PROCEDURES COMMITTEE

Tuesday 27 September 2005

Session 2

£5.00

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by Astron.

CONTENTS

Tuesday 27 September 2005

PROCEDURES COMMITTEE
11th Meeting 2005, Session 2

CONVENER

*Donald Gorrie (Central Scotland) (LD)

DEPUTY CONVENER

*Karen Gillon (Clydesdale) (Lab)

COMMITTEE MEMBERS

*Richard Baker (North East Scotland) (Lab)
*Chris Ballance (South of Scotland) (Green)
*Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
*Alex Johnstone (North East Scotland) (Con)
*Mr Bruce McFee (West of Scotland) (SNP)

COMMITTEE SUBSTITUTES

Murdo Fraser (Mid Scotland and Fife) (Con)
Robin Harper (Lothians) (Green)
Tricia Marwick (Mid Scotland and Fife) (SNP)
Irene Oldfather (Cunninghame South) (Lab)

*attended

THE FOLLOWING GAVE EVIDENCE:

Professor Alice Brown (Scottish Public Services Ombudsman)
Paul Grice (Scottish Parliament Clerk and Chief Executive)
Nora Radcliffe MSP (Scottish Parliamentary Corporate Body)
Huw Williams (Scottish Parliament Directorate of Resources and Governance)

CLERK TO THE COMMITTEE

Andrew Mylne

SENIOR ASSISTANT CLERK

Jane McEwan

ASSISTANT CLERK

Jonathan Elliott

LOCATION

Committee Room 2

Scottish Parliament

Procedures Committee

Tuesday 27 September 2005

[THE OLDEST COMMITTEE MEMBER *opened the meeting at 10:26*]

Temporary Convener

Donald Gorrie (Oldest Committee Member): Good morning, ladies and gentlemen. We are in a slightly peculiar position, as the deputy convener is delayed in traffic and we have to elect a temporary convener. That must be done with the oldest member—me—in the chair. I ask for nominations for a temporary convener.

Richard Baker (North East Scotland) (Lab): I nominate Cathie Craigie.

Cathie Craigie was chosen as temporary convener.

The Temporary Convener (Cathie Craigie): First of all, I thank the committee for the honour of putting me in this position and I express my relief that no question of age was raised regarding my ability to do the job.

Interests

10:27

The Temporary Convener: We move straight to the first item on the agenda, which is a declaration of interests. I invite Donald Gorrie to declare any interests that he may have.

Donald Gorrie (Central Scotland) (LD): I do not know whether it is relevant, but I am also a member of the Standards and Public Appointments Committee—the two committees may impact on each other at some stage. I also declare a great interest in the subject matter of the Procedures Committee, because I served on the committee during the first four years of the Parliament. I am obviously not up to speed on the past two years' work, but I look forward to working with the committee again.

Convener

10:28

The Temporary Convener: The next item is the election of a convener. As the only Liberal Democrat on the committee, Donald Gorrie is the only member eligible to be convener—although that casts no doubts on his ability to do the job. I ask for nominations for the position of convener.

Richard Baker: I nominate Donald Gorrie.

Donald Gorrie was chosen as convener.

The Temporary Convener: I congratulate Donald and wish him well in his new role.

Crown Appointees

10:29

The Convener (Donald Gorrie): Under the next item, we will take evidence from Nora Radcliffe, Paul Grice and Huw Williams. I apologise for the fact that traffic, caused by an accident, slightly delayed the start of our meeting. We are considering procedures relating to Crown appointees. The Scottish Parliamentary Corporate Body has various suggestions as to how to deal with such appointments and I invite Nora Radcliffe to set out her stall, as it were.

Nora Radcliffe MSP (Scottish Parliamentary Corporate Body): Thank you, convener, and congratulations on your new position. We will be seeing rather more of each other across the table than we have done heretofore. I look forward to working with the committee. On behalf of the Scottish Parliamentary Corporate Body, I thank the committee for agreeing to consider these matters and for giving us the opportunity to contribute to the inquiry.

As members know, the SPCB wrote to the Procedures Committee on 9 November 2004, inviting the committee to consider three issues relating to Crown appointees: the introduction of procedures to facilitate the reappointment of Crown appointees on an administrative basis; the special circumstances that provide for some Crown appointees to be appointed for a third term when that is desirable in the public interest; and a parliamentary mechanism for the removal from office of Crown appointees.

Since 2002, the Parliament has undertaken four recruitment exercises to nominate individuals for appointment by Her Majesty. The office holders are the Scottish public services ombudsman and her three deputies, the Scottish information commissioner, the commissioner for children and young people in Scotland and the commissioner for public appointments in Scotland. The statutes establishing those office holders provide that the SPCB shall determine their length of term in office for a period of up to five years, that they are eligible for reappointment and that, with the exception of the children's commissioner, they are eligible for reappointment for a third term in special circumstances.

The first round of reappointments will be those of the deputy ombudsmen, who were appointed on 30 September 2002 for a period of four years and whose appointment period will end on 29 September 2006.

As things stand, there is no specific procedure for reappointments. Therefore, any person who is to be reappointed for a further term must be appointed in accordance with the procedure for appointment itself, as set out in rule 3.11 of the standing orders, which provides for a full appointment procedure, with the establishment of a selection panel and all the associated costs. That is a formal, expensive and time-consuming mechanism.

The adopted code of practice of the commissioner for public appointments in Scotland with regard to ministerial appointments suggests that any reappointment process should be as smooth as possible and should not involve a selection process. In light of that, the SPCB considers a change to standing orders to provide for reappointments on an administrative basis to be the best way forward, subject to the committee's views.

The second issue that we invited the committee to consider was that of reappointment for a third term. Apart from the commissioner for children and young people in Scotland, the legislation establishing the Crown appointees provides that reappointment for a third term is competent only if, by reason of special circumstances, such reappointment is desirable in the public interest. The committee was invited to consider making provision in standing orders to indicate the special circumstances that might make it in the public interest to appoint someone for a third term in office, such as a specific need for continuity of office if, for example, a high-profile investigation was under way.

Although the SPCB is aware that finding a suitable definition without limiting any relevant circumstance for reappointment to a third term might be difficult—each case should be considered on its merits and should not be limited by a set of pre-defined criteria—it would welcome the committee's views on whether it is appropriate to appoint a Crown appointee for a third term on the same administrative basis as their second term in office.

The SPCB asked the committee to consider providing a parliamentary mechanism in standing orders for the removal from office of Crown appointees. The SPCB has no firm view on that, given that statute provides for the removal of Crown appointees. However, as standing orders currently set out procedures for the removal from office of the Auditor General for Scotland and the Scottish parliamentary standards commissioner, there might be merit in achieving consistency by expanding the existing rules to cover Crown appointees.

I thank the committee for giving me the opportunity to contribute to the inquiry. I will be happy to take questions. I hope that members will not mind if I turn to officials for assistance, if I need to. As members are probably aware, I assumed

SPCB portfolio responsibility for commissioners only very recently.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): I understand why the SPCB would want to ensure that there was a smooth administrative process for reappointment, but I would be grateful if you would share with us some further thoughts on the possibility of having an administrative process for a third-term reappointment. I realise that, if a major piece of work was being done, it would be sensible to maintain continuity by allowing the commissioner—in whatever role they were operating—to lead that work to a conclusion, but would a third-term reappointment be for a full term or would it last only until the investigation that was being undertaken was completed?

Nora Radcliffe: I imagine that a third-term reappointment would be long enough to allow whatever special circumstance was cited as a reason for its being necessary to be dealt with. I cannot envisage a set of circumstances that would require a further appointment of five years, which is the maximum that could be awarded. Someone who sought a third reappointment could well have been in post for 10 years and I do not know that it would be desirable for them to seek office for a further five years, for a variety of reasons.

Mr Bruce McFee (West of Scotland) (SNP): Does the process of reappointment by administrative means not bring up the issue of the transparency of individual reappointments? I do not want to go into what happens in any specific case, but I am concerned about the general principle of an individual being shoehorned in for an extra five years simply through some neat administrative method. Are you concerned that the process might appear to happen behind closed doors?

Nora Radcliffe: I do not think that the process need happen behind closed doors or that it would be seen as automatic. It would have to involve some sort of appraisal of the post holder's performance in post and an interview in front of a panel. Although that might not amount to a full selection process, it would mark a deliberate rather than an automatic reappointment. A degree of transparency could be brought to the process, perhaps by involving an external assessor to oversee it. The process would be public—the fact that it was happening would be advertised—so I think that it could be transparent.

Mr McFee: What is the main driver for wanting to move away from a full formal selection process to an administrative process? If we are being led to believe that cost is the main factor, what is the cost of the full procedure?

Nora Radcliffe: I would have to get advice on the cost of the selection process, although I know that it is quite costly. There are other factors that might be more important than cost, such as the need to maintain expertise and continuity. Five years is a relatively short period for learning how to discharge a complex set of duties well. It is in the public interest to benefit from the skills and experience that the post holder develops during their five years, if they want to continue and if the Parliament wants them to continue. Having the option of an extra appointment of up to five years following the first five years offers benefits all round.

Mr McFee: I presume that we would maintain that expertise and continuity only if the person in question was the best person for the job. There is nothing about having to go through a full reselection process that means that the person who was in post at the time would not remain in post, provided that they were the best person for the job. Surely the argument about expertise and continuity would come into play only if a more suitable person was available for the job. Does the question not all come down to money? I go back to my original question: what is the cost? What are we being invited to save by short-circuiting the process by whatever means?

Huw Williams (Scottish Parliament Directorate of Resources and Governance): The costs for recruitment vary, although it is around £20,000 to £25,000, plus a good deal of members' time that is taken up with the sifting process and everything that goes with a full selection panel rather than an administrative reappointment.

Mr McFee: I am sorry to labour the point, but I am trying to get at the main driver for the change, which seems to be coming out bit by bit. First it is the cost, then it is the expertise and continuity and now it is members' time. Which is the main driver for change?

Paul Grice (Scottish Parliament Clerk and Chief Executive): Nora Radcliffe has covered many of the points, but there is a further point for the committee to bear in mind. Reappointment is different from appointment in the first place. The founding statutes envisage reappointment, which obviously refers to the post holder. The legislation envisages that the person who was appointed in the first place—and who has gone through the full selection process—can be reappointed, so perhaps there should be a different process. You are right to focus on how extensive that process should be, but it is a different process from making appointments in the first place.

The other point to bear in mind is that when the appointment committee, or the first selection panel, makes an appointment, it does so in the knowledge that there is a potential to reappoint that person for a further five years. The SPCB

wanted the committee's views so that at least a person who is taking on the post, and anyone else applying, will realise what the process will be down the road—if the process is an administrative one, that will be known about in the first place. In other words, the SPCB will not just opt for administrative reappointment without anyone being clear that that is what it is doing. The fact that the legislation envisages reappointment makes it constitutionally or legally a different proposition from appointment.

Mr McFee: I recognise the difference between an appointment and a reappointment. You said that the founding acts envisage the potential for reappointment. Is that not just saying that someone can hold the post for more than one term? The legislation does not go into the administrative method of doing that, does it?

Paul Grice: I take your point. The corporate body flagged up the issue, but if the committee thinks that a full appointment process is appropriate, that is fine. However, the wording in the legislation is fairly common. It states:

"a person whose period of office … expires … is eligible for reappointment".

The key word is "is"; the legislation talks about the person who holds the post being eligible for reappointment. I take your point—the process could be very full or very narrow. That is, in a sense, the issue.

Mr McFee: Am I correct in assuming that the founding acts are silent on how the individual might be reappointed?

Paul Grice: Exactly.

Mr McFee: So the founding acts essentially say that the person is eligible to be reappointed; the person is not barred from holding the post again.

Paul Grice: I take your point. It depends upon how one reads it.

Cathie Craigie: Paul Grice has answered one of my questions in his response to Bruce McFee. The main driver is that the legislation allows for the reappointment without giving a satisfactory mechanism for that reappointment. Although £25,000 is an awful lot of money, when we are looking to appoint people to positions that deal with far bigger budgets than that, it is not such a significant amount.

It is probably not that easy to attract people to a job that might last for only five years—that might not be a sufficiently attractive proposition to make someone leave the security of a long-term contract. Is that a reason to give some sort of longer-term security, provided that the individual has been able to perform in the job?

10:45

Nora Radcliffe: That is one of the reasons why I see reappointment as a desirable option, perhaps the least-hassle option. It gives flexibility to both sides. It means that somebody who takes on a job knows that they have the option of continuing in it for longer. That is important, given the limitations on re-employment when people demit their office. An ombudsman, in particular, is debarred from working for a variety of employers for a number of years following their term in office. The option of a further term might tip the balance between somebody deciding to and deciding not to apply for the job.

Conversely, people might be discouraged from applying if they think that there is no get-out clause at five years. There are advantages on both sides to maintaining the flexibility of a five-year-plus-five-year appointment, rather than going down the route that is being suggested south of the border, where reappointment might not be part of the package and where there could simply be a longer initial appointment.

The issue has been the subject of guidance from the United Kingdom commissioner for public appointments and the commissioner for public appointments in Scotland. That guidance suggests that an administrative mechanism may be preferable to a full reselection process.

Chris Ballance (South of Scotland) (Green): May we go back to the question of reappointment for a third term? You seemed to suggest that, rather than have reappointment for a third term, there might be grounds for having an extension for a year or two years. Is that within your thinking? Would it be possible to adjust the rules accordingly?

Nora Radcliffe: The legislation would have to be revisited for that.

Huw Williams: Yes. The legislation provides for that only in special circumstances. It would be up to the SPCB to determine the length of the appointments.

Chris Ballance: So the SPCB can determine the length of the appointment when it is making it or at any stage, regardless of the legislation.

Nora Radcliffe: It can determine the length of the appointment at any stage. That would apply to a first reappointment or to a third term. The SPCB was seeking the committee's guidance on whether we should try to define special circumstances. When the legislation was passed, the term "special circumstances" was deliberately undefined. We are asking the committee to put its collective mind to considering whether those circumstances should be defined in any way or whether it is better just to leave that reference to

"special circumstances" and to have each case decided on its merits, without setting any parameters.

Chris Ballance: You gave the example of a situation in which a piece of work still had to be completed and it was felt desirable to ensure that the appointment was maintained until that piece of work was finished. That could involve an extension of a year or two.

Nora Radcliffe: That was one of the circumstances that we envisaged might occur. If the appointment of somebody for a second term was sought, the proceedings would have to start about six to eight months beforehand. I think that very special circumstances would apply if a third term was being considered.

Alex Johnstone (North East Scotland) (Con): I can see the justification for the proposal to move to administrative reappointment, which I would be inclined to support. However, I have one or two concerns that I would like you to address with respect to the process as it is laid out in the paper before us. What happens if an individual or organisation decides that the reappointment would be inappropriate and decides to pursue that through contact with MSPs, perhaps using some publicity? Can anything in the proposed process for reappointment by administrative means deal with that situation, or would such an approach be likely to undermine the process?

Nora Radcliffe: The process ends with the Parliament having to agree to the appointment, so the Parliament has the final say. If the Parliament decided that the appointment was not what it wanted, the appointment would not go ahead.

Alex Johnstone: Therefore, if an individual MSP objected to a reappointment, they could raise the matter in the debate on the motion that that reappointment be made. Would there be no place earlier in the administrative process for that concern to be addressed directly?

Nora Radcliffe: In those circumstances, it would be strange if the member did not make their views clear to the corporate body. I would imagine that that would be part of the SPCB's consideration at the appraisal stage, when it decides whether to recommend reappointment. In the final stage, when the matter comes to the Parliament, it is open to any member to lodge an amendment proposing that the person should not be reappointed.

Alex Johnstone: On a slightly different subject, should the process that we settle on be sufficiently robust to be used for the first and second reappointments, or should we consider a different procedure?

Nora Radcliffe: I would say that the procedure could be the same. I see no reason to make it different. The considerations that we would take on board would be different, in that we would be considering whether circumstances were special enough to justify a third appointment. However, if the mechanism was robust, the same mechanism could be used.

Karen Gillon (Clydesdale) (Lab): Forgive me for missing the beginning of the discussion—I may have missed this point. My preferred option would be for the SPCB to conduct an interview alongside the administrative reappointment process, which would allow for the kind of circumstances that Alex Johnstone outlined to be taken into consideration. I am unconvinced that just following the simple reappointment process would be enough. For the commissioner's sake—to give the commissioner protection—there needs to be transparency. The process should take place through a committee of the Parliament—it may be the SPCB—which would report to the Parliament on the motion that is laid before the Parliament. That process would be transparent, which would give the commissioner cover. Whatever decision a commissioner makes, not everyone will be happy—people will always complain. A combination of the two proposals that the SPCB outlined could be a way forward.

As for reappointment for a third term, I know that the Commissioner for Children and Young People (Scotland) Act 2003, with which I was involved, specifically provides that someone cannot be appointed beyond the second term.

I am interested in exploring the special circumstances argument further. The only circumstance in which someone should be allowed to continue in their post is if they are involved in an investigation that could not be handed on to somebody else. We need to have change among office holders so that people have confidence in them. How will the SPCB outline to the Parliament what the special circumstances are? How will that decision be taken? My concern is that, if we do not put something into standing orders, reappointment could become a fairly regular process, as it is easier than having to start again. I want reassurance that if we do not put something into standing orders—I do not know whether I can get that reassurance, because no Parliament can bind its successors—we will not just end up with a process whereby, if everybody is comfortable with somebody, we just keep reappointing them.

Nora Radcliffe: That is not the spirit of the legislation—it is not what it says and it is not what the SPCB would like to happen. We asked the committee whether it thought that we should attempt to define what is meant by special circumstances. We could perhaps make it clear

that the circumstances would have to be very special and that we would envisage them arising only extremely rarely. We wanted to know whether the committee felt that it was valuable to do that in standing orders or whether we should revert to statute. The legislation was deliberately left with the phrase "special circumstances"—there was no attempt to define it or to put any parameters on it. It is a judgment call about whether we get the desired end result one way or the other. We are looking for the committee's views on that.

Paul Grice: I have two thoughts on that. First, reappointment is not just about special circumstances; it must be in the public interest. I see no reason why the corporate body, in either circumstance—reappointment or, as Karen Gillon said, to avoid a third term just happening—should not be required to make some report as to why it considered the circumstances so special in the public interest. That is quite a high test to meet, so that might be one mechanism that could be used to require the corporate body to justify special circumstances—it might go some way towards guarding against the worry that reappointment just happens without people thinking about it. The public interest test is a key part of why a third term might be envisaged. It might be that the standing orders could direct the corporate body, or whatever the reappointment panel was, towards having to do something to demonstrate to the Parliament that it had properly reflected on that point.

Karen Gillon: What are your thoughts on the SPCB conducting a reappointment interview? As somebody who has to go through a reappointment process every four years, I know how stressful it can be, but it is important because it helps us to focus on what we have been doing and to explain that to people. A similar process might be also useful for the commissioner in looking ahead and planning ahead.

Nora Radcliffe: I quite agree. You are right to say that there would not at the end of the first term in office be automatic reappointment and that there must be a process of—for want of a better word—appraisal to see whether someone has fulfilled the duties of the post to everyone's satisfaction. At that point, as you say, there is an opportunity for the post holder to outline how they have discharged their duties. It certainly would not be automatic.

The process would require some sort of appraisal by a panel of some sort of the first term in office. As was suggested, there is a variety of options. An interview involving the corporate body augmented by the convener of the appropriate committee, perhaps overseen by an independent external assessor, would provide a robust and transparent mechanism.

Karen Gillon: It is quite important that parliamentarians are involved in the process because, whatever decision is made, we are the people who will be held accountable for the decision. If the decision is made by officers of the Parliament, we will still be the ones who are held to account, whether the decision is right or wrong. I would like to see MSP involvement in interviews built into the process. I am not drawn to a full interview process. If somebody is doing a good job we should let them get on with it, but we need to have a role in ensuring that the process is transparent.

Nora Radcliffe: You are right to say that there must be parliamentary scrutiny of the whole process. That can be done by having a panel of members. The advantage of using the SPCB is that it has elected members who have then been elected a second time by the Parliament. That is also the group of MSPs who will have had most to do with the commissioners during their term of office, so they would not have the same catch-up to do as would somebody appointed to a reappointment panel with no previous experience.

There are a lot of pluses in corporate body members being the core of the panel that handles the reappointment interview process, augmented by the convener of whatever committee has had most dealings with the commissioner whose reappointment is being considered, and the whole overseen by an external assessor.

Mr McFee: I want to explore a few issues that you have raised in giving your answers. At the moment, I remain to be convinced either about the driver for the change or about the rationale for the change in terms of the benefit to Parliament. Basically, what we are talking about between an individual being appointed the first time and their being appointed or not the second time is whether they are subject to competition in that reappointment. The reappointment procedure that you are talking about takes out the element of competition as it takes out any other individual who might apply for the job.

I come back to what you said earlier: is there any evidence that people have been dissuaded from coming forward because reappointment by administrative means is not within the current rulebook?

11:00

Nora Radcliffe: It is difficult to prove a negative.

Paul Grice: It is too early to say.

Nora Radcliffe: It may be worth noting that the UK public appointments commissioner suggests that if there is to be provision for a second term, it should be done administratively, with certain

safeguards. I imagine that that proposal is evidence based.

Mr McFee: One assumes that if the commissioner does not carry out his or her duties, some form of action will be taken before they get to the reassessment stage. My concern is that we effectively say that if someone keeps their nose clean and does a reasonable job, they are in for 10 years and it becomes almost a rubber-stamp process. Do you envisage a reappointments process that happens automatically? If someone who is coming to the end of their five-year term expresses a desire to continue, would they automatically go into the reappointment process? Would there be a mechanism to say, "No. We do not think that you are up to the job and we will not go into the reappointment process" or could the person get taken out half way through the process?

My concern is that we might establish a mechanism that means that if at the end of the person's five years in post they want to continue, they automatically go through the assessment. Is that what you envisage?

Nora Radcliffe: There would be a break before that point, because a decision would have to be made to offer re-engagement.

Mr McFee: Who would make that decision?

Paul Grice: Whatever panel had been set up. One advantage—if the SPCB were to do it—comes back to the point that Nora Radcliffe made about the longer-term relationship. Members may be aware that the Finance Committee has strongly encouraged the SPCB to engage more actively with the commissioners over their financial performance; it is pushing them towards having an on-going relationship.

I take your point that there is a timing issue about when the process should begin, to allow for eventualities such as non-reappointment. The process could not be left until the last moment: it would have to begin in plenty of time to allow for a non-reappointment. It is clear that if that happened we would be in a different situation. The issue is whether the decision is left to the appointing panel or whether a committee would want to make recommendations. If the SPCB were responsible, it would want to begin the process early to ensure that it was not a rubber-stamp job. If that were the case and the SPCB recommended against reappointment, there would be an opportunity to go for a new selection process.

Mr McFee: In your view the SPCB would decide whether the person would go through the reassessment or reappointment process and they may or may not come out the other end of it. There would be two assessments: one by the SPCB to decide whether the person would go into the process and another during the process to decide whether they would come out the other end of it.

Nora Radcliffe: That is what we are asking the Procedures Committee to get its head around.

Mr McFee: I am trying to get a flavour of what is envisaged. Either a person will go into the reassessment process automatically or there will be some form of prior assessment to establish whether they should go into the process. Someone must make a decision somewhere about whether the person is eligible to go through the reappointment process. If such a decision is not made, the person would automatically go into that process.

Nora Radcliffe: I would have thought that the process might take place at the request of the postholder.

Paul Grice: Yes.

Mr McFee: I am trying to get a flavour of what is envisaged.

Nora Radcliffe: That is the sort of issue that we hope to thrash out.

The Convener: As I understand it, if the incumbent has indicated that he or she wishes to be considered for another five years, it is suggested that there is, in effect, a recruitment process with a short leet of one.

A committee—either the SPCB or an ad hoc committee—would scrutinise the performance of the person and say yes or no. As Paul Grice indicated, if the committee said no, it would have to do so in time to ensure that there was a full-blown selection procedure. In my view, the procedure is not a rubber stamp. It is proper scrutiny, but scrutiny of one person. We experience that in many political circumstances, when people have to defend their right to stay on in their position. It is quite a robust procedure, but in the first instance it is not competitive and does not involve other people. That is how I understand the process.

Mr McFee: I understand the point that the convener makes. In other words, if the person expresses a desire to continue, they automatically enter the reappointment process. That is the information that I was trying to extract.

Nora Radcliffe: They are considered for reappointment, which is slightly different.

Cathie Craigie: Thank goodness we have got back to understanding the procedure. Bruce McFee was managing to make it sound really complicated. I imagine that the individual would have to let the Scottish Parliamentary Corporate Body know at least 12 months in advance whether they intended to seek reappointment, because the

paper that we have received says that a full reappointment process would take around eight months. We have explored that issue in detail.

I still have a few concerns about reappointment for a third term. I agree with much of what Karen Gillon said and was happy with Nora Radcliffe's earlier response that there would be a third term only in exceptional circumstances and if people were doing a piece of work. The legislation is probably wrong and we should do what we can to explain it away in standing orders. However, a term is five years.

Nora Radcliffe: It is up to five years.

Cathie Craigie: The debate is about reappointment for a third term. That makes me worry that someone may be in the same job for 15 years. We must be clear, because from the discussions around the table this morning and from your responses to questions, it is clear that you do not intend a third term to last for a full five years. Am I right about that? Could a third term be for a year or a couple of years?

Nora Radcliffe: Any appointment is for a period of up to five years. It does not have to be for five years. The deputy ombudsmen were appointed for four years in the first instance. However, as Cathie Craigie says, there may be merit in inserting a long stop in standing orders that makes clear that, if there are special circumstances and a third term of office is envisaged, it should be for a limited period and not for up to five years. I cannot imagine that it would be, but the committee may think that it is sensible to insert such a long stop.

Karen Gillon: You have talked me out of my position on third-term reappointments. The process would have to be started a year in advance. The commissioner would know how much work they had and that they had a year in which to finish it. There should not be special circumstances. If someone knows at the beginning of a year that it is their last year, they will not take on something that will take them three years to complete. We may be looking at two or three months at the other end, and a maximum of six months.

I am sceptical of any provision that could allow for a third-term reappointment. I am convinced that we need to write something into standing orders that would clarify the situation. We cannot have two commissioners in place, but it will be necessary to start the recruitment process in advance. In that situation, do we recruit someone for a post that may start in six, nine or 12 months' time? When we recruit someone, we must be clear about when they will start, so we must also be clear about when the previous commissioner will finish.

The Convener: There is an issue about sustaining the independence of these people and scrutinising how they perform—the two are in contradiction to some degree. Nora Radcliffe suggested that the SPCB is independent but has some knowledge of how the person has performed. How do you see us resolving the contradiction?

Nora Radcliffe: There are two areas of performance. One is what you might call administrative and relates to whether someone has run the office efficiently and discharged their duties thoroughly and effectively. We can monitor that type of performance without in any way infringing someone's political independence. We would not be passing a judgment on the quality of their decision making but on how effectively they discharged their post. We are aware that there is a line that we must not cross, because these people are independent.

Mr McFee: Do you accept that under the present procedures it would be possible to go ahead with a short leet of one?

Nora Radcliffe: I shall consult my officials on that, because it is quite a technical question.

Paul Grice: Are you talking about the present procedures for reappointment?

Mr McFee: Yes. Under the present procedures, if a commissioner wished to be considered for reappointment would it be possible to go ahead with a short leet of one?

Paul Grice: Given that the standing orders are silent on that, I think so, but there is doubt, which is why we want the Procedures Committee to set up a framework. The answer is probably, but we do not regard that as satisfactory. It is better for the standing orders to be explicit on that point.

Mr McFee: Okay. I turn to the issue of a potential third-term appointment for whatever length of time—the suggestion is that it would be for only a short period and not anything like the full five years. Can we think of no method other than allowing a third-term appointment to deal with an investigation that has been going on for more than a year?

Nora Radcliffe: I had not thought of an on-going investigation because, as Karen Gillon said, people would have advance notice of that and it could be handed over. I was thinking of something blowing up in the last few months of someone's tenure. It is difficult to envisage a set of circumstances that would be special enough and would pass the public interest test. The question is whether you want to encapsulate that in the standing orders. Perhaps the people who drafted the original legislation were right to leave it vague.

Paul Grice: There might be one set of circumstances. Karen Gillon is absolutely right about ruling things out. If we had gone through a full selection process to select a new commissioner and then at the last minute that commissioner was unable to take the post for whatever reason, we might be left in the awkward position of having no one to take up the post. In those circumstances we might want to reappoint the outgoing commissioner for a further six months to allow us to undertake a new recruitment competition. One might want a bit of cover in the standing orders to allow for those circumstances.

The Convener: We have covered the ground reasonably well.

Mr McFee: I hear what Paul Grice is saying. I am mindful of the point that Karen Gillon made: that we would be well down the road of the procedure—if we had not finalised it—by the time such special circumstances arose. Under the present standing orders, if the situation that Paul Grice outlined occurred, would there be anything to stop somebody who had completed two terms reapplying for a full interview?

Nora Radcliffe: Yes.

Mr McFee: Is there therefore a different way of approaching the issue?

Paul Grice: They could reapply. It would be quite awkward for them, because they would also have to pass the public interest test to get a third term if they wanted to apply for a further full five years. In the circumstances that I outlined, we would have gone through the process and would be expecting the person to take up post. One assumes that by that time the outgoing person would have ruled themselves out of applying for the third term already and they would be at a significant disadvantage to other people in applying for a full third term, because they would have to pass the public interest test, whereas anyone else applying would just be trying to persuade the selection panel that they were the right person for the job.

Beyond that, it is difficult, especially in the light of what Karen Gillon said, to envisage other circumstances in which the issue would arise—I cannot think of any off the top of my head. The question is whether we leave the matter, as the legislation does, completely open to be considered on a case-by-case basis or whether the committee wants to lay down rules or guidelines to steer whichever body is involved to ensure that it makes such an appointment only in particular circumstances.

11:15

Karen Gillon: My question is more for the committee's officials. Could we put an option in the standing orders to allow us to extend an appointment for up to six months rather than reappoint somebody for five years? I do not know what the legal advice would be on that. I am drawn away from a reappointment for a third term, but towards a provision in our rules for an extension to a contract in specific circumstances.

Paul Grice: Obviously, the committee should seek legal advice, but my initial view is that that would be problematic because the legislation gives the Scottish Parliamentary Corporate Body power to appoint for up to five years. As a general rule, standing orders cannot overrule that. I see the clerk nodding.

Karen Gillon: We could amend the legislation.

Paul Grice: The committee could consider that for the longer term—there may be merit in that. All the legislation tends to have similar phraseology on that issue, although not exactly the same. Obviously, that issue could not be resolved immediately, but if the committee was unhappy about it, that could be borne in mind for future legislation. Unfortunately, we cannot curtail or constrain the legislation through standing orders.

The Convener: That is one of the many issues that we will need to consider and on which we will need advice. I thank the witnesses for leading us into this minefield, although I am not sure whether they led us out again.

Nora Radcliffe: Thank you for your consideration.

The Convener: I now welcome Professor Alice Brown, who is the Scottish public services ombudsman, to talk to us on the issues, particularly annual reports, which she wishes us to consider.

Professor Alice Brown (Scottish Public Services Ombudsman): I extend my congratulations to the convener on his appointment and thank the committee for inviting me to give evidence.

I have submitted written evidence, which is a briefing paper on the annual reports that are laid by the ombudsman and on the other reports that I can lay. The committee also has an embargoed copy of our annual report for the past financial year. I will not go into much detail, but it might be helpful if I make one or two summary points before we get to the specific issue about how we take forward the provision in the legislation.

It is important that ombudsmen or other commissioners lay annual reports before the Parliament, as that is an important accountability

mechanism for the office holder. Annual reports are also an important way in which office holders can hold people to account, because they allow office holders to comment on various issues as they see them. It is helpful for the Parliament to hear that debate. I emphasise that although an annual report is an important mechanism, it can be only one mechanism of giving feedback on the work of the ombudsman or indeed of any other body.

When an annual report is being written, one of the objectives is to try to make it readable and accessible to a range of audiences, but it can be only a summary of the wide range of work that is conducted.

The ombudsmen can lay reports before the Scottish Parliament in three other important areas: we must lay a report when we carry out investigations and I will return to that briefly; we can lay a special report if a body has not complied with an ombudsman's recommendation; and, when there is a systemic issue that we want to report on, we can lay a report to draw the Parliament's attention to a particular point.

There are other forms of communication and other ways of communicating evidence. One could argue that annual reports are outmoded in the 21st century, but they are an important mechanism nonetheless. It is also important to have an active and informative website that contains detailed information about cases and to produce leaflets and different kinds of publications.

Our office responds to a lot of inquiries about particular statistics from bodies that are under our jurisdiction and it is appropriate that we provide that kind of information to them in the format that is most helpful to them. We are subject to the Freedom of Information (Scotland) Act 2002 and our publication scheme may make other bits of information available.

It is important to supplement an annual report with other methods of keeping Parliament, MSPs and committees informed about our work. My office has been active in that regard—we have given evidence, we have held meetings with parliamentary groups and others and we have met individual MSPs to explain a lot of the work that we do.

In our submission, we explain our new reporting mechanism that we are about to introduce in October. We will report a lot more on individual cases on a monthly basis and I hope that that will be valuable information for parliamentary committees when they consider legislation.

We try to maximise the evidence and add value to the investigations that we carry out in lots of different ways. It is important that we carry them out, but it is even more important that we learn lessons from some of the things that have gone wrong in the delivery of public services and that you, as legislators, have the opportunity to look at some of the issues that we raise.

That takes us to the specific question before us today. The Scottish Public Services Ombudsman Act 2002 provides that although we must lay an annual report, the Parliament may give the ombudsman directions as to the form and content of such a report. I admit that I am slightly puzzled by the logic behind that provision. I do not think that it applies to some of the other offices such as those of the children's or information commissioners, but perhaps Karen Gillon remembers. However, I do not have a problem with it as long as certain principles are adhered to. I do not have a strong view on what procedure we should have to give effect to that provision. One could take the line that we should just remain with the status quo and, by default, do nothing. My general concern is that if there is a provision to do something, we should have a procedure to deal with situations should they arise.

Any procedure the committee might consider has to be proportional to the amount of parliamentary time given to it and the value that would be added by proceeding in a different way. Other key principles should be simplicity, transparency and cost-effectiveness and, if there is to be such a process, it should be speedy. As the convener said in an earlier debate, any procedure should also balance the accountability with the independence of the office of the ombudsman.

I am happy to answer any questions.

Chris Ballance: In your submission, you highlight the proposal for change that would enable

"Legislation to allow for providing an apology without admission of liability."

Will you expand on why such legislation is important?

Professor Brown: I would very much like to do so, because the issue arises time and again in the complaints with which we deal. Communication is the major problem that leads to complaints; the responses that people receive when they make complaints are another major problem. Complaints are often escalated if a member of the public does not receive a clear explanation about what has happened and why it happened and if they do not receive an apology if an apology is due—that is crucial.

I have witnessed resistance in different sectors that are under the ombudsman's jurisdiction to giving straightforward apologies; the legal advice tends to be that doing so admits liability. We have

had quite a lot of dialogue with the sectors, particularly with the health sector and local government—in fact, one of my deputies and I are currently going round all the local government chief executives, and the issue was raised yesterday when we were with the chief executive of Perth and Kinross Council. We have received quite a lot of support from people who work in the public services, who would like to be able to give an apology because all the research evidence shows that most reasonable people want an explanation and an apology. They want things to be put right and to be assured that what has happened will not happen to anyone else.

We have considered evidence from other countries that have passed such legislation, and it has been found that litigation decreases as a result, because complaints do not escalate. The problem is dealt with at its root—where it arose. We spend a lot of time saying to bodies, "If you get things right at that point, a problem should never have to come to the ombudsman and cause stress and expense for the complainant and the staff who are complained about." We have had conversations with chief executives, members of the Scottish Parliament and ministers because we think that people in Scotland might want to consider such an approach.

Chris Ballance: I have a huge amount of sympathy with the argument that you have presented, but I also have a huge worry that a proposal that sounds legislatively extremely simple might actually be extremely complicated; it might even rest on UK law. How can we change the legislation in the way you suggest?

Professor Brown: We want to avoid something that is extremely complicated. We can learn from the experience of other countries. We have just started a dialogue with Scottish Executive civil servants to explore how we might approach legislation in a way that reduces the complexities that might arise, but we certainly need more information to take the matter forward. I would not want legislation to be cumbersome and to defeat the purpose of simplifying and speeding up the process.

Chris Ballance: So you are currently exploring with the Executive the possibility of its introducing legislation.

Professor Brown: Yes. We are also happy to receive feedback from individual members.

Mr McFee: I urge you to continue to do what you have described. My experience from a couple of years at the Parliament and from 15 years in two different local authorities is that the vast majority of complaints start out as requests from people who want to know what has happened but who end up with silence—that happens in many cases—or pages of flannel. In general, one can tell which people are looking for financial compensation and which people are looking for answers to their questions. In my experience, the number of people who are genuinely looking for answers far outweighs the number who are looking for some form of financial retribution. Indeed, I suspect that people do not come to you in the first instance; they will go elsewhere and come to you when everything else has failed. As I say, I urge you to continue on the path that you have described, as doing so will be useful.

I want to deal with whether the Parliament should introduce procedures for giving directions on the form and content of your annual report, which is perhaps a more contentious issue. I have concerns about that. Will you comment on the concern that the process could potentially become cumbersome and so set that no account is taken of changing circumstances? A more fundamental problem is that an independent ombudsman—I always find that a strange word to use for a woman—receiving directions about the content and form of their annual report smacks of a form of control.

11:30

Professor Brown: I, too, think that it is quite unusual. I thank Mr McFee for his endorsement of our proposals on the ability to give an apology without admission of liability.

One of the papers that members had in front of them earlier contained an extract from a Nolan committee report. I was a member of the Committee on Standards in Public Life and was responsible—or partly responsible—for the eighth report, from which the quotation was taken. We considered the position of the United Kingdom parliamentary commissioner. We argued that it is very important for a commissioner to lay an annual report and stated clearly that the form and content of the report were matters for the commissioner. We were concerned that, if other people were able to direct the process, it could—directly or indirectly—be seen to impact on the independence of the office.

Quite often, members of the public ask us, "How independent are you? If the Parliament pays for you, how can you possibly be independent?" We tell them about the appropriate mechanisms that are in place to ensure our independence: the ability to lay an annual report and other investigation reports. As I said, it therefore came as a bit of a surprise to see the provision in the Scottish Public Services Ombudsman Act 2002. I am not entirely sure what it adds. As you said, it has the potential to be problematic in relation to timing and other factors. If people want to give feedback on an annual report or to give advice

about what should be in it, there are many more effective ways in which they can do so. We are very open to feedback from individuals on the type of information that they want to see. Also, as I tried to stress in my submission, other more effective means exist to provide information in different formats and forms.

In our annual report, we are trying to identify improvements that could be made to legislation in certain areas—I am thinking of the earlier discussion about whether to clarify ambiguities and so on. The question for me is whether to raise as an issue the possibility of a change further down the line. At the moment, however, the provision exists, and we therefore have to consider in a practical sense how to approach it.

Karen Gillon: We may want to write to the minister to seek clarification on that. Obviously, the Executive drafted the 2002 act and it would be useful to seek clarification on the circumstances under which it would envisage directions being given. I am wary of the Parliament giving directions to any ombudsman. The integrity of the ombudsman service can be maintained only if it is clearly seen to be independent from the Parliament. At the end of the day, that is the most important thing about it.

I put on record my support for your proposal for public sector bodies to be able to give an apology without admission of liability. Like Bruce McFee, I have had many cases over the past six years involving people who simply wanted someone to say sorry. However, as nobody would say sorry, the cases escalated out of control or the person ended up going away with a very negative feeling about the public service involved. That is not the right impression for the public to have of the public sector. The inability of a health board, local authority or whatever to say sorry is significant. I would support such a change.

I have a question on third-term reappointment. Obviously, the issue has been brought to us, but I am not exactly sure what we are being asked to do about it. Do your term of office and those of your deputies coincide? I imagine that the deputy ombudsmen tend to run investigations. Would your reappointment inhibit them in carrying out an investigation?

I understand the point about an appointee who cannot take up an appointment for six months, but are there other circumstances that could come out of the blue in which the ombudsman would have to carry on in post and the role could not be given to one of the deputy ombudsmen?

Professor Brown: Thank you for those questions. I was very interested in the earlier debate.

To answer your first question, the terms of office of the ombudsman and deputies do not coincide. One reason for deciding that they should not coincide was to avoid the possibility of all that learning going at once. I can delegate authority to a deputy or to another member of staff to carry out an investigation. Therefore, I do not regard that as potentially a big problem, unless the situation set a precedent or had a significant effect on the public interest. It comes back to the public interest: what is the public interest in extending the ombudsman's term of office?

My personal position is in line with your own and with that of some of those who gave evidence. It would be exceptional for anyone to be appointed for a third term. There are many good reasons for change and for bringing in new ideas and fresh talent at appropriate points.

As it happens, there has been quite a debate in the Maltese Parliament about the appointment of the next Maltese ombudsman. I know that the term of the current Maltese ombudsman has been extended until some of the problems with the appointment have been sorted out. There may be technical or other difficulties, such as someone becoming ill, which cannot be anticipated. However, in Scotland, there is provision for deputies, so there are ways of getting round such problems.

The Convener: Would it help if we wrote to the Executive to find out what it thinks the provision in the 2002 act means? The committee could decide to do that. My recollection of the discussion at the time was that the purpose of the provision was to guard against possible errors of omission rather than errors of commission. It was not a case of our saying what should be written in a report, but rather of asking a commissioner to provide detailed responses to a question if we felt that they had not done so.

In view of how you have been doing things, such a question is purely academic. However, we cannot go against the legislation. We could invent some rule to cover suggested additions to the report, rather than direct that things be taken out. You usefully cover in your paper the other ways in which you try to contribute to our knowledge. Such a rule could say that if a member thought that we needed more information about X, he or she could pass that on and you would then produce that information separately, rather than put it in your annual report. The current position does not seem terribly satisfactory. How can we make it as little unsatisfactory as possible?

Professor Brown: What you suggest would help to counter any concerns about the independence of the office. Someone could lodge a motion that said, "I think that there should be more information on X or Y." Although the answer

might be that the information sought was available elsewhere, such an approach would at least restrict directions. However, we would not want the unsatisfactory position of a member saying that they were not able to comment on X or Y, whereas I felt that a direction was affecting my ability to fulfil the role of the office. Crucially, we would not want the public to perceive that there was undue interference in the office. What you suggest might be an effective way forward.

The Convener: Thank you very much, Professor Brown. We wish you continuing success in your excellent work.

Professor Brown: Thank you, and thank you for your comments.

The Convener: Does the committee agree to Karen Gillon's suggestion that the clerk write on our behalf to the Executive for clarification?

Mr McFee: Can I ask a quick question? My understanding is that the 2002 act says that the Parliament "may" give directions. What are we clarifying?

The Convener: I presume that we could say that our interpretation is, for example, that Parliament could only add to the annual report and not subtract from it, or something like that. We could have rules that interpret the legislation, or the Executive might have such rules. As it stands, any enthusiastic MSP could initiate a debate on abolishing the whole annual report, printing it in black and white or whatever, and we would have to consider such a motion.

Mr McFee: I think that I understand what you are saying. However, if the wording of the legislation is that the Parliament can give directions to the Scottish public services ombudsman regarding the form and content of the annual report, that would suggest to most reasonable people that Parliament could direct the ombudsman to take things out as well as put things in. I am not against seeking information as to the intent behind the provision; what concerns me is the actuality.

Karen Gillon: I suggested that we write to the Executive because the ombudsman has some concern that the potential exists for outside interference. It is a question of asking for clarification from the Executive, given that it put that provision in the act. We can ask in what circumstances the Executive envisages the provision being used. It is, essentially, a technical matter; however, given that it has been raised, it would be useful for us to get some clarification.

The Convener: Is the committee agreed that the clerk should write to the Executive, seeking such clarification?

Members *indicated agreement*.

The Convener: As committee members are feeling cold, we will have a short break during which they can do three laps around the table or whatever they want to get warm.

11:41

Meeting suspended.

11:50

On resuming—

Private Bills

The Convener: The next item is a request from the Parliamentary Bureau concerning private bills, on which the clerk has circulated a note. Coming to the issue anew, but with some background on it, I take the view that there is widespread support for the concept of having more of the work on private bills undertaken by a skilled planner who could hear objections and so on, rather than by a committee. I think that most of the committee would support the objective behind the paper.

The problem is the timetable that the bureau suggests for our making a change to the standing orders. The bureau wants the change to be made as soon as possible, as it is afraid that some bills may not get through the process before the next election. However, we are here to guard the parliamentary aspect. Also, especially on such a contentious subject, anything that we decide must be ultra-waterproof legally, as it would be a great opportunity for lawyers to make lots of money if anyone was unhappy about the outcome because they stood to lose their house, garden or whatever. Any system that we establish must be foolproof, so that it cannot be killed off through an appeal in the courts.

I am interested to hear how members think that we should progress. The clerk suggests that, as a first stage, we could interview ministers on the subject and perhaps ask for written views from other people as a step forward. We should not say that we will do nothing, but neither should we act as a lapdog for the powers that be.

Mr McFee: I sat through the committee's previous inquiry into the issue and my concern is the advice that we were given then. I want clarification before we invite anybody to the committee. Would the Parliament have the powers to introduce what is proposed? It was made clear to us when we considered the matter before that it would require legislation. Can the matter be dealt with through the standing orders? If so, why were we not made aware of that during the committee's previous inquiry, which took a substantial amount of time? Is there a problem with the powers that such an assessor would have?

Furthermore, what would happen to the ruling that all MSPs who are considering a private bill must hear all the evidence? We were told that if one member is not present at one meeting, there is a problem, and we went through the whole question of whether we could have substitute members for private bill committees. If MSPs make the decision to dismiss objections without having heard the objections—having heard only a report on the objections—does not that open us up to some form of action?

I understand the rationale behind the proposal, but I wonder why, if the option was available to us, we did not consider it when we looked into the issue only a few months ago.

Karen Gillon: Convener, I am sure that you will find over the next few months that we do not tend to act as anybody's lapdog, so you can be reassured on that point.

We have two different sets of legal advice. I guess that the Executive's legal advice is that we can proceed with the proposal and I guess that our legal advice is that we cannot. Legal advice from the Parliament's legal directorate is always that we cannot do something, which worries me, although the official line is that the directorate cannot give legal advice to members. If the proposal can be implemented, I am very drawn to it, but I share Bruce McFee's concern about the conflicting legal advice.

I do not know if we can get an answer without exploring the two sets of legal advice. I do not think that the Parliamentary Bureau would have supported the proposal if its legal advice did not say that it could be done. Clearly, the clerks have prepared a paper that says potentially it cannot be done. The evidence that we received before was that we cannot do anything, because we are only MSPs and everybody wants to take us to court. A bit of me says that we need to start pushing the barriers as a Parliament and stop allowing ourselves to be so constrained. It would be in everybody's interest for somebody with the relevant skills and expertise to conduct that part of the private bill process, rather than MSPs, who are not planning experts.

If that can be done, we should do it. We need to explore the legal advice. We can do that only if we hear from the Minister for Parliamentary Business and get some written evidence from others. I do not want to get into a big debate about the whole private bill process, because we have been there, seen it and done it—we know that legislation is necessary. I do not know if we have it yet, convener, but I want a written guarantee from the minister on behalf of the First Minister and the Executive that whatever we do with the proposal, legislation will be enacted in this parliamentary session. We need to be sure that the proposal is not just a way of circumventing the need for legislation.

The Convener: We have not received any written assurance of that.

Andrew Mylne (Clerk): My understanding is that the First Minister announced in his legislative programme that there would be a bill along the

lines recommended by the committee in its report and that the Executive understands that that bill will be progressed to a timetable for completion by the end of the session.

Karen Gillon: We should get that in writing.

Richard Baker: I agree with all Karen Gillon's points. What she says gives us a helpful way forward. The issue is not about acceding to the bureau; it is about an enabling measure for the Parliament. The private bill process has put great pressure on the Parliament and parliamentarians. The recommended move, which we covered in our inquiry, would improve rather than detract from the process and its accountability. I agree with Karen Gillon that, if the proposal can be implemented, we should go ahead with it.

It might help that we received so much evidence in our previous inquiry. We need to invite the minister to give evidence, but surely written evidence can be provided expeditiously, because we know exactly who will wish to make their views known. We know from our inquiry that they have already formed their views and the proposals are along similar lines to the ones that we considered in the inquiry. The information can be provided expeditiously and efficiently without minimising consultation in any way. The proposal is desirable and, if it can be achieved, it will be an improvement on the current process for all those concerned.

Cathie Craigie: I agree that the proposal would be an improvement for everyone involved. As other members have said, it is not necessary to have a full-blown inquiry. The important issue for me is that we get legal advice that what we endorse is within the spirit of the law. I am happy to hear what the minister has to say and to balance that with written evidence and legal opinion.

Karen Gillon: We should make it clear that we will not be able to produce something by the end of November. The best that we can do is what is outlined in the paper from the clerk. If possible, we would want to conclude some work in this parliamentary term, so that it could go before the Parliament by Christmas, but it may be that that could not happen before the first week back after the recess. It will be for the Executive to determine when a debate would be timetabled. It would have been useful for us if, before making its decision, the bureau had taken on board the comments that were made to it. Asking the committee to complete work by November is unrealistic given the workload that we already have.

12:00

Mr McFee: I do not know whether Cathie Craigie has misinterpreted, but I did not hear anybody suggest that we should open up the whole question of private bills again. We came to a reasonable decision on that.

I have two concerns. First, the proposal might be a method of circumventing the full process. I agree with what Karen Gillon said about that: we should have some sort of reassurance from the First Minister in writing.

The big concern, however, is whether what is being proposed can be done legally. It goes part of the way down the road that we all agreed was the right road, but—having sat through all those debates and having been party to making the changes to standing orders that we were asked to make in order to expedite things in the short term—I am concerned that what is in this proposal was not even mentioned as a possibility before. The proposal has come late in the day. If there had been legal advice that it was practical, it could have been placed before us earlier so that we could have made changes to standing orders that would have been enforced by now.

Totally contradictory legal opinions have come to us very late and my concern is that the proposal may have been cobbled together in such a way as to leave us open to challenge. I want to explore that, rather than the principles behind the proposal. I do not disagree with some of those principles—indeed, I think that we endorsed them in our initial inquiry.

The Convener: I want to ask about the taking of written evidence. I presume that all the people who are interested in the subject have given evidence on the concept of reporters hearing things instead of MSPs hearing them, so we do not need to revisit that. The question now is whether we can put into effect through standing orders what the Executive is going to put into effect through legislation a little later. Is that right?

Andrew Mylne: I think that that is right, convener. In the committee's inquiry, a certain amount of evidence was taken on the general merits of taking some of the process outside the Parliament. However, I suspect that quite a few of the witnesses were not directly asked about, and did not directly address, the legal issues that would arise in relation to the way of achieving that purpose that we are now considering. It may therefore be worth seeking further views on the point, within the timescale that the committee wishes to sign up to.

The Convener: Views on the legal process?

Andrew Mylne: Yes.

Karen Gillon: I am not sure whom we would be asking. If we ask Mrs X, who complained about private bill Y, about the legal process, she will probably not be aware of the legal constraints on

the Parliament. We have to be clear what we are asking people. I would be keen to ask people who know, rather than simply issuing a general call for written evidence to people who gave us evidence before. We do not want to complicate matters more than is necessary. However, do we not have to make a general call for written evidence anyway?

Andrew Mylne: That is up to the committee.

The Convener: If the committee has covered most of the ground in the past, I would have thought that we would not have to make such a call. Picking up on Karen Gillon's point, I would have thought that we want evidence from the clever lawyers who are the guys who will be taking us to court if we get things wrong. That would give us a preview of the holes in the proposal.

Mr McFee: I suspect that, if we ask two sets of lawyers, we will get three sets of opinions. However, I am concerned about the issue. We really will have to look into the technicalities of the proposal. I genuinely do not have a problem with the thrust of the proposal—we have already travelled that particular route. However, our report contained all sorts of checks and balances to do with the formal consultation processes that had to be gone through before something could be taken out of the remit of MSPs and put into the hands of a reporter. I do not see those checks and balances in the current proposal.

We must be sure about the powers that we would give the reporter. Does legislation allow us to give a reporter the powers that he or she would require to undertake a full investigation? What would be the effects of altering only one part of the system? What would happen if the committee that dealt with a bill disagreed with a reporter's recommendations? Under the proposal, would the reporter make recommendations? What would be the formal process by which one approved or otherwise the reporter's recommendations, if he or she were allowed to make recommendations? On what basis would the reporter make recommendations?

I am not trying to overcomplicate matters, but people out there will want to overcomplicate the system and to take advantage of it. The proposal looks as though it has been cobbled together and thrown in at the last minute.

The Convener: The minister's people must produce a more extensive piece of paper than that which we have, to take account of some of your points.

Richard Baker: We can raise all those matters when we take evidence from the minister. I take on board Bruce McFee's concerns but, even with the current proposal, the final decision still rests with committee members. Paragraph 5 of the minister's paper says:

> "It would remain for the committee to decide whether to accept the report … or to consider further evidence as necessary."

We can ask the minister about those matters, but the paper addressed some of the concerns.

Karen Gillon: Several helpful questions in paragraph 8 of the clerk's note could be addressed in advance. Given the timescale because of the October recess, could we ask the Executive for a written response that could be circulated for members to consider before the meeting? Can we also ask our legal people for a similar written brief? That would be a private paper. I reiterate that I would like our legal people to tell us how something can be done, rather than constantly telling the Parliament how things cannot be done. I have become increasingly frustrated with legal advice that is seen to protect the interests of officers rather than members.

The Convener: Good stuff. The consensus is that we will ask the minister to give evidence and that, before that, the minister's people and our people will produce pieces of paper.

What about whom we ask for written evidence from outwith Government sources? To take into account points that have been made, do we have a selective invitation to people who could contribute usefully on the legal aspects of the argument?

Andrew Mylne: The Law Society of Scotland and the Faculty of Advocates are used to providing expert legal opinion on matters with a legal aspect to parliamentary committees. We could ask them to do that within a reasonable timescale. We could discuss other sources with the convener after the meeting.

The Convener: Okay.

Parliamentary Time

12:09

The Convener: We have half a dozen pieces of paper from individuals on the review of parliamentary time and a piece from the clerk. We are considering what other Parliaments do, what we want to do and of whom we wish to ask questions.

Karen Gillon: I am obviously very opinionated today. Having experienced a round-table discussion of climate change at an Environment and Rural Development Committee meeting, I am drawn to that option, if we have the right panel. Having just politicians around the table will not necessarily be helpful, but we could have organisations and the broadcast media to talk about impacts on them. I say that not because I think that they should be able to preclude us from doing anything, but because it is always useful for us to have a steer on what should happen. It would also be useful to have a cross-section of people from civic Scotland, although, rather than having lots of people, we should have two or three. At the Environment and Rural Development Committee's round-table discussion, there were about a dozen people plus the committee and it was not too cumbersome. That allowed people to question one another. In evidence sessions, we sometimes lose the ability for people to cross-examine one another. On issues such as the one that we are considering, however, that approach would be useful.

On the fact-finding visits, the committee will obviously want to congratulate me on swaying the Conveners Group to allow us to have the visits. In discussions, the clerks mentioned that the input from the Norwegian Parliament has been particularly useful, so we should consider including that Parliament in the visits, if possible. Also, we had a meeting with folk from Valencia and we gave them a list of questions that we would like answered. When those answers come back, they might provide us with additional evidence. There is potential for a joint visit to Valencia and to the Catalan Parliament.

Mr McFee: I am not against what Karen Gillon says, but I want to be clear about what we are considering. The agenda says "Review of Parliamentary Time" but a lot of the evidence seems to be skewed towards parliamentary timetabling. Most of it relates to stage 3 of bills. Are we opening that seam again? I am not necessarily against re-examining that but, if we go down that route, I want us to be clear that it is a huge subject. Two or three of the submissions refer to parliamentary timetabling as opposed to parliamentary time, but those are two entirely different things.

Cathie Craigie: The former convener wrote back in response to those submissions to explain what we are considering.

Karen Gillon: It was me.

Cathie Craigie: As I understand it, the inquiry is about the parliamentary week. I remember saying that we should consider the period between 9 o'clock on Tuesday and 5 o'clock on Thursday, but I do not know whether we set that in stone. The inquiry is not about timetabling but about the parliamentary week and the best way of using the time that we have available.

Karen Gillon: That is my understanding of what the inquiry is about, hence the letters that I sent out during my brief tenure as acting convener. We have already set in train procedures by which timetabling can be dealt with. Whether people adopt those procedures and whether they allow adequate time for debate at stage 3 is a political matter. Those decisions are for the business managers and ultimately for the Parliament. The procedures are in place to allow them to hold as long or as short a debate as they like. It is for the business managers to sort out how they use that time and it is for the Parliament to vote them down if it does not agree. My understanding is that the inquiry is about how we use the week rather than about the stages of bills, but I stand to be corrected if that is not the case.

The Convener: I find it a little difficult to distinguish between timetabling and time. As I understand it, the aim is for the Parliament to make the best use of the week. Among other things, that might involve some debates being longer and some being shorter. The inquiry is not exclusively about the timetable. It is not about extending the week and saying, "Right, we're going to have eight days in the week"; it is about making the best use of the time that we have.

Karen Gillon: Convener, it is potentially about extending the parliamentary week—for example, until 7 o'clock in the evening, if that is what people want, or into Friday morning or Monday afternoon. It is potentially about our changing the Parliament's sitting pattern into one week for plenary and one week for committees. I did not think that it would be about bill stages, amendments or whatever. We have had that inquiry. The procedures are in place. If people do not want to implement them, that is a matter for the Parliament. Ultimately, we have provided the mechanisms and it is up to others to decide whether to use them. I have to say that, if the parliamentary week is the subject of the inquiry, we could come up with absolutely anything.

12:15

The Convener: I ask the clerk to read out the inquiry's remit.

Andrew Mylne: I will not read out the whole remit that the committee agreed, but I should say that it is slightly wider than a simple focus on the parliamentary week. The paper says:

"the main aim of the inquiry is to consider how effectively the main time available for Chamber and committee business—9 to 5, Tuesday to Thursday—is distributed and used. It will consider options for different sitting patterns in different parts of the Parliamentary session or year, and different ways of using time each week. It will also consider how time is allocated to different types of business, how topics for debate are chosen, and how speaking time is allocated among those wishing to contribute."

Karen Gillon: But it is not about reopening our inquiry into the timetabling of legislation.

Andrew Mylne: I do not think that that was envisaged when the remit was agreed, but it is for the committee to decide.

Mr McFee: We must be clear about this, because members have expressed different views about the issues the inquiry should cover. I do not think that the remit invites us to review the lodging of amendments and other such bits and pieces, but it could have an impact on the stage 3 question the convener raised if someone argues that there is not enough time in the parliamentary timetable.

We must be clear about the context in which such matters can be considered. If we take the matter to an open forum we could spend a lot of time concentrating on issues that are outwith our remit and miss the opportunity to address issues that are within it. The stage 3 question is relevant if the argument focuses not on setting the timetable—which, as Karen Gillon has correctly pointed out, is a political decision—but on the claim that there is not enough time in parliamentary timetable to cover everything.

The Convener: As we govern our activities, we can decide to look more in one direction and less in another. After all, the remit is not the 10 commandments.

Karen Gillon: But it would be useful to know what we are looking for at this stage. If we want to open up issues such as the timetabling of amendments, we have to take a decision on that. I certainly did not think that that was the aim of the inquiry. The debate centred on what, for want of a better word, could be described as the woolly motions that we sometimes debate and to which members lodge amendments just for the sake of it, when more time could be allocated to legislative debate such as stage 3 consideration of a bill. Instead of debating a nice motion in the morning, we could set aside a whole day for a stage 3 debate. I could be wrong, but I thought that that was the debate that we had decided to explore. To be honest, I genuinely think that the committee should focus on that debate when it takes evidence.

The Convener: The two issues seem to overlap.

Will we have a round table discussion or a formal evidence taking session?

Chris Ballance: Is there room for both?

The Convener: Yes.

Mr McFee: I float the possibility that the public's perception and our perception of what we should be doing might be two entirely different things.

There should certainly be some form of round table discussion for members of public organisations, but if we talk to MSPs and political groups as well—as we should—I suspect that the discussion will go down a different line. I am not sure how happily the two groups would sit together, although it might be useful for the MSPs to listen to what the public organisations have to say. It is the nature of MSPs that they will concentrate on the minutiae, whereas the public organisations will take a much wider view of what the Parliament should be doing and how it should be allocating time.

The Convener: If we have both groups together at the same time, we might get a good discussion.

Karen Gillon: I do not have a view either way. There would be some merit in having two round table discussions. As regards how we split them up and decide who comes to which one, we could have representatives of civic Scotland first and then explore the issues that they raise with MSPs. At that point, we could take stock and make decisions about our lines of inquiry in the subsequent evidence sessions.

Rather than decide now what issues we want to explore further, let us have round table discussions with politicians and the public. That would allow us to get an idea of where people think we should be going. From there, we would be able to identify the folk with whom we needed to explore matters further and how we could progress our inquiry. That would be better than saying that we will have the minister on such-and-such a day and so on.

Let us get everyone round the table in two brainstorming sessions on where we are, where we should be going and how we can move forward. I do not think that there is a time limit to the inquiry.

The Convener: A positive proposition has been made that we should go for two round table

sessions in the first instance. Do we have time to take evidence after that, if we need to?

Andrew Mylne: The overall timetable for the inquiry is not limited, except to the extent that the end of the parliamentary session would be its end point. It is up to the committee to take what time it thinks it needs. We are just looking for a steer on how quickly the committee wishes to start hearing evidence—whether that is done in round table format or in another way—so that we can make the necessary arrangements.

Karen Gillon: It would be useful to have the two round table discussions before we undertake the visits. That is just an idea, but it would allow us to explore in formal evidence what we learned abroad, what civic Scotland told us and what we found out from the paper research exercise. As a result, our exploration of the topic would be better. My guess is that that would have to happen after the Christmas recess to allow people to do the necessary preparatory work now, to have the round table discussions, to do the visits and to pull everything together.

From my perspective, it would be useful to have the round table discussions before we do the visits. If that is not practical, we should at least hold them at around the same time. If we held the preliminary discussions first, we could address some of the issues that emerged with people in other Parliaments to find out how they deal with them and then we could take formal evidence after the Christmas recess.

Mr McFee: That is not unreasonable.

The Convener: We seem to have agreement on that. I assume that the clerks do the invitations to the great and the good—or perhaps the bad—but they might like some suggestions about whom to invite. In my view, the Parliament and the Executive have managed to kill off the Scottish Civic Forum, although it perhaps still exists in a ghostly form.

Andrew Mylne: My understanding is that it still exists.

Chris Ballance: It has funding until the end of March, so I assume that it still consults its members, or is capable of doing so.

Andrew Mylne: It would be helpful to have a further steer from members on whom they would like to invite. Alternatively, the matter could be delegated to the convener, if that was considered appropriate.

Karen Gillon: We must have representatives of the broadcast media. For the sake of balance, we should have one from the public sector and one from the independent sector, which have different perspectives on some of the issues.

The Convener: We will invite some broadcasters and some Civic Forum people, or their equivalents. Do members want business and the trade unions to be represented?

Cathie Craigie: Yes, we should invite business and trade union representatives as well.

How representative is the Civic Forum? I know that when another committee was considering housing or antisocial behaviour, only a small number of Civic Forum people turned up to events. How representative is the Civic Forum and how many members does it have?

The Convener: It is not a big organisation, but it brings together many different organisations.

Karen Gillon: Given that the Scottish Council for Voluntary Organisations has gone to the trouble of submitting evidence to us, it would be useful for us to explore some of the ideas with it and others in a round-table discussion. It has provided some interesting evidence.

Chris Ballance: The suggestion that we hear from one or more members of the consultative steering group about how they feel things have worked out since the planning they did back in 1996 and 1997 was interesting.

The Convener: Members of the CSG gave a lot of evidence to the previous Procedures Committee, but they may have changed their views in the past two years.

Karen Gillon: Is written evidence available on that point? Were some of the questions that we are considering explored with members of the CSG? Forgive me for not recalling whether that happened.

The Convener: They were. There is a mass of evidence that we foolishly produced just before the previous election, which was not good timing. There is a great deal of material in the archives.

Chris Ballance: Is there material that it would be relevant for us to reconsider? If so, could it be recirculated?

The Convener: We have given the clerks a fairly large number of names. There will be another round-table discussion with committee members and other MSPs. Should we drag a minister along, screaming or otherwise, or is it not etiquette for a minister to be here?

Karen Gillon: A minister should be here, as they will have particular views. If we are to have a serious round-table discussion, it is important that they should be present and take part.

The Convener: In my view, the Parliamentary Bureau is the source of most of our problems. Perhaps someone should be at the table to defend its position.

Karen Gillon: To defend the indefensible.

Andrew Mylne: On previous occasions, we invited each political party to send a representative. It was left to the party to decide who it would send. In a case such as this, it might want to send its business manager or whip. That may be one way forward.

Karen Gillon: So each group represented on the bureau would send someone.

Andrew Mylne: Yes.

The Convener: The problem is that one then gets an establishment view.

Karen Gillon: We will be the non-establishment for the purposes of the inquiry.

The Convener: Good—that is an excellent remark. Do we accept Karen Gillon's suggestion that we should try to timetable visits after the round-table discussions? How long does it take to arrange such events?

Andrew Mylne: It takes a certain amount of time. Committee members have already indicated to us which visits they are interested in. If we have at least an idea of the timescale, we can go ahead and make the appropriate administrative arrangements. We are expecting to bring to the committee's next meeting a summary of the written material that we have received from other Parliaments. That may be an opportunity for the committee to take a final view on whether it still wants to visit the three destinations that were originally selected. The deputy convener mentioned that we may want to look again at one possibility. However, until the written material has been circulated, it will be difficult for the committee to make an informed decision.

Karen Gillon: We must try to establish a date on which the visits would potentially take place. We had set a date in early November, but I do not think that that is now realistic.

Our timetable indicates that we do not have a meeting in the week beginning 28 November. Could we consider that week for the visits? If we wait much later, it will be quite far into December before the visits take place. I would be less keen to go that weekend. Other members' diaries might be different from mine, but we could consider the time around 27 and 28 November—although I am not saying that that is necessarily the time that we should go for. Perhaps we could get some idea of members' availability. I do not think that we can all go at the same time anyway.

Andrew Mylne: The matter might be better dealt with administratively. My only hesitation would be that if the committee does not decide on the final destinations until 25 October, there is not very long to make the practical arrangements.

Karen Gillon: Could we do things more quickly by e-mail? If we cannot decide until 25 October, we might get into December, when lots of things will come up and people are pulled in all sorts of different directions with constituency events. Then, we get into January, when there are issues around travelling, particularly in the early part of the month. We therefore go into late January, and it is February or March before we can take evidence. Is it possible for us to get a paper together? It does not need to be a huge paper, though. I am keen to take a steer from you guys, the clerks, on where you think the best or most useful places to visit are. We can therefore sign our decision off earlier, if that meets with your satisfaction, convener.

Andrew Mylne: We can try to circulate something and give the committee a steer, if that would be helpful, so that a decision can be taken well in advance of 25 October.

Mr McFee: There is no point waiting an additional two weeks before attempting to make the arrangements. That would just add to the timetabling problem.

Karen Gillon: And to the cost of the visit, the budget for which is limited.

The Convener: That is all on the review of parliamentary time for the moment.

The committee agreed previously that the next item will be considered in private. Therefore, we now go into private session to discuss our draft report on the Sewel convention.

12:32

Meeting continued in private until 12:57.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice at the Document Supply Centre.

No proofs of the *Official Report* can be supplied. Members who want to suggest corrections for the archive edition should mark them clearly in the daily edition, and send it to the Official Report, Scottish Parliament, Edinburgh EH99 1SP. Suggested corrections in any other form cannot be accepted.

The deadline for corrections to this edition is:

Thursday 13 October 2005

PRICES AND SUBSCRIPTION RATES

OFFICIAL REPORT daily editions

Single copies: £5.00
Meetings of the Parliament annual subscriptions: £350.00

The archive edition of the *Official Report* of meetings of the Parliament, written answers and public meetings of committees will be published on CD-ROM.

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

Single copies: £3.75
Annual subscriptions: £150.00

Standing orders will be accepted at Document Supply.

Published in Edinburgh by Astron and available from:

Blackwell's Bookshop
53 South Bridge
Edinburgh EH1 1YS
0131 622 8222

Blackwell's Bookshops:
243-244 High Holborn
London WC1 7DZ
Tel 020 7831 9501

All trade orders for Scottish Parliament documents should be placed through Blackwell's Edinburgh

Blackwell's Scottish Parliament Documentation Helpline may be able to assist with additional information on publications of or about the Scottish Parliament, their availability and cost:

Telephone orders and inquiries
0131 622 8283 or
0131 622 8258

Fax orders
0131 557 8149

E-mail orders
business.edinburgh@blackwell.co.uk

Subscriptions & Standing Orders
business.edinburgh@blackwell.co.uk

RNID Typetalk calls welcome on
18001 0131 348 5412
Textphone 0845 270 0152

sp.info@scottish.parliament.uk

All documents are available on the Scottish Parliament website at:

www.scottish.parliament.uk

Accredited Agents
(see Yellow Pages)

and through good booksellers

Printed in Scotland by Astron