

LOCAL GOVERNMENT COMMITTEE

Tuesday 18 December 2001
(Afternoon)

Session 1

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LOCAL GOVERNMENT COMMITTEE

34th Meeting 2001, Session 1

CONVENER

*Trish Godman (West Renfrew shire) (Lab)

DEPUTY CONVENER

*Dr Sylvia Jackson (Stirling) (Lab)

COMMITTEE MEMBERS

*Mr Keith Harding (Mid Scotland and Fife) (Con)
*Mr Michael McMahon (Hamilton North and Bellshill) (Lab)
*Tricia Marwick (Mid Scotland and Fife) (SNP)
*Iain Smith (North-East Fife) (LD)
Ms Sandra White (Glasgow) (SNP)

*attended

THE FOLLOWING ALSO ATTENDED:

Linda Fabiani (Central Scotland) (SNP)

WITNESSES

Stephen Bruce (Scottish Executive Finance and Central Services Department)
Michael Buckley (Scottish Parliamentary Commissioner for Administration)
Barney Crockett (Office of the Housing Association Ombudsman for Scotland)
Martyn Evans (Scottish Consumer Council)
Mr Andy Kerr (Minister for Finance and Public Services)
Michael Lugton (Scottish Executive Finance and Central Services Department)
Graeme Millar (Scottish Consumer Council)
Ian F Smith (Office of the Commissioner for Local Administration in Scotland)
Kathleen Steindl (Office of the Housing Association Ombudsman for Scotland)
Brian Thomson (Office of the Commissioner for Local Administration in Scotland)

CLERK TO THE COMMITTEE

Eugene Windsor

SENIOR ASSISTANT CLERK

Irene Fleming

ASSISTANT CLERK

Neil Stewart

LOCATION

Committee Room 2

Scottish Parliament

Local Government Committee

Tuesday 18 December 2001

(Afternoon)

[THE CONVENER *opened the meeting at 13:35*]

Items in Private

The Convener (Trish Godman): Okay comrades, let us start. I welcome Linda Fabiani, who is here as the reporter from the Social Justice Committee. I think that this is the first time that she has been to a Local Government Committee meeting—I am sure that she will enjoy it so much that she will want to come back.

Does the committee agree to take items 4 and 5 in private? Item 4 is our draft report on stage 1 of the Marriage (Scotland) Bill and item 5 is a discussion of potential witnesses on the Land Reform (Scotland) Bill.

Members *indicated agreement.*

Scottish Public Sector Ombudsman Bill: Stage 1

The Convener: We are taking evidence on the general principles of the Scottish Public Sector Ombudsman Bill at stage 1. I think that today is also the first visit of Andy Kerr, the Minister for Finance and Public Services, to the committee—although I can assure members that it will not be his last. The minister is accompanied by Michael Lugton, who is head of the constitution and parliamentary secretariat of the Scottish Executive, and Stephen Bruce, who is the leader of the Scottish Public Sector Ombudsman Bill team.

The minister will make some opening comments before I open up the meeting for questions. I am sure that you will enjoy every minute, minister.

The Minister for Finance and Public Services (Mr Andy Kerr): Thank you. The view is very different from this end of the table. I hope that this is the beginning of a long and healthy relationship with the committee. Having been the convener of the Transport and the Environment Committee for more than two years, I value the role of the Scottish Parliament committees. I look forward to working with the committee, knowing its importance to the work of the Parliament.

I welcome this opportunity to speak to the committee on the Scottish Public Sector Ombudsman Bill. The bill aims to establish a public sector complaints system tailored to Scottish needs. It is an excellent example of how devolution is able to benefit the people of Scotland. The bill flows directly from the Scotland Act 1998, meeting the requirement contained in that act for the Parliament to provide for the investigation of complaints relating to the actions of members of the Scottish Executive and other office holders in the Scottish Administration. The bill also makes key contributions to two specific areas in my ministerial portfolio: better public service delivery in Scotland and furthering the Executive's commitment to promoting the United Kingdom Government's modernising government programme. Effective ombudsman arrangements are vital to achieving both those aims.

The bill's proposals were developed following two wide-ranging consultation exercises. In line with our commitment to open and responsive government, about 800 organisations and individuals were given the opportunity to comment on our proposals, including special interest groups, community groups, public bodies, professional and trade organisations and those with recent experience of the ombudsman system. The bill has benefited from that extensive consultation exercise, which has assisted our

desire to establish a system more attuned to Scottish circumstances.

Throughout both consultations it has been clear to the Executive that many aspects of the current system have been effective. In drafting the bill we have sought to retain what has worked well and then to add to that framework a range of significant reforms to create a more open, accountable, accessible and effective complaints system for Scotland.

The principal reform introduced by the bill is the creation of a one-stop shop, which combines the existing offices of the parliamentary, health service, local government and housing association ombudsmen in Scotland. The one-stop shop will benefit the public, who will find it easier to make complaints, and the ombudsman, who should be able to realise tangible improvements in the operation and effectiveness of the complaints system.

All complaints and information requests will be dealt with by the same office, using standardised procedures. That will avoid the confusion that can currently arise when a complaint falls within the remit of two ombudsmen. A single organisation that deals with public sector complaints will have a higher public profile and will be easier to publicise. It will allow greater flexibility in the use of staff and other resources, together with opportunities for more joint working and sharing of information.

The bill seeks to make the ombudsman more accessible in a number of ways. It removes the need for complaints to go through MSPs and allows complaints to be made orally in special circumstances, or to be made by electronic means. It also allows a person to authorise a representative to complain on their behalf. To promote public awareness of the ombudsman, the authorities that are listed in the bill will be required to provide information about the right to complain to the ombudsman in leaflets, guidance and correspondence.

The openness and effectiveness of the ombudsman will be improved by the requirement for the ombudsman to publish all investigation reports and lay them before Parliament. In addition, the bill empowers the ombudsman to publicise and lay before Parliament special reports on cases when an injustice or hardship has not been remedied.

To improve the accountability of the ombudsman, he or she will be appointed for a fixed term of five years, which will be renewable once. A second renewal will be allowed only in exceptional circumstances. The ombudsman will be required to report annually to the Parliament on the work of the office. The Parliament will have the power to direct the ombudsman as to the form and

content of annual reports.

The current ombudsmen—and the arrangements under which they work—have served Scotland extremely well and they are held in high regard. The Executive welcomes the valuable contribution that the ombudsmen have made to maintaining quality public services. I believe that the reforms introduced by the bill will build on the legacy of the existing ombudsmen and help us to achieve our goal of better public services for the people of Scotland.

I will now do my best to answer the committee's questions. If in doubt, I will ask an official to assist me.

The Convener: I will ask two quick questions. The Executive has decided to expand the remit of the ombudsman to include internal management arrangements for publicly funded schools. Why have you done that? Who will be responsible for deciding where school management ends and educational policy begins?

Mr Kerr: That decision widens the scope of the ombudsman. I am aware of the Convention of Scottish Local Authorities' concerns on the matter, because it has given evidence to that effect. However, the bill limits the ombudsman to investigating administrative matters and excludes him or her from investigating matters of professional judgment. I think that part of your question refers to that.

Paragraph 9 of schedule 4 to the bill provides that the ombudsman not investigate

“Action concerning—

(a) the giving of instruction ...

(b) conduct, curriculum or discipline,

in any educational establishment under the management of an education authority.”

That is supported by section 7(1), which prevents the ombudsman from questioning a discretionary decision taken “without maladministration”, and section 5(1)(a), which entitles the ombudsman to investigate only action taken in the exercise of administrative functions. An attempt has been made to ensure that there is delineation. The ombudsman has not been given full power; it is focused.

Mr Michael McMahon (Hamilton North and Bellshill) (Lab): Why has the Executive limited the proposed powers of the ombudsman to the investigation of maladministration, with the exception of complaints about poor service in the NHS?

Mr Kerr: The role of the ombudsman in the NHS has developed differently. The role of the ombudsman is to investigate complaints of injustice and hardship arising from maladministration, but in the case of health service

bodies it includes complaints about service provision and clinical care and treatment. It was felt that, although that is appropriate for the health sector, it would be inappropriate for the ombudsman to second-guess organisations such as local authorities, which are democratically accountable. Other routes have been created to provide a stage before someone gets to the ombudsman. It is about recognising that the ombudsman can play a different role in the health sector from the one that it plays in the local authorities.

Mr McMahon: If the Executive is keeping the power to investigate complaints of poor service in the national health service, why is it not keeping the similar power that the housing association ombudsman currently has?

Mr Kerr: We can deal with housing associations through the new ombudsman. The main issue is maladministration. We judge whether we are second-guessing bodies. Cases showed that the housing association ombudsman had not used the wider remit to investigate more than maladministration. We judged what had gone before and whether we were second-guessing another organisation unnecessarily and decided that it would be inappropriate to include such powers.

Mr McMahon: That judgment was based on complaints that were received under the present system.

Mr Kerr: The judgment was based on the fact that no cases showed that the housing association ombudsman had used that wider remit.

Mr McMahon: Is that a good criterion on which to base an assessment of whether such a power is needed now? A lack of information could have prevented complaints from being made. The ombudsman could have used a different criterion to decide what maladministration was. You judged that criterion against statistics from another ombudsman, but the criteria may not have been the same.

13:45

Mr Kerr: I accept your point, but the principle is to focus on what we have done well and to make that part of the bill. The evidence suggests that the wider remit was not used and that it is therefore not required. I am sure that we will revisit that point at later stages of the bill. Given the analysis and the information that we have received and the work that has been done by previous ombudsmen, it was felt inappropriate to widen the bill's scope to include such a power.

Tricia Marwick (Mid Scotland and Fife) (SNP): The bill aims to act as

“a re-enforcement of the Ombudsman's independence from the authorities within his ... jurisdiction”.

The Scottish Parliamentary Corporate Body falls within the new ombudsman's jurisdiction. How will you reconcile the ombudsman's independence with the SPCB's responsibility for the ombudsman's pay and conditions?

Mr Kerr: I understand where you are coming from. The bill's provisions on employment, finance and other administrative matters are a result of discussions between officials and interested parties, including the Executive and parliamentary colleagues. The purpose of those discussions was to agree a common approach among all office holders who have a responsibility to the Parliament, including the new ombudsman and the Scottish information commissioner, and to decide how that relates to the new ombudsman's role. The scope for manoeuvre in those discussions was constrained by the Public Finance and Accountability (Scotland) Act 2000 and the Scottish Parliament's standing orders.

I understand the concern that channelling the ombudsman's funding through the parliamentary corporation may appear to compromise his independence, as the corporation falls within the ombudsman's jurisdiction, as you said, but because of the way in which the Scottish Parliament is organised and the way in which money can be paid from the Scottish consolidated fund—which relates to other matters that are under my remit—the only alternative would have been for the Executive to provide funding. If that had happened, we would have had to revisit Tricia Marwick's question in a different way. That would be an impractical way of funding the organisation.

Valid complaints about the parliamentary corporation will be few and far between, I hope. According to the evidence and the expected work loads, the SPCB was considered an appropriate organisation through which to channel funding to the ombudsman. As the Scottish parliamentary commissioner and health service ombudsman are currently funded by the parliamentary corporation, we are not really changing the present system. Perhaps it is the lesser of two evils. We must provide the resources somehow, and they must come from an organisation. The SPCB was chosen as the route.

Tricia Marwick: The problem is not the fact that the SPCB will be the channel for pay and resources. The conflict of interest arises because the SPCB will determine pay, allowances and pensions. That determination causes the conflict, not the fact that the SPCB is the channel for resources.

The Scottish parliamentary commissioner for administration is concerned about the SPCB's

falling within the new ombudsman's jurisdiction. I wish that you would address the fact that the problem is that the determination of conditions, not the channelling of resources, creates a conflict of interest.

Mr Kerr: We start from a point of looking at how else to do that, which goes back to my previous response about the best method for doing it.

We do not think that it would be practical or appropriate to determine pay, allowances and pensions other than through the body that is responsible—the Scottish Parliamentary Corporate Body. The determination of where we split the money and how we allocate resources is made by the corporate body. It is a question of looking at what we can do and how we can best do it—in a sense, the line of best option, which was followed here. If the determination of pay, allowances and pensions did not come from the corporate body, then in relation to finance and the other matters that you mentioned we would have to have another body. Then we would have two separate bodies relating to the ombudsman, which would not be a satisfactory solution either.

Tricia Marwick: Perhaps we could ask the Scottish Parliamentary Corporate Body to comment on that. So far, we have not received any written evidence from it. We might seek its view on its being under the jurisdiction of the ombudsman.

The Convener: Yes, we can do that.

Mr Kerr: We have had discussions with relevant officers in the Parliament, who appear to be quite happy with what the Executive proposes. However, the committee will want to examine that further.

The Convener: I understand that, if officials are named, they can speak. If you want your officials to speak, that is fine.

Mr Kerr: Yes, indeed.

Mr Keith Harding (Mid Scotland and Fife) (Con): Welcome to your first Local Government Committee meeting, minister.

The remit of the proposed public sector ombudsman does not extend to all the services that are covered by the current public sector ombudsmen, such as prisons. How do you reconcile that with the principle of a one-stop-shop ombudsman for all public services?

Mr Kerr: I shall ask Stephen Bruce to comment on the Prison Service. There are a number of hurdles that have to be jumped before we get to the ultimate conclusion. The prisons were left out specifically because they are covered by another body. I leave it to Stephen to discuss the detail.

We are trying to draw what is available into a

one-stop shop to provide the increased access that I spoke about, but there is a list of organisations that stand outside the proposed remit. We can go through why they were left out if the committee wants; there are justifiable reasons for that. We are trying to provide focus, accessibility and an understanding of the system, which will come from the one-stop shop. Greater assistance will be provided to the general public through the use of common systems.

Two bodies are involved with the prisons and it was felt appropriate that they should stand outside the system. I invite Stephen Bruce to give more detail on that.

Stephen Bruce (Scottish Executive Finance and Central Services Department): The Scottish Prisons Complaints Commission is not the ultimate point in the complaints process, as the ombudsman is. If we were to bring the prison complaints commissioner into the one-stop shop, we would take away a step in the complaints process—removing an option for people who wanted to complain—or create an anomalous situation in which somebody could complain twice to the one-stop shop.

Mr Harding: Yes, but the principle of the one-stop shop is that the general public goes to one place. You are saying that they are going to go to one place and be told that that is not the place that addresses the complaint. How are you going to overcome that? Can the prison complaints commissioner not be drawn into the system?

Stephen Bruce: No. People can complain to the Scottish Prisons Complaints Commission first. The system is like an internal complaints procedure, except that it is conducted by an independent person. After someone has used the Scottish Prisons Complaints Commission option, they can proceed to complain to the ombudsman—the one-stop shop.

Iain Smith (North-East Fife) (LD): The written evidence that we have received from the Scottish parliamentary ombudsman, the local government ombudsman and the housing association ombudsman suggests that there is concern that the bill's overemphasis on investigation may leave the ombudsmen with insufficient flexibility to operate as they currently do, resolving disputes that often do not require a formal investigation. Can you comment on why the bill places such emphasis on investigation?

Mr Kerr: That comes out of the fact that we are trying to draw up best practice. We are aware that the ombudsmen were concerned about the apparent emphasis on investigation and we sought to reassure them that the bill does not prevent the ombudsman from resolving complaints informally. That is part of the process. It is a

welcome part of the process, if it can be done.

The bill is intended to provide the statutory framework for the ombudsman to operate effectively with the powers necessary to undertake his formal functions. The intention is that, by focusing on the ombudsman's formal functions without mentioning the informal functions, the bill will allow complete flexibility for the performance of those informal functions, which are not mentioned. The powers, and the existing good practice, allow that to continue.

However, in a bill to establish an ombudsman, we must include the formal processes. That is not to say that those are a must and that it is route 1 to formal processes. It is to say that, in any such bill, we must include the formality of the investigative procedure. It is not designed to undermine or undervalue the informal process, which works effectively and is good practice.

The bill must allow the ombudsman maximum flexibility on informal resolution. That is what we want to do. We have taken that into account in the drafting of the bill. The bill makes no provision for what the ombudsman can or cannot do informally, thereby leaving the scope wide open for the ombudsman to deal with issues as he or she sees fit.

The fact that the investigation procedure is included formally in the bill does not downgrade or undermine the ombudsman's ability to carry out informal investigations and resolve matters for people, which is a strong aspect of the ombudsman's function. After all, it is about resolution, which is the most important aspect.

Iain Smith: I accept that the intention of the bill is not to change that. However, the existing ombudsmen are concerned.

Michael Lugton (Scottish Executive Finance and Central Services Department): That point has been raised with us several times in the implementation group, which I chair and which brings together the existing ombudsmen. Because they have been concerned about it, we have examined it carefully with our legal colleagues more than once. We are satisfied that the bill is drafted in such a way so as not to limit the flexibility of the new ombudsman to deal with cases as he sees fit. As the minister said, we have made a number of drafting changes that emphasise the extent to which flexibility will be available to the ombudsman. We have taken the issue seriously and are fully satisfied that the bill gives the ombudsman as much flexibility as he will need.

Iain Smith: I welcome that assurance. I was merely going to ask the minister whether, if we receive evidence that suggests that another amendment may be required, he will have an open

mind and consider such an amendment.

Mr Kerr: We continue to listen. We want to provide a piece of legislation that will work for those who are involved in the system, including those who have to work with it. I am always open to hearing evidence from witnesses and from committees in the form of amendments.

Michael Lugton is trying to say that we have worked the matter through with those who are most directly involved and we are satisfied that what we propose will work and will not inhibit or undermine the great flexibility that exists in the system.

Dr Sylvia Jackson (Stirling) (Lab): My first question follows on from Iain Smith's. It is to do with a point that the housing association ombudsman raises on the use of the word "investigate" rather than the word "examine". He says:

"I believe that, rather than place undue reliance on wording from ageing legislation, the Bill should make wider use of the terms 'examination' or 'consider' where best applicable. It is better to get the terms exactly right now rather than risk unforeseen limitation by Courts in the future."

As you have been meeting representatives of the current ombudsmen, have you taken that point on board?

Mr Kerr: I do not know whether Michael Lugton has received any representations on that. The fundamental point remains the same: we want a system that will not be limited by the courts in the way that the correspondent suggests. We therefore remain open for discussion on that.

The bill does not come from nowhere. It comes from a very productive engagement with over 800 individuals and organisations. It has come a long way. We are therefore reasonably satisfied that such matters are taken into account.

I think that Stephen Bruce was involved in the discussions with the housing associations.

Stephen Bruce: We have been careful in the legislation to limit the use of the word "investigate" to refer to formal investigations using the powers in the bill. We do not have to have a word for the informal aspects of the ombudsman's work, because they are not specifically mentioned in the bill. The bill focuses on formal powers and uses the word "investigation" to cover those powers.

Michael Lugton: I add that the term "authority subject to investigation" has been dropped completely. The bill uses terms such as "listed authority", "listed authority in question" and "person liable to investigation" instead. In sections 10, 11 and 19, references to "considering a complaint" have been used to acknowledge the fact that the ombudsman has functions other than

investigation. We have tried in the drafting of the bill to reflect carefully the fact that the ombudsman will have more than a merely investigatory role.

Dr Jackson: Publicity and making people much more aware of the work of the ombudsman and the one-stop shop is important. Will you give us more information on how that might be done?

14:00

Mr Kerr: By drawing the process into one system and by having a one-door approach, which allows the pooling of resources, we are encouraging organisations to publicise the fact that the ombudsman exists. That is designed to ensure that we increase access to the service. We are trying to explain the ombudsman's role better through legislation and publicity. We are raising awareness by encouraging organisations that are subject to the work of the ombudsman to put an explanation of it on their literature and allowing people to access that. Having one organisation dealing with public sector complaints makes it easier to gain a higher public profile. The one-stop-shop approach adds to that profile. Stephen Bruce might have something to add specifically on publicity.

Stephen Bruce: I have nothing specific to add. We have been considering publicity, looking ahead to the implementation of the bill. We have been talking to the ombudsmen about it.

Michael Lugton: In the implementation group we have been conscious of the fact that the new office of public sector ombudsman will need to get off to a good start. It will need to have a high profile and to be part of the wider modernising government agenda. There is no point in setting up a body that is invisible and that members of the public do not see as an avenue for redress.

All the ombudsmen, and we in the centre, have been focusing beyond the powers of the bill, on ways in which the new ombudsman can get off to a good start by promoting the office and the procedures. Those procedures include the ability to receive complaints electronically and orally. That promotion has to get across to as wide a public as possible. The ombudsman has to be seen as an effective means of holding the Executive and other public bodies to account. Publicity is not something that we regard as a second order issue. It is at the centre of planning for the new office.

Linda Fabiani (Central Scotland) (SNP): I am a bit concerned about something that I picked up from the housing association ombudsman for Scotland's evidence. He says that he has a worry that

"the provision for authorities to request an investigation is unhelpful."

I feel quite strongly that the ombudsman should be focused on the individual who has a grievance. I am worried that if the authorities are able to instigate the use of the ombudsman, they are then using the office as an arbitration service. It almost becomes too easy for the authorities to shirk any sort of decision-making responsibility and takes away from the good practice, which they should have, of a good complaints procedure. Why has that provision been drafted in that way?

Mr Kerr: I agree with some of the comments that you made about the purpose for which that provision could be used. The issue is the way in which authorities use that power. The provision is intended to address the concern that there might be a case in which there is severe criticism of a department, authority or housing association, but where there is no locus for involving the ombudsman because no formal complaint has been made. On such an occasion the failure is on a larger basis than the individual and the provision would allow the ombudsman to address that.

The provision does not enable authorities to use the ombudsman to manage internal complaints because the request for investigation must meet the same criteria as a complaint from an individual, including the requirement to have exhausted the authority's internal complaints procedure. The bill also provides the ombudsman with discretion to decide whether to undertake an investigation of such a case, so he or she will be able to reject any case where an authority appears simply to be trying to offload a difficult internal complaint. We expect such situations to occur fairly infrequently.

Linda Fabiani: I worry that the service's credibility might suffer if it is seen to be a service that is not for individuals who feel that they have been badly dealt with but that it is, rather, more of an arbitration mechanism.

Mr Kerr: The criteria that will be set would avoid that situation arising. I am not sure about the rigour of those criteria in terms of the discussions that Stephen Bruce and Michael Lugton might have had with the relevant organisations, but I stress that the service is not meant to be used often and that the criteria for its use are fairly specific. It should not be used in the way that Linda Fabiani describes.

Michael Lugton: That is correct. We do not envisage the service being used often, but it is consistent with modern approaches to dealing with complaints to give the body that is complained against the option of referring the case to the highest authority. If the ombudsman is effective—we expect that he will be—he would be quick to point out that an authority had not exhausted the internal processes and would inform it that it must do so before the complaint can be taken up by the

ombudsman. The ombudsman will be able to rebut any suggestion that he is the next stop when it is evident that the stops in the organisation have not yet been exhausted.

Tricia Marwick: The bill makes transitional arrangements for the staff of the ombudsmen to be transferred to the new ombudsman; the health service commissioner for Scotland has expressed concern in relation to that. He acknowledged that the Transfer of Undertakings (Protection of Employment) Regulations—TUPE—do not apply to transfers within public administration, but that Cabinet Office guidance on good practice is available. The health service commissioner for Scotland believes that the wording of the bill, specifically paragraph 2(2) of schedule 6, does not guarantee that the principles of TUPE would be adhered to. Will the minister comment on that?

Mr Kerr: We have sought to ensure that everyone is protected in the process; legal advice suggests that that is the case. We are satisfied that that bill complies with the guidelines and the code of practice to which Tricia Marwick referred.

I have experience of such matters in other areas and I am happy to listen to any concerns. If they are justifiable, I will be happy to revisit the issue. Protection of those who are in the service is at the heart of what we are doing.

Tricia Marwick: My questions today all seem to be technical ones about funding. The financial memorandum says that any additional costs are still to be quantified. When will you be able to say what the costs are likely to be?

Earlier, you suggested that the money would be channelled through the Scottish Parliamentary Corporate Body. Is that an undertaking from the Executive to fund the whole cost of the ombudsman service and to give that money to the SPCB?

Mr Kerr: The money that we currently spend on the service will continue to be spent on the work that is being done, which means that it will transfer to the SPCB. The Executive is also committed to providing resources for any additional costs that are required to get the service running. That will ensure that there is no diminution in the service and that no money will be redirected to the Executive's policy initiative. We do not want to undermine the work of the ombudsman, so we will provide any extra funding that is required at the start up.

As the Minister for Finance and Public Services, I cannot ignore the fact that savings might be made as a result of combining existing offices. However, I think that resources will be required because we hope that the service will be well used and well publicised and that there will be a higher turnover of cases. We are therefore committed to

ensuring that the service is properly funded. The Scottish Parliamentary Corporate Body should not pick up anything that is outwith its responsibilities. The Executive is saying that we will move the money that we currently spend to the SPCB and add any additional resources that are required to start the service.

Tricia Marwick: I want to press you on that. You are saying that the Executive will give money to the Scottish Parliamentary Corporate Body to fund the ombudsman service and that it will provide additional start-up funding. How will year two or year three be funded? As a result of an Executive bill, will the Executive provide ring-fenced funding for something that is not per se the responsibility of the Scottish Parliamentary Corporate Body, which has a responsibility to the Parliament to ensure that the Parliament is functioning? I want to be absolutely clear that the Scottish Parliamentary Corporate Body will not be responsible for any costs of running the service.

Mr Kerr: That is the case.

Mr McMahon: I will return to points that Michael Lugton made. He talked about the bill allowing greater flexibility in investigating and mentioned that there would be more up-to-date mechanisms to allow people to make complaints. He also said that the bill would provide for functions other than the investigation function. Are you confident that the bill as drafted will help public bodies to build systems that will prevent complaints from being made in the first place?

Mr Kerr: I hope so. The bill is part of the wider better public services agenda upon which the Executive has embarked. We expect the ombudsman to build himself or herself into the organisations in which he or she is involved and to encourage local resolution of complaints of maladministration. The opportunity to bring the ombudsmen together under a one-stop shop offers a chance to achieve that and to change proactively to ensure that complaints are rooted out early at local authority level, or whatever, before they get to the ombudsman. That is our desire. I do not know whether Michael Lugton has anything to add.

Michael Lugton: The bill requires the ombudsman to report to the Parliament. We assume that the Parliament will take an interest in how the ombudsman is conducting investigations and dealing with particular complaints. I think that there will be a good case for the ombudsman to provide guidance to the authorities that are within his remit on the kinds of issues that lead to complaints, and to suggest ways in which to minimise the chances of future complaints. We see that as being part of the proactive role of the ombudsman, in addition to his publicising the extent to which he can investigate complaints.

The ombudsmen do that at the moment; their reports are made available to authorities in individual cases and they offer general views. However, that would be an important part of the new ombudsman's role. I accept that it is not sufficient for the ombudsman simply to be reactive and to deal with complaints that he receives. The more he can do to foster the attitude that complaints are to be avoided and that there are ways in which to reduce the number of complaints that come to an authority, the better for all concerned—for the complainant and the authorities.

Dr Jackson: My question refers to whether the public sector ombudsman should have enforcement powers. I gather that you considered whether or not he should have such powers and that you decided that those powers should remain with the Scottish ministers or with the Parliament. Can you give more information about that?

Mr Kerr: The main reason why the bill does not give the ombudsman enforcement powers, or powers to impose sanctions, is that that could undermine the independence of the ombudsman and the investigative role. I hope that that would not be the case. However, authorities that were under investigation might be reluctant to co-operate if they felt that the ombudsman was likely to take enforcement action against them. As I said, I hope that that would not be the case, but it is possible. Enforcement powers are therefore felt to be inappropriate.

14:15

Enforcement powers would also bring the ombudsman within the scope of the European convention on human rights, which is another matter that we had to consider. That would make it necessary to hold a hearing before holding an independent tribunal. Proceedings would have to be conducted in public and judgment would have to be published. All parties that were involved in a complaint to the ombudsman would require legal support, which would increase the cost of investigations and might make it impossible to provide a free service such as that which operates currently.

Other relevant issues relate to complaints of injustice and hardship that result from maladministration. If a complaint is upheld, the ombudsman makes recommendations, as members know. It is then for the authority in question to act on those recommendations. There is no evidence to suggest that those recommendations are not widely respected or that they are not taken on board.

The bill reinforces that position by requiring publication of all investigation reports, and by enabling the ombudsman to publicise cases in

which an injustice has not been remedied. That goes back to the point about balance and how the ombudsman's role is perceived. If the ombudsman does not have enforcement powers, that will not inhibit his role in any way. I believe that that will help relationships to develop and give a better understanding of how the office works. It should also lend authority to the ombudsman's judgment and incentivise the party under investigation to comply with the recommendations.

Ministers are able to seek enforcement action. We can promote legislation that would correct procedures, provide for payments or—where a department of the Scottish Executive is at fault—direct an official to take appropriate remedial action.

The Parliament can take action if it is not satisfied with the action that is taken by ministers. For example, Parliament can, through committees, call ministers to account for their actions.

The principle is: if it ain't broke, don't fix it. The service has developed through a co-operative approach to carrying out investigations. It was felt that giving the ombudsman enforcement powers would destabilise that and that it would not lead to the result that we are all seeking, which is to remedy complaints but also to have good quality public services and to try to stop such things happening in the first place.

Dr Jackson: I have a quick question. If, as you are suggesting, enforcement is in the hands of ministers or the Scottish Parliament, would the same procedures have to be gone through? You mentioned legal representation and the ECHR.

Mr Kerr: No. Any issue that was not resolved locally through the ombudsman would come to ministers. If we felt that there was something wrong, we would be able to legislate for that—committees can conduct inquiries and propose legislation in the Parliament. That would be part of our regular process of altering legislation. It would be a bit like the Parliament's petitions system, in which we seek remedies for things that are wrong. Sometimes we seek such remedies through legislation and sometimes we merely draw attention to the matter and try to get it solved in that way. The ECHR would not come into play in such cases; it would just be the normal work of Parliament.

The Convener: I have two questions. I started with education and now will move to children. Would any of the services that would be provided by the public sector ombudsman for children and young people be more suitably provided by the children's commissioner?

Mr Kerr: That is not a matter that I have considered. I do not know whether it came up during consultation.

Stephen Bruce: There have been some proposals or talk about that. I suppose the point is that the ombudsman has a certain status, credibility and influence when it comes to investigating complaints. It is important to maintain that whether the complaint is from an adult or from a child.

The Convener: Leading on from that and, in some ways, from Sylvia Jackson's comments about how you publicise that function, how do you envisage that that guidance will be issued to the ombudsman and to listed authorities? For example, how will you publicise information in order to make the complaints system in section 20 of the bill accessible for children and young people?

Stephen Bruce: That would have to be a matter for the authorities and the ombudsman. It would not be for the Executive to instruct the ombudsman—

The Convener: But you would consider that information to be part of the wider publicity picture that you were trying to provide about the role of the ombudsman as a one-stop shop that includes children and young people.

Mr Kerr: The other point is that we need to ensure that best practice is followed by organisations across all services in the public sector. Whether or not that best practice lies in the voluntary sector—as I think it does in the cases you talked about in relation to promoting services—we will take that best practice and use it in the mechanisms. There is no exclusivity; we will take the best, because it is difficult to target that sort of publicity. We will learn from the best and ensure that the ombudsman service picks that up and develops it. It is about best practice and ensuring that we achieve it across the service.

The Convener: I thank the minister very much.

Mr Kerr: Thanks for the invitation.

The Convener: Comrades, we now proceed with evidence from the office of the commissioner for local administration in Scotland—the local government ombudsman. Ian Smith, who is the commissioner, has been at the committee before. Brian Thomson is the principal investigating officer. Welcome to the committee. You know the drill—a few minutes from you and then we will ask questions.

Ian F Smith (Office of the Commissioner for Local Administration in Scotland): I will be brief. Brian Thomson is my principal investigating officer. He has worked in the ombudsman's office for 25 years and I believe that he has unrivalled knowledge of complaints management.

As has been said in previous evidence, the current local government ombudsman and the

other ombudsmen in Scotland and their staff are all working together to build a platform for the new service. I broadly welcome the general principles of the bill and believe that the modern ombudsman has two functions, the first of which is dispute resolution and the second of which is improvement of standards.

Handling complaints is the primary function and in my office we are all looking forward to a process that will be more inclusive, accessible, flexible, and—which is important—that will be resourced to cope with demand. We believe that the new institution should focus on helping people to complain and on getting outcomes that all sides regard as positive, through an approach that is conciliatory and which strikes the right balance between formality and informality. Statutory investigation should be the last resort.

Whether a problem is resolved by informal or formal means, independent scrutiny ought to expose weaknesses in practice—up to and including systemic failure—and should ensure that remedial action can be taken that benefits the whole population. My office has a solid record of doing that. In the past, the local government ombudsman has been well placed to bring about improvements in services.

In working alongside the Auditor General, Audit Scotland, regulators and inspectorates of various kinds, other commissions and the model of public audit that is being pioneered in Scotland, the new ombudsman will be well positioned to contribute to public protection and service improvement.

The Convener: I will start before catching other members' eyes. You state in your written evidence that the legislation that you operate under is

“sometimes unnecessarily restrictive and does not always reflect adequately the way public services today are often provided by partnerships with other agencies.”

Can you explain the restrictions that you face and how the bill will rectify that situation?

Ian F Smith: The bill will rectify the situation in two ways. The first is about jurisdiction, which will be much more inclusive because the bill lists the bodies that are subject to scrutiny. Secondly, although dealing with complaints about maladministration is seen as being the basic job of the new ombudsman there exists in the bill and the new organisation the capacity to think more broadly about how to rectify complaints.

Small things could be of enormous benefit, but are probably not seen as such from this distance. The first is the obligation on bodies that are under the jurisdiction to promote the ombudsman. That will prove to be a powerful tool. The second thing—which most people do not see as being very high profile but which I think is very powerful—is the option in the bill for the

ombudsman to bring more generic reports to the Parliament, rather than just reaction to what is going on. In other words, if we identify a systemic failure in the Scottish public service, the Scottish Parliament will get to grips with that at an early stage, simply by the trigger of a report from the public sector ombudsman.

Iain Smith: You say in your evidence that you are uncertain whether the bill as drafted gives enough flexibility to the ombudsman and that the bill might give complainants unrealistic expectations. You also say that too much of the focus of the bill is on the long-stop powers of investigation and report. Could you expand on your concerns and suggest ways in which the bill could be improved to deal with those concerns?

Ian F Smith: I understand why the Executive has drafted the bill as it has. The bill is a good rehearsal of existing legislation and therefore people can be confident about what it is able to do. However, when passing new legislation we should take the opportunity to include a snapshot of what we want best practice to be at the time that we draft the legislation. All of us who are currently in the ombudsman world would like to think that the bill is an opportunity to create a new platform for complaining in Scotland. It would be nice to think that the full range of an ombudsman's activities were recognised in statute. I have included in my written submission a list of things that need to be in people's minds when they draft the legislation.

The bill also has a parallel with powers elsewhere. For example, Northern Ireland uses the language differently from Scotland and the rest of the United Kingdom. A practice has grown up in the ombudsman world of saying that statutory investigation comes at the end of the process and that everything else is done informally. It sends a negative message to the public, as you can imagine, if people get a letter from me that says, "I am not undertaking a formal investigation." A person builds himself or herself up to complain and expects a formal investigation. Northern Ireland's approach is to say, "Everything, including the letter coming through the letterbox of the ombudsman's office, is part of an investigation." Much of that is playing with words, but there is a message there for the public about what it is entitled to and what an investigation amounts to.

In Northern Ireland, when the ombudsman is considering the purposes of investigation, settlement of the matter is specifically mentioned as being a power for the commissioner. If that is not possible, the ombudsman states what action should in his opinion be taken by the body concerned to effect a fair settlement of the matter. What we are driving for—if it is possible and can be framed—is recognition of all the benefits of

existing legislation and provision of more certainty about the power to resolve and to give to bodies that are under jurisdiction strong hints or direction to do something about complaints.

14:30

Dr Jackson: You heard me ask the minister about flexibility. Did his statement convince you that a wider role for the ombudsman is perhaps being envisaged in the bill than you thought previously, or do you think that changes are still required? Is there a specific problem about language?

Ian F Smith: On those matters, there is a wide spectrum of opinion, from the zealot who supports the minister's comments enthusiastically, to the heretic who says that the approach is no good. I fall somewhere in the middle. I think that the foundation legislation needs to include the power of statutory investigation, which is what would be used to deal with an unreasonable organisation. For example, I have opened investigations in the past 12 months in which the council concerned has not been responsive, so I have used the power of investigation only because the council has not taken the matter seriously enough. The investigation has then been discontinued. As a result, such a power has its benefits.

Much will depend on how practice proceeds; however, now that there is a chance that legislation will be passed, it would be good to frame the legislation in a way that fully acknowledges modern ombudsman practice without creating any future inflexibility. It should be possible to do that.

Tricia Marwick: Although I agree that language is very important, it is also important that people feel that their complaints can be dealt with somewhere. People feel frustrated when they get in touch with you or other ombudsmen and are told that their problem falls outwith the ombudsman's remit; they feel that they have absolutely nowhere to go. How many complaints are you unable to deal with because they fall outwith your remit? Furthermore, will the bill extend that remit to ensure that the new ombudsman will be more in tune with some of the frustrations that people feel?

Ian F Smith: The bill deals more than adequately with jurisdiction over matters that an ombudsman in the British system deals with. The business is principally about dealing with complaints about service failure when no recourse is available elsewhere. Many people are excluded from the jurisdiction because they have the right to go to court; to pursue a matter through some other legal mechanism, such as a tribunal; or to appeal to a minister. That will continue to be the case. I do not think that people fully appreciate that fact.

There is a public perception that the ombudsman acts as a body that scrutinises all activities and behaviours.

However, it is important that the procedures that are followed by the new organisation mean that realism is introduced early. Our current procedure requires us to be honest with people from the beginning and to say, "Look, this complaint is not within our jurisdiction; we cannot deal with it", or to inform them of the process that they can expect and alert them to the possibility that there might not be a full-blooded formal investigation that will resolve their problem. The principle of early resolution and redress is important if we are to minimise the damage and hurt that a person who has a grievance can feel.

Tricia Marwick: What percentage of the people who contact you are you unable to help because their complaint is outwith your remit? Secondly, we have talked about advertising the new ombudsman's service when it is introduced. However, although we are all committed to the service, we must be very careful not to raise people's expectations that there will be a one-stop shop at which someone will deal with their complaints. In fact, many people will be excluded from the process because their complaints will fall outwith the ombudsman's remit.

Ian F Smith: I will ask Brian Thomson to answer your first question, and then I will answer the question about advertising.

Brian Thomson (Office of the Commissioner for Local Administration in Scotland): The question is one of nomenclature. The number of complaints that are outwith jurisdiction is probably only about 5 or 6 per cent. The number of complaints by bodies or individuals that are not a matter for the ombudsman or the commissioner for local administration in Scotland to examine, and which are not deemed to be cases of maladministration or failure in administrative process, is much higher. Many complaints relate to the planning system—for example, they are from people whose neighbours have built extensions. In such cases, the local authority made a democratic decision to grant planning permission and that decision cannot be overturned by a third party making a complaint to the ombudsman.

We are probably able to resolve about 20 to 22 per cent of complaints in any one year. Six per cent are outside our jurisdiction. The people who make the remainder of the complaints that are not investigated—investigations comprise 1 to 2 per cent—get a statement of our reasons for not proceeding with a formal investigation.

Tricia Marwick: Does that mean that something like 80 per cent of all the people who write an

initial letter to you find that their complaint cannot be dealt with? That ties in with the point that I am trying to make, which is that we should not raise expectations that cannot be fulfilled.

Brian Thomson: That is a valid point.

Ian F Smith: I will respond to the second point, as it was well made. If I can indulge in a bit of common parlance, the ombudsman is not the judge in the *Sunday Mail*. There is a perception out there that the ombudsman should be all powerful and all seeing. The limitations in the system have to be the way they are. However, the institution that is proposed in the bill would allow us to take a different approach.

The first thing that must be done is to ensure that the advice and assistance that is available to potential complainants is of the highest order. That should also apply to the networks that the organisation develops with the advice-giving voluntary sector. The opportunity exists for third parties to inject realism.

The second thing that must be done is to examine advertising. If my office were not looking forward to abolition this coming summer, we would be looking again at our complaints leaflet, "Up against a brick wall", which conveys the impression that the office of the commissioner for local administration in Scotland is the judge in the *Sunday Mail*. That is not right.

The new institution must look clearly at the personal dimension. In my office, once a complaint has come to us through the initial screening, we have as much personal contact as possible with the complainant. In other words, we do that once we see that the complaint has a bit of life about it and that it is something that we can take seriously. We engage by telephone or, if we can, we go and see the person involved.

Given the present level of resources, it is difficult for others to sustain that practice. However, in my opening comments, I said that if people want to have a modern complaints system that meets the aspirations that members are describing, that system has to be resourced properly. If people want to have a personal service, which gives a sense of realism, that comes with a price tag. I make no bones about the fact that the price is well worth paying.

Mr Harding: The bill would allow organisations to request an investigation where there has been public criticism but where no direct complaint has been made to one of the commissioners or the ombudsman. What effect will that have on the work of the new ombudsman?

Ian F Smith: I hope that, with national advice about internal complaints procedures, the ombudsman's report will be an important thing for

Parliament. I also hope that the organisations under jurisdiction will think that it is highly exceptional to ask for scrutiny by the ombudsman. I like to think that the vast majority of complaints will be reactive complaints from individual members of the public.

The point is well made, because there could be occasions when, because someone's attitude is pretty vexed, the authority has exhausted its own internal abilities and patience. It is at that point that independent, impartial scrutiny from a body that is recognised nationally as impartial is a valuable tool.

Mr Harding: Can you envisage any circumstances when that power could be used?

Ian F Smith: I can. In my present jurisdiction, a local authority might get serial complaints from someone who is not willing to accept decisions and, for the purposes of transparency, the authority concerned might ask us to investigate. Ombudsmen's investigations cut both ways—they look for truth and justice for the complainant, but they also look for truth and justice for the organisation that is complained against. Sometimes we forget that and start from the presumption that the fault lies on the part of the faceless public body. There are times when independent scrutiny of the actions of a public body is good for public confidence in that body.

Mr McMahon: You have told us what you consider to be good about the bill and said that you support it in principle. Has the Executive left anything out of the bill? Is an opportunity being missed to introduce certain provisions that would make the work of the public sector ombudsman even more effective?

Ian F Smith: That is a terribly difficult question. We should be honest about the bill, which is not a root-and-branch review of the ombudsman system—such a review would require much more time.

I am partial to the ideas about public administration that are around in northern Europe and the Scandinavian countries, where they start with a basic system of public administration that is built on rights and a framework for developing that system. In Scotland, we are doing that work incrementally, which will take a while. We do not have time to create the ideal model, which would use a bill to create both a new public sector ombudsman and a model code for public administration for Scotland. We could have a long debate about that, but, as members can tell, I am quite optimistic. There is willingness in Scotland to recognise changing attitudes and values in public administration. Personally, I would look towards the Scandinavian model rather than to models from elsewhere.

We have a chance to consider other influences. That is why I said in my written submission that we should not disregard the influence of the ECHR, and article 6 in particular, on both ombudsmen and public organisations. Nowadays, it stands to reason that people want the fairest hearing that they can get. They also want to know that they have been given as much support as possible in their transactions with public organisations. Last, but by no means least, they need to know that they will get a solid body of reasons for any decision that is taken.

Mr McMahon: I intended to ask you about the implications for the bill of the ECHR. The minister and his team told us earlier that the system for making complaints would be more accessible. Would more accessibility require changes to technology in the ombudsmen's offices? If so, what would the cost implications be? You have already expressed the opinion that we should not see cost as a barrier to the introduction of a new system.

Ian F Smith: I would say that, wouldn't it?

The important point is that we should not see technology as the only answer. There will have to be investment in technology if people are to use electronic communication as a means of making complaints. However, I return to my earlier comment that you should not undervalue the benefit of establishing a personal relationship with a person who has made a complaint. The right price must be put on that, and I believe that such relationships are very valuable indeed. In extreme circumstances, my own practice extends as far as giving a hearing to people who are dissatisfied with a decision that has been taken. That is unusual, but I have had a bit of practice of such hearings and I believe that they pay dividends. They allow people to feel that they had the fairest possible hearing.

The technology will have a cost, but let us not be seduced by cost alone. Let us think about how important it is for someone who has a grievance or a complaint to be heard properly.

The Convener: Has there been enough consultation on the bill?

Ian F Smith: Yes. There has been a remarkable amount of consultation, which, in practical terms, continues, as the ombudsmen are participating in an implementation group with the Scottish Executive. Aside from the consultation, which has been effective, there has been some pretty informed discussion. I took part in a private seminar with the Scottish Consumer Council just before the second consultation exercise closed. I did not think that, in doing so, I had transgressed in relation to my independence; we had a good discussion and exchange of views.

Perhaps I can pick up on the question about the children's commissioner, which was asked of the minister; I was desperate to answer that question. I had the pleasure of giving evidence at the Education, Culture and Sport Committee a few weeks ago when that committee was considering the children's commissioner, a subject that I feel passionately about. I am intrigued that, in the 25 years of the office's life, we have had only one instance in which a child has made a complaint. Even that case could be described as a contrivance—it was not really the child who was making the complaint. That speaks volumes about what Scotland has been like in the past. We must take the opportunity to create as inclusive a system as we possibly can, and that means one that covers all ages.

14:45

Some of the London boroughs have done experimental work on complaints procedures that are targeted at children, particularly in places where there is a large ethnic dimension. The result is that the number of effective complaints about service from adults has increased, because the children understand the system and can act as advocates for their parents or grandparents. There are issues about understanding systems in Scotland. In some ways, it would not be such a good investment to spend too much time on the older generation, but it would be a productive investment to resource information for young people. We do not need to approach complaining from any of our previous standpoints.

The Convener: I was about to ask you about the children's commissioner. If the Education, Culture and Sport Committee has asked you about that, it is likely that that committee will consider how information is provided for young people and children.

Tricia Marwick: When you get a complaint that is within your jurisdiction, you investigate it and resolve it. What is the average time for dealing with a complaint, from beginning to resolution?

Ian F Smith: That is an extremely hard question to answer. Brian Thomson might give a scientific answer, but I suspect that that is not what you are looking for. I have six investigating staff in my office. At any given time, those staff are carrying a case load of about 45 to 50 cases on which they are seeking resolution.

One of the innovations that I have tried to introduce is early intervention. If something seems capable of early resolution, I try to resolve it quickly. There are complaints that come to my office that can be resolved by telephone, if there is a receptive authority at the other end that puts up its hands to a mistake and wants a solution. There are also issues that are unbelievably intractable. In

this year's annual report, I said that I have set myself a target of trying to ensure that no investigation takes longer than a year. Some people will say that I have made a rod for my own back. Occasionally, because of the complexity and seriousness of the complaint—as well as the number of other avenues that the complainant is following—getting something done in less than a year will be very difficult.

We can consider the average time performance measure in complaints management. I like to think that we could turn round a normal complaint in about three months. However, the most important performance measure is the quality of the outcome that we get for the complainant and the organisation that is complained against. Time performance could become a report card concept, taking away a more appropriate emphasis on the quality of the work being done. The time that is taken to deal with a complaint depends on the nature and circumstances of the complaint.

The Convener: Did you want to add something about the publicity that is directed towards young people and children?

Ian F Smith: No. I start from a position on complaints for children. If there has been a service failure, it does not matter whether a person is eight or 80—it is a question of how they feel about being let down. Publicity materials begin not with the ombudsman, but with the organisations under jurisdiction having a common set of values and a common approach.

The Convener: You are probably right about that. Thank you for answering our questions and presenting your case to the committee. We look forward to proceeding with the bill and I am sure that we will see you again.

Okay, comrades. We now welcome the office of the Scottish parliamentary commissioner for administration. Michael Buckley is the ombudsman. You have been sitting there, so you know the drill. You may make an introduction for a few minutes, after which I shall invite questions from members.

Michael Buckley (Scottish Parliamentary Commissioner for Administration): Thank you very much, convener. I welcome the opportunity to give evidence to the committee as part of its consideration of the Scottish Public Sector Ombudsman Bill. I do not want to repeat what Ian Smith has said so eloquently to the committee; I shall just make a number of points.

I welcome the bill. It is a big step forward from the existing situation, in which there are three fragmented schemes. The bill brings together those schemes under one roof. I am sure that that will enable the ombudsman to provide a much better service, principally to the public but also to

bodies within jurisdiction. When one talks about a bill, one inevitably focuses on the things about which one has misgivings, which perhaps gives a false impression. I do not want my various reservations to detract from what I have said; I welcome the bill very much in general terms.

I have three main concerns of principle, the first of which echoes what Ian Smith said. I am concerned about the bill's fairly exclusive emphasis on investigation and reporting. Investigation and reporting are an important part of the ombudsman's work, but increasingly—as Ian Smith said—that work involves trying to resolve complaints in a variety of ways. The emphasis on investigation and reporting tends to push one into rather heavy procedures and off-putting ways of pursuing complaints.

The committee will be aware that complaints of many types are received. Some are problems that just need to be sorted out. For example, a council tenant with a leaking roof wants that roof to be mended; they are not interested in an elaborate explanation of the way in which the housing department works or of the way in which it deals with correspondence. At the other end of the spectrum—this is relevant to my work as the health service ombudsman—someone might say, “My mother was a bit poorly. She seemed to be perfectly well on Tuesday morning, but then she went downhill. I tried to get her into hospital, but the doctor was late in coming and one thing happened after another. By Wednesday evening, she was dead. What happened?” That person wants a clear explanation and an independent and authoritative investigation of what went wrong. Such actions are the appropriate way of dealing with such a complaint. Nevertheless, to emphasise investigation and reporting exclusively is a mistake—with due respect to those who prepared the bill—and I hope that the matter can be addressed.

Secondly, I am concerned that the bill may not maintain the ombudsman's appearance of independence. The ombudsman's pay and pension are to be determined by the Scottish Parliamentary Corporate Body, which is a body within the ombudsman's jurisdiction. It is usually understood that it is wrong to have the ombudsman's pay and pension determined by someone within his or her jurisdiction, for the obvious reason that that reduces the ombudsman's appearance of independence. That will not be a huge problem in practice, because I guess that relatively few complaints will be made against the SPCB. Nevertheless, the point is one of principle and it merits discussion.

Thirdly, I am concerned about the way in which the bill provides for the transfer of staff from the existing ombudsmen's organisations. The normal

understanding is that although, strictly speaking, TUPE does not apply to transfers in the public sector, when staff transfer, they should be given the same terms of service that they had before. However, the bill states that, broadly, terms of service should be as favourable, which seems to imply that some terms might be less favourable. I have reservations about that, although that must not detract from the fact that in general I welcome the bill.

The Convener: The bill will allow members of the public who have a complaint to go straight to the ombudsman; they will not have to go through an elected representative. However, the bill highlights the possible role of elected representatives and civil and public servants as authorised representatives. Do you envisage such representatives receiving preferential treatment or achieving a better outcome than other members of the public?

Michael Buckley: It depends on what you mean by preferential treatment. I do not believe that complainers should receive better treatment or a faster answer because an MSP or a local councillor is associated with the complaint. The bill gives special treatment to such complaints, because it says that a copy of the report may be sent to the authorised representative. That is right, because although we should remove the MSP filter—which is a barrier to making complaints to the ombudsman—a significant part of the ombudsman's role is to advise the Parliament on the way in which services and work at the sharp end affect members of the public. I am glad that the MSP filter is being removed, but that does not mean that I want weaker links between the ombudsman and the Parliament.

Mr McMahon: Outwith the national health service, the new ombudsman's role will be limited to investigating cases of maladministration. Do you consider that to be satisfactory or would you like the ombudsman's remit to be extended?

Michael Buckley: I would like the same formulation for all parts of the jurisdiction. An important point about the bill is that it sets up a single new institution. In my view, the fewer distinctions and differentiations there are within the ombudsman's work, the better.

The NHS formulation, which goes beyond maladministration to include failures of service and failures to provide a service, does not have a huge effect in practice—nevertheless, it is wider. It would be a shame if we got into technical and legalistic arguments. For example, in a complaint involving an NHS body and a local authority, the local authority might argue that the ombudsman could not consider one part of the complaint because it did not concern a case of maladministration. The authority might argue that

the ombudsman could consider the part of the complaint that related to the NHS body, but not the part that related to the local authority. That would not be helpful to anyone.

Mr McMahon: Ian Smith mentioned the Scandinavian model and the ECHR. Should the Scandinavian model be adopted and should we involve measures such as article 6 of the ECHR?

Michael Buckley: The Scandinavian system is pretty different from ours. Sweden and Finland have the original system, which is known as the east Scandinavian tradition. In that system, lawyers consider the legality of actions by public servants and supervise the administration—from the point of view of legality—in the interests of the Parliament. That reflects many special features of the constitution in Sweden and, by extension, Finland. The system is less involved with securing redress for members of the public. The UK model is right for the UK's circumstances. We should not be so concerned with legality, which is for the courts, or whether something is a breach of ECHR rights. The matter is one of common sense.

The ECHR set out to put into formal language what we all think of as decent democratic values, which include openness and what the lawyers call proportionality. Those are the values that the ombudsmen try to espouse. If an authority did something that was a breach of a person's rights under the convention, I would not want to say that I had judged it to be that as a matter of law; such judgments should be a matter for the courts. That said, the ombudsman could get the same result by saying that, whether or not the person's convention rights had been breached, what the authority had done would not have been done if it had been following good administrative practices.

Mr McMahon: I do not want to drive a wedge between the different ombudsmen, but Ian Smith said that the convention should be followed to the letter. You seem to be indicating that what should be followed is the spirit of the convention. Is my reading correct?

Michael Buckley: I am not sure, as I was not here when Ian Smith said whatever it was that he said. You have the advantage over me in that respect.

The ombudsmen are not as concerned with the letter of the law as the courts are. The legislation under which we work, and what is proposed in the bill, is that the ombudsmen are not an alternative to the courts. That is because we do not look at things that are justiciable. However, if we see that the letter of the law has been broken, a case of maladministration might be brought. We do not duplicate the work of the courts. We try to say what is, under the law, sensible, decent administration and what is not.

15:00

Iain Smith: When you referred to Ian Smith's eloquence, I assume that you were talking about the witness and not about me.

I want to expand on an issue that you raised in your written and oral evidence. You say that the way in which the bill was drafted might lead to restrictions on the flexibility of the ombudsman's role. In your written evidence, you say that, as the bill stands, those restrictions might be subject to challenge in the courts and by the auditors. How would you like the bill to be changed to remove that possibility?

Michael Buckley: First, I will deal with the question about the courts. The practice, which is similar south of the border, whereby the local government ombudsman takes forward cases but does not issue a report has been challenged in the courts; the case is currently with the court of appeal. Under the law, the ombudsman exists for the purposes of conducting investigations and, once an investigation has been conducted, the ombudsman shall issue a report. The argument that has been put to the court is that, once the ombudsman has said that he or she is investigating a case, he or she is bound to issue a report. As I said earlier, that is a heavy procedure. I am not sure that the court will accept the argument, but there is always the risk of legal challenge.

In respect of the auditors, the situation is that the ombudsmen are what the lawyers call creatures of statute. We can do only what the law empowers us to do or things that are reasonably incidental to that. If the law says that the ombudsman exists to investigate and report, and if the majority of cases are being dealt with using a method other than investigating and reporting, the auditors might say, "Sorry, but you are supposed to be spending your money on investigating and reporting. You are spending your money on doing something quite different."

The point is similar to my point about the courts. The issue does not require huge amendments to be made to the bill. All the ombudsmen are agreed that the power to investigate and report is required, but it should be made clear that the ombudsman should also have the power to resolve complaints by using methods such as mediation and conciliation.

My understanding is that the Executive believes that the bill, as it stands, will allow the ombudsman to adopt a variety of methods. There is no difference of view on the bill's intention, but we are concerned that the intention may not happen in practice. The new bill gives us the opportunity to get the legislation to reflect the practice, so why not take that opportunity?

Iain Smith: I will play devil's advocate. Is not there a danger that, if you try to define in legislation the ombudsman's additional functions, you might end up doing the opposite of what you want to do? You might end up restricting the ombudsman's role to what has been defined, rather than giving the ombudsman the flexibility that was sought.

Michael Buckley: I am sure that the parliamentary draftsmen will rise to the challenge. It is a matter of saying in general terms that the ombudsman has the power to consider and resolve complaints by any appropriate methods including the conducting of a statutory investigation and the production of a report.

Dr Jackson: I will ask you about your concerns about the SPCB. Is there a solution?

Michael Buckley: I freely concede that the concerns that I expressed are presentational or theological—whatever word one chooses—but they exist. A possible solution would be for appointments that the SPCB decides or proposes to make to be subject to ratification by the Parliament.

The Convener: The Scottish public sector ombudsman's remit excludes certain organisations, such as advisory non-departmental public bodies. Would you like any other organisations to be included in or excluded from the bill?

Michael Buckley: I have no serious reservations about the extent of the bill in that sense. It is not the case that if the Parliament wants the ombudsman to deal with a general area, organisations have been left out of the bill or organisations that should not be in the bill have been included. I make it clear that some of the big issues, such as whether the ombudsman's jurisdiction should be extended to cover new areas such as the curriculum in schools or the operations of the police, are political points for the Executive and the Parliament. I do not want to express any view on that.

The Convener: I will ask the questions that I have asked the other witnesses—you probably have your answer ready—about the services that the public sector ombudsman will provide in relation to children and young people. Would those services be more suitably provided by the children's commissioner? If not, how should the ombudsman issue guidance to listed authorities on publicising information on the complaints system under section 20 and on making that information best accessible for children and young people?

Michael Buckley: It is important to be clear on the roles of the children's commissioner—or any other similar position—and the ombudsman. I certainly support giving the children's

commissioner the functions of ensuring that proper account is taken of the interests of children and young people when policy is formulated and of helping children and young people to find their way through the bureaucratic maze of, for example, the complaints system. However, it would be wrong for the children's commissioner to start investigating individual complaints. That is for the ombudsman to do.

I would be surprised if whoever is appointed as ombudsman will have any difficulty in collaborating closely with the children's commissioner to make procedures child friendly and to ensure that whatever material the office produces is accessible to and understandable for children and that the obligation that the bill lays on public authorities to give information about access to the ombudsman is fulfilled along those lines.

It is important to be clear who does what. There is a tendency to refer to people as ombudsmen meaning advocates or defenders whereas, in our concept, an ombudsman takes on individual complaints, looks into them as appropriate, resolves them and gets redress. It is important to maintain that distinction.

Tricia Marwick: The bill will allow investigations in cases in which there has been no direct complaint to the ombudsman but there has been public criticism. Public criticism is usually media coverage. What effect will that have on the work load? Will it have an impact on the individual investigations? Where should the priorities lie and where will they lie?

Michael Buckley: I am not sure whether the bill goes as far as you say. My understanding is that a complaint that was within the ombudsman's jurisdiction would have to be made and that the body that had been complained about could refer that complaint to the ombudsman. I do not believe that that will have a huge effect on the work load of the office. I would be concerned if it did. Although I can envisage circumstances in which such an investigation might be useful, it is important to maintain the principle that the ombudsman's role is to help the individual citizen.

Interestingly, section 10 of the Health Service Commissioners Act 1993 already provides for a health service body to refer a complaint in such circumstances to the health service ombudsman. I would not say that that never happens, but it happens very rarely.

It is important that the ombudsman should have discretion over whether to take such cases on. It may be that a complaint is referred because, for whatever reason, it has become intractable, although one would suppose that in such a case the original complainer would want to come to the ombudsman; or it may be that a body within the

jurisdiction of the ombudsman is concerned that a member of staff has been unfairly criticised and wants the criticism to be impartially examined.

It would be worrying if bodies started referring complaints to the ombudsman simply because they had a difficult or vexatious complainer—there are already quite enough of those in the ombudsman's office. Such a complainer requires a lot of time and effort that really ought to be expended by the body concerned.

Time alone will tell, but based on our experience I do not think that the point that Tricia Marwick raises will bulk very large in the work of the office.

The Convener: Do you feel that there has been enough consultation on the bill?

Michael Buckley: Yes, I do. The Executive is to be commended on the way in which it has conducted the consultation. It issued two very good consultation documents. The Executive has consulted the ombudsmen to the proper extent; and the ombudsmen have contributed to the proper extent. I have no criticisms of the consultation process. On the contrary, I commend it.

The Convener: Thank you for coming. We have noted your comments about the terms and conditions of service. Those points have been raised before and the committee will address them in its report.

The Deputy Convener (Dr Sylvia Jackson): We welcome to the committee Barney Crockett, who is the housing association ombudsman for Scotland, and Kathleen Steindl, who is his office's senior investigator. You have been listening to previous witnesses so you know how we operate. If you would like to go over some main points in a presentation, we will then ask questions.

Barney Crockett (Office of the Housing Association Ombudsman for Scotland): I am grateful for the opportunity to present evidence to you today. I welcome the early attention that the Parliament has given to the important issue of complaints handling and I appreciate the keen desire to improve the handling of complaints in the public sector in Scotland. I join my colleagues in very much welcoming the bill. Members will have seen that in my written submission.

I have also submitted evidence to both the consultations. The staff at the office of the housing association ombudsman for Scotland have played a keen role in the steering group that was established. We have also visited other ombudsman schemes in Britain to consider their models.

I acknowledge that the committee's focus is on the broad principles of the bill, so I have concentrated my comments on those and, in

particular, on three areas. The first is the sensitive issue of incorporating the voluntary housing movement within the scope of the proposed Scottish public sector ombudsman, which is probably the bill's most innovative aspect. I have indicated in my submission some of the issues that may flow from the voluntary housing movement's incorporation.

15:15

Secondly, I have been concerned to ensure the survival of some valuable aspects of our current non-statutory service that could enhance the new service. The most important aspect of that has been the shift from formal investigation to the close examination that results in the issuance of preliminary views. That has been an effective way of providing timeous, just outcomes for complainants. With that in mind, although I appreciate the potential for flexibility under the bill, I advocate the wider use in the bill of the words "examination" or "consider" rather than "investigation" or "investigate". That would develop some of the points mentioned by my colleagues, particularly those made by Michael Buckley.

Thirdly, I am keen to ensure the continuance of the current level of specific expertise, particularly on housing. That has proved invaluable and will be looked for in the bill by stakeholders in the social housing movement.

All those points are significant, but I echo what Michael Buckley and my other colleagues said in giving my general support for the drive of the bill, especially the drive to take a proactive attitude to complaints. I hope that, if it is properly implemented, that will ensure that Scotland is in a leading position in the UK and in Europe.

The Convener: I apologise for having had to leave the room for a few minutes.

Of course, registered social landlords are not public sector bodies. Have any registered social landlords raised concerns about their inclusion in the remit of the Scottish public sector ombudsman? If so, what issues have they raised?

Barney Crockett: During the consultation, the Scottish Federation of Housing Associations made representations about the inclusion of RSLs in the proposed ombudsman's remit; I do not think that it is opposed to the inclusion of housing associations in the scope of the new body. However, it has sought recognition in the name of the body, which it would like to reflect the fact that not only the public sector will be covered.

I have received representations—I responded to the consultation to this effect—calling for an organisational link with housing to be maintained. Housing associations have informed me of their

wish to ensure that the methods of work that exist between them and us are maintained. Individual housing associations and people who work in them have spoken to me about some general reservations, some of which I have noted in the paper that is before you. People have also mentioned particular aspects of concern.

Dr Jackson: I am not sure whether you were here when the Minister for Finance and Public Services and his colleagues were here, but you will be aware that Iain Smith and I asked whether the bill sufficiently reflects the flexible, wider role of your work. If you heard his response about what the bill now encompasses, how did you react?

Barney Crockett: I was indeed here. I have welcomed the broad encompassing of housing associations, and think that that can be welcomed by the housing association movement too. I think that people will look for the aspects that I have mentioned to be covered in the bill, which is why I flagged them up.

On a minor note, a somewhat wider and more flexible remit is given to my current, non-statutory service. At the moment, that includes the right to examine issues that go beyond maladministration—we may examine possible cases of injustice. It was said that the right to examine issues has never been used to that extent, but that is slightly inaccurate. It was used in that way once, as far as we can recollect. In any case, it has been of value to have been able to reassure people that we have that ability to investigate matters that go beyond maladministration.

Dr Jackson: I was referring to what you said in paragraph 3(ii) of your submission about the use of the word “investigate” and whether we should examine more closely and change the wording, which is taken from aging legislation.

Barney Crockett: That part of the submission echoes earlier representations that you received. The wording does not reflect accurately the work of the different ombudsman services. In a sense we are further along that line than the local government ombudsman. Last year, for the first time, we had no formal investigations, although it is conceivable that that will not be repeated. Overwhelmingly, our work is to ensure timeous and just outcomes for the complainant. It is entirely beneficial if that can be done without reaching the formal investigation phase.

As Mr Buckley pointed out, that work goes beyond what is set out in statute. We are aware that we could face the challenge from auditors that we do not spend any of our money on the formal investigations that are, apparently, the focus of a statutory service. Either complainants or respondent bodies could complain that we are not

doing what is laid down in statute regarding investigation issues. As Iain Smith pointed out, it is correct to say that the way in which we examine complaints could be regarded as an investigation. Many respondent bodies consider our examination of a complaint to be an investigation. We are slightly wary about the wording. In a litigious society, people could say that we had not gone as far as we should, according to the statute. I thought that it was correct to indicate that concern to the committee.

Kathleen Steindl (Office of the Housing Association Ombudsman for Scotland): I would like to make two points, in addition to echoing everything that Barney Crockett said.

First, we are concerned that the effectiveness of the new office might be measured by the number of formal investigation reports that are published. That is a concern about the complainant's perception.

Secondly, I see the potential for the frustration of all of us working in the new service. The bulk of the correspondence that we are likely to have with complainants will be to explain why we are not investigating their complaint formally. That relates to something that Iain Smith said earlier. We are concerned about the perception of the new office.

Mr Harding: In your written evidence, you highlight the fact that there has been a markedly slower increase in complaints to you than to other ombudsmen, despite an increase in housing association tenants. Why do you think that that has happened?

Barney Crockett: There could be various responses to that question. My response is that the slower increase has been to do with improving the internal processes of housing associations in Scotland. That is part of the shift from formal investigations to preliminary views. There is a reasonably ready acceptance of our preliminary views by the housing association community, because it has been familiarised with what we are looking for and what standards we will be setting.

That has produced a serious transformation in the complaint-handling abilities within the housing association movement in Scotland. A small indication of that is the newsletter that we put out. The communication with housing associations that set standards means that we have avoided the sizeable increase in complaints that we might have expected otherwise.

Mr Harding: Do you think that that experience could be carried over to the Scottish public sector ombudsman?

Barney Crockett: I am sure that, to some extent, it already has been. The Scottish public sector has not experienced the kind of rises in the

number of complaints that many other complaint-handling bodies throughout the UK have experienced. I am not claiming that our service is unique, but our proactive approach to working with respondent agencies will be central to managing the problems of complaints, especially the growth in the number of complaints.

Time scales were mentioned. If time scales or budgets are to be kept in control, the complaint-handling abilities of the respondent agencies must be improved. The complaints adjudicators for Scottish Enterprise and Highlands and Islands Enterprise will come under the scheme. Before those adjudicators were appointed, it was expected that they would have to handle many complaints—perhaps 50 a year. In fact, they have had only a very small number to deal with. One of the enterprise agencies has put that down to the fact that, once there was an adjudicator, the standards in the enterprise agencies improved and very few complaints proceeded. That kind of proactive work and attitude is essential if we are to keep control and not have a hopeless overload on the service.

Tricia Marwick: I remember the setting-up of the office of the housing association ombudsman. As you rightly say, it was a voluntary, non-statutory body that was supported and paid for by the housing associations. Could it be the ombudsman's perceived lack of independence that has led to the number of complaints being so small?

Barney Crockett: Let me correct you slightly. We are not paid for by the housing associations. The housing association ombudsman for Scotland is funded by Scottish Homes. We are a tiny, relic part of Scottish Homes that has not moved on to form Communities Scotland, so we are not directly funded by the housing associations. We are funded by Scottish Homes, which is the main funding body for housing associations, but we do not deal with complaints about Scottish Homes or the houses that it operates or rents. The housing associations are completely independent from us. I am in a unique position, as my employer's only role is to note my annual report. That is our level of independence. We are not paid for by the agencies that we investigate.

Tricia Marwick: Let us move on. Some of the agencies that you investigate have, or might have in future, headquarters outwith Scotland. For example, some of the larger housing associations may have their headquarters south of the border. How will the Scottish public sector ombudsman—however he or she is styled in the future—investigate complaints against those housing associations and what should be done to ensure compliance with the ombudsman's recommendations by housing associations south

of the border? Can that be done?

Barney Crockett: At the moment, we deal with all housing associations and other social housing providers that are registered with Communities Scotland. Compliance depends largely on the fact that the regulatory body receives reports from us. The regulation of housing associations that are based south of the border will become a matter of choice. Those housing associations will be able to choose whether to remain registered with Scottish Homes, which would mean that we would still be the investigating body and that regulation would continue to be a matter for Scottish Homes, or to register with the Housing Corporation in England, which would mean that we would not be the investigating body for them. We insist that a process exists whereby we have some influence on redress regarding any housing organisation that comes within our remit.

Tricia Marwick: You are not part of the Scottish public sector, as you rightly point out. You have raised concerns about the fact that the proposed name for the new ombudsman does not reflect what the housing association ombudsman does. Do you think that it will be a major stumbling block to housing associations if the new ombudsman is called the Scottish public sector ombudsman?

15:30

Barney Crockett: I do not have serious reservations about the name. I mentioned that the Scottish Federation of Housing Associations had raised those reservations with me. I hope that it does not prove a serious obstacle, but it is important to convey a clear message about including the voluntary housing movement and to consider seriously the issues that it raises. It has been understood, from discussions with the minister and with those who drafted the bill, that the name that we are currently using may not be the name that eventually goes above the shop.

Tricia Marwick: According to the bill, you are being brought under the umbrella of the Scottish public services ombudsman. You have a system in operation at the moment. You have expressed concerns that your current investigation system may not be continued into the new body. If you could choose either to remain as the housing association ombudsman, separate from the new body, or to be part of the new body, what would you prefer?

Barney Crockett: Provided that I and the other ombudsmen have the kind of guarantees that we have sought for flexibility to examine complaints, I would strongly favour the new public sector ombudsman service. All the ombudsmen have said that they are looking to resolve most complaints through something short of formal

investigation. If we could be assured that that flexibility and the effective relationships that we have built up for dealing with complaints could be maintained, I would strongly favour the new service. As I said, that general proactive position would give everybody in Scotland a clear idea of what they can do if they have an individual grievance of maladministration.

Tricia Marwick: The difference is that all the other bodies are within the public sector. As you rightly point out, the housing associations are not in the public sector. Do you feel that there is a conflict there and that you will not get what you want?

Barney Crockett: I suppose that I am hoping to get what we want. I believe that it is possible to get the kind of complaint-handling organisation that the consultation process is looking for. I am flagging up some issues that require serious consideration in passing the legislation, to ensure that the legislation reflects what the consultation documents have sought.

Iain Smith: In your written evidence, you voice fairly serious concerns about the proposed provision to allow organisations themselves to request an investigation into their affairs by the ombudsman, even when there have been no direct complaints. Could you expand on your reasons for those concerns?

Barney Crockett: The underlying reason for my concern is that I feel that, in presenting the new service, we must send a clear message to the Scottish people. That message should hinge on the fact that it is a body that deals with individuals' grievances and that, if any individual has a grievance about a public body in Scotland, the new ombudsman is the person to come to. Allowing bodies to request an investigation could muddy the waters. By allowing that, we would risk losing the focus that I feel should be central.

We may be concerned about the reputation of public bodies, about improving standards in public bodies or about unfair criticism of people who work for those bodies. Those might all be justifiable concerns and there may be positive outcomes on them due to the Scottish public sector ombudsman, but they should not be the focus of the ombudsman. The focus of the ombudsman should be an individual with a grievance that has not been remedied. You risk losing that clarity of focus in the public mind.

Iain Smith: Do you envisage any circumstances in which it might be appropriate for a public body to refer itself to the ombudsman? Some examples were given earlier. Would any of those cases have been valid, or would you prefer that provision to be dropped?

Barney Crockett: I may have a harsh frame of

mind, but none of them seem appropriate. The clear impression should be that there is somewhere for an individual with a grievance to go. Other issues that have been raised may be of serious concern, but should not be matters for the ombudsman.

Mr McMahon: This question follows on from the one asked by Tricia Marwick, although I do not see why there should be a differentiation between public and voluntary organisations. You state in your evidence that registered social landlords would be looking for a direct point of entry into the Scottish public sector ombudsman. How can that be achieved?

Barney Crockett: It depends on how generic you intend to make the complaints-handling service. The housing association movement—the registered social landlords—will want the kind of relationship that they have had, which is that they can phone someone who has reasonable expertise on the issues with which they are dealing. It would cause concern if they could be dealing with anyone in the service. Registered social landlords would like to deal with people who have a body of knowledge about the specific types of complaint that crop up regularly, so they can call on a pool of knowledge that might provide a quick solution.

Mr McMahon: Is it not more important that the individual has access to the ombudsman rather than the RSL?

Barney Crockett: As I said, my view is that the individual is the crucial element. I am thinking of the individual indirectly. If the person dealing with the complaint has expert knowledge, the individual will get a quicker outcome, which will be linked more reliably to similar cases that have cropped up in the past.

The Convener: This is becoming interesting. You are the third ombudsman witness that we have heard this afternoon and it sounds as though, once the system is set up, you will all keep your own areas of expertise and experience. Someone will come in at a one-stop door. Will they then be sent in different directions? What will the ombudsman do?

Barney Crockett: You have put your finger on one of the difficult issues. Partly because of statute, those decisions will be ones for the appointed ombudsman. We are all talking about something that is largely notional until such a person is appointed. Different models exist. A maximum is laid down for the number of deputies, which I agree with. It will be interesting to see which model the ombudsman eventually chooses. There will be no powerful prefiguring of that before the person is in post, and they will not be in post in the immediate future. That is one reason why

there is so much uncertainty. How it is organised will be a matter for the ombudsman. The ombudsman will decide on the issues that I have raised about there being a recognisable organisational entity to deal with social housing.

The Convener: The whole thing will collapse if we do not hang on to the experience possessed by you and others from whom we have heard this afternoon. It would not make any sense if we lost that experience. Do you believe that the Executive has carried out sufficient consultation?

Barney Crockett: Yes. The consultation process has been effective. We have found it useful. As other witnesses have said, although the consultation was useful, the time scale will now be an issue. The ombudsman will have to hit the ground running. Other than that, I am very pleased with the consultation process.

The Convener: Thank you for your time.

Our next witnesses are Graeme Millar, the chairman of the Scottish Consumer Council, and Martyn Evans, who is that group's director. I have to declare an interest as Martyn and I know each other—that is all that I am saying.

Graeme Millar (Scottish Consumer Council): I will not take up too much time with my opening statement. We welcome the main provisions of the bill and the central policy initiative, which is the creation of a one-stop shop. Our first position was that we were not absolutely sure about the provisions of the bill, but we are now quite convinced that they seem to offer the right way forward. Ombudsman services are important to the public sector as they offer one of the few ways in which a consumer's voice can be heard in a situation that often has a resemblance to a monopoly. Redress is the key consumer issue for us and establishing the right system can make a significant contribution to social justice.

The Convener: Do you think that the proposals will result in an ombudsman who is impartial, accessible, informal and able to resolve complaints promptly? If not, what changes need to be made to ensure that they will?

Martyn Evans (Scottish Consumer Council): The key issues are to do with limitations relating to the areas that the ombudsman can investigate, such as maladministration. That issue is not as straightforward as it might appear to be because the public sector ombudsman should retain powers that the health service commissioner for Scotland has to investigate wide-ranging issues in the health service such as any poor service that is provided by a health service body. The limitations that are placed on the commonsensical view that people have of the making of complaints, especially in relation to maladministration, might make the system less effective.

A separate, but important, point is that, given that the ombudsman will have powers of investigation in relation to various parts of the public sector, it will be difficult to describe to the public the service that will be provided, as the ombudsman will relate in differing ways to each of the services, and it will be difficult to justify the post in terms of public policy. Our concerns are to do with limitations of the powers to investigate and the differential powers to investigate various parts of the public sector.

Mr McMahon: The bill allows an oral complaint to be made to the ombudsman only in special circumstances. Do you have any idea what those special circumstances might be and do you think that they will meet your criteria for accessibility?

Martyn Evans: The current ombudsman services are positive about the range of applications that they make. I do not know what the special circumstances that you ask about will be. I am not sure that they should be spelled out in the legislation, but I suggest that there should be a clear relationship between the section of the bill that deals with the special circumstances and the Disability Discrimination Act 1995. However, once the ombudsman service is up and running, a set of consistent and clear criteria should be established to clarify the situation. As you rightly suggest, the provision is important in terms of access. We are pleased that the provision has been included, especially when we consider the fact that the Freedom of Information (Scotland) Bill states that requests must be made in writing, which is highly restrictive.

15:45

Mr McMahon: When we took evidence on the Ethical Standards in Public Life etc (Scotland) Bill, we had a similar discussion about what constituted a legitimate complaint and what format it should take. Do you think that, if we were to address this issue, we would be in danger of entering into that sort of discussion again? Are you happy to leave the section that relates to special circumstances as it is in relation to equal opportunities, rather than getting into the gossip and tittle-tattle that was associated with the discussion that we had during our consideration of the ethical standards bill?

Martyn Evans: People should be quite clear about the fact that it is possible to make an application other than one in writing. That impacts on two important groups: people with a range of disabilities who cannot undertake to make an application in writing and people with low literacy skills. We would not want the bill to become any more specific about the special circumstances, other than to include a reference to the Disability Discrimination Act 1995. We would like the policy

to be framed by the ombudsman.

When we answered the convener, we said that a range of complaints that are made to ombudsman services cannot be accepted because of the restrictive nature of their powers. We have that problem with the differential powers that the proposed ombudsman will have in relation to various services. The housing association ombudsman has the power to investigate and report on complaints other than those that concern injustice that is caused by maladministration if he is satisfied that it is in the public interest to do so. There is no proposal to transfer that flexible power to the new ombudsman, which means that, if the complaint is not to do with maladministration, the ombudsman will not deal with it.

Mr McMahon: For clarification, could you confirm that the discussion about not having to submit complaints in writing has nothing to do with the discussion about whistleblowers? There might be a feeling that the need to put complaints in writing would prevent some complaints from being made. If we do not address the issue specifically, will we be drawn into that area?

Martyn Evans: We think that the current practice in the ombudsman services is positive and we see no reason why the general permission in the bill is not enough to deal with the issues that you raise. We are in favour of the provision in the bill that means that complaints can be made in a variety of forms.

The Convener: I call Tricia Marwick, to be followed by Iain Smith.

Tricia Marwick: I declare an interest, as I know Martyn Evans as well.

The Convener: I will speak to you about that later.

Martyn Evans: This is a matter for a separate investigation after the meeting.

Mr Harding: You must all let us in on the secret sometime.

Tricia Marwick: I raised with the commissioner for local administration in Scotland the issue of the limitation of investigations into maladministration because of the frustration of people who believe that they have a good case but who, because the ombudsman services' remit is only to examine the processes by which a decision has been reached, are unable to have the fact that they have suffered a grave injustice dealt with if the processes are complied with. People are also frustrated by complaints not being dealt with because they are entirely outwith the remit of the current ombudsman services. Is the bill capable of being amended to allow the public sector ombudsman more discretion?

Martyn Evans: The bill is capable of amendment but getting agreement on such an amendment will be difficult. Although we agree with your concerns that what is proposed might not make sense to people who have complaints about public service that are not instances of maladministration, the current ombudsmen have been served well in a range of investigations by the maladministration remit. Such a robust and delimited remit is an advantage but, if the bill is to address public service issues for the next 10 to 15 years, it might not be in the public interest if there was not a clear attempt to go beyond the maladministration remit. We have said that the guiding principle should be that the remit makes sense to consumers. It is difficult to explain to an aggrieved person that their complaint is not an instance of maladministration.

The Convener: I cannot remember whom I said I would call next. Sorry, Iain Smith.

Iain Smith: Perhaps I should make a complaint about maladministration.

During this afternoon's evidence-taking session, we have had a lengthy discussion on whether the bill is sufficiently flexible to allow the new ombudsman to carry out the duties in the way that the current ombudsmen do. The current practitioners are concerned that the bill concentrates too much on the powers of investigation and report without providing for some of the more informal methods of consideration and resolution that are their working practice. To be balanced about the matter, the Executive's intention is not to restrict that side of the ombudsman's work. The Executive thinks that the bill, as worded, allows for that. Have you considered the bill in that light? Does it give the ombudsman the flexibility to carry on with informal methods of investigation or is it too restrictive?

Graeme Millar: We recognise that, to many who make a complaint, formality seems like a blocking mechanism. To the poor consumer, whose view is valid, formality seems like a Big Brother thing. If everything is treated with great formality, access to the service will be affected. To that extent, we welcome any revision of the bill that would allow investigations to be conducted as the ombudsman sees fit. We encourage a degree of informality in the process.

Martyn Evans: We defer to the practising ombudsmen, but our reading of the bill is that it gives the ombudsman significant flexibility on how investigations should be carried out. Some of the written submissions highlighted a concern that the litigious may exploit the way in which the bill is drafted and say that it does not allow the ombudsman to carry out informal functions. As we read it, the bill's intention is to allow informal investigations and to allow investigations to be

carried out as the ombudsman thinks fit.

If there is a concern that the form of words may allow a challenge to what is current practice, that may be an argument for strengthening those provisions in the bill at a later stage. However, our reading is that the Executive wishes the processes to be described by the ombudsman, which would allow some informality, as long as the ombudsman keeps within the broad guidance on fairness and openness. We approve of that guidance.

Dr Jackson: Let me begin by saying that I do not know Martyn Evans, I am sorry to say.

Mr McMahon: You are slipping up.

The Convener: Or Martyn is slipping up.

Dr Jackson: On publicity, will the proposal to require public authorities to inform complainants about the public sector ombudsman satisfy needs? Is that sufficient?

Graeme Millar: As a generality, there should be a simple responsibility to ensure that the public understand that the service exists. Providing such information is a litmus test of the quality of public sector service provision and an inherent function of that service. As part of their overall service package, many other public sector and private sector organisations already make people aware that such services are available if people are unhappy.

I do not think that the ombudsman's role should be regarded as separate from the quality-control process. It should be articulated simply, as it is in those parts of the public sector that welcome complaints or comments on the services that they provide. An element of those services should be to make available the ombudsman service. It should be simple and straightforward for someone to approach the ombudsman, which is why we support the concept of the one-stop shop. If all organisations that are covered by the ombudsman service give virtually the same message, the ombudsman's office will become well known—I suspect not well abused—as the place to go for people who are unhappy with the way in which their circumstances have been handled. That is a positive development and should be encouraged.

There is good practice out there and people are articulating fully the provision of the ombudsman service. We should encourage that. We should not view the ombudsman's role as being the final arbiter and inspector of an organisation; it should be regarded as part of the quality-control process to improve the organisation's services.

Dr Jackson: Do you think that there should be more in the bill about public authorities publicising the role of the ombudsman?

Martyn Evans: The provisions in the bill to

which you refer are necessary, but our evidence shows that they are not sufficient. In considering the role of the legal services ombudsman, we found that people who made complaints about solicitors had a low awareness of that service despite the fact that they were told of its existence fairly early in the complaints process. We welcome the bill's provisions on the requirement to publicise the ombudsman; we believe that those are necessary. However, we do not have a clear idea about what is sufficient to alert the general public to their right to complain. Amendments to the bill would be welcome. A significantly greater number of people have concerns about public services than make complaints about them, as we said in our written submission.

Tricia Marwick: Do you regard the Scottish public sector ombudsman's role as being to represent the consumer or citizen and to act on their complaints or should he or she also deal with complaints directly from organisations? We have received evidence to suggest that, if an authority felt that a member of its staff had been dealt with unfairly, it could perhaps refer the matter to the ombudsman.

Graeme Millar: As we say in our submission, we support the move to allow authority-initiated investigations. In some respects, our argument is not dissimilar from the evidence that was given by Barney Crockett. If an authority complains or draws something to the attention of the ombudsman, that impacts eventually on the consumer anyway. It may be difficult to provide an example—we have tried and perhaps Martyn Evans knows of one—of circumstances in which it would be highly appropriate for an authority to draw to the ombudsman's attention its concerns in a specific sector, such as public sector housing.

Martyn Evans: The question relates to the type of investigation that the ombudsman can undertake. We heard the strong message from Barney Crockett that the ombudsman's role should be consumer or client centred. We do not disagree with that. However, we think that the ombudsman service should provide not only individual redress, but service improvement. That link is not always made. Complaints can be individualised, but the difficulties from which they arose may continue.

After discussion, we decided to support authority-initiated complaints because that would be an appropriate action for a public organisation to take against part of itself when there was widespread service failure. However, the ombudsman's office would not be able to investigate everything that a public authority asked it to investigate; it would be able to investigate only what fell within its remit. At the moment, it can investigate maladministration that falls within its remit or, in the health service, poor services.

As we have argued, we would like the remit to be extended so that an authority can say to the ombudsman, "We think people are getting a poor service in this particular area. Being client centred, we would approve of an investigation." On balance, we think that authority-initiated investigations would be a good thing and would improve public services.

Tricia Marwick: The public sector ombudsman will be responsible for a number of organisations—for example, the Scottish Qualifications Authority. You talk about complete service failure and you raise the possibility that, in future, the ombudsman could investigate the SQA. However, if there is service failure, should dealing with that not be the role of the committees of the Parliament? Should not the ombudsman be primarily responsible for individual or consumer complaints and the redress of those complaints?

16:00

Martyn Evans: The ombudsman should be able to refuse an authority-initiated complaint and there should be greater clarity about the range of complaints that he or she can deal with.

Complex and large public authorities—which are often hybrids and not as clearly public sector as they once were—could ask for a part of their service to be investigated as a result of complaints by a number of individuals, not all of whom would feel confident to come forward. Complainers can feel vulnerable in a service environment and it would be useful to be able to deal with individual cases. There is a balance. There must be sufficient safeguards to allow the ombudsman to reject an investigation on the ground that another body may do it, but the process must still be about redress and dealing with the impact of service failure on individuals.

That presupposes a widening of the remit of the ombudsman. At the moment, only if our argument is accepted would the ombudsman be allowed to consider wider issues. Otherwise, the only issues that could be considered would be to do with maladministration or, in the restricted case of the health service, poor service. If we had our way, the ombudsman would be allowed to consider wider issues, but there would be restrictions and discretion in the bill for the ombudsman to reject investigations.

Iain Smith: Do you have any concerns about the way in which the independence of the new ombudsman might be affected by the fact that appointments, salaries and terms and conditions will be determined by the Scottish Parliamentary Corporate Body, which is one of the bodies that the ombudsman will be able to investigate?

Graeme Millar: We do not have any real

preference on how the appointments process will take place. However, any process should ensure the independence of the ombudsman. Criteria—such as the Nolan principles—that apply in many other parts of the public sector should apply to the ombudsman service. Consumers, providers, Parliament and all those engaged with the ombudsman should be able to see that things are fair. However, I do not think that we are in a position to advise on how that should be done, because there are many ways of retaining ombudsman independence. We argue that, on issues to do with consumer representation, consumers should feel confident of that independence.

Dr Jackson: In point 7 of your submission you say that you are pleased that the housing association ombudsman is included in the scheme and that you would argue for additional entries. You go on to mention the Scottish Prisons Complaints Commission. Could you elaborate on that?

Graeme Millar: Martyn Evans will give more details but, in general, if we say that there is a one-stop shop for ombudsman services, the public will expect that to be the case. If we are saying that the one-stop shop applies to two, three, four or five areas but that other areas are separate, that will cause a lot of confusion. Everything should be included unless a case can be argued for an exception. We should not just have a cluster that looks like a rebadging or restructuring of what already exists.

We are pleased that the housing association ombudsman is included. We say that everyone should be included and we use the example of the Scottish Prisons Complaints Commission to show that there will be a tremendous problem if we offer a one-stop shop that is not a one-stop shop. Public confidence in the ombudsman service may be quickly lost if people realise that the one-stop shop does not offer access to all services.

There are ways of overcoming that problem, if we do not want an ombudsman to be involved in that one-stop shop. The Scottish Consumer Council could direct individuals to a more appropriate ombudsman, so the issue is perhaps one of communication. However, if we want to sell the concept of a one-stop shop, that one-stop shop must be all inclusive.

Dr Jackson: Do you have examples of other ombudsmen who you think should be included in the public sector ombudsman scheme but are not?

Graeme Millar: We believe that they should all be included. The case has to be argued for their not being included, which might be difficult to do.

Martyn Evans: The question is not one of being able to think of examples of ombudsmen who

should be included in the public sector ombudsman scheme, but one of configuring public services so that all ombudsmen have that kind of oversight. Some public services—the police service, for example—are not subject to that kind of oversight, which means that there is no ombudsman service that one can just slot in.

The issue relates to wider arguments. Some commissioners have a quasi-ombudsman role or a review function, as we have said. If we are to have the review of public services with a single public service ombudsman, perhaps the range of ways of complaining about and obtaining redress from the public services should be considered. That might be a matter of detail in the bill.

Dr Jackson: If you have further thoughts, I will be interested to hear them.

Graeme Millar: I draw your attention to point 9 of our written submission, in which we identify the areas that are not included in the proposals for a public sector ombudsman but perhaps should be—prisons, police, local enterprise companies and schools, for example. That question must be raised, because the danger is that people might be confused. If the ombudsman service is to be improved to become a major quality tool in the public sector, we must consider having a broader base. That is what the Scottish Consumer Council wants, but I concede that there are arguments against that proposal.

The Convener: Was there enough consultation by the Executive?

Martyn Evans: Yes. We were satisfied with the consultation process.

I want quickly to raise another issue. Section 19(6) of the bill refers to the Executive giving notice in writing to the ombudsman that the disclosure of specific documents

“would be contrary to the public interest.”

We do not understand how that Executive restriction squares with the Freedom of Information (Scotland) Bill. We do not understand how the “public interest” is to be defined; it is not broadly defined anywhere in the bill and we want to know in which context it is to be defined. We have raised the matter because we think that there should be more of a link with the requirements of the Freedom of Information (Scotland) Bill.

The Convener: Okay. We have noted that. Thank you for coming along.

Subordinate Legislation

Local Government (Exemption from Competition) (Scotland) Amendment Order 2001 (SSI 2001/431)

Local Government Act 1988 (Competition) (Scotland) Amendment (No 2) Regulations 2001 (SSI 2001/446)

The Convener: We now move on to subordinate legislation. After dealing with this item, which will take only a couple of minutes, we will have a break. The official reporters will then be able to leave.

We have two negative instruments to consider. Their purpose is to postpone further the introduction of compulsory competitive tendering for defined activities, which will be achieved by amending the principal order and regulations to extend the exemption end and introduction dates.

No comments have been received on either of the instruments, which have been considered by the Subordinate Legislation Committee, an extract of whose report is included in the briefing papers. The Subordinate Legislation Committee considered that Parliament's attention need not be drawn to the instruments. No motions to annul the instruments have been lodged and no other action can be taken on them. If members have no comments to make, are we agreed that the Local Government Committee has no recommendation to make on the two instruments?

Members indicated agreement.

16:09

Meeting adjourned until 16:17 and thereafter continued in private until 16:35.

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