

Incidentally, I do not think that it would be possible, in the bill, to place co-location duties on other bodies. That is a matter for others to decide and it would, it seems to me, be outwith the scope of a bill that deals with the Scottish commissioner for human rights.

It is entirely right that that we are simply removing the requirement on the commissioner to appoint a chief executive. That will be left flexible, but any such appointment would be subject to the corporate body's approval of staff appointments and, in the context of parliamentary debates on the matter, it is not likely that such an appointment would be the corporate body's direction of travel. However, as on other matters, the issue is the need for flexibility: circumstances may change and new issues may emerge in the future, and it is appropriate that we leave flexibility of operation—bearing it in mind that the appointment of staff and their terms and conditions are matters for the corporate body's approval. In a variety of respects, the corporate body stands at the fulcrum of decisions on a number of such issues.

A number of points were made about the accountable officer provisions. Again, the issue is flexibility. We are not saying that the accountable

officer should be a particular person; we are saying, rather, that that is a matter for the corporate body to determine. I entirely reject Des McNulty's point that there is circularity in the proposed arrangements. The accountable officer would be designated by the corporate body, not by the commissioner, so there is no circularity or conflict of interest. It may be appropriate to appoint the commissioner as accountable officer, or it may be appropriate to appoint somebody else; it is appropriate to leave that flexible against the background of possible changes in the way in which accountability mechanisms are dealt with more broadly. I am no expert on those mechanisms, but I urge the committee to allow that flexibility.

Similar considerations apply to the commissioner's budget. We could try to micromanage the matter to an extreme degree—we are at some risk of doing that. The Executive's proposals on the budget require that the corporate body approve the budget. I am advised that that implies interchange between the SPCB and the commissioner—the potential for the SPCB to go back to the commissioner to say "We do not like this, so what about that and what about the other?" and for there to be appropriate exchanges. That does not need to be spelled out in the detailed way that Des McNulty's amendment 132 suggests.

In addition, the requirement in new subparagraph (3) that would be inserted by amendment 132, that payments should not be made in respect of a particular year until the budget has been approved if there is an on-going minor dispute about the budget, is too inflexible in practical terms. The corporate body is a responsible body that is endowed with a number of functions by Parliament. The bill will also endow it with a number of functions. We should leave it to the corporate body to deal with such matters in detail.

The convener suggested that the commissioner's budget would be eaten up by staff costs. Members should bear it in mind that a good deal of the commissioner's work will be done by the commissioner and the deputy commissioners, as well as by staff. The commissioner and the deputy commissioners may conduct inquiries or be involved in promoting the importance of human rights. It is somewhat artificial to distinguish between the staff costs of those individuals and the staff and other costs of the body as a whole.

My next point relates to the question of sharing services. I intended to indicate that initially we were rather sympathetic to the suggestion that services should be shared, because that is an area in which the power of the corporate body could be strengthened. I do not think that Des McNulty's approach to the issue is quite right, but if that is the direction of travel that he favours, I will be more than happy to lodge an appropriate amendment at stage 3. That amendment will probably be similar to the amendment that we have lodged in respect of co-location. There must be flexibility, and it is not always appropriate to share services. I am not sure that there is a need for the commissioner to consult bodies that are specified by the SPCB; rather, the commissioner should, in the protocols that he establishes with other bodies, seek to identify whether there is scope for sharing services. We should place a duty on the commissioner to put that at the centre of his work.

The Convener: Will you consider discussing with ministers who have lead responsibility for other commissioners the issue of sharing costs and premises? Off the top of my head, I cannot remember which ministers have those responsibilities. We are discussing the bill in isolation and regardless of whether they support your position or Des McNulty's position, members are fairly united in believing that we must sort out the issue. It happens that we have an opportunity to do that now. You cannot give us a commitment on anything other than what is in the bill, but other ministers have overarching responsibility for other commissions. Are you willing to discuss the matter with those ministers before stage 3, so that you can provide us with an indication of how other commissioners may feed into this agenda?

Robert Brown: I will respond to those comments, although I also want to make a point about the location of the body. I am entirely in agreement with the committee's direction of travel on the issue. At a very early stage in the committee's consideration of the bill, I said that efficiencies in public services are important—other ministers have made the same point. However, the majority of the other commissioners are appointed by Parliament and are not subject to the jurisdiction of ministers per se. Although there may be situations in which the use of services that the Executive provides for other purposes could be examined, the position of commissioners is really a matter for discussion with other commissioners, rather than with ministers.

The Convener: If that is the case, you have just illustrated the problem: we have no control and it is for the commissioners to determine whether they will co-operate.

Robert Brown: To some extent, that is correct with regard to the other commissioners. The obligations that we will place on the Scottish commissioner for human rights are much more stringent than those that we have placed on other commissioners. We cannot deal with those other commissioners in the bill.

The Convener: That is why I am trying to nail you down before we vote on the amendments. You are right to say that it is a bit unfair for us to try to resolve the matter in the bill when, clearly, we need to get other bodies that Parliament has created to co-operate in sharing services. You are now saying that that is a matter for the other commissioners.

Robert Brown: I am saying that we have established the other commissioners, which have their own structures. More important, they are subject to the jurisdiction not of ministers but of Parliament. I am happy to discuss the matter with other ministers where it is relevant to do so, but in this context we are dealing with other bodies. The corporate body is the unifying force that has the power to push the issue in discussions. Through the amendments, we will place specific and stringent obligations on the Scottish commissioner for human rights to deal with such matters. As I said, I am happy to consider the issue of sharing services, which is important.

However, I do not think that we can do much more in the bill. Facilities in other parts of the Executive for matters such as payroll and information technology provision might be used. I am certainly happy to examine the potential for that. That is important, but it is not a matter for the bill.

11:30

We stress co-location. I echo the discussion that has taken place about the possible location of the GB commission, the ombudsman's possible outreach presence in that commission's Glasgow office and options that relate to that. We should keep options as wide open as we can so that the corporate body has clear and effective options and is not presented with a fait accompli, as might have happened before. That is very much the direction of travel and I am sure that the corporate body will listen carefully to the comments that have been made today.

Members should bear it in mind that the bill contains an obligation for the corporate body to approve the location. When that is taken with our amendments to deal with the commissioner's duties on location, we go very much towards what we want.

I will re-examine the services issue—that is an important point that I meant to make initially—and I will consider issues with other ministers.

Stewart Stevenson: I have a question as a result of my shortcomings in reading. What provision says that the corporate body can direct sharing?

Robert Brown: I said not that the corporate body could direct sharing but that it could give direction on the location. However, I said that I was happy to consider for stage 3 the issue of sharing services. That will almost certainly be another issue that relates to the corporate body, given that it has powers to approve staff, salaries and other matters.

Stewart Stevenson: So you give the commitment that, by the end of the bill process, you will have supported the corporate body to have the power to give direction on sharing and location.

Robert Brown: I have said that I would like to consider the phraseology, but that I will return at stage 3 to the direction of travel on making the sharing of services effective.

Stewart Stevenson: I want to be clear about the destination and not simply the compass point that we happen to be heading on.

Robert Brown: The issue is the phraseology. We have said that the determination of locus is subject to approval by the parliamentary corporation. It is likely that such phraseology would be used to refer to services, but we would also want to place a duty on the commissioner to have regard to efficiency and other matters in the use of services.

Stewart Stevenson: Just to be absolutely clear, are you saying that you would support the corporate body having the power to direct or the power of veto until it received the answer that it wanted?

Robert Brown: Absolutely.

Margaret Mitchell: I will comment on the minister's response. Throughout stage 1, we were concerned about the amount of money that was involved and about the lack of efficiency in the monster that would be created to perform the limited functions of awareness raising and promotion—it cannot have the power to consider individual cases. Given that, I am more than disappointed that at stage 2—a fairly detailed stage in the legislative process—the minister is only now addressing sharing of services. If you do not mind my saying so, minister, that is indicative of how the Executive has approached the bill from the beginning.

The Convener: Margaret—we are asking only for clarification at this stage.

Margaret Mitchell: The committee made it clear that the proposed structure was top heavy and that it did not want a chief executive, yet I understand that the minister is saying that although his amendments look as though they would abolish the chief executive, they would not do that—they would create flexibility and ambiguity. Will he confirm that that is not straightforward and does not reflect the committee's will?

The Convener: The minister has the last word.

Robert Brown: I have dealt with the point already. For what it is worth, no amendment has been lodged to prohibit the commissioner for human rights from having a chief executive. However, it is clear that that will not happen in the light of the debate and the amendment to withdraw the requirement to have a chief executive. The matter is for the corporate body and checks and balances are in place. To be frank, I think that we should leave the position reasonably flexible for the corporate body's determination. That is where I leave the matter with the committee.

Des McNulty's amendments would not prohibit the appointment of a chief executive. Perhaps, like me, he accepts that an element of flexibility on such matters must be retained.

The Convener: The question is, that amendment 133 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Glen, Marlyn (North East Scotland) (Lab)
McFee, Mr Bruce (West of Scotland) (SNP)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Pringle, Mike (Edinburgh South) (LD)

ABSTENTIONS

Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 5, Abstentions 1.

Amendment 133 agreed to.

Amendment 154 not moved.

Amendment 134 moved—[Robert Brown].

The Convener: The question is, that amendment 134 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Glen, Marlyn (North East Scotland) (Lab)
McFee, Mr Bruce (West of Scotland) (SNP)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)

ABSTENTIONS

Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 6, Abstentions 1.

Amendment 134 agreed to.

Amendment 135 moved—[Robert Brown].

The Convener: If amendment 135 is agreed to, amendment 155 will be pre-empted.

The question is, that amendment 135 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)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Pringle, Mike (Edinburgh South) (LD)

ABSTENTIONS

McFee, Mr Bruce (West of Scotland) (SNP)
Mitchell, Margaret (Central Scotland) (Con)
Stevenson, Stewart (Banff and Buchan) (SNP)

The Convener: The result of the division is: For 4, Abstentions 3.

Amendment 135 agreed to.

Amendments 156 to 164 not moved.

Amendment 122 not moved.

Amendment 136 moved—[Robert Brown].

The Convener: The question is, that amendment 136 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)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Pringle, Mike (Edinburgh South) (LD)

AGAINST

McFee, Mr Bruce (West of Scotland) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)

ABSTENTIONS

Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 4, Against 2, Abstentions 1.

Amendment 136 agreed to.

Amendment 123 moved—[Des McNulty].

The Convener: The question is, that amendment 123 be agreed to. Are we agreed?

Members: No.

FOR

Glen, Marlyn (North East Scotland) (Lab)
McFee, Mr Bruce (West of Scotland) (SNP)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)

The Convener: The result of the division is: For 7, Against 0, Abstentions 0.

Amendment 123 agreed to.

Amendment 137 moved—[Robert Brown].

The Convener: If amendment 137 is agreed to, I cannot call amendment 124.

The question is, that amendment 137 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Glen, Marlyn (North East Scotland) (Lab)
McFee, Mr Bruce (West of Scotland) (SNP)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)

ABSTENTIONS

Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 6, Against 0, Abstentions 1.

Amendment 137 agreed to.

Amendments 125 and 126 moved—[Des McNulty]—and agreed to.

Amendment 131 moved—[Des McNulty].

The Convener: The question is, that amendment 131 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)
Stevenson, Stewart (Banff and Buchan) (SNP)

AGAINST

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

The Convener: The result of the division is: For 3, Against 4, Abstentions 0.

Amendment 131 disagreed to.

The Convener: Amendment 138 in the name of the minister has been debated with amendment 133. If amendment 138 is agreed to I cannot call amendment 127.

Amendments 138 and 139 are direct alternatives. If amendment 138 is agreed to, amendment 139 will become an amendment to leave out the words that will be inserted by amendment 138 and replace them with the words that would be inserted by amendment 139. Is that all clear?

Mr McFee: That is clear. [*Laughter.*]

Amendment 138 moved—[Robert Brown].

The Convener: The question is, that amendment 138 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Glen, Marlyn (North East Scotland) (Lab)
McFee, Mr Bruce (West of Scotland) (SNP)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)

ABSTENTIONS

Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 6, Against 0, Abstentions 1.

Amendment 138 agreed to.

Amendment 139 moved—[Des McNulty].

The Convener: The question is, that amendment 139 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)
Stevenson, Stewart (Banff and Buchan) (SNP)

AGAINST

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

The Convener: The result of the division is: For 3, Against 4, Abstentions 0.

Amendment 139 disagreed to.

11:45

Amendments 128 and 129 not moved.

Amendment 132 moved—[Des McNulty].

The Convener: The question is, that amendment 132 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)
Stevenson, Stewart (Banff and Buchan) (SNP)

AGAINST

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

The Convener: The result of the division is: For 3, Against 4, Abstentions 0.

Amendment 132 disagreed to.

Amendment 140 moved—[Robert Brown]—and agreed to.

Amendment 165 not moved.

Amendment 141 moved—[Robert Brown].

The Convener: The question is, that amendment 141 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Glen, Marlyn (North East Scotland) (Lab)
McFee, Mr Bruce (West of Scotland) (SNP)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)

ABSTENTIONS

Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 6, Against 0, Abstentions 1.

Amendment 141 agreed to.

Amendment 142 moved—[Robert Brown].

The Convener: The question is, that amendment 142 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Glen, Marlyn (North East Scotland) (Lab)
McFee, Mr Bruce (West of Scotland) (SNP)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)

ABSTENTIONS

Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 6, Against 0, Abstentions 1.

Amendment 142 agreed to.

The Convener: Amendment 143, in the name of the minister, is in a group on its own.

Robert Brown: Amendment 143 will bring the commissioner within the remits of the Scottish information commissioner and the Scottish public services ombudsman. That is consistent with the approach that has been taken for other statutory officeholders. For example, the ombudsman and the information commissioner fall within each other's remits.

The SCHR will fulfil a public function and have contact with members of the public, so the argument is that it should be covered by the provisions of the Scottish Public Services Ombudsman Act 2002 and the Freedom of Information (Scotland) Act 2002. In her evidence at stage 1, the ombudsman specifically asked for confirmation that the SCHR would fall within her remit.

I move amendment 143.

The Convener: The question is, that amendment 143 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Glen, Marlyn (North East Scotland) (Lab)
McFee, Mr Bruce (West of Scotland) (SNP)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)

ABSTENTIONS

Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 6, Against 0, Abstentions 1.

Amendment 143 agreed to.

Schedule 1, as amended, agreed to.

Section 2—General duty to promote human rights

The Convener: Amendment 5, in the name of the minister, is grouped with amendments 104, 6, 7, 7A and 144. I draw the committee's attention to the fact that amendment 5 pre-empts amendment 104.

Robert Brown: Amendments 5 and 7 are drafting changes to make the wording of the commissioner's general duty less cumbersome. The duty is simply to promote human rights rather than the unwieldy provision currently in the bill. There is no change to the substance of the general duty, as the definition of "promote" that amendment 7 inserts into section 2(2) is still

"promote awareness and understanding of, and respect for,"

human rights. Amendments 5 and 7 are technical drafting amendments only.

Amendment 6 addresses concerns that were expressed by members of the committee at stage 1 about the wording of section 2(1)(b), which requires the SCHR to

"encourage Scottish public authorities to comply with section 6 of the Human Rights Act 1998."

Members said that authorities should not need encouragement, as they are already under a legal obligation to comply, and that the present wording might be taken as implying that authorities were felt to be failing or reluctant to meet their obligations in the area.

Amendment 6 removes the reference to encouraging public authorities to comply. The general duty to promote human rights and the particular reference to encouraging

"best practice in relation to human rights"

in section 2(1)(a) will ensure that the core purpose of the SCHR to work with public authorities to develop and maintain a culture of respect for human rights is retained.

Amendment 144 delivers an important commitment that we gave at stage 1 in response to concerns that the commissioner should focus attention on those who would benefit most from their work, such as those who are deprived or socially excluded, rather than on those who might be described as the usual suspects, who are perceived to benefit excessively from human rights. I regard the amendment as giving a vital steer to the commissioner, and the committee may see it in the same light.

The amendment also reinforces the direction against duplicating functions. It requires the commissioner to have particular regard to the human rights of those

"groups in society whose human rights are not, in the Commissioner's opinion, otherwise being sufficiently promoted."

The draftsmen have come up with elegant wording—it is always good to be nice to colleagues—that ensures that the commissioner will concentrate on those who have most difficulty in asserting their rights and minimises the risk that the commissioner will duplicate the work of other bodies.

Amendments 104 and 7A, in the name of Robin Harper, introduce protection as part of the commissioner's general duty. However, as drafted, the amendments would not give the commissioner the function of protecting human rights. Rather, they would give the commissioner the function of promoting the protection of human rights. Mechanisms for the protection of human rights already exist, principally through individuals' ability to defend their rights in court under the Human Rights Act 1998 and the Scotland Act 1998. What we currently lack is a source of expertise, advice and guidance to encourage proactively the development of a culture of respect for human rights. Including protection in the commissioner's general duty implies some sort of involvement in the resolution of individual complaints, which would distract from the commissioner's promotional and awareness-raising functions and would risk encroaching on the proper responsibilities of the courts. Marlyn Glen is intending to move amendments 104 and 7A this morning. I hope that my explanation of their effects will persuade her not to do so.

I move amendment 5.

The Convener: This morning, Marlyn Glen will be Robin Harper and will speak to all the amendments in his name.

Robert Brown: Where is the scarf?

Marlyn Glen: I will speak to the amendments in Robin Harper's name—that is as far as I will go.

As the minister said, the effect of amendments 104 and 7A is to extend the SCHR's general duty to include protection as well as promotion. I listened to the minister's comments, but the amendments would bring the SCHR's powers in line with those of the Great Britain commission for equality and human rights.

Amendment 104 is important, because all the other powers and functions of the SCHR are framed around those of the CEHR. If protection is not included, the ability of the SCHR even to give advice to individuals on their rights could be restricted. I invite the minister to say more about that. The first Paris principle states:

"A national institution shall be vested with competence to promote and protect human rights."

If we do not agree to amendment 104, we will not be following that lead. Amendment 7A is a consequential amendment.

I question the limitations that amendment 6 seems to impose. It removes the provision that requires the SCHR to encourage public authorities to comply with the Human Rights Act 1998. I question the amendment especially in the light of the Amnesty International report to which I referred at last week's meeting. In a survey, Amnesty International found that 65 per cent of Scottish public authorities either did not understand their duties under section 6 of the HRA or could not provide evidence of steps that they had taken to comply with those duties. It is important that we discuss the matter properly. The minister says that human rights are protected, but the survey suggests that that is not the case.

Amendment 144, which I understand replaces amendment 11, refers to

"groups in society whose human rights are not, in the Commissioner's opinion, otherwise being sufficiently promoted."

I appreciate that the SCHR will have to prioritise its work, but might amendment 144 undermine the crucial point that human rights are for everyone and therefore play into the hands of people who claim that human rights are just for minority groups? That would be a dangerous road to travel. There is also a risk that the approach would create a hierarchy of groups that the SCHR would regard as more or less deserving of its consideration. Such a hierarchy might be apparent in the SCHR's promotional material. In the current climate, in which litigation is common, the minister should

also consider whether amendment 144 might encourage groups to think that their rights had not been sufficiently promoted, in comparison with the rights of other groups.

Margaret Mitchell: I reiterate Marlyn Glen's point about amendment 144. If work was not prioritised properly and the human rights of certain groups were not being properly looked after, could there be litigation? Is the minister aware that the Scottish human rights forum opposes amendment 144 for that reason?

The Convener: It is worth returning to our discussions at stage 1, when we considered who is responsible for protecting human rights. The bill would create a person or body that would promote awareness and understanding. In particular in the light of the results of the poll that was conducted on the committee's behalf, several members said at stage 1 that people from a socially excluded background are probably more likely than people from a wealthier background to think that a human rights commissioner could do more.

It is worth debating amendment 144, because the debate can draw out the issues that we would expect the SCHR to address. Ultimately, the law protects people and the court interprets the law. Although a human rights commissioner or body would promote human rights and in some cases exercise the power that the bill would confer on it to intervene if appropriate, ultimately human rights have been breached when the court says so, not when the commissioner says so. We should be clear on that.

Robert Brown: I will deal with the convener's point first, which others have made. The courts are the recourse of last resort on such matters and determine what the law is—in so far as it is not determined in the more general sense by the Parliament. There would be no question of the human rights commissioner making a determination on a human rights matter per se. However, I would expect practical details about whether bodies are following best practice or could do better to be very much the substance of the commissioner's reports. Such matters might not come to the court in the normal course of events, but they might lead to changes in practice. Over the course of the debate, I have referred several times to the human rights consultancy report on the state hospital at Carstairs, which led to changes in practice and policy there. It is that kind of thing that reports by the commissioner for human rights could be useful in doing.

12:00

I reassure Marlyn Glen that there is nothing in our amendments in the group that will restrict the ability of the commissioner to look at issues that relate to public bodies. As she will recall, it was thought that there was something infelicitous about the wording of section 2(1)(b). The general duty on the commissioner remains, which gives general powers in this connection. Paragraph (b) is not required for the overarching general duty

"to encourage best practice in relation to human rights"

to apply to public bodies. That is the reason for amendment 6.

The commissioner will have the power to give advice. However, as the committee knows from the debate and the consultation, it was not intended that the principal role of the commissioner would be to give advice to individuals; it was intended rather that it would be to deal with matters more generally. Nevertheless, the issue remains and we should perhaps explore it further. We have indeed looked at it before.

I take the point that, according to the Amnesty International report, some local authorities have been found not to be doing as much as they could do in this connection. That is exactly the reason for having the commissioner in the first place, so that bodies of various kinds that operate in the public sphere can have the source of advice and promotional opportunity that the commissioner will bring.

As I said, amendment 144 is an important amendment. I want to make it clear that it does not go against the fact that, as Marlyn Glen rightly said, human rights are for everyone and that human rights issues can arise in all sorts and particles of situations. That is not to say that effective provisions are not already in place in some areas for the promotion of human rights. Some people would say that in many respects the criminal courts already provide adequate human rights protection. Human rights law can readily be used in the determination of cases.

Equally, many people take the view that the human rights of some people—those who are perhaps less connected with society, who are socially deprived or who are excluded in various ways, or however we want to describe them—require our particular focus. This relates to the way in which the commission will set out its functions in terms of its strategic plan arrangements, to which we will turn in later amendments. It is not a matter of saying that human rights are not for everyone—they are. It is a matter of saying that in areas where the need for the promotion of human rights is above the usual, some sectors of society should perhaps have a greater prominence in the work of the commissioner for human rights. As I said, the general duty remains.

Margaret Mitchell asked whether litigation may result. I did not follow the point that she made. We are talking about a commissioner for human rights

carrying out functions that have been laid down by the Parliament. I cannot see how the question of litigation could arise as a result of the way in which those duties were carried out.

The Convener: Perhaps the minister will allow Margaret Mitchell to clarify the point.

Margaret Mitchell: If the commissioner failed to prioritise someone who was deemed to come into the category that the minister mentioned, could litigation result?

Robert Brown: I am subject to correction in this regard, but I would have thought that that would be a matter for the ombudsman. Margaret Mitchell will recall that we dealt with an earlier provision in that kind of way. I am not sure that the situation that she describes would lead to judicial review rights, but people would have to take individual advice. I cannot see that it would lead to the possibility of litigation in any other respect, for the particular reason that I cannot see how there would be a complainer. Individual complainers do not have the right per se to take their case before the commissioner for human rights and ask the commissioner to follow through on it. I cannot see how there could be litigation in that regard.

Amendment 5 moved—[Robert Brown].

The Convener: The question is, that amendment 5 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Glen, Marlyn (North East Scotland) (Lab)
McFee, Mr Bruce (West of Scotland) (SNP)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)

ABSTENTIONS

Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 6, Against 0, Abstentions 1.

Amendment 5 agreed to.

Amendment 6 moved—[Robert Brown].

The Convener: The question is, that amendment 6 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)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Pringle, Mike (Edinburgh South) (LD)

AGAINST

McFee, Mr Bruce (West of Scotland) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)

ABSTENTIONS

Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 4, Against 2, Abstentions 1.

Amendment 6 agreed to.

Amendment 7 moved—[Robert Brown].

Amendment 7A moved—[Mr Bruce McFee].

The Convener: The question is, that amendment 7A be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

McFee, Mr Bruce (West of Scotland) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)

AGAINST

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

ABSTENTIONS

Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 2, Against 4, Abstentions 1.

Amendment 7A disagreed to.

The Convener: The question is, that amendment 7 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Glen, Marlyn (North East Scotland) (Lab)
McFee, Mr Bruce (West of Scotland) (SNP)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)

ABSTENTIONS

Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 6, Against 0, Abstentions 1.

Amendment 7 agreed to.

Amendment 144 moved—[Robert Brown].

The Convener: The question is, that amendment 144 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)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Pringle, Mike (Edinburgh South) (LD)

AGAINST

McFee, Mr Bruce (West of Scotland) (SNP)
Mitchell, Margaret (Central Scotland) (Con)
Stevenson, Stewart (Banff and Buchan) (SNP)

The Convener: The result of the division is: For 4, Against 3, Abstentions 0.

Amendment 144 agreed to.

Section 2, as amended, agreed to.

Section 3—Duty to monitor law, policy and practice

The Convener: We are only at section 3—I feel as though we should be much further on. Amendment 12, in the name of the minister, is grouped with amendments 145, 146, 83, 86 and 95.

Robert Brown: At stage 1, committee members expressed reservations about the apparent breadth of the duty to keep the law under review that section 3 imposes on the commissioner. The Executive never intended the commissioner to be expected to keep all the law under review all the time. As the Law Society of Scotland said in its evidence, that would be an impossible task. I therefore said at stage 1 that the Executive would lodge amendments to redefine the law review function and make it clear that it was discretionary rather than mandatory and was subsidiary to the commissioner's core promotional and awareness-raising role.

Amendments 12 and 145 will deliver that commitment. Amendment 12 will remove section 3 and amendment 145 will replace it with a new section that uses the word "may" rather than the previously used "must" and refers explicitly to reviewing

"any area of the law".

The function's subsidiary nature will be emphasised by the fact that the new section will be placed after section 4, which sets out the power to engage in promotional and awareness-raising activity.

The committee's stage 1 report also called for the commissioner to be required to publish strategic plans on similar lines to the duty that will be placed on the GB commission for equality and human rights under the Equality Act 2006. Amendment 146 will meet that call by adding a new section that will require the SCHR to produce a strategic plan every four years. Each plan will set out the objectives and priorities for the period and the activities or kinds of activities that it proposes to undertake, along with timetables. The SCHR will be required to consult on a draft plan, including an explicit requirement to consult the parliamentary corporation, and after such consultation to lay the finalised plan before the Parliament.

In amendments 20A and 21A, the convener had proposed to require the SCHR to consult the Scottish Law Commission before undertaking any law review activity and to provide details of its intentions to review the law in its strategic plan. Those amendments were withdrawn as a consequence of the withdrawal of amendments 20 and 21, but I accept that there is obvious scope for overlap. We have no objection in principle to those requirements being stated explicitly in the bill. We have therefore included provisions in subsection (2) of the new section inserted by amendment 145 and paragraph (b) of subsection (2) of the new section inserted by amendment 146 that achieve the purpose of amendments 20A and 21A.

Amendment 83 replaces the reference to "action" in section 12(2)(b) with a reference to "activities", to bring the description of the matters to be set out in SCHR annual reports into line with that for strategic plans.

Amendment 86 is another consequential amendment. It deletes section 12(2)(c), which requires SCHR annual reports to include a summary of the action that the SCHR proposes to undertake in the following year. That information will instead be set out in the strategic plans.

Finally, amendment 95 moves section 14, which gives the SCHR a general power to co-operate with other persons and bodies and requires it to avoid unnecessary duplication with their activities, to before section 4. That is designed to emphasise the expectation that the SCHR will, as far as is practical, work with existing bodies. It is a robust section that, while respecting the independence of the commissioner, ensures that he or she will remain focused on areas that his or her function can add value to. It operates within the framework of the strategic plan provisions, as I have mentioned.

I move amendment 12.

The Convener: First, I welcome amendment 146 on the strategic plan. I felt strongly that the commissioner should be expected to lay out before Parliament the broad framework of subjects that they intend to pursue in the four-year period. That would provide some structure to the person or organisation with the human rights function, and it is reasonable that Parliament should have some idea of what the commissioner intends to promote without interfering with their independence.

As you know, minister, I have a fundamental concern about whether the commissioner should have any duties to monitor the law. I do not accept that that is the role of a commission, because I believe that it is the role of Parliament. The commissioner could assist the Parliament in monitoring human rights matters and the law, but I make my position clear that law monitoring is a

role for Parliament. We have given part of the role to the Scottish Law Commission, which is required to implement provisions of the European convention on human rights, but there is no point in that if we then give the impression that we are giving its duty to another body.

I welcome the Executive's amendments, which tidy up the situation. My reading is that if the commissioner were concerned about any aspect of Scots law, they would consult the Scottish Law Commission. They would be required to think about that in advance, so we would see it in the SCHR's strategic plan. That would ensure that Parliament could work with the commissioner and that there would be an indication that some work was required on a part of the existing law.

Minister, would you like to say anything in conclusion?

Robert Brown: No, there is nothing that goes against my earlier moves. The amendments are important and I hope that the committee will accept them.

The Convener: The question is, that amendment 12 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Glen, Marlyn (North East Scotland) (Lab)
McFee, Mr Bruce (West of Scotland) (SNP)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Pringle, Mike (Edinburgh South) (LD)

ABSTENTIONS

Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 5, Against 0, Abstentions 1.

Amendment 12 agreed to.

Section 4 agreed to.

After section 4

Amendment 145 moved—[Robert Brown].

The Convener: The question is, that amendment 145 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Glen, Marlyn (North East Scotland) (Lab)
McFee, Mr Bruce (West of Scotland) (SNP)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Pringle, Mike (Edinburgh South) (LD)

ABSTENTIONS

Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 5, Against 0, Abstentions 1.

Amendment 145 agreed to.

Amendment 146 moved—[Robert Brown].

The Convener: The question is, that amendment 146 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Glen, Marlyn (North East Scotland) (Lab)
McFee, Mr Bruce (West of Scotland) (SNP)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Pringle, Mike (Edinburgh South) (LD)

ABSTENTIONS

Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 5, Against 0, Abstentions 1.

Amendment 146 agreed to.

The Convener: I point out to members that we have to finish stage 2 today and that we also have other business. This would be an appropriate time for a break.

12:16

Meeting suspended.

12:25

On resuming—

Section 5—Power to conduct inquiries

The Convener: I reconvene the meeting.

Amendment 105, in the name of Robin Harper, is grouped with amendments 106 to 110.

Marlyn Glen: I agreed to speak to amendment 105 to give the committee a chance to discuss section 5, which is on the power to conduct inquiries. It is important that we do so.

Amendment 105 would extend the scope of inquiries that the SCHR can carry out—inquiries into public authorities generally, specific named public bodies that are the only bodies of their type or matters relating to a suspected breach of torture conventions—to include inquiries into any person or organisation, whether public or private. As they stand, the proposed inquiry powers of the SCHR are limited: they cover only public authorities generally or specific named bodies if they are the only bodies of their type. That means that if the commissioner receives a number of complaints about a local authority, time, staff and resources will have to be committed to undertake an inquiry into all local authorities to tackle the problem,

which is unacceptable when we are conscious that we need to control resources. Amendment 105 seeks to bring the powers of the SCHR into line with those of the CEHR, which will be able to inquire into any public or private body on any matter that is connected with its powers and functions.

Amendment 106 is consequential. Amendments 107 and 108 would extend the categories of people whom the SCHR could call to give evidence. Section 7 specifies the categories of people whom the SCHR can call—they are public authorities or employees of public authorities. Deleting section 7(2) would mean that the people who can be called would not be restricted—all relevant people could be called to any inquiry. That would bring the powers of the SCHR into line with those of the CEHR, which will be able to call any person to give evidence. Such an approach fits with the Paris principles, which state:

"Within the framework of its operation, the national institution shall … Hear any person and obtain any information and any documents necessary for assessing situations falling within its competence".

The committee is aware of how limiting it can be not to have the ability to call on whomever one wants to call in an inquiry and not to be able to ask them for documents.

I am interested in the minister's take on those amendments. Amendments 109 and 110 are consequential.

I move amendment 105.

Mr McFee: I will be brief. I have said that the bill is neither fish nor fowl and that it is limited. Those of us who take such matters seriously believe that it is the result of political compromise. Consequently, its provisions are either unclear or will result in diluted powers for the commissioner.

Amendment 105 seeks as far as possible to make the powers of the SCHR mirror those of the CEHR. It seems strange that, in conducting inquiries into non-devolved issues in Scotland, the CEHR will have the power to call whichever organisations it wishes and to consider any case that it wishes, while the Scottish commissioner for human rights will be restricted in such matters.

We have heard that the rationale for the bill is that the United Kingdom legislation left a gap in establishing the CEHR, but the Executive's role seems to be to plug that gap only partially. To be frank, I often wonder whether the minister believes that he is delivering the best bill that he can.

12:30

The Convener: I suppose that my question is for Marlyn Glen or the minister. Clarity is needed about the GB commission's functions and how they relate to Scotland. I understand that no distinction is needed between public and private organisations on equality issues, because an act of Parliament makes it clear that the commission can operate in the public and private sectors. However, on human rights, we deal primarily with the Human Rights Act 1998 and some conventions. The 1998 act deals primarily with public authorities in the broadest sense, so I am unclear how the GB commission can have a power to hold inquiries into non-public bodies in relation to the 1998 act. Is it because holding an inquiry introduces flexibility? I do not know whether anyone can help me with that.

Robert Brown: Several points have been made. You are entirely right about the definition of human rights, because the 1998 act refers to public bodies—they are the focus of attention. The GB commission will not be set up in precisely the same way. In some respects, such as the power of entry, our bill provides greater powers than the GB commission will have. In some situations, we will have different or fewer powers. We do not have to echo and reflect every detail of the GB commission, but we will follow good guidance if it exists.

Members should remember that the big difference between the GB commission and the proposed Scottish human rights commissioner is simply that the GB commission will have the wider equalities role to which the convener referred. Several provisions in the Equality Act 2006, such as those on who can be called to inquiries, are phrased more generally, and primarily are directed towards the GB commission's equalities role. I am not answerable for the 2006 act, so I cannot say much more about it.

I will deal with the other points that were raised.

The Convener: Have you dealt with my question?

Robert Brown: Yes—in part. I accept that I did not answer it entirely.

The Convener: I would be happy if you wrote to me. I do not understand how the GB body can have the power to compel a witness who is not from a public authority to appear, since it will apply the same act as we will—the 1998 act. Will the GB body have that power? I understand that we will not have it.

Robert Brown: It would be better if I wrote to you. We think that the GB commission will have that power, but consideration of the powers that the GB body will have is not the main issue for our bill. Some issues with powers in relation to human rights are, in a sense, hangovers from the fact that matters are expressed more generally, now that the equalities and human rights roles are joined. I understand that we have different levels of inquiry

for the two functions. To avoid doubt, we are happy to write to you to provide a bit of clarity.

I ask the committee to reject amendments 105 to 110, which Marlyn Glen ably presented. I recognise what she is trying to do. In a sense, an issue of width and depth is involved, involving budgets and so forth. Amendment 105 would cast the inquiry power far too widely. The SCHR must have a reasonably clear focus. Under the inquiry power, the focus will be on considering whether public authorities have sufficient awareness of human rights, exactly as detailed in the 1998 act, and whether that is reflected in their policies and practices. Fundamentally, amendment 105 is unacceptable because the legal obligation to comply with human rights has been imposed on public authorities. That is why section 2(3) imposes a general requirement on the SCHR to have particular regard to the convention rights in exercising its functions.

A fundamental principle is that the SCHR will not handle individual complaints. That has been clear from an early stage: it was dealt with in the consultation papers and so on. Amendment 106 would detract from that principle by empowering the SCHR to investigate individual bodies as a matter of course. That would not be consistent with the vision of the SCHR as a body whose main purpose is the general promotion of human rights rather than being another layer of regulation and enforcement.

With regard to the point about resources, we are beginning to get into Scottish public services ombudsman territory if we narrow the inquiry power to specific inquiries into specific bodies. That would create the potential for the SCHR to overlap with and encroach substantially on the role of the ombudsman. The inquiry power is intended to complement the SCHR's general purpose to promote and raise awareness of human rights issues, by allowing it to investigate broad issues of concern rather than individual cases, but the amendments would detract from that by risking the SCHR becoming bogged down in consideration of specific cases. There would be budgetary considerations, as well, if we went in that direction.

Under section 5, the SCHR's ability to conduct general inquiries will, in any case, include private companies and individuals in so far as their nature and functions bring them within the definition of public authority that is contained in the Human Rights Act 1998. The amendments may be aimed at extending the SCHR's remit to issues such as the provision of contracted-out services or matters of that sort, but it is not necessary to go in that direction, because of the existing powers.

The purpose of the references to "excepted inquiries" in section 9—which have not been mentioned in this discussion—is to ensure that the SCHR will, if requested to do so by the relevant international oversight body, be able to conduct inquiries under international human rights instruments such as the UN convention against torture. In doing so, the SCHR will operate on behalf of the relevant international body and be expected to comply with its procedures, including the preparation and submission of reports. Such reports will be published by the international body in accordance with its own timetable and procedures and will generally remain confidential until published. Amendments 109 and 110 go against that by requiring the SCHR to submit such reports to the Parliament in the same way as other SCHR reports and so could, in practice, prevent the SCHR from undertaking monitoring work under conventions such as the convention against torture.

I have touched on the point about the different role of the CEHR.

The issue of who can be required to give evidence is linked to the issue about public bodies. We are able to require the staff of the public bodies concerned to give evidence but only to ask others. There is a question mark over the advantage of bringing in reluctant witnesses from spheres other than the body concerned. Most of the people who will have an issue to put before the SCHR will be happy to give evidence, as they are entitled to do. The question whether we require to compel them takes us further into other issues.

As I have said from the beginning, the powers that the bill confers are substantial; they are not a compromise. We have tried to fit them into a sensible added-value role in the Scottish context, between the GB commission, which will deal with reserved issues, and the other commissioners and bodies that operate in Scotland. That is why the SCHR has been given the powers in the bill.

Have I missed any of the points that were raised? I have a vague feeling that there was something else.

Marlyn Glen: I have a question about overlap. I was under the impression that there was a requirement in the bill for the SCHR not to overlap.

Robert Brown: Yes, there is.

Marlyn Glen: So that point would be covered, would it not?

Robert Brown: It would. However, if we widened the SCHR's powers to such an extent that, in practical terms, it was pushed too far into the Scottish public services ombudsman's area—which the power to inquire into individual bodies might do—that would produce the overlap that we are trying to avoid. I appreciate that there is a degree of flexibility, but that would push the SCHR's powers too far.

Marlyn Glen: It has been helpful to have this discussion. I underline the fact that there is still a bit of disquiet within equality bodies about the proposed commission and other matters. I look forward to receiving the letter that will clarify the points that the convener has made. At this point, I seek to withdraw amendment 105.

The Convener: Are we agreed that amendment 105 be withdrawn?

Mr McFee: No.

The Convener: In that case, I will put the question. The question is, that amendment 105 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

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

AGAINST

Glen, Marlyn (North East Scotland) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Pringle, Mike (Edinburgh South) (LD)

The Convener: The result of the division is: For 1, Against 5, Abstentions 0.

Amendment 105 disagreed to.

Section 5 agreed to.

Section 6—Restrictions as to scope of inquiry

Amendment 106 not moved.

Section 6 agreed to.

Section 7—Evidence

Amendments 107 and 108 not moved.

The Convener: Amendment 147, in the name of the minister, is in a group on its own.

Robert Brown: I will be brief. Amendment 147 has been requested by the Scottish Legal Aid Board to address a potential conflict between section 7 of the bill and section 34 of the Legal Aid (Scotland) Act 1986. Section 7 gives the SCHR the power to require any person specified in section 7(2) to provide information in connection with an inquiry. Section 34 of the Legal Aid (Scotland) Act 1986 places the Scottish Legal Aid Board under a duty to keep confidential information that is provided to it by persons who are seeking or receiving legal aid. Disclosure in breach of section 34 is a criminal offence. Amendment 147 provides for an exception to be made for the disclosure of information to the commissioner. A similar provision appears in the Scottish Public Services Ombudsman Act 2002.

I move amendment 147.

Amendment 147 agreed to.

Section 7, as amended, agreed to.

Schedule 2 agreed to.

Section 8 agreed to.

Schedule 3

PLACES OF DETENTION: POWERS OF ENTRY, INSPECTION AND INTERVIEW

The Convener: Amendment 47, in the name of the minister, is grouped with amendments 148, 49 and 50.

Robert Brown: Again, I will be brief. In our response to the committee's stage 1 report, we agreed to remove the requirement in the bill for the SCHR to give 14 days' notice before exercising the power to enter a place of detention for the purposes of an inquiry. Amendment 47 delivers that commitment by removing paragraph 1 of schedule 3. That means that the SCHR will be able to exercise that power without giving any prior notice to the institution concerned.

Amendment 148 allows the power to be exercised by the commissioner or any other person who is authorised by him or her. Amendment 49 therefore provides that an individual seeking to exercise the power of entry will be required to produce evidence of his authority to do so before gaining access.

Amendment 50 removes paragraph 3 of schedule 3, which provides for the cancellation of a notice seeking entry. That paragraph is redundant if the other amendments are agreed to.

I move amendment 47.

Mrs Mulligan: I welcome the minister's response on these matters, which the committee considered at stage 1 and wanted to press him on. I am pleased that the Executive has responded.

Mike Pringle: I agree. When I first read schedule 3, I thought it was nonsense. There was considerable discussion of it in the committee. I am pleased that the minister and the Executive have decided to delete the paragraphs. The commissioner will be able to turn up, produce his documentation and gain entry, which is exactly what should happen, not what was originally proposed.

Amendment 47 agreed to.

Amendment 148, 49 and 50 moved—[Robert Brown]—and agreed to.

Schedule 3, as amended, agreed to.

12:45

Section 9—Report of inquiry

Amendments 109 and 110 not moved.

Section 9 agreed to.

Section 10—Confidentiality of information

Amendment 166 not moved.

Section 10 agreed to.

Section 11—Power to intervene

The Convener: Amendment 64, in the name of the minister, is grouped with amendments 111, 112, 112A, 67, 74, 76, 78 and 113 to 118.

Robert Brown: I am beginning to see the far shores of stage 2.

Executive amendments 64, 74, 76 and 78 address drafting points in relation to section 11, to make clear that the provisions relating to the SCHR's statutory power of intervention in civil proceedings will apply without prejudice to any ability to intervene in any type of proceedings under existing law and practice. They do so by replacing references to "this section" in section 11 with references to "subsection (2)", thus ensuring that the detailed provisions on intervention in section 11 apply only to the specific power under section 11(2) and not to the SCHR's capacity under section 11(8) to use any and all existing intervention procedures.

There will be a test on that at the end of my speech.

On Robin Harper's amendments 111, 112 and 112A—which I assume Marlyn Glen will move—we have considered carefully the issues raised by the Law Society of Scotland and others in connection with the intervention provision. However, the Executive's objective remains as expressed at stage 1, namely that the bill should enable the SCHR to intervene where third parties generally can already do so, rather than create a new right of intervention where none presently exists. The provisions in the bill are intended to avoid any doubt that the SCHR has the capacity to use such existing mechanisms. The express power in the bill is therefore limited to civil proceedings, since there is already a general ability for third parties to seek to intervene in such cases, even if it is used only rarely. If, in the future, changes were made to the general law, the power would allow that right to be extended.

On the other hand, there is no existing general ability for third parties to intervene in criminal proceedings. The Executive believes that allowing such a power of intervention, even if it were limited to the SCHR, could prejudice the efficient delivery of justice by creating a potential for delay in personal and important cases. Such a power is also unnecessary, given the strong human rights safeguards that are already built into the criminal justice system. We therefore believe that amendments 111, 112, 112A, 113, 115 and the new section 11 that would be inserted by amendment 118, which would extend the SCHR's express intervention power to all legal proceedings, are inappropriate.

Amendments 112 and 114, and the new section 11 that would be inserted by amendment 118, would also extend the SCHR's intervention power to children's hearings. Similar arguments apply to this as to the previous issue, but perhaps with an even greater degree of urgency.

First, children's cases ought to be determined quickly and without side issues of intervention. They can be regarded as analogous to criminal proceedings in terms of human rights law, so the arguments against allowing the SCHR to intervene in criminal proceedings also have relevance here. I have already touched on the potential for delay.

Secondly, as with criminal proceedings, there is no existing mechanism for any third-party intervention in children's hearings. Rather than creating a one-off intervention power for the SCHR, it would be preferable for that to be considered in the wider context of whether third-party intervention in general should be allowed, so as to allow any potential implications for the children's hearings system to be properly assessed. In that context, the Education Department is considering the children's hearings system at the moment, and legislation on that will be brought forward in the next session of Parliament.

Amendment 112A would extend the SCHR's explicit power of intervention to

"proceedings before the Judicial Committee of the Privy Council".

However, that would be outwith legislative competence, as the procedures that govern the Judicial Committee of the Privy Council are reserved. It is also unnecessary, because the Judicial Committee already has procedures for third-party intervention, of which the SCHR will be able to take advantage under section 11(8).

I am not entirely clear about the intention behind amendment 116. If it is intended expressly to apply the SCHR's intervention power to appeal proceedings in the Court of Session and the sheriff court by removing the word "both" from section 11(9), that is unnecessary, because section 11(9) already provides that the SCHR will be able to intervene in appeal proceedings. If there is an intention beyond that, I would appreciate some clarification on what it is.

Amendment 117 would extend the SCHR's power of intervention to the district courts. However, they deal only with criminal matters, so the arguments that I have given against intervention in criminal cases apply to amendment 117 as well.

The new section 11 that amendment 118 would insert includes a power for the SCHR to institute legal proceedings in its own name and, for that purpose, would disapply the victim test in section 7 of the Human Rights Act 1998. However, it would be outwith legislative competence to confer such a power on the SCHR, as the Human Rights Act 1998 is reserved to Westminster under paragraph 1 of schedule 4 to the Scotland Act 1998. In any event, our position remains that such a power would be undesirable, as it would divert the SCHR away from his core function of promotion and awareness raising. Other jurisdictions have found that having a power to raise cases can create expectations that the power will be used frequently by bodies, which detracts from their other activities. That has emerged strongly from the experience of the Northern Ireland Human Rights Commission.

I move amendment 64.

Marlyn Glen: Section 11 is particularly complicated; it is good to hear the minister's justification. At first sight, it does not look right at all that the commissioner will not have the power to intervene in criminal court cases. The desired effect of amendments 111, 112, 112A and 113 to 118 is to extend that power.

I understand that the Northern Ireland Human Rights Commission was not originally given the power to institute proceedings and that it had to go to the House of Lords to win the right to do so. I would like the minister to go over that point again and explain a little further why that power would not be right for the SCHR.

Amendment 112 is specifically about children's hearings. I take the point that the children's hearings system will be examined in the next parliamentary session, but I reiterate that children's hearings are particularly important and should not be left out of the bill as if they were not. However, the bill on children's hearings will, I presume, be lengthy and wide, and I look forward to considering it in the next parliamentary session.

I am speaking to the amendments in Robin Harper's name because it is important to discuss the points that they raise. Amendment 118 is an alternative way of dealing with the changes that are proposed in amendments 111, 112, 112A and 113 to 117. It has been lodged as an option. In the event that the power to intervene is not accepted, the smaller amendments 111, 112, 112A and 113 to 117 could still extend the commissioner's powers to intervene.

Mr McFee: On this occasion, there is some merit in what the minister says, particularly on how amendments 111, 112, 112A and 113 to 118 have been presented. We are invited to amend a section substantially and then delete it, which seems somewhat pointless. Some of the amendments—particularly amendments 113 to 117—are clumsy and, to be frank, need to be rethought.

The minister made the point that the victim test to which amendment 118 refers is determined elsewhere. That obstacle needs to be overcome. I intend not to move the amendments, to allow Mr Harper to revise what he is attempting to do and be present when his amendments are moved.

A point was made about raising the level of expectations. Heaven forbid that we should have high expectations of our commissioner for human rights—that would be very adventurous. I caution against citing the example of Northern Ireland, where the issues are dramatically different in many respects from those in Scotland. It is not a good comparison.

The Convener: I want to respond to the minister's comments on section 11(9). He has clarified that the commissioner will have the power to intervene in appeal proceedings. We were unclear about that at stage 1. The clarification is helpful, but I want to ensure that I have understood the minister correctly. In Scots law, we do not permit the intervention of third parties generally, although it should be noted that there are more than 600 challenges to the criminal law. Today one of those challenges, on the right to silence, has gone to Strasbourg. If the court in Strasbourg takes the view that speed cameras contravene the right to silence, that will have wide-ranging implications, but it is a matter for the court. The criminal law has been thoroughly tested and, as we indicated in our report, there have been very few successful challenges. However, a bit more work is needed in the area of civil law, where the power of intervention should exist. I want to be crystal clear about whether section 11(9) gives the commissioner the right to intervene at the Court of Session in relation to civil appeals.

Robert Brown: Section 11(9) gives the commissioner the power of intervention at the Court of Session in matters that come within their ambit.

One or two more general points emerge from the discussion. The Northern Ireland experience was not cited in a general sense, although there are various areas in which it is relevant. The issue is the power to intervene, which was not made explicit one way or the other in the statute that constituted the commission. In connection with a coroner's inquiry, the matter had to be referred to the House of Lords, so that the law could be

declared. The House of Lords said that in that regard the commission could take advantage of existing law and practice in other realms. To avoid the same happening in respect of the Scottish commissioner, we have included in the bill a clear statement that if existing law and practice allows interventions, the commissioner will be able to take advantage of that. That clear, overarching commitment is well phrased in the bill.

We do not want to introduce a new power of intervention in particular sorts of procedure as a by-blow of the bill. Any such change should be more considered and should be introduced in the context of criminal law reform, reform of the children's hearings system and so on, if we are so minded.

I have dealt with the main points that members have made. Despite Bruce McFee's comments, at the end of the day we are delivering a bill to establish a Scottish commissioner for human rights that will add significantly to the arrangements for promoting and protecting human rights that are in place in Scotland. The section that we are debating is only a small aspect of the overall scheme, but it gives the commissioner powers that can be used on appropriate occasions to do things in a legal context, within the limits that the amendments set.

13:00

The Convener: The question is, that amendment 64 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)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Pringle, Mike (Edinburgh South) (LD)

ABSTENTIONS

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

The Convener: The result of the division is: For 4, Against 0, Abstentions 2.

Amendment 64 agreed to.

Amendments 111, 112 and 112A not moved.

Amendments 67, 74, 76 and 78 moved—[Robert Brown].

The Convener: If no member disagrees, I will put a single question on the amendments.

The question is, that amendments 67, 74, 76 and 78 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)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Pringle, Mike (Edinburgh South) (LD)

ABSTENTIONS

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

The Convener: The result of the division is: For 4, Against 0, Abstentions 2.

Amendments 67, 74, 76 and 78 agreed to.

Amendments 113 to 118 not moved.

Section 11, as amended, agreed to.

Section 12—Annual report

Amendment 83 moved—[Robert Brown].

The Convener: The question is, that amendment 83 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)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Pringle, Mike (Edinburgh South) (LD)

ABSTENTIONS

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

The Convener: The result of the division is: For 4, Against 0, Abstentions 2.

Amendment 83 agreed to.

Amendment 86 moved—[Robert Brown].

The Convener: The question is, that amendment 86 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)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Pringle, Mike (Edinburgh South) (LD)

ABSTENTIONS

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

The Convener: The result of the division is: For 4, Against 0, Abstentions 2.

Amendment 86 agreed to.

Amendment 130 not moved.

Section 12, as amended, agreed to.

Sections 13 and 14 agreed to.

Amendment 95 moved—[Robert Brown].

The Convener: The question is, that amendment 95 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Glen, Marlyn (North East Scotland) (Lab)
McFee, Mr Bruce (West of Scotland) (SNP)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Pringle, Mike (Edinburgh South) (LD)

ABSTENTIONS

Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 5, Against 0, Abstentions 1.

Amendment 95 agreed to.

After section 14

The Convener: Amendment 119, in the name of Robin Harper, is in a group on its own.

Marlyn Glen: Amendment 119 seeks to insert into the bill a new section that would bring the Scottish commissioner for human rights into line with the CEHR by giving it the power to make grants to other organisations involved in human rights work in Scotland. The wording is lifted from section 17 of the Equality Act 2006. There is a need for a specific power in that regard because the power in section 4 to charge fees for work done is not wide enough to encompass grants. Moreover, the human rights non-governmental organisation sector in Scotland is very underresourced and needs support if the SCHR is to fulfil the aim of providing a strong network of local provision to build a human rights culture throughout Scotland.

I move amendment 119.

Mr McFee: Marlyn Glen has made the point reasonably well. The committee heard evidence that voluntary sector organisations have been starved of cash to carry out their work and that they very much rely on the dedication of a few individuals. Whether amendment 119 is the correct way of dealing with the problem is another matter. The question of grants would certainly arise if the bill's scope were to be widened along the lines suggested earlier. In any case, I suspect that Marlyn will probably withdraw amendment 119. I will not force the amendment to a vote, because the matter needs to be debated in the context of a far wider range of issues. That will happen at stage 3.

The Convener: I am sympathetic to amendment 119, because I have always felt that creating a Scottish commissioner for human rights should not mean that other human rights organisations have to fold. I have highlighted the excellent work in this area of the Scottish Human Rights Centre, formerly the Scottish Council for Civil Liberties; it was a real pity when it had to wind up less than a year ago. I am keen to hear the Executive's views not only on the issue of grants that Marlyn Glen has raised but on the question whether there is scope to ensure that other NGOs receive adequate funding.

Mrs Mulligan: I might be out of sync with my colleagues on this matter, because I do not think that the commissioner's role should include providing grants to other bodies that deal with human rights issues. There is certainly an issue about how such organisations are funded and, like Pauline McNeill, I regret the fact that the Scottish Human Rights Centre had to fold. However, the commissioner's role in promoting and protecting human rights is clear and I think that putting grant-making responsibilities on its shoulders would be an incongruous move. I am interested to hear what the minister has to say, but at the moment I remain unconvinced by amendment 119.

Margaret Mitchell: I am against giving the commissioner grant-making powers. As I have made clear right from the start, I would prefer it if voluntary organisations with the experience and expertise to take up individual cases were funded directly.

Robert Brown: First, I point out that the commissioner probably has grant-making powers both under the general duty in the bill and, specifically, under paragraph 8(1) of schedule 1, which says:

> "The Commissioner may do anything which appears necessary or expedient for the purpose of, or in connection with, or which appears conducive to, the exercise of the Commissioner's functions."

I know that the GB commission will have such a power, but we see it as more of a subsidiary power than one of the body's main roles. Indeed, as we have heard, committee members are divided on the matter.

Given that the power might already exist in the bill, it might be worth considering the nature of such a power and how it might work in practice. The commissioner should, among other things, be able to impose conditions on any grants that he or she makes.

Consideration ought also to involve the Scottish Parliamentary Corporate Body, given its budgetary and general oversight responsibilities. We would like to reconsider some of the issues that have been raised and return to the matter. Nothing that I have said was intended to suggest that it will be the main role of the body to carry out its functions by way of grant provision. However, one could envisage a situation in which giving assistance to

another body might be a way of providing consultancy or other relevant services.

In light of the support for such a measure among at least some committee members, we would like to consider the details further and return to the issue at stage 3. However, the present proposals are not phrased in quite the right way, which is why we want to consider the details of such a provision, against the background of the growing number of governance issues that have been raised. I hope that the committee feels that that is a reasonable response to the views that members have expressed.

Marlyn Glen: I thank the minister for that response. I look forward to revisiting the matter at stage 3. The provision might have different terms, but it would be good if the idea was implemented.

Amendment 119, by agreement, withdrawn.

Sections 15 to 17 agreed to.

Section 18—Interpretation

Amendment 167 not moved.

Section 18 agreed to.

Section 19 agreed to.

Long title agreed to.

The Convener: The long title is the sign that we are at last approaching the end of a bill. That ends stage 2 consideration of the Scottish Commissioner for Human Rights Bill. I thank the minister and his team for appearing at the stage 2 meetings. We have had a long meeting today but, unfortunately for us, it is going to be even longer, as we have other business. I promise that it will be quick.

Robert Brown: I thank you for your consideration and wish the committee well in its business—I know that you are under great pressure.

The Convener: Thank you—see you at stage 3.

Criminal Proceedings etc (Reform) (Scotland) Bill

13:12

The Convener: I will press ahead with the agenda, as some of the items have been carried over from previous meetings.

Members will be aware that a point of order was raised in Parliament last week expressing concerns about our timetable and workload. I have not had an update from the Minister for Parliamentary Business's office on the outcome of that.

I invite members to consider the motion in my name that sets out a proposed order for our consideration of the Criminal Proceedings etc (Reform) (Scotland) Bill at stage 2. We propose to take sections 1 to 5, then sections 7 to 66, so that some of the more difficult provisions will be dealt with further down the track. The deadline for amendments to sections 1 to 5, which are the provisions on bail, will be this coming Friday. If we do not do that, the timetable will definitely slip. I invite comments or questions on the proposal.

Margaret Mitchell: I repeat my concerns about the sausage-machine mentality that seems to exist in the Scottish Parliament. Yesterday, we considered the Scottish Criminal Record Office inquiry; today we considered amendments at stage 2 to the Scottish Commissioner for Human Rights Bill; and next week we will consider an important bill on the reform of summary justice. Although sections 1 to 5 and the other sections that it is proposed to deal with earlier may not be contentious or complicated, they still deserve adequate consideration and scrutiny. I am not too sure where that leaves us, in the absence of a recommendation from the Minister for Parliamentary Business. However, I hope that, if the committee has difficulty when working through the bill and the discussions take longer than we envisage, we will have leeway to ensure that we get the bill right rather than rush it.

13:15

Mr McFee: I agree that we are taking a sausage-machine approach. It is all fine and dandy to oppose such an approach at this stage, but we should be raising our feelings with business managers. There is no point in everybody sitting here and saying, "Isn't it terrible that everything is being squeezed into the machine?" If nobody says a word to business managers they will nod through the timetable. That is what happens in committee and the wider Parliament. Even when today's motion was lodged, nobody lodged one against it. I put it on

the record that it is time to do something or get off the pot. Concerns about firefighting have to be raised in the first instance with business managers from the various parties. I know what will happen—we will be told to stick to the original timetable. It is no use waiting until it is too late; we have to intervene earlier.

The Convener: The impact of taking on an inquiry has probably pushed us over the edge. The problem is not the time that we spend sitting here, which is difficult enough; it is that we have dealt with three bills and one inquiry this week alone and we still have to at least sign off the consultation on the Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill.

The Criminal Proceedings etc (Reform) (Scotland) Bill is what it says it is—it is about criminal proceedings. I have always taken pride in the fact that the committee has scrutinised bills in great detail. We do not want to pass bad legislation and have people out there thinking that we have not given the bill due consideration. I am unhappy about the attitude of the Crown and the police in particular who seem to want us to give them powers without understanding what they will do with them. In order to clarify that at stage 2, we have been offered a meeting with the Crown Office and we are trying to set that up.

I press members for a view about the way forward if you think that the timetable for consideration is not doable. I suggest that we tackle the bail provisions before the recess and then return to consideration of the bill the second week back after the recess. How do members feel about that?

Mrs Mulligan: I share some of the concerns about dealing with so much legislation and the speed at which we are doing so. However, the convener's suggestion about how we consider the Criminal Proceedings etc (Reform) (Scotland) Bill is probably the best. Given my other colleagues' comments, they would not disagree with that. Without weeping and wailing about our position—perhaps Bruce McFee is right that we could pursue other avenues—the convener seeks agreement from us to her recommendation and I think that we should go with it.

Margaret Mitchell: I do not oppose the recommendation, but I add the proviso that it should be looked on sympathetically if discussion takes longer than we anticipate and we do not finish dealing with the amendments by the end of a meeting. If we take longer over our consideration, there will be a good reason for it. We need to hammer out that issue. With that proviso, I am happy to agree to the timetable.

The Convener: I am happy with that proviso—it is pretty much how I would express the situation myself. We must have some flexibility if we come up against a problem that we cannot resolve. One way of resolving it could be to say that we will not agree to a certain amendment at stage 2. We need that flexibility to iron out some of the issues that we raised at stage 1. Part of the difficulty in doing a stage 1 report in which lots of issues are raised is that stage 2 follows so quickly and we do not have time to resolve them. Stage 2 is much more adversarial.

We have also discussed our role in relation to the budget. Thankfully, we are talking about only one meeting, but it will be a four-hour meeting. This is our third meeting this week as it is. Members should say whether they intend to be there. There might be some way in which we could share the responsibility so that we do not all have to be at the budget meeting.

Mike Pringle: Will we have only one more budget meeting?

The Convener: We will have one oral evidence-taking session and then we must prepare a report, so I presume that we will have two meetings on the budget. Members who come to the evidence-taking meeting should come to the meeting on the report.

Mr McFee: I have a point about what you said earlier. As I can testify, because I am on the Procedures Committee, work on any report by that committee is the graveyard shift. As part of the review of parliamentary time that it is undertaking, that committee has issued a consultation paper. Although the paper is not as wide as I would have liked it to be and does not deal specifically with stage 2 or the space between stage 1 and stage 2, for example, members will have the opportunity to raise such issues in the debate—which will, I think, be held on 5 October—if they feel strongly about them. If I remember correctly, the Procedures Committee has received no evidence on stage 2, although it has had some on the timing and lodging of amendments at stage 3. The consultation paper is quite broad, so if members feel that there is insufficient time between the end of stage 1 and the commencement of stage 2, they can express that concern. I say that because there are usually only about six members in the chamber for Procedures Committee debates.

The Convener: We have fed into that work in the past and should continue to do so, but in my opinion we are talking about a more fundamental issue than timetabling. At stage 1 of the Criminal Proceedings etc (Reform) (Scotland) Bill, we asked questions about the detail of how liberation on undertaking provisions would be applied. We should have had answers to those questions. The problem lies in the approach that the Executive's bill team is taking. The Criminal Proceedings etc (Reform) (Scotland) Bill is not the first bill in

relation to which the Executive has expected us to agree to the creation of a general power without our having examined the detail of how that power would be exercised. Our approach has always been to examine the detail. Although we asked our questions at the beginning of the process, they have not all been answered. The issue is about more than just the timetable.

Mr McFee: I certainly agree that it is about the use of parliamentary time rather than just timetabling.

However, there is an issue on which I disagree with you. It is the Executive that promotes a bill, not the bill team. Frankly, the relevant minister has a responsibility to ensure that the committee that is scrutinising a bill gets its answers. I expect the minister in charge of any bill to be able to justify the rationale behind it and to explain how its procedures will work before it becomes the subject of committee consideration. There is a wider issue.

The Convener: Where does that leave us? We will open up the amendment process on sections 1 to 5 and sections 7 to 13, but with Margaret Mitchell's proviso that if we feel we need more time or additional answers in order to make progress as our consideration of the bill proceeds, we should be able to report back to the Minister for Parliamentary Business on how we are doing.

Do members agree to the motion?

Margaret Mitchell: I will be happy to agree to the motion, on the proviso that if the committee finds that consideration takes longer than expected because discussion of particular provisions goes on, the timetable could be amended. The provisions on liberation on undertaking, which the convener mentioned, are an excellent example. Only today it has been reported that a person in Dumfries was cautioned, charged and released in circumstances similar to those that will be subject to the powers on undertakings that we are being asked to agree to in the bill. Not surprisingly, we want to get the provisions right; if that requires a lengthy discussion that puts the timetable out, so be it. I seek confirmation that the minister would be sympathetic to that—that is my proviso. On that basis, I am happy to support the motion.

The Convener: Yes, but the motion refers to sections 1 to 5 and sections 7 to 13. [*Interruption.*] I think that the motion just gives the target for day 1. [*Interruption.*]

Mr McFee: I assume that we will deal with sections 1 to 5 on the first day of stage 2 and sections 7 to 66 on a separate day.

Mike Pringle: That is my assumption.

Mr McFee: If that is not the case, I will oppose the motion.

The Convener: I ask Callum Thomson to clarify matters.

Callum Thomson (Clerk): The motion is the order of consideration for the whole bill. The only feature to point out is that section 6 will be taken out of turn, so it will be dealt with at the end of the main sections of the bill and will probably not be taken until day 4 or thereabouts of stage 2. As far as the target for day 1 is concerned, which is not subject to a motion, we will consider amendments to sections 1 to 5 plus sections 7 through to 13.

Mr McFee: In that case, what was said slightly earlier about the final day for lodging amendments for sections 1 to 5 was not wholly accurate. Friday is potentially the final day for lodging amendments for sections 1 to 13.

Callum Thomson: That is correct, with the exception of section 6.

The Convener: That is the target.

Mr McFee: Friday 29 September is the deadline for lodging amendments to sections 1 to 13, excluding section 6.

Callum Thomson: To explain further, sections 7 to 13 have been suggested because they appear to be relatively non-controversial parts of the proceedings part of the bill—part 2—whereas, if memory serves me correctly, section 14 deals with trial in absence. Therefore, that section has not been included in day 1 of our consideration of amendments. It was thought that to make progress with the bill we should go as far as section 13, excluding section 6.

Mr McFee: I accept the rationale behind the decision, but I want to be clear that the advice that we are being given that amendments should be lodged by Friday 29 September potentially applies up to section 13, excluding section 6.

The Convener: Amendments to those sections cannot be accepted after that deadline, but amendments to other sections obviously will be. The next time we meet to discuss the subject will be the second week after recess, so the deadline will be the first week back.

Mr McFee: The next time we—

The Convener: The next occasion on which we discuss the Criminal Proceedings etc (Reform) (Scotland) Bill after 4 October will be the second week following the recess.

Mike Pringle: "Following the recess." I thought that you said "second week of the recess".

The Convener: No—I mentioned the second week following the recess.

I move,

That the Justice 1 Committee considers the Criminal Proceedings etc (Reform) (Scotland) Bill at Stage 2 in the following order: sections 1 to 5, sections 7 to 66, section 6, section 67, schedule and sections 68 to 71.

Motion agreed to.

Justice and Home Affairs in Europe

13:27

The Convener: Item 4 is justice and home affairs in Europe. Members will recall that the committee has done quite a bit of work and held a parliamentary debate on our work on applicable law on matrimonial matters and divorce. Although we do not have a great deal of time to debate the matter further, I thought it important, given that we have done all this work, that we keep up the pressure in relation to the European Commission's progress on the matter.

We made it clear in our response to the European Commission that the proposals are not in Scotland's best interests. We recommended that the Scottish Executive strongly urge the United Kingdom Government not to opt into any draft community instruments that appear following conclusion of the consultation process. The proposal relating to applicable law on jurisdiction and divorce has recently been published by the Commission. I am informed that none of our concerns has been addressed.

The committee has been invited by colleagues at Westminster to make a submission to the House of Lords European Union Select Committee, which is considering whether the proposal respects EU rules on subsidiarity and proportionality. The House of Lords committee will submit an opinion to the Commission on behalf of the UK Parliament as part of a wider check on the national Parliaments throughout Europe.

The clerks and the Scottish Parliament information centre have given detailed consideration to the Commission's proposals and have prepared a report for the committee to consider. I invite the committee to agree to submit the report to the House of Lords European Union Select Committee as a contribution to the subsidiarity and proportionality check. It is a pity that we cannot get more coverage for the issue, because if the Commission progresses the matter, Scotland will be expected to apply other countries' national laws on divorce. I know that we all feel very strongly about that, but it would be a disaster if we did not comment on behalf of the Scottish Parliament. I invite members to comment on the report and agree it if they can.

Mr McFee: I will not go through the arguments on the matter: we have been through them, there was a debate and nothing has happened to make me change my mind. In fact, everything that has happened since makes me stick to my position and be as belligerent as the Commission appears to be on the matter. We should stick to the

recommendations in paragraphs 20, 21, 56 and 57 of the report.

13:30

Margaret Mitchell: I seek clarification on the content of the response. Did you say that it completely ignores all the points that were made?

The Convener: The Commission has not addressed the points that we made. I think that the UK position is not dissimilar to our own.

Margaret Mitchell: I am a bit confused. I think that I read somewhere that there is to be a UK opt-in—the minister may have used that phrase. Are we opting out of this UK-wide or—

The Convener: We calling on the UK Government not to opt into the provision. The UK can do that, in the same way that Denmark and other countries have done.

Margaret Mitchell: It would be useful to know about the UK response.

Mike Pringle: I was about to ask the same question.

Margaret Mitchell: There is merit in having a united front. The argument that applies to Scotland applies equally to England.

Mr McFee: Although we are asking the UK Government not to opt in, the Executive has yet to firm up its view. We have made representations, but the Executive has not come to a view on its proposals, never mind on the UK Government position.

The Convener: The clerks previously circulated the response of both the UK Government and the Executive. We will circulate them again. In order to keep up the pressure, we need to be sure that the Executive is including in its representations the view of the Justice 1 Committee of the Scottish Parliament.

Mrs Mulligan: As you said, convener, the proposal flies in the face of the way in which Scots law is, and has been, enacted. I agree that the Commission's approach is the wrong way to go. The committee is clear on the matter. We spent a substantial amount of time on our consideration of the Family Law (Scotland) Bill, including consideration of divorce. Given the effect that divorce has on individuals, it seems unnecessary and quite beyond belief that people in those circumstances should face further uncertainty.

We should make the strongest possible representations to the Executive and the Westminster Government that the proposal will be detrimental to the people whom we represent. The time we took in making our representation to the Commission should be acknowledged and the points that we made addressed. I do not want anything to change without first being given a substantive reason why the change should be made. I do not think that that argument can be made, but someone should make the effort to do so.

Mike Pringle: I agree with that.

The Convener: Me too. I am keen that we try to get some coverage on the issue. That may be difficult; it is a dry subject. However, as Mary Mulligan said, if the proposal is introduced into Scots law, people will ask questions such as—

Mike Pringle:—why we did not do anything about it.

The Convener: They will also ask what we tried to do about it. The proposal has serious implications for Scottish courts. I am keen to put something on the committee's position on the website. I will try to do that.

Mike Pringle: Are we going to ask the Executive what it is doing about this? Have we asked the minister that question?

The Convener: There is a ministerial response, but we should raise the point again with the minister. We should say that we have had this discussion today and we should reiterate our position that we hope that the Executive will fight as hard as it has done until now to maintain the Scottish and UK position on the matter.

Mike Pringle: We are making a submission to the House of Lords European Union Select Committee, but is the minister also doing that? If she does not, when the Commission receives our submission, it will say, "The Government ministers of Scotland didn't make a submission; it was just some committee."

The Convener: The work is parliamentary in nature—we have been invited to submit our report in our capacity as a parliamentary committee. That does not prevent us from doing what Mike Pringle is suggesting, which is to press ministers to keep on top of the issue. We are reaching the end of the process. It would be helpful for us to write to the minister to say that we continue to feel as strongly on the matter as we did at the time of the debate, and that we hope that the Executive is also of that view. The clerks and I will do that.

Mr McFee: On that point, in the second-last paragraph of her letter, Cathy Jamieson makes her position absolutely clear—she is nowhere on the issue. She stated:

"I realise that I am not in a position to provide you with a full account of the Scottish position on the proposals and on the UK Government opt-in decision at this particular point in time".

She makes noises to make us feel that we are all singing from the same hymn sheet, but apparently we have not yet managed to get the hymn sheet printed. There seems to be prevarication, which concerns me. If we write again to the minister to make our views clear, that might help to solidify opinion at the Executive.

Margaret Mitchell: It is the phrase

"the UK Government opt-in position"

that caused me difficulty earlier and on which I sought clarification. I would like to know what the UK position on our submission is. Is anyone in a position to tell us?

The Convener: We have the UK position. I will bring in the clerk.

Douglas Wands (Clerk): The committee had circulated to it the UK Government's response to the green paper. At that consultation stage, the UK Government's position was very similar to that of the committee. It saw many negative aspects to the approach that was set out in the green paper.

Obviously, the Commission proposal was published only recently and we are only now at the stage at which both Parliaments and, indeed, other Governments around Europe are considering the proposal. It is still early in the process. The committee has been asked to contribute to the parliamentary element of the UK response. The Scottish Executive will contribute to the UK Government response.

From the minister's letter, one can see that the Executive appears to be at an early stage in its consideration. However, the minister gives a commitment in the letter that she will update the committee once she is clear on the Executive position.

Margaret Mitchell: I am deeply concerned about what she says about

"the UK Government opt-in decision".

My understanding is that the UK Government has not yet taken a decision to opt in. Surely the Executive is considering its decision to be invited to opt in.

Douglas Wands: That decision has not been taken as yet.

Margaret Mitchell: Right. That is helpful.

The Convener: We agreed to take item 5 in private.

13:36

Meeting continued in private until 13:49.

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